The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth

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> 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 indulge in hyperbole. It is the special task of teachers to foster 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. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.[1]

INTRODUCTION

The eloquent rhetoric on "academic freedom" found in opinions of the United States Supreme Court creates the impression that the university classroom provides the professor with a higher order and greater quantum of first amendment protection than is available to those who follow less exalted callings in less sacrosanct workplaces. This impression, however, does not conform to the reality of the Court's first amendment jurisprudence. Most of the stirring language cited to support a thesis of extraordinary protection for classroom utterances appears in decisions in which classroom speech was not in issue.[2] There also exists a great deal of scholarly commentary espousing a doctrine of academic freedom grounded in the first amendment.[3]

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[1] Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

[2] *See* notes 205-46 and accompanying text *infra*.

[3] *See, e.g.*, Finkin, *Toward a Law of Academic Status*, 22 BUFFALO L. REV. 575 (1972); Frakt, *Non-Tenure, Teachers, and the Constitution*, 18 U. KAN. L. REV. 27 (1969); Murphy, *Academic Freedom — An Emerging Constitutional Right*, in ACADEMIC FREEDOM, THE SCHOLAR'S PLACE IN MODERN SOCIETY 17 (Baade ed. 1964); Pettigrew, *"Constitutional Tenure": Toward a Realization of Academic Freedom*, 22 CASE W. RES. L. REV. 475 (1971); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841; Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U. L. REV. 1176 (1973); *cf.* Note, *Academic Freedom — Its Constitutional Context*, 40 U. COLO. L. REV. 600, 615 (1967) [hereafter Note, *Academic Freedom*] ("[I]t is necessary to give academic freedom independent constitutional status . . . [since it] can be . . . justified constitutionally by viewing it as an interest of society rather than as creating a privileged class of educators." (footnote omitted)).

Emerson has suggested that rather than locating protection for academic freedom solely in the first amendment, a court may more properly derive academic freedom

Current constitutional doctrine, however, as developed by the judiciary deciding concrete cases, does not support any superprotected status for classroom utterances. The truth is that classroom speech enjoys less protection than more ordinary speech. Professors are not immune from suffering the unfavorable consequences of their speech. Indeed, they are more vulnerable than the average citizen to being penalized for speech, even outside the classroom. Rather than providing a sanctuary for the robust, freewheeling expression of views, some of which may be unpopular or even "dangerous," the classroom, even in a university, provides a forum in which speech may be sharply curtailed.[4]

All first amendment claimants must prove the existence of "state" action to invoke the protection of that amendment.[5] Once that hurdle is cleared, the presence *vel non* of tenure may be decisive in determining whether first amendment rights are vindicated.

Tenure is a concept that does not admit of any one definition, but if it means anything, it means that the holder cannot be discharged without cause. "Tenured faculty members enjoy the assurance of continued employment which can be terminated only by means of procedural due process and for reasons of extreme misconduct or program curtailment."[6] It is not surprising, then, that most of the cases alleging institutional retaliation for expressive activity are brought by nontenured faculty members, since it is so much easier to terminate their employment. The nontenured professor will rarely have a "liberty" or "prop-

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from the "emanations" of a series of constitutional provisions — the first amendment's freedom of expression and freedom of religion, and the fourteenth amendment guarantees of due process and equal protection. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 612-13 (1970). He warns, however, that even though "the creation of a constitutional structure of academic freedom would be generally feasible," there are reasons to question the wisdom of pressing in that direction. *Id.* at 614. One major objection is the Supreme Court's unwillingness "to give as much force and depth to these principles as the proponents of academic freedom believe necessary." *Id.* at 614-15. The second "objection to the extension of legal controls in support of academic freedom has been that the governmental presence in the academic world would be repressive and destructive rather than liberating." *Id.* at 615.

[4] *See* notes 247-77 and accompanying text *infra.*

[5] *See* notes 29-80 and accompanying text *infra.*

[6] Matheson, *Judicial Enforcement of Academic Tenure: An Examination*, 50 WASH. L. REV. 597, 597 (1975); Byse, *Academic Freedom, Tenure and the Law: A Comment on* Worzella v. Board of Regents, 73 HARV. L. REV. 304, 305-06 (1969) ("[T]he essential characteristic of tenure is continuity of service, in that the institution in which the teacher serves has in some manner relinquished the freedom or power it otherwise would possess to terminate the teacher's services."); *see also* Harrah Indep. School Dist. v. Martin, 440 U.S. 194 (1978) (per curiam) (tenure does not create substantive constitutional rights but only a procedural right to fair process).

erty" interest sufficient to invoke the procedural protections of the fourteenth amendment's due process clause.[7] Without a right to a prior hearing or to the reasons for contract nonrenewal or discharge, the nontenured professor may be unable to establish that a constitutionally impermissible reason motivated the nonretention.[8]

Nontenured faculty members cannot be dismissed, denied a contract renewal, or denied tenure if the primary reason underlying the decision was an intention to deny the claimant's first amendment rights.[9] It is immaterial, in theory, that the professor had no procedural right to an administrative hearing or to be informed of the reasons for the adverse decision. A claim of retaliation for protected expressive activity is an independent basis for a lawsuit, regardless of whether procedural due process is also implicated.[10] In practice, however, nontenured faculty members alleging retaliation for protected expressive activity may be unable to meet their burden of proving illicit intent without knowing the reasons for the institution's decision.[11]

If the claimant demonstrates that protected activity was a substantial factor in the adverse decision, the burden shifts to the institution to demonstrate that the same decision would have been reached even in the absence of the protected conduct.[12] Thus, even if protected activity was a substantial factor in the adverse employment decision, a constitutional violation has not necessarily occurred.

Issues of the confidentiality of faculty votes and of the reasons for these votes in academic employment decisions also frustrate the nontenured claimant who seeks to use the discovery process in a first amendment lawsuit.[13]

As a substantive matter, implication of an expressive interest, even one that ordinarily is regarded as protected by the first amendment, does not suffice to establish a violation of the first amendment in a faculty member's claim of retaliation by an academic institution for the exercise of protected rights. The court will balance the claimant's interest in free speech against the state's interest as an employer in maintaining a competent faculty, in perpetuating public confidence in the educational institution, and in promoting the efficiency of the public

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[7] *See* notes 92-119 and accompanying text *infra*.

[8] *See* notes 120-27 and accompanying text *infra*.

[9] *See* notes 128-39 and accompanying text *infra*.

[10] Board of Regents v. Roth, 408 U.S. 564, 585 (1972) (Douglas, J., dissenting).

[11] *See* notes 120-27 and accompanying text *infra*.

[12] Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977).

[13] *See* notes 140-97 and accompanying text *infra*.

service it performs.[14] It is widely assumed that "academic freedom" is a constitutionally protected right, immunizing the academician's speech and writing from content-based scrutiny. There is no reason to believe, however, that expressive activity in the classroom is free of institutional, as opposed to governmental, control.[15]

"Academic freedom" reflects the idea that universities should be able to perform their teaching and research functions free from political interference by the state.[16] It is, however, an ill-defined legal concept.[17] For example, "academic freedom" was recently defined as "that aspect of intellectual liberty concerned with the peculiar institutional needs of the academic community."[18] It is not clear that "academic freedom" is a constitutionally protected right, although it has been characterized as a special concern of the first amendment.[19] Even if "academic freedom" is

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[14] Pickering v. Board of Educ., 391 U.S. 563 (1968). *See generally* Note, *Judicial Protection of Teacher's Speech: The Aftermath of* Pickering, 59 IOWA L. REV. 1256 (1974) [hereafter Note, *The Aftermath of* Pickering]; Comment, *Free Speech: Dismissal of Teacher for Public Statements*, 53 MINN. L. REV. 864 (1969) [hereafter Comment, *Free Speech*].

[15] *See* notes 265-77 and accompanying text *infra*.

[16] H. EDWARDS & V. NORDIN, HIGHER EDUCATION AND THE LAW 163 (1979).

[17] The American Ass'n of Univ. Professors (AAUP) and Ass'n of Am. Colleges *1940 Statement of Principles on Academic Freedom and Tenure* is reproduced each year in the AAUP's bulletin. It provides, in part: "The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject." 27 AM. A.U. PROFESSORS BULL. 41 (1941). For a history of the development of the concept of academic freedom, see *Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045, 1048-51 (1968).

[18] *Developments in the Law — Academic Freedom*, note 17 *supra*, at 1048. The author then states:

> The claim that scholars are entitled to particular immunity from ideological coercion is premised on a conception of the university as a community of scholars engaged in the pursuit of knowledge, collectively and individually, both within the classroom and without, and on the pragmatic conviction that the invaluable service rendered by the university to society can be performed only in an atmosphere entirely free from administrative, political, or ecclesiastical constraints on thought and expression.

Id. (footnote omitted); *see also* R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955); Fuchs, *Academic Freedom — Its Basic Philosophy, Function and History*, 28 LAW & CONTEMP. PROBS. 431 (1963); Jones, *The American Concept of Academic Freedom*, in ACADEMIC FREEDOM AND TENURE 224 (L. Joughlin ed. 1967).

[19] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (Brennan, J.); *see* notes 205-46 and accompanying text *infra*. For an understanding of historical reality prior to the Supreme Court's recognition of at least limited first amendment expressive rights of teachers, see Note, *Academic Freedom and the Law*, 46 YALE L.J. 670 (1937).

a constitutional right, its protection assures institutional autonomy far more than it protects the speech of either teacher or student. It may be that in a clash between government; that is, legislature, police, or judiciary, and the institution or the individual professor, the educators will be protected. If, however, the clash is between faculty member and institution, or student and institution on an academic matter, the institution will almost always prevail.[20]

In the academic context, institutional and societal interests enjoy far greater first amendment protection than do faculty members' individual interests. Judicial deference to the expertise of academic decisionmakers, particularly at the university level, is widespread. In addition, the importance of expressive activity to the evaluation of the professor's performance in the academic workplace militates against any notion that faculty members' expressive activity in the classroom can be or should be immunized from institutional scrutiny.

There is a plethora of case law involving teachers at the precollege levels, although many of these cases do not involve classroom speech.[21] There is a paucity of cases in which first amendment rights of university professors are at issue and a positive dearth of cases involving academic freedom in the university classroom. What little precedent exists does not support any generalized right of faculty members to exercise complete freedom in presenting assigned subject matter, let alone freedom to use the classroom as a forum to discuss other interesting but unassigned topics.[22] The protections that do exist are more a function of state contract law, collective bargaining agreements, common law rules, and the watchdog function of the American Association of University Professors (AAUP) than of constitutional rights.[23] The professor seeking first amendment protection for expressive activitiy in the classroom will find that the academic institution occupies a position of constitutionally superior strength.

Before attention is focused on current Supreme Court doctrine on expressive activity in academia, a number of nonsubstantive doctrines and concepts which nevertheless determine the reach and reality of substantive rights are explored in this Article. The state action require-

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[20] *See* notes 295-353 and accompanying text *infra.*

[21] For a discussion of these cases, see Miller, *Teacher's Freedom of Expression within the Classroom: A Search for Standards*, 8 GA. L. REV. 837 (1974); Note, *The Aftermath of* Pickering, note 14 *supra.*

[22] Miller, note 21 *supra*, at 860-84; *see also Project — Education and the Law: States' Interests and Individual Rights*, 74 MICH. L. REV. 1373 (1976).

[23] For a discussion of nonconstitutional as well as constitutional means of protecting academic interests, see Finkin, note 3 *supra.*

ment is examined first to underscore its importance to the viability of first amendment claims.[24] Next, the interplay between substantive rights and restrictive notions of the interests that trigger rights to administrative due process is explicated.[25] An examination of evidentiary and other procedural barriers to the success of first amendment claims follows.[26] Finally, the rhetoric of Supreme Court pronouncements on the first amendment protections afforded teachers in an academic context is contrasted with the reality of its holdings.[27] The meaning of these holdings for classroom expressive activity is explored.[28] The conclusion reached is that it is impossible to articulate any but the most minimal protection for professional autonomy without harming institutional concerns and engaging the judiciary in a task beyond its constitutional competence, and that expressive values in the classroom find their greatest protection in extraconstitutional mechanisms and concerns.

I. STATE ACTION

A judicially created limit on the reach of the federal constitution immunizes virtually all the country's private colleges and universities from the first amendment's strictures against interference with expressive activity. The reach of the fourteenth amendment's guarantees of equal protection and due process has been limited to protect against the acts of government, not against the acts of private entities. In the 1883 *Civil Rights Cases*, the Supreme Court truncated the reach of the fourteenth amendment by insisting that "[i]ndividual invasion of individual rights is not the subject-matter of the amendment,"[29] and the Court has not deviated from the view then propounded that "state" action is required to invoke fourteenth amendment guarantees. "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[30] Even if the protection for expressive activity in the class-

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[24] *See* notes 29-80 and accompanying text *infra*.

[25] *See* notes 81-127 and accompanying text *infra*.

[26] *See* notes 128-97 and accompanying text *infra*.

[27] *See* notes 198-246 and accompanying text *infra*.

[28] *See* notes 247-357 and accompanying text *infra*.

[29] 109 U.S. 3, 11 (1883).

[30] Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (footnote omitted). It has been argued that this traditional "unitary" view of state action doctrine, in which both the value of the challenged practice and the nature of the complainant's asserted rights are irrelevant, should give way to a balancing of rights approach. *See* Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221. For an attack on the use of a balancing test, see Choper, *Thoughts*

room is sought in the "liberty" protected by the fourteenth amendment,[31] rather than in the first amendment's guarantees of free speech, the need for state action will stand as a barrier to the invocation of federal constitutional guarantees. Furthermore, the first amendment on its face constrains the conduct only of the federal government,[32] and by its "incorporation" into the due process clause of the fourteenth amendment constrains the conduct only of governmental entities.[33] Therefore, state action must be present whenever vindication of first amendment rights is sought. It is possible, however, to demonstrate that the government is so involved with the private conduct leading to the constitutional claim that "state" action is present. The actions of the administration and governing bodies of "private" schools and colleges have been a frequent source of litigation involving first and fourteenth amendment claims, in which the presence or absence of state action presented the threshold issue.[34]

Because state action doctrine and its subset of the activities of private schools and colleges have been treated exhaustively and definitively elsewhere,[35] the discussion here is abbreviated. The brevity of the discussion, however, does not reflect its importance.

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on State Action: The "Government Function" and "Power Theory" Approaches, 1979 WASH. U.L.Q. 757, 764; Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 44-52.

[31] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923), in which the Court created substantive rights involving educational activities from the fourteenth amendment's due process clause that today would be treated as first amendment expressive concerns. This case's implications for academic freedom are discussed extensively in the text accompanying notes 207-15 *infra*. *See also* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (private schools successfully challenged state law that all grammar schools be public).

[32] "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ." U.S. CONST. amend. I.

[33] "No state shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The first amendment has been made applicable to the states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652 (1925).

[34] For a discussion of state action doctrine in general, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-14 to -15, at 261-75, §§ 18-1 to -7, at 1147-74 (1978); *see also The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 139-51 (1975); Quinn, *State Action: A Pathology and a Proposed Cure*, 64 CALIF. L. REV. 146 (1976); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

[35] *See, e.g.*, O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1969); Schubert, *State Action and the Private University*, 24 RUTGERS L. REV. 323 (1970); *Developments in the Law — Academic Freedom*, note 17 *supra*, at 1056-65.

There is no self-executing protection in the federal constitution against private interference with freedom of expression. Therefore, in the absence of congressional legislation,[36] the state action requirement acts as an absolute barrier to the adjudication of first amendment claims.

Because the Court has stated that "*private* conduct abridging individual rights . . . [violates the fourteenth amendment when] to some significant extent the State *in any of its manifestions* has been found to have become involved in it"[37] and that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state actions,"[38] the activities of many private colleges and universities are arguably state action. Indeed, it should be noted that truly "private" colleges and universities free of all governmental entanglement no longer exist, if indeed they ever did.[39] Government regulation and funding, as well as grants of tax-exempt status, are so ubiquitous in the world of higher education as to blur the distinction between private and public institutions. Because a sharp distinction between public and private universities "imperfectly reflects the realities of higher education,"[40] the presence of state action in the activities of private universities would seem to be a foregone conclusion. The

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[36] It is not clear that Congress could legislate to enforce the first amendment against private conduct. *See* Cruikshank v. United States, 92 U.S. 542 (1875). The extent to which rights stemming from sources other than the thirteenth, fourteenth, and fifteenth amendments can be protected against private action by federal legislation is unknown. In *Cruikshank*, the Court in dictum said that there may be a right to assemble for the purpose of petitioning Congress for a redress of grievances, although the case emphasized that the reach of the fourteenth amendment did not include private action. The extent to which Congress can legislate to enforce the fourteenth amendment rights against "private" violation is also unclear. *See, e.g.*, United States v. Guest, 383 U.S. 745 (1966), in which six Justices indicated that "the specific language . . . [of the fourteenth amendment] empowers the Congress to enact laws punishing all conspiracies . . . [which] interfere with Fourteenth Amendment rights." *Id.* at 762 (Clark, J., concurring, joined by Black, J., and Fortas, J.); *accord id.* at 782 (Brennan, J., concurring, joined by Warren, C.J., and Douglas, J.). Emerson has pointed out that Congress, legislating pursuant to its commerce power, has extended freedom of expression to members of "private centers of power" in the "Bill of Rights" of the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 101, 73 Stat. 522 (codified at 29 U.S.C. §§ 411-413 (1976)). T. EMERSON, note 3 *supra*, at 683.

[37] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (emphasis added).

[38] Evans v. Newton, 382 U.S. 296, 299 (1966).

[39] O'Neil, note 35 *supra*, at 156-57.

[40] *Id.* at 156.

Supreme Court's current state action jurisprudence, however, forecloses such a result.

A. State Action and the Warren Court

The Court has developed a number of theories to determine whether ostensibly private action falls within the reach of constitutional guarantees. These theories, as originally expounded, in most cases by the Warren Court, apply with particular cogency to university activities.

One of the cases most attractive to employees and students of private schools seeking vindication of "constitutional" wrongs is *Burton v. Wilmington Parking Authority.*[41] There the Court held that the actions of a private entity may be attributed to the state if the state is involved to "some significant extent" in the private conduct.[42] In *Burton,* the state had so far insinuated itself into a position of interdependence with the private entity that the state had to be recognized as "a joint participant" in the challenged activity.[43] The *Burton* Court also refused "to fashion and apply a precise formula for recognition of state responsibility" under the fourteenth amendment.[44] Instead, the Court stated that only by "sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[45]

The idea of a symbiotic relationship between the state and the private conduct seemed to speak directly to the relationship between states and private institutions of higher learning, which are chartered, regulated, and in some cases heavily funded by the state. Furthermore, the standard of analysis announced in *Burton* was so vague and ill-defined that almost any involvement between a private entity and the government could be challenged as state action.

Several other state action doctrines seem particularly applicable to private schools. For example, it can be argued that a large private institution is analogous to the company town in *Marsh v. Alabama,*[46] which found itself forbidden to "curtail the liberty of press and religion" of

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[41] 365 U.S. 715 (1961).

[42] *Id.* at 722.

[43] *Id.* at 725.

[44] *Id.* at 722.

[45] *Id.*

[46] 326 U.S 501 (1946). For arguments that the right to *receive* information should be recognized in migrant labor camps and shopping malls, see Note, *Listener's Rights Providing A State Action Theory in the 'Company Town' Analogues,* 55 IND. L.J. 91 (1979).

Jehovah's Witnesses who had distributed religious literature on its streets.[47] It can also be argued that the private college or university performs a "public function" by providing education,[48] or that the private school's charter received from the state transforms it into a state instrumentality, subject to constitutional restrictions.[49] Also, the Court has indicated that governmental regulation of a private enterprise subjects the enterprise to constitutional guarantees.[50] Finally, it can even be argued that government inaction or tolerance of at least some private conduct constitutes state action; that is, the government has an affirmative obligation to prevent discriminatory or other constitutionally offensive conduct.[51]

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[47] 326 U.S. at 508. *See generally* Schubert, note 35 *supra*.

[48] *See* Evans v. Newton, 382 U.S. 296 (1966) (when private entities carry on a function governmental in nature, they become agencies of the state subject to the fourteenth amendment); Terry v. Adams, 345 U.S. 461 (1953) (use of a county-operated primary to ratify the result of a private democratic organization's primary which excluded black citizens violated fifteenth amendment).

[49] *See* Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952) (union could not use powers granted to it under the Railway Labor Act to discriminate against black trainmen); Steele v. Louisville and Nashville R.R., 323 U.S. 192 (1944) (constitutional questions arise if Railway Labor Act confers power on union to discriminate against black trainmen, since a bargaining representative is clothed with power not unlike that of a legislature); Smith v. Alwright, 321 U.S. 649 (1944) (Democratic primary limited to white participants violates fifteenth amendment since political party acted as agency of the state); *see also* Schubert, note 35 *supra*, at 334-38 (discussing the theory that the university is an instrumentality exercising powers delegated to it by the state through its corporate charter); Berle, *Constitutional Limitations of Corporate Activity — Protection of Personal Rights from Invasion through Economic Power*, 100 U. PA. L. REV. 933 (1952) (arguing for extension of the *Steele* doctrine to state-chartered corporations).

[50] *See* Public Utilities Comm'n v. Pollack, 343 U.S. 451 (1952) (government regulated private bus company subject to constitutional restraints, but practice of broadcasting radio program in its buses and street cars not a violation of rider's first amendment rights).

[51] "The *Civil Rights Cases* suggested that government tolerance of private action could be 'state action' if the private action infringed common law liberty, and hence was not itself within the sphere of individual liberty." L. TRIBE, note 34 *supra*, § 18-2, at 1154. "[T]he chief present significance of the *Civil Rights Cases* lies in [their] analytical framework . . . with its suggestion that state toleration of at least some private action might be state action . . . ." *Id.* at 1153 n.16. The view that the state is always involved in private action, if by no other reason than its failure to regulate or condemn the action, has been challenged by Professor Winter:

> The position that almost all private activity should be subject to judicial scrutiny has always seemed rather bizarre to me. It not only would have the gravest possible consequences for individual autonomy, but also would divest the state and federal legislatures of much of their traditional role. It

B. State Action and the Burger Court

Unfortunately for the professor employed by a private institution whose expressive activity has run afoul of administrative "tolerance," these arguments will be of little avail. One consistent thread runs through the Burger Court's state action decisions: a determination to limit severely the scope of those concepts, developed mainly by the Warren Court, which increased the reach of equal protection and due process guarantees.[52] The Court has not directly overruled any of the more expansive state action decisions, but it has imposed increasingly restrictive requirements on existing doctrine. For example, the "public function" performed by the private entity must now be an "exclusive" governmental function before state action is present.[53] In addition, there must be a direct nexus between the allegedly unconstitutional act and the state's involvement.[54] The government must thus be directly involved not only with the institution but also with the particular action giving rise to the constitutional claim. Extensive government regulation and funding are not, in and of themselves, sufficient indicia of state

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would be a radical change in our form of government.

Winter, *Changing Concepts of Equality: From Equality Before the Law to the Welfare State*, 1979 WASH. U.L.Q. 741, 742.

[52] The Court's state action jurisprudence prior to the Burger Court has been described as a "conceptual disaster area." Black, *The Supreme Court 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967). Recent developments have not necessarily led to a more complimentary assessment. It has been said, for example, that "state action theory is not so much a way of thinking about contemporary problems of civil rights and liberties as it is a substitute for thought." Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the* Civil Rights Cases *and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297 (1977).

[53] Flagg Bros. v. Brooks, 436 U.S. 149, 158 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974).

[54] *Jackson*, 419 U.S. at 351. *See generally* McCoy, *Current State Action Theories, the* Jackson *Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions*, 31 VAND. L. REV. 785 (1978). McCoy contends that "the *Jackson* nexus language is a specific application in a state-action-by-regulation case of a broader principle that is equally applicable to all types of state action cases." *Id.* at 818. This is not said with disapproval, since McCoy also states that the findings of no state action in most employee discharge cases are theoretically sound, in spite of the conspicuous failure by the courts to articulate a satisfactory rationale in their opinions. *Id.* McCoy further argues that the nexus requirement in *Jackson* has been misread to mean that there is "a nexus between the state and the challenged activity in each case. Rather . . . the required nexus must exist between the plaintiff's state action theory and the challenged activity. It is this basic theoretical requirement that proves fatal to almost all state action claims . . . challenging the conduct of private institutions." *Id.*

action.[55] Private conduct is not necessarily attributable to the state even though the state has authorized and encouraged it by enacting permissive legislation. A majority of the Burger Court has stated that a state's mere acquiesence in a private action does not transmute that action into that of the state.[56]

Two of the Burger Court's most recent state action decisions reaffirm the majority's determination to circumscribe its scope by the use of an analysis that has particular relevance for private colleges and universities. In *Blum v. Yaretsky*,[57] a class of Medicaid patients challenged as violative of procedural due process a private nursing home's decisions to discharge or transfer patients to lower levels of care without an opportunity for a hearing. A majority of the Supreme Court rejected the argument that because the state extensively regulated and subsidized nursing homes, decisions by the nursing homes constituted state action. Instead,

> The complaining party must also show that 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself.' The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said the State is *responsible* for the specific conduct of which the plaintiff complains.[58]

The opinion also reaffirmed that the state's mere "acquiescense in the initiative of the private party" does not justify imposing responsibility for that initiative upon the state, and that "[t]he required nexus may be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.' "[59] The plaintiffs argued, in vain, that the substantial state subsidization and licensing of the facilities made the state a joint participant in the nursing home's discharge and transfer of Medicaid patients. The majority opined that "privately owned enterprises providing services that the States would not necessarily provide, even though they are extensively regulated, do not fall

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[55] *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (licensing and pervasive regulation of private club that did not encourage discrimination did not constitute state action); *cf.* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (broadcaster's policy of refusing to sell time to groups like the Democratic National Committee for purposes of editorial advertising did not offend the first amendment because the FCC did not foster the challenged licensee policy).

[56] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974).

[57] 102 S. Ct. 2777 (1982).

[58] *Id.* at 2786 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974)) (emphasis in original).

[59] *Id.* (quoting *Jackson*, 419 U.S. at 353).

within the ambit of *Burton.*"[60]

In *Rendell-Baker v. Kohn*,[61] the Court held that the actions of officials at a private school, the income of which was derived primarily from public sources and which was regulated by public authorities, were not subject to federal constitutional guarantees. Chief Justice Burger stated that "[t]he core issue . . . in this case is not whether petitioners were discharged because of their speech or without procedural protections, but whether the school's action in discharging them can fairly be seen as state action."[62] In this case, as in *Blum*, there was a very close nexus between the state and the private entity. The school received almost all its funds from the state and was heavily regulated.[63] The state had also delegated to the school its statutory duty to educate children with special needs. This factor was not present in *Blum*, as nothing in the state statutes or constitution mandated the provision of medical care. It was not sufficient, however, to convince the *Rendell-Baker* majority that the school was performing a "public function." The Court emphasized that while education of maladjusted high schools students is a public function, it is not an *exclusive* prerogative of the state.[64] Nor was there a "symbiotic relationship between the school and the state similar to that found in *Burton.* Here, the school's fiscal relationship with the state was not different from that of many contractors performing services for the government."[65]

It is difficult to conceive of a realistic situation in which the actions of officials at private colleges and universities would constitute state action under current doctrine.[66] Unless state officials actively mandate a decision not to rehire or to dismiss a professor at a private institution,[67]

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[60] *Id.* at 2789 (citing *Jackson*, 419 U.S. at 357-58).

[61] 102 S. Ct. 2765 (1982).

[62] *Id.* at 2770 (footnote omitted).

[63] *Id.* at 2766.

[64] *Id.* at 2772.

[65] *Id.* at 2771.

[66] Although state action has been found in two cases involving universities, these cases are inapposite to other state action cases. The State of Pennsylvania has an unusual relationship with Temple University and the University of Pittsburgh. In Braden v. University of Pittsburgh, 522 F.2d 948 (3d Cir. 1977), and Isaacs v. Board of Trustees, 385 F. Supp. 473 (E.D. Pa. 1974), the state virtually had to take over the governance of two private schools which were in dire financial straits. In *Braden*, the court noted that "[b]ecause Pennsylvania's system of state-related universities . . . seems to be relatively distinctive, it is not surprising that other legal precedents pertinent to the case at hand are lacking." 552 F.2d at 963.

[67] This is not beyond the realm of possibility. For an example of state legislators' seeking to enjoin the continued employment at a state university of a professor they

the most egregious violations of first amendment rights will be immune from scrutiny under the federal constitution. It has been argued however, that the egregiousness of official acts and the importance of the constitutional rights involved "should trigger a less exacting standard of state action."[68] More than one lower federal court has taken the view that "there comes a point where [a private university's valid claims to retaining its private status] are outweighed by the harm wrought on the public interest by 'private' misdeeds — that is, by the offensiveness of the conduct."[69] The Supreme Court, however, has never overtly retreated from the position that its state action analysis does not vary with the particular constitutional guarantee involved, or with the gravity of the private actors' alleged misdeeds.[70]

The Court never reaches the merits of a first or fourteenth amendment claim if it finds no state action.[71] Nevertheless, the Court is open to the charge that it manipulates its state action analysis to accord with its view of the merits of the federal constitutional claim.[72] Even if there is no manipulation, the Court nevertheless determines the substantive reach of specific constitutional commands because its finding of no state

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deemed to be undesirable for ideological reasons, see Cooper v. Ross, 472 F. Supp. 802 (E.D. Ark. 1979), *discussed in* notes 307-27 and accompanying text *infra*.

[68] Weise v. Syracuse Univ., 522 F.2d 397, 405 (2d Cir. 1975); *see also* Pendrell v. Chatham College, 370 F. Supp. 494 (W.D. Pa. 1974).

[69] *Weise*, 522 F.2d at 407. In cases involving private colleges, courts are also concerned with the ramifications of finding state action. In Berrios v. Inter-American Univ., 535 F.2d 1330 (1st Cir. 1976), the court stated "we approach with caution any labelling that might incidentially contribute to the erosion of the autonomy and diversity of private colleges and universities." *Id.* at 1333 (citations omitted).

[70] *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 373-74 (1974) (Marshall, J., dissenting) ("The Court has not adopted the notion, accepted elsewhere, that different standards should apply to state action analysis when different constitutional claims are presented.").

[71] It has been noted, however, that almost without exception the Court finds a constitutional violation if it also finds state action. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 475 (1978) (citing Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952), as the only major case in which "state action was found and the challenged practice was upheld").

[72] The Supreme Court's decisions on state action reflect how the judicial balancing of rights functions to sort out those private activities whose collision with other rights makes them constitutionally infirm. While the balancing has nothing to do with finding a minimum quantum of state activity, the process of sorting out proscribed activities has occurred under the guise of a formulistic search for an undefined minimum amount of state acts.

Id.

action effectively extinguishes the federal constitutional claim.[73] That the merits have not been adjudicated, therefore, provides little consolation to private university professors who have been penalized for expressive activity.

After *Blum* and *Rendell-Baker*, there is little reason to believe that the Court would find state action in the context of private colleges and universities. If there is to be meaningful protection of expressive conduct at private institutions, it must come from other sources, such as state constitutional provisions reaching private conduct.[74]

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[73] L. TRIBE, note 34 *supra*, § 18-7, at 1173-74; *see also* note 71 *supra*. The requirement of state action has a jurisdictional component as well. The aggrieved professor seeking relief in the federal courts under civil rights legislation must demonstrate that the defendant institution was acting under of "color of law," a requirement that has been treated as the equivalent of "state action." United States v. Price, 383 U.S. 787, 794 n.7 (1966). 42 U.S.C. § 1983 (1976 & Supp. IV 1980) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

In Lugar v. Edmondson Oil Co., 102 S. Ct. 2744 (1982), the Court stated: "If the challenged conduct . . . constitutes state action as delimited by our prior decisions, that conduct was also action under color of state law and will support a suit under § 1983." *Id.* at 2753 (footnote omitted). In one of its most significant recent cases, Polk County v. Dodson, 454 U.S. 312 (1981), the Court held that a public defender did not act "under color of state law" within the meaning of § 1983 when representing an indigent defendant in a state criminal proceeding. *Id.* at 325. Although the public defender was employed by the state to represent the respondent, the Court concluded that the assignment entailed functions and obligations in no way dependent on state authority. The decisions made by the public defender in the course of representing the client were framed in accordance with professional canons of ethics, rather than dictated by any rule of conduct imposed by the state. *Id.* at 321. *But see* Branti v. Finkel, 445 U.S. 507, 513-20 (1980) (first and fourteenth amendments protect an assistant public defender from discharge solely because of his political beliefs).

[74] *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (state court's holding that state constitution protected speech and petitioning, reasonably exercised, in privately owned shopping centers, did not infringe owner's federal constitutional rights; a state may interpret its own constitution more expansively than the Supreme Court interprets the federal constitution). For a discussion of the protection of free expression under state constitutions, see *Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1398-1429 (1982); *see also* Note, *Abridgement of Speech and the State Constitution*, 90 YALE L.J. 165 (1980) (arguing that free speech guarantees in *state* constitutions are the appropriate source of protection for canvassing rights in privately held residential communities and public fora).

The Court had a recent opportunity to decide whether state constitutional guarantees of speech and assembly can be imposed upon a private university in *Princeton University v. Schmid.*[75] In that case a nonstudent, Schmid, had been convicted of criminal trespass for distributing political literature on the Princeton campus without obtaining the permission of university officials. Schmid claimed a right of access under the federal and state constitutions. The New Jersey Supreme Court reversed Schmid's conviction on the ground that his *state* constitutional rights of speech and assembly had been infringed.[76] Princeton University, permitted to intervene by the state courts, sought review in the United States Supreme Court to redress what it insisted was the New Jersey Supreme Court's infringement of *its* speech and property rights.[77] The United States Supreme Court did not resolve this conflict between competing free speech interests, but dismissed the appeal for lack of Article III jurisdiction because in its view the case was moot, since the regulation at issue was no longer in force[78] and because Princeton University lacked federal standing.[79]

Currently, the extent to which state constitutional protection for expressive activities can be used by faculty members at private colleges and universities is unknown. Even recognition of a state constitutional "right of access" that does not conflict with the institution's federal rights hardly addresses the issue of the protection to be afforded classroom speech. In fact, classroom speech enjoys so little first amendment protection at state institutions that extending the reach of the federal

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[75] 455 U.S. 100 (1982).

[76] State v. Schmid, 84 N.J. 535, 569, 423 A.2d 615, 640 (1980), *appeal dismissed per stipulation sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982).

[77] Princeton Univ. v. Schmid, 455 U.S. at 101.

[78] *Id.* at 103. The Court's Article III mootness doctrine has a "flexible character." United States Parole Comm'n v. Geraghty, 445 U.S. 388, 400 (1980) (plaintiff in a class action challenging validity of parole guidelines could continue his appeal of a lower court's ruling denying certification, even though he had been released from prison while the appeal was pending); *see also* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) (class action claiming usurious finance charges on bank credit cards not mooted by defendant's offer to individual plaintiffs of maximum amount recoverable or by lower court's entry of judgment in favor of plaintiff); Roe v. Wade, 410 U.S 113 (1973) (fact that plaintiff in suit challenging abortion law no longer pregnant not a barrier to Supreme Court's adjudication since pregnancy "capable of repetition yet evading review"); *cf.* DeFunis v. Odegard, 416 U.S. 312 (1974) (per curiam) (mootness bars plaintiff's challenge to admissions policy as racially discriminatory when plaintiff attended school while litigation pending).

[79] *Cf.* Doremus v. Board of Educ., 342 U.S. 429 (1952) (appeal of state court decisions upholding validity of Bible reading in public schools dismissed because local taxpayers lacked federal standing).

constitution into private institutions would matter little.[80]

II. PROCEDURAL DUE PROCESS

A. Establishing a Procedural Due Process Claim

Although the professor who has lost a teaching job in retaliation for expressive activities has a first amendment claim regardless of whether she or he also has a right to procedural due process, the vindication of first amendment rights may depend upon the availability of procedural due process. In order to raise the issue of how much process is due, the plaintiff must demonstrate that the case involves an interest the interference with or termination of which must be accompanied by procedural safeguards. At one time, the gravity of the loss involved determined the need for procedural safeguards, particularly pretermination hearings, under the fourteenth amendment of the federal Constitution.[81] The more grievous the loss, the greater the likelihood of the Court's mandating that the government observe procedural regularity when depriving the plaintiff of a protected interest.[82]

More recently, however, the Court has made it plain that it is the "nature" of the interest involved, rather than its importance to the claimant, which determines whether the judiciary will reach the issue of what process is due.[83] The plaintiff must possess a "liberty" or "property" interest to be entitled to the fourteenth amendment's protection against governmental deprivation of life, liberty, or property without due process of law.[84] Although for many academics their work is their "life," the Court has not equated it with the term "life," the deprivation of which may be accomplished only with due process.[85] And

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[80] *See* notes 265-77 and accompanying text *infra.*

[81] *See, e.g.*, Bell v. Burson, 402 U.S. 535, 539-43 (1971) (driver's license suspension statute must comport with procedural due process since driver's license may be essential).

[82] *See generally* Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977).

[83] Board of Regents v. Roth, 408 U.S. 564, 571 (1972). Monaghan, note 82 *supra*, at 409, has observed that:

> Prior to *Roth*, Supreme Court definitions of 'liberty' and 'property' had amounted to taking the words 'life, liberty or property' as a unitary concept embracing all interests valued by sensible men. After *Roth*, however, each word of the clause must be examined separately; so examined, we find they do not embrace the full range of state conduct having serious impact upon individual interests.

[84] *Roth*, 408 U.S. at 569.

[85] Sloviter, *Faculty in Federal Court: Decreasing Receptivity?*, 68 ACADEME, Sept.-

the Supreme Court has made clear that an academic job is not, in and of itself, a liberty interest within the meaning of the fourteenth amendment.[86] Thus, the academician protesting loss of employment must be able to demonstrate a property interest in continued employment to invoke even minimum due process guarantees.[87] A survey of the Court's procedural due process jurisprudence of the 1970s demonstrates that its increasingly restrictive definition of property has made that threshold task of the plaintiff more difficult and has increased the ease with which school administrators can circumvent substantive rights.

The Court has not carved out a special procedural due process jurisprudence for faculty members deprived of their jobs. Despite its rhetoric about the glories of academic freedom, the priesthood of teachers, and the value of robust and wide-open debate in the classroom,[88] the Court has relegated the procedural rights of nonretained academicians to those of the "common herd" of city, state, and federal employees. Their procedural rights upon nonretention stand or fall with those of public employees in particular, and all who are aggrieved by government action in general.[89] Certainly the Supreme Court has not recognized any greater or more readily triggered due process rights in faculty members than in government employees in general, even though the safeguarding of first amendment expressive freedoms argues for prophylactic measures.

Pretermination hearings for nontenured faculty members are necessary due to the ease with which controversial speech and dissent can be penalized in a system under which no explanation for nonrenewal decision need be articulated. Unlike most occupations, a professor's work consists in her or his thought or speech, and a speech-related dismissal may well end a professor's career.[90]

Oct. 1982, at 19, 22.

[86] *Roth*, 408 U.S. at 569-71.

[87] Perry v. Sindermann, 408 U.S. 593 (1972); *Roth*, 408 U.S at 569-79.

[88] *See* notes 205-46 and accompanying text *infra*.

[89] For a discussion of the procedural rights of governmental employees, see Note, *The Due Process Rights of Public Employees*, 50 N.Y.U. L. REV. 310 (1975).

[90] More than in most other occupations, the dismissal of a Professor jeopardizes or destroys his eligibility for another position in his occupation. The occupational work of the vast majority of people is largely independent of their thought and speech. The professor's work consists of his thought and speech. If he loses his position for what he writes or says, he will, as a rule, have to leave his profession, and may no longer be able effectively to question and challenge accepted doctrines or effectively to defend challenged doctrines. And if some professors lose their positions for what they say and write, the effect on many other professors will be such that their usefulness to their students and to society will be greatly reduced.

Although the Court has expressed the need for vigilance against infringements on first amendment liberties, it has not recognized the instrumental value of procedural regularity, particularly pretermination hearings, as essential to the protection of substantive rights. If a faculty member lacks the information necessary to establish a federal substantive claim, fair procedure may provide the only means of vindicating her or his expressive interests.[91] The Court's "prior hearing" decisions, however, do not accord meaningful protection to expressive values. In fact, its due process decisions have actually undercut substantive rights.

B. The Supreme Court's "Prior Hearing" Decisions

Although the Court's more generalized rules on the interests protected by procedural due process apply to academicians, two prior hearing cases, *Perry v. Sindermann*[92] and its companion, *Board of Regents v. Roth*,[93] are of special interest to nontenured faculty members. In both cases the claimants were professors of political science at public institutions of higher learning whose one-year employment contracts had not been renewed. Both professors alleged retaliatory nonrenewal based on their exercise of expressive rights protected by the first amendment. Both claimed that the state institutions' failure to provide a pretermination hearing violated the procedural due process rights protected by the fourteenth amendment. In *Sindermann*, the plaintiff prevailed to the extent that the Court recognized that on remand he might be able to establish the possibility of a property interest in his continued employment.[94] In *Roth*, however, the Court foreclosed any possibility of a due process claim, despite a factual situation which demonstrated the dependence of first amendment values on procedural protection and which embodied the most cogent reasons for procedural due process.

In *Roth*, the plaintiff was notified five months before the end of the academic year that his employment would not be renewed. This nonrenewal came at a time of political controversy and highly disruptive

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Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 AM. A.U. PROFESSORS BULL. 735, 753-66 (1955).

[91] Van Alstyne, note 3 *supra*, at 861. Van Alstyne does not, however, view the role of fair procedure in protecting first amendment rights as the sole or more important value of procedural due process. *See* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 475-76 (1977).

[92] 408 U.S. 593 (1972).

[93] 408 U.S. 564 (1972).

[94] *Sindermann*, 408 U.S. at 599-603.

campus events. Several tenured and nontenured professors, whose continuing presence was regarded as an immediate danger, had been suspended without pay and excluded from the campus. Roth sued the university in federal court, alleging deprivation of his right to pretermination due process and violation of expressive rights protected by the first amendment against retaliatory nonrenewal of his contract.[95]

Recognizing the ease with which the protection of a substantive right could be attenuated without procedural safeguards, the federal district court ruled in Roth's favor, noting that "the prophylactic value of pretermination procedures under the circumstances was reasonably essential . . . to protect . . . his substantive constitutional rights."[96] The court also noted that only four of 442 nontenured teachers at the university received notice that contracts would not be offered.[97] In other words, customary practice indicated an expectation of continued employment, although renewal was not "legally" required. The fact that nonrenewal was extraordinary rather than usual indicated a retaliatory purpose.

Despite reasons militating in favor of at least a statement of the reasons for nonretention and an opportunity to respond, the Supreme Court found no basis for Roth's due process claim and ended any hope of a constitutionally compelled right to pretermination procedural due process for nontenured teachers.[98] The majority opined that Roth had no entitlement to his job because state law left "the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials."[99] Since there was no express agreement or implied promise that he would be rehired, Roth had no property interest in his continued employment at the university.[100] Nor did Roth have any personal interest entitled to due process protection.

The university's unexplained decision not to renew his contract did not implicate any liberty interest, and the Court did not see any constitutional damage to his reputation because the nonrenewal was not based on charges such as dishonesty or immorality.[101] Nor had the state imposed a disability on Roth because it had not foreclosed his freedom

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[95] 408 U.S. at 568-69.

[96] Roth v. Board of Regents, 310 F. Supp. 972, 9 (W.D. Wis. 1970).

[97] *Id.* at 974.

[98] 408 U.S. at 578. For a discusion of the need for pretermination due process, written prior to the Supreme Court's decision in *Roth*, see Van Alstyne, note 3 *supra*, at 858-74.

[99] 408 U.S. 564, 567 (1972).

[100] *Id.* at 578.

[101] *Id.* at 573.

to take advantage of other employment opportunities.[102]

Although the *Roth* Court indicated that it would protect as an independent interest a "person's good name, reputation, honor or integrity,"[103] the Court explicitly rejected the notion that nonretention, without more, constitutes an injury to reputation and that a lessened chance of reemployment is an interest entitled to procedural protection.[104] Loss of a job without more specific allegation of harm, such as the state's foreclosing a person from other employment in the state system, does not trigger due process guarantees.

Most important from the standpoint of protecting expressive activity, the Court held that the mere possibility of a first amendment violation did not necessitate a prophylactic hearing, although the Court did indicate that it would respond to a specific showing of nonrenewal based on constitutionally impermissible reasons. The Court noted that Roth's status as a nontenured teacher was irrelevant in this regard.[105] Roth's first amendment claim alone did not entitle him to a prior hearing because he had proved no specific infringement of a first amendment right and his interest in holding a teaching job at a state university was "not itself a free speech interest."[106] The majority refused to extend the requirement of a fair adversary hearing before the state can "readily impinge upon interests in free speech or free press,"[107] to the situation in which a teacher alleges violation of free speech rights.[108]

In *Perry v. Sindermann*, however, the Supreme Court held that a faculty member's claim that he had been denied procedural due process by a junior college's failure to grant him a pretermination hearing presented an issue of fact, and remanded the case for hearing. *Sindermann* differed from *Roth* because, although state law did not authorize the junior college to grant its professors tenure, there was evidence indicating that "there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure,"[109] and Sindermann might have been able to show the existence

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[102] "[I]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Id.* at 575 (citation omitted).

[103] *Id.* at 575 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1970)).

[104] *Id.* at 574.

[105] *Id.* at 573-75.

[106] *Id.* at 575 n.14.

[107] *Id.*

[108] "Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, *simpliciter*, is not itself a free speech interest." *Id.*

[109] *Sindermann*, 408 U.S. at 602.

of such an unwritten law.[110]

These two cases clearly establish that nontenured faculty members have no pretermination rights to notice and a hearing. Any joy occasioned by *Sindermann's* suggestion that unwritten common law in practice might create tenure not thought to exist by the more usual indicia was short-lived. In *Bishop* v. *Wood*,[111] a three and a half year veteran of the police force classified as a permanent employee by a city ordinance, and subject to dismissal on certain grounds, was fired for failure to discharge his duties properly. Wood had no opportunity to contest the cause for his discharge. The federal district court found that the policeman "held his position at the will and pleasure of the city."[112] A divided Supreme Court concluded that this interpretation was plausible under state law and that the plaintiff had no federally protected interests. In his dissent, Justice Brennan criticized the majority for failing to analyze "the common practices utilized and the expectations generated by [the city], and the manner in which the local ordinance would reasonably be read" by members of the police force.[113] Clearly the majority had retreated from its finding in *Sindermann* that a professor arguably had a property interest in his job based on "an unwritten common law."[114]

The *Bishop* Court also found that, although the policeman's discharge was mistaken and based on incorrect information, no protected liberty interest was violated since there was no public disclosure of the reasons for the discharge.[115] The practical consequences of nonretention, such as difficulty in obtaining another job in his profession, were ignored.

In *Paul v. Davis*,[116] the Court gutted the idea of an independent interest in reputation which it had indicated it would protect in *Roth*. The Court found no protected liberty interest even though the local police had put Paul's name on a flyer, distributed to local merchants, describing him as a "known" active shoplifter despite his lack of a conviction for such a crime. In the face of allegations that this characterization would seriously impair his future employment opportunities, and despite the self-evident harm of such a characterization, the Court re-

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[110] *Id.* at 600.

[111] 426 U.S. 341 (1976).

[112] *Id.* at 345 (quoting the district court).

[113] *Id.* at 354 (Brennan, J., dissenting) (footnote omitted).

[114] L. TRIBE, note 34 *supra*, § 10-10, at 524.

[115] 426 U.S. at 348.

[116] 424 U.S. 693 (1976).

fused to recognize a protected interest in reputation unless accompanied by the denial of a tangible benefit such as a specific job.[117]

These decisions have troubling implications for nontenured faculty members. Professor Tribe has noted that "[t]he practical impact of . . . *Bishop v. Wood* is that a public employee can count on procedural due process only if the law or contract defining the employee's job expressly provides that the employee can be discharged *only* for cause."[118] With absolutely no constitutional requirement of an articulated reason for a decision not to hire in the first instance, as well as for the nonretention decision, a faculty member who has engaged in controversial expressive activity may find it almost impossible to demonstrate that she or he lost other academic employment opportunities because of the exercise of protected rights.[119]

The message of the procedural due process cases of the 1970s is clear: administrators are well-advised to make certain that nontenured academic employees have no reason to expect continued employment, and that those who are not retained are not given any reason for their nonretention.

C. The Importance of a Prior Hearing and a Statement of Reasons

Arguably, nonretained faculty members need not concern themselves with procedural due process. Whatever the intrinsic value of prior hearings with their opportunities for human interaction,[120] the jobless

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[117] *Id.* at 701.

[118] L. TRIBE, note 34 *supra*, § 10-10, at 524 (emphasis in original); *see also* Leis v. Flynt, 439 U.S. 438, 443-44 (1979) (no violation of procedural due process in trial judge's denial, without a hearing, of out-of-state lawyer's motion for permission to represent defendant *pro hac vice*; even if lawyers had reasonable expectations that they would be permitted to represent their clients in the courts, they had not shown "the requisite *mutual* understanding." (emphasis in original)). For arguments that the *Roth-Perry* doctrine maintains the proper role of administrative discretion in the disbursement of government benefits by separating substance, which is seen as the state's province, from procedural requirements, which are to be finally determined by the federal courts, see Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146 (1983); *cf.* Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355, 358 (1978) (arguing that fourteenth amendment "liberty" and "property" must receive a minimum constitutional content and that "state law should be borrowed for purposes of defining constitutional liberty and property only if it is adequate to protect those rights").

[119] *See* notes 81-91 and accompanying text *infra*. *See generally* Van Alstyne, note 91 *supra*.

[120] L. TRIBE, note 34 *supra*, § 10-7, at 502-03; *see also* Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841 (1976); Tribe,

faculty member seeks not a fair process, but a fair result. Furthermore, a first amendment claim is an independent basis for a federal or state court case and there need be no expectation of continued employment. Theoretically, tenure or its absence is irrelevant in nonretention cases based on issues of free expression.[121]

Why, then, is a prior hearing or at least a statement of reasons for nonretention so important? Justice Douglas, dissenting in *Roth*, expressed one view: "Without a statement of the reasons for the discharge and an opportunity to rebut those reasons . . . there is no means short of a lawsuit to safeguard the right not to be discharged for the exercise of First Amendment guarantees."[122] The court of appeals in *Sindermann* articulated another reason for a pretermination hearing before resorting to federal court:

> School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination.[123]

The AAUP has concluded that faculty members, upon request, should be given written reasons for a decision against renewal of an appointment.[124] Their rationale is based not on the Constitution, but on policy considerations. A statement of reasons permits the rejected probationary professor to remedy identified shortcomings, to correct erroneous information on which the peer review committee based its decision, and perhaps to realize that institutional concerns other than the individual's competence led to the decision. An additional goal is to "avoid arbitrariness or lack of consideration in the decision-making body itself."[125]

A more imperative reason to observe minimum procedural due process exists when a probationary professor's contract is not renewed. Procedural due process may be the only means of obtaining the information necessary to prosecute a free expression claim. The nontenured

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Structural Due Process, 10 HARV. C.R.-C.L. L. REV. 269 (1975). For a criticism of the "protection of dignitary interest" approach to procedural due process, see Simon, note 118 *supra*, at 187-90.

[121] Board of Regents v. Roth, 408 U.S. 564, 569 n.6 (1972).

[122] *Id.* at 585 (Douglas, J., dissenting).

[123] Sindermann v. Perry, 430 F.2d 939, 944-45 (5th Cir. 1970).

[124] *See* Gray v. Board of Higher Educ., 692 F.2d 901, 907 (2d Cir. 1982) (quoting brief of AAUP).

[125] *Id.* (footnote omitted).

academician provided with no reason for her or his nonretention may never be able to discover the existence of nonpermissible reasons. If an institution chooses to "stonewall" or to give pretextual reasons for its decision, the claimant may never know, much less be able to prove, that her or his constitutional rights were violated.[126]

This is not to suggest that nontenured faculty members never prevail in first amendment claims. In every reported case in which a professor has prevailed, however, the university, usually pursuant to internal policy, had informed the plaintiff of the reasons for nonretention.[127] Once the university specifically states its reasons, it is far easier for the plaintiff to demonstrate that the reasons cannot be substantiated or are pretextual.

If the Court were consistent in its vigilance against infringements of first amendment liberties, it would recognize the importance of procedural regularity protecting substantive rights. In many cases in which nonretained faculty members lack the information necessary to establish a federal substantive claim, fair procedure will provide the only means of vindicating their expressive interests.

III. EVIDENTIARY ISSUES

A. Burden of Proof and the Requirement of an Illicit Motive

A first amendment claimant can get into court by alleging constitutional wrongdoing, regardless of the existence of a right to procedural due process. However, both the substantive law and questions of evidentiary privilege based on the institution's "academic freedom" present formidable obstacles to successful redress of the faculty member's claim.

Federal constitutional claims in which teachers seek redress for retaliatory administrative action, designed to penalize their engaging in the exercise of protected expressive activity, have led to the development of a three-step process to determine the required nexus between the administrative action and the protected activity.[128] First, the claimant must show that she or he engaged in protected activity.[129] Assuming the

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[126] "[A] plaintiff cannot be expected to disprove a defendant's reasons unless they have been articulated with some specificity." Loeb v. Textron, Inc. 600 F.2d 1003, 1011-12 n.5 (1st Cir. 1979) (citations omitted).

[127] *See* note 141 *infra.*

[128] Trotman v. Board of Trustees, 635 F.2d 216, 224-25 (3d Cir. 1980), *cert. denied,* 451 U.S. 986 (1981).

[129] *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). For discussion of activity which is protected by the first amendment, see notes 198-353 and accompany-

claimant can demonstrate that the activity is protected, she or he must next demonstrate that the activity was a substantial or motivating factor in a decision adverse to the claimant.[130] Then, the burden shifts to the defendant to demonstrate by a preponderance of the evidence that the same action would have been taken even in the absence of the protected conduct.[131] Thus, the teacher will prevail only if the court finds that "but for" the protected activity, the employee would not have been removed.[132]

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ing text *infra*.

[130] "Initially . . . the burden was properly placed upon respondent to show that his conduct was . . . a substantial factor — or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him." Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (footnote omitted). For a criticism of the use of the "but for" test in free speech cases, see Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 YALE L.J. 387, 377-84 (1979) [hereafter Note, *Impermissible Motive*]; *see also* Wally, *What Hath* Mt. Healthy *Wrought*, 41 OHIO ST. L.J. 385 (1980). The *Mt. Healthy* doctrine has not been limited to cases arising from loss of employment in an academic setting; its "but for" test has been adopted in other dual motive cases. For example, in a recent case involving "Part 24" of 29 C.F.R., which implements antiretaliation provisions designed to protect employees who report employer violations of statutes or regulations designed to protect public safety, the court reasoned that the "but for" test was the appropriate standard because it did not place a whistle-blowing employee in a better position than he otherwise enjoyed. Consolidated Edison Co. v. Donovan, 673 F.2d 61 (2d Cir. 1982).

The Tenth Circuit has defended the *Mt. Healthy* standard:

> [S]chool board members and regents are probably exposed more than any other group to constitutional claims, issues, and arguments in their day-to-day duties. These matters have thus become a part of the regular problem-solving functions. Since they are so exposed to these issues, and receive information, reports, rumors, complaints, and harassment from so many sources, it is understandable that the Supreme Court has held, in substance, that the 'consideration' of improper or constitutionally protected conduct does not ipso facto constitute a violation of constitutional rights justifying remedial action. This is the sorting that must be done by the board members . . . and in the sorting they necessarily 'consider' a large quantity of information from diverse sources.

Franklin v. Atkins, 562 F.2d 1188, 1190 (10th Cir. 1977) (citations omitted).

[131] *Mt. Healthy*, 429 U.S. at 284; *accord* Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416-17 (1978). If protected conduct is involved in any way, it is not unusual for federal courts to touch all the *Mt. Healthy* bases even though the plaintiff has lost on the question of whether protected conduct was a substantial factor. *See, e.g.*, Ollman v. Toll, 518 F. Supp. 1196 (D. Md. 1981) (court took an "in any event" approach in denying plaintiff's claim that he was not hired because of his Marxist political beliefs); *see also* Franklin v. Atkins, 562 F.2d 1188 (10th Cir. 1977); Cherry v. Burnett, 444 F. Supp. 324 (D. Md. 1977).

[132] *Mt. Healthy*, 429 U.S. at 286-87.

In *Mt. Healthy City School District Board of Education v. Doyle*,[133] the Supreme Court made clear that although conduct protected by the first and fourteenth amendments played a substantial part in the decision not to rehire a nontenured teacher, this did not necessarily amount to a constitutional violation.[134] The *Mt. Healthy* requirement of an illicit "motivation" raises a troubling evidentiary issue: the plaintiff has the burden of demonstrating that the nonretention was motivated by an intent to violate the plaintiff's first amendment rights. If the Supreme Court really means that "motive" must be established, rather than an illegal effect,[135] that evidentiary requirement is subject to criticism on two grounds. One has been succintly expressed by Dean Ely: "*[W]here what is denied is something to which the complainant has a substantive constitutional right* — either because it is granted by the terms of the Constitution or because it is essential to the effective functioning of a democratic government — *the reasons it was denied are irrelevant.*"[136] Some rights, such as freedoms of speech, press, assembly and petition are obviously granted by the Constitution and are essential to the effective functioning of democratic government.[137] The other criticism, of

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[133] 429 U.S. 274 (1977).

[134] *Id.*

> In [*Mt. Healthy*] this Court rejected the view that a public employee must be reinstated whenever constitutionally protected conduct plays a 'substantial' part in the employer's decision to terminate. Such a rule would require reinstatement of employees that the public employer would have dismissed even if the constitutionally protected conduct had not occurred, and, consequently, "could place an employee in a better position as a result of [constitutional] conduct than he would have occupied had he done nothing."

Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416 (1978) (quoting *Mt. Healthy*).

[135] 429 U.S. at 287. The *Mt. Healthy* court used the word "motivating" as well as "substantial" in describing "factor." *Id.*; *see also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1976) (official action not unconstitutional solely because it results in racially disproportionate impact).

[136] Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1161 (1977) (emphasis in original). Tribe suggests that to ensure against decisions based on the exercise of first amendment rights, motivational analysis is required because such subjective criteria are involved and because nontenured teachers can be dismissed for no reason at all. L. TRIBE, note 34 *supra*, § 12-5, at 592. Motives, however, should be irrelevant as to the question of whether protected expressive activity was the reason for the unfavorable decision. A requirement of a statement of reasons for the decision would obviate the problem. The Court has not cured the harm of *Roth* with the requirements of *Mt. Healthy*. On the contrary, it has exacerbated it.

[137] Ely, note 136 *supra*, at 1161 n.26. For the seminal articles initiating the debate on the desirability of motivational analysis, see Brest, Palmer v. Thompson: *An Ap-*

course, is the difficulty of probing into the secrecy of the votes of the body or bodies which made the challenged decision. The extent to which "academic freedom" protects the confidentiality of these votes is an open question.[138] It would be better to have a clear-cut rule that the plaintiff need demonstrate only that protected expression was a substantial factor in the adverse decision, without muddying the waters with talk of "motivating" factors.[139] Such a rule would not obviate the discovery problem but would lessen plaintiff's burden of proof. Even better would be recognition of a doctrine that academic institutional decisions which have an adverse impact on faculty members' first amendment rights are constitutionally forbidden unless the institution can prove that other, nonpretextual reasons exist. Under current constitutional doctrine, however, there are very real evidentiary difficulties in a faculty lawsuit initiated to vindicate even the limited first amendment expressive rights recognized by the Court.

B. Discovery and Confidentiality of Academic Records

Roth establishes that a nontenured professor has no right to a statement of the reasons for nonretention or denial of promotion or tenure.[140] *Mt. Healthy* establishes that a plaintiff must prove that the decisionmakers intended to retaliate against plaintiff's protected expressive activity.[141] Because the plaintiff cannot prove illicit intent without citing the institution's reasons for dismissal, the plaintiff may be unable to make out a prima facie case. Without access to employment records such as tenure files, confidential faculty evaluations of both the plaintiff and of other faculty members, or votes on tenure and promotion and

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proach to the Legislative Motivation in Constitutional Law, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

[138] *See* notes 140-97 and accompanying text *infra*.

[139] *See* Note, *Impermissible Motive*, note 130 *supra*, at 377-84.

[140] Board of Regents v. Roth, 408 U.S. 564 (1972).

[141] In *Mt. Healthy*, the plaintiff was fortunate enough to have been given a statement of the reasons for the recommendation that he not be rehired. The Board of Education cited "a notable lack of tact in handling professional matters" which left much doubt as to his "sincerity in establishing good school relationships," followed by references to an incident in which the plaintiff had telephoned a radio station to convey the substance of an intraschool memorandum relating to teacher dress and appearance, and to an "obscene gesture" incident in the school cafeteria. The district court concluded that the plaintiff's call to the radio station " 'was clearly protected by the First Amendment.' " 429 U.S. at 282-83 (quoting the district court).

the reasons behind negative votes, the plaintiff may have no case.[142]

The Supreme Court has said that the federal discovery rules are to be accorded broad and liberal treatment, particularly when proof of intent is required.[143] It is not clear, however, that the liberal federal rules on pretrial discovery will help plaintiffs to uncover constitutional wrongdoing by university decisionmakers. Although initially it may seem that the disgruntled professor need only allege an exercise of expressive rights as the basis of nonretention in order to force the administration to divulge the reasons for its decision, questions of the confidentiality of tenure committee votes or other internal documents, such as tenure files, force a more critical examination of the issue.

Confidentiality has been characterized as "integrally related to safeguarding academic freedom, a value of constitutional significance."[144] The critical issue is not the specific committee votes — an issue on which the federal circuits differ[145] — but the reasons behind the negative votes.[146] The courts, however, are still struggling with the threshold issue of whether institutional privilege exists against discharge of specific votes or other "confidential" or "sensitive" materials.

1. The *Gray* and *Dinnan* Decisions

Two federal circuit courts have addressed the issue of the confidentiality of faculty votes and have reached somewhat different results. In *Gray v. Board of Higher Education*,[147] the Second Circuit recognized a qualified privilege held by academic institutions to protect the secrecy of faculty committee votes on tenure.[148] The case involved an allegation of racial discrimination in an adverse tenure decision. Although not a first

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[142] For a thorough discussion of the issues of compelled disclosure versus evidentiary privilege for "sensitive" materials in faculty lawsuits in federal courts, particularly those brought under title VII, see Gregory, *Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits on Academic Freedom*, 16 U.C. DAVIS L. REV. 1023 (1983) (*infra* this volume); Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 CALIF. L. REV. 1538 (1981) [hereafter Note, *University Autonomy*].

[143] Herbert v. Lando, 441 U.S. 153, 170-75 (1979); *see also* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 81, at 399 (3d ed. 1976).

[144] Gray v. Board of Higher Educ., 692 F.2d 901, 902 (2d Cir. 1982).

[145] *See* notes 147-64 and accompanying text *infra*.

[146] In *Gray*, for example, the plaintiff admitted that disclosure of specific votes was just the "opening wedge" to uncovering the reasons behind the negative votes. 692 F.2d at 902.

[147] 692 F.2d 901 (2d Cir. 1982).

[148] *Id.* at 908.

amendment case, it has special significance for first amendment claims because it was not brought under title VII, in which direct proof of discriminatory intent is not necessary.[149] Rather, Dr. Gray's civil rights action alleging racial discrimination was brought under 42 U.S.C. sections 1981, 1983 and 1985. The Supreme Court has decided that a finding of intent *is* necessary in section 1981 lawsuits[150] and it is also clear, unfortunately, that Dr. Gray's fourteenth amendment claim required proof of intentional discrimination, as do claims of retaliation for the exercise of expressive rights.[151]

The Second Circuit Court of Appeals held "that absent a statement of reasons, the balance tips toward discovery and away from recognition of privilege."[152] The court's position avoided the twin absolutes of

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[149] Griggs v. Duke Power Co., 421 U.S. 424 (1971) (employer practices having an adverse impact on minorities are unlawful under title VII unless employer can prove job-relatedness). A title VII violation may also be established by a demonstration of discriminatory intent rather than impact. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); *see also* Guardians Ass'n of N.Y. City Police Dep't v. Civil Serv. Comm'n, 633 F.2d 232, 245-67 (2d Cir. 1980), *cert. granted*, 454 U.S. 1140 (1982); Lieberman v. Gant, 630 F.2d 60, 63 (2d Cir. 1980); Bartholet, *Proof of Discriminatory Intent Under Title VII:* United States Postal Service Bd. of Governors v. Aikens, 70 CALIF. L. REV. 1201 (1982).

[150] General Bldg. Contractor's Ass'n. v. Pennsylvania, 102 S. Ct. 3141, 3149 (1982).

[151] Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264, 264-71 (1977); Washington v. Davis, 426 U.S. 229, 239-45 (1976).

[152] *Gray*, 692 F.2d at 908. The plaintiff asked the district court to compel discovery of the votes of two members of the university tenure committee. His motion was opposed on the ground that confidentiality of both the voter and the discussion surrounding the vote was essential to safeguard the tenure system — "an essential linchpin in the commitment to safeguard the academic freedom of individual teachers." *Gray*, 92 F.R.D. 87, 92 (S.D.N.Y. 1981). The district court was pursuaded that this disingenuous reasoning militated in favor of recognition of a privilege against disclosure. The district court applied a balancing test to reach its conclusion, analyzing the issue as follows:

> Any finding that information is protected from discovery must reflect a balancing between, on the one hand, the parties' right to discovery, which stems from society's interest in a full and fair adjudication of the issues involved in litigation and, on the other hand, the existence of a societal interest in protecting the confidentiality of certain disclosures made within the context of certain relationships of acknowledged social value.

Id. at 90.

The district court then held that the benefits of discovery of testimony to support Gray's claim of discriminatory treatment were outweighed by these considerations and "the potential effect of ordering disclosure." *Id.* at 94. For arguments favoring nondisclosure of faculty peer review records, see Smith, *Protecting the Confidentiality of the Faculty Peer Review Records:* Department of Labor v. The University of California, 8 J.C. & U.L. 20 (1981-82); *see also* Stevens, *Evaluation of Faculty Competence as a*

either a "right" to discovery in all cases or an absolute right to resist disclosure.[153] The Second Circuit used a balancing approach to reach its result, adopting the policy and procedure recommended by the AAUP. The AAUP's brief suggested that if the unsuccessful candidate for reappointment or tenure had received a meaningful statement of reasons from the peer review committee and was afforded intramural grievance procedures, "disclosure of individual votes should be protected by a qualified privilege."[154] The Second Circuit concluded that the AAUP's position protects confidentiality and encourages a candid peer review process, striking "an appropriate balance between academic freedom and educational excellence and individual rights to fair consideration."[155]

The result in *Gray* was compelled by the *Roth* holding that a nontenured faculty member is not entitled to discover the reasons for an unfavorable decision regarding her or his tenure and or contract renewal. If a university refuses to state the reasons for an unfavorable decision, as it may do with constitutional impunity, fairness and concern for first amendment freedoms demand a policy requiring disclosure of votes when they have been requested. Without disclosure, a plaintiff cannot "uncover evidence necessary to establishing a prima facie case"[156] and thereby shift to defendants the burden of articulating "with reasonable specificity the reasons for the denial of tenure and to produce some evidence in support thereof."[157] The *Gray* court recognized that adherence to the AAUP's principles and procedures will avoid the need for judicially enforced discovery and that in those circumstances "it may be appropriate to assert a qualified academic peer review privilege."[158]

Gray stands in interesting contrast to *In re Dinnan*,[159] in which the

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Privileged Occasion, 4 J.C. & U.L. 281 (1976-77) (discussing the legal hazards of derogatory evaluations of faculty competence). *But see* Gregory, note 142 *supra* (opposing nondisclosure of faculty peer review files).

[153] *Gray*, 692 F.2d at 908.

[154] *Id.* at 907 (citation omitted).

[155] *Id.*

[156] *Id.* at 908. "Only if defendants explicate the reasons for the denial of reappointment with tenure can Gray proceed to meet his burden of proof that the nondiscriminatory motives advanced by the defendants are merely pretextual." *Id.* n.8.

[157] *Id.* at 905. As the *Gray* court stated, "a college could defeat the demand for disclosure by disclaiming a defense that will require disclosure to rebut." *Id.* at 906. "Future decisions supported by a detailed statement of reasons given to the faculty member on request will be shielded from routine discovery." *Id.* at 908.

[158] *Id.*

[159] 661 F.2d 426 (5th Cir. 1981), *cert. denied sub nom.* Dinnan v. Blaubergs, 457

Fifth Circuit held that a professor had no privilege to withhold information regarding his vote on the plaintiff's promotion to associate professor, despite the professor's contention that he was sheltered by an academic freedom privilege and by a common law secret ballot privilege.[160] The decision is interesting because the court recognized that Supreme Court cases cited in support of "academic freedom" all involve state or federal government attempts to suppress ideas.[161] According to the Fifth Circuit, however, *Dinnan* did not present a question of government interference in academic affairs; therefore, the reasoning behind the "academic freedom" cases did not apply.[162]

The Fifth Circuit correctly recognized the federal constitutional protection against interference by the political branches of government accorded to universities. But the court erred when it stated that because "a *private* plaintiff is attempting to enforce her constitutional and statutory rights in an employment situation,"[163] the judiciary is not meddling in academic affairs. The staffing of a university is most assuredly an academic affair. It is unclear why the *Dinnan* court did not simply say that a discrimination claim trumps an institution's "academic freedom." Instead, the court stated that because there was an allegation of discrimination — a decision based on nonacademic grounds — the university's decision fell outside the bounds of Justice Frankfurter's essential freedoms of a university, particularly the right "to determine for itself on academic grounds who may teach."[164]

2. Other Bases for Asserting Institutional Academic Freedom

Another obstacle to compelled disclosure of employment records, confidential faculty evaluations, and secret votes on tenure and promotion is Federal Rule of Civil Procedure 26(c), which permits a court "to make any order which justice requires to protect a party or person from

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U.S. 1106 (1982).

[160] *Id.* at 427.

[161] As the *Dinnan* court noted: "Ideas *may be suppressed just as effectively by denying tenure as by prohibiting teaching of certain courses.*" *Id.* at 430 (emphasis in original). Since *Dinnan* was an employment discrimination case, however, the issue was not one of suppression of ideas.

[162] *Id.* at 430-31.

[163] *Id.* at 430 (emphasis in original).

[164] *Id.* (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). The Fifth Circuit did recognize the dangerous implications for first amendment rights if "academic freedom" should become a shield behind which tenure committee members could hide votes that were based on constitutionally impermissible reasons. *Id.* at 431.

annoyance, embarrassment, oppression or undue burden or expense."[165] In *Keyes v. Lenoir Rhyne College*,[166] a female faculty member claimed she was denied employment opportunities because of age and sex, and brought suit under title VII, the fourteenth amendment, and North Carolina contract law.[167] The Fourth Circuit upheld the trial court's discretion under Rule 26(c) in declining to order the production of confidential evaluations of each faculty member made annually by either the division or department chairmen.[168] The college had asked that production of the faculty evaluation records be protected so that it might receive "honest and candid appraisals of the abilities of the faculty members by their peers."[169] The Fourth Circuit indicated that had the college relied on the evaluations to justify any male-female disparity, the plaintiff had to be granted the opportunity to demonstrate that the explanation was not pretextual.[170]

The Fifth Circuit relied on *Keyes* in *Jepsen v. Florida Board of Regents*.[171] The plaintiff had moved to compel production of the English department's faculty evaluation forms of fourteen professors, but the defendant requested a protective order based on the confidentiality of the files.[172] Because the university defended against the discrimination claim on the ground that promotional decisions were based solely on

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[165] FED. R. CIV. P. 26(c). The scope of such an order is within the discretion of the trial judge and will be reversed only if there is an abuse of that discretion. Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1973); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2036 (1970).

[166] 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977).

[167] *Id.* at 579.

[168] *Id.* at 581.

[169] *Id.* The Fourth Circuit did not rule on the issue of whether Keyes was entitled to her own faculty evaluations.

[170] *Id.*

[171] 610 F.2d 1379 (5th Cir. 1980).

[172] The request was based upon a Florida statute providing:

> Regulations of the Board of Regents may prescribe the content and custody of limited access records which an institution in the State University System may maintain on its employees. . . . Except as required for use by the president in the discharge of his official responsibilities, the custodian of limited access employee records may release information from such records only upon such authorization, in writing, from the employee or upon order of a court of competent jurisdiction.

FLA. STAT. ANN. § 239.78 (West 1977). "The district court ordered that plaintiff's counsel could personally view faculty evaluations forms, but could not copy the documents or discuss their contents with anyone other than the custodians of the documents, defense counsel, or the Court." *Jepsen*, 610 F.2d at 1381.

unbiased faculty evaluations which involved criteria unrelated to sex,[173] the plaintiff should have been granted the opportunity to demonstrate that the explanation was pretextual. The *Jepsen* court relied upon the suggestion in *Keyes* that, when the evaluations serve as the alleged basis for the university's decision to deny promotion or tenure, the plaintiff's interest in proving her case outweighs the university's interest in protecting the confidentiality of a file, and that in such cases the evaluations must be provided to the plaintiff.

The result in *Keyes* has been criticized as a misuse of Rule 26(c), which was not designed to resolve claims of privilege, and as failing adequately to protect a university's need for confidentiality due to the amount of discretion vested in the trial court.[174] Whether one agrees with this statement, of course, depends upon the extent to which one believes that secret deliberations promote desirable ends. It is difficult to see why confidentiality should be valued for itself and why its absence inhibits honorable candor.[175]

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[173] *Id.* at 1379.

[174] Note, *University Autonomy*, note 142 *supra*, at 1543-44.

[175] The academic freedom purportedly served by an evidentiary privilege is that of the institution, not the individual, despite the district court's equating the two in *Gray*. *Gray*, 92 F.R.D. at 92 (citing Note, *University Autonomy*, note 142 *supra*). In fairness to the author of *University Autonomy*, it should be noted that he recommends that a balancing approach, rather than an absolute privilege, be followed by federal courts. The balancing approach would compel disclosure in faculty lawsuits, even if compelled disclosure significantly burdens "academic freedom" (read institutional autonomy), when there are "compelling countervailing interests." By these interests is meant the vindication of constitutional rights, such as free speech or freedom from discriminatory treatment. It has been suggested that Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977), a news gathering case, represents the paradigm for determining when "the need for disclosure overcomes the constitutionally based privilege." Note, *University Autonomy*, note 142 *supra*, at 1562. The author believes that "academic freedom," that is, "institutional autonomy," is a necessary corollary of the first amendment. *Id.* at 1549-51. In *Silkwood*, the court set forth several factors to consider in deciding whether the information sought is "crucial" to the plaintiff's action: whether the party seeking the information can obtain it from another source; whether the information sought goes to the heart of the matter; and whether the information is relevant, rather than merely "useful" or "helpful." 563 F.2d at 438.

An additional factor, culled from the official information privilege cases, is "the degree of harm that would be caused by compelling disclosure." Note, *University Autonomy*, note 142 *supra*, at 1563. It might be argued, however, that the degree of harm caused by nondisclosure is of equal magnitude in first amendment cases. A prima facie case requires proof of "unconstitutional" intent; therefore, the information sought, at least as to the plaintiff's own files, always is relevant. Even those who recognize a presumptive privilege might consider whether the harm of allowing the veil of academic secrecy to be pierced justifies the violation of expressive rights.

Another illustration of judicially created obstacles to discovery in faculty lawsuits is *McKillop v. Regents of the University of California*,[176] a sex discrimination case in which a female professor sought access to documents in her tenure file. The district court, although acknowledging "the strong federal interest in redressing sex-based discrimination in employment and the federal policy of ensuring access to public information,"[177] denied her request. The court reasoned that she had an alternative method of discovery because the defendants had agreed with the court's suggestion "that an impartial academician review the files to determine whether any implication of discrimination"[178] arose therefrom.

Although the reluctance of the judiciary to make "academic judgments" permeates faculty employment discrimination lawsuits,[179] surely

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[176] 386 F. Supp. 1270 (N.D. Cal. 1975).

[177] *Id.* at 1277 (footnote omitted).

[178] *Id.* at 1277-78. The plaintiff's reaction to this agreement between defendants and the court is not mentioned. The *McKillop* court also suggested that the plaintiff could depose the university's decisionmakers and direct interrogatories to those who were parties to the action. That suggestion, however, ignored the extent to which probing into their motives and reasoning is protected by claims of privilege.

[179] *McKillop* is a case in point:

> It may also be that plaintiff wishes to impeach the evaluations themselves by introducing evidence directed to the question of [her] qualifications and stature as Renaissance Art Historian. The Court is simply not in a position to decide this question; to do so would require the subjective judgments which are meaningless if made by one without expertise and experience in the field.

Id. at 1278 n.13 (citing Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974)). The judicial reluctance to subject university employment practices to the same scrutiny applied to nonacademic employers in order to avoid involvement in subjective judgments concerning faculty qualifications in discrimination suits has been criticized in more recent cases. *See, e.g.*, Powell v. Syracuse Univ., 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978):

> 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 common-sense 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.

Id. at 1153; *see also* Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980):

> [I]t is beyond cavil that generally faculty employment decisions comprehend discretionary academic determinations which do entail review of the intellectual work product of the candidate. That decision is most effectively made within the university and although there may be tension between the faculty and the administration on their relative roles and re-

the issue of "implications of discrimination" requires judicial consideration. Even an in camera review of the files, however, raises serious questions of procedural due process.[180]

A recent Ninth Circuit case adds another dimension to the problem of an academic freedom privilege. *Lynn v. Regents of the University of California*[181] arose from a title VII claim of sex discrimination in which the plaintiff was denied access to her tenure review file. When Lynn requested that the university produce the file at the discovery stage, the

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> sponsibilities, it is generally acknowledged that the faculty has at least the initial, if not the primary, responsibility for judging candidates.
> . . . Whenever the responsibility lies within the institution, it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure.

Id. at 547-48 (citation omitted). Having said this, the court proceeded to uphold an award of tenure to the plaintiff as a remedy for her discrimination claim, provided she obtained a master's degree within two years. *Id.* at 549. The Third Circuit disclaimed a tenure "award," indicating that the district court had "attempted to place plaintiff in the position she should have been 'but for' the unlawful discrimination." *Id.* The court further noted:

> 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 which employ persons who work primarily with their hands.

Id. at 550. It should be noted, however, that in *Kunda* there was no dispute whatsoever as to the plaintiff's qualifications.

Both *Powell* and *Kunda* relied upon the *Report of the House Committee on Education and Labor*, which set forth the reasons to amend title VII's coverage to include both public and private educational institutions:

> The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination. Accordingly, the committee feels that educational institutions, like other employers in the Nation, should report their activities to the Commission and should be subject to the provisions of the Act.

H.R. REP. NO. 238, 92d Cong., 2d Sess. 19-20 (1971), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2155; *see also* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982) (courts should apply same standards in academia, law firms, and managerial settings as in blue collar workplaces).

[180] *See* notes 181-85 and accompanying text *infra*.

[181] 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 53 (1982).

district court issued a protective order.[182] The university did produce the file at the trial stage, but it was submitted to the court for in camera review. Its contents were not disclosed to Lynn, but were used as evidence by the district court rather than for the purpose of determining whether the contents of the file were privileged.[183] The Ninth Circuit held that the refusal to disclose the contents of the file violated due process.[184] The court did not "decide" whether tenure review files, and more particularly peer evaluations, are privileged in academic title VII cases, but did suggest that disclosure of evaluations should be required.[185]

Certainly the *Lynn* court's reasoning, even if dictum in an employment discrimination case, is apposite to first amendment cases arising in academia. The court noted the judiciary's use of a balancing test in which the university's interest in confidentiality is weighed against the title VII plaintiff's need to obtain peer evaluations to prove discriminatory conduct.[186] The court considered a number of factors in arriving at this conclusion: "the importance of enabling plaintiffs to prove that discriminatory conduct has occurred, the difficulty of obtaining direct proof of discriminatory motivation and the strong national policy against discrimination in educational employment."[187] These considerations are even more compelling in first amendment cases in which proof of a retaliatory motive is a *sine qua non* of plaintiff's case, unlike in title VII cases. In the same vein, if the university seeks to defend against a retaliatory claim on the ground that the decision was made solely for reasons unrelated to the exercise of first amendment rights, or would have been made despite their exercise, the plaintiff should be entitled to obtain evaluations or other materials upon which the allegedly constitutionally permissible decision was based.

As matters stand now, however, the academician with a first amendment claim faces obstacles of unknown dimension. Although *Gray*, with its recognition of only a "qualified" privilege, represents a step in the right direction, there are arguments in support of the *Dinnan* holding of an absolute right to disclosure of at least the plaintiff's own files and the committee votes, and especially the reasons for a tenure or promotion decision.

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[182] *Id.* at 1345.

[183] *Id.*

[184] *Id.* at 1345-46.

[185] *Id.* at 1346-47.

[186] *Id.* at 1347.

[187] *Id.*

The arguments favoring a privilege are not compelling or even persuasive. The fear has been expressed repeatedly that compelled disclosure of peer review committee deliberations and votes will chill candid peer evaluation, disturb the harmony of faculty relations, and threaten "academic freedom."[188] While no one argues for an uncandid peer review process, it is not clear why peer evaluation should not be able to stand the light of day. Surely the fear of hurt feelings on the part of a disappointed candidate hardly suffices to shield faculty deliberations. As for disruption of faculty relations, the dismissed faculty member is not going to be kindly disposed toward those who sat in unfavorable judgment against her or him. If the concern is with relations between opposing factions in a battle over the worth of a candidate, wounds will be inflicted regardless of disclosure *vel non* to the judiciary and the disappointed candidate.

The most specious argument of all, however, and the one accepted most uncritically by individuals who should know better, is that "academic freedom" and "excellence" are served by nondisclosure.[189]

Since confidentiality of peer evaluations is so widespread, why does academic excellence not abound? Could it be that one has nothing to do with the other? Despite the tenuous connection, the belief or profession of the belief that confidentiality begets academic excellence is a widespread and enduring piece of cant.

Even more difficult to follow is the academic freedom argument, which is usually stated as a conclusion. It is thought that pretrial disclosure of the reasons for a decision adverse to a candidate represents

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[188] Gray v. Board of Higher Educ., 692 F.2d 901, 907 (2d Cir. 1982); *see also* Note, *University Autonomy*, note 142 *supra*, at 1549.

[189] "At the outset the Court notes that this system of faculty selection has produced one of the finest, if not the finest, institutions of higher education in the country, and certainly the pre-eminent state university system." McKillop v. Regents of the Univ. of Cal., 386 F. Supp. 1270, 1275 (N.D. Cal. 1975). The judge was convinced by two affidavits — one from the Chancellor at U.C. Davis and one from the Vice President of Academic Affairs — and by his own experience, that confidentiality promoted more candor in evaluations than did disclosure. He went on to note that the University of Oregon had "not yet attained, and perhaps does not strive to obtain, the stature which the University of California has attained." *Id.* at 1276. He then noted that more importantly, Oregon's newly adopted policy of limited disclosure does not reflect a repudiation of the confidentiality principle as a prerequisite to effective peer evaluation. *Id.* At this juncture one has to ask why, since the University of Oregon does practice confidentiality in somewhat different form than the University of California, and apparently has practiced confidentiality on a less limited basis in the past, the University of Oregon has not obtained the stature among state university systems obtained by the University of California.

unwarranted judicial intervention in the affairs of the university. This fear of judicial overstepping is prompted by a respect for relative institutional competence — a belief that decisions on the merits of academic candidates are beyond the capabilities of judges.[190] To a lesser extent, this judicial deference is based on an anachronistic view of the academic world as a place of " 'shared authority' evolved from the medieval model of collegial decisionmaking in which guilds of scholars were responsible only to themselves."[191] A majority of the Supreme Court actually stated that traditions of "collegiality and tenure" continue to play a significant role at many universities.[192]

However, even if these reasons are sound, there is no connection between nondisclosure and the "academic freedom" of the university to choose its faculty members. Substantive law is not being created by disclosure rules, except to the extent that restrictive evidentiary rules foreclose or hinder the vindication of substantive rights. There are both statutory and constitutional limits on the right of an academic group to pick and choose its members.[193] For example, title VII restricts even a private university's ability to discriminate against members of groups

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[190] *See* note 179 *supra.*

[191] NLRB v. Yeshiva Univ., 444 U.S. 672, 680 (1979) (citations omitted) (faculty members are endowed with managerial status sufficient to remove them from coverage of the National Labor Relations Act). For an incisive treatment of this decision, see Sussman, *University Governance Through a Rose-Colored Lens:* NLRB v. Yeshiva, 1980 SUP. CT. REV. 27; *see also* Baldridge, *Shared Governance: A Fable About the Lost Magic Kingdom*, 68 ACADEME, Jan.-Feb. 1982, at 12; Berdahl & Gove, *Governing Higher Education: Faculty Roles on State Boards*, 68 ACADEME, May-June 1982, at 21.

[192] *Yeshiva Univ.*, 444 U.S. at 689. For a recent symposium on the managerial role played by university faculties, see *A Question of Governance*, 68 ACADEME, Jan.-Feb. 1982, at 3.

[193] *See, e.g.*, Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879 (1979) [hereafter Note, *University Hiring*], discussing the extent to which federal antidiscrimination laws are impinging on academic freedom and institutional autonomy; *see also* Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach To Faculty Title VII Litigation*, 60 B.U.L. REV. 473 (1980), in which the author discusses the enormous increase in faculty litigation spawned by antidiscrimination measures:

> To list these changes in the law is not to criticize them, even implicitly. These initiatives by three branches of the federal government are proper measures to guarantee fundamental fairness in our society. One of the often ignored products of this legal ferment, however, has been the dramatic rise in academic litigation, with its accompanying pressure for increased judicial intervention in the academic decision-making process.

Id. at 481 (footnote omitted).

covered by its employment provisions.[194] The fourteenth amendment protects some classes of traditionally disfavored individuals, and even some favored classes.[195] The first amendment provides some protection for "extramural" expressive activity, and very limited protection for in-class speech.[196] These hard constitutional and statutory realities may displease those who believe that a university should be an enclave beyond the reach of laws which restrict the behavior of other employers and coworkers.[197] Confidentiality for peer review will not change these restrictions on academic freedom, although recognition of an academic evidentiary privilege, even a qualified one, may serve to deny justice to individual claimants.

Disclosure of the reasons for nonretention or dismissal does not menace academic freedom. Absent a clearly impermissible reason, which is virtually the only reason for the adverse action, a university can refuse to hire or retain an academic employee for no reason, an inane reason, or a hateful reason, so long as it does not fall within the miniscule group of prohibited reasons. If and when the Supreme Court confronts the issue of an academic evidentiary privilege, it should reflect on the harm, unredeemed by any countervailing good, that a privilege of nondisclosure would engender.

IV. THE FIRST AMENDMENT AND THE UNIVERSITY CLASSROOM

Having discussed procedural and evidentiary barriers to the vindication of university professors' first amendment freedoms, the remainder

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[194] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 13, 86 Stat. 103, 113 (codified at 42 U.S.C. § 2000e-17 (1976)).

[195] Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Educ., 347 U.S. 483 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Strauder v. West Va., 100 U.S. 303 (1879); *cf.* Craig v. Boren, 429 U.S. 190 (1976) (statute prohibiting sale of 3.2% beer to males under 21 and females under 18 violates equal protection under "intermediate" level of scrutiny to be used when gender is a classifying factor). *But see* Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982) (state can invoke compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefitted by the classification actually suffer a disadvantage related to the classification; state's exclusion of males from nursing school for females not justified, since no showing that women lacked opportunities to obtain nursing training); *cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (no agreement as to standard of review involved in "benign" racial classification cases).

[196] *See* notes 247-77 and accompanying text *infra*.

[197] *See, e.g.*, Sherman, *Anti-Intellectualism and Civil Rights*, 8 CHANGE 34 (1976), in which the author contends that courts are setting dangerous precedents, when, in the interests of civil rights, they rule that academic standards are unconstitutional.

of this Article is focused on the substantive protection afforded expressive activities in the university classroom by the federal Constitution. Any hypothetical cases are based on two presuppositions — that state action is present, and that the aggrieved faculty member can prove that expressive activity was involved in an adverse institutional decision.

There are two strands which may become commingled in a single case involving classroom speech. For example, an issue may arise because the professor spoke of public issues extraneous to the particular subject matter assigned. Or, the professor's teaching methods, including choice of books, topics of classroom discussions, allocation of responsibility between teacher and student, use of certain words, and interjection of personal ideological or philosophical viewpoints may have led to administrative disapproval and reprisals.

Most federal court cases have arisen in the secondary school context, which presents difficulties when the same issues arise at the postsecondary level of education. Since the judiciary has traditionally treated precollege education as both a local matter and an element of parent's fourteenth amendment "liberty" interests in their children, the courts have allowed school boards to "exercise control over teacher's classroom speech to preserve congruence with parental values."[198] There is the further problem of the undemocratic nature of the federal court, a factor that is "intensified when the court becomes a potential vehicle protecting in the classroom, the imposition of values themselves undemocratically derived."[199] Analysis from these cases is also made less

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[198] Miller, note 21 *supra*, at 846.

> The central fact in the distinction between higher and lower education is the role of value inculcation in the teaching process. The public schools in the United States traditionally have viewed instilling the young with societal values as a significant part of the schools' educational mission. Such a mission is directly opposed to the vision of education that underlies the premises of academic freedom in higher education.

Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What they Teach*, 124 U. PA. L. REV. 1293, 1342-43 (1976) (footnote omitted).

The concern is frequently expressed that federal court review of first amendment claims interferes with the decisionmaking authority of school boards or officials. *See, e.g.*, Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799, 2817 (1982) (Burger, C.J., dissenting) (expressing concern that "a school board's decision concerning what books are to be in the school library is subject to federal court review" (footnote omitted)). However, it should be noted that the issue is more accurately expressed as whether the judiciary has a constitutional role to play in the administration of school libraries. *See, e.g.*, Testa v. Katt, 330 U.S. 386 (1947) (state courts have a duty to enforce the federal Constitution).

[199] Miller, note 21 *supra*, at 847.

useful because of the widespread view that the purpose of elementary and secondary school is to indoctrinate students by transmitting a defined body of knowledge, values, and traditions.[200] Despite the serious question of whether the Supreme Court is performing a function assigned to it under the Constitution when it undertakes to determine what the function of a state university should be, absent any allegation of a purpose which transgresses a constitutional limit, the Court has indicated that the mission of a university is not to indoctrinate, but to develop the critical faculties of its students.[201]

The Supreme Court has never directly addressed the question of the constitutional protection to be accorded teaching methodology or any other form of classroom speech as an element of first amendment freedom, and federal court cases involving university teachers' classroom rights are sparse and in disagreement. The Supreme Court's rhetoric in cases on other issues involving teachers, however, gives the impression in dicta that there is first amendment protection for classroom speech at all levels of educational instruction, and superprotection for speech in the rarified atmosphere of the university classroom.[202] When the reality of the Supreme Court's jurisprudence on expressive activity in the university classroom is separated from its rhetoric, a different picture emerges. While there is federal protection against interference with classroom speech by governmental bodies external to the institution, the institution itself can impose and enforce restraints almost at will.[203] Unless the federal courts view university decisionmakers as "the government" in a political sense, which they clearly do not, cases establishing

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[200] *See, e.g.*, Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799 (1982), *discussed in* text accompanying notes 282-94 *infra*. *See generally* Arons & Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309 (1980), in which the authors examine "the ways in which the ideology and structure of schooling infringe upon first amendment rights and undercut the political process." *Id.* at 360; Comment, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R.-C.L. L. REV. 485 (1979) (discussing students' rights against indoctrination).

[201] *See* notes 220-42 and accompanying text *infra*. Universities have always had a vocational component to their mission, of course, but this touch of the "trade school" is not a source of pride to schools which aspire to greatness. To most students, except some of the independently wealthy who choose to live off income rather than earnings, or those few who choose not to pursue a vocation for pecuniary gain, the vocational mission is a matter of great importance.

[202] *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).

[203] *See* notes 295-353 and accompanying text *infra*.

a right of the university or professor to be free from ideological coercion by the political branches of government[204] are inapposite to instances in which academic concerns underlie such coercion.

It is virtually meaningless to speak of university faculty members' expressive rights in the classroom. The Supreme Court has decided very few cases in which teachers' expressive rights under the first amendment were directly at issue, and it has never decided a case in which constitutional protection of classroom speech was necessary to its holding. The first amendment protection that has been extended to classroom expressive activity is extremely limited in scope, since only feckless and futile "speech" enjoys immunity against administrative retaliation. Moreover, "academic freedom," so far as it is a constitutional term, gives the academy the right to make internal judgments, based on content if need be, free from external coercion or review. In fact, a faculty member's expressive activity *outside* the classroom enjoys limited protection due to the Court's deference to institutional concerns that may outweigh activity entitled to protection in other contexts.

A. The Supreme Court's Rhetoric on Academic Freedom and Teacher First Amendment Rights

In *Tinker v. Des Moines Independent Community School District*,[205] Justice Fortas stated that it had been the "unmistakable holding of the Court for almost 50 years" that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[206] This hyperbole is consistent with a long line of opinions in which extravagant statements concerning expressive rights and the academic setting were made. However, these statements do not comport with the actual holdings in those decisions. Justice Fortas, for example, cited *Meyer v. Nebraska*,[207] a 1923 case, as support for his statement. There the Court held that as a matter of substantive due process a state cannot forbid the teaching of a foreign language.[208] The case arose from the conviction of a private school teacher who had taught German to a ten-year-old boy in violation of a Nebraska statute which criminalized the teaching of a modern foreign language to any child who had not completed the eighth grade. *Meyer* is widely re-

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[204] *See* notes 329-31 and accompanying text *infra*.

[205] 393 U.S. 503 (1969).

[206] *Id.* at 506.

[207] 262 U.S. 390 (1923).

[208] *Id.* at 403.

garded as the first modern case dealing with "academic freedom,"[209] although the Supreme Court mentioned neither academic freedom nor the first amendment in its opinion. Instead, the Court found no legitimate state end to justify the state's restriction upon the teaching of German, despite the state's insistence that it was vital to the public interest "to promote civil development by inhibiting training and education of the immature in foreign tongues."[210]

It is difficult to determine the exact basis for the Court's holding in *Meyer.* Justice Reynolds included both the teacher's right to teach and the right of the parent to employ him within the "liberty" of the fourteenth amendment.[211] The Court, however, has not recognized teaching as a protected liberty interest for purposes of procedural due process,[212] although the Court has continued to acknowledge the importance of effective teaching and the acquisition of knowledge.[213] *Meyer* was later cited in *Griswold v. Connecticut* [214] as standing for the proposition that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."[215] Justice Douglas went on to rhapsodize that "[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read[216] . . . and freedom of inquiry, freedom of thought, and freedom to teach[217] . . . indeed the freedom of the entire university community.[218]" However, this was all dictum, unrelated to the issue in *Griswold.*[219]

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[209] *See Developments in the Law — Academic Freedom*, note 17 *supra*, at 1042 n.5; Note, *Academic Freedom*, note 3 *supra*, at 606.

[210] *Meyer*, 262 U.S. at 401.

[211] *Id.* at 399. Justice Stone referred to *Pierce* and *Meyer* as involving statutes directed respectively at particular religions and national minorities. United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938).

[212] *See* notes 81-91 and accompanying text *supra.*

[213] "[E]ducation and acquisition of knowledge [are] matters of supreme importance which should be diligently promoted." Meyer v. Nebraska, 262 U.S. 390, 400 (1923); *see also* Bartels v. Iowa, 262 U.S. 404 (1923) (no legitimate state power restricts right to teach German in private schools).

[214] 381 U.S. 479 (1965).

[215] *Id.* at 482.

[216] *Id.* (citing Martin v. Struthers, 319 U.S. 141, 143 (1943)).

[217] *Id.* (citing Wieman v. Updegraff, 344 U.S. 183, 195 (1952)).

[218] *Id.* (citing Baggett v. Bullitt, 377 U.S. 360, 369 (1964); Barenblatt v. United States, 360 U.S. 109, 112 (1959); Sweezy v. New Hampshire, 354 U.S. 234, 249-50, 261-63 (1957)).

[219] The issue was the state's power to define certain conduct affecting the marital relationship as criminal, and the Court's conclusion was that a prohibition against use of contraceptives violated *something* in the Constitution. The exact source of the mar-

The *Griswold* court referred to two cases, *Sweezy v. New Hampshire* [220] and *Wieman v. Updegraff*,[221] which are often cited as support for an independent right of academic freedom arising from the first amendment. Indeed, these cases contain stirring language which might lead one to conclude that there exists a constitutionally protected right to unfettered expressive activity in the classroom, were these statements not dicta. For example, in *Sweezy v. New Hampshire*, Chief Justice Warren wrote for the plurality:

> 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. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolute. 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.[222]

An examination of the facts in *Sweezy*, however, reveals that all the above is somewhat beside the point. Sweezy, a guest lecturer at the state university, was investigated by the New Hampshire Attorney General pursuant to a state legislature resolution directing the attorney general to determine whether there were "subversive persons" in the state and to recommend further legislation. During the investigation Sweezy refused to answer certain questions related to the content of a lecture he had delivered at the state university, on the ground that they were not pertinent to the inquiry and that they violated his rights under the first amendment.[223]

Sweezy was convicted of contempt for refusing to answer these and other questions, but the United States Supreme Court reversed. The plurality held that the contempt conviction could not stand because it was uncertain whether the state legislature had authorized the attorney general to gather the kinds of facts about which he had inquired. This arguable absence of authority meant the use of the contempt power

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ried couple's right to use contraceptives has been the subject of a great deal of controversy. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

[220] 354 U.S. 234 (1957).

[221] 344 U.S. 183 (1952).

[222] 354 U.S. at 250.

[223] *Id.* at 236-37.

violated the due process requirements of the fourteenth amendment.[224]

Justice Frankfurter, concurring with Justice Harlan, rested his conclusion upon Sweezy's right to political and academic privacy.[225] As did the Chief Justice, Justice Frankfurter expressed his concern over the intrusion of political authority into the classroom: "Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."[226] Justice Frankfurter also noted that "[i]n the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority."[227]

In *Sweezy*, although six Justices indicated that the content of classroom speech at public universities was immune from legislative inquiry

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[224] *Id.* at 252. The plurality's opinion is based on the notion that the attorney general's assigned task encroached upon the authority of the legislature, a violation of the separation of powers doctrine. Chief Justice Warren denied that the conclusion reached was grounded upon the doctrine of separation of powers. *Id.* at 255. The fact remains that the plurality opinion ends with the confusing statement that "[o]ur conclusion does rest upon a separation of the power of a state legislature to conduct investigations from the responsibility to direct the use of that power insofar as that separation causes a deprivation of the constitutional rights of individuals and a denial of due process of law." *Id.* A unanimous Court several years earlier agreed that:

> Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty.

Dreyer v. Illinois, 187 U.S. 71, 84 (1902). Still, the Court has on more than one occasion held state governments to separation of power principles. *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367 (1951), presenting the question of whether the members of a *state* legislative committee are liable for violation of rights guaranteed by the federal constitution, in which the Court stated that the "courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Id.* at 378; *see also* Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981) (state court had exercised unduly intensive scrutiny of the legislative judgment concerning which types of nonreturnable containers were to be banned as an environmental protection measure).

[225] 354 U.S. at 262 (Frankfurter, J., concurring).

[226] *Id.*

[227] *Id.* at 266.

in the absence of a compelling reason, this was not the holding of the case.[228] *Sweezy* has been characterized, however, as the first case in which a majority of the Court recognized the existence of academic freedom.[229] Chief Justice Warren relied upon *Wieman v. Updegraff*[230] for much of his rhetoric about academic freedom in *Sweezy*. *Wieman* involved the validity of a loyalty oath required for all state officers and employees, including faculty members. The Court held that the oath offended due process because the state excluded from public employment those who had been members of any organization listed by the United States Attorney General as "communist front" or "subversive," regardless of their knowledge concerning the activities and the purposes of the organizations.[231] This reaffirmance of the due process requirement that penalties for associational activities must be based on knowing membership has nothing to do with classroom activity *per se*, yet Justice Frankfurter's concurring opinion contains the following language:

> 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 affects not only those who . . . are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.[232]

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[228] *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 129 (1958) ("We think, that investigatory power in this domain is not to be denied Congress solely because the field of education is involved. Nothing in the prevailing opinions in *Sweezy v. New Hampshire* . . . stands for a contrary view.").

[229] Note, *Academic Freedom*, note 3 *supra*, at 611.

[230] 344 U.S. 183 (1952).

[231] *Id.* at 191.

[232] *Id.* at 195 (Frankfurter, J., concurring). Justice Frankfurter also spoke of democracy's need for "disciplined and responsible" public opinion, a commodity which can be secured only if "habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens." *Id.* at 196. After describing education as the "basis of hope for the perdurance of our democracy," he elevated teachers to the status of "priests of our democracy," and warned that "[t]hey cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them." *Id.* Justice Frankfurter then listed those conditions he deemed essential to the fulfillment of their high calling:

> They must have the freedom of responsible inquiry, by thought and ac-

Again, this language is not necessary to the decision, since anyone investigated by a legislative committee has an associational right to be free from penalty for "innocent" membership in even a subversive organization.[233] Moreover, recognizing the associational rights of teachers has little direct bearing on the extent of their classroom freedom.

A more recent example of the grandiloquent language on academic freedom appeared in *Keyishian v. Board of Regents*,[234] in which Justice Brennan spoke of the societal interest in "academic freedom":

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not just 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 vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[235]

The issue in *Keyishian* again involved the constitutionality of a loyalty program in which mere knowing membership in a proscribed organization sufficed to justify dismissal or other sanctions. *Keyishian* held that mere knowing membership was an inadequate criterion for disqualification from public employment. An individual must specifically intend to support and actually adhere to the illegal objectives of the organization before membership can be the basis for sanctions.[236] The fact that the case involved teachers was immaterial to the Court's holding.[237] Moreover, the Court did not identify academic freedom as

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> tion, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by the National or State government.

Id. at 196-97.

[233] *See, e.g.*, Scales v. United States, 367 U.S. 203 (1961).

[234] 385 U.S. 589 (1967).

[235] *Id.* at 603 (citations omitted).

[236] *Id.* at 606.

[237] Similar results have been reached in other contexts. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967) (defense employment); Elfbrandt v. Russell, 384 U.S. 11 (1966) (public employment); Aptheker v. Secretary of State, 378 U.S. 500 (1963) (passport requirements). *See generally Developments in the Law — The National Security Interests and Civil Liberties*, 85 HARV. L. REV. 1130 (1972).

an independent constitutional right, and Justice Brennan's language quoted above makes it clear that academic freedom is a societal interest rather than an individual interest.

The Court's rhetoric on academic freedom reflects concern not only for societal interests, but for institutional interests as well. For example, if we examine Justice Frankfurter's "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"[238] — it is evident that these are institutional, not individual freedoms.

A more recent case further supports the idea that academic freedom, whatever its constitutional dimensions, is an institutional interest. In *Regents of the University of California v. Bakke*,[239] the university asserted that one goal of its special admissions plan was to attain a diverse student body, which Justice Powell accepted as "a constitutionally permissible goal for an institution of higher education."[240] He reaffirmed the "freedom of a university to make its own judgments as to education,"[241] including the selection of its student body. Justice Powell cited Justice Frankfurter's "four essential freedoms" with approval, and reiterated that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."[242]

Another case cited in support of the constitutionalization of academic

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[238] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring (citation omitted)).

[239] 438 U.S. 265 (1978).

[240] *Id.* at 311-12 (Powell, J., announcing the judgment of the court).

[241] *Id.* at 312.

[242] *Id.* Justice Powell has been very protective of the educational institution's autonomy in a number of other cases. In Cannon v. University of Chicago, 441 U.S. 677, 736 (1979) (Powell, J., dissenting), he criticized the Court's holding that a private right of action exists under title IX of the Educational Amendments of 1972, absent express authorization, on the grounds, *inter alia*, that the academic community may suffer. In Board of Curators v. Horowitz, 435 U.S. 78, 92 (1978) (Powell, J., concurring), he joined the Court's opinion because, in his view, the respondent medical student was dismissed solely for academic reasons, and because the standards of due process were met. In Goss v. Lopez, 419 U.S. 565, 584 (1974) (Powell, J., dissenting), he criticized the majority's due process requirements in school suspension cases as unprecedented interference with the operation of schools. Justice Powell's concern for academic freedom was also evident in Healy v. James, 408 U.S. 169 (1972), in which he stated that "the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming the Nation's dedication to safeguarding academic freedom." *Id.* at 180-81 (citations omitted).

freedom is *Epperson v. Arkansas*,[243] in which the Court struck down an Arkansas statute prohibiting the teaching of the theory of evolution in its public schools and universities. Although this is the only case, other than *Meyer v. Nebraska*, in which the Court has ruled on state control over educational curricula, the Court declined to rely on academic freedom principles, instead basing its decision on the impermissible purpose of the statute;[244] that is, to further the "fundamentalist sectarian convictions"[245] of some of Arkansas' citizens. The statute's constitutional flaw was its prohibition of a scientific theory for the sole reason that it was deemed to conflict with a particular religious doctrine. The law, therefore, was in violation of the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof.[246]

B. Expressive Rights in the Academic Context

1. Expressive Rights Outside the Classroom

A series of cases involving extramural speech of teachers has extended limited protection to utterances outside the classroom. In *Pickering v. Board of Education*,[247] a teacher had been discharged for publishing a letter to the editor of a local paper, in connection with a proposed tax increase, criticizing the school board and superintendent. The Court held that, absent false statements made recklessly or knowingly, the teacher could not be discharged for speaking on issues of public importance.[248] Although the Court stated that public employees did not relinquish their rights, as citizens, to comment on matters relating to their work,[249] the Court also discussed six possible exceptions to this general principle: a great need for confidentiality;[250] a relationship between superior and subordinate which is so personal that public criticism would undermine their working relationship;[251] disruption of the educational

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[243] 393 U.S. 97 (1968).

[244] *Id.* at 108.

[245] *Id.* at 103.

[246] *Id.*

[247] 391 U.S. 563 (1968).

[248] *Id.* at 574. *See generally* Comment, *Free Speech*, note 14 *supra*; Note, *Dismissal of Teacher for Publishing Views on Issues of Public Importance Must be Tested by* New York Times *Rule*, 20 SYRACUSE L. REV. 72 (1968); *see also* Note, *The Aftermath of* Pickering, note 14 *supra*.

[249] 391 U.S. at 568.

[250] *Id.* at 570 n.3.

[251] *Id.*

process;[252] disruption of the teacher's relationship to the school administration;[253] failure to present grievances to superiors prior to public discussion;[254] and statements which were relevant to an employee's competence.[255]

The extent to which the last two exceptions can furnish a basis for dismissal has yet to be resolved. How many of these factors must be present before sanctions can be visited upon a teacher is not clear. However, the *Pickering* exceptions have been applied to many situations, including those involving sanctions against university professors for extramural expressive activities.[256]

The Supreme Court has had three occasions since *Pickering* to address the issue of teachers' rights to express themselves outside the classroom without fear of administrative reprisals. In *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*,[257] a state employment commission refused to allow a teacher to address it at a public meeting on the subject of pending collective bargaining negotiations. Under state law, a commission could "bargain" only with a teacher's certified union representative. The Court held that a teacher who was not a union member had a first amendment right to speak at a public meeting.[258] In *Givhan v. Western Line Con-*

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[252] *Id.* at 572-73.

[253] *Id.* at 570.

[254] *Id.* at 572.

[255] *Id.* at 573 n.5.

[256] *See generally Note — Sanctions Against Dissenting or Politically Active Teachers*, in 1 POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 837 (4th ed. 1976).

[257] 429 U.S. 167 (1974).

[258] *Id.* at 175. The Court also stated that teachers who are not members of the union authorized as the collective bargaining agent of the teachers in the district have an absolute right under the first amendment to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the news media. *Id.* at 176 n.10; *cf.* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977) (statutorily mandated agency shop clauses for public school teachers did not violate rights of speech or association; however, agency shop fees collected by the union from objecting, nonunion members for political and ideological purposes violated the first and fourteenth amendments).

Most recently, a divided Court held that the first amendment is not violated by an incumbent teachers' union collective bargaining agreement with a school board that granted the incumbent union access to teachers' mailboxes and to the interschool mail system, and denied such access to a rival union. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948 (1983). Justice White's opinion stated that there was no constitutional obligation to allow any organization to use the school mail system since the system was not a public forum. Equality of access was not required since the access policy was based on "the *status* of respective unions rather than their views." *Id.*

solidated School District,[259] a unanimous Court held that the *Pickering* principle applied to private communications as well as public speech and invalidated the discharge of a teacher who had been fired for criticizing school practices and policies in a series of private meetings with her principal.[260] And in *Mt. Healthy City School District Board of Education v. Doyle*,[261] the Court indicated that a teacher had engaged in constitutionally protected speech when he called a radio station to convey the substance of an internal memorandum relating to teacher dress and appearance "which was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues."[262] Because there had been "no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public,"[263] the Court accepted the district court's finding that the communication was protected. Justice Rehnquist's cryptic comment suggests that if the board had an established policy of curtailing communications, at least of internal memoranda, that policy would be constitutionally permissible.[264]

2. Expressive Rights Inside the Classroom

In *Tinker v. Des Moines School Independent Community District*,[265] the Court did confront the issue of first amendment rights in the classroom. There, students were suspended for wearing black armbands to protest the United States' military involvement in Vietnam. Signifi-

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at 957 (emphasis in original). Justice Brennan, joined by Justices Marshall, Powell and Stevens, dissented on the ground that the exclusive access provisions amounted to viewpoint discrimination that infringed the rival union's first amendment rights and failed to advance any substantial state interest. *Id.* at 969.

[259] 439 U.S. 419 (1979).

[260] *Id.* at 443-44. The Court indicated that, in determining whether private expression was protected, additional factors would be brought into the calculus so that when a government employee personally confronts an immediate supervisor, the employing agency's efficiency may be threatened by not only the content of the message, but also the time, manner, and place in which it is delivered. *Id.* at 415 n.4. *See generally* Schauer, *"Private Speech" and the "Private" Forum:* Givhan v. Western Line School District, 1979 SUP. CT. REV. 217.

[261] 429 U.S. 274 (1977).

[262] *Id.* at 282.

[263] *Id.* at 284.

[264] For a discussion of *Mt. Healthy*, see Gee, *Teacher Dismissal: A View from* Mount Healthy, 1980 B.Y.U. L. REV. 355.

[265] 393 U.S. 503 (1969).

cantly, the school had not banned all political symbols, but had only singled out those symbols of a particular viewpoint.[266] The Court used a balancing test to determine the extent of the students' first amendment rights in the school context. The Court stated that the expressive activity could not be prohibited unless it "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school."[267] The expression here could not be prohibited, because the school officials' banning of the armbands was not based on a disruption of school work or impairment of other students' rights, but only on "undifferentiated fear." In upholding the students' right to wear armbands under these facts, the Court noted that "[a]ny word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance."[268] The Court went on, however, to state that "our Constitution says that we must take this risk, and our history says that it is this sort of hazardous freedom — this kind of openness — that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."[269]

A moment's reflection reveals, however, that under the Court's analysis constitutional protection is extended only to that classroom speech which is ineffective and fails to stir up the controversy deemed so essential to the health of the republic.[270]

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[266] *Id.* at 510-11.

[267] *Id.* at 509 (quoting the standard used by the Fifth Circuit in Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[268] 393 U.S. at 508.

[269] *Id.* at 508-09 (citation omitted).

[270] *See, e.g.*, Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (nontenured teacher who refused to participate in daily pledge of allegiance in a passive and unobtrusive manner and who made no attempt to proselytize ordered reinstated on first amendment grounds); *accord* Plano v. Baker, 504 F.2d 595 (2d Cir. 1974) (probationary teacher allegedly discharged for assigning homework on subject of premarital sex not required to exhaust administrative remedies since courts must resolve issue of whether conduct is protected by first amendment); Hanover v. Northrup, 325 F. Supp. 170 (D. Conn. 1970) (teacher's refusal to participate in pledge of allegiance protected by first amendment since no disruption of school activities resulted); Maryland v. Lundquist, 262 Md. 534, 278 A.2d 263 (1971) (teachers and students cannot be required to stand, salute the flag and recite pledge of allegiance in unison, when posture of case raises no factual issue of potential or actual disruption); *see also* Birdwell v. Hazelwood School Dist., 352 F. Supp. 613 (E.D. Mo. 1972), *aff'd*, 491 F.2d 490 (8th Cir. 1974), in which the court upheld the dismissal of a teacher who had been fired for classroom speech in which he urged his students not to allow the presence of military recruits at the high school and, *inter alia*, to throw apples at them.

James v. Board of Education,[271] a "teacher's rights" case in which the Second Circuit relied on *Tinker* in determining that a school board could not dismiss a teacher who wore a black armband in class in symbolic protest against the Vietnam War without transgressing the first amendment,[272] reaffirms this point. The court noted that the board of education had "made no showing whatsoever at any stage of the proceeding that . . . James, by wearing a black armband, threatened to disrupt classroom activities or created any disruption in the school."[273] Nor did "the record demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[274]

The court did not require a finding of actual disruption; it was enough that the statements were "infused with the spirit of violent action." *Id.* at 621. *See also* Starsky v. Williams, 353 F. Supp. 900 (D. Ariz. 1972), *aff'd*, 512 F.2d 109 (9th Cir. 1975) (assistant professor's termination at Arizona State University violated his first and fourteenth amendment rights because, *inter alia*, the utterances in which he attacked the administration and called for basic change were so abstract that they could not be the basis of reprisals); *see also* Barker v. Hardway, 394 U.S. 905, 905 (1969) (Fortas, J., concurring in the denial of certiorari) ("The petitioners were suspended from college *not* for expressing their opinions on a matter of substance, but for violent and destructive interference with the rights of others" by engaging in aggressive and violent demonstration and not in peaceful, nondisruptive expression.); Blanton v. State Univ. of N.Y., 489 F.2d 377 (2d Cir. 1973); Rozman v. Elliot, 467 F.2d 1145 (8th Cir. 1972); Haynes v. Dallas County Junior College Dist., 386 F. Supp. 208 (N.D. Tex. 1974); Furumoto v. Lyman, 362 F. Supp. 1267 (N.D. Cal. 1973); Dougherty v. Walker, 349 F. Supp. 629 (D. Mo. 1972); Crossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968); People v. Arvanities, 17 Cal. App. 3d 1052, 95 Cal. Rptr. 493 (2d Dist. 1971).

In fairness, it should be noted that *Tinker* ushered in a whole new era of students' rights, a subject of extensive commentary. *See, e.g.*, Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969); Note, *Student Constitutional Rights on Public Campuses*, 58 VA. L. REV. 552 (1972). The scope of *Tinker* has been tested and vindicated in subsequent cases. *See, e.g.*, Papish v. Board of Curators, 410 U.S. 667 (1973) (student's first amendment rights violated by expulsion from state university for distributing an allegedly indecent newspaper); Healy v. James, 408 U.S. 169 (1972) (a college, when acting as an instrumentality of a state, may not restrict the rights of speech and association of a group of students, based on its finding the group's views abhorrent). *But cf.* Board of Curators v. Horowitz, 435 U.S. 78 (1978) (academic expulsion of a student resulting in dismissal during her final year of medical studies does not necessitate a hearing on procedural due process grounds). *See generally* Dessem, Board of Curators of the University of Missouri v. Horowitz: *Academic Versus Judicial Expertise*, 34 OHIO ST. L.J. 476 (1978).

[271] 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

[272] *Id.* at 571.

[273] *Id.* at 572.

[274] *Id.* (citing *Tinker*, 393 U.S. at 514).

Thus, only passive and unobtrusive speech which fails to excite controversy is protected under *Pickering.* Although *Pickering* involved out-of-class criticism of a school's administration, a decisive point was that Pickering's critical public statements had "no impact on the necessary operation of the schools." The Court also noted that the statements did not impair Pickering's classroom effectiveness or affect his fitness to teach. Presumably, "true" statements would be subjected to the same balancing.[275]

This is not to say that there must be disruption in order for expressive activity in the classroom to be curtailed. If in-class statements are so critical of the administration's policies and practice that a proper working relationship between administration and students is jeopardized, these discussions may be the basis for termination of the teacher's services.[276] And statements which call the teacher's competence into question may also be the basis of dismissal or nonrenewal.[277]

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[275] *See* note 264 *supra.*

[276] *See, e.g.*, Birdwell v. Hazelwood School Dist., 352 F. Supp. 613 (E.D. Mo. 1972) (no constitutional right to teach politics in algebra class); Nigosian v. Weiss, 343 F. Supp. 757 (E.D. Mich. 1971) (upholding probationary teacher's dismissal for discussing a teacher's strike without prior board approval).

[277] "The School district's concern with the educational qualifications of its teachers cannot under any reasoned analysis be described as impermissible . . . ." Harrah Indep. School Dist. v. Martin, 440 U.S. 194, 199 (1978); *see also* Duke v. North Texas State Univ., 469 F.2d 829 (5th Cir. 1973) (upholding dismissal of university teacher for making speeches, using profane language, and criticizing university administration, on grounds that university's interest in a competent faculty and public confidence in the institution outweighed teacher's interest as a citizen in commenting upon matters of public concern); Resetar v. Maryland State Bd. of Educ., 299 A.2d 225 (Md. App.), *cert. denied,* 444 U.S. 838 (1979) (upholding dismissal of public school teacher who called his students "jungle bunnies"). In-class statements are often distinguished from "matters of public concern." *See, e.g.*, Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), *cert. denied,* 411 U.S. 972 (1973) (nontenured, temporary substitute teacher's claim of a first amendment violation in his dismissal for overemphasizing sex in a health survey course, counselling excessive numbers of students rather than referring them to university professional counsellors, and belittling other staff members in discussions with students, held to be without merit). "His disputes . . . about course content and counselling were not matters of public concern." *Id.* at 931; *accord* Lindsey v. Board of Regents, 607 F.2d 672 (5th Cir. 1979) (distribution of questionnaire on broad range of issues of public concern to fellow faculty members protected under first amendment; erroneous public statements critical of ultimate employer neither impeded teacher's proper performance of his daily duties in the classroom nor interfered with regular operation of the schools generally); *see also* Hetrick v. Martin, 480 F.2d 705 (6th Cir.), *cert. denied,* 414 U.S. 1075 (1973), *discussed in* notes 338-41 and accompanying text *infra.*

The latest case on public employees' rights of free speech is Connick v. Myers,

C. Curriculum Restrictions and Professional Freedom

Questions of curriculum choices made by a local school board are not directly on point when the issue is a university professor's methodology or philosophy. However, the *Meyer*[278] and *Epperson*[279] cases provide insights into the question of whether the individual professor's or the collective faculty's rights will be protected. These cases indicate that a legislature cannot prohibit the teaching of certain subjects through the use of criminal sanctions. Justice Black's concurrence in *Epperson* expressed concern with the intimation in the majority opinion that " 'academic freedom' permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him."[280] He stressed that he was "not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed."[281]

Justice Black's fears of judicial intrusion into curricular decisions traditionally left in the hands of state and local authorities seemed unfounded until the 1982 *Island Trees* case.[282] The issue there was whether the first amendment imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries.[283] The case arose when a local board of education decided to remove nine books from elementary and secondary libraries and from use in the curriculum.[284]

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103 S. Ct. 1684 (1983) (first amendment does not prevent the discharge of state employee for circulating questionnaire concerning internal office affairs because subject was not a matter of public concern) (divided Court).

[278] 262 U.S. 390 (1923).

[279] 393 U.S. 97 (1968).

[280] *Id.* at 114 (Black, J., concurring).

[281] *Id.* at 113-14.

[282] 102 S. Ct. 2799 (1982).

[283] *Id.* at 2802.

[284] A number of students sought declaratory and injunctive relief in federal district court, alleging denial of their first amendment rights because the school board had "ordered the removal of the books from school libraries and proscribed their use in the curriculum because particular passages . . . offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value." *Id.* at 2804. The district court granted summary judgment in favor of the school board, because local school boards have "broad discretion to formulate educational policy," except for decisions sharply implicating basic constitutional values. Even though the removal "clearly was content-based," the court found no "sharp and direct infringement of any first amendment right." *Id.*

A three-judge panel of the Second Circuit reversed the district court's judgment and

Justice Brennan, writing for the plurality, reaffirmed the Court's recognition of the broad discretion of local school boards in the managing of school affairs, and the vital importance of public schools " 'in the preparation of individuals for participation as citizens' and as vehicles

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remanded the case for trial. Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404 (2d Cir. 1980). The Supreme Court granted certiorari and, in a fragmented decision which saw five Justices concur in the judgment, affirmed the court of appeals.

Justice Brennan announced the judgment of the court and wrote an opinion joined, in *toto*, by Justices Marshall and Stevens, and, in part, by Justice Blackmun. Justice Blackmun agreed with the plurality that school officials may not remove books from school libraries for the *purpose* of restricting access to the political ideas or social perspectives discussed in the books when that action is motivated simply by the officials' disapproval of the ideas involved. However, Justice Blackmun tried to avoid the implication of a "right to receive" ideas for fear that such a right might lead to an affirmative state obligation to provide students with information or ideas. *Id.* at 2813-14 (Blackmun, J., concurring). Justice Blackmun viewed the evidentiary (and constitutional) issue as whether the action was taken to "suppress ideas," albeit any number of ideas may be suppressed under his "impermissible political motivation," since he sought to narrow it by indicating that books may be rejected without judicial interference if they are irrelevant to the curriculum, less well-written than books chosen, contain offensive language, are psychologically or intellectually inappropriate for any group, or even because the ideas they advance are "manifestly inimical" to the public welfare. *Id.* at 2815 (citation omitted).

Justice White, concurring in the judgment, refused to discuss "the extent to which the First Amendment limits the discretion of the school board to remove books from the school library," *id.* at 2816 (White, J., concurring), on the ground that such a resolution of the ultimate issues was premature since summary judgment was precluded by a material issue of fact — the "reason or reasons underlying the school board's removal of the books." *Id.* His concurrence in the judgment, however, indicates agreement with the notion that the motivation for the removal is the key to its constitutional validity. Chief Justice Burger dissented, as did Justices Powell, Rehnquist and O'Connor. The Chief Justice could find support in neither the language of the first amendment nor the Court's first amendment jurisprudence for a " 'right' to have the government provide continuing access to certain books." *Id.* at 2819 (Burger, C.J., dissenting). He stressed that there is no previously recognized right to have the government serve as a conduit for information, but that even if there were, "schools in particular ought not to be made a slavish courier of the material of third parties." *Id.*

Justice Powell's separate dissent reiterated concern that the plurality's opinion rejected a basic concept of public education in this country: "that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools." *Id.* at 2822 (Powell, J., dissenting).

Justice Rehnquist, in dissent, stated that he could agree with the plurality that a Democratic school board could not order the removal of all books written by Republicans, but he would "save for another day" such an extreme example because the books in question had been removed due to their vulgarity and profanity. *Id.* at 2829 (Rehnquist, J., dissenting).

for 'inculcating fundamental values necessary to the maintenance of a democratic political system.' "[285] He also, however, reaffirmed that the board's decisions must comport with first amendment imperatives. The nature of students' first amendment rights in this context was examined and found to consist of a " 'right to receive information and ideas' . . . [that is] explicitly guaranteed by the Constitution . . . [as] an inherent corollary of the rights of free speech and press."[286] This "right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them."[287] Furthermore, and "[m]ore importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."[288]

After rejecting the board's claim of absolute discretion to remove books from its school libraries, Justice Brennan turned to the question "of the extent to which the First Amendment places limitations"[289] on that discretion. He concluded that while school boards "rightly possess significant discretion to determine the content of their school libraries . . . that discretion may not be exercised in a narrowly partisan or political manner."[290] In Justice Brennan's view the issue in the case was a factual one: Whether the board *intended* by its removal decision "to deny [students] access to ideas with which [the board] disagreed,

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[285] *Id.* at 2806 (citing Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)). He agreed with the school board, therefore, that a local school board must be allowed " 'to establish and apply their curriculum in such a way as to transmit community values,' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.' " *Id.* (citation omitted).

[286] *Id.* at 2808 (citations omitted). Professor Emerson has suggested that a "right to know," consisting of a "right to read, to listen, to see and to otherwise receive communications" and "the right to obtain information as a basis for transmitting ideas or facts to others," is an emerging constitutional right grounded in the first amendment freedom of expression. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1. Emerson's thesis that there is constitutional support for a right to know is disputed by O'Brien in *Reassessing the First Amendment and the Public Right to Know in Constitutional Adjudication*, 26 VILL. L. REV. 1 (1980). Emerson's argument that the Burger Court is divided on an issue that does not enjoy majority support is reaffirmed by *Pico*, in that the Supreme Court has failed to denominate a first amendment right to know and that there are dangers in judicial construction of an affirmative constitutional right to know. *See also* Note, *School Books, School Boards, and the Constitution*, 80 COLUM. L. REV. 1092 (1980). *See generally* Symposium: *The First Amendment and the Right to Know*, 1976 WASH. U.L.Q. 1.

[287] 102 S. Ct. at 2808 (emphasis in original).

[288] *Id.* (emphasis in original).

[289] *Id.* at 2809.

[290] *Id.* at 2810.

and if this intent was the decisive factor in [the board's] decision, then [the board has] exercised [its] discretion in violation of the Constitution."[291] In other words, the board's *motivation* was the decisive factor in determining whether the students' rights had been infringed upon. The core evil the Brennan opinion sought to prevent was removal based on a desire to "suppress ideas." Indeed, he noted that if the books were removed because of their pervasive vulgarity or because of questions about their "educational suitability" the removal would be permissible.[292]

Brennan sought to limit the reach of his opinion by noting that the decision in no way affected "the discretion of a local school board to choose books to *add* to the libraries of their schools."[293] The implication is plain. A school board can suppress books for ideological and political reasons at will so long as the judgment is made at the purchasing stage but once a book is on the shelf it acquires a "constitutional tenure," protected against removal for improper reasons.

What, if anything, does *Island Trees* say about the university classroom? It is difficult to answer, because the decision is so inconclusive, because the governance of state universities is multi-layered, with nonelected decisionmakers at every level,[294] and because the Court has never *directly* addressed the issue of the function of a state-sponsored university in our constitutional democracy. Most important, consideration of institutional autonomy as well as competence and administrative discretion serve to limit judicial intrusion into the management of the university.

D. University Administrative Discretion and Institutional Autonomy

There is no federal constitutional requirement that state universities exist at all. Since they do exist, however, the question becomes who is to determine the mission of the enterprise — the judiciary, or the educational institution with the aid of the legislature. Clearly the legislature cannot work toward an impermissible purpose, nor can the institu-

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[291] *Id.*

[292] *Id.*

[293] *Id.* (emphasis in original).

[294] Yurko, note 193 *supra*, at 474. Appointment, promotion, and tenure procedures vary greatly from one state university system to another. *Compare* Franklin v. Atkins, 562 F.2d 1188 (10th Cir. 1977) (board of regents had the ultimate authority to reject the appointment in issue) *with* Ollman v. Toll, 518 F. Supp. 1196 (D. Md. 1981) (final decisionmaker was university president). The distinction is not without significance, because the plaintiff has to prove the motives of the ultimate decisionmaker.

tion. "Stifling dissent" through budget cuts absent a clear and present danger of disorder, for example, has a reek of unconstitutionality, but such illegal purposes are not articulated often enough to give the courts an opportunity to address the issue of a university's failure to provide opportunities to study controversial and unpopular topics. A decision to phase out a program or not to create it in the first place can always be couched in terms of financial exigency and institutional needs, even though the effect is to limit discourse and keep certain ideas from gaining academic respectability.

Even if one assumes that a university's function is to develop a searching mental capability in its students, does it follow that a university's administration or, more likely, its faculty operating collectively as a department, cannot make content-based decisions about curriculum, textbooks, teaching philosophy and course content? For example, should a university be able to eliminate the teaching of Greek and Latin from its offerings — a decision which surely and traditionally contracts the spectrum of knowledge available to university students — without the decisions being subject to judicial review? If there is a right to receive ideas, a student may complain that her or his opportunities to study humanities are being curtailed while opportunities to study accounting or computer programming flourish. And what of the professor whose particular speciality becomes worthless in the academic marketplace? Is there a "right to send ideas" that includes a state sponsored classroom? Do certain subject matters acquire "constitutional tenure"? The answer seems to be "no," desirable though it may be to keep the flame of the humanities aglow. There are those who believe that liberal arts education transforms one's view of the universe in a way that is both wonderful and important. It does not follow, however, that the Constitution commends or commands the availability of a state-sponsored education in liberal arts. The constitutional truth is that university administrators have virtually unfettered discretion to make curricular decisions, hire faculty members on the basis of philosophical bent, fail to continue the employment of those hired, eliminate courses or indeed whole departments, sometimes on a statewide basis, and evaluate classroom performance — all on the basis of content-based criteria — and all in the name of academic freedom. Were some fool of an administrator to announce publically for the record that a particular decision was made to cast a pall of orthodoxy over the intellectual life of the university, or were a state legislature to prohibit the teaching of

certain subject matter, a constitutional violation might ensue.[295] In the real world, however, state colleges and universities, free in theory from direct political control — although the most important educational decisions are undoubtedly made in the budget office of any state government — are free to exercise virtually unfettered administrative discretion.

There *is* one instance in which a federal court hobbled administrative discretion by using a university's disdain for women's studies as evidence of a discriminatory attitude toward women. In a title VII academic employment case, *Lynn v. Regents of the University of California*,[296] the district court concluded that the university's criticism of the plaintiff's work reflected its belief that women's studies was not a worthy endeavor, but this "lack of enthusiasm . . . was not evidence of discrimination because the University would have had the same objection if a man concentrated his studies on women's issues."[297] The Ninth Circuit reversed and remanded, on the ground that "[a] disdain for women's issues, and a diminished opinion of those who concentrate on those issues, is evidence of a discriminatory attitude towards women."[298] Because an appeal is pending on the due process issue of the confidentiality of faculty peer reviews,[299] it is not known whether the university's

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[295] *See* notes 198-246 and accompanying text *supra*. Justice Rehnquist has found a clear implication "from the Court's opinion [in *Healy v. James*] that the constitutional limitations on the government's acting as administrator of a college differ from the limitations on the government's acting as sovereign to enforce its criminal laws." Healy v. James, 408 U.S. 169, 201 (1972) (Rehnquist, J., concurring). Arguably this reasoning applies to decisions on faculty hiring, at least as to academic issues. A firestorm of publicity and controversy surrounding a faculty appointment may lead to a claim that the appointment was based on the decisionmaker's fear of the legislature's visiting reprisals upon the university's budget. In Ollman v. Toll, 518 F. Supp. 1196 (D. Md. 1981), the plaintiff's Marxist political beliefs made the question of his appointment as departmental chairman at the University of Maryland a cause celebre. "The Governor, legislators, alumni, members of the faculty, members of the Board of Regents and private citizens raised questions concerning the propriety of the proposed appointment." *Id.* at 1200. The plaintiff alleged, in vain, that the decisionmakers were improperly influenced by the attacks on his Marxism.

[296] 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 53 (1982). *See* notes 159-97 and accompanying text *supra* (discussing due process issues involved in confidentiality of faculty peer review).

[297] 656 F.2d at 1343.

[298] *Id.* (footnote omitted). Since the case was remanded on the issue of whether Lynn should have access to the contents of her tenure files, the Ninth Circuit did not have to decide whether the university's evidence that its denials of merit raises and tenure were based on poor scholarship was a cover for discrimination.

[299] *Id.* at 1346-47 n.13. As this Article went to press, the Supreme Court denied

legitimate nondiscriminatory reason was a pretext or discriminatory in its application.[300] *Lynn* suggests a principle that scholarship in women's studies, ethnic studies, or minority studies cannot be the sole reason to deny merit raises, promotion, or tenure because title VII protects against discrimination based on race, color, sex, religion or national origin. In other words, title VII carves out an exception to the principle that a university can determine for itself what is a worthy topic for scholarship — even at a private university. This principle does not protect those whose unpopular or unrespected research subject matter is not covered by title VII. Nor is it clear that one can establish discrimination based on sex if her or his research and writings are on black history. It may be that one must be a member of the protected group engaged in scholarship about that particular group before an inference of discrimination can be drawn.

Despite *Lynn*, an educational institution does not have a constitutional obligation to provide opportunities for research on and study of any particular subject, and can constitutionally discontinue programs with impunity so long as it does not do so for the express purpose of discriminating against anyone or promoting intellectual orthodoxy. There are educational and moral imperatives demanding that a curriculum not exclude study of vast segments of the human race. A curriculum which reflects ethnocentricity, racism, sexism and class bias is deplorable, but the first amendment does not necessarily give the judiciary power to correct a situation which results either from inaction or from the pursuit of a legitimate purpose.

Although there is little precedent, federal court cases arising in the classroom context offer severely circumscribed protection for the expressive rights of university professors. There are two reasons for this result. One is judicial balancing of institutional interests against the individual faculty member's freedom of expression. The other concern, always present, is the question of relative institutional competence. The higher the level of education involved, the more reluctant the judiciary is to interfere with administrative or quasi-administrative discretion on academic matters.

Respect for "university autonomy," which is not the same as the collective and societal interests characterized as "academic freedom" under the first amendment, has been a hallmark of court decisions involving academic employment.[301] Although this deference to institutional deci-

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certiorari. 103 S. Ct. 53 (1983).

[300] *Id.*

[301] Yurko, note 193 *supra*, at 490-99.

sionmakers has been criticized in recent years, and appears to be waning in title VII litigation,[302] it is a doctrine that is dismissed less easily in faculty academic speech and writing cases.

The judicial balancing of institutional interests against a faculty member's freedom of expression is illustrated by *Goldwasser v. Brown*,[303] in which the Second Circuit indicated that "the free speech interest of the teacher is to have his say on any and every thing about which he has feelings, provided there is no significant likelihood of impairment of his efficiency."[304] In that case a teacher employed by the federal government to teach foreign military officers enrolled in a school at an American military installation was fired for spending classroom time lecturing his students on American foreign policy, anti-semitism, and race prejudice. The Court noted that Goldwasser had not been hired to teach "current events, political science, sociology, or international relations"[305] and that his observations on Vietnam appeared to "have, at best, minimal relevance to the immediate classroom objectives."[306] Goldwasser was discharged essentially because he went beyond his prescribed classroom duty and discussed matters extrinsic to his academic duties. Thus, assigned subject-matter creates limits on expressive rights which can be avoided by only minimal and ineffective irrelevancies. Any comments that excite discussion or do not relate directly to the assigned subject matter can be the basis of sanctions since they impair efficiency.

Cooper v. Ross,[307] a recent federal court case in which a professor's first amendment claim was partially vindicated, also illustrates how limited the range of protected expression is, as well as how reluctant the judiciary is to decide the question of who determines the ideological or philosophical perspective from which a course should be taught — the individual faculty member, or the faculty acting collectively. *Cooper,* one of the few cases in which speech in the university classroom was directly in issue, is worth discussing in detail because of the difficult questions involved. Cooper, an assistant professor at a state university, sued in federal court alleging that he was not reappointed to

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[302] *Id.*

[303] 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

[304] *Id.* at 1176.

[305] *Id.* at 1177. Because Goldwasser's students were both "foreign" and military officers, complicating questions of embarrassment of the federal government existed which are not present in the usual conflict between teacher and state or local authorities.

[306] *Id.*

[307] 472 F. Supp. 802 (E.D. Ark. 1979).

the faculty in retaliation for exercise of his speech and association rights.[308] His discharge followed certain activities involving both classroom speech and extramural speech and association.[309] In his third year of teaching at the university, Cooper had become a member of the Progressive Labor Party (PLP). He also informed his classes in World Civilization and American Civilization that he was a Communist and a member of the PLP and that he taught his courses from a Marxist point of view. These remarks, picked up by an underground student newspaper, occasioned a great deal of public controversy, culminating in twenty-three state legislators, as individuals, filing a suit in state court to enjoin Cooper's further employment at the university, pursuant to an Arkansas statute which barred members of any Nazi, Facist, or communist society from state or local employment.[310] The university joined with Cooper in contesting the suit on the ground that the Arkansas statutes were unconstitutional, a conclusion eventually reached by the Arkansas Supreme Court.[311]

The most interesting free speech issue arose out of the meetings Cooper had with the university Chancellor. They first discussed the various statements Cooper had made inside and outside the classroom. At a second meeting, the Chancellor asked Cooper whether, if instructed by the university, Cooper would teach his courses from an objective point of view and refrain from stating his own beliefs to his classes.[312] Cooper responded that "he felt it would be intellectually dishonest if he did not state his own beliefs, that he could not be entirely objective toward other points of view, and that if he were ordered not to teach from a Marxist point of view he would feel compelled to resist the order."[313] Shortly after the second meeting, Cooper was notified that he would not be reappointed. The university furnished Cooper with a list of reasons, several of which were based on alleged complaints of students.[314]

The trial court found that several of the reasons which referred to

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[308] *Id.* at 804.

[309] *Id.* at 804-05. Cooper also participated in public fora sponsored by Students for Action and the Progressive Labor Party regarding another faculty member's use of *The Unheavenly City* by Edward Banfield as a required textbook. Cooper characterized the book as "racist" and "unscientific," and argued against its use as required course material and in favor of its being banned from the university campus. *Id.* at 805.

[310] *Id.* at 805.

[311] *Id.* at 808.

[312] *Id.* at 805.

[313] *Id.*

[314] *Id.* at 805-07.

student complaints could not be substantiated, and concluded that the decision not to renew Cooper's appointment was motivated by his communist and PLP memberships and his public statements of that fact both in and out of the classroom.[315] Regarding the scope of course coverage and Cooper's alleged deviation from departmental requirements, the court found that there were no departmental standards or policies requiring that World Civilization, or any other course, be taught from an objective or any specific point of view.[316] Furthermore, as a factual matter, Cooper had substantially covered the subject matter of his courses and had not used his classes to proselytize students for membership in the PLP.[317]

The trial court held that Cooper's membership in the PLP was constitutionally protected, as was his right to state publicly that he was a Communist and a member of the PLP.[318] The court also concluded that Cooper's announcement of his personal philosophical and political beliefs was constitutionally protected under *Tinker*, since there was no substantial or material disruption in the classroom following his remarks.[319] The court noted, however, that it intimated "no view as to whether the same expression by a teacher in a public grade school or high school classroom would also be constitutionally protected."[320] The court emphasized that its holding was "strictly limited to a teacher's right simply to inform his students of his views and does not imply that a teacher has the right to proselytize students or to devote so much class time to such matters that his coverage of the prescribed subject matter is impaired."[321]

The interesting and difficult issue arose from the university's contention that "along with its right to determine the curriculum and subject matter to be taught, it is the University's prerogative to determine that material should be presented from an objective point of view or from any other particular point of view."[322] Thus, the ultimate issue was whether Cooper's decision to teach his course from a Marxist point of view was constitutionally protected. The trial court recognized that the issue "involved a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university ad-

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[315] *Id.* at 814.
[316] *Id.* at 813.
[317] *Id.*
[318] *Id.* at 814.
[319] *Id.* at 810.
[320] *Id.* at 811 n.5.
[321] *Id.*
[322] *Id.* at 812.

ministration, and the academic freedom of the university to be free of government, including judicial, interference."[323] It did not, however, have to reach "this sensitive and difficult issue," since Cooper's teaching from a Marxist perspective was not one of the reasons given to Cooper for his nonreappointment.[324] The court concluded, therefore, that it was an afterthought rather than a motivating factor in the discharge.[325] In dictum, the court discussed those cases in which the courts have protected a teacher's choice of teaching methodology. The cases make plain, however, that no absolute right exists to choose teaching materials and methods; rather, the administration's failure to formulate standards constituted the constitutional violation which was, in essence, a procedural flaw.[326] Query, whether a university may constitutionally prohibit or require teaching from a Marxist point of view if fair warning of the prohibition or requirement is given? The *Cooper* court did not have to decide that question since it determined that the nonrenewal was not motivated by his teaching methods. The answer, of course, depends on the extent to which academic freedom is viewed as an institutional interest rather than any matter of individual right, and whether students' interests are to be factored into the decision. It seems clear that the political branches of government, at least when external threats to national security are perceived to be within acceptable limits, cannot prescribe or proscribe teaching methodology or curricular choices.[327]

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[323] *Id.* at 813.

[324] *Id.*

[325] *Id.*

[326] *Id.* at 813-14. *See, e.g.*, Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969) (school committee's decision to suspend high school teacher for assigning an article concerning "dissent, protest, radicalism and revolt" and repeating "a vulgar term for an incestuous son" held arbitrary); Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass) (teacher dismissal for unbecoming conduct for using the word "fuck" in discussion on "taboo" words constituted a denial of due process), *aff'd on due process grounds*, 448 F.2d 1242 (1st Cir. 1971); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) (teachers could not be dismissed for assignment of a short story by Kurt Vonnegut, Jr., to junior high classes). These cases are discussed in depth in Goldstein, note 198 *supra*, at 1317-49; Miller, note 21 *supra*, at 860-79; Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032, 1036-50 (1971); Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479, 1495-1503 (1972). For a critical examination of judicial intervention in school curricula and libraries, see Diamond, *The First Amendment and the Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981).

[327] *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (Frankfurter, J., concurring).

There also exists very broad language used in other contexts by the Supreme Court which seems relevant to the question of who determines the perspective from which courses are taught. In *Wooley v. Maynard*,[328] the Court reaffirmed the right of citizens to freedom from compelled expression of ideas with which they disagree. Whether the recognition in *Wooley* that the state cannot force an individual to be an instrument of an ideological, religious, or moral point of view with which she or he disagrees means that teachers cannot be compelled to teach from a particular view, even one of "neutrality," is an open question. There is a "freedom of intellectual conscience" issue which cannot be lightly dismissed.

Whether a state university acting on its own can impose overt ideological restraints on its faculty also may be an open question. As a practical matter, however, there is so much discretion in hiring practices that a department can easily fill its ranks with those of a particular ideological or philosophical bent. The state university that wants to have a history department with a strongly Marxist orientation probably is not barred from such a result by the first amendment in any meaningful way, if at all, given the allocation of decisionmaking authority. That is not to say that the issue of whether institutional autonomy is entitled to greater protection than the freedom of individual faculty members is easily resolved. It can be argued that a university's contribution to the robust exchange of ideas consists in seeking homogeneity within the ranks of its faculty.[329]

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[328] 430 U.S. 705 (1977). *Wooley* is the latest in a series of cases which have held that belief and protestations of belief cannot be compelled by the government. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977) (compelled support of union's political activity unrelated to collective bargaining denied first amendment rights); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (pupil who for reasons of conscience refused to salute the American flag and recite the pledge of allegiance could not be suspended from school without violating expressive rights). In *Barnette* the Court made it plain that its holding went beyond state proscription of religious orthodoxy. The Court spoke of the sphere of intellect and spirit which it is the purpose of the first amendment to reserve from all official control. *Id.* at 642; *accord* Torcaso v. Watkins, 367 U.S. 488 (1961) (state requirement that person take an oath which required a belief in God to qualify for public employment violates religious clauses); Cole v. Richardson, 405 U.S. 676 (1972) (state employees' required oath to uphold and defend state and Federal Constitutions a permissible "affirmative oath"; that portion which required opposition to attempted overthrow of government read as a statutory restatement of the support oath); *see also* Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. REV. 995 (1982).

[329] It has been suggested, for example, that "[a] university . . . which staffed its philosophy department solely with neo-Thomists might thereby diminish the 'robustness' of internal debate, but gathering scholars of like mind could well enhance their

If this is a valid conclusion, the issue can be rephrased as whether a department or university's academic reputation is of greater value than a student's exposure to a wide variety of viewpoints, or to even more than one viewpoint. Undoubtedly, the institution has an interest in enhancing its reputation, which benefits its students as well as providing psychic income, by enhancing the research funds available to the faculty and administration.[330] In addition, the judiciary is probably correct in its own assessment of a lack of expertise in academic matters, (a lack of expertise shared by faculty members when issues outside of their specialties arise) but that does not necessarily end the discussion. The question remains whether the judiciary has a constitutional obligation to promote diversity in a faculty which has determined for itself that it is content with a homogeneity of views. If this question is viewed from the individual faculty member's and student's perspective and that of society, rather than just that of the institution or department, the answer is yes, not as a matter of educational policy but as a matter of freedom from compelled speech. A state university should not be able to set up overt ideological barriers to teaching methodology so long as curricular coverage is adequate. The practicalities are such, however, that recognizing a right of professors to be free from ideological coercion would of necessity be very limited. Most departmental decisions are beyond the reach of the first amendment as is demonstrated by the self-evident answers to the following questions: Can a department designate required textbooks or does the Constitution guarantee professorial discretion in the choice of textbooks? Can the individual professor determine course coverage or must she or he comply with departmental dictates? Can the university judge the "quality" of a professor's publications with constitutional impunity? Can a professor use the classroom to "proselytize" for favored causes unrelated to the subject matter? Can other faculty members judge the classroom performance and assess the academic competence of a professor without running afoul of the first amendment?

In addition, the standards of qualification for academic employment are so subjective and vague that not only are they susceptible to manip-

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overall effectiveness, making debate in the larger society more vigorous than it otherwise might have been." Note, *University Hiring*, note 193 *supra*, at 885 (footnote omitted).

[330] For a discussion of the extent to which reputation of academic affiliation determines whether a scholar's papers will be published in scholarly journals, see Ceci & Peters, *A Naturalistic Study of Peer Review in Psychology: The Fate of Published Articles Resubmitted*, in BEHAVIORAL AND BRAIN SCIENCES 187 (1982).

ulation to perpetrate covert unlawful discrimination, but they also are susceptible to use in covert retaliation for expressive activity.[331] The standards are usually as imprecise as "teaching ability," "publications and scholarly activity," "quality of mind," "intellectual force," "scholarship," and "teaching effectiveness, and contributions to departmental objectives and those of the whole University."[332] When expressive issues are involved, however, there is a difficulty not present in the discrimination cases. Whereas sex, race or religion should never be a basis to deny academic employment in the absence of a benign purpose, utterances are almost always relevant to a professor's worth.

The Supreme Court has on occasion stated that the content of speech is beyond the reach of the government, "that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[333] The Court has even gone so far as to suggest that there is " 'equality of status in the field of ideas' "[334] and that the "government must afford all points of view an equal opportunity to be heard."[335] These sweeping statements are not consistent with the whole of the Court's first amendment jurisprudence and are nonsense in an academic setting. The idea that equality is a core value of the first amendment is problematic at best,[336] but when notions of equal protection for ideas are extended to the classroom, the principle breaks down completely. Someone must choose between competing demands for space in the curriculum and time in the academic classroom. So long as

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[331] M. EDWARDS & V. NORDIN, HIGHER EDUCATION AND THE LAW 605 (1979).

[332] EEOC v. Tufts Inst. of Higher Learning, 421 F. Supp. 152, 160 (D. Mass. 1975).

[333] Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (citations omitted). Drawing upon *Mosley's* language, Karst argues that "equality deserves recognition as part of the central meaning of the First Amendment." Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1973). For other commentary suggesting that the degree of judicial review is a function of whether a restriction is content-based, *see* L. TRIBE, note 34 *supra*, §§ 12-2, -7, -20, at 580-84, 598-601, 682-88; Ely, *Flag Desecration: A Case Study in the Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Stone, *Restrictions on Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). For the suggestion that all governmental regulation of expression be subjected to a unifying "compelling state interest" analysis, see Redlish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

[334] Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (quoting A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

[335] *Mosley*, 408 U.S. at 96.

[336] For the full measure of the scholarly debate on this issue, see articles cited in note 333 *supra*.

the decisionmaker is not a political arm of the government, the institutional decisionmaker should be free to decide academic matters without judicial interference.

At the heart of this difficulty lies a paradox. Speech and writing are the very essence of an academic career — a fact which argues for procedural protection of academicians' expressive interests, yet militates against any notion that the contents are beyond institutional inquiry. The question of which institution has the authority to scrutinize, criticize, and "penalize" the written or oral expressions of faculty members on academic subjects has one answer: that authority lies solely within the educational institution, not the legislature, judiciary, or even executive branches of government (at least that portion of the executive branch not directly entrusted with administering the state's educational institutions).[337] Evidently, the judiciary has not and will not side with

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[337] *See* Healy v. James, 408 U.S. 169, 201 (1972) (Rehnquist, J., concurring) (government's acting as college administrator differs from its sovereign capacity); *see also* notes 205-46 and accompanying text *supra*.

Yurko suggests a similar concern in the title VII context when he argues for recognition that American colleges and universities (including private schools) function as "intermediate" organizations, that is, those formed under the sanction of the government and delegated a measure of governmental power to achieve certain goals. Yurko seeks to provide a theoretical orientation so that courts can identify the fundamental goals of academic institutions and better understand the organizational dynamics to achieve those goals. Yurko, note 193 *supra*, at 506-41.

Consideration of the following recent statement of Justice Brennan illuminates the difficulty inherent in equating those who must determine the competence of faculty members with the government acting in its capacity as sovereign:

> [The Court] has never held that government may allow discussion of a subject and then discriminate among viewpoints on that particular topic, even if the government for certain reasons may entirely exclude discussion of the subject from the forum. In this context, the greater power does not include the lesser because for First Amendment purposes exercise of the lesser power is more threatening to core values. Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of free speech.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 964 (1983) (Brennan, J., dissenting)

There is the related problem of the ramifications of equating teachers' speech, especially at the university level, with government speech. Yudof has addressed the dual-role of "government" speech in (i) contributing to the development of a democratic consensus through its power to inform and lead; and (ii) threatening the process of democratic consent by destroying the citizenry's independence of judgment. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979). "Government" speech is not specifically defined, but seems to include the speech of all government officials and employees of

individual faculty members in disputes of this nature. If the issue is the protection to be accorded a truly provocative classroom utterance, there is little reason to expect the faculty member to prevail. And there is even less reason to believe the judiciary will review scholarly writing for evidence of first amendment violations.

In sum, if speech or writing are on "academic subjects," their contents are subject to institutional review, free of judicial oversight. If classroom utterances are on nonacademic or unassigned subjects, they can be penalized because the professor is not doing her or his assigned task.

In *Hetrick v. Martin*,[338] the Sixth Circuit squarely confronted the issue of whether the first amendment protects teaching methodology at the college level. Hetrick, an assistant professor of English at Eastern Kentucky University, had her contract terminated because her teaching philosophy was not acceptable to the school. She placed more responsibility on and gave more freedom to her students than the university deemed appropriate to its institutional purpose of educating students from somewhat restricted backgrounds. The Sixth Circuit affirmed the district court's holding that the first amendment did not protect a teacher against discharge for "pedagogical attitudes" at variance with those of the administration, and noted that academic freedom "does not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors . . . just because her methods and philosophy are considered acceptable somewhere within the teaching profession."[339] The court feared that a contrary holding would

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government entities such as prisons, hospitals, schools, and military installations. For a discussion of government speech in the campus newspaper context, see Comment, *Student Editorial Discretion, the First Amendment, and Public Access to the Campus Press*, 16 U.C. DAVIS L. REV. 1089 (1983) (*infra* this volume). Yudof argues that teachers are entitled to a special autonomy not shared by other governmental employees, Yudof, *When Government Speaks*, *supra* at 876, particularly when school attendance is compulsory, in order to diminish "the power of government to work its will through communication." *Id.* at 877. Shiffrin argues, however, that "[d]ivining precise methods of adequately treating the problems of academic freedom at the grammar school level is probably not possible. We are probably best advised to tolerate more ambiguity than we would like." Shiffrin, *Government Speech*, 27 UCLA L. REV. 555, 653 (1980); *see also id.* at 647-53 (discussing educational speech); Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979) (proposing that the first amendment should be interpreted to include an implied prohibition of governmental advocacy).

[338] 480 F.2d 705 (6th Cir.), *cert. denied*, 414 U.S. 1075 (1973); *accord* Clark v. Holmes, 474 F.2d 928 (7th Cir. 1973).

[339] *Hetrick*, 480 F.2d at 709.

"substitute the First Amendment for tenure,"[340] and would convert "the vague, inclusive term 'teaching methods' into a specific, protected form of speech that cannot be considered by a school administration in determining whether a nontenured teacher should be renewed."[341] The case again is one of relative institutional competence, in which the court refused to weigh the merits of Hetrick's educational philosophy.

Finally, a recent Supreme Court decision involving access by speakers to a state university's facilities, rather than classroom speech issues, deserves mention since it added support to the concept that academic freedom is an institutional interest, even though the decision undercuts institutional autonomy to some extent. *Widmar v. Vincent*[342] presented the question of whether a state university which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion. The university had forbidden the use of its building or grounds by such groups in its belief that the establishment clause mandated the prohibition to maintain strict separation between church and state.[343] The Supreme Court, however, held that the regulations violated the free exercise and free speech clauses of the first amendment.[344] The majority viewed the regulation as content-based discrimination against religious speech which could not stand since the university had created a forum for use by student groups and could not offer a "compelling" justification for its prohibition.[345]

The majority opinion affirmed that the Court does not "question the right of the University to make academic judgments as to how to allocate scarce resources" and "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."[346] The Court also affirmed "the continuing validity of cases that recognize a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an

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[340] *Id.*

[341] *Id.*

[342] 454 U.S. 263 (1981).

[343] *Id.* at 265. This issue differs, of course, from the unresolved issue of ideological viewpoint in Cooper v. Ross, *discussed in* notes 307-27 and accompanying text *supra.*

[344] 454 U.S. at 267.

[345] *Id.* at 276.

[346] *Id.* (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

education."[347]

Concurring only in the judgment, Justice Stevens expressed his concern that "the use of the terms 'compelling state interest' and 'public forum' to analyze the question presented . . . may needlessly undermine the academic freedom of public universities."[348] He noted that although "most major colleges and universities are operated by public authority . . . their facilities are not open to the public in the same way the streets and parks are."[349] The difference, of course, is that "[u]niversity facilities — private or public — are maintained primarily for the benefit of the student body and the faculty."[350] Justice Stevens then formulated his concept of the "academic freedom" endangered by the majority's approach. It is evident that this freedom is that of the institution and not the faculty member. "In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials."[351] These decisions include such content-based determinations as selection of library books, hiring professors "on the basis of their academic philosophies," selecting courses for the curriculum, rewarding "scholars for what they have written," and encouraging students to participate in extracurricular activities.[352] It is not clear whether Justice Stevens would include an external body such as a state board of regents in the term "university manager."

What is clear is that Justice Stevens views "academic freedom" as adhering to the institution rather than the individual and as permitting, possibly mandating, judicial deference to content-based decisionmaking. In other words, rather than creating an enclave in which expressive activity is protected against any scrutiny or criticism, the very foundation of academic freedom is the freedom of the institution to make content-based judgments about the teaching and writing activities of its faculty.

The Court's tilt in the direction of recognition of a right of access is not surprising. An idea that consistently informs its educational jurisprudence is that students should be exposed to a broad spectrum of views, at least at the university level. The Court has not given much guidance as to how a university is to allocate scarce resources except to

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[347] *Id.* at 277 (citation omitted).

[348] *Id.* at 277-78 (Stevens, J., concurring).

[349] *Id.* at 278.

[350] *Id.*

[351] *Id.*

[352] *Id.*

indicate that the decision must be content-neutral. The opposing view, of course, is that the university should not have to provide a forum on a first-come first-served basis regardless of the educational merits of the presentation. The Court's position on the right of access is inconsistent with the deference it has displayed toward the institutional autonomy of colleges and universities. However, it conforms to the notion covertly expressed by lower federal courts that while the worth of university classroom materials is beyond the competence of the judiciary, federal judges are competent to override educational authorities at lower levels or to pick and choose between competing educational methods.[353]

CONCLUSION

There has been a long historical debate over the "core" values protected by the first amendment. This debate continues, but whatever those values are, the university would seem to be a particularly apt forum for their promotion. Whether the first amendment exists to promote a "marketplace of ideas,"[354] to aid in the development of personal autonomy,[355] to promote politically astute and responsible citizens,[356] or as simply a desirable end in itself,[357] the university in the minds of

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[353] Similarly, the Supreme Court as well as lower federal courts operates on the unarticulated premise that the allocation of use of a college auditorium for outside speakers does not involve judgments requiring academic expertise. For example, the courts have consistently invalidated attempts to bar controversial speakers from campus. *See, e.g.*, Pickings v. Bruce, 430 F.2d 595 (8th Cir. 1970) (court noted it had been unable to find a single case decided in the 1960s in which a speaker ban had been upheld by a federal court).

[354] *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Support for the "marketplace" theory can be derived from both J. MILTON, *Areopagitica — A Speech for the Liberty of Unlicensed Printing to the Parliament of England (1644)*, in THE WORKS OF MILTON 293 (1931), and J. MILL, *On Liberty*, in THREE ESSAYS (1975).

[355] *See, e.g.*, J. MILL, *Considerations on Representative Governments*, in THREE ESSAYS (1975).

[356] *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *see also* A. MEIKELJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT (1948).

[357] *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . valued liberty both as an end and as a means."); *see also* Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 65 (1974); Scanlon, *A Theory of Free Expression*, 1 PHIL. & PUB. AFF. 204 (1972); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) ("The constitutional guarantee of free speech ulti-

many exists to promote all of the above. There are powerful countervailing doctrinal developments, however, which reduce the university's function as a promoter and protector of free speech values in the classroom to little more than constitutional myth, even if a university is within the reach of the first amendment. The most powerful of all is the doctrine of relative institutional competence. The higher the level of education involved, the more reluctant the judiciary is to interfere with administrative discretion in academic matters. Interference from the political branches of government will not be brooked, but the fact remains that a nontenured professor's academic career lives and dies by the content-based decisions of other faculty members, students and administrators.

The extravagant language of the Supreme Court on academic liberty has undoubtedly been sincere and well-meant, but it has created expectations of meaningful individual classroom liberty that cannot be met under either the concrete reality of its jurisprudence or the practicalities of university governance and autonomy. Rather than enjoying hyperprotected status under the first amendment, university classroom speech can be sharply curtailed. That there is so much intellectual freedom and diversity in our colleges and universities reflects dedication to principles of individual intellectual liberty that are not, in the final analysis, a matter of constitutional right, but of institutional judgments that in freedom lies strength.

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mately serves only one true value . . . 'individual self-realization.' "). Some commentators recognize all these values as underlying the first amendment's protection of freedom of expression. *See, e.g.*, T. EMERSON, note 3 *supra*.