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ARTICLES

THE LEGAL NATURE OF ACADEMIC FREEDOM IN UNITED STATES COLLEGES AND UNIVERSITIES

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I. INTRODUCTION

The courts serve as the ultimate guardians of the free expression of ideas in colleges and universities throughout the United States. While the Constitution does not enumerate any specific right of academic freedom, the Supreme Court of the United States has employed the first and fourteenth amendments to help ensure that academic institutions can continue to be forums for the unfettered exchange of ideas.[1] State constitutions and statutes also help determine the contours of academic freedom.[2]

Application of a concept as noble as academic freedom is bound to provoke debate since it protects the liberty to pursue and teach ideas freely although these ideas may be contrary to popular opinion. The exercise of academic freedom can be protected by an aca-

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1. *See, e.g.*, Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978); Brandenburg v. Ohio, 395 U.S. 444 (1969); Sweezy v. New Hampshire, 354 U.S. 234 (1957); *see also infra* notes 116-24, 133-40, 142 and accompanying text.

2. *See, e.g.*, McKillop v. Regents of the Univ. of California, 386 F. Supp. 1270 (N.D. Cal. 1975) (applying California law and denying access to tenure review materials sought by plaintiff in sex discrimination case); Kahn v. Superior Court (Davies), 188 Cal. App. 3d 752, 233 Cal. Rptr. 662 (1987) (finding California constitutional privacy right allowed nondisclosure of faculty committee discussions leading up to decision to reject candidate for a history department chair); *see also* Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982).

demic institution as well as by government. The level of protection afforded by a particular college or university is influenced by institutional goals and by a desire for orderly administration. Both long-range planning and day-to-day operations are, in turn, influenced by external opinions, including those of alumni, benefactors, and the public at large. Consequently, tension naturally occurs when a professor freely expresses beliefs that are not shared by others. An expression of unpopular views could adversely effect an academic's career advancement.

The creditability of any public or private institution should depend upon its ability to survive as a marketplace of ideas, even when some of the values espoused appear to be patently absurd or eons ahead of their time. The law will not judge the absurdity of an idea in protecting free speech.[3] A major criterion in determining relative rank in academia should be the ability of a college or university to provide and monitor a forum for idea dissemination successfully.

Ideally, a post-secondary educational institution should provide an environment for the intelligent exchange of thought without the aid of courts. However, the Supreme Court of the United States and other courts have found it necessary to explore academic freedom in such disparate factual situations as controversial lectures that have favored Marxist economic philosophy[4] and tenure decisions in which a university sought anonymity for peer evaluators.[5]

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3. Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957). "History has amply proved the virtue of political activity by minority, dissident groups. . . . Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society." *Id.*

4. *Id.* (upholding a professor's first amendment right not to disclose the content of a guest lecture he delivered and his knowledge of the Progressive Party and its members).

5. University of Pennsylvania v. Equal Employment Opportunity Commission, 110 S. Ct. 577 (1990) (finding that academic freedom did not protect the university's interest in tenure-review materials sought by Equal Employment Opportunity Commission ("EEOC") in investigating allegations of Title VII violation); *see generally* EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986) (granting EEOC access to peer review material despite college's claim of confidentiality under the concept of academic freedom); EEOC v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983) (relying on academic freedom to find an institutional qualified privilege against disclosure of faculty personnel files to EEOC); Gray v. Board of Higher Educ., 692 F.2d 901 (2d Cir. 1982) (compelling discovery of votes of tenure committee members in civil rights action despite courts allowance for qualified evidentiary privilege predicated on academic freedom); *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981), *cert. denied sub nom.* Dinnan v. Blauberg, 457 U.S. 1106 (1982) (holding professor in contempt of court for his refusal on ground of academic freedom to answer deposition question about how he voted on promotion of female faculty member who claimed employment discrimination).

In the adjudicatory process, courts have recognized the value of academic freedom for professors[6] and have suggested that the same freedom may exist for the academic institutions themselves.[7] However, protection of academic freedom for colleges and universities, as well as for their individual scholars, is warranted only to the extent that society benefits from the protection of the free dissemination of ideas.[8]

The Supreme Court has not expressly recognized the difference between individual and institutional academic freedom in developing the outer limits of this concept. Perusal of case law, however, strongly suggests that a finding or a denial of academic freedom largely depends upon whether the person seeking its protection is a human being or an institution.[9] In addition to protecting a professor's promulgation of ideas, academic freedom has also been applied to institutions as a means of justifying the nondisclosure of college and university personnel records relevant to allegations of a wrongful tenure or promotion denial,[10] and as a proper reason for denying citizen use of university property in the exercise of their right of free speech.[11]

This article investigates the judicially articulated rationales for protecting certain conduct under the umbrella of academic freedom. Relying mainly on the free speech guarantee of the first and fourteenth amendments, the courts have espoused and discussed academic freedom without articulating a clear definition of that concept.[12] Because of this ambiguity, and the variety of situations

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6. *See infra* notes 96-141 and accompanying text.

7. *See infra* notes 25-40 and accompanying text.

8. *See infra* notes 49-58, 76-80, 163-67, 174-75, 177-190 and accompanying text.

9. *See, e.g.*, University of Pennsylvania v. EEOC, 110 S. Ct. 577 (1990); Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978); Runyan v. McCrary, 427 U.S. 160 (1976); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Keyishian v. Board of Regents of the Univ. of the State of New York, 385 U.S. 589 (1967); Sheltan v. Tucker, 364 U.S. 479 (1960); Sweezy v. New Hampshire, 354 U.S. 234 (1957); *see also* 42 U.S.C. §§ 2000a-2000e (1988).

10. *See supra* note 5 and accompanying text.

11. Widmar v. Vincent, 454 U.S. 263 (1981) (holding that University of Missouri's exclusion of a registered student religious group from open forum facilities violated first amendment free speech guarantee); Healy v. James, 408 U.S. 169 (1972) (remanding controversy between Central Connecticut State College and local chapter of Students for a Democratic Society for evidentiary hearing to determine whether chapter was willing to abide by reasonable campus rules and regulations in determining whether college's refusal to recognize the student group violated first amendment free speech and association guarantees).

12. *See University of Pennsylvania*, 110 S. Ct. at 577; *Widmar*, 454 U.S. at 263; *Sweezy*, 354 U.S. at 234; *see also infra* notes 96-126 and accompanying text.

in which this issue has arisen, the law does not foster predictability. For example, the law appears to encourage academic freedom in instances where common sense and fairness negate protection of such freedom.[13] More specifically, in litigation, some colleges and universities have used the first amendment based freedom in lieu of reliance on institutional autonomy, which is not seated on a constitutional base.

This article also examines the effect that academic freedom case law has had on the operation of colleges and universities. An educator's free speech and an educational entity's exercise of institutional autonomy affect societal interests. This article explores factors important in determining the parameters of academic freedom. These factors are: (1) whether the protection of academic freedom should be afforded institutions as well as individuals; (2) whether the scholar's protection should depend upon his employer's status as a publically or privately owned and operated institution; (3) whether the professor whose conduct is at issue is tenured or not; (4) whether scholars claim this freedom against the state[14] or against the institution employing them;[15] and (5) whether colleges and universities should be permitted to rely on academic freedom as insulation from governmental interference into their policies and operations.[16]

Case law discussions of both institutional and individual academic freedom provide some understanding of the extent to which courts, especially the Supreme Court of the United States, find that this concept protects societal interests in free speech and assembly. The courts do not appear to separate scholar and entity academic freedom.[17] This article suggests that institutional aca-

13. *See, e.g., University of Pennsylvania*, 110 S. Ct. at 577 (rejecting the University's contention that institutional academic freedom was a basis for denying EEOC access to peer review information in evaluating allegations of impermissible discrimination in tenure denial).

14. *See, e.g., Sweezy*, 354 U.S. at 249-50, 261-64 (espousing academic freedom as a ground for vindicating professor who refused to answer certain questions posed to him in legislative investigation to eliminate subversive persons from state government).

15. *See Sindermann*, 408 U.S. at 593; *Roth*, 408 U.S. at 564.

16. *See University of Pennsylvania*, 110 S. Ct. at 577; *Bakke*, 438 U.S. at 265; Kahn v. Superior Court (Davies), 188 Cal. App. 3d 752, 233 Cal. Rptr. 662 (1987); State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982).

17. However, in *Sweezy*, Justice Frankfurter appeared to have fused individual and institutional academic freedoms in his concurring opinion. 354 U.S. at 255-67. In his rationale extending first amendment rights to a United States scholar, he quoted a plea of South African scholars against governmental intervention into the affairs of their universities. *Id.*

demic freedom could often be more accurately described as institutional autonomy.

II. Institutional Academic Freedom

The nature of institutional autonomy encompasses the idea of academic freedom for colleges and universities. The desirability of government nonintervention into the decisions of an educational institution is not always related to the institution's role as a base camp for experimentation and other research leading to informed public opinion. Some governmental intervention into the affairs of a college or university does not affect the institution's role of increasing the common body of knowledge. Even absent a compelling first amendment reason for granting academic freedom, however, government nonintervention may be appropriate.[18] Historical and current examples illustrate that institutional autonomy may exist for purposes other than academic freedom.

One ancient example of an establishment of institutional autonomy unrelated to the protection of the free exchange of ideas is the granting of civil jurisdiction over alien students to the University at Bologna.[19] This policy encouraged foreigners to enter Bologna to study by allowing them to avoid some of the ordinary duties of citizenship,[20] thereby increasing the diversity of the student body. Another ancient example of institutional autonomy unrelated to academic freedom is the Parisian university's power to control lectures and sermons delivered anywhere in Paris without having to answer to the French Parliament.[21] Here the ecclesiastically-based autonomy, subject only to the authority of the king,[22] had a potentially adverse effect on freedom of speech. The control over lectures and sermons could squelch, as well as promote, the exposition of new ideas.

The German experience provides another example. Many attribute the international preeminence of German universities to their adherence to three propositions which, in translation, are: (1) the freedom of students to learn without administrative constraints;

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at 262-64; *see infra* notes 37-39 and accompanying text for a continuation of the fusion concept.

18. *See* Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985).

19. H. Rashdall, The Universities of Europe in the Middle Ages 151 (1936).

20. *Id.*

21. *Id.* at 427-28.

22. *Id.*

(2) the freedom of university professors to pursue their research, report upon it, and teach; and (3) the freedom of the institution to determine academic matters without interference from the government.[23] The first two propositions mentioned may obviously and fairly be labeled "academic freedom." The last, autonomy of the institution as a self-governing entity of the faculty, was never imported into the United States. While European universities are governed by faculty or students, the governing bodies of colleges and universities in the United States, on the other hand, are comprised for the most part of nonacademics. These institutional board members are selected by a political process for state institutions, and by self-perpetuating boards or others not on the faculty for private schools.

Currently, rather broad institutional autonomy is assured colleges and universities. This autonomy, or discretionary authority, arises from common law doctrines, statutes, and in some instances, from state constitutions.[24] Before discussing the grants of autonomy to modern post-secondary educational institutions in the United States, it is helpful to explore the possibility that some institutional conduct may be protected under the concept of academic freedom.

The Supreme Court of the United States first articulated the concept of institutional academic freedom in *Sweezy v. New Hampshire*.[25] The plurality opinion by Chief Justice Warren acknowledged the beneficial role of unrestrained academia:

> 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. . . . 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.[26]

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23. R. HOFSTADER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 386-87 (1955).

24. *See* Kahn v. Superior Court (Davies), 188 Cal. App. 3d 752, 233 Cal. Rptr. 662 (1987).

25. 354 U.S. 234 (1957). In *Sweezy*, the state of New Hampshire brought charges against a state university professor for violation of a state statute designed to "eliminate 'subversive persons' among government personnel." *Id.* at 236. The state's investigation of the professor included asking him questions regarding the context of his lectures and any affiliations he may have had with the communist party. The Supreme Court held he did not have to answer these questions because of his first amendment freedoms.

26. *Id.* at 250.

The concurring opinion of Justice Frankfurter was even more expansive in expressing that "the dependence of a free society on free universities,"[27] necessitated the existence of " 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[28]

Although the *Sweezy* plurality and concurring opinions did not agree on the theory applicable in purging Sweezy of contempt for his failure to disclose the topic of his guest lecture at the University of New Hampshire,[29] the Chief Justice and five Justices together laid the groundwork for later contentions that institutional academic freedom exists. The plurality reasoned that the legislature separated its investigatory powers from its responsibility to direct the use of that power.[30] The concurrence based its conclusion on the first amendment right of a citizen to free speech and political privacy.[31]

In announcing the court's judgment in *Regents of the University of California v. Bakke*,[32] Justice Powell stated that "[a]cademic freedom, though not a specifically enumerated right, long has been viewed as a special concern of the First Amendment."[33] He reiterated Justice Frankfurter's "four essential freedoms"[34] in response to one of the medical school's arguments that its admission program favoring African-Americans, Asian-Americans and Mexican-Americans was constitutionally permissible, since it served to provide a diverse student body. While Justice Powell accepted the school's assertion that "tradition and experience lend support to

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

28. *Id.* at 263. (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10-12 (1957) (a statement of a conference of senior scholars from the University of Cape Town and the University of Witwatersrand)).

29. 354 U.S. at 253-55, 265-67 (Frankfurter, J., concurring). The Court's opinion by Chief Justice Warren includes no reference to the text of the Constitution or to precedent. Nor did Justice Frankfurter cite specific legal precedent in deciding against the state and against governmental intrusion into the life of a university. *Id.*

30. *Id.* at 235-55.

31. *Id.* at 255-67 (Frankfurter, J., concurring).

32. 438 U.S. 265 (1978).

33. *Id.* at 312 (Powell, J., announcing the Court's judgment and expressing his own views).

34. *Id.*; *see supra* note 28 and accompanying text.

the view that the contribution of diversity is substantial,"[35] he rejected the goal of diversity alone as sufficient to justify the questioned admissions program, absent proof that the program's racial classification was necessary to promote the interest of diversity.[36] Even though the concept of academic freedom failed to justify the admissions program, *Bakke* nevertheless provides additional judicial opinion that *institutional* academic freedom exists.

The existence of institutional academic freedom also finds support in *Widmar v. Vincent*.[37] Justice Powell, writing for the *Widmar* majority, affirmed "the right of the University to make academic judgments as to how best to allocate scarce resources or 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.' "[38] The *Widmar* Court declined, however, to find institutional academic freedom more important than "the fundamental principle that a state regulation of speech should be content-neutral."[39]

Sweezy, *Bakke*, and *Widmar* introduce a concept of academic freedom that is derived not from orthodox constitutional roots or reasoning, but rather from the acknowledgment of the importance of the participation of academia in the formation of public policy. Post-secondary educational institutions, while powerless to institute reforms, are well positioned to identify important societal problems and to suggest solutions. Academic freedom serves to provide political information for voters as legislative tasks become more difficult in view of the population growth and of the effectiveness of lobbyists and their special interest groups. Protecting the free expression of ideas of academics, especially those of political scientists and sociologists, is important, if not vital, to the task of informing the electorate.

As important as are the four cited freedoms for academic institutions,[40] other social interests necessitate establishing parameters for the exercise of these freedoms, such as the established constitutional guarantees of free speech, assembly, and religion. In addition, institutional "academic freedom" may be limited by constitu-

35. *Bakke*, 438 U.S. at 313.
36. *Id.* at 314-15.
37. 454 U.S. 263 (1981).
38. *Id.* at 276 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)).
39. 454 U.S. at 276.
40. *See supra* notes 28, 38 and accompanying text.

tional and statutory rights of individuals. A conflict may arise between a university's right to determine who will teach and the federal laws proscribing discrimination in employment. The Supreme Court recently resolved just such a conflict in a case involving an academic tenure dispute.[41] Before turning to the facts of that case, however, we need to explore the general nature of academic tenure and the procedures for obtaining it.

A. *Academic Freedom and Tenure Peer Review*

The peer review process for awarding academic tenure is deemed central to the proper functioning of colleges and universities.[42] The rather elaborate process allows an institution the opportunity to evaluate a professor after some period of time (often six years) to determine whether the individual should be afforded continuous employment. The integrity of the process is not only important in the allocation of the institution's limited resources in view of its goals and standards, but is also important with regard to fairness to the probationary professor seeking tenure. Fairness, of course, requires an objective evaluation of the candidate's contributions in view of the standards set by the institution at which he seeks virtually life-time employment. Since a professor should be judged in part upon his or her creativity in contributing to the school's success, the evaluation includes some elements of subjectivity.[43]

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41. University of Pennsylvania v. EEOC, 110 S. Ct. 577 (1990).

42. *See University of Pennsylvania*, 110 S. Ct. at 586 (university asserted that the peer review process is the most important element in the effective operation of a tenure system and such a system determines what the university will look like over time); EEOC v. Franklin & Marshall College, 775 F.2d 110, 115 (3d Cir. 1985) (recognizing the importance of confidentiality in the peer review process), *cert. denied*, 476 U.S. 1163 (1986); EEOC v. University of Notre Dame du Lac, 715 F.2d 331, 336 (7th Cir. 1983) (asserting that the peer review process for faculty tenure is the best and most reliable method of promoting academic excellence); McKillop v. Regents of Univ. of California, 386 F. Supp. 1270, 1275 (N.D. Cal. 1975) (claiming that the peer recommendation system for faculty tenure at the University of California produced one of the finest institutions of higher learning in the United States and the pre-eminent state university in California); *see also* C. BYSE & L. JOUGHLIN, TENURE IN AMERICAN HIGHER EDUCATION vi-vii (1959) (reporting that in many colleges and universities pre-tenure faculty serve a testing period on the job); R. MILLER, EVALUATING FACULTY FOR PROMOTION AND TENURE (1987) (suggesting that the tenure process should enable an institution to retain faculty best suited to its nature and directions); FACULTY TENURE: A REPORT AND RECOMMENDATION BY THE COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION 1-20 (1973) (discussing the pros and cons of a tenure system including the positive impact on academic freedom and also the elimination of employment decisions that might otherwise result from generosity, friendship, or neglect).

43. Unfairness often results when a significant gap exists between the tenure standards announced by the institution and the application of those standards. The law, however, does

Tenure is worth the professorial effort to obtain it. While not an absolute guarantee of life-time employment by the college or university awarding it, tenure affords a fair amount of job security. Generally, the tenured professor cannot be dismissed absent (1) conduct of the individual constituting good cause for termination or (2) a demonstrably bona fide financial exigency, or bona fide discontinuance of a program or department.[44] In addition, tenure affords the professor status within and beyond the college or university that rewarded him the long-term employment agreement.

Considering the economic and professional advantages of the tenured status, tenure decision procedures traditionally provide for thorough evaluations by the employer's administrators, the candidate's on-campus peers, and by off-campus colleagues[45] familiar with the candidate's work within the pertinent academic discipline.[46] While some evaluators may participate frequently in ten-

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not generally provide redress in such situations. The gap is significant only as evidence that the employer has violated some constitutional guarantee or statutory provision such as Title VII. The concept of institutional autonomy sometimes permits unfairness of the type described here. *See infra* note 195 and accompanying text.

Institutional autonomy was recognized in *University of Pennsylvania*, 110 S. Ct. at 577 where the Court found "[t]he [EEOC] is not providing criteria that [the University] *must* use in selecting teachers. Nor is it preventing the University from using any criteria it may wish to use, except those—including race, sex, and national origin—that are proscribed under Title VII." *Id.* at 587.

44. *See, e.g.*, Krotkoff v. Goucher College, 585 F.2d 675, 678-80 (4th Cir. 1978) (finding the discharge of tenured professor legally permissible on the ground of financial exigency although the college's by-laws mentioned the possibility of discharge only after age 65 or for cause).

Dismissals for cause of tenured faculty do not encompass institutional financial exigency. Rather, they are based on professorial incompetency or neglect of duty or moral turpitude. Dismissals for cause contemplate formal charges and an opportunity to answer the charges, with the burden of proof upon the institution. *See id.* at 679.

The position of the American Association of University Professors ("AAUP") is that termination of a tenured appointment shall occur only for financial exigency, program discontinuance not mandated by financial exigency, or medical reasons. Presumably, since moral turpitude is not mentioned, these are but some examples of what AAUP considers "adequate cause." 1982 *Recommended Institutional Regulations on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS & REPORTS 23-25 (AAUP, Washington, D.C. 1984).

45. These off-campus colleagues are often referred to in academia as "outside reviewers."

46. *See, e.g.*, EEOC v. Franklin & Marshall College, 775 F.2d 110, 111-12 (3d Cir. 1985) (tenure candidate evaluated by Professional Standards Committee made up of dean and five faculty-elected members, the president of the college, and the College's Grievance Committee), *cert. denied*, 476 U.S. 1163 (1986); Namenwirth v. Board of Regents of Univ. of Wisconsin Sys., 769 F.2d 1235, 1237-39 (7th Cir. 1985) (tenure applicant was evaluated by the Salary and Promotion Committee which considered letters reviewing her work by scholars from outside her department, including the Zoology Department Committee, the Biological Sciences Divisional Committee, her dean, the University Committee, and—presumably—higher authority all prior to her suit alleging sex discrimination), *cert.*

ure reviews, most of them, especially instructional faculty, serve infrequently and are essentially amateur rather than professional reviewers. Not only does infrequency of service make their task difficult, but sometimes gaps between stated institutional goals and operational realities make it difficult to opine that a candidate deserves or does not deserve tenure.

When candidates are unsuccessful in their quest for extended employment, they naturally want to know the grounds for rejection. Academic freedom has been suggested by some colleges and universities as a basis for denying rejected candidates access to documents generated and used in the review process. These institutions argue that confidentiality in peer review systems is important in obtaining candid and honest assessments of candidates under scrutiny.[47] These assessments are crucial, the argument continues, to the institution's freedom to determine "who may teach."[48]

The Supreme Court recently addressed the tension between confidentiality for evaluators and Title VII discovery rights in *University of Pennsylvania v. Equal Employment Opportunity Commission*.[49] The university's argument, as restated by the Court, was "that the First Amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, and this in turn is central to the tenure process, which in turn is the means by which [the university] seeks to exercise its asserted academic-freedom right of choosing who will teach."[50]

Rosalie Tung alleged that she was denied tenure by the University of Pennsylvania on the basis of her race, sex, and national origin—in violation of her Title VII rights.[51] Tung did not officially

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denied, 474 U.S. 106 (1986). For the various functional levels at which the tenure candidate is evaluated, see C. BYSE & L. JOUGHLIN, TENURE IN AMERICAN HIGHER EDUCATION 35-38 (1959) (describing reviews by the departmental faculty committee, the department head, the general faculty committee, the dean, the faculty administration (university) committee, the president, and the governing board). Although this multi-layered system was described over 30 years ago, it is probably even more widespread now considering the growth in size of the faculty at many colleges and universities.

47. *See supra* note 5 and accompanying text.

48. *See supra* note 28 and accompanying text.

49. 110 S. Ct. 577 (1990).

50. *Id.* at 587-88.

51. *Id.* at 580 (Tung alleged a violation of § 703(a) of Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000(e) (1988)).

receive a reason for her lack of success. She learned unofficially, however, that the Wharton School's lack of interest in China-related research was why the Personnel Committee recommended against her becoming tenured.[52]

The Equal Employment Opportunity Commission ("EEOC") subpoenaed confidential letters written by Tung's evaluators, the department chairman's evaluation, and other documents reflecting the deliberations of the faculty committees participating in the tenuring process. The subpoena also sought comparable portions of the personnel files of five males who had been granted tenure, in order to consider Tung's allegations that they were equally or less qualified than she.[53]

Even without the advantage of hindsight, it is not surprising that the Court unanimously held that the institution must furnish the requested information to the EEOC.[54] While the Court probably could have relied entirely on mandates of Title VII[55] and Federal Rule of Evidence 501, it also found that the disclosure of the information did not impermissibly infringe on the university's right to determine who may teach.[56] The Court, describing the institutionally asserted injury from the disclosure as "speculative,"[57] as well as "remote and attenuated,"[58] did not place the requested confidentiality under the umbrella of academic freedom.

The Court granted certiorari in *University of Pennsylvania* "[b]ecause of what might be thought of as a conflict in approach"[59] between the Third Circuit's decision in *EEOC v. Franklin and Marshall College*[60] and the holding of the Seventh Circuit's in *EEOC v. University of Notre Dame du Lac.*[61] In *Notre Dame*, the court found a qualified academic freedom privilege, permitting the university "to redact the name, address, institutional affiliation, and any other identifying features (e.g., publications, professional honors received, or any other material which could be used to iden-

52. 110 S. Ct. at 580.
53. *Id.*
54. *Id.* at 589.
55. 42 U.S.C. §§ 2000e-2(a), -8(a), -9 (1988).
56. 110 S. Ct. at 586-88.
57. *Id.* at 588.
58. *Id.*
59. *Id.* at 581.
60. 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986).
61. 715 F.2d 331 (7th Cir. 1983).

tify the particular academician) of the reporting scholar."[62]

Franklin and Marshall contrasts with *Notre Dame* in that while redaction in the former took place pursuant to a district court order,[63] Notre Dame voluntarily produced redacted files to the EEOC.[64] The two decisions appear to agree on the point at which or the circumstances under which the evaluators must be identified during the course of the EEOC's investigation. The "conflict in approach" in these two circuit court decisions, alluded to by the Supreme Court,[65] appears to lie less in the ultimate access by EEOC to "confidential" information and more in the appropriate role of academic freedom as the basis for nondisclosure. The Seventh Circuit relied upon academic freedom to establish a qualified peer review privilege, avoiding disclosure of the identity of a reviewer until the claimant particularizes a need to know his or her evaluator's identity.[66] The Third Circuit, on the other hand, rejected the contention that academic freedom was relevant to requiring disclosure. The court declined to recognize a qualified academic privilege, and refused to adopt any balancing approach in determining the EEOC's right of access.[67]

The Second Circuit has also considered the contention that a qualified academic freedom privilege protects the confidentiality of information generated in the tenuring process. In *Gray v. Board of Higher Education, City of New York*,[68] the court, although recognizing a qualified academic privilege, held this interest in academic freedom did not outweigh a black educator's interest in discovering the identity of two committee members who recommended against his tenure.[69] The court found that the educator's need for information to prove discriminatory intent was more important than the college's interest in maintaining confidentiality of the votes.[70]

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62. *Id.* at 338. District courts are assigned the task of reviewing the files to determine whether redactions are reasonably necessary to prevent disclosure of the identity of the scholar providing the evaluation. *Id.*

63. *Franklin & Marshall*, 775 F.2d at 117.

64. *Notre Dame*, 715 F.2d at 337 n.4.

65. *See University of Pennsylvania*, 110 S. Ct. at 581.

66. *Notre Dame*, 715 F.2d at 335-39.

67. *Franklin & Marshall*, 775 F.2d at 114-17.

68. 692 F.2d 901 (2d Cir. 1982).

69. *Id.* at 908.

70. *Id.* Dr. S. Simpson Gray, a black educator, sought redress under §§ 42 U.S.C. 1981, 1983, 1985. These statutes require him to show more than discriminatory impact for his § 1981 claim and discriminatory intent for his fourteenth amendment claim in contrast to a Title VII claim which does not require direct proof of discriminatory intent. 692 F.2d at 905.

Those who assert a qualified privilege not to disclose certain information during the investigatory stage of the employee's or former employee's claim, stress disclosure's putatively chilling effect on the procurement and quality of evaluators' comments and conclusions. It was argued in *Gray* that disclosure of how two tenure committee members voted would chill candid peer evaluations and disturb harmony of faculty relations.[71] In *Franklin and Marshall*, the disclosure of documents involving on and off campus evaluators would likely result in less than "candid, honest assessments of the candidates under review"[72] as well as embarrassment and confrontational situations. In *Notre Dame*, disclosure would require the university to breach the promise of confidentiality given in advance to evaluators and deemed critical by the university in obtaining candid and frank evaluations in all cases.[73] After *University of Pennsylvania*,[74] it would appear that none of these considerations, singularly or together, suffice to create an evidentiary privilege against a rejected tenure applicant who alleges impermissible discrimination in the tenure process. Thus, discovery triumphs when pitted against whatever public good may transcend from confidentiality of peer-review generated views and conclusions.

University of Pennsylvania obviously required a balancing of society's interest in academic freedom for institutions and society's concern over fairness in tenuring educators with due regard for congressional mandates and the law of evidence.[75] The unanimous decision rejects academic freedom as a ground for confidentiality for peer review evaluators. Thus, it appears that the societal value in obtaining the truth when impermissible discrimination is alleged is more important to society than anonymity for evaluators who opine about or vote on a candidate for tenure.

Although now eclipsed by the authority of *University of Pennsylvania v. EEOC*, the case *In re Dinnan*[76] lucidly articulates the reasons for rejecting peer review confidentiality on the ground of

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As in EEOC investigations, however, Gray sought discovery of peer review information prior to trial. *Id.* at 901-02.

71. *Id.* at 907.

72. 775 F.2d at 114.

73. 715 F.2d at 336.

74. 110 S. Ct. at 577.

75. *Id.*

76. 661 F.2d 426 (5th Cir. 1981), *cert. denied sub nom.* Dinnan v. Blauberg, 457 U.S. 1106 (1982).

institutional academic freedom or as an appropriate evidentiary privilege. In addressing the tenure committee member's refusal to reveal how he voted, the *Dinnan* court reiterated that "exceptions to the demand for every man's evidence . . . are in derogation of the search for truth."[77] The federal circuit court also noted that, "ideas may be suppressed just as effectively by denying tenure as by prohibiting the teaching of certain courses."[78] The court concluded that the decision disallowing confidentiality "should work to reinforce responsible decision-making in tenure questions"[79] by eliminating secrecy claimed under the tent of institutional academic freedom. While *Dinnan* was not mentioned in *University of Pennsylvania*, the philosophy of the federal circuit court appears to anticipate the Supreme Court's view that "[n]ot all academics will hesitate to stand up and be counted when they evaluate their peers"[80] even knowing of the possibility that their stance might later be disclosed.

B. *Time for Identifying Evaluators*

Although the Supreme Court did not favor academic freedom over the EEOC's investigatory needs, the Court did recognize the need for some degree of institutional autonomy. The issue not clearly determined in *University of Pennsylvania* involves the threshold circumstances under which the EEOC becomes entitled to know the identity of the evaluators. The particular issue is whether the law permits redaction of the records subpoenaed by the EEOC. Since this issue was not fully considered by the district court, it was not resolved on appeal.[81] If the law permits initial removal of the names and other information which would identify the evaluators, and requires disclosure of their identities later only after the EEOC demonstrates a particularized need to evaluate the evaluators, then the tenure candidate's college or university can retain greater control over the release of this information. The determination of this issue will affect the degree of autonomy the law grants academic institutions—without the need to consider *institutional* academic freedom which the Supreme Court has determined will not protect "confidential" peer review materials from

77. *Id.* at 430 (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).
78. *Id.* at 430.
79. *Id.* at 432.
80. *University of Pennsylvania*, 110 S. Ct. at 588.
81. *Id.* at 581 n.2.

disclosure.

III. Individual Academic Freedom

Academic freedom should enable teachers and students to teach and learn without being harassed for their philosophical, political, or ideological beliefs. This academic freedom has many protectors. Although not a specifically enumerated constitutional right, it is often protected by the first amendment.[82] Other protectors include state laws, the American Association of University Professors, and in varying degrees individual colleges and universities through their policies and practices.

The value of academic freedom was most elegantly described by Justice Frankfurter:

> Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. 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.[83]

A. *Views of the American Association of University Professors*

Courts have referred to the American Association of University Professors' ("AAUP") statements[84] concerning academic free-

82. Regents of Univ. of California v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J., announcing the Court's judgment and expressing his own views) (rejecting academic freedom as a ground for judicial acceptance of a medical school's admissions program found to violate the equal protection clause of the fourteenth amendment).

83. Sweezy v. New Hampshire, 354 U.S. 234, 261-62 (1957) (Frankfurter, J., concurring).

84. *Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Com-*

dom.[85] The AAUP positions are helpful in determining the parameters of individual academic freedom for two reasons. First, due to the wide latitude colleges and universities have in determining who will teach or do research under their auspices,[86] they should follow expected norms announced by the AAUP unless the contract of employment notes a contrary agreed-upon expectation of the employer. Second, the responsibility of protecting a professor's freedom to express himself and to make intellectual inquiry lies first with the employer. The 1940 Statement of the AAUP regarding Academic Freedom and Tenure ("1940 Statement") is a significant effort to help assure the types of institutional and professional conduct that are essential to meaningful teaching and research.[87]

Since the AAUP's position on academic freedom and tenure is designed to guide all colleges and universities, its position does not anticipate complete uniformity in the professor-institution relationship. The AAUP anticipates variations expressly with regard to research for pay and in recognition of the religious or "other aims"[88] of a particular post-secondary educational institution. Since the AAUP guidance admonishes the professor that he "should at all times be accurate, should exercise appropriate re-

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ments, supplemented by 1982 *Recommended Institutional Regulations on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS & REPORTS 3-9. 21-30 (AAUP, Washington, D.C. 1984) [hereinafter AAUP POLICY DOCUMENTS & REPORTS].

85. *See, e.g.*, Gray v. Board of Higher Educ., 692 F.2d 901, 907 (2d Cir. 1982) (adopting the AAUP position that keeping tenure committee voting confidential is acceptable even when the candidate is rejected, if the candidate receives a statement outlining reasons for non-selection and is afforded adequate intramural grievance procedures); Krotkoff v. Goucher College, 585 F.2d 675, 682 (4th Cir. 1978) (citing AAUP's policy statements sanctioning the dismissal of tenured faculty because of financial exigency); Browzin v. Catholic Univ. of Am., 527 F.2d 843, 845-49 (D.C. Cir. 1975) (interpreting AAUP regulations governing termination of tenure based on financial exigency or program discontinuation and requiring the institution to make every effort to find the professor another suitable position elsewhere in the university); Adamian v. Jacobsen, 523 F.2d 929, 932 n.l, 934-35 (9th Cir. 1975) (remanding termination-for-cause case to determine whether University of Nevada would interpret its code copied from AAUP *Statement of Principles* as AAUP would interpret the same provisions in view of tenured professor's allegation of violation of first amendment rights); Cusumano v. Ratchford, 507 F.2d 980, 984-87 (8th Cir. 1974), *cert. denied*, 423 U.S. 829 (1975) (finding that failure to provide as much notice of termination of untenured professors as designated by AAUP and incorporated into University of Missouri regulations did not create de facto tenure status); Blair v. Board of Regents, 496 F.2d 322, 324 (6th Cir. 1974) (finding due process given to terminated probationary professor and noting that Memphis State University, Tennessee, had followed AAUP recommended procedures).

86. *See* Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985); Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980).

87. AAUP POLICY DOCUMENTS & REPORT, *supra* note 84.

88. *Id.* at 2.

straint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman,"[89] the admonition may condemn some conduct that would be protected free speech under the first amendment.[90] In the event of a conflict between the AAUP Statement and the Constitution, constitutional mandates will obviously prevail. The AAUP recognized the potential conflict in a 1982 supplement to the 1940 Statement[91] which included a quotation from *Sweezy v. New Hampshire*[92] stressing that "teachers and students must always remain free to inquire, to study and to evaluate."[93]

Where law or institutional policy and practices define academic freedom, teachers find security in knowing that their intellectual expressions and experimentations will not be directed by the conflicting values of others who oppose their beliefs, stated values, or hypotheses. Similarly, students know that the teacher's utterances represent his or her best professional judgment, and do not simply reflect the institution's attitudes.

While there is no such thing as a false opinion or belief, and students in post-secondary educational institutions should have the opportunity to examine conflict between ideas, free speech is not unlimitedly free. One legal limitation on speaking out is civil liability for defamation.[94] The government may also limit or proscribe speech which "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[95] Beyond governmental restrictions, the professor's professional reputation depends upon the basis for, and manner in which, an idea is expressed. Except for the most callous academic, this final factor alone should prevent an abuse of academic freedom. Absent self-restraint and pride in the methodology of one's academic disci-

89. *Id.*

90. *See Sweezy*, 354 U.S. at 250, 261-62 (Frankfurter, J., concurring).

91. *See* AAUP POLICY DOCUMENTS & REPORTS, *supra* note 84.

92. 354 U.S. 234 (1957).

93. AAUP POLICY DOCUMENTS & REPORTS, *supra* note 84 (quoting *Sweezy*, 354 U.S. at 250).

94. Defined by state law, generally defamation is the injuring of a person's character or reputation by making false statements orally (slander) or in writing (libel), although many factors are relevant in a determination of liability for defamation in a particular case. *See, e.g.*, Great Coastal Express v. Ellington, 230 Va. 142, 334 S.E.2d 846 (1985).

95. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (condemning a state statute as violative of the first and fourteenth amendments because it forbade advocacy of the use of force or of a legal violation without considering whether such advocacy was directed and likely to incite or produce imminent lawless action).

pline, however, career advancement should be difficult and legal action may be appropriate.

Any professor, regardless of his status or whether he teaches at a public or private institution, may claim that he was improperly terminated as a result of his exercise of permissible academic freedom. The degree to which the law will protect the questioned conduct is less if the teacher is untenured, works for a private college or university, or both. While these two factors theoretically have no relation to the societal value of a professor's inquiries or pronouncements, the reality is that a tenured faculty member at a state school currently has greater protection in the exercise of free speech than most of his colleagues.

B. *Tenured or Untenured Status*

Two companion cases define the limits of academic freedom for untenured professors: *Board of Regents of State Colleges v. Roth*[96] and *Perry v. Sindermann*.[97] Decided on the same day, these cases address (1) Roth's claim that the decision not to rehire him resulted from his statements criticizing the university administration, and therefore violated his fourteenth amendment rights;[98] and (2) Sindermann's claim that the college's failure to renew his one-year contract was due to his public disagreements with the Board of Regents, and violated both the first and fourteenth amendments.[99] Both claimants were untenured and employed by state-owned institutions.

Both cases were five-to-three decisions. The Supreme Court found that Roth was not entitled to a hearing nor did he have to be advised of the reasons for Wisconsin State University's failure to rehire him, since he was not deprived of "liberty" or "property."[100] The Court remanded *Sindermann* to the district court for several determinations, including whether non-renewal was a reprisal for the exercise of constitutionally protected rights.[101]

The question is whether these superficially inconsistent decisions

96. 408 U.S. 564 (1972).
97. 408 U.S. 593 (1972).
98. *Roth*, 408 U.S. at 566-69.
99. *Sindermann*, 408 U.S. at 594-96.
100. *Roth*, 408 U.S. at 578-79 (noting that simply because a hearing was not required, constitutionally the opportunity for a hearing regarding non-retention could be appropriate in public colleges and universities).
101. *Sindermann*, 408 U.S. at 603.

can be reconciled. *Sindermann* had been employed as a professor in the Texas junior college system from 1959-1969.[102] Roth, on the other hand, had served only one year at Wisconsin State University.[103] This factual difference, while possibly significant in obtaining judicial sympathy for Sindermann, was not stressed in the rationales of the two cases. Longevity alone cannot qualify one for continuous future employment absent a contract provision to that effect.[104]

The situation in *Roth* is more common than in *Sindermann*, since probationary untenured faculty members are terminated more readily. At that time, Wisconsin law left the decision whether to rehire an untenured professor for the next academic year to the unfettered discretion of university officials, and further provided that the reason for non-retention need not be given.[105]

The issue before the Supreme Court was whether the untenured Roth had a constitutional right to a statement of reasons and a hearing on the university's decision not to rehire him. The Court looked to the nature of Roth's interest in renewal of his employment, only to find that it was neither a "liberty" nor a "property" interest protected by the fourteenth amendment.[106] The Court noted that the university had not imposed a stigma or other disability on him that limited his freedom to take advantage of other employment opportunities.[107] Thus, in the Court's view, the university's refusal to rehire him was not so damaging to Roth's liberty to teach as to require a hearing.

The Court also found that the University of Wisconsin did not deprive Roth of a property interest, as "property" is understood when applying the fourteenth amendment. The Court stated that "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[108] The Court suggested the failure of state colleges and universities to provide reasons for non-renewal

102. *Id.* at 594.
103. *Roth*, 408 U.S. at 566.
104. *See generally* Cusumano v. Ratchford, 507 F.2d 980, 986 (8th Cir. 1974), *cert. denied*, 423 U.S. 829 (1975).
105. *Roth*, 408 U.S. at 567 (construing WIS. STAT. § 37.31(1) (1967)).
106. *Id.* at 578-79.
107. *Id.* at 573.
108. *Id.* at 577.

and a hearing was not good institutional policy.[109] However, it was a bad policy that was nonetheless constitutional. The Court also found Roth's freedom-of-speech issue meritless. The district court had stayed proceedings on the allegations that non-renewal was based on the exercise of first amendment rights.[110]

The majority in *Roth* rejected the two main conclusions expressed in Justice Douglas' dissent: (1) that non-renewal is "a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired"[111] at least by the same state system, and (2) that allegations of denial of free speech require the government to prove that the speech does not require due process protection.[112] It also rejected Justice Marshall's dissenting opinion that the "liberty" and "property" criteria of the fourteenth amendment were met in *Roth* because the employer was the government.[113] Marshall opined that every citizen-applicant for a government job is entitled to be hired unless the government can establish some reason for its refusal to do so.[114] He would have afforded the untenured Roth a constitutionally guaranteed hearing and a statement of the reasons for non-retention for a second year's employment.[115]

In *Sindermann,* the employer explained his reason for not renewing the professor's contract in a press release. Sindermann was allegedly let go for insubordination.[116] However, he received neither an official statement of the reasons for his dismissal nor a hearing upon non-renewal. Sindermann, who professed the belief that the Texas two-year college system should become a four-year system, contended that his advocacy of that view resulted in his termination, in violation of first (free speech) and fourteenth (procedural due process) amendment rights.[117]

The district court granted summary judgment in favor of the Texas community college system. However, the Supreme Court remanded the case to afford Sindermann the opportunity to prove

109. *Id.* at 578-79.
110. *Id.* at 574-75.
111. *Id.* at 585 (Douglas, J., dissenting).
112. *Id.* at 584.
113. *Id.* at 588-89 (Marshall, J., dissenting).
114. *Id.* at 588.
115. *Id.* at 590-91.
116. *Sindermann,* 408 U.S. at 595 n.1. Specifically, Sindermann attended legislative committee meetings despite college officials' refusal to allow him to leave class for that purpose.
117. *Id.* at 595.

his claim of entitlement to continued employment.[118]

One explanation for the different treatment by the Supreme Court of the two "untenured" professors, Roth and Sindermann, is the latter's longevity in the same educational system together with the possibility "that the college had a de facto tenure system."[119] In affording Sindermann the opportunity to prove tenure earned under a de facto system, the Court appeared to express a different judicial philosophy of academic freedom for educators than it had expressed in *Roth*.

In *Sindermann*, the Court stated that the "lack of a contractual or tenure 'right' to re-employment . . . is immaterial to his free speech claim,"[120] citing and reaffirming *Shelton v. Tucker*[121] and *Keyishian v. Board of Regents*.[122] Later the same majority opinion stated that "lack of formal contractual or tenure security . . . though irrelevant to his free speech claim, is highly relevant to his procedural due process claim. But it may not be entirely dispositive."[123] Without conceding that Sindermann could show a loss of liberty or property, the Court found he was entitled to the opportunity to do so at a hearing. His claim was bolstered by job security statements in the "Odessa Junior College Faculty Guide" and in guidelines established by the Coordinating Board of the Texas College and University System.[124]

A cynic might suggest that the different outcomes of *Roth* and *Sindermann* resulted only from the professors' disparate lengths of prior service rather than upon due process protections for tenured faculty. Perhaps a fairer and more workable analysis is that de facto tenure may have resulted from an "implied"[125] agreement even though the faculty handbook stated that "Odessa College has no tenure system."[126]

In *Cusumano v. Ratchford*,[127] two probationary professors ar-

118. *Id.* at 602-03.
119. *Id.* at 599-600.
120. *Id.* at 597-98.
121. 364 U.S. 479, 485-86 (1960).
122. 385 U.S. 589, 605-06 (1967). Justice Douglas no doubt would have suggested the additional precedential value of Sweezy v. New Hampshire, 354 U.S. 234 (1957), 354 U.S. at 234, protecting even the freedom of a guest lecturer.
123. *Sindermann*, 408 U.S. at 599.
124. *Id.* at 600.
125. *Id.* at 601-02.
126. *Id.* at 600.
127. 507 F.2d 980 (8th Cir. 1974).

gued that they obtained de facto tenure because the University of Missouri gave slightly less notice than was required by the university's written rules for non-renewal of probationary faculty.[128] Nevertheless, the court refused to find de facto tenure, concluding that the facts simply did not support a constitutional or contractual claim for continuous employment.[129] *Cusumano*, decided after *Roth* and *Sindermann*, established that an educational system's failure to adhere strictly to the letter of its tenure procedures does not alone result in de facto tenure.

The absence of tenure is not always fatal in the advancement of a constitutionally-based claim. In *Sweezy v. New Hampshire*,[130] Sweezy refused to answer some of the questions posed in the New Hampshire state investigation designed to eliminate "subversive persons" from government employment. Two of the questions he refused to answer were: "What was the subject of your [guest] lecture [at the University of New Hampshire]?," and "Did you advocate Marxism at that time?"[131] Neither the majority nor the concurring opinions found the lack of tenure determinative in purging the contempt citation against the professor for his refusal to answer certain questions he deemed "irrelevant or violative of free speech guarantees."[132]

Untenured educators were also successful in advancing first amendment rights in *Keyishian v. Board of Regents of the University of the State of New York*[133] and in *Shelton v. Tucker*.[134] Keyishian, an untenured instructor of English at the University of Buffalo, refused to sign a state-mandated certificate that he was not a "subversive" (communist), resulting in his dismissal.[135] The Court vindicated Keyishian by finding the New York statute unconstitutional. It rejected the premise "that public employment, including academic employment, may be conditioned upon the surrender of

128. *Id.* at 986. Instructor Cusumano claimed that the notice he received of March 31, 1971, stating that 1971-72 would be his last academic year at the university was contrary to his entitlement of notice of not less than one year. Associate Professor Harmon made a claim similar to Cusumano's. Both believed they should have more than a full academic year in which to seek new employment.

129. *Id.*

130. 354 U.S. 234 (1957).

131. *Id.* at 243-44.

132. *Id.* at 258 (involving an elaborate legislative scheme to have the state attorney general investigate with respect to subversive activities and to report back to the legislature).

133. 385 U.S. 589 (1967).

134. 364 U.S. 479 (1960).

135. *Keyishian*, 385 U.S. at 591-92.

constitutional rights which could not be abridged by direct government action."[136] Thus, the Court repudiated the state's stance that people should work elsewhere if their beliefs do not accord with the legislature's. In *Shelton v. Tucker*,[137] the Court declared unconstitutional an Arkansas statute requiring every teacher in a state-supported school or college to file annually a list of organizations to which he belonged or regularly contributed.[138] In Arkansas all professors and other teachers were hired on a year-to-year basis.[139] The first amendment protection was extended to teachers who were untenured, thereby preventing governmental evaluations of their beliefs based upon organizational associations.[140]

The precedential value of *Sweezy*, *Keyishian*, and *Shelton* may be affected by the political climate out of which they arose. During the "McCarthy Era" the federal and state governments zealously sought to identify and weed out persons with political beliefs left of center. This era was characterized by legislative and administrative hunts for "communists" in callous disregard for the civil liberties of the prey. Through these court decisions the judiciary furnished governmental reasonableness. The Court's guardianship of first amendment rights for faculty, even for the untenured, was socially valuable in that era. It also introduced the judicial concept of academic freedom. If later administrations attempt to impose unreasonable burdens on intellectual expression or inquiry, both the tenured and untenured have these three important Supreme Court opinions for refuge against irrationality and bigotry.

Before leaving the tenure area, one tactical consideration should be noted. A college or university which does not permit a probationary faculty member to be considered for tenure is in a much stronger position to defend against a claim of wrongful termination. First, property interests "are not created by the constitution,"[141] and a tenure-denied stigma cannot attach to a professor whose contract is simply not renewed. Second, considering the multiple levels of tenure review utilizing on-campus administrators, instructional faculty, and off-campus peer evaluators, the opportunity for allegations of a denial of due process is significant.

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136. *Id.* at 605.
137. 364 U.S. at 479.
138. *Id.* at 480.
139. *Id.* at 485-90.
140. *Id.* at 482.
141. *See supra* note 108 and accompanying text.

The only perceived institutional disadvantage of ending the employment relationship by permitting a term contract to expire (after giving proper notice) is that non-renewal is purely an administrative action. The college or university exercising institutional autonomy in this way cannot later claim that teaching faculty found that the candidate failed to meet the criteria for continuous employment.

C. *Public-Private Dichotomy*

Colleges and universities are either state-owned or privately-owned entities. This public-private dichotomy in post-secondary education sometimes determines the extent of an individual professor's academic freedom. The law affords greater protection for public sector scholars than it does for their colleagues in private enterprise.

To be relied upon successfully in matters before the courts, individual academic freedom must be rooted in some related constitutional or statutory provision, or in an express or implied employment contract right. Academic freedom has been tied to the first amendment's rights of free speech and assembly and to the fourteenth amendment's due process requirements.[142] These federal constitutional protections would not generally be available to a faculty member of a private college or university because the allegations of institutional impropriety would not involve "state action."[143] However, certain statutory rights are available to private sector faculty as well as to employees of government owned and operated colleges and universities. Currently, the statutory rights most frequently exercised by professors are those found in Title VII prohibiting employment discrimination based on race, color, religion, sex, or national origin.[144]

While teachers at private colleges cannot allege state action, it is nonetheless unlikely that courts will tolerate these schools' complete disregard for their faculty's constitutional rights. Justice

142. *See, e.g.*, Regents of Univ. of California v. Bakke, 438 U.S. 265, 320 (1978); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Baggett v. Bullitt, 377 U.S. 360, 366-69 (1964); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

143. Bunton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

144. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1988); *see also* Civil Rights Act of 1871, 42 U.S.C. § 1985 (1988); Civil Rights Act of 1870, 42 U.S.C. § 1983 (1988); Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988).

Douglas noted the public-private dichotomy in *Board of Regents of State Colleges v. Roth*,[145] maintaining that "the First Amendment, applicable to the States by reason of the Fourteenth Amendment, protects the individual against state action when it comes to . . . freedoms guaranteed by the First Amendment."[146] Although recognizing that faculty working in private institutions have less government-protected academic freedom, Justice Douglas did not endorse differentiating on the basis of the public-private dichotomy. Rather, he noted that, "[t]he same [impropriety of dismissal due to philosophical, political, or ideological beliefs] may well be true of private schools, if through the device of financing or other umbilical cords they become instrumentalities of the State."[147]

These umbilical cords, including federal funding, regulation, student aid, and tax status considerations, may be relied upon successfully in the future to extend protections of the first and fourteenth amendments to faculty in the private sector. One institution, Grove City College, refused to accept federal funds in assertion of its purely private character.[148] If the autonomy of private institutions to foster intellectual expressions and experimentations is someday curtailed, the cases will involve not only the federal nexus, but also the belief that society benefits from the unfettered inquiries and intellectual expression of scholars. Because experimentation, research, and synthesis by professors is deemed valuable to society, perhaps private institutions will use enough self-restraint to avoid a "test case" to determine whether due process, equal protection, and first amendment rights will be extended to private sector faculty under a federal nexus theory.

Admittedly, no evidence exists to test the hypothesis that private colleges and universities generally afford their faculties as much academic freedom as do public educational institutions. Individual reputations among peer schools and the competition to hire the best scholars, should induce many private institutions to allow their faculty a full share of academic freedom. In a case involving a professor's claim of dismissal due to his participation in on-campus political protests, Stanford University (a private school) conceded the state action issue.[149] In voluntarily giving up

145. 408 U.S. 564 (1972).
146. *Id.* at 581 (Douglas, J., dissenting).
147. *Id.*
148. *See* Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982).
149. *See* Franklin v. Leland Stanford Jr. Univ., 172 Cal. App. 3d 322, 328 n.3, 218 Cal.

what was probably its best defense, Stanford demonstrated its high regard for the promotion of academic freedom for faculty.

A private college or university's voluntary assurance of academic freedom takes on additional importance considering the Burger Court's narrow approach to "state action."[150] The private university professor with a first amendment-type claim seeking redress for university infringements of academic freedom will probably have to rely on the terms of his employment contract or applicable state statutes. Logically, we should permit no less academic freedom for private university professors than for professors at state-supported schools. However, the Bill of Rights and the fourteenth amendment are designed to protect individuals from the state and not from private infringements upon individual liberties.[151]

Some private institutions are owned by or are affiliated with various religious groups. The AAUP expressly recognizes the religious nexus as a reason for some limitation on the exercise of academic freedom.[152] The beliefs of a particular religion might well influence curriculum structure and employment practices. The AAUP position is not, of course, binding on the courts, and the employment practices of all academic institutions must conform to Title VII mandates against impermissible discrimination.[153]

IV. INSTITUTIONAL AUTONOMY

Institutional autonomy is the freedom of a college or university from state control. In *Sweezy v. New Hampshire*,[154] Justice Frankfurter categorized the four areas in which a college or university needs discretionary authority which, when wisely exercised, can enhance its reputation and its effectiveness in educating students. An academic institution needs "to determine for itself *on academic*

Rptr. 228, 230 n.3 (1985).

150. *See* Rendall-Baker v. Kohn, 457 U.S. 830 (1982); *see also* Schubert, *State Action and the Private University*, 24 RUTGERS L. REV. 323 (1970).

151. The Bill of Rights provides that Congress shall make no law abridging the freedom of speech, U.S. CONST. amend. I, while the fourteenth amendment extends this guarantee to protect against state action as well. U.S. CONST. amend. XIV. Thus, only governmental action, legislative, administrative or judicial, qualifies as "state action" when a litigant claims academic freedom as an adjunct of free speech or some other constitutional safeguard. Actions of nongovernmental entities such as private colleges or universities, ordinarily do not qualify as "state action."

152. *Sweezy*, 354 U.S. 234; *see, e.g.*, AAUP POLICY DOCUMENTS & REPORTS, *supra* note 84.

153. *See supra* notes 84-85, 91-93 and accompanying text.

154. 354 U.S. 234 (1957).

grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[155] Interestingly, Justice Frankfurter described these determinations as an exercise of "essential freedoms," rather than "academic freedoms."[156]

Two decades later in *Regents of the University of California v. Bakke*,[157] Justice Powell reiterated Frankfurter's four categories of institutional decision making. The Court does appear to equate "academic freedom" with "[t]he freedom of a university to make its own judgments as to education includ[ing] the selection of its student body."[158] In *Widmar v. Vincent*,[159] Justice Powell may have suggested a fifth freedom, "the right of the University to make academic judgments as to how best to allocate scarce resources."[160] Since availability of financial assets undoubtedly influences hiring practices, curriculum, pedagogy, and admissions policies, Justice Powell thoughtfully injected into the discussion the reality that the range of managerial decisions for any one institution is dependent upon its resources. Surely he did not intend to suggest a theoretically lesser degree of autonomy for the less affluent colleges and universities. In *Widmar* he was contemplating the prospect that more student organizations might request use of the university's space than the entity could financially accommodate.[161]

The *Widmar* opinion recognizes that colleges and universities have taken on a duty to provide educational opportunities not directly connected to coursework. The administrative difficulty of determining which extracurricular activities will be favored with the use of physical facilities and other support is discussed. The *Widmar* Court held that the University of Missouri, a state university, could not deny use of its facilities to an on-campus religious student group when it made facilities generally available to other registered student groups: "a state regulation of speech should be content-neutral."[162] In terms of academic freedom, *Widmar* limits the scope of institutional autonomy in selecting only certain extra-

155. *Id.* at 263 (Frankfurter, J., concurring) (emphasis added).
156. *Id.*
157. 438 U.S. 265 (1978).
158. *Id.* at 312-20.
159. 454 U.S. 263 (1981) (challenging the University of Missouri's denial of use of its facilities for extracurricular purposes by a student religious group).
160. *Id.* at 276.
161. *Id.*
162. *Id.* at 277.

curricular activities when first amendment rights are involved.

A. *The Princeton Grounds*

State law may also place limitations on institutional autonomy as was recently demonstrated in a New Jersey case, *State v. Schmid*.[163] Schmid, representing the U.S. Labor Party, went onto Princeton University property to sell party literature. The solicitation would have complied with the university's rules only if Schmid was affiliated with that institution, had been invited by a person affiliated with it, or obtained a Princeton-issued permit to distribute the literature.[164] Schmid met none of these criteria. The written rules included no criteria for the issuance of a permit,[165] and the university's policy was not to issue one unless the applicant had an invitation.[166] Schmid was convicted of criminal trespass and fined fifteen dollars plus court costs.

The New Jersey Supreme Court, relying on the free speech guarantee of the New Jersey Constitution, exonerated Schmid of criminal liability. This state appellate court stated that the extent to which indiscriminate political solicitation could be denied by the private academic institution on open areas of the campus depended upon (1) the nature of the "normal" use of the area; (2) the extent of the invitation to the public to use the property; and (3) the purpose of the expressive activity in relation to the private and public use.[167] These are the factors that the New Jersey state courts use in balancing college or university prerogatives against the state constitutional guarantee of free expression. They appear to strike a balance with institutional autonomy rather than institutional academic freedom.

In *Kahn v. Superior Court (Davies)*,[168] the Court of Appeals for the Sixth District of California declared that "the fostering of academic excellence finds support in the [state] constitutional right to privacy."[169] Davies was a visiting professor who, following rejection of his candidacy to fill a chair in the history department at Stan-

163. 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982).
164. 84 N.J. at 538-41, 423 A.2d at 616-18.
165. *Id.* at 567-68, 423 A.2d at 632.
166. *Id.* at 541, 423 A.2d at 618.
167. *Id.* at 563, 423 A.2d at 630.
168. 188 Cal. App. 3d 752, 233 Cal. Rptr. 662 (1987).
169. *Id.* at 770, 233 Cal. Rptr. at 674.

ford University, sued one of the tenured history professors (Kahn) who participated in official confidential discussions leading to his rejection.[170] When Davies sought to depose Kahn, Kahn attempted to avoid being deposed by asserting his rights to academic freedom and privacy.[171] While the court effectively briefed all of the federal circuit court opinions then dealing with the conflict between academic freedom and disclosure of faculty votes and comments on personnel matters,[172] it decided against compelling the deposition based on the privacy assurances of article 1, section 1 of the California Constitution.[173]

B. *Freedom Beyond Autonomy?*

The right and duty of a college or university to manage itself is an underlying theme in the "academic freedom" case law. The boards and the top administrative officials of public and private institutions of higher learning are chosen to establish policy for "their" entity. Courts normally defer to decisions of the boards and employees who are authorized to govern and operate their designated institutions. Public colleges and universities are subject to state legislative and administrative constraints in fiscal, personnel, and property management matters. Even private schools are not absolutely free of federal or state regulation. If they were, they would be on equal footing with the federal government, that is, completely autonomous.

Over the last few decades courts and legislatures have been asked to influence managerial decisions and to provide remedies for parties claiming injury as a result of certain managerial actions. Examples of injuries not involving academia include injuries from defective products, gerrymandering to dilute the voting influence of minority groups, and corporate take-overs ousting existing management and affecting the value of stockholders' equity. The quests for governmental paternalism to protect or to destroy the status quo include the extension of Title VII coverage to colleges and universities, even though the result is a lessening of academia's

170. *Id.* at 755-57, 233 Cal. Rptr. at 663-65.

171. *Id.* at 758-59, 233 Cal. Rptr. at 665.

172. *Id.* at 759-63, 233 Cal. Rptr. at 666-69.

173. *Id.* at 765, 233 Cal. Rptr. at 670. While Stanford was not a party to the defamation business interference suit, the court in preventing Kahn's deposition relied upon the university's need for confidentiality as to what goes on in the peer review process. *Id.* at 768, 233 Cal. Rptr. at 673.

right to determine who will teach.[174] While these institutions need to be able to exercise freedom "on academic grounds,"[175] gender-based or race-based discrimination in hiring or promotion cannot be defended as promoting academic excellence. Rather, discrimination based on race, color, religion, sex, or national origin suggests that a college or university is not allocating its scarce resources in a way that will procure for it the best faculty those resources can attract. Only if an employer hires or promotes the lesser qualified person out of fear of litigation will Title VII have an adverse impact on its academic programs. When the decision is on academic grounds, a Title VII violation will not occur.

Institutional autonomy for colleges and universities is justified on both theoretical and practical grounds. Theoretically, the boards and top level management possess the expertise in administering schools that a court could not be expected to acquire. When academic administrations are situated to do their job well, they are familiar with the factual peculiarities of the organization they manage. Courts defer to the decisions of managers in academia simply because the judiciary is not generally responsible for selecting the paths that will lead an educational institution to excellence, mediocrity, or failure. As a practical matter, expending judicial resources to improve the goals and operations of an educational institution would be an unwise use of court time and energy. If every discretionary decision in academia were subject to judicial scrutiny, the courts would be swamped with cases filed by dissatisfied faculty, students, and outsiders challenging administrative decisions.

Institutional autonomy generally provides unfettered discretion

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174. The extension was explained succinctly in University of Pennsylvania v. EEOC, 110 S. Ct. 577, 582-83 (1990).

> When Title VII was enacted originally in 1964, it exempted an "educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." § 702, 78 Stat. 255. Eight years later, Congress eliminated that specific exemption by enacting § 3 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103. This extension of Title VII was Congress' considered response to the widespread and compelling problem of invidious discrimination in educational institutions. The House Report focused specifically on discrimination in higher education, including the lack of access for women and minorities to higher ranking (*i.e.*, tenured) academic positions. . . . Significantly, opponents of the extension claimed that enforcement of Title VII would weaken institutions of higher education by interfering with decisions to hire and promote faculty members.

Id.

175. *See* Sweezy v. New Hampshire, 354 U.S. 234, 263 (Frankfurter, J., concurring).

in matters involving employment of faculty, curriculum, pedagogy, and admission of students. Indeed, a search reveals no recent case litigating the merits of a college or university decision in the curricular or pedagogical areas.[176] The recent cases involving limitations on autonomy concern who may attend and who may teach.

C. *Who May Attend*

Regents of the University of California v. Bakke,[177] involves a medical school admissions program which favored applicants belonging to disadvantaged minority groups. This preferential treatment for the disadvantaged was challenged by a white male who claimed that rejection of his application under the school's program violated Title VI of the Civil Rights Act of 1964,[178] and the equal protection clause of the fourteenth amendment. While the Justices who agreed on the outcome disagreed somewhat on the rationale, the Court's decision is significant because it limits a university's right to determine for itself who it may admit.[179]

A later case, *Regents of the University of Michigan v. Ewing*,[180] emphatically recognizes the general judicial deference to institutional decisions. Ewing was admitted into a special six-year program which, if successfully completed, would result in the award of an undergraduate and a medical degree.[181] Immediately upon commencement of the program and continuously thereafter, Ewing ex-

176. Some older cases do involve curricular and pedagogical considerations and are at least of historical significance in deciding academic freedom and institutional autonomy issues that may arise in the future. *See* Farrington v. Tokushige, 273 U.S. 284 (1927) (invalidating legislation in Hawaii regulating schools conducted in a foreign language, primarily Japanese); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating Oregon law compelling public school attendance for children between the ages of 8 and 16); Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating state law forbidding instruction in any language other than English until after the eighth grade); Berea College v. Kentucky, 211 U.S. 45 (1908) (allowing criminal conviction of college under Kentucky law for teaching blacks and whites together despite charter provisions encouraging that practice); Vidal v. Girard's Ex'rs., 43 U.S. (2 How.) 127 (1844) (upholding college's charter right to exclude ecclesiastics, missionaries, or ministers of any sect whatsoever from the premises). While these cases demonstrate the age-old state questioning of specific acts of institutional autonomy, the rationales must be considered in light of the expansion of first amendment law since 1952. In that year the Court held that the first amendment, through the fourteenth, protects liberty against infringement by the states. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 500-01 (1952).

177. 438 U.S. 265 (1978).

178. 42 U.S.C. §§ 2000a-2000e (1988).

179. *See Bakke*, 438 U.S. at 265.

180. 474 U.S. 214 (1985).

181. *Id.* at 215.

perienced pronounced academic difficulties.[182] In addition, he failed the National Board of Medical Examiners ("NBME") test, a prerequisite for undertaking the final two years of the program. The University refused Ewing an opportunity to retake the qualifying test, although it had allowed other students over the years to retake the NBME.[183] Ewing sought a court order allowing him a second chance at the NBME. He alleged that he had a property interest in the program and that the school's decision to dismiss him was arbitrary and capricious and violated his substantive due process rights under the fourteenth amendment.[184]

Speaking for a unanimous Court, Justice Stevens pointed out that the federal courts are inappropriate forums "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions."[185] Such decisions, he maintained, cannot be adapted to the procedural tools of judicial or administrative decision making because the decisions require an expert evaluation of cumulative information.[186] While Justice Stevens opined that an institutional decision giving Ewing a second chance at the test might have prevented protracted litigation, he and the other Justices had no difficulty in finding that institutional autonomy existed and was properly, if unwisely, exercised. Justice Powell, agreeing "fully with the Court's emphasis on the respect and deference that courts should accord academic decisions,"[187] would have expanded the rationale to deny (rather than "assume") that Ewing's interest in the program raised any issue of substantive due process.[188]

Admissions practices are not, however, completely beyond the control of government. In *Runyon v. McCrary*[189] the Court held that the 1866 Civil Rights Act proscribed discrimination against blacks in admission even by a nonsectarian, private, commercially operated school.[190]

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182. *Id.* at 217 n.4.
183. *Id.* at 216.
184. *Id.* at 217.
185. *Id.* at 226.
186. *Id.*
187. *Id.* at 230 (Powell, J., concurring).
188. *Id.*
189. 427 U.S. 160 (1976).
190. *Id.* at 175.

D. *Who May Teach*

Institutional autonomy allows post-secondary educational entities to hire, retain, promote, or dismiss whomever they please, subject to constitutional, statutory and contractual rights. Title VII is currently a high profile statute superimposed on the institution-professor contract,[191] although it is not the only important federal statute prohibiting discrimination against members of minorities. Under Title VII, unlawful employment practices involve institutional acts and practices with respect to compensation, terms, conditions, or privileges of employment based on race, color, religion, sex or national origin.[192]

Even Title VII tenure-denial cases reinforce the courts general reluctance to interfere with institutional decisions. In *Lieberman v. Gant*,[193] the Second Circuit deferred to the University of Connecticut's "rigorous standards"[194] for tenure. It recognized that a teacher's demonstration of qualifications for continuation as an untenured faculty member did not alone show that the applicant had met the university's criteria for virtually life-time employment: "Title VII does not require that the candidate whom a court considers most qualified for a particular position be awarded that position. . . ."[195] The court viewed the purposes of the tenure process as two-fold: (1) to leave vacancies for more qualified prospects and (2) to permit a university's quest for excellence rather than for mediocrity.[196]

Decisions as to who should be hired into tenure-track positions, like the granting of tenure itself, are ill-suited for federal court supervision.[197] It must be remembered, however, that the anti-interventionist position of the courts is limited by the mandates of

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191. *See supra* notes 174-75 and accompanying text.

192. 42 U.S.C. § 2000e-2(a)(1) (1988).

193. 630 F.2d 60 (2d Cir. 1980).

194. *Id.* at 64.

195. *Id.* at 67.

196. *Id.* at 70.

197. *See, e.g.*, Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974) (a Title VII sex-discrimination claimant asking the court to examine the university's recruitment, compensation, promotion and termination practices); *see also* Huang v. College of Holy Cross, 436 F. Supp 639, 653 (D. Mass. 1977); Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1353-54 (W.D. Pa. 1977); Cussler v. University of Maryland, 430 F. Supp. 602, 605-06 (D. Md. 1977); Peters v. Middlebury College, 409 F. Supp. 857, 868 (D. Vt. 1976); Labat v. Board of Higher Educ., 401 F. Supp. 753, 757 (S.D.N.Y. 1975).

the Equal Employment Opportunity Act of 1972.[198] Thus, tension will remain between judicial non-intervention into college and university affairs and the legislatively mandated court duty to provide redress for impermissibly discriminatory employment practices throughout academia.[199] While institutional autonomy does not permit discrimination on racist or sexist grounds, "the law does not require . . . that employment be rational, wise, or well-considered.[200]

Title VII and academic freedom for individuals have a common feature. They are counter-majoritarian provisions, the former designed to remove race and gender as a barrier to career advancement, and the latter to protect academics whose ideas offend those who have the influence to thwart career advancement. Title VII is a burden on institutional autonomy only if one accepts the assumption that academic employers find race-based and sex-based discrimination more important than hiring, retaining, or promoting the best qualified person their budgets can afford.

V. Conclusion

Freedom for any person in any particular endeavor requires restraint by other entities, whether natural, judicial or governmental. Freedom of speech is the first amendment right to say whatever one wants to say, short of defamation or speech conduct that would qualify as incitement to overthrow the government or that would endanger public safety. The free speech guarantee serves as the basis of the concept of academic freedom.

Academic freedom has been judicially created and partially defined in resolving legal controversies in which one or both of the parties was a scholar or a post-secondary educational institution. State constitutions are also applicable in determining the contours of academic freedom. A party seeking the protection of a constitutional right hopes to triumph using a choice of weapons. If courts afford academic freedom protection, statutory rights and common law rights (including contractual rights) will be subordinated.

Academic freedom as a legal concept was "born" out of the loyalty investigations of the 1950s. These investigations targeted aca-

198. *See supra* note 174.
199. *See, e.g.*, Powell v. Syracuse Univ., 580 F.2d 1150, 1153-54 (2d Cir. 1978).
200. *Id.* at 1156-57.

demics who were suspected of harboring communist political beliefs. The investigatory harassment was directed at scholars rather than at the colleges or universities where they taught or lectured. *Sweezy* and other cases not only protected scholars against unreasonable inquiries into their political beliefs, but also acknowledged the important contributions that educational institutions can make in the formation of public policy.

Colleges and universities are traditional and convenient places for the scholarly advancement of new ideas. Faculty, especially those in the social sciences, are well qualified to inquire into and speculate about social problems, and to stimulate others to reflect upon them. The values of society tend to reprioritize over the years, with the result that dissent in one era may become the generally accepted view in another. This phenomenon justifies the Supreme Court's admonition that scholarly activity should be generally unfettered.

Given the appropriateness of academic freedom for faculty, the question becomes whether the courts should extend the same protection to colleges and universities, the institutional camp sites for scholarship and research. There appears to be no reason for doing so except to the extent that these institutions need enough autonomy to ensure the independence and fearlessness of their faculty.

In *University of Pennsylvania v. EEOC*,[201] the Supreme Court refused to accept academic freedom as a justification for the university's claim of confidentiality for peer review information sought by the EEOC. The Supreme Court of New Jersey found that the state constitution was of greater weight than a private university's interest in deciding who could enter its campus.[202] Proprietary interests were also subordinated to free speech by the Supreme Court in *Widmar v. Vincent*,[203] holding that a university must observe the content-neutral feature of governmental regulation affecting the exercise of free speech.

In no case has a college or university successfully relied upon academic freedom to justify its actions absent simultaneous protection for scholarly activity. Although refusing to extend the concept of academic freedom to policies and practices of colleges and uni-

201. 110 S. Ct. 577 (1990).

202. State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982).

203. 454 U.S. 263 (1981).

versities, the courts nevertheless do defer to many of the decisions that these institutions make. Generally, colleges and universities are free to determine, on academic grounds, who teaches, what is taught, how it is taught, and who may join the student body. It would seem that the courts' deference to decisions in these important areas recognizes institutional autonomy, but not necessarily academic freedom.

Institutional autonomy fosters healthy competition among post-secondary educational institutions. Courts, although a vital segment of the system of checks and balances, are a part of the government, as they act as guardians of civil liberties. Frequent intrusions by the courts into the decision-making processes of colleges and universities would be unwarranted. As noted in *Regents of the University of Michigan v. Ewing*,[204] judges are not equipped to make academic decisions because such decisions require an expert evaluation of cumulative information. Institutional autonomy permits each college or university to excel, muddle through, or fail on its own, placing unfettered managerial responsibility in the institution.

Institutional autonomy is a workable theory. Colleges and universities are free to govern themselves within the limits of the law. For example, these institutions are generally free to determine personnel matters, curriculums, pedagogues, and the composition of their respective student bodies. Supreme Court deference to these institutional determinations was recently reaffirmed in *Ewing*.[205] Since the doctrine of institutional autonomy is not derived from the Constitution, however, the policies and practices of colleges and universities cannot conflict with statutes or terms of an employment contract. Thus, contractual, constitutional, and statutory rights must be honored by public and private institutions.

Institutional autonomy regarding enrollment is also limited by the fourteenth amendment's equal protection provision. In *Regents of the University of California v. Bakke*,[206] the Supreme Court re-evaluated the university's admission program, finding that the terms of the program were constitutionally inappropriate, although designed to pursue the commendable institutional goal of

204. 474 U.S. 214 (1985).
205. *Id.*
206. 438 U.S. 265 (1978).

diversity among the student members. In *Runyon v. McCrary*,[207] the Court held that the 1866 Civil Rights Act proscribed discrimination against blacks even by a nonsectarian, private, commercially-operated school.

If no legal limitation existed with regard to institutional autonomy, colleges and universities would be as powerful as the federal government. In striking an appropriate balance between governmental intrusions into the operations of colleges and universities, adoption of institutional autonomy is a practical doctrine. "Institutional academic freedom," on the other hand, is an unworkable, unwise, and unsuccessful concept in establishing the limits of a college or university's autonomy.

It appears that academic freedom belongs solely to members of the faculty. Such a restrictive use of such freedom will in no way detract from institutional autonomy. Rather, acknowledgment of the restriction will encourage better legal analyses when colleges and universities consider claiming rights against faculty, or against outsiders who, for example, seek admission to the student body or to use the institution's facilities.

To speak of academic freedom for scholars may give the appearance of sentimentality or subjectivity. Even Justice Frankfurter's analysis of the need for unfettered scholarship[208] might sound pompous to someone who is unfamiliar with the operations and contributions of colleges and universities or who takes liberty for granted. Given the inevitable changes in societal values, the common body of knowledge developed by scholars should be available for analyzing current societal problems and for suggesting appropriate reforms. *Sweezy* and its progeny serve to guarantee academic freedom for faculty.

A review of constitutional case law demonstrates that the concept of academic freedom is designed to protect individual scholars, even against the institutions where they serve. For clarity and ease of analysis, it appears from the same review that institutional rights against intrusions by government should be analyzed and determined under the doctrine of institutional autonomy. Colleges and universities can claim governmental protection when they act to shield individual scholars from political influences. These institutions can perform this necessary function derivatively through

207. 427 U.S. 160 (1976).

208. Sweezy v. New Hampshire, 354 U.S. 234, 261-62 (1957) (Frankfurter, J., concurring).

academic freedom for faculty or through their own rights under institutional autonomy.