Harry Keyishian was a junior at New York City's Queens College in 1952 when the Senate Internal Security Subcommittee came to town. The subcommittee’s goal was to persuade the local Board of Higher Education to be more aggressive in rooting out allegedly subversive faculty from the city’s public colleges.
The first professor to be called before the subcommittee was the economist Vera Shlakman, an officer in the left-wing Teachers Union, whose campaigns against low pay, poor school maintenance, and racially biased textbooks had antagonized city officials since the early 1930s. Shlakman had found Queens College "wonderful" when she arrived, in 1938—the faculty full of European intellectuals, refugees from Nazism, and the students diligent and eager.

Like many beleaguered academics in the early 50s, Shlakman objected to legislative probes into her political beliefs, and when the time came, she refused to tell the subcommittee whether she had ever been a Communist Party member. Despite her 14-year tenure at Queens, she was fired two weeks later.

The undergraduate Harry Keyishian, who up to this point had been more interested in girls than politics, joined a committee to protest Shlakman's firing. From that modest beginning, he would, 15 years later, become a protagonist in the U.S. Supreme Court's most important ruling on academic freedom.

One of Keyishian's favorite teachers, the literature scholar Oscar Shaftel, was the second person fired from Queens.

Like Shlakman, Shaftel refused to answer questions about his political beliefs or activities, but he did tell the subcommittee that he thought Communists could be competent teachers: "I cannot imagine an academic administrator of any sense and magnitude and dignity saying to Sean O'Casey, who has been generally associated with Communists, 'You may not teach the drama,' or tell Picasso, 'You cannot teach art.'"

For years, libertarians had fought laws and policies barring Communists from teaching as direct assaults on the First Amendment, while supporters of loyalty programs had painted all Communists as mental slaves of Moscow. In 1952 the Supreme
Court upheld New York's 1949 Feinberg Law, which required detailed procedures for investigating the loyalty of every public-school teacher and ousting anyone who had engaged in "treasonable or seditious acts or utterances" or joined an organization that advocated the overthrow of the government by "force, violence, or any unlawful means." It was a typical cold-war-era loyalty law; hence, Adler v. Board of Education, the Supreme Court's 1952 decision upholding it, had nationwide repercussions.

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In Adler, a majority of the court found no First Amendment problem with the Feinberg Law. Embracing the anti-Communist fervor of the time, the court said that teachers had no right to their jobs; and because they worked "in a sensitive area" where they shaped young minds, the authorities were entitled to investigate their political beliefs.

Even at that unfortunate moment for free speech, however, the court was not unanimous: Justice William O. Douglas wrote a fiery dissent in the Adler case. Douglas said the Feinberg Law "proceeds on a principle repugnant to our society—guilt by association"; furthermore, it "turns the school system into a spying project," with the ears of students, parents, and administrators "cocked for tell-tale signs of disloyalty." The law would "raise havoc with academic freedom," he predicted; "a pall is cast over the classrooms."

Fifteen years later, in 1967, Justice William J. Brennan would borrow Douglas's image of a pall over education in a case that overturned Adler and invalidated the Feinberg Law.
That 1967 case began at the Buffalo campus of the State University of New York. SUNY required all employees to sign a "Feinberg certificate" affirming that they were not members of the Communist Party, and that if they ever had been, they had disclosed that fact to the university’s president.

Some 300 SUNY-Buffalo professors had voted their opposition to the Feinberg certificate, but *Adler* was still the ruling precedent, and caution and a desire for job security prevailed. In the end, only four faculty members refused to sign the certificate; a fifth, the poet George Starbuck, declined to answer a question about subversive associations on a civil-service form. In 1964 the five rebels filed suit to challenge the Feinberg Law.

Harry Keyishian, who since his Queens College days had attended graduate school, served in the Navy, and started his professional life as an English instructor at Buffalo, was one of the five. He jumped at the chance to take his "revenge on the 50s" and became the lead plaintiff in 1967's *Keyishian v. Board of Regents*.

Some Supreme Court decisions over the previous decade had chipped away at loyalty programs, but Justice Brennan, writing in *Keyishian*, rejected wholesale the idea that restrictions on expression, ideas, and political associations are permissible under the First Amendment as conditions of public employment. And because the Feinberg Law singled out teachers, Brennan had particular words to say about education. "Our Nation is deeply committed to safeguarding academic freedom," he wrote, "which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

What had happened in the 15 years between the *Adler* and *Keyishian* cases? Of course, the political landscape had changed: The "haunted 50s" (to use the journalist I.F. Stone’s phrase) had
given way to the more libertarian 60s. Popular opinion had finally rejected the demagoguery of opportunists like Sen. Joseph McCarthy, and liberal Supreme Court justices had replaced more conservative ones (although even in the heady year of 1967, Keyishian was decided by a narrow 5-to-4 vote).

The fates of Vera Shlakman, Oscar Shaftel, and hundreds of others affected by loyalty programs in academe may seem like ancient history. But those events, and the court’s eventual recognition of First Amendment academic freedom, are stories with resonance today. Battles over free speech on the campus continue to bedevil our national politics. Today’s war on terrorism has replaced anti-Communism as a justification for limiting civil liberties, both on the campus and off.

Although fears of a return to the repressive zealotry of the late 40s and early 50s are overblown, we do face threats to academic freedom now, both institutionally and in the courts. Often those threats arise from a habit of mind, long prominent in American politics, that seeks simple answers to complex problems, that shuts out nuanced or radical critique, and that demonizes dissent, especially from the left.

Keyishian also left many questions about academic freedom unanswered. In the following decades, judges often applied the language of Keyishian broadly, leading one scholar to complain that, "lacking definition or guiding principle," First Amendment academic freedom "floats in the law, picking up decisions as a hull does barnacles."

As the federal courts became more conservative, that hull-and-barnacles critique gained adherents. Courts began to view the First Amendment concept of academic freedom, if they recognized it at all, as a right belonging to the university as an institution, not to individual professors. Some commentators argued that academic freedom, although important as a principle
of educational policy, has no basis in the Constitution.

Indeed, in the 2006 case *Garcetti v. Ceballos*, the Supreme Court threw the legacy of *Keyishian* into doubt. In *Garcetti*, the court continued its project of narrowing First Amendment protection for all public employees by ruling that statements made "pursuant to their official duties" can be subject to discipline without violating the Constitution.

In response to an alarmed dissent by Justice David H. Souter pointing out that professors' scholarship and teaching are part of their "official duties," Justice Anthony M. Kennedy, writing for the majority in *Garcetti*, added a caveat suggesting that just maybe—as if the question were undecided—"expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."

For the majority on today's Supreme Court, evidently, *Keyishian*'s recognition of First Amendment academic freedom, the product of two decades' bitter experience with loyalty investigations and anti-Communist purges, did not have much resonance.

Whatever the fate of academic freedom in the courts, it is widely accepted as a matter of educational policy. But questions still abound as to its meaning and scope. Obviously professors cannot, in the name of academic freedom, engage in sexual and racial harassment. But too often, vague and overbroad campus speech codes interfere with legitimate teaching. One example arose in 2007, when a Brandeis University professor used the term "wetback" in a course describing American attitudes toward Mexicans, and Brandeis declared him guilty of harassment.

Professors must also teach the subjects assigned, and not spend their time in a chemistry class lecturing about history or literature (which does not mean they should be punished for occasionally
straying from assigned topics). A history professor who denies the Holocaust in class, or a professor who teaches creationism instead of evolution in Biology 101, can be reassigned or even, after fair procedures, dismissed on grounds of incompetence. A professor who keeps such benighted views out of the classroom and out of his or her scholarly writing has a First Amendment right to air them without fear of retaliation by the university.

This First Amendment right to speak out as a citizen—what the American Association of University Professors calls "extramural speech"—should have protected the University of Colorado professor Ward Churchill, who wrote an essay after September 11, 2001, in which he attacked the stock traders who worked at brokerage firms in the World Trade Center as "little Eichmanns." The university understood that right, and so, responding to pressure to get him off the payroll, found instances of "research misconduct." A jury concluded that was a pretext; but the courts decided that Churchill should lose his case anyway, because the university committee that had recommended his firing was "immune" from suit.

The Churchill case not only made bad law; it demonstrated that, as in the McCarthy era, judges are not exempt from the temptation to bend constitutional principles to the political passions of the day. Churchill’s statement was hyperbolic and offensive, but the First Amendment should have protected him from retaliation wholly apart from the concept of academic freedom.

At the core of academic freedom are teaching and scholarship. Should those activities be a "special concern of the First Amendment," as the Supreme Court ruled in Keyishian? That is, are teachers an elite, with free-speech rights greater than everybody else’s? They are not.

But as Justice Felix Frankfurter explained in a 1952 case that
invalidated a test oath required of professors in Oklahoma, teachers are "the priests of our democracy" because it is their "special task ... to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens."

His point was that academic freedom is necessary not because teachers are smarter or better than everyone else, but because they serve the public interest by imparting the skills to think critically and participate meaningfully in the great, if often flawed, American experiment in democracy.

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