IS ACADEMIC FREEDOM
A CONSTITUTIONAL RIGHT?

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INTRODUCTION

It is a very great honor to have been invited to inaugurate the George Sanchez Memorial Lecture Series at the University of Houston. While to my great regret I never had the opportunity to know Dr. Sanchez personally, I feel as though I must have been the beneficiary of his wise counsel in countless ways through his writings and his influence upon those who did have the good fortune to have been his students, colleagues and contemporaries. His was a remarkable career, and his contributions to several fields of human learning have been vast.  

As we gather this evening to pay tribute to such a person as Dr. Sanchez, it is well to pause and recognize clearly the rich legacy that he has left with us. The lessons that he taught through the generations of his active life and career have well stood the test of time—as the creation of a lecture series in his honor perhaps best attests. In that sense, and surely this evening, we are all his students and the beneficiaries of his legacy and his teaching. For my part, I am simply honored to have been given the opportunity to help join in this most fitting tribute to an inspiring American.
ACADEMIC FREEDOM AND THE CONSTITUTION

It has become rather fashionable of late to disparage the role of the Constitution—and especially of the First Amendment—in protecting academic freedom. The latest treatise on free speech and free press contains no reference to academic freedom, even in the appendix—a sharp contrast to the full chapters devoted to this theme in earlier works. A recent law review symposium addresses at length the claimed nexus between academic freedom and the Bill of Rights, but the lead article asserts that contracts, regulations and policies offer greater protection than does the Constitution.

The scholarly view of this relationship has not always been so grudging, as we shall see in a moment. And I am less willing than many of my First Amendment colleagues to concede the demise of the topic on which I have agreed to speak this evening. In supporting a more vital view, I would submit the testimony of two expert witnesses. Let me call first Ms. Lucy DeLeone of Ravenna—not the Italian coastal city with the famed mosaics, but its lesser namesake in Northeast Ohio. One cold November morning more than a decade ago Ms. DeLeone placed in a wastebasket in the parking lot of the county courthouse the official copy of a grand jury report and set fire to it. This action was not in protest, but rather in compliance with a federal district court decree. Now what, you may well ask, does all this have to do with academic freedom and the Constitution? Ms.
DeLeone's qualifications may become a bit clearer if I add that she was the county clerk of Portage County, Ohio in 1970 during the fateful months following the tragedy at Kent State University. The federal court order which she carried out with a match in the parking lot resulted from a lawsuit filed by several Kent State professors who charged that the grand jury report abridged their academic freedom. The federal judge agreed, and ordered that all copies of the report be destroyed.\footnote{5}

Since our memories of that painful time have dimmed considerably, I might provide a bit more background. The name of Thomas Lough, a Kent State sociology professor once accused of teaching his students how to make a Molotov cocktail, has long since passed from active memory. (Indeed, even the Molotov cocktail can probably be found today only at the Smithsonian.) Lough and several others took umbrage at the report of a special grand jury which Governor James Rhodes had charged to determine possible criminal activity during the Kent State shootings--and he did not mean on the part of the Ohio National Guard. The jury relished the task, and lowered the boom on the administration and some--it stressed not all--of the faculty for being overly permissive.

The report in fact asserted that "an over-emphasis on dissent can be found in the classrooms of some members of the university faculty." These unnamed instructors "devote their entire class periods to urging their students to openly oppose our institutions of government ... "\footnote{6}
Several Kent professors took to federal court their claim that the grand jury report unconstitutionally abridged academic freedom. A District Judge in Cleveland took extensive testimony. A number of Kent State instructors described ways in which they had modified curricula or truncated classroom discussion in response to the grand jury report. The judge found this testimony credible and compelling: "The report is dulling classroom discussion and is upsetting the teaching atmosphere ... When thought is controlled, or appears to be controlled, when pedagogues and pupils shrink from free inquiry at a state university because of a report of a resident grand jury, then academic freedom of expression is impermissibly impaired. This will curb conditions essential to fulfillment of the university's learning purposes." So the court ordered the report destroyed. In carrying out that decree by touching a match to the report's official copy, Lucy DeLeone must at least for a moment have realized that the First Amendment protects academic freedom in the classroom.

As a second expert witness, I would call Edward M. Davis, the now retired chief of the Los Angeles Police Department. Sometime in the early 1970s, the LAPD sent undercover agents to the University of California, Los Angeles to register as students, attend classes, and submit reports on discussions they had observed. The resulting files allegedly contained police dossiers on individual professors without evidence of any law violations. As a result (claimed one UCLA professor in taking the chief to state court), undercover police activity had directly chilled freedom of expression and inquiry in the classroom.
The California Supreme Court remarked that such covert activity might violate the Constitution wherever it took place. Yet the choice of the college classroom as a surveillance site was particularly reprehensible: "The presence in a university classroom of undercover officers taking notes to be preserved in police dossiers must inevitably inhibit the exercise of free speech both by professors and students ... [T]he threat to First Amendment freedom posed by any covert intelligence gathering network is considerably exacerbated when ... the police surveillance activities focus upon university classrooms and their environs ... [T]he crucible of new thought is the university classroom; the campus is the sacred ground of free discussion. Once we expose the teacher or the student to possible future prosecution for the ideas he may express, we forfeit the security that nourishes change and advancement. The censorship of totalitarian regimes that so often condemns developments in art, science and politics is but a step removed from the inchoate surveillance of free discussion in the university; such intrusion stifles creativity and to a large degree shackles democracy." With this ringing vindication of academic freedom, the California Supreme Court ordered an end to classroom surveillance. Like County Clerk DeLeone, Chief Davis had learned firsthand that academic freedom deserved some constitutional protection.

The choice of these two decisions has a logic that may not be obvious. Neither case would rank among major academic freedom precedents; indeed, both are virtually unknown even to the experts. Yet both recognize what I would identify as the core of legal
protection for academic freedom. Along with a relatively small number of others, they address the central issue of professorial speech and thought in the university classroom. It is that medium which most clearly deserves constitutional protection. Whatever may be said of the need to safeguard other parts of university life--research, extramural statements, promotion and tenure decisions, admission and evaluation of students, use of campus facilities and the like (about which more later), it is the core of speech in the classroom that should most clearly claim our solicitude and that of the courts.

Whatever the cases may hold--and more of that a bit later--there is growing doubt about the primacy of academic freedom as a constitutional issue. The perception of legal recourse for academic freedom has gone through several cycles. A reader of Zachariah Chafee's 1920 treatise, *Free Speech in the United States*, would have looked in vain for a section on academic freedom. Chafee himself was, of course, well aware of other safeguards, including the founding five years earlier of the American Association of University Professors. The initial AAUP Declaration of Principles issued in 1915 was, of course, the precursor of the widely adopted 1940 Statement on Academic Freedom and Tenure. The year of Chafee's first edition was significant to academic freedom for quite a different reason. A New York legislative committee proposed that any teacher within the state--including college professors--must receive a license; the licensing process would involve an inquiry whether the instruction "will be detrimental to the public interest." This bill passed both houses of the legislature but was vetoed by
Governor Al Smith. The veto message showed early recognition of the primacy of academic freedom: "The free play of public opinion, resting upon freedom of instruction and discussion within the limits of the law, would be destroyed and we should have the whole sphere of education reduced to a formula prescribed by governmental agency." Yet Chafee could not in 1920 have cited court decisions supporting this view. His failure in the treatise to mention academic freedom is quite understandable.

By the late 1930s, there was nascent scholarly interest in this issue. A *Yale Law Journal* Note--prompted in part by the dismissal of my remote predecessor Glenn Frank--outlined the legal premises of academic freedom. The author warned, however, that it would be "unduly optimistic to look to the courts for the development of effective legal protection for academic freedom, at least pending an improvement in the concrete provisions made for such rights in statutes and customary contracts." Twenty-five years later, my perceptive Wisconsin colleague Professor David Fellman found little change: "A reading of hundreds of cases has yielded very few opinions which pay any attention to the subject of academic freedom, and, much less, show any genuine appreciation of either its meaning or importance."

Yet the 1960s did bring a new and more hopeful insight. Professor William P. Murphy contributed to a 1963 symposium an article entitled, "Academic Freedom--An Emerging Constitutional Right." After acknowledging the paucity of direct precedent, Murphy invoked some encouraging analogies; he then argued that freedom to
teach and to learn lay at the core of all intellectual freedom. Murphy viewed recent Supreme Court decisions as "harbingers of what is to come, a promise of protection yet to be redeemed." ¹³/

That symposium also contained the historical perspective of Ralph Fuchs; Arval Morris' critique of the loyalty oath, which was soon to lead to a Supreme Court victory in Baggett v. Bullitt; Thomas Emerson's and David Haber's essay on "The Faculty Member as Citizen"; and even a thoughtful demurrer by Russell Kirk. Thus the essential intellectual groundwork had been put in place. By 1977 Professor Walter Metzger (the AAUP official historian) could edit an entire volume entitled, "The Constitutional Status of Academic Freedom." ¹⁵/ So, in a sense, we have come full circle--from a time when the courts were perceived as inaccessible to a time when many perceive the courts as more irrelevant to academic freedom claims than remote.

Before assessing the current condition more closely, a word or two of deference to more skeptical colleagues might be proper. A lack of excitement about First Amendment protection for academic freedom is at least understandable, and for several reasons. First, it is quite true that court decisions squarely recognizing professorial speech in the classroom are relatively few. Indeed, perhaps only the classic case of Sweezy v. New Hampshire really belongs in that category. Increasingly, Supreme Court cases on higher education involve instead such newer subjects as preferential admissions, student discipline, collective bargaining, and use of campus facilities by religious groups. Traditional
issues of academic freedom have not been central to the Court's docket for some time.

Second, it is true that many of the so-called academic freedom protections might well have developed without professorial involvement. The loyalty-security area offers a good illustration. While faculty groups properly claim credit for the successful challenges to disclaimer-type oaths, the necessity for a faculty plaintiff in any of these cases remains uncertain. Indeed, one of the earliest Supreme Court victors in the loyalty/security battle was a New York subway conductor with the improbable name of Max Lerner. His constitutional claim could as readily have been made by a City University professor; Conductor Lerner simply happened to get to court first and thus deserves the laurels.

Third, there is no doubt that non-constitutional safeguards have expanded more rapidly in recent years. Governing boards freed of the political anxieties of the '60s became increasingly benign in matters both substantive and procedural. State legislatures also became more willing to provide safeguards that would have seemed superfluous if not downright subversive a decade ago. In institutions with modest academic traditions--notably junior and community colleges--collective bargaining agreements supplied a new measure of professorial protection. More clearly than was true a decade ago, the Bill of Rights is not the only safeguard to which embattled faculties of the 1980s may look.
Fourth, the issues of the '80s are subtler than were those of the '60s and '50s. Loyalty oaths, legislative investigations, dismissals for political activity, and the like are largely threats of the past. Today's academic freedom challenges appear less menacing. The most relevant case on the Supreme Court's current docket, for example, asks whether Minnesota's public employee bargaining law violates academic freedom of non-members of a community college union by giving the union sole power to select persons to "meet and confer" with administrations. Our predecessors who fought in the '50s for the very survival of McCarthy era victims might remark how easy we seem to have it in these quieter times. Yet the constitutional issue in the Minnesota community college case is not trivial. It is, moreover, close kin to a question that centrally implicates academic freedom and which the courts must soon decide--whether sanctions for non-payment of union dues may include the termination of a tenured or continuing faculty appointment. For the moment, though, it is true that the storms are milder today than in earlier times, and for this reason the constitutional role in protecting academic freedom may seem muted.

Finally, I sense some lack of clarity and consensus within the university world. We use terms like "academic freedom" with a degree of confidence that may surpass our common understanding. We tend to assimilate the claims of persons in public and private institutions--though lawyers are quite clear that the Bill of Rights reaches in the private sector only what is "state action." For the most part, faculty and others on private campuses must depend upon non-constitutional safeguards. We also tend, even in the public
sector, to assimilate universities which enjoy special status under state constitutions and those which are simply creatures of legislation. Here again, the distinction may be critical—as Michigan's constitutional universities and their faculties have often discovered by obtaining judicial protection against legislative intrusion.

Even worse, we are not always clear whose academic freedom is at stake. Relatively rare is the case in which all parts of the academic community make common cause against an external threat. More typical is the case in which one constituency seeks protection from another—students from administration, faculty from governing boards, teaching assistants from faculty and the like. Sometimes such cases present, in fact, conflicting claims to academic freedom. The governing board, for example, may assert an overriding interest in making personnel decisions adverse to an individual professor's personal welfare. When a visiting lecturer is heckled, some now argue that it is the heckler's speech and not the lecturer's that deserves protection. Or the senior faculty may argue that setting the terms and conditions of teaching assistants' employment—including course syllabus and grading practices—should be protected against the graduate students' claim that their academic freedom is threatened. In such cases, academic freedom plays a central role. Yet a court called upon to vindicate abstract principles would be forced to make painful choices among competing claims within the academic community. For reasons I shall elaborate a bit later, we might be well advised to keep such dilemmas out of court by resolving them through our own tribunals.
The reasons for scholarly skepticism are plausible if (to me) less than compelling. What needs now to be done is to revisit that distinction between core and periphery of which I spoke a bit earlier, and determine as best we can the current condition of academic freedom as a constitutional precept. I would urge that we look first at professorial speech in the classroom—that freedom to teach and to express beliefs—however controversial, unpopular or even bizarre—at the core of the learning process.

Seminal protection comes, of course, from the Supreme Court's Sweezy decision. As a visiting lecturer at the University of New Hampshire, Paul Sweezy had come under the watchful eye of State Attorney General Louis Wyman. Acting as a one-person subversive activities investigating committee, Wyman twice summoned Sweezy and asked about his political associations, activities, and specifically about a lecture he had given to a humanities course at the university in March, 1954. (Sweezy had also appeared the previous year by invitation of the regular professor offering this class.) When the state court held that Sweezy must answer Wyman's inquiries, including those about his university lecture, the case attracted the Supreme Court's attention. Sweezy had the good fortune to have as counsel Yale Law School Professor Thomas I. Emerson, who had already written at length on the value of constitutional protection of academic freedom. While a plurality of the Court reversed on grounds more procedural than substantive, it did acknowledge "the essentiality of freedom in the community of American universities." The opinion added: "To impose any strait jacket upon the intellectual leaders
in our colleges and universities would imperil the future of our Nation ... [T]eachers 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.\textsuperscript{19/}

It was, however, the concurring opinion of Justices Frankfurter and Harlan that fully recognized the significance of Sweezy's academic freedom claim. With the special insight of a former law professor, Frankfurter elaborated the delicate but vital nexus between freedom to teach and study on a university campus and the vitality of a democracy.\textsuperscript{20/}

The Sweezy decision remains as forceful today as it was in 1957. The pertinent paragraphs are often cited as the major source of constitutional protection for academic freedom. If the cases which turn directly upon Sweezy are relatively few, that fact reflects more the docket than the stature of the precedent. Moreover, a respectable handful of lower federal and state court cases can be cited--the Kent State grand jury and UCLA undercover police cases among them--in which practices comparable to the New Hampshire investigation have been condemned on similar grounds. At its essence, therefore, the constitutional premise of academic freedom seems to be alive and well.

If classroom speech is the core of protection, perhaps the innermost ring is the faculty member's extramural statements and associations. Here it seems to me the courts have guaranteed essentially what we should expect--that university professors will enjoy at least as much extramural freedom as do other government
employees, but not necessarily more. Constitutional decisions striking down loyalty oaths, intrusive reporting requirements, inhibitions on political activity and other constraints have involved professors as plaintiffs for reasons more incidental than central. While (as I suggested earlier) a City University professor would not have been less successful than the subway conductor in resisting questions about Communist Party membership, there was no magic in the fact that the companion case happened to involve a public school teacher. Nor was a teacher plaintiff necessary to later cases striking down Arkansas's associational reporting requirement, or the disclaimer loyalty oaths of Florida, Washington, Arizona, New York and Maryland. Despite the presence in many of these opinions (notably the New York oath case) of strong reaffirmation of Sweezy, such statements seem more incidental than essential. What the cases establish--regardless of the plaintiff's profession--is a widely shared claim to freedom of association, expression, and belief within the public sector. State university professors share fully in that freedom--but with no evidence that their extramural activities or statements enjoy a greater measure of constitutional freedom than those of colleagues holding less sensitive posts in the public sector.

There is one possibly contrary case. It involves the UCLA experience of Professor Angela Davis. The Regent decision to deny reappointment--withdrawing for this purpose an authority usually delegated to campus chancellors--reflected in part her alleged irresponsibility in extramural speeches. A major source of restraint was a 1956 AAUP statement. Professor Davis was, in the
Regent majority's view, held to a higher standard of speech outside the classroom than, let us say, a custodian or a clerk elsewhere on the UCLA campus. Obviously the AAUP statement was never intended to be so used; a commendable attempt at self-regulation became at the hands of a punitive board a self-inflicted wound for the academic community. When a California court eventually upheld the Regent action, it implied that university professors might enjoy less rather than more constitutional protection in making extramural statements. Yet the Davis case stands in isolation; its perversion of academic self-regulatory standards represents a rare aberration. I mention it here for the sake of completeness--and perhaps as a gentle reminder of times when academic freedom was imperiled in ways we easily forget.

Let me add an important caveat. I do not suggest for a moment that university professors should not as a matter of policy enjoy special latitude in statements or activities outside the classroom. If nothing else, the safeguards of tenure (and of continuing appointments for nontenured faculty) should ensure that much. The point is only that the Constitution may not guarantee to university professors broader opportunities to join (or not to join) outside groups, to declare (or refuse to declare) beliefs and affiliations, or to criticize government policies. What ought to be as a matter of governing board or legislative tolerance is quite different from what must be by constitutional command.

As we leave the relatively comfortable core, let me offer an hypothesis for the range of remaining issues: Where an academic
freedom claim may not be dispositive, a concept of academic
defereence justifies treating many university processes and decisions
differently from off-campus matters. This formulation is hardly
novel. In fact, as we shall see shortly, many university cases
recognize in this way the distinctive nature of the academic
environment. Illustrations come from many areas. I would select
for closer examination several that seem especially apt—
university-based research; personnel decisions; admission of
students; evaluation of student performance; and use of university
facilities.

We might begin with the issue of university-based research.
Obviously a flat prohibition of all research—or of a major area of
inquiry—would pose academic freedom problems comparable to
silencing of a professor in the classroom. But in real life the
issue usually arises obliquely—through restrictions on the use of
laboratory animals, the prevention of certain hazardous research, or
28/
demands for data derived from the laboratory. The courts have
seldom addressed the potential—and, I believe, growing—tension
between the freedom of inquiry and the intrusive presence of other
branches of government.

Within the past year and a half two federal appellate courts
have sought to reconcile demands for research data with claims of
intellectual freedom. In both cases the resolution has supported
the researcher's wish not to comply with a private party subpoena
for laboratory data—though on grounds more technical and procedural
than substantive or constitutional. Especially pertinent is the
judgment of the Seventh Circuit Court of Appeals in a case involving research at the University of Wisconsin-Madison on the effects of certain herbicides on rhesus monkeys. The Dow Chemical Company demanded extensive data for use in an EPA administrative hearing; the scientists refused to comply on several grounds, including the burdensome character of the demand and the potentially disruptive effect that compliance would have on research then in progress. The court might well have quashed the subpoenas in a less sensitive context—and partly because Dow demanded a massive volume of information, including much that had not yet even been validated, much less published. But the Appellate Court did recognize the vital significance of the context: such demands would "threaten substantial intrusion into the enterprise of university research and ... are capable of chilling the exercise of academic freedom." The phrasing of this caution is critical. The court did not treat the request as a direct or even potential suppression of speech, but rather as the indirect constraint which it was. Later, the Sixth Circuit reached a similar conclusion in a case involving the Jeep Corporation's request for data in a study of automotive safety done at the University of Michigan. Again, the basic reason for quashing the subpoena was essentially procedural and technical, though the opinion contained clear recognition of the sensitivity of the interests that would be threatened by disclosure.

The few other research cases are generally consistent. While scholars have variously propounded and refuted a theoretical basis for the academic researcher's claim of confidentiality, the more practical resolution of individual cases by the courts seems more
helpful. In any such case, the special nature of the university laboratory deserves substantial deference. An outsider who seeks access to that laboratory and its results should be expected to meet a higher burden of proof than is true for a routine subpoena. That burden can occasionally be met and discovery compelled if other interests outweigh the researcher's claim. There is not yet—and may never be—an immutable or inviolate academic researcher's privilege. What does exist and is important to the freedom of university inquiry is a special degree of deference, and a judicial recognition of the special conditions of the academic community.32/

Similar principles seem to have evolved in the academic personnel area. More than a decade ago, federal courts first perceived the tension between faculty personnel processes and claims of unlawful discrimination. One federal court cautioned in an early case, "Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a university level are probably the least suited for federal court supervision." Other courts expressed similarly deferential views of the faculty personnel process. When such claims have been overridden and a faculty member reinstated, courts usually acknowledge the risks of intervention and the vital differences between campus personnel processes and those in business or elsewhere in government.

The recent cases on disclosure of tenure votes may serve to illustrate this approach. Three federal Courts of Appeals have now spoken to this issue. In the first case, involving Professor Dinnan at the University of Georgia, the Court was unmoved by a plea for
academic deference. Professor Dinnan was eventually sent to jail for refusing to disclose how he had voted on the plaintiff's candidacy for tenure. The two later cases, however, took a more sensitive approach. The Gray case in New York recognized the special nature of the tenure process and declined to order blanket disclosure of departmental or committee votes. Only if the institution refused to provide the aggrieved candidate a statement of reasons for negative action would individual votes be subject to disclosure. In citing with approval the applicable AAUP policy statement, the Second Circuit felt it had struck an appropriate balance between the special personnel needs of the academic community and the legal mandate of non-discrimination. Especially pertinent is its statement of reconciliation: "Academic freedom is illusory when it does not protect faculty from censorious practices but rather serves as a veil for those who might act as censors. Because our decision [...] inhibits capricious nonrenewal of employment based on race rather than academic grounds, we believe it to be basically consistent with the goals of academic freedom." This judgment clearly embodies that degree of "academic deference" which permits accommodation.

The latest case involves a similar personnel dispute at the University of Notre Dame. The Seventh Circuit several months ago adopted a view similar to that of the Gray court. In refusing to order disclosure of the names of faculty involved in the tenure decision, this Court recognized "a qualified academic freedom privilege" which allowed the University to delete certain sensitive
information before making available to the plaintiff those files necessary to a race or sex discrimination suit.

Recognition of "academic deference" in personnel matters comes from another quarter. Four years ago, the Supreme Court found that Yeshiva University's faculty were not covered by the National Labor Relations Act. There, too, a special appreciation of academic processes and policies led the Court to order agency abstention. University professors were simply different from employees of a private company: "The 'business' of a university is education, and its vitality ultimately must depend upon academic policies that largely are formulated and generally are implemented by faculty governance decisions ... There can be no doubt that the quest for academic excellence and institutional distinction is a 'policy' to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal." Thus a majority found collective bargaining inappropriate for the full-time faculty of such an institution, and for reasons unique to the academic community.

Mention of the Yeshiva case reminds us that the Supreme Court has spoken recently of other types of academic judgments, such as the admission of students. In successive terms, the Court rendered two decisions which are not easily reconciled. In one, [Bakke v. Board of Regents](#), a bare majority recognized the University's special claim to take race into account in the admission of applicants to competitive graduate professional programs. In the other case, [Cannon v. University of Chicago](#), the Court found no
special reason for exempting universities from the nondiscriminatory admissions policy of Title IX. Since the two cases were decided not many months apart, one would have expected a closer analysis of similarities and differences under the rubric of academic deference. Indeed, the special needs of universities received only the briefest attention from a single dissenting judge in Cannon; the possible relevance of Bakke in the later case was apparent only to him.

Despite the lack of explicit reconciliation, the two admission policy cases may aid our understanding of academic deference. Surely the University of California could not have claimed complete immunity from judicial review of its admissions to medical school. What it could claim, and did, was that even an otherwise actionable claim of race discrimination should be seen in the context of a university's special mission. Thus did Justice Powell and a tenuous majority recognize that "The freedom of a university to make its own judgments as to education includes the selection of its student body." Reference to Sweezy and other academic freedom cases served not to immunize the admissions judgment, but rather to occasion the weighing of other claims in a different balance.

When Cannon reached the Court the following year, the basis for dispensation was clearly narrower. The University could argue only that sex discrimination admission suits were "burdensome and inevitably will have an adverse effect on the independence of members of university committees." For the Justices, this concern was properly addressed to Congress--and had, in fact, been resolved
by Congress with full knowledge of the potentially burdensome nature of the remedy it was creating in Title IX. Moreover, "Nothing but speculation supports the argument that university administrators will be so concerned about the risk of litigation that they will fail to discharge their important responsibilities in an independent and professional manner." Perhaps a stronger claim for academic deference could have been made in Cannon, and would have affected the tone of the opinion—though I rather doubt the result would have been different. The contrast between Bakke and Cannon is elusive, though both cases seem fairly close to that soft line which distinguishes university issues from comparable issues arising in other contexts.

Another area of recent litigation also involves students. While the Supreme Court has never held that a university student expelled or dismissed for disciplinary reasons has a constitutional right to an adversary hearing, the Court has cited with approval lower court judgments to that effect. Constitutional due process ensures state university students at least some form of notice, and an opportunity to confront and to contest adverse evidence before being evicted from the academic community. The issue which remained open was that of procedure appropriate to academic sanctions. That question reached the court in 1978 in the Horowitz case. A medical student at the University of Missouri-Kansas City was dismissed in her final year of study for failing to meet academic standards. In a federal court suit she claimed that dismissal without a full adversary hearing abridged her constitutional rights. (Informal consultation
and a more formal but non-adversarial hearing had, in fact, been afforded.) A unanimous court found that whatever process was due had in fact been provided. Central to the judgment was a review of the differences between academic and disciplinary sanctions. Given the highly sensitive process of evaluating student performance, the court "declined to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship." A blanket claim of immunity on the university's part would have fared poorly. Yet the Horowitz opinion exemplifies a more flexible concept of academic deference through recognition of the special needs of the academy.

The final area of inquiry happens by pure coincidence to involve the very same institution. The University of Missouri-Kansas City denied use of campus meeting rooms to a student religious organization. It was university policy not to offer such facilities "for purposes of religious worship or religious teaching." The student group took to federal court its claim that once the university had created a forum for student activities, it could not selectively withhold that forum from religious organizations. The university invoked in extenuation a clause of the state constitution which mandated strict separation between church and state—arguably stricter than what the federal establishment clause compels.

The court of appeals deferred to the university's interest. But the Supreme Court upheld the students' claim, rejecting not only the university's specific arguments but also its broader plea for
judicial abstention. This time the court was simply not persuaded that academic freedom was even remotely implicated. A decade earlier the court had held that universities could not bar student political groups on the basis of feared violence. In the Missouri case a university which had "created a forum generally open to student groups" could not deny that forum to a particular form of speech or assembly--even for the laudable purpose of keeping church and state at arm's length. (Only the separate opinions of Justices Stevens and White recognized the issue of academic deference and the special sensitivity of the matter.)

Here, too, of course, the claim for special treatment could go too far. About the same time Princeton University invoked academic freedom in seeking to bar from its campus political solicitors who claimed a right of access under the state constitution. The New Jersey court found Princeton's claim overstated--given the broad range of speakers and others already on the campus--and rejected the plea of immunity. As Professor Matthew Finkin has recently shown in his thoughtful Texas Law Review article, a compelling case could be made for "institutional academic freedom"--but one that does not include Princeton's claim to cordon its campus from political solicitors. The university's interest was, in fact, more "proprietary" than "academic." The case would have been quite different if, for example, the university had been doctrinally committed to oppose the views of a particular solicitor. "It seems plain," Finkin writes, "that the court would not compel the institution to admit him onto its premise. Princeton, however, did
not assert that [the solicitor's] views were in any sense discordant with its private purposes." The Princeton claim is therefore less compelling than the superficially similar claim of the University of Missouri-Kansas City. Perhaps the courts were right in both cases to deny institutional pleas for special treatment; my own preference would have been to deny Princeton's claim but to uphold Missouri's. Perhaps the case is yet to come which will provide the necessary contrast to complete the cycle.

Let me conclude with several brief suggestions. First, resort to the courts for vindication of academic claims is not always wise. The California Loyalty Oath case recalls at least one reason for caution. When University of California faculty in 1952 persuaded the State Supreme Court that the special Regents' oath was invalid, the victory proved unexpectedly pyrrhic. The basis for that judgment was the primacy of the state's general loyalty oath, which despite the University's constitutional status now applied on campus as everywhere else in the state. It took another law suit and the passage of 15 years to free California faculty from the arguably more onerous general loyalty oath. Perhaps the suit should still have been brought even if the outcome were known; the lesson is at least worth contemplating before one rushes to court.

Second, one should look to constitutional litigation only for those safeguards that are unavailable from any other source. Quite apart from the risk of an adverse judgment, the expense and time involved in litigation are substantial. And there is an invitation
which such litigation offers courts to meddle in the affairs of universities—invited in for one purpose but sometimes inclined to stay beyond their welcome as other issues may arise. Meanwhile the full potential of protective state legislation has not been fully tapped. Beyond even the benign administration and enlightened governing board, there are lawmakers who may even enjoy providing safeguards which we too readily assume only a court can confer.

Third, litigation functions best when all segments of the academic community make common cause. There will be times, of course, when discord is unavoidable. If a governing board denies tenure or an administration punishes a student group, an assumption of internal harmony would, of course, be naive. Yet there are times when Board, administration, faculty and students may all be together—witness, for example, the joint campaign of all constituencies against Pennsylvania's 1970 attempt to compel colleges around the world to report information about even minor student infractions. Wherever common cause is possible, the beneficial effects for litigation seem obvious.

Fourth, litigation should look wherever possible beyond the immediate facts and seize opportunities to expand judicial horizons. The increasing receptivity of judges to national AAUP statements illustrates the potential. In the Gray case a federal appeals court actually made AAUP policy its basis of judgment and several months later another federal Appellate Court did likewise in the Notre Dame case. Increasingly, such statements provide evidence
of academic community practice and precept, as well as offering accepted solutions to particular disputes.

Last, and perhaps most obvious, I would urge modest expectations. Academic interests, decisions, processes, and values certainly need judicial protection well beyond the professor's right to speak in the university classroom. The courts have often acknowledged the need for broader protection. Yet as we move outside the classroom to other university settings, we should candidly accept the dilution of one of the most forceful of First Amendment claims. If we fail to understand the difference between core and periphery, we risk the loss of that which is most vital and central to intellectual freedom in the university.

A Prospectus: Academic Freedom Issues of the Future

As one looks ahead, there is reason both for optimism and for apprehension. We do not expect a resurgence of McCarthyism; loyalty oaths, legislative investigation of suspected subversion and even classroom surveillance appear to be creatures of another era. Yet there are some ominous clouds now on the horizon. In this closing section, I might identify four current areas of concern which will suggest that vigilance for the condition of academic freedom is always appropriate.

First on my list would probably be domestic threats at the national level. There is, for example, National Security Directive 84.
This order seeks to impose lifetime censorship upon government employees who have had access to certain classified information. The potential chilling effect is obvious for scholars who return to campus after serving for sometimes brief periods in federal positions of vital importance to the national welfare.

There are other examples of domestic restriction. Several years ago, for example, the National Science Foundation included in a grant award letter a clause requiring the grantee (in an area of cryptographic research) to delay publication of results which might require classification until they were cleared by the National Security Agency. Indeed, the whole classification system itself has ominous implications. The April, 1982 Executive Order made easier the restriction of information by extending the scope of classification to information originating under federal grants. These and other illustrations should suffice to make the point.

Second, I would identify recent restrictions on international communication among scholars and scientists. Here, too, the evidence is relatively familiar. It includes, for example, a Defense Department demand a year and a half ago for a withdrawal of papers about to be presented at an international conference on optics and laser communications. It includes also letters sent by the State Department to various universities limiting the activities of visiting scholars from the Soviet Union and the People's Republic of China. Under the International Traffic and Arms Regulations and the Export Administration Regulations, there has in fact been
much recent concern over possible limits upon international scientific communication. The recent report of a special commission of the National Academy of Sciences surveyed the technology transfer problem and concluded that very little of the alleged "hemorrhage" could be traced to universities or their faculties. Nonetheless, concern over restrictions of this type is clearly warranted.

The third area of concern is the local or community level of government. While Harvard and MIT were ultimately successful in persuading Cambridge voters not to ban research on nuclear weapons, and Ann Arbor declined to forbid recombinant DNA research within the city limits, local and state laws do pose serious threats to university research. Other examples would include laws restricting fetal research or studies of the brain; research into genetic differences in intelligence among population groups; and such direct constraints as the recently invalidated Berkeley ordinance banning electroshock therapy. The political process seems to have become increasingly responsive to pressures from constituent groups concerned about everything from "fuzzy little creatures" to local nuclear holocaust. The courts have had little opportunity to judge the constitutionality of such laws. Not far in the future, however, there lies the case which will test the validity of such restrictions and which must place in the balance the especially sensitive character of the university environment.

The fourth and final focus is university governance itself. The suit recently filed by a group of University of Massachusetts-Amherst
faculty poses the issue quite directly. That suit contends that any sanction or penalty against tenured faculty required by a union agreement for non-payment of dues seriously threatens academic freedom and individual liberty. The conflict seems unavoidable, though many collective bargaining agreements do circumvent it through dispensations for the recalcitrant professor. The Massachusetts case will now provide the crucible within which this conflict of values is certain to be well tested.

Someone else would doubtless have identified a rather different set of issues. For me—and for the moment—these four must suffice.
FOOTNOTES


6. Id. at 349.

7. Id. at 350.


20. Id. at 261, 262.


29. Dow Chemical Co. v. Allen, 672 F.2d 1262, 1276, (7th Cir. 1982).

30. Buchanan v. American Motors Corp., 697 F.2d 151 (7th Cir. 1983).


36. EEOC v. University of Notre Dame du Lac, 715 F.2d 331, 339-40 (7th Cir. 1983).

37. NLRB v. Yeshiva University, 444 U.S. 672 (1980).


43. Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980).


46. Finkin, supra note 10

47. Id. at 854.


53. Id. at 453.


55. Sullivan & Bader, supra note 52, at 454.

