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Does the First Amendment Really Provide Protection
Against Judicial Interference in the Academic
Decision Making of Colleges and Universities?

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I. Prologue

As the general counsel of a university, two recent federal appellate cases especially intrigue me. The first, chronologically, upheld a judicial award of tenure to a faculty member at Boston University as a remedy for a jury finding of unlawful gender discrimination. Brown v. Trustees of Boston University, 891 F.2d 337 (1st Cir. 1989) reh. denied (1990), cert. denied 110 S.Ct. 3217 (1990). The second reversed an award of summary judgment in favor of Tufts Medical School against a dismissed medical student. The student had claimed unlawful discrimination on the basis of disability (dyslexia) in Tufts' refusal to test him by a method other than short answer examinations. Wynne v. Tufts University School of Medicine, 932 F.2d 19 (1st. Cir. 1991) (en banc).

The outcomes are interesting because they each may be seen as significant intrusions into a core area of academic decision making -- qualitative judgments of scholarly and academic achievement. But because each decision appears in purely statutory terms to be a permissible, if not wholly persuasive result, one is then inclined to ponder whether there are constitutionally protected elements of academic freedom which are threatened or at least ignored by the decisions.

For an audience of readers/discussants whose interests lie more in the general area of not-for-profit organizations than higher education law, I ask you, nevertheless, to read on. It has been on the campuses of not-for-profit educational

institutions, public and private, that the battle for academic freedom has been waged over the decades against politicians, governing boards and presidents, donors, and professorial colleagues.¹ Moreover, there is room for considerable skepticism about the ultimate ability of for profit institutions to place freedoms in research and publication of employees, for example, above competing financial interests of shareholders and management. Indeed, in recent years, the growth of university-industry collaborations and the introduction of new financial incentives for professors, universities, and their commercial collaborators have highlighted some troublesome pressures which profit motives place on choices of research topics, the publishing of research results, and even standards for granting tenure². More importantly for the purposes of this paper, there is a large array of general regulatory schemes which impact upon the conduct of universities and which from time to time are claimed to threaten an institution's academic freedom.³

II. Institutional Academic Freedom

In his concurring opinion in Sweezy v. New Hampshire, 354 U.S. 234, 263 (1967), Justice Frankfurter wrote of "the four

¹ See R. Hofstadter & W. Metzger, The Development of Academic Freedom in the United States 413-506 (1955).

² See D. Bok Beyond the Ivory Tower, 149-168 (1982).

³ Compare Oaks, A Private University Looks at Governmental Regulation, 4 J. Coll. & U. L. 1 (1976) with H. Edwards, Higher Education and the Unholy Crusade Against Government Regulation (1980).

essential freedoms of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."⁴ While much of the discussion and legal development of academic freedom focused on protecting a faculty member from the encroachments of administrators or governing boards on his or her own campus,⁵ other developments alluded to the right of the academic institution itself to be free from inappropriate intrusions.⁶

At common law there was a long-standing judicial reluctance to impose traditional rules of liability on the academic decisions of universities.⁷ Courts recognized extensive freedom from state regulation, apparently limited only by requirements of good-faith dealing and adherence to overriding public policy.⁸

⁴ This broad language represented the first time in which the Supreme Court had suggested that academic freedom was protected by the First Amendment. See, Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 Yale Law Journal 251, 290 (1989).

⁵ Id. at 273-279.

⁶ There is a robust debate in the literature about whether there is or should be a doctrine of institutional academic freedom. Compare, Byrne, supra, note 4 at 311-340 who strongly endorses the concept with Finken, On "Institutional" Academic Freedom, 61 Texas L. Rev. 817 (1983) who fears that its recognition will conflict with and ultimately erode the academic freedom of individual faculty members. See also Yudof, Three Faces of Academic Freedom, 32 Loyola L. R. 831, 851-858 (1987).

⁷ Byrne, supra note 4 at 323-327.

⁸ Id. at 323. Academic abstention was often invoked to remove the courts from evaluating the propriety of decisions to dismiss professors or students. In People ex rel. Pratt v. Wheaton College, 40 Ill. 186, 187-88 (1886), a student suspended

The cases embodying academic abstention, however, offer little insight into the rationale behind it. One suggestion was that colleges operate in an insular, partly mythical world in which the goals, ideals and values inherent in the university mission differ significantly from those of society as a whole.⁹ For this reason, traditional legal standards were seen as insufficient to evaluate academic decisions and judges themselves ill-equipped to second-guess the decisions of university administrators.¹⁰

The history of abstention and (to a lesser extent) various states' recognition of a constitutional status for their

for violating rules prohibiting "secret societies" sought judicial reinstatement. The court stated:

But whether the rule be judicious or not, it violates neither good morals nor the law of the land and is therefore clearly within the power of the college authorities to make and enforce. A discretionary power has been given them to regulate the discipline of their college in such a manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family.

⁹ Byrne, supra note 4 at 325.

¹⁰ Id., See e.g. Ward v. Board of Regents, 138 F. 372, 377 (8th Cir. 1905) ("Questions concerning the efficiency of a teacher in an institution of learning, his usefulness, his relations to the student body and to other members of the faculty, are so complicated and delicate that they are peculiarly for the consideration of the governing authorities of the institution. It may be perfectly apparent to them that the presence of a teacher is prejudicial to the welfare and discipline of the college, although it would be difficult, if not impossible, to make it so appear to a jury by the production of evidence in court.")

public universities, strengthened a tendency towards judicial deference to discretionary academic decisions.

In the years since the decision in Sweezy, discussions of deference have acquired more frequent constitutional clothing. In Board of Curators, University of Missouri v. Horowitz, 435 U.S. 78 (1978), the Supreme Court held that the plaintiff had not been deprived of either procedural or substantive due process of law in her dismissal from medical school without a formal campus hearing into whether she had in fact failed to meet the institution's academic standards. Horowitz had received satisfactory examination grades, but was found deficient in patient oriented skills and attention to personal hygiene, and had been warned and counseled over a period of years.

We conclude that considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the Due Process Clause of the Fourteenth Amendment. (435 U.S. at 90 n.3.)

The Court further observed:

The decision to dismiss respondent ... rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress towards that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools

of judicial or administrative decision making.... (Id. at 90)

And, in rejecting the substantive due process claim, the court observed:

Courts are particularly ill-equipped to evaluate academic performance. (Id. at 92)

Similarly, in Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) a unanimous Supreme Court rejected another dismissed medical student's claim. Ewing had contended that his substantive due process rights had been arbitrarily violated by the school's refusal to permit him, unlike all preceding students with a similar failure, to re-take a particular national examination. Speaking again in broad terms the Court stated:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. 474 U.S. at 225.

While at one level Horowitz and Ewing appear to have elevated the long standing common law tradition of abstention from interference in academic matters to broadly phrased constitutional doctrine, the language of the principal opinions avoids grounding the required deference in the First Amendment.

In his brief concurring opinion in Ewing, Justice Powell added,

Judicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate, particularly where orderly administrative procedures are followed -- as in this case. (Id. at 227)

His phraseology consciously places evaluations of students in a broader context of academic decision making. In the accompanying footnote, Justice Powell references his own concurring opinion in Horowitz and his opinion in University of California Regents v. Bakke, 438 U.S. 265, 312 (1978).

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

The reference is worth observing not only because of its First Amendment theme. In Bakke, the Court condemned the setting aside of a fixed number of places in the incoming class of a medical school (16 of 100) for members of specified minority groups. Nevertheless, in dictum which has become a cornerstone of affirmative action efforts on college and university campuses, Justice Powell drew a connection between Frankfurter's "four essential freedoms," especially the right to determine who may be admitted to study, and a university's right to consider the racial diversity of its student body as one factor in the admissions process. Thus, it was suggested, the interpretive boundaries of Title VI of the Civil Rights Act of 1964, when applied to a university, are influenced by some measure of concern for institutional academic freedom.

A further recognition of institutional academic freedom

is found in Justice Steven's concurring opinion in Widmar v. Vincent, 454 U.S. 263 (1981). In Widmar, the Court found unconstitutional a regulation at the University of Missouri which prohibited student religious groups from holding prayer meetings on school property otherwise generally available to student organizations. The university had erroneously understood the Establishment Clause to require such a prohibition. The majority stated that the University needed a compelling interest to justify content-based discrimination against the religious speech of students. In his concurrence, Justice Stevens argued that requiring a university to satisfy the compelling interest standard might infringe a university's own academic freedom to distinguish between speech of high and low academic value. Substantive decisions of administrators deserve academic freedom protection because they are necessary and appropriate in creating the atmosphere of a university (454 U.S. at 278).

From these cases and themes it is argued, academic abstention (has been) raised to a constitutional level; there it generates force comparable to other constitutional norms, such as due process. The principle can also be directed to legislatures and administrative agencies, prohibiting them from reducing the university to a passive instrument of political or utilitarian calculation.¹¹

Nevertheless, as discussed below, the constitutional threads of Sweezy, Horowitz, Ewing, Bakke and Widmar have not

¹¹ Byrne, supra, note 4 at 331.

restrained recent judicial penetration into what many would regard as core issues of academic freedom -- awards of tenure and choices of how to evaluate student competence.

III. Brown v. Trustees of Boston University

In Brown v. Trustees of Boston University, 891 F.2d 333 (1st Cir. 1989) reh. denied (1990), cert. denied 110 S. Ct. 3217 (1990), the plaintiff, denied tenure in the English Department at Boston University, alleged breach of a faculty collective bargaining agreement, violations of Title VII of the Civil Rights Act of 1964 and the Massachusetts antidiscrimination law.¹² The jury made a finding of sex discrimination under the collective bargaining agreement which the judge applied to the statutory claims, not themselves triable to a jury.¹³ The District Court ordered that Brown be reinstated with tenure.

On appeal, the University argued that the award of tenure was improper because it was more intrusive than the remedies ordinarily granted in Title VII employment discrimination cases (such as reinstatement and back pay) in that it mandated a lifetime relationship between the University and the professor. Because of the intrusiveness of tenure awards and the First Amendment interest in academic freedom, the University

¹² 42 U.S.C. Section 2000e-2(a)(1); Mass. Gen. L. ch. 151B Section 4.

¹³ Under the Civil Rights Act of 1991 signed by President Bush in late November, 1991, such a Title VII claim will now be directly triable to a jury.

contended that a court should not award tenure unless there is no dispute as to the professor's qualifications.¹⁴

The First Circuit upheld the award. After acknowledging the rarity of judicial awards of tenure as a remedy for unlawful discrimination and stating a wariness of intruding into academic tenure decisions, the Court insisted that once a finding of unlawful discrimination had been made, Title VII required "make whole" relief as much against a university as against any other defendant. The court quoted Frankfurter's "four freedoms" language in Sweezy, pointed out that Frankfurter's source had been statements made by the Chancellors of two South African universities at a conference of senior scholars¹⁵ and then swiftly added that "academic freedom does not include the freedom to discriminate against tenure candidates on the basis of sex or other impermissible grounds." (Id. at 362)

¹⁴ Boston University argued that the two prior federal appellate cases upholding awards of tenure were distinguishable on this ground. Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980) (college found to have discriminated on the basis of sex against a female professor by denying her tenure because she lacked a master's degree without having told her in advance that she needed one; the district court's order that the professor be granted tenure if she obtained her master's degree within two years was affirmed. Ford v. Nicks, 741 F.2d 858 (6th Cir. 1984) ("Ford I") (upheld an order reinstating a professor, with tenure, to an institution which at the time automatically awarded tenure after five years of successful teaching; the professor had been discharged after four years in retaliation for helping his wife file a sex discrimination claim against the school).

¹⁵ In seeming to highlight the non-judicial character of Frankfurter's source, the Court did not mention that the Chancellors were arguing against the right of their government to apply race separation laws to a university's decisions on whom to admit as students. See Finken, supra note 6 at 846-847.

It rejected the suggestion of several amici that the case be remanded for a non-discriminatory decision and found that the Congressional legislative history in 1972 subjecting universities to the reach of Title VII made a tenure award an appropriate remedy. Finally it observed that

Brown's near unanimous endorsement by colleagues within and without her department suggests strongly that there are no issues of collegiality or the like which make the granting of tenure inappropriate.
Id. at 363.

In focussing on the attitude of the court to the claim of academic freedom, the opinion may be read in a variety of ways. At one level, the court may have been persuaded that because there had been a high degree of scholarly praise and faculty support for Brown's tenure candidacy¹⁶, a failure to remand for a new academic evaluation by non-discriminatory persons represented no genuine threat to the University's freedom to choose its tenured faculty. In any event, it rejected the suggestion as being impractical on the ground that the original tenure decision had been made eight years earlier. At trial, the two principal discriminatory actors were portrayed as having been Boston University's outspoken president, John Silber, whose own negative judgment on the candidate's file appears to have been

¹⁶ Brown was unanimously recommended (22-0) for tenure by her department and by the Appointments, Promotions, and Tenure Committee of her College. The University wide APT Committee was supportive (9-2) and in a later vote, unanimous (10-0). An ad hoc Tenure Review Committee consisting of three professors from outside Boston University produced a 2-1 favorable recommendation in her favor. Id. at 341-344.

the decisive element in the tenure denial and the Dean of the College of Liberal Studies. Perhaps a remand was also thought (but not stated) to be futile in light of the presumed power of the president.

At another level, however, the opinion conveys some sense of indifference or even skepticism towards the academic freedom claim. In declaring that "make whole" relief be as available under Title VII against a university as against other employers accused of unlawful discrimination, the court did not pause very long to reflect on whether this should necessarily be so in all cases.

First, in stating that "(t)here are no cases ... denying an award of tenure to a professor who has been found to be the victim of a discriminatory tenure decision;" (*Id.* at 361 n. 21) the court appears to have overlooked two relevant decisions in the Sixth Circuit. In Gutzwiller v. Fenik 860 F.2d 1317 (6th Cir. 1988), the court of appeals reversed the district court and directed the entry of judgment for the plaintiff professor on her Title VII, tenure denial claim. The court declined, however, to direct the district court on remand to order reinstatement with tenure.

While a few courts have indicated a willingness to award reinstatement with tenure as a remedy in discrimination cases, see, e.g., Kunda v. Muhlenberg College, 621 F.2d 532, 546-51 (3rd Cir. 1980), we believe such relief will, in most cases, entangle the courts in matters best left to academic professionals. Accordingly, such relief should be provided in only the most exceptional cases. Only when the court is

convinced that a plaintiff reinstated to her former faculty position could not receive fair reconsideration (i.e. consideration without the taint of discrimination) of her tenure application should it order reinstatement with tenure.

And in Ford v. Nicks 866 F.2d 865, 877 (6th Cir. 1989) ("Ford II"), in citing the above quoted passage from Gutzwiller, the Sixth Circuit upheld the female professor's reinstatement but overruled an award of tenure as an abuse of discretion by the district court.

Second, and more broadly, the concern is not that the Brown court impermissibly read the language of the leading authority which it cites on Title VII remedies, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Despite a reading of Albemarle in the Sixth Circuit cases cited above which found a significant degree of judicial discretion in the selection of equitable relief in a tenure denial case, Albemarle did declare that once Title VII liability has been imposed, a court should deny "make whole" relief "only for reasons which if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Id at 421. Nor is the concern that the Brown court overstated the importance of Congress' observation in 1972 that "women have long been invited to participate in the academic process, but without the prospect of gaining employment as serious scholars." (891 F.2d at 362)

The unaddressed issue in Brown is whether or not

universities are different, and if so whether the difference has some degree of constitutional protection which may affect the permissible range of remedies under a federal or state statute. The sweep of the court's language seems to preclude recognition of such a claim in any tenure discrimination case, even where the evidence of scholarly entitlement is subject to greater dispute. Indeed, in the First Circuit at least, once a jury has made a finding of unlawful discrimination in a tenure denial case, under the jury instructions approved in Brown¹⁷ the remedy of awarding

¹⁷ The Brown court also concluded that the trial jury was, on the whole, properly instructed and was not invited impermissibly to substitute its judgment on a plaintiff's entitlement to tenure for the judgment which would have been reached on campus in the absence of unlawful discrimination. In so ruling, the court approved the following jury instruction (891 F.2d at 355)

Whether the plaintiff deserves tenure or not is not the test here, either. I would suppose that deserving people are sometimes awarded tenure and sometimes not. Certainly, before you get -- that is not the full test; that is certainly one thing you have to consider. Obviously, if she didn't deserve tenure on any kind of objective basis, the university was quite right in turning her down. If you find that she did deserve tenure, she was qualified on an equal basis, then you have the question of whether she was turned down for (illegal reasons).

Contrary to the court's confident conclusion, this language certainly appears to invite the jury (a) to decide whether the plaintiff deserved tenure and (b) if so, whether she was denied tenure for impermissible reasons, instead of asking whether the tenure review process on campus would have reached a different result in the absence of unlawful discrimination.

tenure seems to be available, and arguably mandatory.¹⁸

The jury found that, 'but for' sex discrimination, Brown would immediately have been granted tenure. Awarding her tenure is the only way to provide her the most complete relief possible. (891 F.2d at 362)

IV. Wynne v. Tufts University School of Medicine

Another difficult question involving judicial deference to academic judgments arose in Wynne v. Tufts University School of Medicine, 932 F.2d 19 (1st Cir. 1991) (en banc). The plaintiff was a student who had been dismissed from medical school because of unsatisfactory academic performance. He brought suit, inter alia, for a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, alleging that he was an "otherwise qualified" person and that Tufts had failed to make a statutorily required "reasonable accommodation" of his disability (dyslexia) by insisting on the use of short answer questions on certain of the first year course examinations which Wynne had failed.

The district court granted summary judgment to Tufts. A panel of the First Circuit reversed and remanded for further proceedings, and upon a petition for rehearing en banc, the panel's decision was upheld by a 4-3 vote.

The separation between the en banc majority and dissent

¹⁸ After Brown, lower courts have found little difficulty in making remedial awards of promotion in rank from associate to full professor of already tenured persons. See, e.g. Jew v. University of Iowa, 749, F.Supp. 946 (S.D. Iowa 1990); Bennun v. Rutgers, 737 F.Supp., 1393 (D.N.J. 1990).

was a debate over judicial deference to academic decision-making. Superficially, there was significant agreement among the seven judges on the four controlling legal issues of the case. First, under the statute, a university is required to make a reasonable accommodation to a student's handicap, since with an appropriate accommodation a person not appearing at first to be academically qualified could demonstrate that he or she is in fact so. Second, a host of case specific circumstances must be examined in determining what is "reasonable" in light of the needs of, and possible harms to, the individual and the institution. Third, some degree of respect for academic decision-making as articulated in Ewing is applicable in judging who is "otherwise qualified" and what is a "reasonable accommodation;" and fourth, summary judgment could possibly be available in the context of the academic testing before the court.

If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation. (932 F.2d at 26)

The written debate among the judges centered on whether that test had been satisfied. The heart of the matter was the degree of deference to be accorded to a particular portion of an undisputed affidavit submitted to the district court by the Dean of Tufts Medical School to justify the use of the multiple choice

examinations at issue. The affidavit provided in relevant part:

11. The particular type and form of written, multiple choice (Type K) examinations administered to Mr. Wynne and all first year Tufts students is expressly designed to measure a student's ability not only to memorize complicated material, but also to understand and assimilate it.

12. In the judgment of the professional medical educators who are responsible for determining medical testing procedures at Tufts, written multiple choice (Type K) examinations are important as a matter of substance, not merely of form. In our view, the ability to assimilate, interpret and analyze complex written material is necessary for the safe and responsible practice of modern medicine. It is essential for practicing physicians to keep abreast of the latest developments in written medical journals. Modern diagnostic and treatment procedures often call for the reading and assimilation of computer-generated data and other complex written materials. Frequently, and often under stressful conditions fraught with the most serious consequences, physicians are called upon to make choices and decisions based on a quick reading, understanding and interpretation of hospital charts, medical reference materials and other written resources. A degree from the Tufts University School of Medicine certifies, in part, that its holder is able to read and interpret such complicated written medical data quickly and accurately.

13. It is the judgment of the medical educators who set Tufts' academic standards and requirements that this and other important aspects of medical training and education are best tested and evaluated by written, multiple choice examinations of the type given to Mr. Wynne and all of his peers.

The majority found the affidavit too conclusory, failing to contain the detailed findings said to be required by the case law interpreting Section 504:

There is no mention of any consideration of possible alternatives, nor reference to any discussion of the unique qualities of multiple choice examinations. There is no indication of who took part in the decision or when it was made. (Id. at 28)

Then, going beyond the details of the affidavit, to far more portentous declarations, the majority reasoned that while deference to the academic judgment was due under the principles of Ewing, the nature of the deference was affected by the demands of a statutory scheme.

The question in Ewing was whether a university had violated substantive due process (i.e. had engaged in wholly arbitrary action) in dropping plaintiff from an academic program after plaintiff had failed several subjects and received the lowest score so far recorded in the program. This was a context where no federal statutory obligation impinged on the academic administrators; their freedom to make genuine academic decisions was untrammelled. (Id. at 25) (emphasis supplied)

The Ewing formulation which limits judicial overrides of academic judgments to cases in which there has been "a substantial departure from accepted academic norms" was not seen as controlling. It is

not necessarily a helpful test in assessing whether professional judgment has been exercised in exploring reasonable alternatives for accommodating a handicapped person. We say this because such alternatives may involve new approaches or devices quite beyond accepted academic norms. (Id. at 26)

In the judgment of the majority, Tufts, on the record before the court, had not fulfilled its obligations under the handicap discrimination statute to demonstrate that,

its determination that no reasonable way existed to accommodate Wynne's inability to perform adequately on written multiple-choice examinations was a reasoned, professional academic judgment not a mere ipse dixit. (Id.)

The dissenters, by contrast, found the Dean's affidavit dispositive. The affidavit recited the views of the medical educators who set Tufts' academic standards and who believed that the demands of medicine "are best tested" by a multiple choice exam. The obvious alternatives of oral exams and essay-type written exams had been considered less satisfactory because they did not sufficiently test reading comprehension. Despite evidence in the record that another medical school (Brown) would have permitted Wynne to take an oral examination, the dissent insisted that no reasonable fact finder could find "a substantial departure from academic norms." (Id. at 30) (emphasis supplied)

After observing that Wynne's psychological learning disadvantage was closely related to a particular characteristic, an inability to learn, which need not be legally "accommodated" under Section 504, the dissenters made two further observations about judicial deference.

(T)he designing of tests aimed at screening out those who will not become good doctors is a quintessentially academic task, close to the heart of a professional school's basic mission (T)he design of proper academic tests (as far as this record is concerned) is not itself a science, but, rather, is a judgmental matter in respect to which teachers and doctors are far more expert than judges and juries. (Id. at 31)

The dissent (authored by Chief Judge Breyer, a former

tenured professor at Harvard Law School) concluded with a concern that judicial interventions tend to harm the structure of academic decisionmaking on campus.

These ... circumstances should caution us against applying reasonable sounding legal standards in a way that, as a practical matter, would force universities to produce the kinds of proofs that seem to appeal especially to courts -- "hard" evidence, tests of tests, statistical studies -- for to do this is to take a basic educational decision away from those who may know the most about it, teachers using their own subjective judgment and experience, and place it in the hands of those (say, lawyers) who will have to defend an academic decision in court. (Id.)

In sum then, the dissent finds that Tufts has met the Ewing standard for exercising professional judgment and cautions that an insistence on more proceedings and more proof will harm the fabric of academic decision making. The majority finds that the Ewing test, while important, needs some modification because of the presence of controlling statutory standards which demand a greater degree of justification by the university for its testing methodology than stated in the record.

The internal debate on the First Circuit is not framed, however, as a debate about competing definitions of deference, much less a debate about constitutional law or infringements of academic freedom. Why was this so? After all, the dissent could have chosen to argue that the failure of the Court to defer to Tufts Medical School had violated a precept of constitutional significance contained in Ewing, and that the majority had erred in conforming the Ewing test to fit Section 504 instead of

interpreting Section 504 to fit Ewing. Perhaps such a frontal argument, especially at this stage of the case, seemed unnecessarily aggressive. The immediate result of the decision is only a remand, not the override of an academic judgment as to who is qualified to become a physician. No unavoidable conflict is yet presented between the command to reasonably accommodate the disabled and the freedom to decide how something may be taught or who may learn. Nevertheless, the choice of the more restrained tone may be born of something more than judicial collegiality and patience.

V. Conclusions/Observations/Speculations

Why then, in Brown and Wynne was the idea of the institution's constitutional academic freedom given such little recognition? The possibilities are several. First, the author has chosen poor examples with which to explore the subject. If so, I apologize, gentle reader, for the intrusion on your time. I thought that beyond the virtues of being real and recent, they were recurrent and reasonably close to the heart of the matter. Second, the doctrine does not exist. This seems improbable. One can imagine misguided hypothetical statutes which would quickly propel a majority of the Supreme Court to a square First Amendment holding. The recent extravagant and unsuccessful claim by the University of Pennsylvania that enforcement against it of E.E.O.C. subpoenas for tenure records would violate the First Amendment has not ruled out, one supposes, an ability to defeat

on constitutional grounds an infringement which is both "direct" and "content-based,"¹⁹ such as a xenophobic prohibition on teaching a particular nation's language, literature or history.

Third, the doctrinal underpinnings of the constitutional claim by an educational institution remain underdeveloped and of uncertain weight in many litigation contexts, especially where the claim competes with public policy enunciated in remedial legislation.

Fourth, the recent and immediately foreseeable cases may not be ones in which the constitutional language of Horowitz and Ewing should, in the end, produce results which differ from those which courts are reaching on non-constitutional grounds. Except at the hypothetical extreme, the presumed constitutionalization of abstention has been overstated or, in any event, is unnecessary.

Fifth, either Brown or Wynne or both were, in fact, incorrectly decided (or unwisely silent in protective dicta). Institutional academic freedom was incrementally eroded and the harm will increase over time unless corrected by future opinions.

¹⁹ See University of Pennsylvania v. E.E.O.C., ___ U.S. ___, 110 S.Ct. 577, 587 (1990).