

Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits on Academic Freedom

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INTRODUCTION

Three decades ago, a Justice of the United States Supreme Court first suggested that the concept of academic freedom deserved constitutional recognition. In his dissent to *Adler v. Board of Education*,¹ Justice Douglas observed:

What happens under [the Feinberg Law] is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect.²

Fifteen years later, Justice Douglas saw his earlier dissenting view in *Adler* vindicated. For the first time, in *Keyishian v. Board of Regents*,³ a majority of the Court explicitly recognized academic freedom as a constitutionally protected right under the first amendment.⁴

Since *Adler*, the Supreme Court, lower federal courts, and state

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¹ 342 U.S. 485 (1952) (upholding New York's Feinberg Law, which disqualified from employment public school teachers who were members of "subversive organizations").

² *Id.* at 510 (Douglas, J., dissenting).

³ 385 U.S. 589 (1967) (invalidating the "anti-subversive" provisions of New York's Feinberg Law).

⁴ *Id.* See text accompanying notes 29-30 *infra*.

courts have all reviewed claims of academic freedom.⁵ These claims have met with varying degrees of judicial acceptance.

Recently, federal courts have been confronted with a novel and unprecedented academic freedom claim. In *In re Dinnan*,⁶ the plaintiff sued the Board of Regents of the University of Georgia, claiming that as the result of sex discrimination she was unlawfully denied promotion and tenure, and terminated as a faculty member. In a discovery proceeding she sought to question a member of the tenure committee concerning his vote. He refused to answer such questions, claiming an academic freedom privilege under the first amendment.

Similarly, in *Gray v. Board of Higher Education*,⁷ the plaintiff, a Black male community college instructor in the City University of New York system, instituted an action under the Civil Rights Acts,⁸ alleging that he was denied promotion and reappointment with tenure because of race discrimination. During discovery proceedings, he requested two members of the institution's tenure committee to reveal their votes. As in *Dinnan*, the defendants refused to answer certain questions, claiming that their votes and discussions were entitled to an academic freedom privilege.

In this Article I shall argue that the deliberations and votes of university and college tenure committees should not be kept confidential under the guise of academic freedom. Indeed, claims that tenure deliberations and votes are confidential because of "academic freedom" are entirely inconsistent with the purposes for which academic freedom has been recognized. Part I summarizes the legal literature and judicial developments defining academic freedom and its scope and purpose. This summary includes a survey of scholarly commentary on the subject, the development of the influential position of the American Association of University Professors, and a brief review of the constitutional development of the concept of academic freedom, gleaned from decisions of the United States Supreme Court and state and federal courts. Part II examines in detail the novel academic freedom claims asserted in *Dinnan* and *Gray*. Part III then considers the desirability of restricting the *Gray* court's application of academic freedom. The section begins by exploring the traditional policy of judicial noninterference in academic disputes and the modification of that policy in recent years. It then dis-

⁵ See notes 20-30 and accompanying text *infra*.

⁶ 661 F.2d 426 (5th Cir. 1981), *cert. denied sub nom. Dinnan v. Blaubergs*, 457 U.S. 1106 (1982).

⁷ 692 F.2d 901 (2d Cir. 1982).

⁸ 42 U.S.C. §§ 1981, 1983, 1985 (1976 & Supp. IV 1980).

cusses whether such noninterference is appropriate in cases involving the academic freedom claims of university tenure committees, especially in light of the link between judicial deference and university discriminatory practices. Finally, the section argues that despite *Gray's* failure to specify whether academic freedom protects individual tenure committee members or the entire university, extending this protection to either party exceeds the scope of academic freedom.

I. ACADEMIC FREEDOM — ITS DEFINITION, DEVELOPMENT, SCOPE AND PURPOSE

In evaluating the recently asserted academic freedom privilege claimed to protect secrecy in tenure deliberations, it is helpful to examine the concept of academic freedom as it has been described in earlier and varied contexts. There is general agreement that current academic freedom doctrine derived from concepts in the nineteenth century German university.⁹ One of the earlier attempts to define academic freedom in its modern context was Professor Machlup's characterization:

Academic freedom consists in the absence of, or protection from, such restraints or pressures, chiefly in the form of sanctions threatened by state or church authorities or by the authorities, faculties, or students of colleges and universities, but occasionally also by other power groups in society — as are designed to create in the minds of academic scholars (teachers, research workers, and students in colleges and universities) fears and anxieties that may inhibit them from freely studying and investigating whatever they are interested in, and from freely discussing, teaching, or publishing

⁹ See Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976). Professor Goldstein notes:

Although some aspects of intellectual freedom embodied in the concept of academic freedom find their sources in antiquity, the modern development of the doctrine of academic freedom is derived largely from the nineteenth century German concepts of *lehrfreiheit* and *lernfreiheit* — freedom of teaching and learning. The basic concepts were that a university faculty member was free to teach what and how he thought best, with university authorities or external agencies such as government, imposing only the most minimal restraints on either teacher or student.

Id. at 1299. Although both principles were central to the German academy, *lehrfreiheit* is more relevant to the recently asserted academic freedom claims. See Goldstein, *Academic Freedom, Its Meaning and Underlying Premises as Seen Through the American Experience*, 11 ISRAEL L. REV. 52 (1976). A more elaborate discussion of the German influence may be found in R. HOFSTADTER & W. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 367-412 (1955).

whatever opinions they have reached.¹⁰

Other commentators, consistent with Professor Machlup's definition, identify as central to academic freedom the protection of college and university faculty members in carrying out their functions of teaching and research.¹¹ In sum, academic freedom "signifies the intellectual autonomy of the members of the academic community — freedom of the faculty in research and teaching, freedom of the students in learning, and freedom of both from imposed conceptions of the truth."¹²

Any discussion of the development of academic freedom would be incomplete without acknowledging the central role and critical contribution of the American Association of University Professors (AAUP). The AAUP's Committee on Academic Freedom and Tenure was formed in 1915, having as its primary purpose "to formulate principles and procedures, the observance of which would insure intellectual freedom in colleges and universities."¹³ Subsequently, the American Council on Education issued its 1925 *Conference Statement on Academic Freedom and Tenure*, which the AAUP endorsed a year later.¹⁴ Finally, after several conferences, representatives of the AAUP and the Association of American Colleges formulated and issued the 1940 *Statement of Principles on Academic Freedom and Tenure*,¹⁵ restating the principles enunciated in the 1925 *Conference Statement*. The 1940

¹⁰ Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 AM. A.U. PROFESSORS BULL. 753, 753-54 (1955).

¹¹ See Fuchs, *Academic Freedom — Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROBS. 431 (1963). Fuchs states:

Academic freedom is that freedom of members of the academic community, assembled in colleges and universities, which underlies the effective performance of their functions of teaching, learning, practice of the arts, and research. The right to academic freedom is recognized in order to enable faculty members and students to carry on their roles.

Id. at 431; see also Hunter, *Federal Antibias Legislation and Academic Freedom: Some Problems With Enforcement Procedures*, 27 EMORY L.J. 609, 617 (1978) ("The term 'academic freedom' encompasses a group of interests important to teachers, scholars, students and administrators from elementary to graduate and professional schools. The interests all relate, to a greater or lesser degree, to the transmission of knowledge and the nourishment of creative thought.").

¹² Kadish, *Church-Related Law Schools: Academic Values and Deference to Religion*, 32 J. LEGAL EDUC. 161, 166 (1982).

¹³ AAUP, *The 1915 Declaration of Principles — Academic Freedom and Tenure*, 40 AM. A.U. PROFESSORS BULL. 90, 90-91 (1954).

¹⁴ *Academic Freedom and Tenure — Statement of Principles*, 40 AM. A.U. PROFESSORS BULL. 80, 81 (1954) (referring to prior endorsement of 1925 *Conference Statement*).

¹⁵ *Id.*

Statement of Principles remains the AAUP's official position on academic freedom.

In response to the proceedings in the United States District Court in *Matter of Dinnan*,¹⁶ the AAUP issued its most recent report, *A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*.¹⁷ In a later proceeding in the United States Court of Appeals for the Second Circuit, *Gray v. Board of Higher Education*,¹⁸ this report was a crucial factor in the court's decision.¹⁹

The United States Supreme Court during the last several years has issued several decisions touching on academic freedom. Justice Douglas' dissent in *Adler* was the first statement by a Supreme Court Justice in which academic freedom specifically was recognized.²⁰ *Wieman v. Updegraff*,²¹ decided the same term, struck down an Oklahoma statutory loyalty oath which applied to all state officers and employees. Although the majority's decision rested upon the statute's arbitrary and discriminatory exclusion of persons from public employment based solely on organizational membership, Justice Frankfurter's concurrence heralded the Court's explicit recognition of academic freedom which followed in later cases. While Justice Frankfurter's opinion contained no explicit reference to academic freedom, it clearly embraced academic freedom principles to which he would afford constitutional protection:

By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice.²²

¹⁶ No. 79-42-Ath. (M.D. Ga. filed May 24, 1979) (contempt order).

¹⁷ 67 *ACADEME* Feb.-Mar. 1981, at 27 [hereafter *AAUP Disclosure Statement*].

¹⁸ 692 F.2d 901 (2d Cir. 1982).

¹⁹ See notes 32-69 and accompanying text *infra* for a discussion of the *Gray* case.

²⁰ See Murphy, *Academic Freedom — An Emerging Constitutional Right*, 28 *LAW & CONTEMP. PROBS.* 447, 454 (1963); see also Comment, *Academic Freedom — Its Constitutional Context*, 40 *U. COLO. L. REV.* 600, 609 (1968).

²¹ 344 U.S. 183 (1952).

²² *Id.* at 195 (Frankfurter, J., concurring). He further observed, in a famous and frequently cited passage:

To regard teachers — in our entire educational system, from the primary grades to the university — as the priests of our democracy is therefore not to engage in hyperbole. It is the special task of teachers to foster

Five years later in *Sweezy v. New Hampshire*,²³ which overturned a teacher's contempt conviction for refusal to answer questions about a classroom lecture, Chief Justice Warren, in a dictum as strong as the language in Justice Frankfurter's concurrence in *Wieman*, observed:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.²⁴

During the next decade, the Court made two additional important pronouncements related to academic freedom. In *Barenblatt v. United States*,²⁵ the Court upheld the defendant's contempt conviction for refusing to answer questions posed during a congressional investigation, but reiterated its belief that "inquiries cannot be made into the teaching that is pursued in our educational institutions."²⁶ In *Shelton v. Tucker*,²⁷ the Court held unconstitutional an Arkansas statute requiring all teachers in state supported schools and colleges to file annual affidavits listing their memberships or contributions to organizations. Although the Court invalidated the statute because of its overbreadth, the opinion noted that "[t]he vigilant protection of constitutional freedom is no-

those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.

Id. at 196.

²³ 354 U.S. 234 (1957).

²⁴ *Id.* at 250 (plurality opinion).

²⁵ 360 U.S. 109 (1959).

²⁶ *Id.* at 112. The Court explained its position in the following passage:

Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls.

Id.

²⁷ 364 U.S. 479 (1960).

where more vital than in the community of American Schools."²⁸

Thus, the stage was set for the first explicit recognition by a majority of the Court of a constitutional basis for principles of academic freedom. In *Keyishian v. Board of Regents*,²⁹ Justice Brennan wrote for the Court:

Our nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom The classroom is peculiarly the "marketplace of ideas."³⁰

II. DINNAN AND GRAY: A NOVEL ACADEMIC FREEDOM CLAIM

The recent *In re Dinnan*³¹ and *Gray v. Board of Higher Education*³² cases have raised a novel and unprecedented academic freedom claim in the federal courts.

The relevant facts and issues in both cases were virtually identical. The one distinguishing factor is that in *Dinnan* the plaintiff alleged sex discrimination, while in *Gray* the plaintiff alleged race discrimination.³³ In both cases, members of a college or university tenure committee³⁴

²⁸ *Id.* at 487.

²⁹ 385 U.S. 589 (1967) (invalidating the anti-subversive provisions of New York's Feinberg Law on grounds of vagueness and because "public employment, including academic employment, may [not] be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action").

³⁰ *Id.* at 603 (citation omitted).

³¹ 661 F.2d 426 (5th Cir. 1981), *cert. denied sub nom.* *Dinnan v. Blaubeurgs*, 457 U.S. 1106 (1982).

³² 692 F.2d 901 (2d Cir. 1982).

³³ Although *Dinnan* involved a claim of employment discrimination under title VII, while *Gray* involved a claim of civil rights violations, the differing results in the two cases do not stem from the differences in the underlying claims. Rather, the decisions reflect fundamentally different approaches to academic freedom analysis.

³⁴ Here, and in the balance of this Article, the term "tenure committee" is used to refer to the faculty committee which votes on applications for promotion or tenure and makes recommendations to those having the authority to appoint to faculty positions, promote to higher academic ranks, or confer tenure. Such committees are generally the college's or university's Board of Trustees, Board of Regents, or a similar governing body. They are variously denominated; in *Dinnan*, for example, the recommending body was the university's College of Education Promotion Review Committee, and in *Gray* it was the college's Personnel and Budget (P&B) Committee. In some institutions, an ad hoc faculty committee performs the function. While the tenure committee customarily makes the initial evaluations of an application for promotion or tenure, additional reviews and recommendations to the institution's governing body are often made by others in an institution's administrative hierarchy, such as the provost and the

refused, during discovery proceedings, to divulge their votes on the denial of the plaintiff's promotion or tenure application. The refusal in each case was based partly upon the assertion that the votes and deliberations of tenure committee members are protected from disclosure by an "academic freedom privilege." Although two circuit courts similarly framed the issues, they engaged in strikingly different analyses and reached results which, while superficially similar, are fundamentally different.

In *Dinnan* the Fifth Circuit Court of Appeals noted that the claim of privilege based upon academic freedom had not previously been considered or recognized by any court, and rejected Professor Dinnan's arguments "on the basis of fundamental principles of law and sound public policy."³⁵ After observing that "[t]he basis of justice is the truth and our system frowns upon impediments to ascertaining that truth,"³⁶ the court briefly reviewed the law of privilege, identifying the origins and rationales for the constitutionally protected privilege against self-incrimination, the attorney-client privilege, the priest-penitent privilege, the spousal witness privilege, the physician-patient privilege, and the attorney's "work-product" privilege. The court defined privilege as the right not to give testimony,³⁷ and concluded that "[p]rivileges are based upon the idea that certain societal values are more important than the search for truth."³⁸ Acknowledging the value of academic freedom and recognizing that the Supreme Court frequently has upheld academic freedom in the face of government pressure,³⁹ the *Dinnan* court found inapposite those Supreme Court cases upon which Professor Dinnan relied:

[I]n all those cases there was an *attempt to suppress ideas by the government*. Ideas may be suppressed just as effectively by denying tenure as by prohibiting the teaching of certain courses. Quite bluntly, this Court feels that the government should stay out of academic affairs. However, these issues are not presented in the instant case. Here a *private* plaintiff is attempting to enforce her constitutional and statutory rights in an employment situation. Therefore, the reasoning behind the cited cases simply does not apply here.⁴⁰

Finally, the court considered Professor Dinnan's claim of "institutional academic freedom," based on the decision in *Regents of the Uni-*

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³⁵ *Dinnan*, 661 F.2d at 427.

³⁶ *Id.*

³⁷ *Id.* at 428.

³⁸ *Id.* at 429.

³⁹ *Id.* at 430.

⁴⁰ *Id.* (emphasis in original).

versity of California v. Bakke.⁴¹ In *Bakke*, the Supreme Court defined "institutional academic freedom" as the freedom of the university to make its own judgments as to education.⁴² The *Dinnan* court rejected this claim, however, relying on the plaintiff's allegations that "the University of Georgia decided a tenure application *on other than academic grounds*, which clearly takes it outside of what the *Bakke* Court envisioned to be the limits of academic freedom."⁴³ Thus, the *Dinnan* court supported judicial nonintervention in such tenure evaluation subjects as teaching, research, and scholarship. The court, however, found intervention necessary and appropriate whenever tenure evaluations "*can be shown to have been used as a mechanism to obscure discrimination . . .*"⁴⁴ Accordingly, the court affirmed the order of the district court compelling discovery and holding Professor Dinnan in contempt.⁴⁵

Gray reached the Second Circuit Court of Appeals in a different posture. In the district court,⁴⁶ after the defendant tenure committee members refused to respond to discovery questions regarding their votes, the plaintiff moved to compel their responses pursuant to Rule 37 of the Federal Rules of Civil Procedure.⁴⁷ The plaintiff's motion and defendants' cross-motion for a protective order were referred to a magistrate, who recommended that the district court order the defendants to answer questions concerning their votes on the plaintiff's promotion and tenure applications. The district court reversed the magistrate's recommendations and declined to order the defendants to answer the plaintiff's questions, finding that "the secret tenure votes here meet the criteria for the application of a qualified privilege"⁴⁸

In reaching this determination, the district court purported to balance the right to discovery, which stems from society's interest in full and fair adjudication, against society's interest in protecting the confidentiality of disclosures made during relationships of acknowledged social value.⁴⁹ After examining the right to discovery and Dean Wigmore's four fundamental conditions for establishing a privilege, the district court evaluated the tenure committee's claim of privilege.⁵⁰ The

⁴¹ 438 U.S. 265 (1978).

⁴² *Id.* at 312. See notes 127-36 and accompanying text *infra*.

⁴³ *Dinnan*, 661 F.2d at 432 (emphasis in original).

⁴⁴ *Id.* (emphasis in original).

⁴⁵ *Id.* at 433.

⁴⁶ *Gray v. Board of Higher Educ.*, 92 F.R.D. 87 (S.D.N.Y. 1981).

⁴⁷ *Id.* at 88.

⁴⁸ *Id.* at 94.

⁴⁹ *Id.* at 90.

⁵⁰ The district court summarized the four conditions necessary for recognizing a

court weighed the peer review system for granting tenure, and the adverse consequences of disclosing the secret votes claimed to be essential to that system, against the benefit to the plaintiff which would flow from requiring disclosure of such votes. Consistent with the approach in *Dinnan*, the district court, citing *Keyishian v. Board of Regents*⁵¹ and Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*,⁵² asserted that the Supreme Court has attached constitutional significance to academic freedom.⁵³ The court then observed, quoting liberally from the AAUP's 1940 *Statement of Principles*,⁵⁴ that "[t]he tenure problem is an essential linchpin in . . . safeguard[ing] the academic freedom of individual teachers, [and] maintenance of the confidentiality of the decision-making process is generally an integral element of a peer review system for granting or withholding tenure."⁵⁵ The court emphasized the importance of the secret ballot in any voting process as a means of freeing voters from undue influence or pressure from those having power over the voter. While conceding that "those voting on tenure decisions are not concerned about reprisals from those about whom they must make judgments," the district court nevertheless concluded that there was great value in maintaining secrecy: "It is not difficult to perceive that the failure to maintain the confidentiality of votes on tenure decisions would tend to promote divisiveness among faculty members, and could well lead to Department Chairmen and those with greater influence exerting a disproportionate impact on such decisions."⁵⁶

The district court then concluded that because the plaintiff could obtain evidence to support his constitutional claim by means *other* than discovery of the secret tenure votes, and because it was unclear whether

privilege: first, the communications must have been made with the understanding that they would not be disclosed; second, the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties; third, the relationship must be one which, in the opinion of the community, ought to be sedulously fostered; and fourth, the injury that will inure to the relationship by virtue of the disclosure of the communications must outweigh the benefit that would result from forcing a witness to disclose the information. *Gray*, 92 F.R.D. at 90 (citing 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (McNaughton rev. 1961)).

⁵¹ 385 U.S. 589 (1967).

⁵² 354 U.S. 234, 255-67 (1957).

⁵³ *Gray*, 92 F.R.D. at 91.

⁵⁴ See note 14 and accompanying text *supra*.

⁵⁵ *Gray*, 92 F.R.D. at 92 (quoting AAUP *Statement of Principles on Academic Freedom and Tenure*).

⁵⁶ *Id.* at 93.

the information the plaintiff sought shed light on his claim of race discrimination, the confidentiality of the tenure review system should be protected.⁵⁷

The Second Circuit panel hearing the *Gray* appeal purported to adopt the district court's approach to the case. Nevertheless, it reversed, weighing the balance differently on the facts.⁵⁸ The court, citing *Herbert v. Lando*⁵⁹ and *Trammel v. United States*,⁶⁰ acknowledged the Supreme Court's dictum that "discovery rules are to be accorded broad and liberal treatment, particularly where proof of intent is required,"⁶¹ and noted that federal courts have "flexibility to adopt rules of privilege on a case by case basis."⁶² The *Gray* court, however, departed from the no-privilege approach of the *Dinnan* court. It opted instead for the balancing approach taken by the court below, but struck the balance differently.⁶³ Citing its own authority that discriminatory intent must be proved directly in a suit under section 1981, unlike in a suit under title VII of the Civil Rights Act of 1964, in which it may be proved inferentially,⁶⁴ the court found that the plaintiff's need to know the votes of the tenure committee members was "transparently evident."⁶⁵ The court continued:

Dr. Gray might prove LaGuardia's intent to discriminate if he could establish that [the defendant members of the Tenure Committee] harbored a racial animus against him and that this was manifested in votes against his

⁵⁷ *Id.* at 94. ("[T]he scales tip decidedly toward the protection of the confidentiality of the faculty peer review system which [the court] views as embodying a broader social value."). For a critique of the district court's holding in *Gray*, see Note, *Academic Freedom Privilege: An Excessive Solution to the Problem of Protecting Confidentiality*, 51 U. CIN. L. REV. 326 (1982). *But see* Comment, *Balancing Academic Freedom and Civil Rights: Toward an Appropriate Privilege for the Votes of Academic Peer Review Committees*, 68 IOWA L. REV. 585 (1983).

⁵⁸ *Gray v. Board of Higher Educ.*, 692 F.2d 901, 902 (2d Cir. 1982).

⁵⁹ 441 U.S. 153, 170-75 (1979) (no first amendment privilege bars discovery of the editorial processes of those responsible for publishing allegedly defamatory material).

⁶⁰ 445 U.S. 40, 50 (1980) (petitioner could not invoke the spousal witness privilege to bar his wife from testifying against him voluntarily).

⁶¹ *Gray*, 692 F.2d at 904.

⁶² *Id.*

⁶³ *Id.* at 902, 904.

⁶⁴ 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980) [hereafter title VII]. For a discussion of title VII theories of recovery that avoid direct proof of discriminatory intent, see Cooper, *Title VII in the Academy: Barriers to Equality for Faculty Women*, 16 U.C. DAVIS L. REV. 975 (1983) (*supra* this volume); Tepker, *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C. DAVIS L. REV. 1047 (1983) (*infra* this volume).

⁶⁵ *Gray*, 692 F.2d at 905 (footnote omitted).

reappointment and tenure — but to begin with he would, of course, have to know the votes. Or, he could establish that the reasons given by the [tenure] [c]ommittee for his actions were pretexts for its refusal to rehire and tenure him — if the committee had given reasons.⁶⁶

Absent the disclosure of reasons for tenure denial, however, the defendant college could defeat the disclosure demand by disclaiming any defense that would require disclosure to rebut. Without discovery of the votes, the plaintiff could not prove intent to discriminate, a critical element of his case.⁶⁷

Noting the defendants' concern that compelled disclosure of tenure committee votes would chill candid peer evaluations, disturb faculty relationships and thereby threaten academic freedom, the court addressed the AAUP's brief. The brief urged that so long as an unsuccessful candidate is furnished with a meaningful statement of reasons and afforded appropriate grievance procedures, the votes of the tenure committee should be entitled to a qualified privilege.⁶⁸ The court agreed:

We believe the position of the AAUP on the precise matter before us to be carefully designed to protect confidentiality and encourage a candid peer review process. It strikes an appropriate balance between academic freedom and educational excellence on the one hand and individual rights to fair consideration on the other, so that courts may steer the "careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior"⁶⁹

Dinnan and *Gray* thus reached similar results, but for quite different reasons. *Dinnan* found no qualified privilege to be necessary, while *Gray* recognized the need for such a privilege but considered it outweighed by the plaintiff's need to prove discriminatory intent.

III. PLACING APPROPRIATE LIMITS ON ACADEMIC FREEDOM

A. *Traditional Judicial Deference*

Federal courts traditionally have been reluctant to intervene in academic disputes. This principle of judicial deference to the judgment of academics was recently reiterated by the United States Supreme Court in *Board of Curators of the University of Missouri v. Horowitz*,⁷⁰ in which the Court observed:

⁶⁶ *Id.* (citation omitted).

⁶⁷ *Id.* at 906.

⁶⁸ *Id.* at 907.

⁶⁹ *Id.* at 907-08 (quoting *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir.), cert. denied, 439 U.S. 984 (1978)).

⁷⁰ 435 U.S. 78 (1978).

[W]e decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship. We recognize, as did the Massachusetts Supreme Judicial Court over 60 years ago, that a hearing may be "useless or harmful in finding out the truth as to scholarship."⁷¹

The doctrine of judicial deference has been particularly prominent in cases involving sex discrimination in matters of reappointment, promotion, and tenure,⁷² and in at least some of the reported cases involving race discrimination in academic institutions.⁷³ For example, in *Lewis v. Chicago State College*,⁷⁴ a case under the Civil Rights Act,⁷⁵ the plaintiff sought promotion to full professor and alleged discrimination against Black faculty members. Although the court found no racial prejudice, it felt constrained to add that promotion decisions are not normally justiciable.⁷⁶

⁷¹ *Id.* at 90 (quoting *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19, 23, 102 N.E. 1095, 1097 (1913)). One leading commentary notes:

While there are many cases in which judges refuse to hold colleges or universities accountable in court due to some facet of the particular institution's legal identity, there are also numerous cases in which the courts, as a matter of common law, refuse to intrude on the academic process. The courts have traditionally refused to interfere in the basic academic process of the university, particularly in the evaluation of students or faculty.

. . . The doctrine of academic abstention has probably had one of its cleanest statements, and its most dramatic impact, in the area of academic sex discrimination, where none of the first thirty-odd cases reported have been decided in favor of the plaintiff faculty member.

H. EDWARDS & V. NORDIN, *HIGHER EDUCATION AND THE LAW* 14 (1979).

⁷² See, e.g., *Huang v. College of the Holy Cross*, 436 F. Supp. 639, 653 (D. Mass. 1977) (because "tenure decisions normally involve difficult qualitative judgments," the courts should be reluctant "to override faculty appointments and tenure decisions absent an impermissible discrimination by the university or college"); *Cussler v. University of Md.*, 430 F. Supp. 602, 605-06 (D. Md. 1977) ("[P]romotion decisions in academia necessarily involve matters of professional judgment. The courts are, therefore, reluctant to substitute their judgment for the judgment of academics with expertise in their respective fields.") (citations omitted).

⁷³ See, e.g., *Labat v. Board of Higher Educ.*, 401 F. Supp. 753, 757 (S.D.N.Y. 1975) ("Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.") (quoting *Faro v. New York Univ.*, 502 F.2d 1229, 1231-32 (2d Cir. 1974)); *Moore v. Kibbee*, 381 F. Supp. 834, 839 (E.D.N.Y. 1974); *Lewis v. Chicago State College*, 299 F. Supp. 1357, 1359 (N.D. Ill. 1969) (noting that "the judiciary is not the appropriate forum for decisions involving academic rank").

⁷⁴ 299 F. Supp. 1357 (N.D. Ill. 1969).

⁷⁵ 42 U.S.C. §§ 1983, 1985 (1976 & Supp. IV 1980).

⁷⁶ *Lewis*, 299 F. Supp. at 1360.

Perhaps the strongest assertion of the doctrine of judicial deference is found in the opinion of the Second Circuit in *Faro v. New York University*.⁷⁷ *Faro* involved an action under title VII in which the female plaintiff charged that a change in her tenure track employment status was the result of sex bias or discrimination. In affirming the district court's finding of no sex bias or discrimination, the Second Circuit stated: "Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."⁷⁸

Similarly, in *Megill v. Board of Regents*,⁷⁹ the Fifth Circuit rejected a university professor's civil rights action against the state Board of Regents for refusing to grant him tenure. The professor had alleged deprivation of his constitutional rights of free speech and due process, but the court adhered to "the policy that federal courts should be loathe to intrude into internal school affairs."⁸⁰ Likewise, in *Johnson v. University of Pittsburgh*,⁸¹ a federal district court noted that it had found no title VII case ordering tenure and promotion of a college professor over the judgment of academic professionals.⁸² Having observed that a university's tenure criteria could not be used "as window dressing to disguise . . . invidious sex discrimination,"⁸³ the court nevertheless followed the pattern of denying relief, noting that it was not a "Super Tenure Committee."⁸⁴ The court concluded that a tenure decision cannot be made by a court but instead must be made by the faculty, the administration, and the trustees of the university.⁸⁵

B. Rejection of the Traditional View

Five years ago, in *Powell v. Syracuse University*,⁸⁶ the doctrine of judicial deference in academic matters received serious reconsideration and sharp criticism. Ironically, this criticism came from the same federal court which three years earlier, in *Faro v. New York University*,⁸⁷ had made one of the strongest and most influential statements of the

⁷⁷ 502 F.2d 1229 (2d Cir. 1974).

⁷⁸ *Id.* at 1231-32.

⁷⁹ 541 F.2d 1073 (5th Cir. 1976).

⁸⁰ *Id.* at 1077 (citations omitted).

⁸¹ 435 F. Supp. 1328 (W.D. Pa. 1977).

⁸² *Id.* at 1354.

⁸³ *Id.* at 1355.

⁸⁴ *Id.* at 1353.

⁸⁵ *Id.*; see also note 73 *supra*.

⁸⁶ 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

⁸⁷ 502 F.2d 1229 (2d Cir. 1974).

doctrine. In *Powell*, the plaintiff alleged that termination of her employment contract resulted from discrimination based on race, color, and sex. Although the Second Circuit affirmed the district court's order dismissing the petition, its comments addressing the question of judicial deference warrant extensive quotation. The court stated:

In recent years, many courts have cited the *Faro* opinion for the broad proposition that courts should exercise minimal scrutiny of college and university employment practices. Other courts, while not citing *Faro*, have concurred in its sentiments.

This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the commonsense position we took in *Faro*, namely that courts must be ever-mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964. In affirming here, we do not rely on any such policy of self-abnegation where colleges are concerned.⁸⁸

While I do not suggest that the doctrine of judicial deference in academic employment discrimination cases was finally laid to rest in *Powell*,⁸⁹ cases after *Powell* provide encouragement to plaintiffs claiming that negative promotion and tenure decisions were influenced by sex or race bias. In *Sweeney v. Board of Trustees of Keene State College*,⁹⁰ the plaintiff in a title VII suit charged that the failure to promote her to the rank of full professor was the result of sex discrimination. In sustaining the claim, the First Circuit conceded that most of the evidence did not prove discrimination against the plaintiff in particular and that the facts revealed a "close case."⁹¹ The court nevertheless endorsed the district court's conclusion that the reasons given for failure to promote were influenced by the plaintiff's gender.⁹² Significantly, both the lower court and the appellate court thoroughly reviewed the evidence before the tenure committee and freely questioned and rejected the committee's judgments based on that evidence, without any suggestion that academic expertise demanded judicial deference to those judgments.

The following year, in *Kunda v. Muhlenberg College*,⁹³ the Third Circuit decided a title VII action in which the plaintiff alleged sex dis-

⁸⁸ *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1153 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978) (footnotes omitted).

⁸⁹ See, e.g., *Clark v. Whiting*, 607 F.2d 634, 639-40 (4th Cir. 1979).

⁹⁰ 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

⁹¹ *Id.* at 114.

⁹² *Id.* at 113.

⁹³ 621 F.2d 532 (3d Cir. 1980).

crimination by a college in its failure to promote her and grant her tenure. The district court had ordered the plaintiff reinstated to her faculty position with back pay and promoted to the rank of assistant professor, together with an award of tenure on the condition that the plaintiff achieve a master's degree within two years.⁹⁴ Affirming the district court's order, the court of appeals significantly rejected the assertion by the college and a number of amici that the district court's judgment regarding tenure was "an unwarranted intrusion by the judiciary into the academic mission of an educational institution which . . . threatens academic freedom itself."⁹⁵ Although endorsing basic academic freedom principles enunciated by the Supreme Court, and asserting the entitlement of academic freedom to "maximum protection," the court refused to accept the proposition that academic freedom is implicated in every employment decision of an educational institution.⁹⁶ The court further observed:

The fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility to insure the award of a meaningful remedy. Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those who work primarily with their hands.⁹⁷

Because of the clear congressional intent to subject educational institutions to title VII requirements and the documented history of employment discrimination against women in academic institutions,⁹⁸ the Third Circuit in *Kunda* refused to adopt a position of judicial deference. The court also noted with approval the opinion of the Second Circuit in *Powell v. Syracuse University*.⁹⁹

In its decision in *In re Dinnan*, the Fifth Circuit, citing *Kunda* with approval, similarly declined to adopt the posture of judicial deference: "Here the allegation is that the appellee was *discriminated against*, precisely the situation that the Third Circuit envisioned in *Kunda v. Muhlenberg College* in which courts should intervene."¹⁰⁰ In *Gray v. Board of Higher Education*, however, the Second Circuit reached the

⁹⁴ *Kunda v. Muhlenberg College*, 463 F. Supp. 294, 314-15 (E.D. Pa. 1978).

⁹⁵ *Kunda v. Muhlenberg College*, 621 F.2d 532, 547 (3d Cir. 1980).

⁹⁶ *Id.*

⁹⁷ *Id.* at 550.

⁹⁸ See notes 106-16 and accompanying text *infra*.

⁹⁹ 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); see also *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379 (5th Cir. 1980) (also approving *Powell*).

¹⁰⁰ *In re Dinnan*, 661 F.2d 426, 431 (5th Cir. 1981) (emphasis in original), *cert. denied sub nom.* *Dinnan v. Blaubecks*, 457 U.S. 1106 (1982).

contrary result, adopting the doctrine of judicial deference in substance and effect.¹⁰¹

Contrary to the *Gray* court's holding, the concept of academic freedom has no relevance whatsoever to protecting confidentiality and encouraging candid peer review in the context of claims of sex or race discrimination in academic employment.

C. *The Link Between Judicial Deference and University Discrimination*

In the following paragraphs, I shall argue that in light of the interests involved in *Dinnan* and *Gray*, the court in *Dinnan* properly intervened on the plaintiff's behalf and rejected Professor Dinnan's claim of academic freedom. The court in *Gray*, on the other hand, while technically granting the plaintiff relief, did so in a manner unlikely to provide relief to claimants who in the future seek to show unlawful discrimination in tenure decisions. Moreover, the *Gray* decision will provide to the tenured professoriate and to academic institutions privileges which are unsupported by the pronouncements of the Supreme Court as it has defined the contours of academic freedom.

In reaching its decision, the *Gray* court without hesitation or criticism adopted the AAUP *Preliminary Statement on Judicially Compelled Disclosure*,¹⁰² summarizing the statement as follows:

The AAUP statement . . . concludes that faculty members, upon request, should be informed in writing of the reasons for a decision against reappointment. Recognizing the latitude that must be given the institution acting through its faculty, but balancing academic freedom against standards of fairness, the Statement seeks to take into account the confusion that can occur between the limited rights of probationary faculty members and the due process rights guaranteed to tenured faculty, but nevertheless determines that reasons must be given the faculty member denied reappointment or tenure who requests them. This is to permit the rejected probationer to remedy identified shortcomings, to correct erroneous information on which the peer review committee based its decisions, as well as perhaps to realize that the decision resulted from institutional considerations unrelated to his or her competence.¹⁰³

The court's uncritical acceptance of the AAUP Statement would be considerably more persuasive were it not for the sorry record of academic institutions in making appointment and reappointment decisions,

¹⁰¹ *Gray v. Board of Higher Educ.*, 692 F.2d 901, 907-08 (2d Cir. 1982). See text accompanying note 69 *supra*.

¹⁰² *AAUP Disclosure Statement*, note 17 *supra*.

¹⁰³ *Gray*, 692 F.2d at 907.

and the extent to which standards of fairness have not characterized such decisions.¹⁰⁴ The court in *Gray* viewed the AAUP Statement as striking a balance between "academic freedom and educational excellence" on the one hand, and "individual rights to fair consideration" on the other.¹⁰⁵ The evidence, however, if not overwhelming, at least strongly suggests that neither standards of educational excellence nor fair consideration have characterized academic appointment, reappointment, and tenure decisions in cases in which applicants were women or minorities. There is no lack of documentation of sex discrimination in academia. One study, for example, found discriminatory behavior on the part of male colleagues and employers to be a "major hindrance to the career development of professional women" in academia.¹⁰⁶ The author found that the most common form of discrimination, in addition to salary discrepancies, was differential treatment regarding promotions, tenure, and seniority.¹⁰⁷ Ironically, academic women who were professionally active or engaged in substantial publication, an activity generally acknowledged to be of primary importance in tenure decisions, reported more experiences with employer discrimination.¹⁰⁸

A more recent study of academic women noted the lesser proportion of women doctorates appointed to academic positions as compared to men, and stated that "[e]ven if a woman is hired to a faculty position, it is very likely that she will encounter a struggle when it comes to promotion. . . . Most women are clustered at the lower ranks, in nonladder research and lecture positions, and in the less prestigious institutions."¹⁰⁹ Another study amply supports the foregoing observations. Evaluating the importance of merit principles, the author observes:

[T]he case has been somewhat overstated: The professoriate are not necessarily judged on the basis of the quality of their research or teaching, that is, they are not necessarily judged according to how well they perform the central academic functions, which is the meaning of merit; other factors less vital to the dissemination of knowledge are as important to the careers of university professors.¹¹⁰

In support of these conclusions, the author found that during the

¹⁰⁴ See generally K. DAVIDSON, R. GINSBURG & H. KAY, *SEX-BASED DISCRIMINATION* 869-86 (1974).

¹⁰⁵ *Gray v. Board of Higher Educ.*, 692 F.2d 901, 907 (2d Cir. 1982).

¹⁰⁶ H. ASTIN, *THE WOMAN DOCTORATE IN AMERICA* 110 (1969).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 148.

¹⁰⁹ *WOMEN IN ACADEMIA: EVOLVING POLICIES TOWARD EQUAL OPPORTUNITIES 2* (E. Wasserman, A. Lewin & L. Bleineis eds. 1975).

¹¹⁰ L. LEWIS, *SCALING THE IVORY TOWER* 8 (1975).

1959-60 academic year, women held only 9.9 percent of the professorships and 17.5 percent of the associate professorships, with somewhat higher percentages at lower ranks.¹¹¹ With respect to race, the same author cites an earlier study of university faculty characteristics which revealed that almost 98 percent of the faculty members were white.¹¹²

The authors of a leading work devoted to sex discrimination summarized the dismal situation of academic women as follows:

Perhaps surprising, but by now well documented, the relative representation and status of women as faculty members at universities and colleges deteriorated from the 1930s to the 1970s. The proportion of women serving in academic positions declined. Salary differentials associated with sex were marked and prevailed for every race. Legislation in the 1960s prohibiting sex discrimination in employment left academic employment untouched. The Equal Pay Act did not apply to academic and professional employees until amended in July 1972. Title VII excluded academic employment until its scope was enlarged by the Equal Employment Opportunity Act of 1972¹¹³

The desire to ameliorate the status of women and minorities in academia¹¹⁴ is clearly reflected in the congressional debates which preceded the 1972 extension of the antidiscrimination provisions of title VII to academic institutions.¹¹⁵ Ironically, in light of the posture subse-

¹¹¹ *Id.* at 129. On the subject of tenure and promotion of faculty women, Lewis further observes:

In 1972, of the 4,470 tenured professors in seven Ivy League institutions plus the Massachusetts Institute of Technology, only 151 were women. The ratio of women to men is even more unfavorable at the level of full professor. For example, for the 1969-70 academic year no full professor at Harvard was a woman (except for the holder of one chair endowed for a female). It was reported in *Science* in 1972 that in major universities one in fifty full professors was a woman. Over a period of close to seventy years, no woman junior appointee in six social science departments at the University of Chicago was advanced to the rank of full professor. In the spring of 1969, 11 out of 475 full professors at the University of Chicago were women (and only 16 out of 217 associate professors were women).

Id. at 130 (citations omitted).

¹¹² *Id.* at 17.

¹¹³ K. DAVIDSON, R. GINSBURG & H. KAY, note 104 *supra*, at 870.

¹¹⁴ See generally Astin & Berger, *Sex Discrimination in Academe*, in *ACADEMIC WOMEN ON THE MOVE* (A. Rossi & A. Calderwood eds. 1973).

¹¹⁵ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e (1976 & Supp. IV 1980)).

The debates which preceded passage of the amendments contain frequent references to the status of women and minorities, of which the following are examples:

As regards minorities, statistical studies show that minorities are generally underrepresented in teaching positions in educational institutions, and

quently assumed by the defendants in *Dinnan* and *Gray*, the title VII amendments were unopposed by the academic community, and academic leaders were among the supporters of the fight against discrimination.¹¹⁶

Thus, there appears to be a clear consensus, supported by ample evidence, that academic institutions have engaged in sex and race discrimination to at least the same extent as other societal institutions. The title VII amendments,¹¹⁷ reflecting values similar to those inherent in the

those that are employed are relegated to the lower paying and less prestigious positions. . . . This underrepresentation becomes more pronounced when we look at the institutions of higher learning where Negroes account for only 2.2 percent of all faculty, Orientals 1.3 percent, and all other minorities only 0.3 percent.

118 CONG. REC. 1992 (1972) (remarks of Sen. Williams).

The Senator also noted the existence of discrimination against women in higher educational institutions:

In institutions of higher education, women are almost totally absent in the position of academic dean, and are grossly underrepresented in all other major faculty positions. Also, I would add, that this discrimination does not only exist as regards to the acquiring of jobs, but that it is similarly prevalent in the area of salaries and promotions where studies have shown a well-established pattern of unlawful wage differentials and discriminatory promotion policies.

Id.

Another Senator also noted the widespread discrimination against women teachers and administrators:

[T]he rule is that once hired, women do not receive advancement as often as men. While almost half of the male teachers are given the status of full professor, only 10 percent of the women make it that far. As a result, the highest faculty ranks are weighted with men; the lowest rank with women.

118 CONG. REC. 3936 (1972) (remarks of Sen. Bayh).

A House Report accompanying the Act detailed a similar effect:

Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. In the field of higher education, the fact that black scholars have been generally relegated to all-black institutions, or have been restricted to lesser academic positions when they have been permitted entry into white institutions is common knowledge. Similarly, in the area of sex discrimination, women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars.

H.R. REP. NO. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2137, 2155.

¹¹⁶ See Vanderwaerdt, *Higher Education Discrimination and the Courts*, 10 J.L. & EDUC. 467, 467-68 (1981).

¹¹⁷ 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980).

Civil Rights Act,¹¹⁸ demonstrate a clear congressional intent to secure for academic persons the right of admission to and participation in academic enterprises free of invidious sex or race discrimination. As suggested above, traditional notions of judicial deference should not be permitted to thwart this intent.¹¹⁹

Similarly, an unwarranted expansion of the concept of academic freedom should not be permitted to further constrict the ability of plaintiffs to prove race and sex discrimination by academic institutions.¹²⁰ The *Dinnan* court, I would suggest, in flatly declining to recognize or create any privilege which might permit a tenured professor to refuse to reveal his promotion or tenure votes, took proper account of the foregoing considerations. The *Gray* court, on the other hand, while mandating disclosure of the tenure vote in the particular circumstances of the case, nevertheless implicitly created a qualified academic freedom privilege.¹²¹ Apart from whatever policy considerations may suggest protection of tenure and promotion votes from disclosure, academic freedom principles do not require such protection and indeed, do not justify it.

D. Whose Academic Freedom is Protected by Nondisclosure?

It is not clear from the court's opinion in *Gray* whether the protection of academic freedom applies to individual tenure committee members or to universities as institutions. Extending this protection to either party, however, exceeds the scope of academic freedom.

The first obvious possibility is that protection is afforded in some circumstances to the professors who are members of college and university tenure committees. The *Gray* court so hinted by referring to the concerns of the district court and the appellees that "candid peer evaluation will be chilled, and the harmony of faculty relations will be disturbed"¹²² Virtually identical concerns were raised in *Dinnan*, and the court's response in rejecting them is persuasive. After noting that its opinion should signal to potential wrongdoers that the cloak of "academic freedom" cannot be used to avoid responsibility for their actions,¹²³ the court concluded:

¹¹⁸ 42 U.S.C. §§ 1981, 1983, 1985 (1976 & Supp. IV 1980).

¹¹⁹ See text accompanying notes 98-101 *supra*.

¹²⁰ See Machlup, note 10 *supra*, at 761.

¹²¹ See note 101 and accompanying text *supra*.

¹²² *Gray v. Board of Higher Educ.*, 692 F.2d 901, 907 (2d Cir. 1982).

¹²³ *In re Dinnan*, 661 F.2d 426, 432 (5th Cir. 1981), *cert. denied sub nom. Dinnan v. Blauberger*, 457 U.S. 1106 (1982).

No one compelled Professor Dinnan to take part in the tenure decision process. Persons occupying positions of responsibility, like Dinnan, often must make difficult decisions. The consequence of such responsibility is that occasionally the decision-maker will be called upon to explain his actions. In such a case, he must have the courage to stand up and publicly account for his decision. If that means that a few weak-willed academic individuals will be deterred from serving in positions of public trust, so be it; society is better off without their services. If the decision-maker has acted for legitimate reasons, he has nothing to fear. We find nothing heroic or noble about the appellant's position; we see only an attempt to avoid responsibility for his actions. If the appellant was unwilling to accept responsibility for his actions, he should never have taken part in the tenure decision-making process. However, once he accepted such a role of public trust, he subjected himself to explaining to the public and any affected individual his decisions and the reasons behind them.¹²⁴

The *Dinnan* court thus properly recognized that the protection of secrecy in the tenorial process on the grounds of academic freedom would be a perversion of academic freedom principles. Mandatory disclosure of votes and deliberations relating to tenure and promotion decisions in no way impairs the values which are central to the concept of academic freedom; namely, the freedom of individual academic men (and occasionally women) to research and teach, and the freedom of students to learn.¹²⁵

The second possible answer to the inquiry of whose academic freedom is protected by nondisclosure is that "institutional academic freedom" is protected by keeping tenure and promotion votes and deliberations secret.¹²⁶ "Institutional academic freedom," although the subject of at least two recent student comments in the law review literature,¹²⁷ has not received explicit recognition by a majority of the United States Supreme Court in any of its opinions marking the perimeters of academic freedom. The source of the concept of institutional academic freedom is

¹²⁴ *Id.*

¹²⁵ Kadish, note 12 *supra*, at 166; see also Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, 404 ANNALS 140 (1972):

The phrase "academic freedom" in the context "the academic freedom of a faculty member of an institution of higher learning," refers to a set of vocational liberties: to teach, to investigate, to do research, and to publish on any subject as a matter of professional interest, without vocational jeopardy or threat of other sanction, save only upon adequate demonstration of an inexcusable breach of professional ethics in the exercise of any of them.

Id. at 146; see also Fuchs, note 11 *supra*.

¹²⁶ See notes 41-44 and accompanying text *supra*.

¹²⁷ Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 CALIF. L. REV. 1538 (1981); Note, *Testing the Limits of Academic Freedom*, 130 U. PA. L. REV. 712 (1982).

Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*.¹²⁸ Alluding to "the dependence of a free society on free universities," which "means the exclusion of governmental intervention in the intellectual life of a university,"¹²⁹ Justice Frankfurter quoted with approval the statement of a conference of senior scholars from South African universities which concluded:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.¹³⁰

Although the Court rendered a number of opinions defining the boundaries of academic freedom,¹³¹ the notion of institutional academic freedom contained in Justice Frankfurter's opinion in *Sweezy* remained unremarked upon for more than three decades. It finally reemerged in *Regents of the University of California v. Bakke*, in Justice Powell's opinion¹³² announcing the judgment of the Court but writing for himself only. In a context entirely different from *Sweezy* or from the cases which have been the focus of this Article,¹³³ Justice Powell included the selection of its student body as within the freedom of a university to make its own judgments, and quoted with approval Justice Frankfurter's summary of the "four essential freedoms" comprising academic freedom.¹³⁴

It is fair to conclude that the *Sweezy* concurrence, together with Justice Powell's opinion in *Bakke*, are insubstantial foundations upon which to build a theory of institutional academic freedom which would preserve the secrecy of promotion and tenure votes and deliberations. The *Dinnan* court properly rejected the appellant's arguments in reliance on this aspect of *Bakke*, noting that the plaintiff in that case was alleging a denial of tenure based on other than academic grounds. Accordingly, the so-called essential freedom of an institution to decide on academic grounds who may teach was, on the facts, clearly "outside of what the *Bakke* Court envisioned to be the limits of academic free-

¹²⁸ 354 U.S. 234, 255-67 (1957).

¹²⁹ *Id.* at 262 (Frankfurter, J., concurring).

¹³⁰ *Id.* at 263 (Frankfurter, J., concurring).

¹³¹ See notes 20-30 and accompanying text *supra*.

¹³² 438 U.S. 265 (1978).

¹³³ *Bakke* involved the challenge of a white male to the admissions policy of the University of California, Davis, medical school, which took race into consideration in admission decisions.

¹³⁴ *Bakke*, 438 U.S. at 312.

dom."¹³⁵ Certainly, it would be an unwarranted expansion of academic freedom to permit a claim of institutional academic freedom to impair the ability of claimants to prove sex and race discrimination in tenure and promotion decisions.¹³⁶

CONCLUSION

Nearly twenty years ago, in its first definitive pronouncement on the subject, the United States Supreme Court viewed academic freedom as "a special concern of the First Amendment."¹³⁷ The Court's decisions prior to and subsequent to *Keyishian* clearly identify academic freedom as a right attending to individuals to teach, write, conduct research, and speak freely. Reliance upon academic freedom principles to protect the secrecy of university and college tenure deliberations and votes, rejected in *Dinnan* and implicitly adopted in *Gray*, protects institutions at the expense of individual rights.¹³⁸ When infringement of such rights is alleged, academic institutions and tenure committee members who have authority to implement the policies of those institutions should be held accountable and responsible for their actions. In the context of tenure and promotion decisions, the creation of an evidentiary privilege based upon academic freedom is in derogation of the principles upon which academic freedom is based.

¹³⁵ *In re Dinnan*, 661 F.2d 426, 431 (5th Cir. 1981), *cert. denied sub nom. Dinnan v. Blaubeurgs*, 457 U.S. 1106 (1982).

¹³⁶ For a discussion reaching a similar conclusion, see Comment, *Academic Freedom vs. Title VII: Will Employment Opportunity Be Denied on Campus?*, 42 OHIO ST. L.J. 989 (1981). An argument to the contrary, urging constitutional protection of the autonomy of educational institutions in hiring decisions, may be found in Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879 (1979).

¹³⁷ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

¹³⁸ Such a use of academic freedom to create a privilege for tenure committee decisions would be particularly invidious in a case in which tenure is denied because of a professor's exercise of his own academic freedom. Assume, for example, that a professor refuses to award a grade to a particular student at the behest of the professor's superiors. Under the holding of *Gray*, there is at least the possibility that a court would allow a tenure committee to thwart a legitimate exercise of academic freedom without accountability, so long as some statement of reasons is supplied. Such a result would work precisely in opposition to the values which academic freedom is designed to foster.