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Institutional Academic Freedom or Autonomy Grounded upon the First Amendment: A Jurisprudential Mirage

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INSTITUTIONAL ACADEMIC FREEDOM OR AUTONOMY GROUNDED UPON THE FIRST AMENDMENT: A JURISPRUDENTIAL MIRAGE

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INSTITUTIONAL ACADEMIC FREEDOM OR AUTONOMY GROUNDED UPON THE FIRST AMENDMENT: A JURISPRUDENTIAL MIRAGE

Richard H. Hiers

Abstract:

In recent decades, several federal judges and Supreme Court Justices have stated that, at some time or another in the past, the Court determined that public universities or their professional schools are entitled to institutional academic freedom (or institutional autonomy) under the First Amendment. Notwithstanding the views of many learned commentators, the Court has never so held. Concurring opinions and *dicta* do not constitute Constitutional law. This article traces the series of misattributions, misreadings and other errors that have contributed to the present peculiar state of confusion in regard to these matters.

I. INTRODUCTION

Up until 1978 no one had suggested that academic institutions might be entitled to academic freedom (sometimes confused with "autonomy") under the First Amendment. In that year, one Supreme Court Justice, in a solo opinion, proposed that such institutions were, somehow, so entitled. Since then, and on the basis of that 1978 solo opinion, several other Supreme Court Justices, federal appellate judges, and commentators have come to assume that the Court has held that the First Amendment protects the "academic freedom" (or "autonomy") at least of public universities or their

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2 The writer wishes to thank J. Peter Byrne, John LaNear, David M. Rabban, and Jeffrey C. Sun for their gracious and helpful presentations and suggestions at a panel session of the American Education Research Association focused on "Individual vs. Institutional Academic Freedom" in San Francisco, April, 2006. Errors in the present article, whether minor or egregious, are solely the writer’s own.

3 See infra note 59 and accompanying text. Throughout this article the sections of Justice Powell’s *Regents of the Univ. of Cal. v. Bakke* opinion, in which no other justices joined, will be referred to as a solo opinion.

professional schools. In short, that there is such a thing as constitutional institutional academic freedom.⁴

Commentators have written numerous scholarly law journal articles on the subject of "institutional academic freedom." Some have advocated constitutional protection for such freedom as a bulwark against external (for instance, legislative) encroachments upon individual faculty academic freedom.⁵ Others have advocated First Amendment institutional academic freedom as a way of ensuring colleges' or universities' authority to develop and maintain affirmative action programs or student body diversity.⁶ On the other hand, a few commentators have warned that institutional academic freedom could be invoked by college or university administrations – or by courts on their behalf – in order to trump or over-ride First Amendment academic freedom claims by individual faculty.⁷ Both the Fourth and the Seventh Circuits have, in fact, done just that.⁸

The present article does not argue either for or against the benefits or perils of institutional academic freedom. Instead, it observes that the Supreme Court has never actually held that academic institutions are entitled to either academic freedom or autonomy under the First Amendment.⁹ Language cited in support of the proposition that the Court has so held can be found only in concurring opinions and dicta.¹⁰ Nevertheless, the notion of constitutional institutional academic freedom or autonomy has taken on a life of its own – wholly apart from any constitutional roots or foundation. Advocates of various causes and concerns have invoked its authority to add weight to their arguments.¹¹ But it is an illusion, a fantasy, a mirage. How did this strange jurisprudence come about?

It came about through what might be considered a parade, if not comedy, of errors. Some errors were relatively minor, such as misattributing quoted sources. Others were more fundamental – and more persistent – such as failing to distinguish between concurring opinions or dicta and Court holdings, misrepresenting the substance of previous opinions, and interpolating new language into purported quotations from prior authority. There seems to be something about the topic that inspires impressionistic and mistaken, if not intentionally misleading readings and interpretations. This

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⁴ See infra notes 112-354 and accompanying text.
⁵ See infra notes 201-354 and accompanying text.
⁸ See infra notes 153-164, 241-266, 300-306 and accompanying text.
⁹ See infra notes 43-111 and accompanying text.
¹⁰ See infra notes 112-354 and accompanying text.
¹¹ See infra notes 112-354 and accompanying text.
article will describe the principal mistakes, misreadings and misinterpretations that have culminated in the notion that the Supreme Court has, at one time or other, held that academic institutions themselves enjoy a First Amendment right to academic freedom or autonomy.\textsuperscript{12}

Most, if not all, of the fundamental errors derive from certain portions of Justice Powell's solo opinion in \textit{Regents of the University of California v. Bakke}.\textsuperscript{13} There, Justice Powell undertook to extract the idea that universities themselves are entitled to certain "freedoms" -- which he characterized as "academic freedom" -- under the First Amendment from his own amalgam of sources.\textsuperscript{14} These sources consisted of language quoted in Justice Frankfurter's concurrence in \textit{Sweezy v. New Hampshire}, language from the Court's opinion in \textit{Regents of State University of New York v. Keyishian}, and Justice Powell's own interpolations and commentary in \textit{Bakke}.\textsuperscript{15}

In order to trace the history of subsequent developments, this article begins by describing both Justice Frankfurter's \textit{Sweezy} concurrence and the Court's holding in \textit{Keyishian}.\textsuperscript{16} Careful attention will be given in Part II to what Justice Frankfurter (and the source he quoted) actually said, and to the fact that his was a concurring opinion.\textsuperscript{17} The language and substance of the Court's \textit{Keyishian} opinion will be examined closely in Part III.\textsuperscript{18}

As will be shown, all relevant misreadings and misrepresentations of both Justice Frankfurter's \textit{Sweezy} concurrence and the Court's holding in \textit{Keyishian} took place only in the years following publication of Justice Powell's \textit{Bakke} solo opinion in 1978. All such misreadings and misrepresentations evidently were influenced by that opinion. Part IV of this article, therefore, describes and analyzes Justice Powell's solo opinion, attending particularly to his legal reasoning.\textsuperscript{19}

In order to keep track of the influence Justice Powell's \textit{Bakke} solo opinion had on subsequent case law, the errors it gave rise to will be examined in Part V as follows. First, this section will examine errors with respect to the reading and interpretation of Justice Frankfurter's \textit{Sweezy} concurrence.\textsuperscript{20} Second, this section considers errors in reading and representing what the Court said in \textit{Keyishian}.\textsuperscript{21} And to close, Part V of this article discusses errors in reporting the substance and significance of Justice Powell's \textit{Bakke} solo opinion, itself.\textsuperscript{22} In some cases, such errors over-lap;

\textsuperscript{12} \textit{See infra} notes 112-354 and accompanying text.
\textsuperscript{14} \textit{Id.} at 311-312.
\textsuperscript{15} \textit{See infra} notes 43-111 and accompanying text.
\textsuperscript{16} \textit{See infra} notes 24-58 and accompanying text.
\textsuperscript{17} \textit{See infra} notes 31-41 and accompanying text.
\textsuperscript{18} \textit{See infra} notes 48-56 and accompanying text.
\textsuperscript{19} \textit{See infra} notes 63-111 and accompanying text.
\textsuperscript{20} \textit{See infra} notes 123-176 and accompanying text.
\textsuperscript{21} \textit{See infra} notes 178-200 and accompanying text.
\textsuperscript{22} \textit{See infra} notes 201-352 and accompanying text.
for example, both Justice Frankfurter’s *Sweezy* concurrence and *Keyishian* are sometimes misrepresented in the same discussion. In such instances, these errors will be noted in appropriate separate subsections of this article. In many cases, error begets error, to the extent that something in the nature of a family tree or genealogy of error can be identified. It will be shown that subsequent Supreme Court concurrences and *dicta* occasionally find their place in such genealogies.

II. JUSTICE FRANKFURTER’S CONCURRENCE IN *SWEEZY V. NEW HAMPSHIRE*

In *Sweezy v. New Hampshire*, the Supreme Court addressed certain issues arising out of Paul M. Sweezy’s refusal to answer some questions put to him by the State’s Attorney General pursuant to statutory authority. Mr. Sweezy declined to answer these questions on constitutional grounds. The questions concerned the contents of an invited lecture he had given at the University, as well as, the political associations and activities of certain persons with whom he was acquainted. After Sweezy again refused to answer these questions, this time as a witness in court, he was held in contempt and ordered committed to the county jail. The state supreme court upheld the conviction.

The Court’s plurality opinion, written by Chief Justice Warren, stated that the conviction should be reversed because Mr. Sweezy’s First Amendment rights and liberties “in the areas of academic freedom and political expression” had been violated. Such a violation offended the Fourteenth Amendment’s due process clause inasmuch as “the Attorney General’s interrogation of [Sweezy was] wholly unrelated to the object[ive] of the legislature in authorizing the inquiry . . .”

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23 See infra notes 201-352 and accompanying text.
25 Id. at 239-42 n.6.
26 Id. at 234-44.
27 Id. at 244-45
28 Id. at 245.
29 Id. at 250.
30 Sweezy, 354 U.S. at 254-55. The Fourth Circuit has contended that the *Sweezy* plurality’s decision did not implicate the First Amendment: “[T]he plurality did not vacate Sweezy’s contempt conviction on First Amendment grounds, but rather concluded that because the Attorney General lacked authority to investigate Sweezy, the conviction violated due process.” *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) (en banc). The *Urofsky* court apparently ignored the plurality’s explicit language on point:

The State Supreme Court thus conceded without extended discussion that petitioner’s right to lecture and his right to associate with others were constitutionally protected freedoms which had been abridged through this investigation. These conclusions could not be seriously debated. Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are
Justice Frankfurter's concurrence was joined by Justice Harlan. Here Justice Frankfurter reviewed certain policy considerations that militate against "governmental intrusion into the intellectual life of a university," most notably, perhaps, "the dependence of a free society on free universities." In support of these public policy considerations, Justice Frankfurter cited from among "the testimony of a cloud of impressive witnesses," an address by T. H. Huxley, a statement by Harvard President A. Lawrence Lowell, certain British University Grants Committee reports, and the "latest expression on this subject," The Open Universities In South Africa, a book written in 1957 by scholars at two South African universities in opposition to that nation's government's proposed Apartheid program, which would bar non-whites from admission to these institutions as students.

Language from the book quoted by Justice Frankfurter included the following:

'A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates - 'to follow the argument safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression - areas in which government should be extremely reticent to tread.

Sweezy, 354 U.S. at 249-50. The Fourteenth Amendment's Due Process Clause does not function in a vacuum. This Amendment's language reads in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. AMEND. XIV § 1. The issue before the Sweezy Court was whether Mr. Sweezy had been deprived of liberty -- viz., his First Amendment rights -- without due process of law. The Sweezy plurality found that he had been so deprived:

Our conclusion does rest upon a separation of the power of a state legislature to conduct investigations from the responsibility to direct the use of that power insofar as that separation causes a deprivation of the constitutional rights of individuals and a denial of due process of law.

354 U.S. at 255 (emphasis added).

31 Id. at 255-67 (Frankfurter, J., concurring in result, joined by Harlan, J.).

32 Id. at 261, 262; see also id. at 261-64. For purposes of the present study, it is not necessary to consider Justice Frankfurter's analysis of the State's intrusions upon Mr. Sweezy's political rights, other than to note (1) his precise terms in the following statement: "In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority," id. at 266; and (2) that Justice Frankfurter found, but only implicitly, that the State had violated Mr. Sweezy's First Amendment political rights, viz., "so basic a liberty as his political autonomy," or his "right [as] a citizen to political privacy, as protected by the Fourteenth Amendment . . . ." Id. at 265, 266-67. Justice Frankfurter did not refer specifically to the First Amendment.


where it leads.' This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.'

'Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university.'

'* * * It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' The Open Universities in South Africa 10-12. (A statement of a conference of senior scholars from the University of Cape Town and the University of The Witwatersrand, including A. v. d. S. Centlivres and Richard Feetham, as Chancellors of the respective universities.)

This language, especially the third quoted paragraph, has figured prominently in subsequent judicial discussions, most notably, beginning in 1981. This language was to become the basis for the latter-day notion that colleges and universities are entitled to academic freedom or autonomy under the First Amendment. As will be shown, this South African language came to function, to borrow Justice Holmes characterization of federal common law, as "a brooding omnipresence in the sky," somehow (supposedly) furnishing quasi-, if not super-constitutional authority for the idea of institutional academic freedom.

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34 Sweezy v. New Hampshire, 354 U.S. 234, 262-63 (1957) (Frankfurter, J., concurring in the result) (quoting OPEN UNIVERSITIES, supra note 33, at 11-12) (internal punctuation omitted). The sentence quoted internally, "It is an atmosphere . . . admitted to study," is there attributed to an address by Dr. T. B. Davie reported in The Cape Times, Feb. 28, 1953. OPEN UNIVERSITIES, supra note 33, at 12 n.10.

35 See infra notes 112-354 and accompanying text (explaining how subsequent opinions have based their holdings on Justice Frankfurter's use of The Open Universities language.

36 S. Pac. Co. v. Jenson, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

37 See infra notes 123-157 and accompanying text.
Necessarily, these South African scholars were not proposing to
ground their concerns upon the First Amendment or other United States
constitutional premises. In *The Open Universities*, the authors were arguing
in favor of university autonomy and faculty academic freedom as important
social policy values. There was no reference to the U.S. Constitution.

Nor did Justice Frankfurter, himself, undertake to ground the portion
of his concurrence regarding either Sweezy’s lecture or “the intellectual life
of a university” upon the First Amendment. Justice Frankfurter invoked
the First Amendment only indirectly or implicitly, and then only in his
discussion of “political activity” or “the right of a citizen to political
privacy.” His concurrence makes no mention at all of “academic
freedom.”

III. KEYISHIAN V. BOARD OF REGENTS OF THE UNIVERSITY OF
THE STATE OF NEW YORK

In this case, the Supreme Court held unconstitutional a network of
New York State laws and regulations that restricted teachers’ rights of
speech and association. These laws and regulations provided that teachers
who advocated certain types of activity or belonged to various “subversive”
organizations were disqualified for appointment to, or retention in, the
State’s schools. A three-judge federal court upheld the network as
constitutional, and the Supreme Court, noting probable jurisdiction, heard the

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38 See Richard H. Hiers, *Institutional Academic Freedom – A Constitutional
Misconception: Did Grutter v. Bollinger Perpetuate the Confusion*, 30 J. C. & U. L. 531, 533-
REV. 817, 843 (1983):

[The Open Universities] made clear that a breach in the wall of
institutional autonomy may impair academic freedom even though no
individual scholar can be shown to have been threatened for what he
teaches or publishes. In other words, although [The Open Universities]
conceived of academic freedom and institutional autonomy as separate
ideas, it emphasized the manner in which they may be intimately
connected.

Id.

39 See supra note 33.

40 He used this expression twice: Sweezy v. New Hampshire, 354 U.S. 234, 261-
62 (1957) (Frankfurter, J., concurring).

41 See supra note 32 and accompanying text.


York at Buffalo was not a party to the suit. The question before the Keyishian Court was the
constitutionality of the state laws and regulations. The State Board of Regents was involved
because the challenged laws required the Board to promulgate rules and regulations, and to
take various administrative actions to enforce them.

44 Id. at 609-10.

45 Id. at 593-602.
Appellants were members of the faculty of the University of Buffalo, which was a state university at the time the action arose.

The Court held various sections of the challenged laws impermissibly vague and overbroad, and, therefore, in violation of the appellant teachers' First Amendment rights. Because Keyishian has often been cited in recent years as authority for purported First Amendment rights of universities, the Court's holdings and related language are quoted here in full. As to appellants' First Amendment speech rights, the Court reasoned and held as follows:

We emphasize once again that precision of regulation must be the touchstone in an area so closely touching our most precious freedoms, for standards of permissible statutory vagueness are strict in the area of free expression. Because the First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone. For the threat of sanctions may deter almost as potently as the actual application of sanctions. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

The regulatory maze created by New York is wholly lacking in terms susceptible of objective measurement. . . . Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery . . . .

We therefore hold that [§] 3021 of the Education Law and subdivisions 1(a), 1(b) and 3 of sect. 105 of the Civil Service Law as implemented by the machinery created pursuant to [§] 3022 of the Education Law are unconstitutional.

The Court found that the New York laws and regulations also violated appellants' First Amendment right of association:

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46 Id. at 592-93.
47 Id. at 591-92.
48 Id. at 604, 609-10.
49 Keyishian, 385 U.S. at 603-04 (internal citations and punctuation omitted).
[Certain sections of these provisions] seek to bar employment both for association which legitimately may be proscribed and for association which may not be proscribed consistently with First Amendment rights. Where statutes have an overbroad sweep, just as where they are vague, the hazard of loss or substantial impairment of those precious rights may be critical, since those covered by the statute are bound to limit their behavior to that which is unquestionably safe. 50

The majority opinion, written by Justice Brennan, includes two emphatic statements regarding the importance or value of teachers’ academic freedom as a matter of national concern and national interest. 51 In the first, the Court stated:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, [rather] than through any kind of authoritative selection. 52

Justice Brennan’s opinion went on, quoting at some length from the Sweezy Court’s plurality opinion:

‘The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are

50 Id. at 609 (citations omitted).
51 Id. at 603.
52 Id. at 603 (internal citations omitted) (brackets in original).
accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.53

The Court clearly understood that academic freedom - the freedom of "teachers", "those who guide and train our youth", "the intellectual leaders in our colleges and universities" - was grounded upon the First Amendment, and that such First Amendment freedoms were violated by the statutes and regulations before the Court.54

Faculty or teachers' academic freedom was clearly one of the "vital First Amendment rights" the Court referred to here. The Court did not even discuss the possibility that the University itself might be entitled to academic freedom under the First Amendment. There was no such issue in the case, and the Court did not rule on it.55 In all of its discussion of academic freedom, the Keyishian Court made no mention of Justice Frankfurter's Sweezy concurrence or The Open Universities language quoted in it.56 Until 1978, no court or commentator had yet suggested that public colleges or universities themselves might be entitled to either academic freedom or institutional autonomy under the First Amendment.57 That first suggestion - later to be regarded by many as gospel - came in the form of Justice Powell's solo opinion in Regents of the University of California v. Bakke.58

IV. JUSTICE POWELL SOLO OPINION IN BAKKE 59

Mr. Allan Bakke, a white male applicant, was denied admission to the Medical School of the University of California at Davis, even though the

53 Id. at 603 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).
54 Id.
55 See Keyishian, 385 U.S. 589. More than ten years would elapse before anyone suggested that Keyishian had anything to do with the academic freedom of universities.
56 Id.
57 See infra note 112 and accompanying text.
59 No other Justice joined parts IV-D or V-A of Justice Powell's opinion. These parts are found at Bakke, 438 U.S. at 311-19. Justice Powell's discussion of academic freedom and the First Amendment is confined to these subsections of his opinion. The only portions of Justice Powell's opinion that were joined by four other Justices were Parts I and V-C. See id. at 272, 329. Justice White joined part III-A. Id. Justices Brennan, White, Marshall, and Blackmun wrote a separate opinion, concurring in the judgment in part and dissenting in part. Id. at 324-79. Justice Stevens, joined by Burger, C.J. and Stewart and Rehnquist, J.J., likewise wrote another separate opinion, concurring in the judgment in part and dissenting in part. Id. at 408-21. Justices White, Marshall, and Blackmun each also wrote their own separate opinions. Id. at 379-409. Designating parts IV-D and V-A of Justice Powell's Bakke opinion as his "solo opinion" avoids any need to determine whether it would be better characterized as "dissenting" or "concurring."
School had admitted several minority students with lower test scores under a special admissions program. The admissions program had been devised by the Medical School's faculty, and was administered by committees composed of faculty, students, and administrators. The California Supreme Court held that the School's special admissions program was unlawful, enjoined the school's consideration of race when making future admissions decisions, and directed the trial court to order Mr. Bakke admitted.

Justice Powell considered that the medical school's special admissions program violated the Fourteenth Amendment's equal protection requirement, and concluded that the portion of the California Supreme Court's judgment invalidating that program should be upheld. Four other Justices agreed in that result on the ground that the medical school's special admissions program violated Title VI of the Civil Rights Act of 1964. The other four Justices, writing separately, agreed with Justice Powell in reversing the California Supreme Court's judgment that race could never be considered a factor in admissions policy. Part IV.D. of Justice Powell's opinion discussed academic freedom and the First Amendment, and Part V.A. referred, albeit obliquely, to the First Amendment. Neither of these parts was joined by any other Justices, nor did either of the two groups of Justices writing separately even mention either academic freedom or the First Amendment.

No judge, Justice or commentator prior to Bakke had ever suggested that the Supreme Court had held that public colleges or universities might be entitled to academic freedom or autonomy under the First Amendment. Subsequent proposals to the effect that such institutions are so entitled all derive directly or indirectly from Justice Powell's solo opinion in Bakke, from Justice Frankfurter's Sweezy concurrence, and/or from Keyishian, when misread in light of Justice Powell's solo opinion in Bakke. It is important, therefore, to examine closely what Justice Powell said, and to assess its accuracy.

A. The Language of Justice Powell's Bakke Solo Opinion

Relevant language from that solo opinion is quoted below. Numbers inserted in brackets immediately after certain sentences mark statements that are examined in the analysis that follows. Justice Powell the following:

60 Bakke, 438 U.S. at 276-77.
61 Id. at 272-77.
62 Id. at 270-71.
63 Id. at 320.
64 Id. at 271, 408-21 (Stevens, J., concurring).
65 Id. at 272, 324-79 (Brennan, J., concurring).
67 Id. at 315-19; see infra note 96 and accompanying text.
68 See infra part V. of this article.
The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. [1.] Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. [2.] The freedom of a university to make its own judgments as to education includes the selection of its student body. [3.] Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom: [4., 5.]

"'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Sweezy v. New Hampshire*, 354 U.S. 234, 263. (1957) (concurring in result). [6.]

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967): [7.]

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *United States v. Associated Press*, D.C., 52 F. Supp. 362, 372." [8.]

The atmosphere of "speculation, experiment and creation" - so essential to the quality of higher education - is widely believed to be promoted by a diverse student body. [9.] As the Court noted in *Keyishian*, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples. [10.]

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Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. [11., 12.] In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.  

By juxtaposing these quotations and citations and adding his own interpretive glosses, Justice Powell was trying to show that universities are entitled to academic freedom under the First Amendment, defined in terms of the "four essential freedoms" language quoted in Justice Frankfurter's Sweezy concurrence. In particular, Justice Powell wished to credit universities with a constitutionally guaranteed right to select students who would contribute to "the robust exchange of ideas."  

B. Analysis and Critique

Justice Powell's reasoning prompts a number of questions and comments. These are considered in the sequence indicated by the numbers inserted above in brackets.

[1.] Justice Powell's statement that it "clearly is a constitutionally permissible goal for an institution of higher education" to seek "the attainment of a diverse student body," seems incontrovertible, even though it is unsupported by citation to authority. Arguably any goal not prohibited by the Constitution may be presumed to be constitutionally permissible. The issue in Bakke, however, was whether the means for attaining that goal were constitutionally permissible. Rather than begging this question, Justice Powell probably meant only to introduce the argument that followed.

[2.] The proposition that academic freedom is "a special concern of the First Amendment," though set out without quotation marks or attribution, derives from Keyishian. Keyishian had to do with teachers' academic freedom, a point Justice Powell left unmentioned.

[3.] As if it somehow followed, Justice Powell then declared - ipse dixit - without citing authority that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student

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70 Id. at 314.
71 Id. at 312; supra note 34 and accompanying text.
72 Id. at 313; supra note 70 and accompanying text.
73 Id. at 311-12; supra note 70 and accompanying text.
74 Id. at 269-71, 287-311.
75 Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); see supra note 52 and accompanying text.
76 See supra notes 49, 50, and 53 and accompanying text.
body." Keyishian, of course, said nothing about "the freedom of a university to make its own judgments as to education" or about a university's selection of its student body; nor did it characterize any university's freedoms as First Amendment rights. It may be noted that Justice Powell's statement that a university has "the freedom . . . to make its own judgment as to education" is much broader than the "four essential freedoms" enumerated in Justice Frankfurter's quotation from The Open Universities.

[4.] In order to validate this declaration, Justice Powell then turned to Justice Frankfurter's concurrence in Sweezy. He characterized the language Justice Frankfurter had quoted from The Open Universities as if Justice Frankfurter himself had summarized the four essential freedoms. Justice Powell did not note that the quoted language came from The Open Universities book, nor did he explain how language from a South African context could possibly serve as authoritative construction of the U.S. Constitution.

[5.] Again, writing ipse dixit, without further explanation or authority, Justice Powell stated that the four essential freedoms constitute academic freedom. Justice Frankfurter had not said that they did so. Nor had any one else said so. By 1978 a substantial body of scholarly literature on the subject of academic freedom had been published, a body of literature Justice Powell was either unaware of, or ignored. None of that literature had equated academic freedom with The Open Universities' "four essential freedoms."

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77 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978); see also supra note 70 and accompanying text.
78 See Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); see also supra notes 43-58 and accompanying text.
79 See supra note 34 and accompanying text.
81 Id.
82 Id.
83 Bakke, 438 U.S. at 312.
84 See, e.g., THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (Random House 1970); Ralph F. Fuchs, Academic Freedom -- Its Basic Philosophy, Foundation, and History 28 LAW & CONTEMP. PROBS. 431 (1963); William P. Murphy, Academic Freedom -- An Emerging Constitutional Right; Arval A. Moris, Academic Freedom and Loyalty Oaths, 28 LAW & CONTEMP. PROBS. 487 (1963); Thomas I. Emerson and David Haber, Academic Freedom of the Faculty Member as Citizen, 28 LAW & CONTEMP. PROBS. 525 (1963). See also Comment, Developments in the Law, Academic Freedom, 81 HARV. L. REV. 1045 (1968); RICHARD HOFSTADTER & WALTER METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (Columbia University Press 1955). None of these publications suggested that academic institutions might or should be entitled to academic freedom under the First Amendment, nor does The 1940 Statement on Principles of Academic Freedom and Tenure, the basic professional standard for institutions of higher learning in the United States. See AAUP POLICY DOCUMENTS & REPORTS 3-4 (9th ed. 2001). For history and analysis of The 1940 Statement, see Walter P. Metzger, The 1940 Statement of Principles on Academic Freedom & Tenure, 53 LAW & CONTEMP. PROBS. 3 (1990).
[6.] Justice Powell apparently considered the quoted language authoritative, but did not explain how a concurring opinion could serve as binding authority. It is possible that Justice Powell intended to cite Justice Frankfurter’s concurrence as merely persuasive authority. However, in view of his later reference to academic freedom as a “special concern of the First Amendment” - language borrowed from Keyishian - and his subsequent contention that “petitioner invokes a countervailing interest, that of the First Amendment,” it appears more likely that Justice Powell intended his fellow Justices to believe that the language from Justice Frankfurter’s concurrence had somehow been transmuted into constitutional law.

[7.] That Justice Powell himself so believed seems likely in view of the fact that immediately following the Sweezy concurrence quotation, Justice Powell turned, now expressly, to Keyishian for support. In doing so, however, Justice Powell, perhaps inadvertently, made the following totally erroneous statement: “Our national commitment to the safeguarding of these freedoms within university communities was emphasized in Keyishian v. Board of Regents.” Keyishian said nothing at all about the four essential freedoms of a university, much less emphasizing “our national commitment to safeguarding” them.

[8.] Justice Powell’s quotation from Keyishian is prefaced by his quotation from Justice Frankfurter’s concurrence featuring the quoted language about “the four essential freedoms” and the erroneous claim that Keyishian emphasized “our national commitment to safeguarding these freedoms;” it is followed by Justice Powell’s reiteration of language from Justice Frankfurter’s concurrence about “speculation, experiment and creation.” Apparently Justice Powell intended to give the impression that the language from Justice Frankfurter’s Sweezy concurrence was somehow adopted or ratified by the Keyishian Court; it had not been.

[9.] Here Justice Powell states that the “atmosphere of ‘speculation, experiment and creation’... essential to the quality of higher education - is widely believed to be promoted by a diverse student body.” As sole authority for this purportedly widely held belief, he quoted from a writing by

85 Bakke, 438 U.S. at 311-12.
86 Id. at 312, 313.
87 Id. at 312-13.
88 Id. at 312.
89 See supra notes 73-111 and accompanying text.
90 Bakke, 438 U.S. at 312.
91 See William W. Van Alstyne, Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review, 53 Law & Contemp. Probs. 79, 135-38 (1990) (urging that Justice Powell’s discussion of academic freedom was consistent with both Sweezy and Keyishian, in that it merely affirmed that the medical school’s faculty’s admissions program was based upon its exercise of good faith professional judgment). Nevertheless, Van Alstyne referred to “institutional academic freedom” as if the Sweezy and Keyishian Courts had embraced that concept. Id. at 136-37.
92 Bakke, 438 U.S. at 312.
President William G. Bowen of Princeton University. President Bowen’s quoted remarks included no reference to “the atmosphere of speculation, experiment and creation.”

[10.] Justice Powell’s next sentence appears to have been intended to imply that Keyishian held that student body diversity was a First Amendment value of some sort:

As the Court noted in Keyishian, it is not too much to say that the ‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.

Although the actual quotation from Keyishian is enclosed by internal quotation marks, the introduction, “As the Court noted in Keyishian . . .” implies that Keyishian had somehow provided a constitutional foundation for university admissions policies that would expose future leaders “to the ideas and mores of students” from diverse backgrounds. Keyishian had done nothing of the sort.

Justice Powell’s cryptic reference to the First Amendment in part V-A of his opinion likewise indicates that he somehow considered student body diversity a First Amendment value: “[t]he experience of other university admission programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end.” Justice Powell did not explain or cite authority for the proposition that “educational diversity [is] valued by the First Amendment.”

[11.] In the paragraph that follows, Justice Powell evidently meant to cite Keyishian (and his own appended language) as constitutional authority, not just as a statement of commendable social or public policy. “Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the ‘robust exchange of ideas,’ petitioner invokes a countervailing constitutional interest, that of the First Amendment.” “Thus” signifies that Justice Powell thought or contended that Keyishian had somehow constitutionalized the language quoted in Justice Frankfurter’s Sweezy concurrence about the freedom of a university to select students. It had not done so.

93 Id. at 312 n.48.
94 Id. 312-13.
95 Id.
96 Id. at 316.
97 Id.
98 Bakke, 438 U.S. at 313.
99 See supra note 34 and accompanying text.
100 See supra notes 24-58 and accompanying text.
By "countervailing constitutional interest," Justice Powell evidently meant to suggest that Mr. Bakke's Fourteenth Amendment equal protection claim might be counter-balanced or off-set by the University's (or its Medical School's) First Amendment right to select students.\(^{101}\) He did not explain how a governmental agency engaged in state action might be deemed to enjoy a First Amendment right to be free from judicial review of constitutional claims by persons affected by that action.\(^{102}\)

The final sentence in the quoted portion of Justice Powell's reasoning seems more of a social policy than a constitutional argument: "In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission."\(^{103}\) The goal of enrolling a diverse student body might be considered an important, or even compelling, state interest.\(^{104}\) That such a goal was, arguably, of "paramount importance," however, does not mean that the University was therefore authorized by the First Amendment to achieve it.

How exactly Justice Powell believed or proposed that universities themselves might be endowed with First Amendment rights with respect to the "freedoms" stated in The Open Universities quotation from Justice Frankfurter's Sweezy concurrence remains unclear. It does not matter greatly, however, since no other Justice or Justices joined in Justice Powell's reflections in regard to these matters.\(^{105}\) Various judges and commentators have apparently overlooked this critical consideration. Justice Powell's statements about academic freedom and the First Amendment, as well as his re-interpretations of Justice Frankfurter's Sweezy concurrence and of the Court's opinion in Keyishian, though no doubt of interest to legal scholars,

\(^{101}\) See Finkin, supra note 38, at 850 (discussing Justice Powell's Bakke solo opinion, Finkin observed, "Labeling [the medical school's] institutional function as 'academic freedom' raises a countervailing constitutional claim in order to shield the preferential admissions policy from more exacting examination").

\(^{102}\) See Hopwood v. Texas, 78 F.3d 932, 943 n.25 (5th Cir. 1996):
Saying that a university has a First Amendment interest in [academic freedom] is somewhat troubling. Both the medical school in Bakke and in our case, the [University of Texas] law school are state institutions. The First Amendment generally protects citizens from the actions of government, not government from its citizens.

\(^{103}\) Id. (comment by Judge Jerry E. Smith).

See also J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment", 99 YALE L.J. 251, 257 (1989). "Why the First Amendment protects administrative activities at some remove from teaching and scholarship has yet to be adequately justified." Id. To date, no judge, Justice, or commentator has provided that justification.


\(^{105}\) Four Justices in Bakke concluded that the School's "goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify use of race-conscious admissions criteria." Id. at 368 (Brennan, J., concurring in part and dissenting in part). In Grutter v. Bollinger, 539 U.S. 306, 328 (2003), the Court held that the University of Michigan's Law School "has a compelling interest in a diverse student body."
are not the opinion of the Bakke Court, but are simply Justice Powell’s own thoughts, and carry no more authority than those found in a concurring opinion. It is unlikely that any legal scholar or jurist would fail to agree with the proposition articulated in one of the several opinions set out in Bakke itself: “only a majority can speak for the Court or determine what is the ‘central meaning’ of any judgment of the Court.” In any case, a solo opinion is not a holding of the Court.

Some federal appellate courts have disagreed as to whether, in view of Justice Powell’s statement that student body diversity might be considered a compelling state interest, the Bakke Court’s majority position could be so construed as well. Four other Justices seemed to say that such diversity was an important state interest. The applicable standard for ascertaining the Court’s holding in such circumstances was set out in Marks v. United States:

When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds...”

There can be no doubt about the result if this standard is applied to Justice Powell’s lone statements about academic freedom and the First Amendment. Only one other Justice in Bakke even mentioned academic freedom, and none of the Justices, besides Justice Powell, discussed institutional academic freedom or any First Amendment basis for it. Justice Powell’s lone statements in regard to these matters cannot possibly be construed as the holding or even the opinion of the Court.

V. AFTER JUSTICE POWELL’S SOLO BAKKE OPINION. THE EMERGING NOTION THAT A SUPREME COURT HAD GROUNDED INSTITUTIONAL ACADEMIC FREEDOM, OR PERHAPS INSTITUTIONAL AUTONOMY, UPON THE FIRST AMENDMENT

Until publication of Justice Powell’s Bakke solo opinion in 1978, no one else had proposed that either Justice Frankfurter’s Sweezy concurrence or the Court’s decision in Keyishian somehow meant that public colleges and

106 Bakke, 438 U.S. at 408 n.1. (Stevens, J., concurring in part and dissenting in part).
107 Id. at 314-16.
108 Id. at 324, 362-63 (Brennan, J., concurring in part and dissenting in part); see also supra note 104.
110 Bakke, 438 U.S. at 402, 405 (Blackmun, J., concurring).
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universities were endowed with academic freedom or autonomy as First Amendment rights. Nor did judges, Justices or commentators do so immediately following Bakke. The process, however, had begun.

This article now undertakes to track the re-interpretation of the three opinions that have given rise to the present state of confusion. Necessarily, this account will involve some overlap or duplication, since judges, Justices, and commentators often base their positions and proposals on more than one of these sources.

Five sets of Supreme Court cases are part of this subsequent history. These are: Widmar v. Vincent (1981) and Justice Stevens’ concurrence in the case; Board of Regents of the University of Michigan v. Ewing (1985); University of Pennsylvania v. EEOC (1990); Justice Souter’s concurrence in Regents of the University of Wisconsin v. Southworth (2000); and Grutter v. Bollinger (2003). Relevant portions of opinions in each case will be examined in connection with one or more of this article’s analytical sub-sections. None of the decisions in these cases held that academic institutions are entitled to either academic freedom or autonomy under the First Amendment, but in each case, there is either a concurring opinion or dicta that has been construed to such effect.

Readings and misreadings of Justice Frankfurter’s Sweezy concurrence by various judges, Justices, and commentators will be considered first; then some of the main errors as to what the Court did (and did not) say in Keyishian; and finally, the misleading consequences of Justice Powell’s solo opinion in Bakke.

A. Justice Frankfurter’s Sweezy Concurrence Revisited Following Bakke

Judges, Justices, and commentators have given expression to a number of errors in their readings of and reflections upon Justice

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112 See Comment, supra note 84, at 1065 n.2, n.3, 1067, 1073 (describing Sweezy and Keyishian as cases relating to teachers’ academic freedom or First Amendment rights).


114 See, e.g., infra notes 135-136, 148, 166, 188-193, 198, 250-252 and accompanying text.


120 See, e.g., infra notes 135-137, 145-152, 166-169, 187-195, 259 and accompanying text (analyzing Univ. of Pa. v. EEOC, 493 U.S. 182 (1990)).


122 See infra notes 123-177, 178-200, 201-354 and accompanying text.
Frankfurter's *Sweezy* concurrence.\(^{123}\) The least important of these misreadings is simply incorrect citation to the case.\(^{124}\) More serious errors relate to the language appearing in the final paragraph quoted from *The Open Universities* that begins, "It is the business of a university . . ."\(^{125}\) These errors can be grouped under three categories: (1) failure to identify correctly the source of the much-quoted language about "the business of a university,"\(^{126}\) (2) confusion as to what this quoted language – or Justice Frankfurter’s concurrence – actually did or did not say,\(^{127}\) and (3) treating this language – quoted in a concurring opinion – as if it were the Court’s holding.\(^{128}\)

1. Misattribution

Several judges and even some Justices have failed to observe that Justice Frankfurter was quoting from *The Open Universities* book. Justice Stevens mistakenly attributed this language to T. H. Huxley.\(^{129}\) More problematically, some judges have written as if they supposed that Justice Frankfurter, himself, authored the quoted language.\(^{130}\) What is more surprising is that at one time and another even various Supreme Court Justices mistakenly attributed the quoted language to Justice Frankfurter himself. The first such instance was in Justice Powell’s solo opinion in *Bakke*.\(^{131}\) Quoting from Justice Frankfurter’s *Sweezy* concurrence, Justice Powell stated that Justice Frankfurter “summarized these four essential freedoms.”\(^ {132}\) In fact, Justice Frankfurter made no mention of these freedoms or other language quoted from *The Open Universities* in his


\(^{125}\) See supra text accompanying note 23.

\(^{126}\) See infra notes 123-137 and accompanying text.

\(^{127}\) See infra notes 138-164 and accompanying text.

\(^{128}\) See infra notes 165-177 and accompanying text.


\(^{130}\) See supra notes 32-33 and accompanying text (a possible explanation as to the likely basis for this confusion).

\(^{131}\) See, e.g., Urofsky v. Gilmore, 216 F.3d 401, 414 (4th Cir. 2000); Feldman v. Ho, 171 F.3d 494, 495 (7th Cir. 1999); Webb v. Bd. of Tr. Of Ball State Univ., 167 F.3d 1146, 1149 (7th Cir. 1999); Notre Dame du Lac, 715 F.2d 331, 335 (7th Cir. 1983); Martin v. Helstad, 699 F.2d 387, 391 (7th Cir. 1983) and Martin, 699 F.2d at 397 (Coffey, J. concurring).


\(^{133}\) Id. at 312 (emphasis added). See also Justice Thomas’ dissent in *Grutter v. Bollinger*, 539 U.S. 306, 363 (2003) (Thomas, J., concurring in part and dissenting in part) (introducing the quoted language with the phrase, “According to Justice Frankfurter . . .,” as if Justice Frankfurter, himself, had written it).
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concurring statement.\textsuperscript{133} He quoted, but did not write the language in question.\textsuperscript{134}

Others also have mistakenly read language in Justice Frankfurter's concurrence as if it were the opinion of the Court. Writing for a unanimous Court in \textit{University of Pennsylvania v. EEOC}, Justice Blackmun erroneously attributed \textit{The Open Universities} language to the \textit{Sweezy} Court. "When, in \textit{Sweezy} and \textit{Keyishian}, the Court spoke of 'academic freedom' and the right to determine on 'academic grounds who may teach' the Court was speaking in reaction to content-based regulation."\textsuperscript{135} Reference to a university's freedom "to determine [for itself] on academic grounds who may teach" is found only in \textit{The Open Universities} language quoted by Justice Frankfurter in his \textit{Sweezy} concurrence.\textsuperscript{136} It was not quoted or repeated by either the \textit{Sweezy} plurality or the \textit{Keyishian} Court.\textsuperscript{137}

2. \textbf{What Justice Frankfurter's \textit{Sweezy} Concurrence Did and Did Not Say}

Several Justices and judges have misread Justice Frankfurter's concurrence and/or the quoted \textit{Open Universities} language in a variety of ways. Misreadings by various Supreme Court Justices are considered first.

\textit{a. Misreadings by Other Supreme Court Justices}

One persistent misreading is the claim that in his concurrence, Justice Frankfurter had proposed to ground Mr. Sweezy's speech or academic freedom rights upon the First Amendment. The earliest instance is found in Justice Clark's dissent in \textit{Sweezy}: "My Brothers FRANKFURTER and HARLAN . . . join in the reversal . . . on the ground that Sweezy's rights under the First Amendment have been violated."\textsuperscript{138} This might arguably be a correct interpretation of Justice Frankfurter's reasoning with respect to Sweezy's political rights.\textsuperscript{139} But it is incorrect as to Justice Frankfurter's analysis of what he called "governmental intrusion into the intellectual life of a university."\textsuperscript{140} That portion of his concurrence, including his quotation

\textsuperscript{134} Id. at 262-63.
\textsuperscript{135} Univ. of Pa. v. EEOC, 493 U.S. 182, 197 (1990). See also id. at 196 where Justice Blackmun attributes \textit{The Open Universities} language to Justice Frankfurter, himself.
\textsuperscript{136} Sweezy, 354 U.S. at 263. See also Abigail K. Holland, Note, The High Price of Equality: The Effect of the Solomon Amendment on Law Schools' First Amendment Rights, 38 SUFFOLK UNIV. L. REV. 855, 860 (2005) (ascribing language from \textit{The Open Universities} quoted in Justice Frankfurter's concurrence to "[t]he Court").
\textsuperscript{138} Sweezy, 354 U.S. at 268 (1957) (Clark, J., dissenting)
\textsuperscript{139} See supra note 32.
\textsuperscript{140} Sweezy, 354 U.S. at 261.
from *The Open Universities*, makes no mention of Mr. Sweezy’s First Amendment rights.

Further confusion on this point is instanced in Justice Thomas’ dissent in *Grutter v. Bollinger*:

The constitutionalization of “academic freedom” began with the concurring opinion of Justice Frankfurter in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) . . . The Court held that the investigation violated due process . . .

Justice Frankfurter went further, however, reasoning that the First Amendment created a right of academic freedom that prohibited the investigation.

As previously observed, Justice Frankfurter’s *Sweezy* concurrence mentions neither the First Amendment nor academic freedom, and at no point attempted to say that the former somehow under-girded the latter.

Justices Thomas and Scalia may have been misled by language in Justice Blackmun’s opinion in *University of Pennsylvania v. EEOC*. Here, writing for a unanimous Court, Justice Blackmun erroneously stated that in his *Sweezy* concurrence, Justice Frankfurter had “recognized that one of the four essential freedoms that a university possesses under the First

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141 Id. at 260-64.
142 Id. at 262-63.
143 539 U.S. 306, 362 (Thomas, J., concurring in part and dissenting in part, joined by Scalia, J.) (internal citations omitted). Justice Thomas cited all but one page of Justice Frankfurter’s twelve-page concurrence, but did not cite to any particular text where Justice Frankfurter supposedly articulated this “reasoning.” Id. at 362.

The Fourth Circuit likewise recently reported, erroneously, that Justice Frankfurter’s concurrence referred explicitly to academic freedom, as grounded in the Constitution: “Justice Frankfurter . . . relied explicitly on academic freedom in concluding that Sweezy’s contempt conviction offended the Constitution.” Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000) (en banc). As noted above, Justice Frankfurter’s *Sweezy* concurrence made no mention of the First Amendment or the Constitution as a basis for academic freedom. Nor did it even mention academic freedom.

144 Commentators sometimes also have been misled. See, e.g., Byrne, supra note 102, at 312 (discussing Justice Frankfurter’s purported emphasis upon and description of academic freedom in his *Sweezy* concurrence); Finkin, supra note 38, at 842-43 (referring to Justice Frankfurter’s “placing special emphasis on academic freedom”); Van Alstyne, supra note 91, at 110. “Frankfurter and Harlan held, on first amendment academic freedom grounds, that ‘the first amendment shield[ed]’ Sweezy’s refusal to answer questions probing the contents of his university lecture.” Id. at 100; GERALD GUNThER, CONSTITUTIONAL LAW 1407 n.5 (11th ed. 1985) (“Justice Frankfurter’s comment on academic freedom was among the first to include that concept within the First Amendment.”); Matthew J. Streb, *The Reemergence of the Academic Freedom Debate, in ACADEMIC FREEDOM AT THE DAWN OF A NEW CENTURY* 8 (Evan Gerstmann and Matthew J. Streb, eds., 2006). “[A] majority first recognized academic freedom as a constitutional right in *Sweezy v. New Hampshire* (1957).” Id. Streb evidently meant to include Justice Frankfurter in this “majority.”

Amendment is the right to determine for itself on academic grounds who may teach. As mentioned previously, neither The Open Universities nor Justice Frankfurter made any mention of the First Amendment in connection with the "four essential freedoms of a university."

Justice Blackmun also characterized the issue in Sweezy incorrectly. As to Sweezy (and also Keyishian) he wrote: "In those cases government was attempting to control or direct the content of the speech engaged in by the university or those affiliated with it." In fact, Sweezy said nothing at all about "speech engaged in by the university." The University of New Hampshire was not a party to the case. Neither the Sweezy plurality nor Justice Frankfurter even mentioned speech by the university. The question before the Sweezy Court was whether Mr. Sweezy's own rights had been violated.

b. Misreadings by Lower Federal Courts

Certain other misreadings and distortions of Justice Frankfurter's concurrence and/or his quotation in it from The Open Universities may be mentioned. For instance, in Webb v. Board of Trustees, a Seventh Circuit
panel stated, on the basis of Justice Frankfurter’s *Sweezy* concurrence that “the University[‘s] . . . ability to set a curriculum is as much an element of academic freedom as any scholar’s right to express a point of view.”\textsuperscript{153} Neither *The Open Universities* authors nor Justice Frankfurter had distinguished between the freedoms of a university and those of its faculty.\textsuperscript{154} An even more imaginative misreading of Justice Frankfurter’s *Sweezy* concurrence in regard to curricular matters is set out in the Fourth Circuit’s en banc opinion in *Boring v. Buncombe County Board of Education.*\textsuperscript{155} Having cited Plato, Burke, and Justice Frankfurter’s quotation from *The Open Universities,* this court concluded, somewhat remarkably, “[w]e agree with Plato and Burke and Justice Frankfurter that the school, not the teacher, has the right to fix the curriculum.”\textsuperscript{156} It might be mentioned that Justice Frankfurter’s concurrence contains no language to that effect.\textsuperscript{157}

The Fourth Circuit recently offered another variation of this misreading.\textsuperscript{158} Mistakenly attributing *The Open Universities* language to Justice Frankfurter, himself, this court declared:

> The right recognized by Justice Frankfurter . . . was not the individual right claimed by Appellees, but rather an institutional right belonging to the University of New Hampshire . . . . Significantly, at no point in his concurrence does Justice Frankfurter indicate that individual academic freedom rights had been infringed; in his view, the constitutional harm fell entirely on the university as an institution.\textsuperscript{159}

As previously observed, neither *The Open Universities* document nor Justice Frankfurter’s concurrence refers to either constitutional rights or harms or to academic freedom; necessarily neither the document nor the concurrence says anything about such harms being inflicted upon a university.\textsuperscript{160}

Though not citing Justice Frankfurter’s quotation from *The Open Universities,* a Seventh Circuit judge, evidently drawing on its language as filtered through Justice Powell’s *Bakke* solo opinion, announced his own

\textsuperscript{153} Webb v. Bd. of Trustees, 167 F.3d 1146, 1149 (7th Cir. 1999).

\textsuperscript{154} See *Sweezy v. New Hampshire,* 354 U.S. 234, 255-67 (1957) (Frankfurter, J., concurring); see supra notes 24-41 and accompanying text.

\textsuperscript{155} Boring v. Buncombe County Bd. of Educ., 136 F.3d 364 (4th Cir. 1998). For facts and analysis see Hiers, supra note 33, at 89-93.

\textsuperscript{156} Boring, 136 F.3d at 370.

\textsuperscript{157} See id. at 370. Nor do the excerpts the court quoted from Plato or Burke.

\textsuperscript{158} See generally Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000).

\textsuperscript{159} Urofsky, 216 F.3d at 412-13; see also infra notes 194-195 and accompanying text; Feldman v. Ho, 171 F.3d 494, 495 (7th Cir. 1999) (citing Justice Frankfurter’s *Sweezy* concurrence as authority for the proposition that “[a] university’s academic independence is protected by the Constitution.”).

\textsuperscript{160} See supra notes 138-142 and accompanying text.
views regarding academic freedom. "I would hold that the interest of academic freedom includes the right of a university administration to determine who may be admitted to study as well as a right to determine and direct its faculty and student body." The judge did not explain whether he was thinking of academic freedom as a First Amendment liberty or as a social policy value, or why it should be regarded as a prerogative of a university's administration. His conception of university governance seems to have been based either upon the command-control model, or on a mind-set of identification with and deference to those vested with authority. Other Seventh Circuit opinions regarding institutional academic freedom have likewise tended to equate "the university" with its administration.

3. A Concurring Opinion is not the Holding of the Court or the Law of the Land

Perhaps the most striking type of mistake courts and commentators have made in regard to Justice Frankfurter's Sweezy concurrence has been to cite it as if it represented the Court's majority holding and thus stated settled constitutional law.

As previously noted, in The University of Pennsylvania case, Justice Blackmun wrote with reference to Sweezy and Keyishian: "[w]hen in those cases, the Court spoke of ... the right to determine on 'academic grounds who may teach' the Court was speaking in reaction to content-based regulations." The italicized language here cited by Justice Blackmun is found neither in the Sweezy plurality opinion nor in Keyishian, but only in The Open Universities excerpt quoted in Justice Frankfurter's concurrence. The Court had not so spoken. Justice Blackmun's error is all the more remarkable because his opinion was joined by all the other Supreme Court Justices. It might have been expected that at least one of the nine Justices' several law clerks would have delicately drawn this error to their attention.

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161 Martin v. Helstad, 699 F.2d 387, 397 (7th Cir. 1983) (Coffey, J., concurring).
162 Id.
164 See infra notes 241-266, 300-306 and accompanying text.
165 See, e.g., Lovelace v. S. Mass. Univ., 793 F.2d 419, 426 (1st Cir. 1986).
167 See supra text note 34 and accompanying text.
Equally odd are those instances where courts have recognized that Justice Frankfurter's opinion was in concurrence, but nevertheless accorded it binding constitutional authority. The earliest and possibly most noteworthy such instances is Justice Powell's flat declaration in Bakke: 

"[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."\(^{170}\) As authority for this declaration, Justice Powell cited Justice Frankfurter's *Sweezy* concurrence.\(^{171}\) This misunderstanding as to authority is echoed in some Seventh Circuit opinions, notably by Judge Easterbrook:

A university's academic independence is protected by the Constitution, just like a faculty member's own speech. Concurring in *Sweezy v. New Hampshire* . . . . Justices Frankfurter and Harlan referred to the four 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."\(^{172}\)

Judge Easterbrook evidently italicized the phrase "of a university" in order to clinch his contention that a "university's academic independence is protected by the Constitution." He did not explain how or why a quotation from South African scholars writing about conditions in South Africa might affect First and Fourteenth Amendment jurisprudence in the United States, or why a concurring opinion should be accorded the weight of constitutional law.\(^{173}\)

Some other courts and even a few commentators likewise seem to have believed that Justice Frankfurter's *Sweezy* concurrence somehow had morphed into the Court's holding.\(^{174}\) Thus in time, Justice Frankfurter's

\(^{170}\) Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978). Here as elsewhere in parts IV-D and V-A of his opinion, Justice Powell was speaking only for himself, since no other Justices joined in these portions of his opinion. See supra note 59.

\(^{171}\) See supra note 70, 77-82 and accompanying text.

\(^{172}\) Feldman v. Ho, 171 F.3d 494, 495 (7th Cir. 1999) (emphasis in original) (internal citations omitted). See also Webb v. Board of Trustees, 167 F.3d 1146, 1149-50 (7th Cir. 1999), where Judge Easterbrook likewise italicized "of a university" when making a similar statement; Asociacion de Educacion Privida de Puerto Rico v. Echevarria-Vargas, 385 F.3d 81, 88 (1st Cir. 2004) (Torruella, J., dissenting) (citing Justice Frankfurter's *Sweezy* concurrence as authority for "the four components of academic freedom"). Justice Frankfurter's concurrence was also cited - unsuccessfully - as authority for institutional academic freedom by George Washington University in a zoning case. George Washington Univ. v. District of Columbia, 318 F.3d 203, 211-12 (D.C. Cir. 2003).

\(^{173}\) See supra note 172 and accompanying text.

\(^{174}\) See, e.g., Hulen v. Yates, 322 F.3d 1229, 1238 (10th Cir. 2003); Wirsing v. Bd. of Regents, 739 F.Supp. 551, 553 (D.Colo. 1990), aff'd 945 F.2d 412 (10th Cir. 1991). See also Widmar v. Vincent, 454 U.S. 263, 276 (1981) (citing Justice Frankfurter's concurrence as authority for the purported "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 . . . and who may be admitted to study.'"). The *Widmar* majority implied that this "right" was related to "the academic freedom of public universities," but did
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conciliation in Sweezy became the foundation for the notion that academic institutions themselves – or their administrators – were entitled to academic freedom or autonomy under the First Amendment. Significantly, it would be more than two decades after Sweezy before any judge, Justice, or commentator so proposed. That they did so at all was because they came to view it through lenses supplied by Justice Powell in his solo opinion in Bakke.

Justice Powell not only read Justice Frankfurter’s Sweezy concurrence in a special way. He also proposed a distinctive and erroneous reading of the Court’s opinion in Keyishian v. Board of Regents.

B. Keyishian Revisited and Misread in Light of Justice Powell’s Bakke Solo Opinion

As will be seen, many Justices, judges, and commentators came to read Keyishian as it was described in Justice Powell’s solo opinion. Perhaps this is not surprising, since courts and their law clerks often rely on more recent cases’ accounts as to the meaning of earlier cases. This section first examines Justice Powell’s own construction or reconstruction of Keyishian. It then turns to a series of misreadings of Keyishian that appear to derive from Justice Powell’s account of it in his Bakke solo opinion.

1. Justice Powell’s Own Reconstruction of Keyishian

Justice Powell revisited and proceeded to reconstruct Keyishian in his solo opinion in Bakke. Early in part IV-D, Justice Powell quoted the “It is the business of a university” language from Justice Frankfurter’s Sweezy concurrence (without noting that it derived from The Open

not mention the First Amendment as basis for either that “right” or public universities’ academic freedom. Id. at 276 n.20, 264-277.

Peter Byrne identifies Sweezy as part of “[t]he Court’s new elaboration of institutional academic freedom.” Byrne, supra note 102, at 312. See also David M. Rabban, A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment, 53 LAW & CONTEMP. PROBS. 227, 280 (1990).

See infra notes 223-354 and accompanying text.

See supra notes 59-111 and accompanying text.


See infra notes 180-186 and accompanying text.

See infra notes 187-200 and accompanying text.

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-19 (1978). These pages contain parts IV-D and V-A of Justice Powell’s opinion. No other Justice or Justices joined in these portions of the opinion.
but then followed it with a totally erroneous statement regarding the substance of Keyishian:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (concurring in result).

Our national commitment to the safe-guarding of these freedoms within university communities was emphasized in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). In fact, *Keyishian* said absolutely nothing about safeguarding “these freedoms,” and nothing at all as to university admissions policies.

Later in the same paragraph, Justice Powell again ascribed to *Keyishian* significant language that is nowhere to be found in that case: “As the Court noted in *Keyishian*, it is not too much to say that the ‘Nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.” However commendable exposure “to the ideas and mores of students, as diverse as this Nation of many peoples” might be as a matter of social policy, neither that language nor the concept of diversity has any basis whatsoever in *Keyishian*. Justice Powell’s own misreading or misrepresentation of *Keyishian* directly influenced subsequent interpretation of that case by those who took his reconstruction at face value. Many such interpreters apparently preferred to trust Justice Powell’s rendition rather than draw their own conclusions as to the meaning of the case as published in the reporters.

2. Derivative Misreadings of Keyishian

Justice Blackmun’s opinion in *University of Pennsylvania v. EEOC* suggests that he misread or confused the substance of *Keyishian* under the
influence of Justice Powell’s reconstruction. Referring to both Sweezy and Keyishian, Justice Blackmun wrote: “In those cases government was attempting to control or direct the content of the speech engaged in by the university or those affiliated with it.” Sweezy and Keyishian can be viewed as cases dealing with governmental efforts to control or limit speech by persons affiliated with state universities; however, it is completely inaccurate to say that these cases in any way involved speech engaged in by universities themselves. Justice Blackmun may have assumed that the universities involved in the Sweezy and Keyishian cases supported the speaker’s or faculty members’ speech interests; but these cases clearly had to do with individual speakers’ First Amendment rights, not those of universities. Justice Blackmun also stated, incorrectly, that these cases attributed the right to determine on “academic grounds who may teach” to the universities themselves. Justice Blackmun may have assumed that the universities involved in the Sweezy and Keyishian cases supported the speaker’s or faculty members’ speech interests; but these cases clearly had to do with individual speakers’ First Amendment rights, not those of universities. Neither the Sweezy plurality nor the Keyishian Court had spoken of “the right to determine on ‘academic grounds who may teach.’” That language derives solely from The Open Universities book quoted by Justice Frankfurter in his Sweezy concurrence.

Incorrect or groundless assertions by the Court, even if only in dicta, may be perpetuated by inattentive references in later court decisions. This point is illustrated, for example, by the Fourth Circuit’s en banc reconstruction of Keyishian on the basis of Justice Blackmun’s erroneous comments:

The discussion by the Court indicates . . . that it was not focusing upon the individual rights of teachers, but rather on the impact of the New York provisions on schools as institutions. The vice of the New York provisions was that they impinged upon the freedom of the university as an

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188 Id. at 187 (emphasis in original). As to Justice Blackmun’s similar confusion in regard to Sweezy, see supra notes 145-152 and accompanying text. Commentators also were misled. See, e.g. Rabban, supra note 174, at 280: “Early cases such as Sweezy and Keyishian recognized constitutional academic freedom as an individual as well as an institutional right.”
190 See supra notes 24-58 and accompanying text.
191 Univ. of Pa. v. EEOC, 493 U.S. 182, 187 (1990) “When, in those cases, the Court spoke of ‘academic freedom’ and the right to determine on ‘academic grounds who may teach’ the Court was speaking in reaction to content-based regulation.” The Court so spoke in neither of these cases.
192 Id.
193 See supra note 34 and accompanying text.
Thus error begets error, and illusions come to take on a life of their own. The Urofsky Court did not mention that the University of Pennsylvania Court had rejected the University's claim to any constitutional "academic freedom" privilege under the First Amendment.\textsuperscript{195}

More recently, Justice O'Connor — and four other Justices — were misled by Justice Powell's apparent misrepresentation of language from Keyishian in his Bakke solo opinion:

Justice Powell emphasized that nothing less than the "nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." [438 U.S.] at 313 (quoting Keyishian v. Board of Regents of State of N.Y., 385 U.S. 589, 603 (1967).\textsuperscript{196}

It is not clear from this citation whether Justice O'Connor was aware that when writing the phrase "... to the ideas and mores of students as diverse as this Nation of many peoples," Justice Powell was \textit{not} quoting from Keyishian, but instead was inserting his own language and presenting it as if it derived from Keyishian.\textsuperscript{197}

\textsuperscript{194} Urofsky v. Gilmore, 216 F.3d 401, 414 (4th Cir. 2000) (en banc). As to Urofsky, see also supra notes 30, 143 and accompanying text; notes 158-160; infra note 221 and accompanying text. Latter-day readings of both Justice Frankfurter's Sweezy concurrence and Keyishian are strangely riddled with both minor and major mistakes. Evidently the Urofsky court believed that the language of Keyishian itself could be ignored. See supra notes 49-55 and accompanying text. Compare Urofsky with Hardy v. Jefferson Community College, 260 F.3d 671, 680 (6th Cir. 2001) (correctly noting that Keyishian referred to teachers' First Amendment rights).

Among many pointed critiques of Urofsky, see Rebecca Gose Lynch, Comment, Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm, 91 CAL. L. REV. 1063, 1073-1108 (2003); J. Peter Byrne, The Threat to Constitutional Academic Freedom, 31 J.C. & U.L. 79, 110-12 (2003). Byrne wrote: "This is the worst academic freedom decision since the notorious Bertrand Russell case in 1940." Id. at 111. Other critiques are cited in Hiers, supra note 38, at 554 n.129.


\textsuperscript{197} See supra notes 70, 94-95 and accompanying text.
Justice O'Connor's opinion in *Grutter* added another gloss to *Keyishian*. Reverting to Justice Powell's opinion in *Bakke*, she stated:

... Justice Powell reasoned that by claiming "the right to select those students who will contribute most to the 'robust exchange of ideas,'" a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U.S. at 313 (quoting *Keyishian v. Board of Regents of Univ. of State of N.Y.*, supra, at 603)." 198

The expression that thereby a university "seek[s] to achieve a good that is of paramount importance to the fulfillment of its mission" is not quoted from *Keyishian*; nor did Justice Powell attribute it to *Keyishian*. 199 The expression derives solely from Justice Powell's solo opinion. 200

C. Subsequent Misunderstandings and Misapplications of Justice Powell's Solo Opinion in *Bakke*

As indicated in the preceding analysis, Justice Powell's solo opinion in *Bakke* could be read to say that academic institutions of higher learning themselves enjoy academic freedom under the First Amendment. 201 Surprisingly, a number of Justices, judges, and commentators have come to regard Justice Powell's solo opinion as if it were the holding of the Court in *Bakke*. Some notable instances of this misunderstanding are described next. 202 In addition, several Justices, judges, and commentators have read various meanings into Justice Powell's concurrence that go well beyond its explicit language. These revisionist readings or re-interpretations of Justice Powell's *Bakke* solo opinion will be considered in the remaining portion of this section. 203

I. Treating Justice Powell's Bakke Solo Opinion as the Opinion of the Court

It has already been observed that judges, Justices, and commentators occasionally confuse Justice Frankfurter's *Sweezy* concurrence with the *Sweezy* Court's opinion.204 The same kind of confusion also occasionally

198 *Grutter*, 539 U.S. at 329.
200 *Bakke*, 438 U.S. at 313.
201 See supra notes 59-111 and accompanying text.
202 See *infra* notes 204-222 and accompanying text.
203 See *infra* notes 223-354 and accompanying text.
204 See supra notes 165-177 and accompanying text.
occurs with respect to Justice Powell’s *Bakke* solo opinion. Some courts mistakenly described it as the Supreme Court’s opinion, or at least its “plurality” opinion. The fact that the published Supreme Court reporters did not attach the label “concurring” or “dissenting” to those portions of Justice Powell’s opinion that were not joined by four other Justices may have contributed to the problem. Still other courts and commentators, while recognizing it as a solo opinion (or concurrence), nevertheless have treated it as if it were somehow controlling.

a. *Widmar v. Vincent*

The earliest instance of this confusion is in *Widmar v. Vincent*, a case concerning use of a state university’s facilities by a student religious group. Here the Court cited language from Justice Frankfurter’s *Sweezy* concurrence that had been quoted in Part IV-D of Justice Powell’s *Bakke* solo opinion as authority for the proposition that the University had a “right . . . 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.’” It is not clear that the *Widmar* Court was aware that the language from Justice Frankfurter’s *Sweezy* concurrence was quoted only in Justice Powell’s solo opinion and, therefore, did not constitute the *Bakke* Court’s holding. The Supreme Court had not established any such right. In a footnote, the *Widmar* Court implied that this “right” was derived from “the academic freedom of public universities.” That public universities were entitled to academic freedom likewise had been asserted only in Justice Powell’s *Bakke* solo opinion.

In any case, the *Widmar* Court’s citations to Justices Frankfurter’s concurrence and Powell’s solo opinion and its footnote reference to the academic freedom of public universities are all *dicta*. The Court’s holding rested upon its conclusion that the state’s asserted interest “in achieving greater separation of church and state than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause and in this

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205 Given the facts that various Justices joined different parts of Justice Powell’s *Bakke* opinion, and that the published report included opinions by five other Justices or clusters of Justices, some agreeing with Justice Powell as to results, while also dissenting, it is understandable that readers might well have been confused.

206 See *infra* note 215 and accompanying text.


208 See *infra* notes 215-222 and accompanying text.


210 *Id.* at 276.

211 *Bakke*, 438 U.S. at 312.

212 *Widmar*, 454 at 276 n.20.

213 The *Widmar* Court did not purport to ground either public universities’ “right” to make such judgments or their academic freedom on the First Amendment.
case by the Free Speech Clause as well,” and was, therefore, not sufficiently “‘compelling’ to justify content-based discrimination against [the students’] religious speech.”

b. Lower Federal Courts and Commentators

At least two Seventh Circuit opinions mischaracterize Justice Powell’s Bakke solo opinion as his “plurality opinion.” Several cases and a few commentators cite this solo opinion as if it were the opinion, or even the holding of the Bakke Court.

Perhaps the earliest example of this misreading is from the Second Circuit in Gray v. Board of Higher Education, City of New York, where the court stated:

In Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2773 . . . the Supreme Court acknowledged that academic freedom included as one of its elements the right of colleges and universities to choose their students . . .

Such language, however, is found only in Justice Powell’s Bakke solo opinion. Other federal courts, such as the First and Third Circuits,

\[\text{\footnotesize References:}\]

214 Widmar, 454 U.S. at 276. As to the critical difference between holdings and \textit{dicta}, and difficulties distinguishing the two, see Michael Abramowicz & Maxwell Stearns, \textit{Defining Dicta}, 57 STAN. L. REV. 953 (2005). The authors propose the following summary definitions:

A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta.

\textit{Id.} at 961. The authors give careful attention to several of Justice Powell’s statements or propositions in \textit{Bakke}, but do not discuss Justice Powell’s comments about academic freedom or the First Amendment, probably because those comments are found only in his solo opinion, and, therefore, are not even \textit{dicta}. \textit{Id.} at 961-94

215 EEOC v. Univ. of Notre Dame Du Lac, 715 F.2d 331, 335 (7th Cir. 1983) (panel opinion by Coffey, J.); Martin v. Helstad, 699 F.2d 387, 397 (7th Cir. 1983) (Coffey, J., concurring). Black’s Law Dictionary defines a “plurality opinion” as follows: “An opinion of an appellate court in which more justices join than in any concurring opinion (though not a majority of the court) is a plurality opinion as distinguished from a majority opinion in which a larger number of justices on the panel join than not.” \textit{Black’s Law Dictionary} 1154 (6th ed. 1990).

216 Gray v. Bd. of Higher Educ., New York, 692 F. 2d 901, 908 (2d Cir. 1982). Another instance is Mincone v. Nassau County Cmty. Coll., 923 F.Supp. 398, 402 (E.D.N.Y. 1996). “[A]cademic freedom is a special concern of the first amendment, which extends both to educators and institutions” \textit{Id.} (citing \textit{Bakke} without noting that here Justice Powell was writing only for himself).

likewise have treated that language as if it came from the Court, itself.\footnote{218}{See, e.g., Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 492 (3d Cir. 1998) (citing “opinion of Powell, J.” as “case law from the Supreme Court); Lovelace v. Southeastern Mass. Univ., 793 F.2d 419, 426 (1st Cir. 1986).} Therefore, it is not surprising that an amicus brief recently submitted to the Supreme Court stated incorrectly: “Justice Powell’s opinion is controlling with regard to its statements that rely on the First Amendment’s protections for academic freedom because it garnered the support from four Justices of the Brennan plurality.”\footnote{219}{Compare Brief for Michigan Governor Jennifer M. Granholm as Amicus Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) with Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996): “Justice Powell’s argument in [Part IV-D of his opinion in] Bakke garnered only his own vote and has never represented the view of a majority of the Court in Bakke or any other case.”}

Even legal scholars have mistaken Justice Powell’s solo opinion for the opinion of the Court or as otherwise somehow “controlling.” For example, one legal scholar has written:

Beginning no later than 1978 . . . the Court has developed a concept of academic freedom as a qualified right of the institution to be free from government interference in its core administrative activities, such as deciding who may teach and who may learn.\footnote{220}{Byrne, supra note 102 at 257; see also id. at 313 (describing Justice Powell’s discussion of “institutional autonomy” as part of “his separate yet controlling opinion in Regents of the University of California v. Bakke.”). Byrne did not explain why or how this “separate” opinion could be considered “controlling.”}

Citations to Justice Powell’s Bakke solo opinion sometimes omit any reference to its status as a solo opinion, thereby conveying the impression that it carried greater authority.\footnote{221}{See also Mark G. Yudof, Three Faces of Academic Freedom, 32 Loy. L. Rev. 831, 856 (1987). “In Bakke, an outsider to the University, an applicant for admission, challenged the University’s admissions policies, and, in the name of institutional academic freedom, the University’s position was largely vindicated.” Id.; David M. Rabban, Academic Freedom, Individual or Institutional?, 87 ACADEME 16 (Nov. – Dec. 2001) (“Bakke and Widmar, the first Supreme Court cases that recognized a distinctive category of institutional academic freedom under the First Amendment . . . ”); Paul Horwitz, Grutter’s First Amendment, 46 B.C.L. Rev. 461, 461, 465-66, 468, 491-94 (2005) “Bakke represented a significant shift in the constitutional law of academic freedom . . . .” Id. at 465. “[T]he implications of Bakke’s institutional autonomy theory of academic freedom . . . .”. Id. at 468.}

\footnote{218}{See, e.g., Urofsky v. Gilmore, 216 F.3d 401, 414 (4th Cir. 2000) (referring to the “opinion of Powell, J.” regarding academic freedom as part of “more recent Supreme Court jurisprudence”); Piarowski v. Illinois Community College, 759 F.2d 625, 629 (7th Cir. 1985) (citing “Justice Powell’s opinion” as authority for the “equivocal” term “academic freedom” as meaning “the freedom of the academy to pursue its ends without interference from the government.”); EEOC v. Univ. of Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983); Martin v. Helstad, 699 F.2d 387, 392 (7th Cir. 1983). See also Ailsa W. Chang, Note,
status as a solo opinion (or concurrence), a few federal appellate judges have, nevertheless, cited it as if it were, somehow, binding or controlling authority anyway.\footnote{See, e.g., Asociacion de Educacion Privida de Puerto Rico v. Echevarria-Vargas, 385 F.3d 81, 88 (1st Cir. 2004) (Torruella, J., dissenting) (citing Justice Powell’s solo opinion as authority for declaring that the First Amendment guarantees academic freedom for administrative actions by private secondary school officials); see also Hulen v. Yates, 322 F.3d 1229, 1238 (10th Cir. 2003): “[W]e . . . acknowledge the ‘freedom of a university to make its own judgments as to education,’ Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312, . . . (1978) (Powell, J., concurring)”. See Byrne, supra note 194, at 87-88 (referring correctly to Justice Powell’s “concurring opinion” in Bakke, but then stating that “Bakke set the method for considering institutional academic freedom in a constitutional case”).}

Since 1978, several courts and some commentators also have found meanings in Justice Powell’s Bakke solo opinion that do not plainly appear in its language. Patterns and examples of these readings or misreadings will now be considered.

\section*{2. Revisionist Readings and Re-interpretations of Justice Powell’s Bakke Concurrence}

Two revised versions or reconstructions of Justice Powell’s Bakke solo opinion commonly came to expression in following years. One suggests that a college’s or university’s academic freedom is distinct from, and may be in opposition to its faculty’s academic freedom. The other is that actions by a college or university should be free from governmental “interference,” even in the form of judicial review. It may be noted that Justice Powell’s Bakke solo opinion advocated neither such proposition.\footnote{The University of California, Davis, Medical School’s admissions plan had been developed by the School’s faculty, and was administered by both faculty and administrative officers of the School. See supra notes 60-61 and accompanying text.}

Moreover, Justice Powell declared that the School’s admissions program violated Bakke’s right to equal protection. See supra note 63 and accompanying text. Justice Powell did not suggest that a university’s academic freedom might conflict with its faculty’s academic freedom; and he certainly did not propose that a university’s policies and procedures should be exempt or immune from judicial review.

\footnote{Cooper v. Ross, 472 F.Supp. 802 (E. D. Ark. 1979).}
government, including judicial, interference.” The court’s assumption that a university was entitled to academic freedom derived, evidently, from Justice Powell’s *Bakke* solo opinion.

The idea that both universities and their faculties are entitled to academic freedom under the First Amendment, and that these two academic freedoms may conflict, was elaborated later, particularly in a number of Seventh Circuit opinions. These Seventh Circuit opinions very likely also derived in part from its panels’ reading or misreading of language in a concurring opinion by Justice Stevens. As will be noted, Justice Stevens’ concurrence in turn was grounded upon Justice Frankfurter’s *Sweezy* concurrence and Justice Powell’s solo opinion in *Bakke*.

b. Justice Stevens’ Concurrence in *Widmar v. Vincent*  

Justice Stevens had served as an appellate judge on the Seventh Circuit, and, following his appointment to the Supreme Court in 1975, was the Court’s representative “allotted” to that Circuit. It may be assumed that Seventh Circuit judges in the early 1980s knew Justice Stevens personally and held in high regard the opinions he wrote as a Justice of the United States Supreme Court.

The Supreme Court’s decision in *Widmar v. Vincent* was announced in 1981. The case concerned a student religious group’s First Amendment complaint about being denied use of facilities at the University of Missouri. The Court held that the University’s “exclusionary policy” violated “the fundamental principle that a state regulation of speech should be content neutral.”

Justice Stevens concurred, but objected that the majority’s “use of the terms ‘compelling state interest’ and ‘public forum’ to analyze the question presented in this case may needlessly undermine the academic freedom of public institutions.” He continued:

In my opinion, a university should be allowed to decide for itself whether [for example] a program that illuminates the genius of Walt Disney should be given precedence over one that may duplicate material in the classroom. Judgments of this kind should be made by academicians, not by federal

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225 *Id.* at 805. For facts and analysis, see Hiers, *supra* note 33, at 64-66.
226 See *infra* notes 234-240 and accompanying text.
231 *Id.* at 277.
232 *Id.* at 277-78.
judges, and their standards for decision should not be
encumbered with ambiguous phrases like ‘compelling state
interest.’”

In a footnote to his statement that such judgments should be made by
academicians rather than by federal judges, Justice Stevens added, “Justice
Frankfurter forcefully spoke of the grave harm resulting from governmental
intrusion into the intellectual life of a university . . . , [354 U.S.] at 261.”

He then quoted the familiar “It is the business of a university” language
found in Justice Frankfurter’s concurrence, mistakenly ascribing it to T. H.
Huxley, rather than The Open Universities. He proceeded then to construe
broadly the implications of this language: “Although these comments were
not directed at a public university’s concern with extracurricular activities, it
is clear that the ‘atmosphere’ of a university includes such a critical aspect of
campus life.”

freedom, though not a specifically enumerated constitutional right, long has
been viewed as a special concern of the First Amendment.’)”

Justice Stevens did not specifically propose that the “freedoms of a
university” were either properly characterized as “academic freedom” or
protected by the First Amendment from “governmental intrusion.” But his
quotation from Justice Powell’s Bakke solo opinion suggests that he may
have accepted Justice Powell’s theory that there might be some connection
among these “freedoms,” academic freedom, and the First Amendment. It
may be important to notice that Justice Stevens did not distinguish between
faculty “academicians” and administrative “academicians,” nor did he
suggest that the academic freedom of a university might conflict with that of
its faculty.

c. In the Seventh Circuit

The earliest Seventh Circuit opinion to distinguish between
institutional academic freedom and faculty academic freedom was Dow
Chemical Co. v. Allen. The Dow court did not suggest that these two types

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233 Id. at 278-79.
234 Id. at 279 n.2.
235 Id. See supra note 34 and accompanying text.
236 Widmar, 454 U.S. 279 n.2
237 Id.
238 Compare Widmar, 454 U.S 263 (1981) with Justice Powell’s Bakke solo opinion, Bakke, 438 U.S. at 312, which identified the former as the latter.
239 See supra note 234 and accompanying text.
240 See infra notes 267-299 and accompanying text (discussion Regents of the
University of Michigan v. Ewing).
241 Dow Chem. Co. v. Allen, 672 F.2d 1262 (7th Cir. 1982). “Case law considering
the standard to be applied where the issue is the academic freedom of the university to be free
of academic freedom were in conflict – nor had Justice Stevens done so in his 
Widmar concurrence. The court cited Justice Powell’s unidentified 
paraphrase from Keyishian: “[a]cademic freedom, though not a specifically 
enumerated constitutional right, long has been viewed as a special concern of 
the First Amendment.” Justice Stevens had quoted the same statement in a 
footnote to his Widmar concurrence. It is likely that the Dow panel was 
familiar with that concurrence and footnote. The court found that three 
University of Wisconsin research faculty members’ “interest in academic 
freedom” might “properly figure into the legal calculation” as to whether a 
private corporation might subpoena their entire work products. It 
concluded, “[T]here is little to justify an intrusion into university life which 
would risk substantially chilling the exercise of academic freedom.” The 
University was not a party to the case and the Court made no finding as to its 
putative academic freedom. Subsequent Seventh Circuit panels and judges 
were not always so circumspect.

A concurring opinion by Judge Coffey in Martin v. Helstad, decided 
the next year, showed which way the wind would soon blow. Judge 
Coffey expanded considerably upon Justice Powell’s revision of Justice 
Frankfurter’s quotation from The Open Universities. “I would hold that the 
interest of academic freedom includes the right of a university administration 
to determine who may be admitted to study as well as a right to determine 
and direct its faculty and student body.” Here Judge Coffey explicitly 
assigned a university’s academic freedom to its administration. As

of governmental interference, as opposed to academic freedom of the individual teacher to be 
free of restraints from the university administration, is surprisingly sparse.” Id. at 1275. Very 
likely the Dow court derived the idea that the university itself might enjoy an “academic freedom . . . to be free of governmental interference” from Justice Stevens’ comments in his 
Widmar concurrence which, in turn, were based on his reflections regarding Justice Powell’s 
Bakke solo opinion. A close reading of the Dow court’s opinion indicates that its “opposed to” 
expression really meant “as distinct from.” The Dow court was not engaged in balancing 
(purported) institutional academic freedom against faculty academic freedom, but simply 
wondering what standards would be applicable in each kind of case.

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242 See generally Hiers, supra note 33, at 67-69.
243 Dow, 672 F.2d at 1274.
244 See supra note 237 and accompanying text.
245 See supra note 228, 241, 244 and accompanying text; see also infra note 247 
and accompanying text.
246 Dow, 672 F.2d at 1276-77.
247 Id. at 1277. Here, again, we see an echo of Justice Stevens’ Widmar 
concurrence which quoted Justice Frankfurter’s Sweezy concurrence as to “governmental 
intrusion into the intellectual life of a university.”
248 See Dow, 672 F.2d 1262.
249 Martin v. Helstad, 699 F.2d 387, 392 (7th Cir. 1983) (Coffey, J., concurring).
250 Id. at 397. See supra notes 161-164 and accompanying text; infra note 252 and 
accompanying text.
251 Martin, 699 F.2d at 397. Judge Coffey also stated, possibly paraphrasing from 
Justice Powell’ Bakke solo opinion, “Basic academic decisions, such as the determination as 
to the make up of the faculty and who may be a student on the first day of classes, have long 
been regarded as among the essential freedoms of a university administration.” Id. Judge
authority for so assigning, Judge Coffey quoted from Justice Powell’s “plurality opinion” in Bakke, and from Justice Powell’s quotation about “the business of a university” from Justice Frankfurter’s Sweezy concurrence.252 The Martin panel offered its own expansive reading of Justice Powell’s Bakke solo opinion:

The deference accorded academic dismissals is based on the policy of fostering academic freedom at the university level. Regents of the University of California v. Bakke, 438 U.S.265, 311-15, 98 S.Ct. 2733, 2759-61 ... (1978) (Powell, J.). This policy is of greater importance in the case of admissions. Id. at 312, 98 S.Ct. at 2759.253

Contrary to the panel’s apparent meaning, Justice Powell’s Bakke solo opinion said nothing at all about academic dismissals or any connection between such dismissals and academic freedom; necessarily, Justice Powell did not ascribe greater importance to academic freedom in regard to academic admissions than in regard to dismissals.254

The same year, another Seventh Circuit panel held that the University of Notre Dame du Lac was entitled to “a qualified academic

Coffey did not cite authority for this statement, possibly because there was none. Writing after Widmar, but before Martin, one legal scholar already visualized the kind of problematic outcome that would result from this trend in Seventh Circuit jurisprudence:

The potential evil of the theory of “institutional” academic freedom lies in this very lack of differentiation [between institutional autonomy and faculty academic freedom], because, the interests insulated are not necessarily those of teachers and researchers but [rather those of] of the administration and governing boards; the effect is to insulate management decision making from close scrutiny, even in cases where the rights or interests of the faculty might be adverse to the institution’s administration. Consequently, the theory of “institutional” academic freedom would provide institutional autonomy with more than a prudential claim to judicial deference; it provides a constitutional shield against interventions that would not ordinarily seem improper, for example, judicial intervention on behalf of faculty whose civil or academic rights had been infringed by the institution.

Finkin, supra note 38, at 851 (internal quotation marks omitted). The kind of interpretation advocated here by Judge Coffey turns the First Amendment on its head by assigning its protection to university administrators, who in public colleges or universities, are state agents, as a weapon to use against individual faculty whose speech rights are protected by that Amendment, according to the Sweezy plurality and Keyishian. See supra notes notes 29-30 and accompanying text; see also supra notes 43-58 and accompanying text.

Martin, 699 F.2d at 397. It will be recalled that neither Justice Powell’s Bakke solo opinion nor Justice Frankfurter’s Sweezy concurrence distinguished between a university and its faculty, or between a university’s academic freedom and its faculty’s academic freedom. Nor did either opinion accord academic freedom to a university’s administration.

Id. at 391. The quoted language appears to refer to institutional, rather than individual faculty, academic freedom.

See Bakke, 438 U.S. at 311-19.
freedom privilege protecting academic institutions against the disclosure of the names and identities of persons participating in the peer review process." The panel cited Justice Powell’s Bakke solo opinion and his quotations from Justice Frankfurter’s Sweezy concurrence and from Keyishian as authority. The panel was under the impression that it was joining “other courts in recognizing a limited academic freedom privilege in the context of challenges to college or university tenure decisions.” Actually, none of the cases cited to that effect had so held – a point mentioned here only as another instance of judicial error or confusion in regard to purported institutional academic freedom. The Supreme Court effectively over-ruled Notre Dame du Lac a few years later in University of Pennsylvania v. EEOC.

Justice Powell’s Bakke solo opinion figured both directly and indirectly in several later Seventh Circuit panel opinions. One panel opinion was especially important in shaping subsequent Seventh Circuit jurisprudence: Piarowski v. Illinois Community College. Mr. Piarowski was chairman of the college art department. College officials asked him to remove three racially and sexually offensive representations from one of the school’s main hallways, but he refused to do so. When officials moved them anyway, he claimed they thereby violated his First Amendment rights.

Judge Posner wrote for the panel:

[Though many decisions describe “academic freedom” as an aspect of the freedom of speech that is protected against governmental abridgement by the First Amendment . . . the term is equivocal. It is used to denote both the freedom of the academy to pursue its ends without interference from the government (the sense in which it is used, for example, in Justice Powell’s opinion in Regents of the University of California v. Bakke . . . or in our recent decision in E.E.O.C. v. University of Notre Dame du Lac . . .), and the freedom of the individual teacher . . . to pursue his ends without

255 EEOC v. Univ. of Notre Dame du Lac, 715 F.2d 331, 337 (7th Cir. 1983).
256 Id. at 335-36.
257 Id. at 377.
258 See Hiers, supra note 33, at 72-75 as to particulars.
259 Univ. of Pa. v. EEOC, 493 U.S. 182 (1990). The Court granted certiorari in order to resolve “what might be thought of as a conflict” between the Third Circuit’s rejection of the University of Pennsylvania’s claim to a qualified academic freedom privilege under the First Amendment, and the Seventh Circuit’s decision in Notre Dame du Lac. Id. at 188. The Court concluded “that the EEOC subpoena process does not infringe any First Amendment right” enjoyed by the University of Pennsylvania. Id. at 201.
260 Piarowski v. Ill. Cmty. Coll., 759 F.2d 625, 629 (7th Cir. 1985). See also infra notes 300-306 and accompanying text.
261 Piarowski, 759 F.2d at 626-28.
262 Id.
interference from the academy; and these two freedoms are in conflict, as in this case.263

Neither Justice Powell’s Bakke solo opinion nor the Seventh Circuit’s Notre Dame du Lac opinion distinguished between a university’s putative academic freedom and that of its faculty.264 Nor did Justice Stevens so distinguished in his Widmar concurrence.265 Perhaps Judge Posner derived this characterization from Judge Coffey’s concurrence in Martin.266 No one had previously suggested that the term “academic freedom” was “equivocal.”

d. Regents of the University of Michigan v. Ewing

Judge Posner’s characterization of “academic freedom” as equivocal was soon echoed by Justice Stevens in Regents of the University of Michigan v. Ewing.267 The Court decided Ewing just ten days after it denied Mr. Piarowski’s petition for writ of certiorari.268 Language in Ewing suggesting that academic institutions themselves are entitled to academic freedom – or autonomy – under the First Amendment, derives from Justice Powell’s Bakke solo opinion and his re-interpretation in it of Keyishian and Justice Frankfurter’s concurrence in Sweezy. Ewing is sometimes said to have been one of the cases in which the Supreme Court held that institutional academic freedom (or autonomy) is protected under the First Amendment.269

Scott E. Ewing had been a medical student in a special program (“Inteflex”) at the University of Michigan.270 Students who wished to continue in this program were required to pass the National Board of Medical Examiners (NMBE) Part 1 Examination.271 Mr. Ewing failed to do so and was dismissed from the program.272 The Sixth Circuit held that the University had violated Ewing’s substantive due process property right by refusing to allow him to re-take the examination.273 The Supreme Court granted certiorari in order “to consider whether the Court of Appeals had misapplied the doctrine of substantive due process,” subsequently held that it had done so, and reversed.274 The Court reasoned, in part, as follows:

263 Id. at 629 (citations omitted). As to facts and issues in Piarowski, see generally, Hiers, supra note 33, at 78-81.
264 See Bakke, 438 U.S. at 311-19 (1978); EEOC v. Univ. of Notre Dame du Lac, 715 F.2d 331 (7th Cir. 1983).
266 See supra notes 251-252 and accompanying text.
268 Ewing was decided on December 12, 1985. Ewing, 474 U.S. 214. The Court had denied Mr. Piarowski’s petition for writ of certiorari on December 2, 1985. Id. at 1007.
269 See infra notes 277, 283, and 294 and accompanying text.
271 Id.
272 Id.
273 Id. at 915-16 (internal quotations omitted).
Ewing's claim... must be that the University misjudged his fitness to remain a student in the Inteflex program. The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. 275

Consequently, the Court found no substantive due process violation: "[Mr. Ewing's] dismissal from the Inteflex program rested on an academic judgment that is not beyond the pale of reasoned academic decision-making when viewed against the background of his entire career at the University of Michigan, including his singularly low score on the NMBE Part 1 examination." 276

Certain language in Justice Stevens' Ewing opinion has prompted a few commentators to conclude that the Ewing Court held that universities or their professional schools are entitled to academic freedom based upon the First Amendment. 277 The language in question, however, does not sustain that conclusion. 278 In addition to Justice Stevens' statement quoted above, he also wrote:

Considerations of profound importance counsel restrained judicial review of the substance of academic decisions....

Added to our concern for lack of standards is a reluctance to trench upon the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment." Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). If a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," Bishop v. Wood, 426 U.S. 341, 349 (1976), far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions -- decisions that require "an expert evaluation of

275 Id. at 225 (internal citations omitted).
276 Id. at 227-28.
277 See, e.g., Byrne, supra note 102, at 317. "In 1985, a unanimous Supreme Court accepted the use of institutional academic freedom in Regents of the University of Michigan v. Ewing." Id.; see also Brief for Michigan Governor Jennifer M. Granholm, supra note 219, at 9.
278 See infra notes 279-299 and accompanying text.
cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.” Board of Curators, Univ. of Missouri v. Horowitz, 435 U.S. at 89-90.279

Here, Justice Stevens cites Keyishian as if it, perhaps, stood for the idea that the First Amendment somehow calls on courts to safeguard the academic freedom of public educational institutions – a misreading of Keyishian undoubtedly derived from Justice Powell’s Bakke solo opinion.280 Moreover, it is notable that the quotation from Horowitz refers specifically to “academic decisions . . . made by faculty members of public educational institutions.”281 Justice Stevens referred specifically to “the faculty’s decision” in the case of Mr. Ewing, and to the importance of judicial “respect for the faculty’s professional judgment.”282 None of this language suggests that the Court here held that educational institutions themselves are entitled to academic freedom under the First Amendment. The Court may have mistakenly assumed that it had previously so held. But it had not done so. It cannot seriously be contended that the Supreme Court decides questions of constitutional law by mistakenly attributing such decisions to its prior cases.283

Justice Stevens added a somewhat peculiar footnote following his citation to Keyishian.284 This footnote is sometimes cited as a reason for concluding that the Ewing Court held that the First Amendment protects institutional academic freedom.285

Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see Keyishian v. Board of Regents, 385 U.S. at 603; Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (opinion by Warren, C.J.), but also, somewhat inconsistently, on autonomous decision-making by the academy itself, see University of California Regents v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.); Sweezy v. New Hampshire,

280 See supra notes 70, 75-78 and accompanying text.
281 Ewing, 474 U.S. at 226 (emphasis added).
282 Id. at 225. Whether faculty members should be entitled to academic freedom protections under the First Amendment when making administrative decisions for public educational institutions is another question. Since making such decisions arguably constitutes state or governmental action, it may be doubted whether such protections would or should be available. See Hiers, supra note 38, at 557-60.
283 Byrne, supra note 194, at 114 n.243 (citing Ewing as one of “the several Supreme Court opinions after Bakke where the Court affirmed that state universities enjoy some degree of institutional academic freedom”).
284 Ewing, 474 U.S. at 226 n.12.
285 See Byrne, supra note 102, at 257 n.20; Holland, supra note 136, at 861 n.48.
354 U.S., at 263 (Frankfurter, J., concurring in result). Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of “the four essential freedoms” of a university. *University of California Regents v. Bakke*, 438 U.S., at 312 (opinion of Powell, J.) (quoting *Sweezy v. New Hampshire*, supra, at 263 (Frankfurter, J., concurring in result)) (internal quotations omitted).266

Justice Stevens correctly cites *Keyishian* and *Sweezy*’s plurality opinion as authority for individual faculty academic freedom.287 He does not, however, point out that Justice Powell’s account of academic freedom derived entirely from Justice Powell’s own redacted reading of *Keyishian* and from the “four essential freedoms” language quoted from *The Open Universities* in Justice Frankfurter’s *Sweezy* concurrence.288 Nor did he take the occasion to observe that Justice Frankfurter’s concurrence made no mention of academic freedom.289 Justice Stevens’ citations to Justice Powell’s *Bakke* solo opinion do not indicate whether he was aware that Justice Powell was not speaking (or writing) for a majority of the Court.290

At any rate, Justice Stevens said nothing about institutional academic freedom in this footnote.291 Rather, he referred to “autonomous decision-making by the academy itself.” Academic freedom, he wrote, “thrives” on both “independent and uninhibited exchange of ideas among teachers and students,” and “autonomous decisionmaking by the academy itself.”292 He did not identify the role of faculty in such decisionmaking, but, elsewhere in his opinion, emphasized that the academic decision regarding Mr. Ewing was made by the institutions’ faculty.293 Moreover, he did not state here that he thought such autonomous decision-making was in any way based upon the First Amendment.294 Perhaps he was thinking of university autonomy as a

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266 *Ewing*, 474 U.S. at 226 n.12.
287 See supra notes 29-30, 43-58 and accompanying text.
288 See supra notes 70, 75-100 and accompanying text.
290 *Ewing*, 474 U.S. at 266 n.12. Here Justice Stevens characterizes the plurality opinion in *Sweezy* as “opinion of Warren, C.J.,” Justice Frankfurter’s *Sweezy* concurrence as “Frankfurter, J., concurring in result,” and Justice Powell’s solo opinion in *Bakke* as “opinion by *Powell, J.*” (Why only Justice Powell’s name is spelled with capital letters is not explained.)
291 Id.
292 Id.
293 See supra notes 281-282 and accompanying text.
294 Necessarily, he did not attempt to explain how institutional autonomy might be grounded on or protected by the First Amendment. Compare Finkin, supra note 38, at 818 (“Institutional autonomy and academic freedom are related but distinct ideas.”) with *Mincone v. Nassau County Cmty. Coll.*, 923 F. Supp. 398, 402 (E.D.N.Y. 1996) (citing Justice Stevens footnote as authority for saying that First Amendment academic freedom “extends both to
social policy value or state interest to which courts should defer. Justice Stevens did not explain how he visualized the purported inconsistency between individual academic freedom and "autonomous decision-making by the university itself." Perhaps without giving much thought to the matter, he simply was echoing his former Seventh Circuit colleague, Judge Posner's characterization of the term "academic freedom" as "equivocal."

Whatever Justice Stevens may have intended when writing the language from Ewing quoted above, his comments regarding academic freedom and autonomous decision-making do not constitute the Court's holding. The Ewing Court held simply that the University—or more precisely, the faculty members serving as its Promotion and Review Board, had made their decision to dismiss Mr. Ewing on the basis of "reasoned academic" considerations, and, consequently, had not violated his Fourteenth Amendment right to substantive due process. The Ewing case did not involve any conflict between faculty academic freedom and institutional autonomy. The Court stated no holding as to either academic freedom—institutional or otherwise—or the First Amendment. Whatever the Ewing Court may have said about academic freedom, therefore, is dicta.

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295 See Ewing, 474 U.S. at 227-28. Justice Stevens statement could be read to imply some inconsistency between "the independent and uninhibited exchange of ideas among teachers and students:" on the one hand, and "autonomous decision making by the academy itself" on the other. But the more likely meaning is that he believed there could be some inconsistency or conflict between individual faculty members' academic freedom and autonomous decisions made by "the university" or "the academy"—leaving open the question as to whether such decisions might be made by faculty or by administration.

296 As noted, the Court's Ewing decision was announced ten days after the Court denied certiorari as to Piarowski, in which Judge Posner had pronounced the term "academic freedom" "equivocal." See supra notes 263, 268 and accompanying text. Justice Stevens may have assumed that Judge Posner, a respected and learned jurist, had worked out some basis in constitutional law for that characterization.

297 Ewing, 474 at 227-28. See also Regents of the Univ. of Wis. v. Southworth, 529 U.S. 217, 236, 238 (2000) (Souter, J., concurring in the judgment)("Ewing addressed not the relationship between academic freedom and First Amendment burdens imposed by a university, but a due process challenge to a university's academic decision, while as to them, the case stopped short of recognizing absolute autonomy. Ewing, supra, at 226 and n. 12."). Although this language is not entirely pellucid, it does clearly enough state that the Ewing Court did not decide anything in regard to academic freedom and the First Amendment. Justice Stevens, who wrote for the Court in Ewing, apparently agreed, since he joined in Justice Souter's Southworth concurrence.


299 As to the holding-dicta distinction, see Abramowicz & Stearns, supra note 214.
e. And Back to the Seventh Circuit

Judge Posner’s language in Piarowski was quoted or cited in a few Seventh Circuit opinions following Ewing, thus indirectly perpetuating the idea of institutional academic freedom implicit in Justice Powell’s Bakke solo opinion, albeit in a somewhat distorted form. Seventh Circuit judges, contemplating supposedly conflicting academic freedoms, typically deferred to institutional authority. For instance, in Weinstein v. University of Illinois, the court wrote:

Weinstein invokes ‘academic freedom,’ but that equivocal term . . . does not help him. Judicial interference with a university’s selection and retention of its faculty would be an interference with academic freedom. ⁴

The clear implication is that, so far as the Seventh Circuit was concerned, an institution’s academic freedom nullifies its faculty’s academic freedom, and that the former amounts to a grant of immunity from judicial review. Such Seventh Circuit opinions suggest that, so far as this court is concerned, an institution’s putative entitlement to academic freedom automatically cancels or outweighs individual faculty academic freedom claims.⁵

Curiously, none of the Seventh Circuit opinions that cite or follow Justice Powell’s Bakke solo opinion as authority notes that, as the opinion of only one Justice, it had no controlling weight. Neither did subsequent Seventh Circuit panels or judges even begin to explain how administrative actions by a public university – as a government agency or entity – might be entitled to protection under the First Amendment.⁶ Nor did any of the Supreme Court Justices who later alluded to institutional academic freedom attempt such justification.

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⁴ See, e.g., infra notes 301-302 and accompanying text.
⁵ See also Keen v. Penson, 970 F2d. 252, 257 (7th Cir. 1992). The Keen panel cited both Piarowski and Justice Stevens’ Ewing footnote in support of the proposition that "the asserted academic freedom of a professor can conflict with the academic freedom of the university to make decisions affecting that professor." Id. at 257. Justice Stevens’ Ewing footnote said nothing about such possible conflict. See supra note 286 and accompanying text.
⁶ See generally Hiers, supra note 38, at 556-568; supra note 102 (comment by Judge Smith).

Justice Powell’s *Bakke* solo opinion evidently influenced Justice Souter’s concurring opinion in *Board of Regents of the University of Wisconsin v. Southworth*. Here Justice Souter stated:

Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities should have the freedom to make decisions about how and what to teach. . . .

Some of the opinions in our books emphasize broad conceptions of academic freedom that if accepted by the Court might seem to clothe the University with an immunity to any challenge to regulations made or obligations imposed in the discharge of its educational mission.

Justice Souter did not cite to Justice Powell’s *Bakke* solo opinion, but relied mainly on *Regents of University of Michigan v. Ewing* and on Justice Frankfurter’s concurring quotation from *The Open Universities*. In contrast to Justice Powell, Justice Souter added, “Our university cases have dealt with restrictions imposed from outside the academy on individual teachers’ speech and associations.” This statement is correct. His earlier statement that under Supreme Court jurisprudence academic freedom applies to universities’ “decisions about how and what to teach” is not. The Supreme Court has never so held. Nor did it do so more recently in *Grutter v. Bollinger*.

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308 *Id.* at 237. Justice Souter added, however, that the “broad statements on academic freedom” in *Ewing* and Justice Frankfurter’s concurrence in *Sweezy* did not apply here, among other reasons, because: “*Ewing* addressed not the relationship between academic freedom and First Amendment burdens imposed by a university, but a due process challenge to a university’s academic decisions,” while “Justice Frankfurter’s discussion in *Sweezy*, though not rejected, was not adopted by the full Court.” *Id.* at 238.

309 *Regents of the Univ. of Wis. v. Ewing*, 474 U.S. 214 (1985). Justice Stevens’ suggestions in *Ewing* as to possible First Amendment protection for institutional academic freedom derived from Justice Powell’s *Bakke* solo opinion, including the latter’s re-interpretation of *Keyishian*. See *supra* notes 279-280 and 284-290 and accompanying text.

310 *Southworth*, 529 U.S. at 237-39; *supra* notes 24-41


312 See *supra* note 308 and accompanying text.

g. Grutter v. Bollinger

Barbara Grutter, who is white, had applied for admission to the University of Michigan's Law School. She applied pursuant to the School's special admissions policy, which was designed by a faculty committee in an effort to "achieve student body diversity." She then sued, and, in due course, the Supreme Court granted certiorari in order to resolve the question "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities." Justice O'Connor wrote for the Grutter majority. Not surprisingly, Justice O'Connor turned to Justice Powell's Bakke opinion for guidance in her analysis of the University of Michigan Law School's admissions policy, which had been designed to track Justice Powell's views.

Justice Powell emphasized that nothing less than the "‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples." [438 U.S.] at 313 (quoting Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967). It is unclear whether Justice O'Connor recognized that the quoted language about "the ideas and mores" of diverse students did not derive from Keyishian, but instead was added by Justice Powell speaking for himself. She did recognize that Justice Powell's "diversity" rationale was set out in part of his opinion that was joined by no other Justice.

However, Justice Powell's Bakke solo opinion evidently misled Justice O'Connor (and five other Justices) into thinking that Justice Frankfurter's Sweezy concurrence and the Court's opinion in Keyishian had grounded institutional academic freedom -- or, rather, autonomy -- upon the First Amendment:

In announcing the principle of student body diversity as a compelling interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded on the

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314 Id. at 316.
315 Id. at 314-16.
316 Id. at 322.
317 Id. at 311.
318 Id. at 322-25, 328-30, 334-37, 339, 341, and 343.
320 Id. at 324.
321 See supra notes 70, 94-95 and accompanying text.
322 Grutter, 539 U.S. at 325.
First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." Bakke, supra, at 312.323

It is important to observe that Justice Powell did not invoke any cases "recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy."324 He did not even mention "educational autonomy," let alone any cases grounding such policy on the Constitution.325 Instead, he characterized the freedoms in question as "academic freedom."326 Not only courts, but also commentators tend to confuse the concepts of academic freedom and institutional autonomy.327

As authority for his statement that "the freedom of a university to make its own judgments as to education including the selection of its student body" was based on the First Amendment, Justice Powell had cited only two authorities. One was language from The Open Universities quoted in Justice Frankfurter’s Sweezy concurrence.328 The other was Keyishian.329 Justice Frankfurter’s concurrence did not ground university “freedoms” on the First Amendment, nor did his concurrence constitute binding authority.330 And while both Sweezy and Keyishian were concerned with the academic freedom of teachers, neither said anything at all about educational or institutional academic freedom or autonomy.331 Not even in dicta.

Dissenting in Grutter, Justice Thomas, joined by Justice Scalia, addressed this point. Quoting from Justice Frankfurter’s Sweezy concurrence (though mistakenly attributing The Open Universities language to Justice Frankfurter, himself), Justice Thomas wrote:

According to Justice Frankfurter: 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment, and creation. . . .'

In my view, '[i]t is the business' of this Court to explain itself when it cites provisions of the Constitution to invent new doctrines – including the idea that the First Amendment

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323 Id. at 329. As to Justice Kennedy’s similar error, see infra text accompanying note 325.
324 Grutter, 539 U.S. at 329.
326 Id. at 312.
328 Bakke, 438 U.S. at 312.
329 Id. at 312-13. See also supra notes 70-98 and accompanying text.
330 See supra notes 24-41, 138-164 and accompanying text.
331 See supra notes 24-58 and accompanying text.
authorizes a public university to do what would otherwise violate the Equal Protection Clause. The majority fails in its summary effort to prove this point. The only source for the Court’s conclusion that public universities are entitled to deference even within the confines of strict scrutiny is Justice Powell’s opinion in Bakke. Justice Powell, for his part, relied only on Justice Frankfurter’s opinion in Sweezy and the Court’s decision in Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589 (1967).  

The majority was apparently prepared to take Justice Powell’s word for it, notwithstanding Justice Thomas’s pointed dissent. Justice Thomas did not specifically point out that Justice Frankfurter’s opinion in Sweezy was only a concurrence, or that neither Sweezy nor Keyishian said anything at all as to deference to public universities’ decision-making authority. Clearly, however, Justice Thomas understood that neither Justice Frankfurter’s opinion in Sweezy nor the Keyishian Court had held that public universities were endowed with First Amendment rights.

Like the Court’s majority, Justice Kennedy also was misled. Dissenting in Grutter, Justice Kennedy stated “Justice Powell’s approval of the use of race in university admissions reflected a tradition, grounded in the First Amendment, of acknowledging a university’s conception of its educational mission. [Bakke], at 312-314, ante, at 329.” There was no “tradition, grounded in the First Amendment, of acknowledging a university’s conception of its educational mission.” Understandably, Justice Kennedy cited no cases that might constitute such a tradition, for there were no such cases.

Neither Justice O’Connor nor Justice Kennedy even attempted to explain how a public university might be entitled to a First Amendment right to select students for admission – or for any other purpose. Of course,
neither had any need to do so. Judges and Justices writing *dicta* are free to elaborate their own views without grounding them on constitutional or statutory authority. Justice O'Connor’s references to what she thought Justice Powell had said in *Bakke* about First Amendment protection for academic freedom or educational autonomy clearly are *dicta*. Likewise, dissenting opinions may merely express the dissenters’ ideas about what the law *should* be. Such references do not constitute propositions actually decided by the *Grutter* Court.340

Justice O’Connor acknowledged that lower federal courts were divided as to whether Justice Powell’s “diversity rationale, set forth in part of [his] opinion joined by no other Justice, [was] nonetheless binding precedent under *Marks*.”341 She also recognized that the Court was not bound by Justice Powell’s diversity rationale, which may or may not have attempted to draw support from some kind of theory as to First Amendment institutional academic freedom.342 Instead, Justice O’Connor stated:

We do not find it necessary to decide whether Justice Powell’s opinion is binding under *Marks*. It does not seem “useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.” *Nichols v. United States*, *supra*, at 745-746. . . . More important, for the reasons set out below, today we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.343

corporations, even though their governing boards may be. For example, the Yale Corporation is not Yale University. As to arguments for extension of First Amendment academic freedom to religious colleges and universities, see James D. Gordon, III, *Individual and Institutional Academic Freedom at Religious Colleges and Universities*, 30 J. C. & U. L. 1 (2003).

339 539 U.S. 324, 329. As noted *supra* text accompanying notes 60-75, Justice Powell’s *Bakke* solo opinion attempted to ground institutional academic freedom— not autonomy— on the First Amendment.

340 As to the distinguishing marks of *dicta*, see Abramowicz & Sterns, *supra* note 198.

341 *Grutter*, 539 U.S. at 325; see also *supra* note 109 and accompanying text.

342 See *supra* notes 94-102 and accompanying text.

343 *Grutter*, 539 U.S. at 325. Commentators who favor the concept of institutional academic freedom have struggled in order to extract support from *Grutter*. See, e.g., various statements in Byrne, *supra* note 194, at 116-118, 121. “[T]he compelling’ quality of the university’s interest stems from First Amendment protection for the autonomy of good faith educational decision making.” *Id.* at 116. “The logic of Justice O’Connor’s opinion for the Court required that great weight be placed upon institutional academic freedom to make the case that student body racial diversity amounts to a compelling interest.” *Id.* “The point is clear: creating a diverse student body is a compelling state interest because institutional academic freedom requires deference to the college’s or university’s judgment that such a class furthers educational goals.” *Id.* at 117. “But in the clinch, *Grutter* justifies the weight it affords educational autonomy only by quoting Powell in *Bakke*.” *Id.* at 118. “The logic of the
The \textit{Grutter} majority, applying strict scrutiny, determined that the University of Michigan Law School’s race-based admissions program was “necessary to further a compelling governmental interest,” was narrowly tailored, and therefore did not violate Ms. Grutter’s right to equal protection under the Fourteenth Amendment. Justice O’Connor listed a wide range of “benefits” that “bolstered” the “Law School’s claim of a compelling interest.” Most of those benefits had been articulated in the numerous \textit{amicus} briefs submitted on its behalf, not by the School. Curiously, none of these benefits or interests was identified as a \textit{state} interest. Some were said to be interests of the Law School; the others were described in terms of their contributions to the Nation as a whole, namely, American business, the Nation’s military needs, American society and culture, and providing a “visibly open” pathway to emerging national leadership. These benefits and interests were, in effect, broad social or public policy values.

Though citing Justice Powell’s invocation of earlier cases, which she said recognized “a constitutional dimension, grounded on the First Amendment, of educational autonomy,” Justice O’Connor did not factor either educational autonomy or the First Amendment into her account of the “compelling” interests which, she implied, outweighed Grutter’s Fourteenth Amendment equal protection right. Instead, she wrote:

\begin{quote}
Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Court’s doctrinal argument requires that academic freedom have [constitutional status], even if Justice O’Connor’s opinion only stingily gives it rhetorical support.” \textit{Id.} at 121.
\end{quote}

\textit{Grutter}, 539 U.S. at 326, 344. The Court also found no violation of Title VI or 42 U.S.C. § 1981. \textit{Id.} at 344. For a scathing account of Justice Powell’s diversity rationale in \textit{Bakke} and its application in the \textit{Grutter} Court’s analysis, see Lino A. Graglia, \textit{Grutter and Gratz: Race Preference to Increase Racial Representation Held “Patently Unconstitutional” Unless Done Subtly Enough in the Name of Pursuing Diversity}, 78 Tul. L. Rev. 2037 (2004). 

\textit{Grutter}, 539 U.S. at 330 (emphasis added).

\textit{Id.} at 329-33.

\textit{See id.} at 330-333.


\textit{Grutter}, 539 U.S. at 329. Justice O’Connor’s majority opinion does not attempt to “weigh” or evaluate the relative importance of the Law School’s interest and Ms. Grutter’s constitutional right. Instead, having concluded that the Law School’s interest was “compelling,” the majority apparently assumed without analysis that interest superior to Ms. Grutter’s right to equal protection. The majority stated in conclusion, “[i]n summary, the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.” \textit{Id.} at 343. \textit{Cf.} Graglia, supra note 344, at 2046, commenting on Justice O’Connor’s analysis in \textit{Grutter}. “The Equal Protection Clause has been made to disappear!” \textit{Id.}
Law School’s proper institutional mission, and that “good faith” on the part of a university is “presumed” absent “a showing to the contrary.” 438 U.S. at 318-319.350

Nor did the Grutter majority propose that the Law School had a First Amendment right to autonomy (or academic freedom) that off-set in any way Ms. Grutter’s equal protection claim. The Court simply concluded – without engaging in any reported “balancing” - that the various state or governmental interests implicated in the School’s admissions program were more important than that equal protection right. The First Amendment did not enter into the equation.351 Justice O’Connor’s majority opinion cited Justice Powell’s Bakke solo opinion as authority for the proposition that a university enjoys a constitutional, namely, First Amendment, right or interest in educational autonomy, but her opinion makes no holding to that effect.352

Significantly, Justice O’Connor’s characterization of the Court’s holding does not refer to any First Amendment basis for deference to institutional autonomy. Instead, she wrote:

Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.353

350 Grutter, 539 U.S. at 329.
351 See Kathy L. Wyer, Comment, A Most Dangerous Experiment? University Autonomy, Academic Freedom, and the Concealed-Weapons Controversy at the University of Utah, 2003 UTAH L. REV. 983, 1008 n.139 (2003) (reading Grutter’s holding as based on “constitutional academic freedom”). Another commentator observed, “[t]he order and allocation of proof was not explained in Justice O’Connor’s opinion.” Leland Ware, Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases, 78 TULANE L. REV. 2097, 2109 (2004). Nevertheless, Ware proposes: “Relying on academic freedom principles, the majority accorded considerable deference to the university’s educational judgments concerning the value of student body diversity.” Id. at 2098-99. See also id. at 2105 (“Invoking principles of academic freedom, the majority accorded considerable deference to the university’s ‘complex educational judgments’ concerning the educational benefits of student body diversity.”); id. at 2109 (“[T]he majority in Grutter invoked academic freedom principles and accorded a presumption of validity to the university’s claims concerning the value of diversity.”). Ware does not discuss or mention any First Amendment basis for or connection with such “academic freedom principles.” It would be more accurate to say that to some extent the Court deferred to the university’s policy out of respect for institutional autonomy. See supra note 323 and accompanying text; see infra note 353 and accompanying text. The Grutter majority nowhere mentions “academic freedom principles.”
352 Grutter, 539 U.S. at 329. See Byrne, supra. note 343.
353 Grutter, 539 U.S. at 328. See generally Edward N. Stoner II & J. Michael Showalter, Judicial Deference to Educational Judgment: Justice O’Connor’s Opinion in
Nothing is said here about institutional academic freedom or autonomy. Instead, the majority states that it was simply "giving a degree of deference" to academic autonomy. To so state does not constitute a determination that academic institutions are entitled to academic freedom or autonomy under the First Amendment. The Grutter Court opinion contains no holding as to institutional academic freedom, institutional autonomy, or the First Amendment.

Perhaps at some point the Supreme Court will address directly the question whether colleges and universities are so entitled. If or when that happens, the Court will have to decide whether the Constitution really does provide adequate underpinnings for institutional autonomy or academic freedom. To date, it has not even attempted to do so.

VI. CONCLUSIONS

Since 1978, several judges, Justices and commentators have declared that the First Amendment somehow under-girds the academic freedom or autonomy of public colleges and universities. They did so because they believed that at some point, the Supreme Court already had so held. Various Justices have so stated in concurring opinions and in some cases Court majorities seem to have agreed in dicta that universities or their professional schools are entitled to academic freedom or autonomy based upon the First Amendment. But the Supreme Court has never held that public colleges and universities are entitled to either academic freedom or institutional autonomy under the First Amendment. Nor has any judge, Justice or commentator explained how institutional academic freedom or autonomy could be grounded upon the First Amendment. To do so would require addressing several constitutional considerations, some of which are only mentioned here. For instance, the First Amendment protects speech and association, not state action, whether in the form of policy-making or administrative decision. Also, it protects the rights of individual persons


As to these issues, see supra note 338 and accompanying text and Hiers, supra note 38, at 556-68.

See supra notes 112-352 and accompanying text.

Id.

Judges and Justices usually do not dissent, concur or concur specially if they happen to disagree with dicta penned by the writing judge or Justice, so long as they are in agreement as to the results and the basic legal reasoning leading to it. Special concurrences generally are written only if the concurring judge or Justice reaches the same result by applying significantly different legal theories, and particularly wishes to call such theories into question. Therefore, the fact that judges or Justices seem to "agree" in dicta does not provide a basis for predicting how they would decide if the matter were later fully briefed and argued before the Court. There is an important difference between agreeing in dicta, on one hand, and articulating a reasoned holding on the other.
from governmental intrusion, not the rights - if any - of government or governmental agencies from constitutional claims by individual persons. The Court has never held that the First Amendment protects government speech. Nor has it ever held that public colleges and universities are persons for purposes of First and Fourteenth Amendment analysis.

The rather remarkable pattern of confusion traced in this article largely dates and derives from Justice Powell's solo opinion in Bakke. There, Justice Powell fused Keyishian's language affirming the importance of First Amendment academic freedom for teachers with Justice Frankfurter's concurring quotation in Sweezy from The Open Universities about the "four essential freedoms of the university." Later courts and commentators sometimes confused so-called institutional academic freedom with institutional autonomy. And several have confused concurrences and dicta in earlier cases with holdings by the Court. It is not necessary to decide to what extent any of the particular instances described in this article might be characterized as intentional misrepresentations rather than simply as misreadings of prior cases. The Supreme Court does not decide constitutional law questions by mistakenly assuming that it had already ruled on those questions sometime in the past. Fictitious or phantom precedents do not constitute constitutional law. Judges and Justices must relate their interpretations of the Constitution to the text of the Constitution, not simply to what they think the Court once may have said.

Thus, it may be concluded that the Court has never held that educational institutions themselves are entitled to academic freedom under the First Amendment. The notion that the Court has so held may be aptly characterized as a jurisprudential mirage. Once approached and viewed up close, it vanishes.

To be sure, public colleges and universities may have an obligation to provide the kind of atmosphere where First Amendment academic freedom can flourish. Arguably, as "expressive association," academic institutions may invoke First Amendment academic freedom protections on behalf of their faculty and students. Courts may certainly defer to the

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358 It is noteworthy that The Open Universities language quoted by Justice Frankfurter in his Sweezy concurrence states that it is "the business of a university to provide that atmosphere" where its "essential freedoms" can "prevail." See supra note 34 and accompanying text. Justice Powell properly indicated that a university's seeking to promote "the 'robust exchange of ideas'" involves a "First Amendment interest." See supra note 70 and accompanying text. But the First Amendment interest is that of those engaged in free speech on the campus, not that of the university itself.

359 Recently, the Court wrote in Rumsfeld v. Forum for Academic and Inst. Rights 126 S.Ct 1297, 1312-12 (2006)("We have recognized a First Amendment right to associate for the purpose of speaking, which we have termed a 'right of expressive association.'") See, e.g., Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000). The reason we have extended First Amendment protection in this way is clear: The right to speak is often exercised most effectively by combining one's voice with the voices of others. See Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984). If the government were free to restrict individuals' ability
expert judgment of academicians, or even recognize institutional autonomy “within constitutionally prescribed limits” whether as a matter of sound public policy or as an important state interest. But none of these propositions is the same as saying that colleges, universities or their professional schools, themselves, are entitled to the enjoyment of either academic freedom or autonomy under the First Amendment. First Amendment protection for institutional academic freedom or institutional autonomy might be beneficial, as some cases and commentators have forcibly contended. Such protection, however, could have deleterious consequences, as some lower court decisions have demonstrated and other commentators have suggested. This article does not take a position as to the possible advantages or disadvantages of First Amendment protection of these interests. Its simply concludes that the Supreme Court has never held that the First Amendment accords such protections.

to join together and speak, it could essentially silence views that the First Amendment is intended to protect. Ibid.” Rumsfeld, at 126 S.Ct. at 311-12. Grutter v. Bollinger, 539 U.S. 306, 328 (2003). A commentator recently has suggested that courts “might defer to institutional academic freedom even where it restricted individual academic freedom” if the hate speech codes in question were necessary to deter serious harm to victims. Timothy C. Shiell, “Three Conceptions of Academic Freedom” in ACADEMIC FREEDOM AT THE DAWN OF A NEW CENTURY 31 (Evan Gerstmann and Matthew J. Streb, eds., 2006).

See, e.g., supra note 255 and accompanying text (protecting peer review processes); see also Wyer, supra note 351 and Ware, supra note 351 (respectively urging university autonomy as a basis for controlling guns on campus, and institutional academic freedom as basis for defending affirmative action and student diversity).

See, e.g., supra note 194 (comments on Urofsky) and supra note 251 (quoting Finkin). See also Paul Horwitz, Grutter’s First Amendment,” 46 B.C.L. Rev. 461 (2005) (suggesting alternative readings of Grutter and noting numerous potentially positive and negative implications as to each).