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## Open Access and Academic Freedom: Teasing out Some Important Nuances

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**Abstract:** Discussion of the ways in which Open Access (OA) and academic freedom interact is fraught for a number of reasons, not least of which is the unwillingness of some participants in the discussion to acknowledge that OA might have any implications for academic freedom at all. Thus, any treatment of such implications must begin with foundational questions. Most basic among them are: first, what do we mean when we say ‘open access’; second, what do we mean when we say ‘academic freedom’? The answers to these questions are not as obvious as one might expect (or hope), but when they are answered it becomes much easier to address a third, also very important, question: in what ways might OA and academic freedom interact? With every new OA mandate imposed by a government agency, institution of higher education, or funding organization, careful analysis of this issue becomes more urgent. This article attempts to sort out some of these issues, controversies, and confusions.

**Keywords:** open access; academic freedom

The intersection of open access (OA) and academic freedom is contested intellectual and ideological terrain. One reason for this is the fact that OA itself is a politically fraught issue; the question of whether it is acceptable for copyright holders—especially commercial publishers—to restrict access to scholarly content, making that content available only to those who pay for it, was uncontroversial prior to the advent of the Internet (when such content was distributed primarily by means of physical documents), but is now highly contested and has become increasingly so over the past twenty years. To the degree that OA is seen and treated by those in

power as a moral imperative, the freedom of authors to publish as they wish (including in toll-access venues) will inevitably be constrained, and depending on one's understanding of what academic freedom includes, such constraints may be seen to impinge upon that freedom.

Given both the importance of access to scholarship and the importance of academic freedom, any tension between the two is bound to result in difficulties for public discourse and policy formation, particularly within academia; those who favor maximal authorial freedom may be seen as anti-OA, while those who favor maximal OA may be seen as willing to oppress authors. Sorting out these difficulties requires, first of all, establishing what is meant by the terms 'open access' and 'academic freedom.' Unfortunately, neither term has a universally accepted definition, so the first order of business must be to establish and understand the various ways in which each is used.

## **NUANCE #1: DEFINITIONS OF OPEN ACCESS**

The open access movement began to come into focus nearly 20 years ago, with a public statement of principles that emerged from the Budapest Open Access Initiative (BOAI), a conference convened by the Open Society Institute in late 2001. The BOAI defined 'open access' as follows:

*By 'open access' to [research] literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution and the only role for copyright in this domain should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.<sup>1</sup>*

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<sup>1</sup> 'Budapest Open Access Initiative'. Declaration published 2002.  
<https://www.budapestopenaccessinitiative.org/boai15-1> (accessed 12 November 2020).

Although this definition is not universally accepted, it remains the one most commonly invoked when a definition of OA is requested. It should be noted that it includes the following essential elements:

1. Free online availability of the text to the public
2. A grant to the public of unrestricted reuse rights
3. Authors' retention of exclusive rights only as they pertain to 'the integrity of their work' and 'the right to be properly acknowledged and cited'

The BOAI definition is not the only one, however. In 2003, a year after that definition was promulgated, another one emerged from a similar gathering in Berlin. The Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities is somewhat stricter than the BOAI definition; it requires not only that content be freely available for reading, download, and unlimited reuse, but also that it be deposited 'in at least one online repository ... that is supported and maintained by an academic institution, scholarly society, government agency, or other well-established organization that seeks to enable open access, unrestricted distribution, interoperability, and long-term archiving.'<sup>2</sup> Thus, according to the Berlin definition, an article that is freely available for reading, download, and unrestricted reuse, but which is hosted uniquely by a commercial publisher, may not qualify as OA.

It is worth noting here that in this context, "unrestricted reuse" means reuse rights according to the general parameters laid out in a Creative Commons Attribution-only License<sup>3</sup>. Under this license, the work is made freely available not only for all to read and download, but also for all to republish and redistribute, including for commercial purposes, without having to seek further permission from the copyright holder. There is also no restriction on public performance or the creation of derivative works. The license requires only that those who reuse the work in some way give attribution to the author as the creator of the original version.

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<sup>2</sup> 'Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities'. Declaration published 22 October 2003. <https://openaccess.mpg.de/Berlin-Declaration> (accessed 12 November 2020).

<sup>3</sup> <https://creativecommons.org/licenses/> (accessed 12 November 2020).

Another definition was also put forward in 2003, this one arising from a meeting that took place in Bethesda, Maryland. The Bethesda Statement on Open Access Publishing<sup>4</sup> offers a definition quite similar to the Berlin version, with one very important difference: according to the Bethesda Statement, a publication is only OA if it is ‘deposited immediately upon publication’ in a suitable repository. Thus, according to the Bethesda Statement, applying a temporary embargo to a published paper—thereby making it available only to paying readers for some period of time before it is made freely available—would disqualify it from being considered an OA publication.

In a less formal manner, other individuals and organizations have also put forward their own proposals and assertions regarding what constitutes genuine open access. The Directory of Open Access Journals (DOAJ) will designate a journal as OA even if it allows authors to impose various reuse restrictions on their work<sup>5</sup>, whereas the definition adopted by the Scholarly Publishing and Academic Resources Coalition (SPARC) makes the complete grant of all exclusive copyright prerogatives a defining feature of OA<sup>6</sup>. To add to the confusion, the term “open access” may be used in casual conversation among members of the scholarly and publishing communities to describe various levels of openness, all of them having in common only the free availability of text to the public. (In the OA community, the term ‘public access’ has gained common usage to distinguish work that is only freely available to read and download from that which is also available for unrestricted reuse<sup>7</sup>.)

Since there is no Global Ministry of Open Access, and no centralized authority to which one may turn with questions about what the term ‘really’ means, and since disconnects between the various definitions reflect, in some cases, conflicting and deeply held ideological beliefs about how the world of scholarship should be, there is little likelihood that a single universally-

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<sup>4</sup> ‘Bethesda Statement on Open Access Publishing’. Statement published 20 June 2003. <http://legacy.earlham.edu/~peters/fos/bethesda.htm> (accessed 12 November 2020).

<sup>5</sup> Directory of Open Access Journals. ‘Information for Publishers: Copyright, Licensing, Publishing Rights’. <https://doaj.org/publishers#licensing> (accessed 12 November 2020).

<sup>6</sup> Scholarly Publishing and Academic Resources Coalition. ‘Open Access to Scholarly and Scientific Research Articles’. <https://sparcopen.org/wp-content/uploads/2016/01/SPARC-Open-Access-Factsheet.pdf> (accessed 12 November 2020).

<sup>7</sup> Scholarly Publishing and Academic Resources Coalition. ‘SPARC Statement on the Department of Energy’s Plan for Increasing Public Access to the Results of Federally-funded Research’. Press release (4 August 2014). <https://sparcopen.org/news/2014/sparc-responds-to-the-department-of-energys-public-access-plan/> (accessed 12 November 2020).

accepted definition of the term will emerge anytime soon. This means that whenever one engages with someone else in conversation about OA, it is advisable to begin that conversation by asking each other ‘What do you mean when you say OA?’.

## **NUANCE #2: DEFINITIONS OF ACADEMIC FREEDOM**

To make matters more complicated, academic freedom is no less variably defined than OA is. Unlike that of OA, the definition of academic freedom is sometimes enshrined in law—but this only means that its definition varies from one polity to another, and in many countries there is no official, legal definition of academic freedom at all. And even where a right to academic freedom exists in a constitution or in statute, the term itself is often left undefined.

For example, in the United States academic freedom is not a legal right. It is, instead, a cultural and institutional norm that is deeply held and respected in the scholarly community, where it is generally believed that academic freedom is essential to the unfettered pursuit of truth. Unless academic freedom is vigilantly protected, the logic goes, there is too much risk that academics will be constrained in their pursuit of truth by political or institutional pressure. The parameters of academic freedom in the United States are enshrined in a statement made in 1940 by the American Association of University Professors (AAUP), which says that academics ‘are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties’<sup>8</sup>. While one notable piece of case law—*Keyishian v. Board of Regents of the University of the State of New York*—found that academic freedom is ‘a special concern of the First Amendment which does not tolerate laws that cast a pall of orthodoxy over the classroom,’<sup>9</sup> there is no statute in the United States that defines academic freedom or that gives it specific legal protection.

Outside of the United States, views, policies, and laws regarding academic freedom are highly variable.

From an international perspective, there are some who see academic freedom as being implied in Article 26 of the United Nation’s (UN) 1948 Universal Declaration on Human

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<sup>8</sup> American Association of University Professors. ‘1940 Statement of Principles on Academic Freedom and Tenure’. <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> (accessed 12 November 2020).

<sup>9</sup> *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

Rights<sup>10</sup>, which posits a universal right to education. In interpreting this Article, the UN's Committee on Economic, Social, and Cultural Rights (ESCR) has specifically argued that 'the right to education can only be enjoyed if accompanied by academic freedom.' Furthermore:

*Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfill their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds.*<sup>11</sup>

Of course, neither the UN's Declaration nor the ESCR's interpretation of Article 13 carries the force of law. At the national level, however, there are countries that have given academic freedom that level of recognition. In Germany, for example, academic freedom is written into Article 5, paragraph 3 of the national constitution, although in terms that are rather vague: 'Kunst und Wissenschaft, Forschung und Lehre sind frei' ('Art and scholarship, research and teaching are free')<sup>12</sup>. The South African Constitution of 1996 guarantees 'academic freedom and freedom of scientific research,' without specifying further what those freedoms entail<sup>13</sup>, and Sweden, similarly, has an article in its constitution that says simply 'the freedom of research is protected

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<sup>10</sup> United Nations. 'Universal Declaration of Human Rights'. Declaration published 10 December 1948. <https://www.un.org/en/universal-declaration-human-rights> (accessed 12 November 2020).

<sup>11</sup> United Nations Committee on Economic, Social, and Cultural Rights. 'General Comment 13 The Right to Education.' (12 December 1999) <https://www.escr-net.org/resources/general-comment-13-right-education> (accessed 12 November 2020).

<sup>12</sup> Basic Law for the Federal Republic of Germany. Article 5, paragraph 3. [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) (accessed 12 November 2020). Translation the author's.

<sup>13</sup> Constitution of the Republic of South Africa No. 108 of 1996, Chapter 2, Section 16(d). 18 December 1996. <https://www.gov.za/sites/default/files/images/a108-96.pdf> (accessed 12 November 2020).

according to rules laid down in law'<sup>14</sup>. In the United Kingdom, the Education Reform Act of 1988 provides assurance that 'academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas or controversial or unpopular opinions, without placing themselves in danger of losing their jobs or privileges they may have at their institutions'<sup>15</sup>. The constitutions of Namibia<sup>16</sup>, Malawi<sup>17</sup>, and Ghana<sup>18</sup> all include explicit provisions for academic freedom (though none of those documents offers a definition for the term). On a less formal level, there have been various statements and declarations issued by academic organizations, such as the Kampala Declaration<sup>19</sup> (which condemns state-based "restrictions on freedom of association, movement, speech and publishing" in the context of academic institutions)

What this means is that when it comes to academic freedom, the situation is sadly similar to that of open access: when two people from different social and legal milieux discuss academic freedom, they cannot necessarily assume that both are discussing quite the same thing.

Having seen that definitions of OA remain a matter of dispute and that academic freedom is a concept with different meanings and varying levels of legal protection, we now turn to the question of whether (and if so, how) OA and academic freedom interact—and immediately see both that the issue is complex and that it is not obviously subject to clear, let alone authoritative, resolution. However, one question does immediately suggest itself: given that OA concerns the dissemination and reuse of scholarship, not its content, what reason is there to believe that these two concepts interact at all? In other words, if—as we often assume—academic freedom is about freedom of thought, inquiry, and speech, then where would we get the idea that OA (which

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<sup>14</sup> Sweden's Constitution of 1974 with Amendments through 2012, Part 7, Article 18.  
[https://www.constituteproject.org/constitution/Sweden\\_2012.pdf?lang=en](https://www.constituteproject.org/constitution/Sweden_2012.pdf?lang=en) (accessed 12 November 2020).

<sup>15</sup> Education Reform Act 1988, Part IV: Academic Tenure, Section 202(2)(a).  
<http://www.legislation.gov.uk/ukpga/1988/40/section/202> (accessed 12 November 2020).

<sup>16</sup> Constitution of the Republic of Namibia, Chapter 3, Article 21(1).  
<https://www.un.int/namibia/namibia/constitution> (accessed 12 November 2020).

<sup>17</sup> Constitution of Malawi, Chapter 4, Article 33.  
[https://malawilii.org/system/files/consolidatedlegislation/null/constitution\\_of\\_malawi\\_pdf\\_25073.pdf](https://malawilii.org/system/files/consolidatedlegislation/null/constitution_of_malawi_pdf_25073.pdf)  
(accessed 12 November 2020).

<sup>18</sup> Constitution of the Republic of Ghana, Chapter 5, Article 21(b).  
[https://www.constituteproject.org/constitution/Ghana\\_1996.pdf](https://www.constituteproject.org/constitution/Ghana_1996.pdf) (accessed 12 November 2020).

<sup>19</sup> Council for the Development of Economic and Social Research in Africa. 'Kampala Declaration on Intellectual Freedom and Social Responsibility.' (26-29 November 1990)  
<http://hrlibrary.umn.edu/africa/KAMDOK.htm> (accessed 12 November 2020).



affects not the content of scholarship, but only its availability and reuse) has anything to do with it?

Here it is worth noting that there are many, particularly in the OA advocacy community, who argue that in fact OA and academic freedom are either mutually complementary by definition<sup>20</sup> or do not interact in any meaningful way<sup>21</sup>. Others have argued that academic freedom is so ill-defined that there's no real way to say whether or how it can be affected by OA<sup>22</sup>.

Things are not that simple, however, particularly in the United States, where the accepted urtext of academic freedom specifically mentions 'full freedom' not only 'in research' but also 'in the publication of the results.' It is in the arena of publishing behavior that concerns about a potential conflict between OA and academic freedom arise, and it is exactly the vagueness that characterizes so many definitions of academic freedom that contributes to the difficulty of resolving questions about such conflicts. Most references to academic freedom in law and policy say nothing one way or the other about freedom to decide how and where to publish. The AAUP statement is one outlier in that it makes specific reference to 'full freedom... in... publication,' whereas the British definition of OA, which is unusually specific and direct, focuses squarely on the content of research and scholarship and on scholars' freedom to express their views and findings, saying nothing at all about freedom to choose where and how to publish one's work. The Kampala Declaration is also unusual in that it frames "restrictions on... publishing" very specifically as an infringement of academic freedom.

This is particularly interesting in light of the fact that some of the strongest expressions of concern about OA and academic freedom have come, in recent years, from British learned societies. The British Sociological Association has raised a concern that, in a publishing environment significantly characterized by APC-funded OA journals, academic freedom would be threatened

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<sup>20</sup> Rice, C. (2013) 'Open Access: Four Ways It Could Enhance Academic Freedom'. Blog post in *The Guardian*. <https://www.theguardian.com/higher-education-network/blog/2013/apr/22/open-access-academic-freedom-publishing> (accessed 12 November 2020).

<sup>21</sup> Berkman Klein Center. 'Good Practices for University Open-access Policies: Talking about a Policy'. [https://cyber.harvard.edu/hoap/Talking\\_about\\_a\\_policy](https://cyber.harvard.edu/hoap/Talking_about_a_policy) (accessed 12 November 2020).

<sup>22</sup> Eve, Martin Paul. 'Some Jottings on Academic Freedom and Plan S/Open Access'. <https://eve.gd/2018/10/23/jottings-on-academic-freedom-and-plan-s/> (accessed 12 November 2020).

*... as academics will have to compete internally within their institutions for APCs. Publication will therefore not rest on the quality of work done and peer reviewed by subject experts, but will be judged by academic managers and committees, who may be influenced by internal academic politics, subject to the pressures of allocating scarce resources without necessarily being able to make specialist quality judgements which are the business of the journal editors and peer reviewers.*<sup>23</sup>

A similar concern was raised on basically the same grounds in the same context by the British Academy (“if UK academics are pressured into not publishing in leading journals in their field, this ... restricts academic freedom”<sup>24</sup>) and the Royal Historical Society (“if access to Gold funds becomes not just a marker of prestige inside universities but a vital mode of access to publication, then one of the principal sources of creativity in and the high international standing of the UK HE system—academic freedom—will be lost”<sup>25</sup>).

Such concerns are amplified to the degree that researchers are deeply dependent on funders for the subvention of APC payments. Will academics be able to rely on, for example, government funders to support the open publication of work that might contain findings inimical to the government’s interests? Will private funders make it clear (either explicitly or implicitly) that their grant funds can only be used to support OA publication when the scientist’s findings are congenial to the funders’ agendas?

But all of this begs the important question raised earlier: how can the emergence of OA itself—which is not necessarily supported by APC-based funding models, and which in theory only broadens and extends publishing opportunities—possibly be seen as a threat to the academic freedom of scholars, however that freedom may be defined?

This brings us to the third important nuance that must be taken into account when considering the interactions of OA and academic freedom.

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<sup>23</sup> UK Parliament. ‘Open Access: Written Evidence Submitted by the British Sociological Association.’ <https://publications.parliament.uk/pa/cm201213/cmselect/cmbis/writev/openaccess/m23.htm> (accessed 12 November 2020).

<sup>24</sup> UK Parliament. ‘Open Access: Written Evidence Submitted by the British Academy.’ <https://publications.parliament.uk/pa/cm201213/cmselect/cmbis/writev/openaccess/m13.htm> (accessed 12 November 2020).

<sup>25</sup> UK Parliament. Business, Innovation and Skills Committee. ‘Written Evidence Submitted by the Royal Historical Society.’ <https://publications.parliament.uk/pa/cm201314/cmselect/cmbis/99/99vw64.htm> (accessed 12 November 2020).

### **NUANCE #3: VOLUNTARY OPEN ACCESS AND COMPULSORY OPEN ACCESS**

This may be the most important nuance of the three, because the element of compulsion is essential for there to be any serious conflict between OA and academic freedom. To my knowledge, no one has argued—or would argue—that OA, when freely embraced by a scholarly author, creates any tension whatsoever with that author’s academic freedom. The issue arises only when OA is made compulsory by those with power over authors, particularly by institutions, funders, or governments—either by means of a direct requirement to publish in OA venues, or by the driving out of non-OA publishing options. Different entities have different degrees of power over authors, and therefore different levels of ability to coerce them into specific publishing behaviors<sup>26</sup>, and the urgency of the academic freedom question increases as that power increases.

For example, an individual journal has relatively little coercive power over authors, because in most cases authors have more than one journal in which they may publish and still achieve their scholarly and career goals. A publisher’s ability to coerce authors increases with the number of journals it publishes and with the desirability of its journals as places in which to publish. A research funder has more significant power over authors, and employers have even more; governments have the most power of all. Thus, if a government says ‘Scholars in our jurisdiction must make their work OA,’ this poses much greater and more troubling implications for academic freedom than a journal saying ‘All articles we publish will be made OA.’ It comes down to the question of what the AAUP calls ‘freedom in publication’—the more power an entity has to constrain a scholar’s publishing options, the better positioned that entity is to limit her ‘freedom in publication.’ And the more we see ‘freedom in publication’ as an important dimension of academic freedom, the more troubling the exercise of such power over authors will be.

Clearly, then, the degree to which OA mandates are relevant to academic freedom depends on the degree to which one sees the right to make unconstrained publishing choices an intrinsic part of academic freedom.

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<sup>26</sup> Anderson, R. ‘Open Access, Academic Freedom, and the Spectrum of Coercive Power’. *The Scholarly Kitchen* 5 November 2018. <https://scholarlykitchen.sspnet.org/2018/11/05/open-access-academic-freedom-and-the-spectrum-of-coercive-power/> (accessed 12 November 2020).

Do such mandates exist? Yes, and they are growing in number and impact. For various political and structural reasons, institutional OA mandates remain exceedingly rare in the United States<sup>27</sup>. However, in countries where there is a high degree of centralized control over higher education, such as the United Kingdom and Europe, OA mandates are more common<sup>28</sup>—a recently implemented scheme known as Plan S has been particularly controversial<sup>29</sup>—and there has been some growth in such mandates at the funder level in the United States as well, notably on the part of the Gates and Ford Foundations. Federal funding agencies in that country, acting in response to the dictates of a 2013 memorandum from White House Office of Science and Technology Policy (OSTP)<sup>30</sup>, have adopted mandates that require ‘public access’ to the published results of funded research—‘public access,’ again, being distinguished from ‘open access’ in that there is no requirement either that the publications be made immediately available (embargo periods of up to twelve months are allowed) or that they be made available for unrestricted reuse.

## CONCLUSION

The interactions of OA and academic freedom are not always easy to discern, and discussion about such impacts is complicated by ideological differences between members of the scholarly community and by the complexity of the scholarly communication ecosystem in which its dynamics play out. Given the importance of the issues at play, however, this discussion is more important than ever. A step in the right direction of such discussion is the resolution of confusion that arises from varying definitions of the terms ‘open access’ and ‘academic freedom,’ from the disparate legal and cultural contexts in which those terms are used, and from the ideological differences that often exist between those discussing the issues. While global resolution of these

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<sup>27</sup> Anderson, R. (2016) ‘Why Are There Virtually No Mandatory Open Access Policies at American Universities?’. *Learned Publishing* 29:215-218.

<sup>28</sup> Swan, A. (2015) ‘Open Access Policies: Policy Effectiveness’. Paper presented at SPARC Europe Workshop, LIBER 2015, London (24 June 2015).

<sup>29</sup> Rabesandratana, Tania (2019) ‘Will the World Embrace Plan S, the Radical Proposal to Mandate Open Access to Scientific Papers?’, *Science* 3 January 2019. <https://www.sciencemag.org/news/2019/01/will-world-embrace-plan-s-radical-proposal-mandate-open-access-science-papers> (accessed 12 November 2020).

<sup>30</sup> The White House, Office of Science and Technology Policy ‘Expanding Public Access to the Results of Federally Funded Research’. 22 February 2013 <https://obamawhitehouse.archives.gov/blog/2013/02/22/expanding-public-access-results-federally-funded-research> (accessed 12 November 2020).

differences may be out of reach, clarification of the terms—at least in specific conversational contexts—is not.

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*Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

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