ACADEMIC FREEDOM—AN EMERGING CONSTITUTIONAL RIGHT

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INTRODUCTION

In 1937, a comment in the *Yale Law Journal*, prompted by episodes at two leading universities, surveyed the American case law and concluded as follows:¹

It is extremely difficult to frame a legal action through which the courts can give relief against such unwarrantable limitations on academic freedom. Academic freedom is not a "property" right, or a constitutional privilege, or even a legal term defined by a history of judicial usage and separately listed in the digests and *Words and Phrases*. Moreover, where a case is brought presenting the consequences of an interference with academic freedom in justiciable form, and petitioning for an accepted mode of legal relief, the plaintiff faces the added barrier of a profession of judicial reluctance to intervene in the internal affairs of an educational institution, an attitude which is said to limit the court to an examination of the authority, not the propriety, of administrative action.

A quarter of a century later, when Professor David Fellman surveyed the legal situation, he found it essentially unchanged:

While there has been no dearth of litigation in the state appellate courts on subjects involving teachers and education, 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 importance²

So far as academic freedom and tenure in colleges and universities are concerned, American decisional law may be described as formless and almost rudimentary. While there has been some discussion of the concept of tenure in higher education, very little understanding of its meaning and significance will be found in the reported cases, and if professors enjoy some security of tenure, they have it for nonlegal reasons largely. As for academic freedom, one must look very hard indeed to find a judicial opinion in which the phrase is even used, and genuine appreciation of its great values in the life of the nation is almost nonexistent in the published views of appellate judges³ While the case for academic freedom is a powerful one, and while it is accepted in some important circles of American life, it cannot be said that the judges have even begun to demonstrate any serious appreciation of what it is all about.⁴

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¹ Comment, *Academic Freedom and the Law*, 46 YALE L.J. 670, 671 (1937).

² Fellman, *Academic Freedom in American Law*, 1961 WIS. L. REV. 3, 17. By this time academic freedom had finally made its way into *Words and Phrases*. The pocket part to volume 1 carries the title and the following definition: "'Academic freedom' is the freedom to do good and not to teach evil." This profound utterance is from *Kay v. Board of Higher Education of the City of New York*, 173 Misc. 943, 951, 18 N.Y.S.2d 821, 829 (Sup. Ct. 1940), in which the court barred the appointment of Bertrand Russell to a chair of philosophy at City College of New York.

³ Fellman, *supra* note 2, at 35.

⁴ *Id.* at 46.

The reasons for this state of affairs are doubtless multiple and not always clear. Certainly they go beyond the reasons given by the judges in their decisions. Without seeking to exhaust the possibilities, it is suggested that the following have been important factors. First, the academic world has not sufficiently educated the rest of the populace as to the purpose, need, and importance of academic freedom. Indeed, one of the most discouraging aspects of the situation is how many members of the teaching fraternity there are who show little comprehension of or sympathy for the cause, and who, so long as they are not personally affected, will watch with apparent unconcern while one of their colleagues is victimized.⁵ It is not surprising that a freedom which is valued so little by so many of its beneficiaries is accorded little respect by others. Judges, of course, share to a large extent the attitudes and opinions of the time and the community in which they serve. We teachers may as well admit that academic freedom is not a value for which the public at large has any great enthusiasm. Educators are aware, of course, that academic freedom rests upon the broad social and public ground that unless teachers are free to think and study and teach and write, the high purposes of education to serve and advance the welfare of society will be frustrated. Too often, however, the claim of academic freedom is put forth in a guise which makes it appear to be a bid for special privilege. This gives it little appeal either to the public or to the courts. It is important that both should realize that social progress, and not simply individual right, is the basic and ultimate justification for academic freedom.

A second reason, I think, is one which is common to most of the great human freedoms. That is that they are almost invariably invoked by or in behalf of some persona or causa non grata. The test case frequently centers on an individual who personally or because of his conduct is considered unattractive or undesirable in some way by the community in which he asserts the right. This is one reason why there is such resistance to a generous interpretation of those provisions of the Bill of Rights which are applicable to criminal defendants. It is why the privilege against self-incrimination arouses such an adverse reaction when used by one who is thought to be a communist. It is why the Negro's claim to freedom from discrimination is resisted so bitterly in the Deep South. The claim of academic freedom, likewise, is apt to be advanced in support of a teacher whose activities run strongly counter to community mores and attitudes. It may be a teacher who advocates desegregation in Alabama, or who opposes in Massachusetts the nation's policy toward Cuba, or who condones pre-marital sex relations in Illinois. It is when the exercise of a freedom is unpopular or controversial that the propensity to deny it is most strongly aroused.

⁵ "The average professor in an American college will look on at an act of injustice done to a brother professor by their college president with the same unconcern as the rabbit who is not attacked watches the ferret pursue his brother up and down through the warren to predestinate and horrible death. We know, of course, that it would cost the non-attacked rabbit his place to express sympathy for the martyr; and the non-attacked is poor, and has offspring, and hope for advancement. The non-attacked rabbit would, of course, become a suspect, and a marked man the moment he lifted up his voice in defense of rabbit-rights." John Jay Chapman, quoted in RUSSELL KIRK, *ACADEMIC FREEDOM* 98 (1955).

It should be clear that unless the freedom is protected in such cases it may as well not, indeed, does not exist. Someone has put the thought in the pungent observation that unless we protect the rights of the so-and-so's, the rights of all of us will be in danger. And yet it takes a considerable degree of detachment and mental self-discipline to defend a freedom on behalf of an individual or a cause which is thought to be hostile or dangerous. As Mr. Robert Hutchins has said, "Academic freedom is, I think, generally regarded as a device by which weak-minded or vicious people in some way hang on to their jobs when all right-thinking men would agree that they ought to lose them."⁶

A third reason why the courts have not accorded more respect to the claims of academic freedom is, I believe, the failure of the academic community to vigorously and collectively press these claims before the courts. Many educators have discounted the law as a source of protection for academic freedom.⁷ This may be the result, rather than the cause, of the numerous instances in which teachers have gone to court and lost. Such efforts have been *ad hoc*, episodic, personally financed, and tried by counsel under whatever legal theory could be dredged up under the circumstances. The academic community in an organized sense has given little support to these legal actions. Compare the way in which Negroes have won judicial recognition and protection of their right to be free from discrimination through careful formulation of legal arguments and the bringing of test cases under the auspices and financial support of a national organization. I will concede at once that there are substantial and obvious differences between the two situations. It is true that the American Association of University Professors (AAUP) has intervened as a friend of the court in a few selected cases, but its energies are expended almost entirely in non-legal directions. This is not said by way of criticism; there are doubtless sound reasons why this is so. Indeed, many educators believe very strongly that the cause of academic freedom will be better off by relying on self-help methods within the academic world rather than by turning to the law and the courts. This may be the better wisdom. All I am suggesting is that, when the organized academic community, for whatever reason, has not pressed the claims of academic freedom in the courts, it should occasion no great surprise that the courts have by and large not recognized such claims.

It is the primary purpose of this article to suggest that a series of recent decisions by the United States Supreme Court has opened up the possibility of a substantial degree of judicial protection of academic freedom as a right recognized and guaranteed by the United States Constitution. To the extent that academic freedom may be a matter of constitutional right, it should serve effectively to remove the two obstacles to judicial protection noted at the outset, namely, the difficulty in framing

⁶ ROBERT M. HUTCHINS, *THE UNIVERSITY OF UTOPIA* 78 (1953).

⁷ See, e.g., ROBERT M. MACIVER, *ACADEMIC FREEDOM IN OUR TIME* 237 (1955): "When we speak here of the scholar's rights we do not refer to legally established guarantees, for the law provides few of the particular safeguards he needs, and in the nature of the case it must probably remain so." And see note 12 *infra*.

a legal cause of action and the reluctance of courts to intervene in the internal affairs of an educational institution. A claim of denial of a recognized right under the United States Constitution is, of course, a good cause of action not only in the federal but also in the state courts, always assuming that the facts are sufficient to support the claim.⁸ As to the second point, it is not lightly to be assumed that anyone, including the governing board of a college or a university, can be vested with non-reviewable discretion to interfere with a right guaranteed by the Constitution.

It must be borne in mind, however, that any protection of academic freedom which may flow from the provisions of the Constitution would be confined to public institutions. Constitutional limitations run against action by government, not against private individuals or associations. The "state action" concept would obviously include action by the governing boards of state colleges and universities and would just as clearly seem to exclude action by privately endowed institutions of learning. Of course, if the act of the private institution was required by the state then the Constitution would be applicable. As it happens, however, it is by action of the governing boards in the state colleges and universities that academic freedom is most frequently violated. This phenomenon was observed as early as the turn of this century,⁹ and has also been found by very recent studies to be the case today.¹⁰ The fact is further substantiated by the experience of the AAUP. Of the fifty-one institutions censured between 1931 and 1962, thirty-one were public. It follows, therefore, that although the constitutional protection of academic freedom would be limited in its scope to public institutions, such confinement happens to coincide with the area where the need for the protection is greatest. If, as many educators believe,

⁸ Jurisdiction is not discussed in this article. The relevant statutory provisions, so far as the United States district courts are concerned, would appear to be 28 U.S.C. §§ 1331 and 1343(3) (1958), and 42 U.S.C. § 1983 (1958). In certain instances, resort to state courts may be preferable. See *Racial Integration and Academic Freedom*, 34 N.Y.U.L. REV. 725, 899 (1959) (part 1 of a study by the Arthur Garfield Hays Memorial Fund, New York University, School of Law).

⁹ "... the tendency to jeopardize the freedom of the teacher is probably more conspicuous among state universities than among endowed ones." Hadley, *Academic Freedom in Theory and Practice*, 91 ATLANTIC MONTHLY 152, 334, 344 (1903).

¹⁰ "The central fact of the present is that these pressures come primarily from government and bear more heavily upon institutions dependent upon public support. Even Mr. Harold Laski, who theoretically would not be expected to make the observation, notes in his *American Democracy* that such academic freedom as American colleges and universities possess is more ample in privately endowed and supported institutions than in public ones. Though there are, of course, many exceptions to this statement, my experience on the whole reinforces his observation." Kirkland, *Academic Freedom and the Community*, in *FREEDOM AND THE UNIVERSITY* 115, 116 (1950) (Essays presented as lectures in the third part of Cornell University Symposium on "America's Freedom and Responsibility in the Contemporary Crisis," Spring, 1949).

"Now it has often been remarked . . . that academic freedom commonly is more secure, and the unflinching pursuit of wisdom is more frequently encountered, at our distinguished private universities and colleges than at most institutions supported by the state; and I found this to be true. The necessity of conforming to popular impulses of the hour, as expressed through the executive and legislative branches of state governments, often severely hampers the independence of the state university or college I do not mean to say that all state universities and colleges are weakly subservient to the political administration. . . . Yet, by and large, I am well enough satisfied that the atmosphere is freer, and the respect for the dignity of the professor greater, at private foundations." RUSSELL KIRK, *ACADEMIC FREEDOM* 35-36 (1955).

the future belongs to public education and private education will be more and more forced to the wall financially, the scope of the protection will increase. In any event, judicial protection of academic freedom in the public institutions would almost inevitably have a wholesome effect upon the practice in the private ones.

I

ACADEMIC FREEDOM DEFINED

Before reviewing the court decisions, it seems advisable to ascertain the nature and definition of the thing we are considering. Probably the best way to do this is to consult the academic authorities who have reflected deeply and written well on the subject of academic freedom. The definitions of academic freedom set forth in the footnote below are offered as the best that I have found in my reading of the literature.¹¹

Although all of these definitions are different in phraseology and although each has its own variation of emphasis, they are all essentially the same in content. Collectively, they define academic freedom in terms of study, research, opinion, discussion, expression, publication, speech, teaching, writing, and communication. To one familiar with constitutional law but who had never heard of academic freedom, these terms would instantly fall within a familiar framework, the great

¹¹ Arthur Lovejoy, one of the founders of the American Association of University Professors (AAUP), offered the following early definition: "Academic freedom is the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics." Lovejoy, *Academic Freedom*, 1 ENCYC. SOC. SCI. 384 (1930).

Professor Fritz Machlup, currently president of the AAUP, after noting that "it is difficult or impossible to formulate an unambiguous definition of academic freedom," defines the term as follows: "Academic freedom consists chiefly in the absence of, or protection from, such restraints or pressures . . . as are designed to create in the minds of academic scholars (teachers, research workers, and students in colleges and universities) fears and anxieties that may inhibit them from freely studying and investigating whatever they are interested in, and from freely discussing, teaching, or publishing whatever opinions they have reached." Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. BULL. 753 (1955).

Professor Robert MacIver has written that "Academic freedom is a right claimed by the accredited educator, as teacher and as investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation, or penalization because these conclusions are unacceptable to some constituted authority within or beyond the institution. Here is the core of the doctrine of academic freedom. It is the freedom of the student within his field of study." ROBERT M. MACIVER, *ACADEMIC FREEDOM IN OUR TIME* 6 (1955).

Finally, the 1940 *Statement of Principles* which is accepted generally throughout the educational world as the most authoritative statement extant, asserts that academic freedom means that "(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties. . . . (b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. . . . (c) The college or university teacher is a citizen, a member of a learned profession, and an officer in an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. . . ."

and indispensable freedom which the first amendment protects against abridgment by Congress, and which is considered so fundamental to a system of liberty and justice that it is included in the due process clause of the fourteenth amendment and thus made a limitation on the powers of the states. Indeed, academic freedom as so defined seems to fall so naturally and readily and logically within the ambit of constitutionally protected speech and communication that it would be surprising, in fact, if academic freedom had not been brought within the scope of the first and fourteenth amendments.¹² It is clear from the jurisprudence of the past twenty-five

¹² But consider the following statement of Professor Russell Kirk, that academic freedom is not to be found "guaranteed by any article of the federal or state constitutions, or described in any legislative enactment, here in America. . . ." In so far as this statement is descriptive of the state of the law as of the time it was written, no quarrel can be taken with it, although its validity has been undermined by subsequent Supreme Court decisions, as we shall see presently. Professor Kirk continues: "Nothing in the laws of our federal system, or of the several states, guarantees the enduring right of a teacher to speak the truth as he sees it, or to pursue the truth according to the light that is given him. In extreme circumstances, it is true such a teacher might appeal to the general provisions for freedom of speech found in the federal Bill of Rights and in the state constitutions; but then he would be appealing not to *academic* freedom, but simply to the statutory freedom which is constitutionally guaranteed to all men, whatever their occupation or status." RUSSELL KIRK, *ACADEMIC FREEDOM* 5 (1955). If a denial of academic freedom consists of reprisal for what a teacher has said or written, then the protection of the teacher under general free speech principles would seem clearly to be a protection of his academic freedom. The fact that *academic* freedom is not explicitly mentioned in the Constitution would seem to be unimportant. Constitutionally protected speech can be exercised through a variety of media and in a variety of contexts, only one of which is the mouth and pen of a professor, and none are mentioned in the Constitution. Academic freedom is one kind of speech in one context, and because it can be subsumed under a broader heading it does not thereby lose its identity. Many a discharged professor would not cavil over the point.

Consider also the following statement by Professor Fritz Machlup: "Academic freedom antedates general freedom of speech by several hundreds of years, and its development was quite separate and independent. In the United States, academic freedom is not a right that professors or students have under the Constitution or under any law of the land, whereas general freedom of speech is one of the civil liberties protected by the Bill of Rights in our Constitution. While violations of this right can be taken to the courts of law, infringement of academic freedom can be protected only by appealing to the conscience of individuals and groups in society; there is no recourse to the courts except where contractual relations are involved. Finally, academic freedom requires special safeguards quite different from those provided by the freedom of speech guaranteed in the Constitution." Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. BULL. 753, 755 (1955). Again, to a large extent the statement is a descriptive one, subject to being outdated, as it has been, by subsequent judicial declaration. The statement raises the additional point, however, that historically, academic freedom and free speech generally had disparate sources of origin and have had separate lines of development. But this would not seem to preclude their eventual merger. Free speech theory antedated the Constitution, which subsequently incorporated it. Constitutional guarantees have their own evolutionary processes, and they grow by enveloping action. The history of constitutionally protected speech in this country has been written largely within the past twenty-five years. A guarantee which extends its mantle over the street corner orator, the anonymous pamphleteer, and the motion picture might sensibly be thought broad enough to include the university professor.

A recent history has also distinguished academic freedom and freedom of speech. "The connections between free speech and academic freedom are many and subtle. One thing is clear as far as their historical linkages are concerned: the advance of the one has not automatically produced a comparable advance of the other. We have seen, for example, that academic freedom scored victories in which freedom of speech did not share. . . .

Conversely, freedom of speech has made gains while academic freedom stood still. . . . One may therefore conclude that the two freedoms develop independently for different reasons, or that they are causally related to a common long-term factor, such as the diffusion of political power or the growth of the habit of tolerance. Nevertheless, it can also be demonstrated that, under certain favorable conditions, these two freedoms do affect one another directly, and that the secure position of the one may improve the position of the other and deepen and broaden its meaning and potency." RICHARD HOFSTADTER

years that the Supreme Court is committed, and one may say with some confidence irrevocably committed, to a liberal application of these amendments. The dispute over the proper tests and standards to be applied in speech cases and the disagreement as to result in particular instances sometimes obscure the broad consensus on the Court that the survival of our democratic society will depend largely upon the broad scope and exercise of intellectual freedom. Educational freedom is perhaps the most important aspect of intellectual freedom, and among the educational freedoms none are more important than academic freedom, the freedom of the teacher. It would be passing strange if the Supreme Court had not come eventually to recognize within its broad view of intellectual freedom one of the vital components.

II

SUPREME COURT OPINIONS ON ACADEMIC FREEDOM

Let us look, therefore, at the opinions through which the Court has recognized academic freedom as a constitutional right. This can be done conveniently by briefly noting four of the Court's decisions, all rendered during the 1950's.¹³

In *Adler v. Board of Education*,¹⁴ the Court upheld the constitutionality of a section of the New York Civil Service Law, implemented by the so-called "Feinberg Law." These sections together provided for the disqualification and removal from the public school system of teachers and other employees who advocated the overthrow of the government by unlawful means or who belonged to organizations which had such a purpose.¹⁵ The gist of Justice Minton's majority opinion stated that,

A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right

& WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 403-04 (1955).

See also, for views contrary to the text, York, *The Legal Nature of Academic Freedom*, 48 BRIEF 246 (1953), and Cole, *Academic Freedom as a Civil Right*, 2 WESTERN POL. Q. 402 (1949).

¹³In an earlier case, *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court invalidated a statute which prohibited the teaching of German in all schools in the state through the eighth grade. Plaintiff taught German at a private school. The Court said that "His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [fourteenth] amendment." *Id.* at 400.

¹⁴342 U.S. 485 (1952).

¹⁵In invalidating the statutes, the trial court stated: "The problem posed by these statutes has many facets. Yet essentially they raise but one basic question—How far may the state go in imposing restrictions or conditions on employment as teachers in the public schools?"

"In seeking the answer to this question it should be borne in mind that to impart the principles of democracy, freedom of thought and speech must be preserved in the school setting. The atmosphere must be one which encourages able independent men to enter the teaching profession. To develop good citizens teachers must give students the facts, help them to learn to think and urge them to reach their own conclusions. To so teach, the teacher must himself be free to think and speak. He must not be under threat of enforced conformity to rigid standards; he must be free of blind censorship; he must be open-minded to new ideas—even when they do not appear to be orthodox. The heart of American education is independent thought." *Leterman v. Board of Education of the City of New York*, 196 Misc. 873, 877-78, 95 N.Y.S.2d 114, 118 (Sup. Ct. 1949).

and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.¹⁶

Justice Douglas wrote a dissenting opinion, concurred in by Justice Black. It is important in this study because it is the first opinion by a Supreme Court Justice to expressly recognize academic freedom as a constitutional right. Justice Douglas said in part:¹⁷

The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher.

The public school is in most respects the cradle of our democracy. . . . the impact of this kind of censorship in the public school system illustrates the high purpose of the First Amendment in freeing speech and thought from censorship. . . .

The very threat of such a procedure is certain to raise havoc with academic freedom. . . . Fearing condemnation, [the teacher] will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled. . . .

There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. . . .

This system of spying and surveillance with its accompanying reports and trials cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect. . . . We need be bold and adventuresome in our thinking to survive. . . . The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued wherever they lead. We forget these teachings of the First Amendment when we sustain this law.

Justice Frankfurter, dissenting for jurisdictional reasons, nevertheless paid respect to "the teacher's freedom of thought, inquiry, and expression," and to "the freedom of thought and activity, and especially . . . the feeling of such freedom, which are, as I suppose no one would deny, part of the necessary professional equipment of teachers in a free society."¹⁸

The same year in which it upheld the New York law the Court, in *Wieman v. Updegraff*,¹⁹ invalidated an Oklahoma statute requiring all state officers and employees to take loyalty oaths that they were not, and had not been for the preceding five years, members of organizations listed by the United States Attorney General as communist front or subversive. The requirement was struck down because of its indiscriminate classification of innocent with knowing membership in such organizations. The action had been commenced because certain members of the faculty and staff at Oklahoma Agricultural and Mechanical College had refused to take the oath. This circumstance prompted Justice Frankfurter to write a separate concurring opinion in which Justice Douglas joined. It is worth quoting at some length:²⁰

¹⁶ *Adler v. Board of Education of the City of New York*, 342 U.S. 485, 493 (1952).

¹⁷ *Id.* at 508-11 *passim*.

¹⁸ *Id.* at 504-05.

¹⁹ 344 U.S. 183 (1952).

²⁰ *Id.* at 195-97.

. . . to require such an oath, on pain of a teacher's loss of his position in case of refusal to take the oath, penalizes a teacher for exercising a right of association peculiarly characteristic of our people. . . . Such joining is an exercise of the rights of free speech and free inquiry. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers. . . .

That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or state government.

The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon state and national power.

In 1957, in the case of *Sweezy v. New Hampshire*,²¹ the recognition of academic freedom as a constitutional right moved from dissenting and concurring opinions into acceptance by a majority of six members of the Supreme Court. In this case the Court reversed a conviction of contempt entered against a professor who had refused to answer questions asked by state authority concerning his connection with the Progressive Party and the content of a lecture delivered at the state university. There was no majority opinion, although six Justices concurred in the result. The opinion of Chief Justice Warren, in which Justices Black, Douglas, and Brennan concurred, stated:²²

²¹ 354 U.S. 234 (1957).

²² *Id.* at 249-50.

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. . . . These are rights which are 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.

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

Justice Frankfurter wrote a separate concurring opinion in which Justice Harlan joined. This opinion stated that,²³

When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate. . . .

These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. . . .

. . . in these matters of the spirit inroads on legitimacy must be resisted at the incipency. This kind of evil grows by what it is allowed to feed on.

The last case to be noted at this time is *Barenblatt v. United States*.²⁴ Here the Court, by a five-to-four decision, upheld the contempt conviction of a professor who had refused to answer questions concerning his membership in the Communist Party propounded by a subcommittee of the House Committee on Un-American Activities. The majority opinion, written by Justice Harlan, distinguished the case from *Sweezy* in that the Communist Party and the Progressive Party were "very different thing[s]" and that the interrogation as to the content of a lecture was a factor absent from the *Barenblatt* case. What interests us here, however, is the fact that at the very beginning of his opinion, Justice Harlan stated that,²⁵

²³ *Id.* at 261-63.

²⁴ 360 U.S. 109 (1959).

²⁵ *Id.* at 112. The relationship between the freedoms of teacher and student was expressed in 1831 by Thomas Cooper, in defending himself against removal from South Carolina College:

"If doubts bearing on the subject are concealed and not discussed, the students will have reason to complain of injustice. The difficulties which a professor is forbidden to approach will remain on their minds, and they will depart unsatisfied with half knowledge and doubts unresolved. They have a right

Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain.

The leading dissenting opinion, written by Justice Black and joined by Chief Justice Warren and Justice Douglas, was based on broad first amendment grounds and did not specifically discuss the existence of those freedoms in an academic context. Justice Brennan dissented separately on another ground. Since these four dissenting Justices are the same four for whom Chief Justice Warren spoke in the *Sweezy* case, it may be assumed with confidence that they agree with the statement of Justice Harlan quoted above. The *Barenblatt* case, therefore, demonstrates that, as of 1959, all nine Justices of the Supreme Court had expressly recognized academic freedom as being within the area of constitutional protection.²⁶

III

EMPLOYEE STATUS—THE PRIVILEGE DOCTRINE

One formidable impediment to the judicial protection of academic freedom and academic tenure, so far as teachers in state institutions are concerned, has been the legal status of the teacher as a state employee. In the eighteenth and nineteenth centuries abortive efforts were made to establish that professors in private colleges had a "freehold" in their office, with tenure for life, of which they could not be deprived except for cause and after a hearing.²⁷ Later cases raised the question, depending upon the nature of the relief sought, whether professors in state universities were "officers" or "employees."²⁸ Without resurrecting these decisions, it seems sufficient to say that as of today, in both legal and economic relationship, teachers are considered to be employees. From this fact many persons, including judges, have concluded that the payment of salary carries with it the right to control the content of the teacher's research, publication, and teaching. Under this view, of course, there can

to expect from their professor no concealment, no shrinking from unpopular difficulties, but a full and honest investigation, without suppression or disguise.

"Whatever temporary advantage may result from a timid suppression of truth, or a compliance with unreasonable dictation, it is of great consequence to the permanent reputation of this College that students shall come here with the expectation of being taught fully, impartially, and honestly, whatever they are required to learn; and that they should leave this College with the impression that they have actually been thus honestly taught; any impression that their teachers are directed or inclined to avoid difficulties, because they are unpopular, or to suppress or conceal doubts that must arise hereafter, or any timid manouvring [sic] in the mode of teaching, may serve the purpose of a narrow-minded caution, but it is not fair; and therefore it does not become the reputation of this College or its professors." Quoted in HOFSTADTER & METZGER, *op. cit. supra* note 12, at 268.

²⁶ One legal scholar in 1958, after reviewing the Court's decisions, confidently asserted that "The interest in academic freedom stands forth as a recognized constitutional right," and using that as a premise, went on to argue that interference with the right should be recognized as a tort. Cowan, *Interference With Academic Freedom: The Pre-Natal History of a Tort*, 4 WAYNE L. REV. 205 (1958).

²⁷ See RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 460-62 (1955).

²⁸ *Id.* at 463-66; Comment, *Academic Freedom and the Law*, 46 YALE L.J. 670, 672-74 (1937).

be no such thing as academic freedom.²⁹ It is undeniable that the claims of academic freedom run counter to the usual prerogatives of an employer. If the claims are valid, it must be because there is something different in the particular employee or the particular employment. Reflection quickly makes it apparent that a professor is something different from just a "hired hand" and that his duties are not cut to the typical employer-employee pattern.³⁰ It is his possession of a specialized body of knowledge and wisdom, and his sustained mastery of it, which make his services valuable. It is his function to acquire knowledge and to impart it to students and to the public. His competence in his field is greater than that of those who retain him in the name of the state. Although legally and economically he may be an employee, functionally his usefulness is defeated if he is subject to the normal controls of employment in his performance. Recurrence to the Supreme Court statements set forth previously demonstrates beyond any doubt that the Court is very much aware of the uniqueness and importance of the teaching function and the essentiality of academic freedom in the performance of it. What has always been so in fact has now been recognized in law by the nation's highest tribunal.

Another obstacle to judicial protection has been erected as a corollary of the teacher's status as an employee. This is the doctrine that public employment is a privilege to be commenced, continued and terminated on such terms and conditions as the government may determine, even though these terms may deny public employees constitutional rights generally enjoyed by other citizens.³¹ Two examples

²⁹ One classic statement is found in *Scopes v. State*, 154 Tenn. 105, 111, 289 S.W. 363, 364 (1927), the famous "monkey" trial. "The plaintiff in error was a teacher in the public schools of Rhea county. He was an employee of the state of Tennessee or of a municipal agency of the state. He was under contract with the state to work in an institution of the state. He had no right or privilege to serve the state except upon such terms as the state prescribed. . . . The statute before us . . . is an act of the state as a corporation, a proprietor, an employer. It is a declaration of a master as to the character of work the master's servant shall, or rather shall not, perform. In dealing with its own employees engaged upon its own work, the State is not hampered by the limitations of . . . the Tennessee Constitution, nor of the fourteenth amendment to the Constitution of the United States."

³⁰ The 1915 *Declaration of Principles*, issued shortly after the founding of the AAUP, addressed itself to the uniqueness of the university teacher's status and chose a striking analogy by which to illustrate it. "These considerations make still more clear the nature of the relationship between university trustees and members of university faculties. The latter are the appointees, but not in any proper sense the employees, of the former. For, once appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene. The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession; and while, with respect to certain externals of his vocation, he accepts a responsibility to the authorities of the institution in which he serves, in the essentials of his professional activity his duty is to the wider public to which the institution itself is morally amenable. So far as the university teacher's independence of thought and utterance is concerned—though not in other regards—the relationship of professor to trustees may be compared to that between judges of the Federal courts and the Executive who appoints them. University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees than are judges subject to the control of the President with respect to their decisions; while of course, for the same reason, trustees are no more to be held responsible for, or to be presumed to agree with, the opinions or utterances of professors than the President can be assumed to approve of all the legal reasonings of the courts." 40 A.A.U.P. BULL. 98-99 (1954).

³¹ See Dotson, *The Emerging Doctrine of Privilege in Public Employment*, 15 PUB. ADMIN. REV. 77 (1955).

of the application of this doctrine will suffice. In *Bailey v. Richardson*,³² the court of appeals upheld the dismissal of a federal employee (not a teacher) under the federal loyalty program, and disposed of the contention that the dismissal was a violation of the guarantee of due process in bald and stark language:³³

The due process clause provides: "No person shall . . . be deprived of life, liberty, or property without due process of law. . . ." It has been held repeatedly and consistently that Government employment is not "property" and that in this particular it is not a contract. We are unable to perceive how it could be held to be "liberty." Certainly it is not "life." So much that is clear would seem to dispose of the point. In terms the due process clause does not apply to the holding of a government office.

And in the *Adler* case, meeting the argument that the New York loyalty program violated the teachers' rights of speech and association, Justice Minton made this answer:³⁴

It is clear that such persons have the right under our law to assemble, speak, and think as they will. . . . It is equally clear that they have no right to work for the State in the school system on their own terms. . . . They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the state thus deprived them of any right of free speech or assembly? We think not. Such persons are or may be denied, under the statutes in question, the privilege of working for the school system of the state of New York. . . .

The seminal statement on which the doctrine of privilege in public employment rests was made in 1892 by Justice Holmes, then on the Massachusetts bench. The petitioner, Holmes said, "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."³⁵ Those who quote this sentence as authority do not usually quote the sentence which followed, for Holmes added: "On the same principle the city may impose any reasonable condition upon holding offices within its control." Even Justice Minton in *Adler* referred to the "reasonable terms" laid down by New York. As Professor Fellman has observed, "There is a vast difference between saying that government may deal with employees in its own sovereign pleasure and saying that it is restricted to the imposition of 'reasonable conditions.'"³⁶ This is the view which has now been accepted by the Supreme Court, and significantly, in cases involving the rights of teachers.

Justice Frankfurter met the problem directly in his concurring opinion in a 1951 case involving an oath required by Los Angeles of its municipal employees:³⁷

The Constitution does not guarantee public employment. . . .

But it does not at all follow that because the Constitution does not guarantee a right to public employment, a city or a state may resort to any scheme for keeping people out

³² 86 U.S. App. D.C. 248, 182 F.2d 46 (D.C. Cir. 1950).

³³ *Id.* at 57.

³⁴ *Adler v. Board of Education of the City of New York*, 342 U.S. 485, 492 (1952).

³⁵ *McAuliffe v. Mayor, Etc., of City of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892).

³⁶ Fellman, *supra* note 2, at 12.

³⁷ *Garner v. Board of Public Works of City of Los Angeles*, 341 U.S. 716, 724-25 (1951).

of such employment. Law cannot reach every discrimination in practice. But doubtless unreasonable discriminations, if avowed in formal law, would not survive constitutional challenge. Surely, a government could not exclude from public employment members of a minority group merely because they are odious to the majority, nor restrict such employment, say, to native-born citizens. To describe public employment as a privilege does not meet the problem.

And Justice Douglas, dissenting in the New York teachers case, stated:³⁸

I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights. . . . The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher.

These views, expressed in dissent and concurrence, were shortly thereafter accepted by the Court itself. In the Oklahoma oath case noted earlier, the Court reconsidered the privilege concept and declined to follow it. Granting protection to the professors in this case, the Court, speaking through Justice Clark, said:³⁹

We are referred to our statement in *Adler* that persons seeking employment in the New York public schools have no right to work for the State in the school system on their own terms. . . . They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. . . . To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. For, in *United Public Workers*, though we held that the federal government through the Hatch Act could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work. . . ." We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

It could not be denied that these same limitations are applicable to the states as well as to Congress. It would seem equally undeniable that a standard which would be invalid if included in a statute would be equally invalid if applied to an individual in a particular case. And surely a standard which would not justify exclusion from employment would not justify termination of existing employment. Several years later in another case involving a professor the Court granted protection and again through Justice Clark dismissed the privilege doctrine briefly:⁴⁰ "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and non-discriminatory terms laid down by the proper authorities."

It is clear from these expressions that the Court has consciously rejected the doctrine of privilege so far as public employment is concerned, and in its stead, has

³⁸ *Adler v. Board of Education of the City of New York*, 342 U.S. 485, 508 (1952).

³⁹ *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952).

⁴⁰ *Slochower v. Board of Higher Education of the City of New York*, 350 U.S. 551, 555 (1956).

adopted a minimum position that public employment may not be lawfully conditioned upon a denial of the employee's freedom of speech or association, freedom of religious exercise, or freedom from discrimination. As we have seen, academic freedom is usually defined in terms of those elements included in the constitutional guarantees of free speech and communication, and this is the sense in which it has been recognized explicitly by the Supreme Court. If the Court's language means anything at all, it would necessarily follow that no public educational institution may validly discharge a teacher for engaging in protected speech and communication. The teacher's status as a public employee, instead of being a justification for denying him his academic freedom, has now become the source of its protection, since his employer, the state, is the very authority whose power is limited by the Constitution. As Professor Cowan has aptly expressed it, ". . . the contention that the state as employer has greater rights than the state as a political sovereign has disappeared."⁴¹ Constitutional law thus protects academic freedom by defining it in terms of constitutional guarantees and then recognizing that these guarantees are limitations upon the state's power to terminate employment. So stated, the proposition seems so self-evident that one who was unfamiliar with all of the cases to the contrary might pause to wonder that we have only so recently come to this result. Even yet, however, it is not a result which is universally recognized and accepted.

IV

FIFTH AMENDMENT—FREEDOM OF ASSOCIATION

It would be going too far to say that the Court has held that no exercise of a constitutional right may ever validly support termination of employment. This is shown by the fifth amendment cases which have arisen out of loyalty and security programs and especially out of inquiry into membership in the Communist Party or other subversive organizations. A decade ago, when the issue first became prominent, the academic world was divided over the rights and duties of professors and institutions in this area. The furor has largely subsided, and will not be resurrected here. The holdings of the cases are an important measure of the constitutional freedom of the teacher. In *Slochower v. Board of Higher Education*,⁴² the New York City charter provided that whenever an employee of the city utilized the privilege of self-incrimination to avoid answering a question relating to his official conduct, his term or tenure of office or employment should terminate and the office or employment should be vacant. Slochower, an associate professor at Brooklyn College, a public institution, invoked the privilege against self-incrimination under the fifth amendment before an investigating committee of the United States Senate, which interrogated him as to former membership in the Communist Party. As a result he was summarily discharged. The discharge was upheld by the New York courts and reversed by the Supreme Court. The Court

⁴¹ Cowan, *supra* note 26, at 219.

⁴² 350 U.S. 551 (1956).

held that the discharge violated due process because, as the Court viewed the matter, New York had drawn the inference from the fifth amendment plea that Slochower was guilty of some offense or that he had committed perjury. An inference of guilt from a fifth amendment plea was not permissible, said the Court, because it would "impute a sinister meaning to the exercise of a person's constitutional right." The practical effect was that the questions asked were taken as confessed and made the basis of discharge. Stripped of the inference, the discharge fell as being an arbitrary action wholly without support.

Subsequent cases have eroded the result, if not the reasoning, of *Slochower*. The fifth amendment plea is not, under present decisions, available in a state inquiry. But even when it is properly invoked in a federal proceeding, the states, by recasting the rationale and ground for discharge, have been upheld in their right to terminate employment for refusal to answer questions relating to membership in subversive organizations. Thus, in *Lerner v. Casey*,⁴³ the Court upheld the discharge of a subway conductor for refusal to answer such questions under a statute which authorized discharge when reasonable grounds existed for belief that the employee was "of doubtful trust and reliability." In *Nelson and Globe v. Los Angeles*,⁴⁴ the Court upheld the discharge of a social worker for refusal to answer such questions under a statute which made such refusal "insubordination." In both cases the Court found that no inference of guilt had been drawn from the refusal to answer and on this basis distinguished *Slochower*. *Beilan v. Board of Education*⁴⁵ involved the discharge of a teacher who had refused to answer questions by the public school superintendent as to his membership in subversive organizations. The discharge was based upon the statutory ground of "incompetency" which was interpreted by the state court to include the refusal to answer such questions. The Supreme Court upheld the discharge, again noting that no inference had been drawn from the teacher's refusal to answer. In its opinion the Court stated that,⁴⁶

By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher.

The result has been the same when the refusal to answer questions regarding Communist membership was based on the first amendment. The leading case is *Barenblatt v. United States*,⁴⁷ where the Supreme Court, after making the reference previously quoted to the "constitutionally protected domain" of academic freedom, stated:⁴⁸

⁴³ 357 U.S. 468 (1958).

⁴⁴ 362 U.S. 1 (1960).

⁴⁵ 357 U.S. 399 (1958).

⁴⁶ *Id.* at 405.

⁴⁷ 360 U.S. 109 (1959).

⁴⁸ *Id.* at 112.

But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls.

Later in its opinion the Court said that "We think that investigatory power in this domain is not to be denied Congress solely because the field of education is involved."⁴⁹ Still later the Court said that it could not "fairly be concluded that this investigation was directed at controlling what is being taught at our universities rather than at overthrow" [of the government].⁵⁰

Nor has freedom of speech and association been availing as a defense against a state requirement of an oath disclaiming membership in the Communist Party or other subversive organizations. The Supreme Court has consistently upheld the power of a state to require such an oath of its employees, including teachers. It has laid down, however, the important qualification that the state may not predicate termination of employment on refusal to take the oath or on membership in an organization covered by the oath unless the employee had knowledge of the organization's unlawful nature and purpose. Innocent membership, therefore, may not be the basis of termination, either directly or indirectly through an oath requirement. The Court has also held that an oath may be so broad, vague, ambiguous and indefinite as to violate due process for that reason.⁵¹

The sum total of the foregoing cases seems to be that the teacher, like other employees, has no constitutional right to be free from inquiry, federal or state, as to his membership in the Communist Party or other subversive organizations, and that his employment may be terminated for refusing to respond to such inquiry or for knowing membership in such an organization. The Court has been sharply divided, however, and the cases in which state power was upheld against private right have frequently been five to four decisions. For this reason it may fairly be concluded that, even if these decisions are not overruled, they indicate the maximum limit of the state's power, at least as to political speech and association, to inquire or predicate termination. This conclusion is supported also by the *Sweezy* case, where the Court held that inquiry as to membership in the Progressive Party exceeded constitutional limits. As Justice Frankfurter put it in his concurring opinion, "Whatever, on the basis of massive proof and in the light of history . . . be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party. . . . This precludes the questioning that petitioner resisted in regard to that Party."⁵² The Justice also noted, "It cannot require argument that inquiry would be barred to ascertain whether a citizen had voted for one or the other of the two major parties. . . ."⁵³

⁴⁹ *Id.* at 129.

⁵⁰ *Id.* at 130.

⁵¹ *Cramp v. Board of Public Instruction of Orange County, Florida*, 368 U.S. 278 (1961).

⁵² *Sweezy v. New Hampshire*, 354 U.S. 234, 266 (1957).

⁵³ *Ibid.*

And Chief Justice Warren noted that "History has amply proved the virtue of political activity by minority, dissident groups. . . . Mere unorthodoxy or dissent from the prevailing mores is not to be condemned."⁵⁴

Outside the political area, the Court has recently protected the freedom of association of teachers in the case of *Shelton v. Tucker*.⁵⁵ An Arkansas statute required every teacher in a state-supported school or college, as a condition of employment, to file annually an affidavit listing without limitation every organization to which he had belonged or regularly contributed within the preceding five years. A professor at the University of Arkansas and a teacher at Little Rock Central High School brought actions, in state and federal courts respectively, challenging the validity of the affidavit requirement. Both courts sustained the statute, but the Supreme Court reversed. "The vigilant protection of constitutional freedoms," the court stated, "is nowhere more vital than in the community of American schools." Many of the relationships required to be reported "could have no possible bearing upon the teacher's occupational competence or fitness." The Court concluded that the affidavit requirement, in its "unlimited and indiscriminate sweep," went "far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."⁵⁶ Justice Frankfurter was on the other side. "If I dissent from the Court's disposition in these cases," he said,⁵⁷

it is not that I put a low value on academic freedom. . . . It is because that very freedom in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers. . . . Of course, if the information gathered by the required affidavits is used to further a scheme of terminating the employment of teachers solely because of their membership in unpopular organizations, that use will run afoul of the fourteenth amendment.

In the proceeding below in the *Shelton* case, the federal court had invalidated an Arkansas statute making it unlawful for a member of the National Association for the Advancement of Colored People to be employed by the state of Arkansas or any of its subdivisions. The result seems correct beyond any possible argument. It may be taken, therefore, that a basis which would not support official inquiry could not be a valid basis for termination. And under Justice Frankfurter's view, the basis of termination is more limited than the basis of inquiry.

These cases protecting the teacher's freedom of association are clearly relevant to the teacher's freedom of speech generally and especially to his "teaching-freedom." Freedom of association is a right closely allied to and cognate with freedom of speech. The scope of protection extended to the one is largely co-extensive with that accorded to the other. The constitutional protection recognized by the court in *Sweezy* and *Shelton* as to a teacher's associational freedom must be no less as to

⁵⁴ *Id.* at 251.

⁵⁵ 364 U.S. 479 (1960).

⁵⁶ *Id.* at 487-90 *passim*.

⁵⁷ *Id.* at 495-96.

his beliefs or his written and oral expressions of them. What a teacher says and writes, therefore, is also constitutionally protected, even though the views expressed may be "unorthodox" or "dissident" or "unpopular." That such views are protected by the first amendment the Supreme Court has said time and time again. The only novelty here is the suggestion that this may still be true when such views are held or expressed by teachers.

V

RELEVANCE OF FITNESS

Is it possible to extract from the Court's decisions a controlling principle which marks the dividing line between the state's lawful power to terminate employment and the employee's exercise of constitutional rights? I believe that answer may be indicated by the fact that, in the cases upholding the state's power of inquiry into associations and memberships of teachers and other employees, the Supreme Court has consistently related the inquiry to the state's right to determine fitness and competency. Thus, in an early oath case, *Garner v. Board of Public Works*, the Court stated:⁵⁸ "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service." Succeeding cases involving teachers have all emphasized the point. In *Adler* the Court observed, "That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."⁵⁹ In *Slochower* the Court said that,⁶⁰

It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at "the property, affairs, or government of the city, or . . . official conduct of city employees." In this respect the present case differs materially from *Garner*, where the city was attempting to elicit information necessary to determine the qualifications of its employees.

In *Beilan* the Court cited all the foregoing authority and added that "We find no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness."⁶¹ We have already seen in *Shelton* that the irrelevance to fitness was a principal reason for the invalidation of the affidavit requirement.

This repeated importance attached to the relevance of the inquiry to the fitness of the teacher suggests that this is the key factor in the Court's decisions. Such relevance would seem to be equally a limitation on the power to terminate employ-

⁵⁸ *Garner v. Board of Public Works of the City of Los Angeles*, 341 U.S. 716, 720 (1951).

⁵⁹ *Adler v. Board of Education of the City of New York*, 342 U.S. 485, 493 (1952).

⁶⁰ *Slochower v. Board of Higher Education of the City of New York*, 350 U.S. 551, 558 (1956).

⁶¹ *Beilan v. Board of Public Education, School District of Philadelphia*, 357 U.S. 399, 406 (1958).

ment as on the power of original inquiry. The requirement of relevance to fitness excludes from the state's legitimate interest, and leaves within the teacher's right, associations and speech and publication which are not related to his fitness but are merely unpopular, unorthodox, or controversial. The requirement of relevance to fitness also suggests the broader possibility of a limitation on the state's power where the basis of termination is outside the area of speech and association. If such relevance is absent, then the termination may be considered to be arbitrary and therefore a violation of due process. As the Court noted in *Beilan*, "Fitness for teaching depends upon a broad range of factors."⁶² One can readily think of many such factors—homosexuality, drunkenness, narcotics addiction—which would raise no constitutional questions so far as their relevance to fitness is concerned. Typically, however, even where there is a statute or regulation setting forth the grounds for discharge, there will be a catch-all phrase such as "conduct unbecoming a teacher" or "conduct prejudicial to the best interests of the University." Experience demonstrates that many a teacher or professor has been discharged under some such phrase, for reasons quite unrelated to his fitness. The due process theory set forth above offers a means of challenging such arbitrary action, and would thus reach many cases not falling within the speech-association category.

VI

RECENT STATE CASES

As of today, only three Supreme Court decisions—*Wieman*, *Slochower*, and *Shelton*—have invalidated the substantive basis for termination of a teacher's employment. In none of these did the Court expressly find a violation of the teacher's academic freedom. There is no reason to doubt the Court's sincerity that it will always be on the alert to protect against invasion of this "constitutionally protected domain." And yet until there is a decision from the Court invalidating a termination squarely for the reason that it violated academic freedom, it may be expected that the state courts and lower federal courts will be reluctant to take the lead in granting relief in an area heretofore within the almost plenary power of university authorities. Consider the recent case of *Koch v. Board of Trustees of the University of Illinois*.⁶³ Koch was an assistant professor of biology employed under a two-year contract. About half-way through the first year the university newspaper published a letter written by Koch in response to an earlier letter written by two students criticizing standards of sexual morality at the University. Koch's letter, in the language of the appellate court, "contained a rather liberal approach to the problems concerning morality on modern day university campuses," and among other things, asserted that "premarital intercourse among college students is not, in and of itself, improper." The president of the university, conceiving that Koch's views were "offensive, re-

⁶² *Ibid.*

⁶³ 39 Ill. App.2d 51, 187 N.E.2d 340 (1962).

pugnant and contrary to commonly accepted standards of morality and his espousal of these views could be interpreted as an encouragement of immoral behavior and that for these reasons he should be relieved of his University duties," so relieved him. A faculty committee, after a hearing, recommended reprimand rather than discharge, but the board of trustees ordered discharge at the end of the first contract year. Koch then brought an action for breach of contract, which was dismissed on motion by the trial court. Under Illinois practice, an appeal was taken directly to the state supreme court, "alleging the existence of a constitutional issue." Defendant's motion to transfer the appeal to the appellate court on the ground that "no constitutional issues were involved" was sustained. The appellate court then affirmed the dismissal of the entire case.

The disposition by the Illinois Supreme Court was both unfortunate and inexplicable. The case could have served as a useful one in which to illuminate the area of a professor's freedom of speech. Certainly Koch's views were "unorthodox" and "unpopular" and therefore *prima facie* within the area of protection staked out by the Supreme Court. Whatever the decision on the merits might have been, it is palpably incorrect to assert that no constitutional question was involved. It is difficult to believe that the Illinois Supreme Court would not hold the expression of such views constitutionally protected from state sanction if the utterance had been by a private citizen. To say that no constitutional issue is raised when a professor is discharged for expressing them can only mean that, although the speech is protected, the speaker is not. The assertion of the Illinois Supreme Court, then, simply demonstrates a judicial reluctance to recognize that a professor may have the same freedom of speech as other citizens. It must be conceded that in some instances this may well be true. Here an analogy may be drawn to the employer "free speech" cases under the National Labor Relations Act. There the NLRB and the courts have recognized that the employer-employee relationship and the physical environment in which management speaks may render certain employer speech coercive and hence unprotected. Similarly, the teacher-student relationship and the forum of the classroom may serve, in certain situations, as limitations upon a professor's "teaching" freedom. No one would claim, for example, that the state could punish utterance of risqué stories in the living room or even in a dinner address, and yet teaching freedom would probably not protect their utterance in the classroom. Again, the mathematics professor could not consistently use classroom time to expound his political views and successfully claim it was his constitutional right. But no such qualifications were present in the *Koch* case, and one can but regret that the most important issue of the case was never discussed.

A recent case, *Jones v. Board of Control*,⁶⁴ was brought by a law professor at the University of Florida whose employment was terminated by the president of the university before the expiration of his one-year contract. The reason for the dis-

⁶⁴ 131 So.2d 713 (Fla. 1961).

missal was his violation of a rule of the Board of Control, the governing body of the state university, which prohibited employees under the board's jurisdiction from seeking election to public office, and requiring any employee desiring to engage in a political campaign for public office to submit his resignation. Jones' violation of the rule was his filing of qualifying papers to run in a primary election for circuit judge. The president's action was upheld by the board, and Jones brought a breach of contract action seeking the salary for the remainder of his contract term. One of the arguments advanced by Jones was that the board rule was an unreasonable encroachment upon his right as a citizen to run for public office and also an unreasonable violation of his academic freedom.

The Supreme Court of Florida did not think much of "academic freedom" which it put in quotes each time the term was used, presumably because the court could find no "definitive meaning" of the term in the briefs or in any authorities. The court then stated:⁶⁵

As contended for by the appellant, however, we understand the expression "academic freedom" to comprehend a claimed privilege of scholars and academicians and teachers generally to teach without restriction either to subject matter or as to limitation on collateral activities. Should we adopt literally the position of the appellant, it appears to us that we would be compelled to concede that a license to teach in a public school system is subject to no regulations whatsoever regarding either the nature of the subject matter to be taught or the time and effort that may be required to be devoted to the classrooms.

This was certainly not the position taken in the appellant's brief. Nowhere in the brief was it contended that academic freedom was a "privilege," that it was "without restriction or limitation" or that it was "subject to no regulations whatsoever." So far as I know, no responsible advocate of academic freedom has ever taken such a position. The argument actually made in the brief was that the Board's rule was an *unreasonable* interference with academic freedom, an argument later recognized by the court itself. While the court rejected the concept of academic freedom, it did not base its decision on the privilege doctrine, "although we might appropriately do so," but upon the principle that public employment must necessarily be subject to reasonable rules and regulations. Applying the test of reasonableness, the court upheld the board rule on the grounds that political campaigns would make inordinate demands upon the time and energies of the professor, would potentially subject students to political influences, and would potentially involve the university.

VII

THE TEACHER'S FREEDOM AS CITIZEN

The *Jones* case is unique in that virtually all of the cases challenging termination for extra-curricular activity have involved public school teachers. The distinction is frequently made between the teacher's academic freedom and his extra-curricular

⁶⁵ *Id.* at 717.

freedom as a citizen. The validity of the distinction depends upon the sanction which is imposed. If a teacher is punished as a citizen for what he has said or written as a citizen, no question of academic freedom arises. But when he may not be punished constitutionally as a citizen, and is instead removed from his position as a teacher, I cannot conclude other than that his academic freedom has been violated. The thought behind the distinction seems to be that the teacher's extra-curricular freedom is the same as that of other citizens, and his academic freedom is something special to his own profession. Actually, as the public school teacher cases starkly reveal, the teacher's problem, in the extra-curricular world, has been to get *as much* legal protection as other citizens, and in the academic world, to get *any* legal protection at all. So far as constitutional protection is concerned, the Supreme Court decisions recognize both the teacher's "teaching-freedom" and also his freedom as a citizen.^{65a}

Nor do the decisions thus far recognize any distinction, so far as constitutional protection is concerned, between university or college professors and teachers in the primary and secondary schools. But, as Emerson and Haber have pointed out,⁶⁶ Problems of academic freedom at elementary and secondary educational levels would appear to differ at some points from the issues raised at the level of higher education. Thus the lack of maturity of the students may be thought to require different teaching methods as well as different controls over the teaching staff.

Eventually, therefore, the decisions may recognize a difference in the scope of constitutional protection, although it would appear that any lesser protection for the grade school teacher would be justified only as to his curricular freedom.

VIII

ACADEMIC TENURE AND ACADEMIC DUE PROCESS

But substantive freedoms in the abstract offer no protection to anyone. Nor are they self-enforcing. In this connection, Justice Frankfurter has observed that "the

^{65a} But see Lovejoy, *supra* note 11: "In some cases teachers have been dismissed or otherwise penalized because of their exercise, outside the university, of their ordinary political or personal freedom in a manner or for purposes objectionable to the governing authorities of their institutions. While such administrative action is contrary in spirit to academic freedom, it is primarily a special case of the abuse of the economic relation of employer and employee for the denial of ordinary civil liberties."

And consider HOFSTADTER & METZGER, *op. cit. supra* note 12, at 405: "The attempt to assimilate the doctrine of free speech into the doctrine of academic freedom aroused hostility in certain quarters. It seemed to demand a special protection for professors when they engaged in the rough give-and-take of politics. To argue that the institutional position of professors should not be affected by what they said as citizens was to urge immunity for them from the economic penalties that may repay unpopular utterances—the dwindling of clients, the boycott of subscribers, the loss of a job. Such a demand for immunity, exceeding anything provided by the constitutional safeguard of free speech, going even further than the 'free-market' conceptions of the great philosophers of intellectual liberty, was bound to strain the less tensile tolerance of American trustees and administrators." It may be noted that the philosophers of intellectual liberty were not writing in the context of a written constitution which imposes on the state in its capacity as an employer limitations subject to growth and development through the judicial process.

⁶⁶ THOMAS I. EMERSON & DAVID HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1022 (1958).

history of liberty has largely been the history of observance of procedural safeguards."⁶⁷ And so it has been with academic freedom. From the beginning it has been recognized that academic freedom had a procedural as well as a substantive aspect.⁶⁸ The achievement and maintenance of the substantive freedom has been considered to be dependent upon the creation of a system which would give the teacher some measure of employment security. The surest and proven way to stifle and discourage the teaching and publication of unpopular or controversial opinions was, and still is, to discharge the teacher. Academic tenure, therefore, at an early date was recognized as the necessary handmaiden of academic freedom. In turn, the most efficacious way to protect academic tenure was the establishment of and adherence to certain procedures which were to be followed if an appointment was to be terminated. Academic due process and academic tenure thus became the procedural means through which the end of academic freedom was to be achieved. The importance of tenure and academic due process has been recognized by academic authorities without exception.⁶⁹

Hofstadter and Metzger have discussed this point in interesting fashion.⁷⁰

The emphasis on bureaucratization changed the direction of the struggle for academic freedom in this country. The fight for academic freedom became as a result a fight for precautionary rules, for academic legislation, not merely one in which the battles were

⁶⁷ *McNabb v. United States*, 318 U.S. 332, 347 (1943).

⁶⁸ See the 1915 *Declaration of Principles on Academic Freedom and Tenure*, reprinted in 40 A.A.U.P. BULL. 90 (1954).

⁶⁹ To quote Lovejoy again, "... the chief practical requisite for academic freedom consists in guaranteed security of tenure in professorial positions, unless removal for some grave cause (such as proved incompetence or moral delinquency), other than the content of the teaching of the professor concerned, becomes necessary. Experience has shown that such cause may sometimes be officially alleged for dismissals which are in fact due to pressure from economic, sectarian or other groups desirous of restricting freedom of teaching in some particular. Removal from professorial office should therefore be possible only through some definite form of judicial procedure in which the faculty, as the local representatives of the academic profession, should responsibly participate." *Academic Freedom*, 1 ENCYC. SOC. SCI. 384, 386 (1930).

"The source of tenure is its relationship to academic freedom. Tenure is regarded as a major guarantee of freedom because it puts the instructor beyond the easy reach of administrative tyranny or the quixotism of governing boards. . . . If freedom is the mark of strength, tenure is its symbol. For tenure is the guarantee to the individual that his freedom is real and not a shadow." Wriston, *Academic Tenure*, 9 AMERICAN SCHOLAR 339, 344 (1940).

"The essence of academic freedom is the right of the duly qualified scholar to carry on research, teaching, and publication without restraints or interference by the institution which employs him. As citizen of a free state he has indeed the right to carry on these activities without restraint or interference on the part of the public authorities; but the civil guarantees alone are insufficient to make the scholar free in his pursuit of the truth. His ability to function as a scholar depends as a rule upon his continued occupancy of his academic post; hence, without specific guaranties against arbitrary or disciplinary dismissal his civil liberties are nugatory. It is therefore not strange that the movement for academic freedom centers in security of tenure, nor that to many who view the matter cursorily academic liberty and security of tenure mean the same thing, even though the establishment of security of tenure in itself is virtually the creation of a property right rather than the realization of a form of personal liberty." Johnson, *Academic Freedom*, in *FREEDOM: ITS MEANING* 200 (Ashen ed. 1940).

Professor Machlup states flatly that "Academic freedom cannot be secured without academic tenure." Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. BULL. 753, 757 (1955).

⁷⁰ RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 456-57 (1955).

ex post facto attempts to rectify injustices. For good and for ill, academic freedom and academic tenure have become inseparably joined. The good results are many. Too often, the attempt to achieve vindication after a professor has been dismissed is little more than a posthumous inquest; it is the better part of wisdom to look for and devise preventives. Too often, the issues of an academic freedom case are obscured by the idle question of motives; tenurial rules provide a standard whose infraction is more easily demonstrable.

The same authors, surveying in 1955 the academic freedom cases in which the AAUP had participated, concluded that,⁷¹

The reported cases also justify the assumption that academic freedom is dependent upon academic tenure and due process. In fully 63 of the 94 cases in which the administration was held to blame, guarantees of tenure were absent and dismissal on short notice was permitted by the institution. Indeed, the absence of law and fixed procedure was the one element that these remiss institutions had in common. They were heterogeneous with respect to size, geographical location, and form of control. They even varied with respect to scholarly importance. . . . Clearly, there was a problem antecedent to and inclusive of the problem of protecting freedom, and that was the problem of establishing a government of law, not of whim.

These academic convictions are reflected in the 1940 *Statement of Principles*, which sets forth at some length proper and acceptable standards of tenure and also discusses the desirable procedure to be followed for termination of an appointment. Promoting the acceptance and observance of academic tenure and due process requirements is the program which has been assumed by the American Association of University Professors since its organization in 1915, and with increasing success over the years. Thus by 1959 a leading study of tenure plans in higher education was able to report that "The tenure idea is almost universally accepted," even though it was "embodied in a bewildering variety of policies, plans, and practices."⁷² There had not been, however, any corresponding increase in the judicial protection available to the teacher. The authors of the study concluded that,⁷³

Legal protection of tenure is insubstantial. Judicial reluctance to decree specific performance of "personal service" contracts, charter provisions authorizing discharge at will, disclaimer and finality clauses, confusing uncertainty in the written plans of some institutions, the complete absence of formal plans in others, the vagueness and inconclusiveness of termination criteria, and retention of ultimate decisional authority by most governing boards—all underscore the hazards of reliance on judicial protection of tenure.

Another recent study has also emphasized the difficulties in achieving legal protection of tenure and has suggested possibilities for improvement.⁷⁴

⁷¹ *Id.* at 493-94.

⁷² CLARK BYSE & LOUIS JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION* 132-33 (1959).

⁷³ *Id.* at 136.

⁷⁴ Davis, *Enforcing Academic Tenure: Reflections and Suggestions*, 1961 WIS. L. REV. 200. See also Byse, *Academic Freedom, Tenure, and the Law: A Comment on Worzella v. Board of Regents*, 73 HARV. L. REV. 304 (1959).

IX

SUPREME COURT DECISIONS ON RIGHT TO HEARING

The Supreme Court, in another series of decisions, has opened up the possibility of a substantial degree of protection of academic due process, and as a result academic tenure, under the Constitution. The concept of due process, of course, is one which is drawn directly from constitutional law. As we know, due process has both a substantive and a procedural aspect. In its substantive aspect it includes within the fourteenth amendment as limitations upon the states the great freedoms which the first amendment protects against infringement by the national government. It is substantive due process which makes academic freedom the constitutional right of teachers in state colleges and universities. Substantive due process is of relatively modern origin so far as the United States Constitution is concerned, dating only since around 1890. Our immediate concern at this point, however, is with procedural due process. Historically, procedural due process may be traced directly as far back as 1215 when, in Magna Carta, the Crown agreed, as to a limited class of persons, not to proceed summarily but only after notice and hearing given in accordance with "the law of the land." Succeeding generations of English judges strongly condemned governmental action against individuals without giving them notice and hearing, drawing upon philosophical and Biblical sources to support their conclusion. In American constitutional law, the due process guarantee has been interpreted to require fair procedure, and the basic and essential elements of fair procedure have been held to be, under both federal and state constitutions, notice and hearing as prerequisites to the imposition of sanctions. The following statement of the Supreme Court is typical. "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial. . . ."⁷⁵ This has been held with respect to administrative action in many fields as well as in judicial proceedings. Of specific importance in our context are those cases which indicate that public institutions violate constitutional due process if they discharge teachers without giving them notice and an opportunity for a hearing.

Adler v. Board of Education,⁷⁶ is the first case to which attention should be directed. The statute provided for a listing by the Board of Regents, after notice and hearing, of organizations seen to be subversive within the meaning of the act. It also provided for the dismissal, again after notice and hearing, of teachers who were members of the listed organizations. By state court interpretation, this had been held to mean membership with knowledge of the organization's unlawful purpose. Such membership, the act declared, "shall constitute prima facie evidence of disqualification" for employment as a teacher. It was argued that this was a denial of due process on the ground that the fact found bore no relation to the fact presumed.

⁷⁵ *Truax v. Corrigan*, 257 U.S. 312, 332 (1921).

⁷⁶ *Adler v. Board of Education of the City of New York*, 342 U.S. 485 (1952).

After denying that the presumption was an unreasonable one, Justice Minton, for the court, said: "Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it." He then quoted with approval the following language of the New York Court of Appeals:⁷⁷

"The presumption growing out of a prima facie case . . . remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and, unless met by further proof, there is nothing to justify a finding based solely upon it" (quoting *Potts v. Pardee*, 220 N.Y. 431, 433, 116 N.E. 78, 79 (1917)). Thus the phrase "prima facie evidence of disqualification" as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the prima facie evidence. . . . Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. . . . Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute. . . . In that view there here arises no question of procedural due process (quoting *Thompson v. Wallin*, 301 N.Y. 476, 494, 95 N.E.2d 806, 814-15 (1950)).

The clear inference of the case is that if the teacher had not been given the opportunity in a hearing to prove either non-membership or that membership was innocent, the discharge would have violated procedural due process. The hearing required by the statute was thus required by due process to be one in which the teacher had an opportunity to controvert the facts which were decisive of the question of disqualification. The logic of the decision would seem to require the same result regardless of the nature of the controverted fact and also to apply where the fact is one found on the basis of evidence rather than by presumption. Thus, the court was of the view that the finding of disqualification was one which had to be supported by "substantial" evidence or by a "fair preponderance" of the evidence. It may also be noted that the sufficiency of the evidence to support the finding was a question which could be reviewed judicially. Of course, this is no more than the rule usually applied to the findings of administrative agencies, but it is of special importance here because of the propensity of many courts in the past to refuse to review the exercise of discretion in the operation of educational institutions.

The decision in *Slochower v. Board of Higher Education*,⁷⁸ rested on a procedural as well as a substantive ground. Under the statute involved, as interpreted by the New York courts, dismissal of the employee for pleading self-incrimination was automatic, without any right to notice, charges, hearing or opportunity to explain. The fact that discharge was automatic with no opportunity for a hearing meant that,⁷⁹

⁷⁷ *Id.* at 495-96.

⁷⁸ 350 U.S. 551 (1956).

⁷⁹ *Id.* at 558.

No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for the exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely.

The Supreme Court's opinion stated that ". . . we conclude the summary dismissal of appellant in the circumstances of this case violates due process of law." In discussing the procedural invalidity of the professor's discharge, Justice Clark wrote:⁸⁰

This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The state has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the state. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law.

What was merely a matter of inference in *Adler* now became a square holding.

As noted, subsequent cases have eroded the substantive importance of *Slochower*, but its procedural holding has not been impaired. Thus, in *Beilan v. Board of Education*,⁸¹ the teacher had, prior to discharge, been accorded a formal hearing with counsel; therefore the procedural due process question did not arise. In *Nelson and Globe v. Los Angeles*,⁸² the discharge had been a summary one, without any notice or hearing, but in his appeal to the Supreme Court, the employee did not make the failure to give him a hearing one of the issues. The Court commented on this fact in its opinion: "But petitioner here raises no such point, and clearly asserts that 'whether or not petitioner Globe was accorded a hearing is not the issue here'."⁸³ Since Globe based his whole case upon the substantive question, the Court, consistent with its usual policy, did not pass upon any question of procedural due process. In *Lerner v. Casey*,⁸⁴ the statute required the dismissal to be "after investigation" and based "upon all the evidence." It also gave the discharged employee a right of appeal to the Civil Service Commission, which could take further evidence. Lerner appeared before the Department of Investigation three times, the latter two accompanied by counsel. After his discharge, he did not appeal to the Civil Service Commission, but brought an action in court for reinstatement. In its decision, the Supreme Court stated:⁸⁵

It is said that New York's statute deprives him of procedural due process in that it provides for dismissal of employees in the first instance without a statutory right to a hearing, opportunity for cross-examination, or disclosure of the evidence on which dismissal is based. However, appellant is in no position to complain of procedural defects in the statute. His own refusal to answer blocked proceedings at his appearances before the Department of

⁸⁰ *Id.* at 559.

⁸¹ 357 U.S. 399 (1958).

⁸² 362 U.S. 1 (1960).

⁸³ *Id.* at 8.

⁸⁴ 357 U.S. 468 (1958).

⁸⁵ *Id.* at 473.

Investigation, and more important he failed to pursue his administrative remedy by appealing to and obtaining a hearing before the State Civil Service Commission.

The Court's decision in *Cafeteria and Restaurant Workers Union, Local 473 v. McElroy*⁸⁶ is more troublesome. This case involved a cook employed by a private employer at a cafeteria located on the premises of the Naval Gun Factory. On the assertion that she failed to meet the security requirements of the installation but without any hearing, she was required to turn in her identification badge and denied further access to the premises. The Supreme Court upheld the summary action in an equivocal opinion. Although the case involved private rather than public employment, the Court seemed to treat it as though it were the latter.

[The] question cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law."⁸⁷

After this seeming rejection of any privilege approach, the opinion then went on:⁸⁸ "The Court has consistently recognized that an interest closely analogous to [the cook's], the interest of a government employee in retaining his job, can be summarily denied." Invoking older authorities, the Court stated that "It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." Then, referring to more recent decisions, the Court concluded:⁸⁹

Those cases demonstrate only that the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer. But to acknowledge that there exist constitutional restraints upon state and federal governments in dealing with their employees is not to say that all such employees have a constitutional right to notice and a hearing before they can be removed. We may assume that [the cook] could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist. It does not follow, however, that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational

Justice Brennan wrote a vigorous opinion for four dissenters.⁹⁰

. . . if [petitioner's] badge had been lifted avowedly on grounds of her race, religion, or political opinions, the Court would concede that some constitutionally protected interest—whether "liberty" or "property" it is unnecessary to state—had been injured. . . . I assume for present purposes that separation as a "security risk," if the charge is properly established, is not unconstitutional. But the Court goes beyond that. It holds that the mere

⁸⁶ 367 U.S. 886 (1961).

⁸⁷ *Id.* at 894.

⁸⁸ *Id.* at 896.

⁸⁹ *Id.* at 897-98.

⁹⁰ *Id.* at 900-02.

assertion by government that exclusion is for a valid reason forecloses further inquiry Such a result in effect nullifies the substantive right—not to be arbitrarily injured by Government—which the Court purports to recognize. What sort of right is it which enjoys absolutely no procedural protection? . . . under today's holding petitioner is entitled to no process at all. She is not told what she did wrong; she is not given a chance to defend herself. . . . I cannot believe she is not entitled to some procedures. . . . In sum, the Court holds that petitioner has a right not to have her identification badge taken away for an "arbitrary" reason, but no right to be told in detail what the reason is, or to defend her own innocence, in order to show, perhaps, that the true reason for deprivation was one forbidden by the Constitution. That is an internal contradiction to which I cannot subscribe.

. . . in my view, it is fundamentally unfair, and therefore violative of the Due Process Clause of the Fifth Amendment, to deprive her of a valuable relationship so summarily.

In evaluating the majority holding, it is important to note that it rested largely upon the traditional and historic power of military commanders to exclude civilians from military installations. The cited cases which upheld summary discharge of federal employees were nineteenth century cases arising under the spoils system, and have clearly been undermined by the modern authorities. The Court did not purport to be relying on a theory of privilege; instead, it analyzed the case in terms of the respective interests involved, and stated that it was "under the circumstances of this case" that no hearing was required. After all is said, however, it must be conceded that the decision is an exception to the usual rule of the recent cases that due process requires a hearing. It is not believed, however, that it impairs the applicability of the general rule to the discharge of teachers.

A recent case is a strong indication that the Court in teacher cases still subscribes to the procedural holding in *Slochower*. *Nostrand v. Little*⁹¹ was an action brought by two professors at the University of Washington challenging the validity of a 1955 statute which required every public employee to subscribe to an oath that he was not a subversive person or a member of the Communist Party or any subversive organization within the meaning of the act. The statute provided that refusal to take the oath "on any grounds shall be cause for immediate termination of such employee's employment. . . ." Interpreted to include scienter, the oath requirement was upheld by the Washington Supreme Court. Appeal was taken to the United States Supreme Court on both substantive and procedural grounds. The result was a per curiam opinion addressed to the procedural question. The Court stated:⁹²

One of the claims is that no hearing is afforded at which the employee can explain or defend his refusal to take the oath. The Supreme Court of Washington did not pass on this point. The Attorney General suggests in his brief that prior to any decision thereon here, "the Supreme Court of Washington should be first given the opportunity to consider and pass upon" it. Moreover, appellants point to a recent case of the Washington Supreme Court, *City of Seattle v. Ross* . . . as analogous. There that court overturned an ordinance

⁹¹ 362 U.S. 474 (1960).

⁹² *Id.* at 475.

because it established a presumption of guilt without affording the accused an opportunity of a hearing to rebut the same. In the light of these circumstances we cannot say how the Supreme Court of Washington would construe this statute on the hearing point.

On the remand it was recognized in the state court that "Implicit in the remand is the implication that, if we hold that such a hearing is not afforded by the act, it is 'violative of due process.'" ⁹³ The Washington Supreme Court delivered a highly interesting opinion to which further reference will be made shortly. At this point it is sufficient to note that the Washington court held that the professors would be entitled to a hearing before they were discharged for refusal to take the oath. The professors appealed from a judgment dismissing their complaint. This time the Supreme Court dismissed their appeal "for want of a substantial federal question." Justice Douglas, dissenting, noted that "The disposition that the Court makes of the case resolves one of the questions presented by the appeal, *viz.*, that appellants are entitled to a hearing before they can be discharged for refusing to take the oath."⁹⁴ He and Justice Black would have heard the case because of the substantive questions presented.

Relevant at this point is the analogous situation dealt with in *Dixon v. Alabama State Board of Education* ⁹⁵ involving the expulsion of students from a state college for alleged misconduct stemming from their participation in sit-in demonstrations. The students were given no notice or hearing prior to their expulsion. The district court dismissed the case, but the court of appeals reversed. Emphasizing the importance of educational opportunity, the court stated:⁹⁶

The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens. . . . expulsion may well prejudice the student in completing his education at any other institution. Surely no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value.

The court concluded that "We are confident that precedent as well as a most fundamental constitutional principle support our holding that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct."⁹⁶ The significance of this case for our purpose lies in its recognition of the student's freedom to learn. This freedom is substantially impaired, however, if the teachers who instruct him do not enjoy a corresponding freedom. The relation between the two was expressly recognized by the Supreme Court in 1959 when it referred to "academic teaching-freedom and its corollary

⁹³ 361 P.2d 551, 567 (Wash. 1961).

⁹⁴ *Nostrand v. Little*, 368 U.S. 436 (1962).

⁹⁵ 294 F.2d 150 (5th Cir. 1961).

⁹⁶ *Id.* at 157-58.

learning-freedom." The due process requirement of a hearing prior to dismissal of either teacher or student supports the educational freedom which is composed of the interwoven freedom of each.

The cases clearly support the teacher's right to a hearing before termination of employment, at least where the reason for termination is allegedly unconstitutional. They do not, however, discuss in any detail the nature of the hearing or what particulars it should include. The Court is notably reluctant to indulge in specifics in this area. In a recent case involving the right to a hearing in another context, Chief Justice Warren wrote:⁹⁷

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. . . . Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Justice Brennan adopted the same approach in his dissent in the *McElroy* case,⁹⁸ when he said:

I do not mean to imply that petitioner could not have been excluded from the installation without the full procedural panoply of first having been subjected to a trial, with cross-examination and confrontation of accusers, and proof of guilt beyond a reasonable doubt. I need not go so far in this case.⁹⁹

Some clues are available, however, from the Court's decisions in the teacher cases. As noted in *Adler*, the hearing required was one in which the teacher had an opportunity to controvert the facts which were decisive of the question of disqualification. And in *Nostrand* the Court referred to a hearing at which the professor "can explain or defend." These statements would certainly seem to indicate a hearing which would include a specification of charges, some knowledge of the evidence against the teacher, and some opportunity to present a defense with evidence in his own behalf. In all reason, these would seem to be the minimum essentials if the hearing were to serve any useful purpose at all. The opinion of the court of appeals in the student expulsion cases is instructive on the point. "The notice," said the court,¹⁰⁰

should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case.

⁹⁷ *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

⁹⁸ *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886 (1961).

⁹⁹ *Id.* at 900.

¹⁰⁰ *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158 (5th Cir. 1961).

In the situation before it, the court said "something more than an informal interview" was required. That something more was a hearing which would give "an opportunity to hear both sides in considerable detail." The court made it plain that "a full-dress judicial hearing, with the right to cross-examine witnesses," was not required. But, to preserve "the rudiments of an adversary proceeding," the court said that the student should be given the names of the witnesses against him, a report on the testimony of each witness, and an opportunity to present his own defense and testimony or affidavits in his behalf.

The Statement on Procedural Standards in Faculty Dismissal Proceedings,¹⁰¹ approved by the Council of American Association of University Professors in 1957 and by the Association of American Colleges in 1958, goes into considerable detail in setting forth recommendations as to the particulars which should be included in a hearing in a professorial discharge case. Bearing in mind Chief Justice Warren's statement that "due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings," the considered judgment of these two organizations, representing as they do both professors and administrative heads, could very properly be resorted to by the courts for guidance.

X

TENURE AND NON-TENURE STATUS

Another matter now to be noted is the question raised by the state court decisions in the *Globe* and *Nostrand* cases. The California statute and civil service regulations involved in the *Globe* case provided that a hearing prior to discharge should be afforded only to permanent, and not to probationary, employees. Since *Globe* was a temporary employee, he was not given a hearing. The trial court held that due process required a hearing, even though state law did not, but the appellate court reversed. To support his contention, *Globe* had relied on the *Slochower* case, but the appellate court thought the case was authority for just the contrary position. It noted that *Slochower* was "a permanent employee entitled to tenure under the state law" and that "A New York statute gave a procedural right to a hearing before discharge to persons in the class of *Slochower*." The court said that an analysis of the opinion disclosed that the Supreme Court had determined *Slochower's* "rights of employment and discharge under conditions of tenure, or permanency, wherein by statute the employee was entitled to a hearing as compared with the temporary status of petitioner herein and his total lack of any right of hearing under the charter and civil service rules."¹⁰² As a temporary employee, *Globe* had no vested employment right and could be discharged summarily. Under this interpretation, the due process violation in *Slochower* was the failure to accord a hearing to a professor *with tenure* and statutory right to a hearing. As we have seen, when

¹⁰¹ 44 A.A.U.P. BULL. 270 (1958).

¹⁰² *Globe v. County of Los Angeles*, 329 P.2d 971, 976 (Cal. App. 1958).

the *Globe* case went to the Supreme Court, the argument was based solely on substantive grounds, and the question of *Globe's* right to a hearing was not passed upon.

When the *Nostrand* case was remanded for determination of the hearing question, the Washington Supreme Court reached the same conclusion. It first asserted generally that¹⁰³

in the absence of civil service or other tenure rights, public employees may be discharged by their employers without any reason being assigned therefor. There is no vested right to public employment in the state of Washington unless the employee has some tenure rights provided by law. Since the power to discharge is absolute except for such tenure rights, the discharged public employee is not entitled to a hearing regarding the reason for his discharge.

Then, referring specifically to the oath requirement, the court stated:¹⁰⁴

If he declines to sign, the employee is subject to immediate discharge. If he has no tenure rights, he has no vested right to public employment, and the act affords him due process. *Nelson v. County of Los Angeles* On the other hand, if he has tenure rights, he must be accorded such a hearing as his contract of employment calls for.

The court then noted that the two plaintiffs were professors with tenure, and concluded that the oath statute, as to them, must be construed in light of the tenure rights they had under the rules and regulations of the university regents. Under those rules and regulations, professors with tenure were entitled to a hearing prior to discharge. Thus, although the plaintiffs were not entitled to a hearing under the oath statute, they were entitled to it under the tenure regulations which, the court said, formed part of their contract of employment. It is clear that, under this opinion, professors without tenure, or other state employees with no comparable source of a hearing right, could be summarily discharged pursuant to the oath statute. As we have seen, the Supreme Court dismissed a second appeal in *Nostrand* "for want of a substantial federal question." From the Supreme Court's vantage point, the Washington court had held that the plaintiffs in the case did have a right to a hearing, for whatever reason under state law, and therefore, the due process requirement of the Constitution was satisfied. The Supreme Court's dismissal of the appeal, of course, did not indicate any agreement with the opinion of the Washington Supreme Court.

It is submitted that both the California and Washington courts were wrong. First, each court misconstrued a Supreme Court opinion on which it placed reliance. The California court's interpretation of *Slochower* as being based on his tenure status and statutory right to a hearing is not supported by any language in the Supreme Court's opinion, which does not indicate that these facts had any bearing whatever upon the result. Indeed, Justice Brennan in his dissenting opinion in *Globe*, commented on the California court's use of *Slochower*, and stated that "this Court did not reverse the judgment of New York's highest court because it had

¹⁰³ *Nostrand v. Little*, 361 P.2d 551, 558 (Wash. 1961).

¹⁰⁴ *Id.* at 560.

disrespected Slochower's state tenure rights, but because it had sanctioned administrative action taken expressly on an unconstitutionally arbitrary basis."¹⁰⁵ Similarly, the Washington court's reliance on the court's decision in *Globe* to support its statement that a non-tenure employee could be summarily discharged is misplaced, since, as we have noted twice, the question of *Globe*'s right to a hearing was not raised before the Supreme Court and was not discussed in the majority opinion.

A second and more fundamental fallacy in both opinions is that the two state courts still cling to the idea that public employees never have any right to a hearing prior to discharge unless it is given to them by statute or by contract. This completely ignores the fact that a right to a hearing may be required by due process even when not otherwise provided for or authorized by law. Indeed, this is the most important function of procedural due process, to require a hearing where otherwise there would be none. It is a primary source of the right to a hearing, and where the Supreme Court has recognized that due process gives an employee a right to a hearing, the state court may not finesse away the right on the basis of the employee's tenure or non-tenure status. This is no doubt what Justice Brennan had in mind when he stated in *Globe* that "this Court has nothing to do with the civil service systems of the States, as such."¹⁰⁶ The sound and correct conclusion would seem to be that where the right to a hearing prior to discharge is a requirement of due process, it is a right which is shared by temporary as well as permanent employees, and by professors who have not acquired tenure at their institutions as well as those who have. If this were not so, we would have the anomalous situation of a professor at one state university with a tenure system enjoying a constitutional right not shared by his colleague at a less enlightened institution. This would destroy the uniformity of obligation which the fourteenth amendment due process clause imposes upon the states in their capacity as employers. In this connection, it may be noted that *Sweezy's* right to academic freedom was recognized by the Supreme Court, even though he was not a professor with tenure.

XI

ONE-YEAR CONTRACTS

A serious problem in protecting academic freedom arises from the fact that many institutions employ their teachers on a one-year contract basis. The contract is renewed annually if the teacher is acceptable. All of the previous discussion has concerned the substantive limitations on the right to discharge during a term or the necessity of hearing before discharge. Now suppose the institution, for reasons which would not support discharge, simply lets the contract run out and then declines to renew. Contract law provides no remedy for this situation, but it does not therefore follow that constitutional law can not. However, the language of

¹⁰⁵ *Nelson v. County of Los Angeles*, 362 U.S. 1, 16 (1960).

¹⁰⁶ *Id.* at 15.

the Supreme Court in *Shelton v. Tucker*¹⁰⁷ lends no encouragement. There, in considering the Arkansas organizational affidavit statute, the Court said that "These provisions must be considered against the existing system of teacher employment required by Arkansas law. Teachers there are hired on a year-to-year basis. They are not covered by a civil service system, and they have no job security beyond the end of each school year."¹⁰⁸ The Court said it was not disputed that "to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech, and a right which, like free speech, lies at the foundation of a free society." The Court then stated:¹⁰⁹

Such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain.

This language at first blush seems to recognize an absolute right not to renew the annual contract.

Another approach is suggested by the Supreme Court of New Jersey in *Zimmerman v. Board of Education of Newark*.¹¹⁰ Under New Jersey law, teachers are employed on annual contracts. The first three years are probationary, and after the third year the teacher acquires tenure status. The plaintiff's contract was not renewed at the end of the third year and he brought suit seeking reinstatement with tenure. The New Jersey Supreme Court denied the claim, stating:

At the expiration of an annual contract period, the employment relationship ceases to exist unless a new contract has been entered into. While some states provide for automatic re-employment or renewal of contract unless contrary notice is given, our statute does not so specify. And except to the extent of constitutional or statutory limitations, there is no legal duty on the part of a board to re-employ a teacher at the end of a contract term.¹¹¹

The qualifying phrase clearly suggests that there are constitutional limitations even to the right not to renew an expired contract. This suggestion was elaborated in a concurring opinion by Chief Justice Weintraub:¹¹²

As a general proposition, powers vested in local government must be exercised reasonably and the judiciary will review local action for arbitrariness. . . . The question is whether probationary employees are beyond that proposition.

The Legislature intended wide latitude in the employing authority to determine fitness for permanent employment. It is clear that public employment may not be refused upon a basis which would violate any express statutory or constitutional policy. A simple example would be discrimination for race or religion. But I am not sure such specific limitations are the only restraints. If the employing agency, for an absurd example, thought blondes

¹⁰⁷ 364 U.S. 479 (1960).

¹⁰⁸ *Id.* at 482.

¹⁰⁹ *Id.* at 486.

¹¹⁰ 38 N.J. 65, 183 A.2d 25 (1962).

¹¹¹ *Id.* at 75, 183 A.2d at 30.

¹¹² *Id.* at 79-80, 183 A.2d at 33.

were intrinsically too frivolous for permanent employment, a court would find it difficult to withhold its hand.

But if we may inquire into "unreasonableness," it would seem to follow that there must be a "reason," *i.e.*, "cause" for refusal to continue the teacher into a tenure status. That course has its difficulties. It would not mean the court would not recognize a wide range of "reasons" or would lightly disagree with the employer's finding that the "reason" in fact existed. But it would follow that upon demand the teacher would be entitled to a statement of the grounds, with the right to a hearing and to a review as to whether the grounds are arbitrary in nature or devoid of factual support. . . . Such individual inquiries could involve some practical problems in the administration of a school system.

Even this dictum was somewhat diluted. The teacher had been refused renewal of his contract for having pleaded the fifth amendment before a subcommittee of the House Un-American Activities Committee. In an earlier decision, the New Jersey Supreme Court had voided discharges of teachers for this reason, holding that the assertion of a federal constitutional right did not constitute "cause" for the dismissal of a teacher with tenure. Chief Justice Weintraub, however, thought that refusal to renew an annual contract for the same reason was not "arbitrary" under his quoted theory. He believed that the discretionary power not to renew a contract, although not absolute, was not as constitutionally restricted as the power to discharge during the contract term.

The approach of the New Jersey court is in line with the Supreme Court's language in *Wieman v. Updegraff*, that Congress could not provide that "no Republican, Jew or Negro shall be appointed to public office, or that no federal employee shall attend Mass or take any part in missionary work." Surely the power of renewal would be subject to the same limitations as the power of original appointment. The absence of a contract in both cases is irrelevant, since the limitation is not one imposed by contract, but by constitutional law. And surely a standard improper enough to invalidate a statute would likewise be prohibited in application to an individual case by any form of state action. The real difficulty with respect to one-year contracts is not, therefore, in establishing that the power not to renew is, as a matter of law, subject to constitutional limitations.¹¹³ The real difficulty is the practical one that the invalid reason for the refusal to renew is not apt to be formally announced. The proper answer here would seem to be the one suggested by Chief Justice Weintraub—that is, to require a statement of the ground for discharge upon demand by the teacher, followed by a hearing and judicial review to determine if the reason for the refusal was valid or not. This would protect the right of the teacher without interfering with any proper exercise of power by the

¹¹³ Another possible approach would be to analogize the renewal of teachers' contracts to the renewal of a license issued by the state for a term permitting the licensee to engage in a certain occupation or activity. It is the general rule in this situation that licenses can neither be revoked during a term nor denied renewal on expiration of a term for arbitrary reasons or without notice and hearing. No reason is apparent why the teacher should be accorded any less protection than a licensee. The courts have been especially zealous in protecting the licenses of physicians and attorneys from arbitrary and summary termination of their licenses. The teacher is equally a professional person, performing a function many would consider even more important to society, but certainly at least equally so.

appointing authority. The Supreme Court's language in *Shelton* cannot be taken as a considered judgment that the power not to renew an annual contract is unrestricted. It seems more likely that the language was used for the purpose of highlighting the effect that the affidavit would have on academic freedom. Teachers under one-year contracts would certainly be intimidated in their associations and in their utterances for fear of alienating their employers.

CONCLUSION

Academic freedom has been considered in this article in its historic sense, as a freedom of the teacher. The struggle for academic freedom has demonstrated that academic tenure and due process are the means essential to achieving that great end. In this struggle constitutional law can become an important support in public institutions, through the requirement of a hearing prior to a teacher's discharge and by prohibiting certain reasons for discharge. Tenure thus becomes to some extent constitutionally protected. As between the two forms of assistance constitutional law can give to academic freedom, the procedural is probably more important than the substantive. For surely the summary discharge is the most drastic and effective technique in stifling academic freedom. It is safe to say that many discharges would never have occurred if a hearing had been required and the reasons brought into the open. Constitutional protection of due process in teacher termination cases needs no more than the willingness of courts to require in the academic community what they have required in a host of other contexts—the elemental decency and justice of a right to notice and hearing before action is taken. There is no reason why the most venerable of our constitutional rights should be wanting in public institutions of learning. With or without a hearing, however, experience demonstrates that teachers continue to be discharged for their beliefs, associations, teaching, speaking and writing. Constitutional law can proscribe such reasons, and confine the bases of discharge to those which are relevant to the teacher's fitness and competence.

But constitutional law can never be more than an occasional valuable ally in the struggle for academic freedom. For various practical and legal reasons, judicial intervention cannot reasonably be hoped for except in the extreme case of termination of employment. And yet there are many techniques of harassment short of termination which may be used to penalize a teacher—refusal to promote or to increase salary are two of the most common. To combat and redress all the myriad ways in which academic freedom may be undermined and thwarted will always require vigilant and determined self-help activity within the academic community itself. For this the law will never be a substitute. In addition, many cases in which constitutional law might help will never be brought for various personal reasons. Litigation is an expensive and lengthy ordeal which the aggrieved professor may be unwilling to undergo. Or he may be so thoroughly disgusted with the institution that he no longer has any desire to stay and "fight it out" and simply wants to go elsewhere. Finally, even in a termination case the constitutional issue would need

to be relatively clear and uncomplicated. Certainly not all discharges are for constitutionally prohibited reasons. A reading of the investigation reports of the fourteen institutions now on the censured list of the AAUP illustrates the point. Some of the cases were in the area of refusal to answer questions relating to former communist membership. Some are a tangled skein of personality differences, conflicts over educational policy, and the like. In others a semblance of a hearing was held. In the judgment of the AAUP, academic freedom, tenure, or due process was violated in each case, but many are not, for one reason or another, constitutional law cases.

In my opinion, the investigation reports do reveal, however, that in five of the cases involving public institutions—Auburn University,¹¹⁴ Texas Technological College,¹¹⁵ Alabama State College,¹¹⁶ Alcorn Agricultural and Mechanical College,¹¹⁷ and Sam Houston State Teachers College¹¹⁸—there was a clear violation of a constitutional right to a hearing. The termination was summary in all five cases under circumstances where the reason for the discharge was clearly or allegedly unconstitutional. In four cases involving public institutions—Auburn, Alabama State, Sam Houston State Teachers College, and University of Illinois¹¹⁹—the substantive reason for the discharge was in my opinion, clearly unconstitutional. In the Auburn case the announced reason for the summary discharge was that the professor had written a letter to the university newspaper supporting racial integration. In the Alabama State case, the discharge was forced by former Governor Patterson because of the professor's beliefs, associations and activities in behalf of racial equality. The years since *Brown v. Board of Education* have seen an increasing number of abridgments of academic freedom in the South over the racial issue.¹²⁰

The organized academic community has not in the past taken an active part in urging issues of academic freedom upon the courts. The philosophy behind this reluctance cannot be dismissed lightly.¹²¹ But events are likely to force a change in

¹¹⁴ 44 A.A.U.P. BULL. 158 (1958).

¹¹⁵ *Id.* at 170.

¹¹⁶ 47 *id.* 303 (1961).

¹¹⁷ 48 *id.* 248 (1962).

¹¹⁸ 49 *id.* 44 (1963).

¹¹⁹ *Id.* at 25.

¹²⁰ See Woodward, *The Unreported Crises in the Southern Colleges*, Harper's Magazine, Oct. 1962, p. 82.

Also on the AAUP censure list is Benedict College, a Negro Baptist institution in Columbia, South Carolina. See 46 A.A.U.P. BULL. 87 (1960). In this case Governor Timmerman and the State Board of Education coerced the college administration into discharging certain professors because of their views and activities in behalf of racial integration, by threat of refusing to certify the college's graduates for teaching positions in the public schools of the state. This would seem to be one of those rare instances where "state action" has violated academic freedom, tenure and due process in a private institution.

¹²¹ It has been stated that the AAUP neither "aggressively seeks, or is entirely sure that it even wants, to have the principles it promotes incorporated into American constitutional law by the Supreme Court. After all, what the Court gives, it can take away. Moreover, in the process it may unwittingly persuade many people that only those principles of academic freedom that are finally recognized by the courts as law need be observed. . . . academic freedom may be left in a weaker position than it was before it became a concern of the law." Carr, *Academic Freedom, the American Association of University Professors, and the United States Supreme Court*, 45 A.A.U.P. BULL. 5, 6, 20 (1959).

policy. The cases will continue to be brought by embattled professors and teachers, perhaps in increasing numbers now that the Supreme Court has at last given express recognition to academic freedom in its opinions. The need to see that academic freedom issues are properly presented so that they may be properly passed upon is likely to impel more and more intervention by professional organizations if only on an amicus basis. The courts, in the long run, neither can nor should be ignored by the academic community. Although their assistance is not likely to be forthcoming in any but extreme cases, an enlightened judicial attitude would inevitably have a wholesome effect, in the academic world and in society generally, in enhancing the acceptance of and respect for academic freedom.¹²²

As yet, the Supreme Court's decisions are harbingers of what is to come, a promise of protection yet to be redeemed. What is needed now is a decision from the Court squarely invalidating the termination of a teacher's employment made without a hearing or because of a violation of academic freedom. Until there is such a decision, it is probably more accurate to refer to academic freedom as an emerging constitutional right. A case involving a teacher whose employment was terminated for upholding the Court's own decision in *Brown* would be a fitting vehicle to put the expressly recognized freedom on a sound footing. But whether in the racial area or not, such a decision seems to be, in the fullness of time, inevitable.

¹²² " . . . [C]ourts are powerful agencies of social control, and even their inactivity may entail serious consequences. They have much to offer in the defense of intellectual freedom. When American courts come to understand that the right of teachers and students to academic freedom is a fundamental legal right which is as much entitled to judicial protection as any other constitutional right, then indeed, will the cause of intellectual liberty acquire a powerful and most welcome ally." Fellman, *Academic Freedom in American Law*, 1961 WIS. L. REV. 3, 46.