Academic Freedom of Speech

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Introduction

Academic freedom refers to "the ability of educational institutions, professors, and other scholars to pursue knowledge without unreasonable interference from the government or, in the case of individual faculty members, from within educational institutions themselves."[1] The academic freedom principle has been attacked from both the political Right and the political Left in recent years.[2] Although the critiques come from opposite sides of the ideological divide, both proffer the same argument: that teachers and scholars are spreading dangerous ideas that need to be stopped. Those on the Left claim the dangerous ideas

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* Associate Professor, Barry University Dwayne O. Andreas School of Law. Thank you to Dean Leticia Diaz and Barry University School of Law for their support for this article. Thank you to Ana Romero and Carlos Vassell for excellent research assistance.

[1] David Hudson, *"The Foundation of Intellectual Discovery": The Role of Academic Freedom in Civil Society*, Found. for Individual Rts. & Expression (Nov. 1, 2022), https://www.thefire.org/news/foundation-intellectual-discovery-role-academic-freedom-civil-society. The Organization of American Historians elaborates on this definition:

> Academic freedom is the principle of freedom of expression for scholars engaged in discipline-related teaching, learning, research, publication, and service. Academic freedom is the foundation of intellectual discovery; it ensures an open search for knowledge and "nourishes the environment within which students develop critical habits of mind" essential to the citizenry of a democratic society. Academic freedom entails both rights and responsibilities.

Academic Freedom, Org. Am. Historians, Dec. 20, 2020, https://www.oah.org/about/governance/policies/academic-freedom-guidelines-and-best-practices (footnote omitted).

[2] For a critique from the Left, see Zamir Ben-Dan, *"Hold Your (Un)scholarly Tongue": Dismantling Sir Racism's "Academic Freedom' Shield*, 33 S. Cal. Rev. L. & Soc. Just. 159, 162 (2024) (arguing that "[t]raditional academic freedom" must be reworked for the modern world because it "protects plainly racist academic speech, assuming an all-white intellectual community and assuming that racial hierarchy is necessary for democratic existence"). For a critique from the Right, see S. Ernie Walton, *Gender Identity Ideology: The Totalitarian, Unconstitutional Takeover of America's Public Schools*, 34 Regent U. L. Rev. 219, 220-21 (2022) (arguing that that has been a "totalitarian-style education" takeover in America's schools and that "America's schools have slowly become indoctrination factories for the ideology that sex is fluid, that there are multiple genders, and that a person's 'sex assigned at birth' has nothing to do with a person's so-called 'gender identity'").

are racist, sexist, transphobic, homophobic, etc.[3] Those on the Right claim the dangerous ideas are tyrannical, supportive of Communism, anti-religious, anti-American, etc.[4] Critics on both sides argue, either directly or by implication, that the shield of academic freedom is being misused by political adversaries to protect harmful speech that should not be protected.[5] Such critiques raise important questions. Is academic freedom, as an independent doctrine, a valid basis for protecting the speech of educators? If so, on what principle or principles does this doctrine rest? What is its scope? Is it, as some claim, being misused in a way that undermines the purposes for which academic speech is protected? And finally, given the divergent approaches courts have taken to the issue of academic freedom, what might be a workable framework for courts moving forward?

The first two of these questions—which pertain to the validity and basis for the academic freedom doctrine—will be addressed in Part I. The doctrine's origins in American jurisprudence will be addressed in Part II. Its modern scope, derived primarily from case law and recent scholarly treatment, will be addressed in Part III. Contemporary progressive critiques of academic freedom will be addressed in Part IV, while contemporary conservative attacks on academic freedom will be discussed in Part V. Part VI will put forth a four-part framework, or test, which courts might use to assess actions taken by institutions and governments to curtail individual academic freedom, or to retaliate against faculty members for their academic speech. Part VII will conclude.

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[3] *See, e.g.*, Ben-Dan, *supra* note 2, at 162; Logan Mitchell, *Delegitimizing Transphobic Views in Academia*, 30 J. ETHICS & SOC. PHIL. 628, 629 (2025) ("Considerations of academic freedom seem to compel providing platforms of some sort to those advocating for supposedly nuanced transphobic views, even if those views are implausible and harmful.").

[4] *See, e.g.*, Walton, *supra* note 2, at 220-21; Dara E. Purvis, *Transgender Students and the First Amendment*, 104 B.U. L. REV. 435, 462 (2024) (noting that Republican National Committee Chair Ronna McDaniel had written "that children were 'being indoctrinated with anti-American and sexually-explicit propaganda' in school").

[5] *See* Ben-Dan, *supra* note 2, at 162; Mitchell, *supra* note 3, at 629; Walton, *supra* note 2, at 220-21; Purvis, *supra* note 4, at 462.

BACKGROUND

I. THE CASE FOR PROTECTING ACADEMIC FREEDOM

A. *The Principles Underlying Academic Freedom*

It has long been recognized that in liberal societies—those founded on classical liberal principles of individual rights, equality before the law, and democratic governance[6]—teachers and scholars play a crucial role.[7] Such individuals foster critical thinking, promote social awareness, and shape societal values.[8] Yet these very same qualities often make academic professionals[9] a threat to those in power.[10] Although the threat is felt to some degree by leaders in representative democracies, it is far greater in authoritarian regimes.[11] The more absolute a leader's power, the more threatened they are by academics whose work challenges official dictates. [12]

This is not surprising. Academics, in both teaching and research, are tasked with advancing the frontier of knowledge for themselves, their colleagues, their students, and the public.[13] This search for truth is

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[6] A liberal society, as the term "liberal" is used in the classic sense, is one founded on the principles of liberalism, prioritizing individual rights, freedoms, and equality before the law. *See, e.g.*, Melissa Mayeux, *A Match Made in Antitrust Heaven? A Liberalistic Exploration of the Medical Match's Antitrust Exemption*, 13 WASH. U. JURIS. REV. 121, 138-39 (2020). It values individual liberty, freedom of speech, religion, and assembly, alongside the rule of law and democratic governance. *Id.*

[7] Henry A. Giroux, *Educators as Public Intellectuals and the Challenge of Fascism*, POL'Y FUTURES EDUCATION, Nov. 2024, at 1534, 1535-36, 1539, https://doi.org/10.1177/14782103241226844.

[8] *Id.*

[9] Throughout this article, I will occasionally refer to educators and intellectuals collectively as "academics" or "academic professionals." This term includes professors and researchers. When referring specifically to college- and university-level faculty members, I will use the term "professors" or "faculty members."

[10] *See, e.g.*, Jessica M. Zaccagnino, *The Tragedy of Central European University: Theorizing Hungarian Illiberal Democracy and Its Threat to Academic Freedom*, 52 CONN. L. REV. 1187, 1241 (2021) ("Intellectuals pose a specific threat to authoritarians because critical discourse threatens to destabilize their régimes.").

[11] *See id.* at 1233-34, 1241.

[12] *See id.* at 1233-34.

[13] *See* Matthew Reid Krell, *The Ivory Tower Under Siege: A Constitutional Basis for Academic Freedom*, 21 GEO. MASON U. CIV. RTS. L.J. 259, 271 (2011) ("The ethical responsibilities of academics are to 'seek and state the truth as they see it. . . . To exercise critical self-discipline and judgment in using, extending, and transmitting knowledge, and to practice intellectual honesty.") (citation modified).

one of the central principles of the academic enterprise.[14] But those who hold power often resist the search for objective truth.[15] Authoritarian governments, for example, often "seek[] to undermine public discourse by attacking and devaluing education, expertise, and language," precisely because the search for truth so often runs counter to the aims of those in power.[16]

Accordingly, the very thing that makes academics an enemy to authoritarians—truth seeking—makes them indispensable to liberal societies. But these benefits endure only when academics are free to pursue knowledge, however unpopular or inconvenient. This is one of the principal reasons academic freedom has long been recognized as a cornerstone of democratic society, rooted in the broader principle of free speech.[17] Protecting academic freedom ensures orthodox doctrine cannot be dictated by a central authority by protecting the freedom to hold and express unpopular ideas.[18] Indeed, the same constitutional and philosophical values that protect free expression in public discourse[19] must be vigorously defended within academic institutions, where it is not only individual rights at stake, but also the intellectual vitality of society at large.[20]

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[14] *See id.*

[15] *See, e.g.*, Zaccagnino, *supra* note 10, at 1241.

[16] *See id*. at 1207.

[17] *See* Aziz Huq, *Easterbrook on Acad. Freedom*, 77 U. CHI. L. REV. 1055, 1055-56 (2010).

[18] *See, e.g.*, R.A.V v. St. Paul, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed."); Virginia v. Black, 538 U.S. 343, 358 (2003) ("The hallmark of the protection of free speech is to allow free trade in ideas—even ideas that the overwhelming majority of people might find distasteful or discomforting."); Boy Scouts of America v. Dale, 530 U.S. 640, 647-48 (2000) (asserting the First Amendment right to free speech "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas"); *see also* Chapin Cimino, *Freeing Speech and the First Amendment Value of Promoting Public Discussion*, 42 T. MARSHALL L. REV. 67, 72 n.16 (2016) (citing numerous Supreme Court cases supporting the assertion that an underlying purpose of protecting free speech is to protect unpopular views).

[19] The principles that support protecting free expression as a fundamental right include self-governance, discovering truth, advancing autonomy, and promoting tolerance. ERWIN CHEMERINSKY, THE FIRST AMENDMENT 5-9 (2024).

[20] *See, e.g.*, Gerald S. Kerska, *Balancing First Amendment Rights with an Inclusive Environment on Public University Campuses*, 101 MINN. L. REV. 1791, 1792 (2017) (setting out the University of Minnesota principles on free speech, which state, *inter alia*, "[a] public university must be absolutely committed to protecting free speech, both for constitutional and academic reasons" and "[e]ven when protecting free speech conflicts with other important University values, free speech must be paramount").

As a result, numerous academic institutions have adopted rules protecting the academic freedom of faculty members in their teaching, research, and publication.[21] Academic freedom is, at its most fundamental level, an articulation of how the freedom of speech is protected in the academic realm.[22] The First Amendment of the U.S. Constitution enshrines the right to speak freely, particularly on matters of public concern.[23] Public academic institutions must comply with First Amendment limitations, and many private academic institutions have voluntarily agreed to abide by them.[24] In either case, however, for academics to fulfill their societal purpose, they must be allowed to question dominant narratives, publish dissenting findings, and engage students in open inquiry.[25] Without this freedom, education becomes indoctrination. Scholarship becomes sycophancy. In scholarly literature, in the laboratory, and in the classroom, the ability to challenge widely-held assumptions without fear is not a luxury—it is a necessity.

The commitment to academic freedom rests on the principle that truth emerges through the clash of ideas.[26] As John Stuart Mill noted, even false ideas have value because they force defenders of truth to

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[21] *See* William E. Thro, *Embracing Constitutionalism: The Court and the Future of Higher Education Law*, 44 U. DAYTON L. REV. 147, 150 n.23 (2019) (noting how numerous universities have adopted the University of Chicago's Report of the Committee on Freedom of Expression Principles, or the "Chicago Statement," advocating for the protection of academic freedom).

[22] *See* Sara E. Gross Methner, *A Catholic University Approach to Campus Speech: Using Constitutional Academic Freedom to Hold the Tension of Free Speech, Inclusive Diversity, and University Identity*, 15 U. ST. THOMAS L.J. 358, 378 n.119 (2019); *see also* Erwin Chemerinsky, *Hate Speech Is Protected Free Speech, Even on College Campuses*, VOX (Dec. 26, 2017) (opining that free speech principles under the First Amendment "are essential to academic freedom"), https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest.

[23] *See* U.S. CONST. amend. I; *see also* Snyder v. Phelps, 562 U.S. 443, 444 (2011) ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection.") (alteration in original) (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

[24] *See* Robert H. Jerry II, *Framing Campus Free Expression Conflict Through a Dispute Resolution Optic: Insights for Campus Leaders*, 2018 J. DISP. RESOL. 57, 66 (2018) ("As state actors, all public universities are legally bound to protect the constitutional rights of their students, and thus the protections of the First Amendment apply on public campuses. Private universities are not state actors, and because the First Amendment limits only government action, a private university is not bound by the First Amendment unless its governing board adopts rules that make the principles of the First Amendment applicable on the campus. Many private universities have done exactly that.").

[25] *See* Gross Methner, *supra* note 22, at 378 n.119; Chemerinsky, *supra* note 22.

[26] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (asserting that "the best test of truth is the power of the thought to get itself accepted in the competition of the market").

sharpen their arguments and test their assumptions.[27] The freedom to be wrong, to explore unconventional hypotheses, or to offend dominant ideologies is essential to human progress. Galileo's conflict with the Catholic Church and the eventual triumph of heliocentrism exemplifies how suppressing academic inquiry can delay truth and harm society.[28] This classic phenomenon occurs all the time in modern society, albeit most often not with such great scientific significance.[29] We need not reach back to antiquity to observe the suppression of views that later become broadly accepted.[30]

B. *Past Examples of Government Interference with Academic Freedom Demonstrate the Dangers Posed*

History offers sobering lessons about the consequences of restricting academic freedom. One of the earliest records of academic censorship was the burning of books and burying of scholars that was purported to have taken place in 213 BCE during the first Chinese dynasty.[31] Specifically, the Chinese emperor Qin Shi Huang attempted to consolidate his power and destroy threats to his rule by outlawing all Confucian writing and teaching, ordering the burning of all Confucian books, and ordering the burying alive of 460 Confucian scholars.[32] Qin Shi Huang's purge reportedly destroyed countless works of philosophy, history, literature, and religion, as well as the lives of leading intellectuals.[33]

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[27] *See* JOHN STUART MILL, ON LIBERTY 30 (Batoche Books 2001) (1859).

[28] *See* Nathaniel T. Noda, *Perpetuating Cultures: What Fan-Based Activities Can Teach Us About Intangible Cultural Property*, 44 CREIGHTON L. REV. 429, 450-51 (2011).

[29] *See id.*

[30] This is particularly true in today's digital world, where politically driven narratives are disseminated broadly with unprecedented speed, often misinforming large segments of the public. *See* Wes Henricksen, *The Price of Disinformation*, 15 UC IRVINE L. REV. 731, 732–33 (2025) (discussing examples of recent polling revealing large portions of the public being misinformed on major issues because of buying into ideological narratives).

[31] *See* Lois Mai Chan, *The Burning of the Books in China*, 213 B.C., 7 J. LIBR. HIST. 101, 101-08 (1972).

[32] *See id.*; *see also* Xiangshu Fang, *Burning Books and Burying Scholars: On the Policies of the Short-Lived Qin Dynasty in Ancient China (221-207 B.C.)*, 3 INT'L J. LIBERAL ARTS & SOC. SCI. 54, 55 (2015) ("The book-burning was so thorough and vicious that even the records of [the first emperor's] own ancestry were destroyed.").

[33] *See* Chan, *supra* note 31, at 101-08. Some modern scholars cast doubt on the historical accuracy of the claim. *See, e.g.*, MICHAEL NYLAN, THE FIVE "CONFUCIAN" CLASSICS 29-30 (2001).

The crackdown on academic freedom is not an issue limited to antiquity. The twentieth century is replete with its own examples. In the wake of the United States' entry into the First World War, American universities and school districts imposed strict bans on teaching or researching the German language and culture.[34] At the height of this "anti-German hysteria,"[35] German books were removed from libraries and, in some cases, publicly burned.[36] The performance of music by German composers was banned, certain German words and phrases, such as "sauerkraut," were substituted for more socially accepted terms, such as "liberty cabbage,"[37] and German-language newspapers and social clubs faced significant pressure and many were forced to close.[38] Moreover, pressure was put on academics and scholars to renounce Germany and Germanness, and to publicly declare loyalty to the United States and its military efforts in Europe.[39] It is believed

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But it is nevertheless indicative of the common occurrence of leaders destroying intellectual threats to their power.

[34] *See, e.g.*, Elliot L. Richardson, *The Spirit of Liberty Is Skeptical Learned Hand*, 75 B.U. L. REV. 231, 235 (1995) (reviewing GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994)) (noting that "[d]uring World War I, Nebraska (as well as twenty-two other states) passed a law prohibiting the teaching of foreign languages in primary schools" with the aim of stopping the teaching of German); A. Christopher Bryant, *Constitutional Forbearance*, 46 U. RICH. L. REV. 695, 706 (2012) (discussing "the anti-German hysteria following U.S. entry into the First World War").

[35] Bryant, *supra* note 34, at 706.

[36] *See* Jayesh M. Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law*, 51 HOUS. L. REV. 781, 809-10 (2014). The book-burning took place on both sides of the Atlantic, with Germans likewise burning books seen as threats. *See, e.g.*, Edward Salo, *The Weaponization of Heritage: The Examination of Protecting, Destroying, and Assimilating Heritage As A Weapon in Irregular Warfare*, 16 U. ST. THOMAS J. L. & PUB. POL'Y 721, 726 (2024) (". . . On August 19, 1914, the German Army entered the university town of Louvain in Belgium" and, there, they "burned the university library which included special collections of medieval manuscripts and books. The event resulted in the loss of more than 230,000 books, including 750 medieval manuscripts.").

[37] Rathod, *supra* note 36, at 810.

[38] Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990s*, 30 CASE W. RES. J. INT'L L. 57, 93 n.112 (1998).

[39] *See* Cora Lee Nollendorfs, *The First World War and the Survival of German Studies: With a Tribute to Alexander R. Hohlfeld*, *in* TEACHING GERMAN IN AMERICA: PROLEGOMENA TO A HISTORY 176, 181-83 (David P. Benseler et al. eds., 1988). Cora Lee Nollendorfs noted, for example, that "American academicians as a group and American institutions of higher learning as a whole were thought in some circles to be pro-German," and were therefore targeted. *Id.* at 183; *see also* Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365, 368 n.18 (2005) (discussing an accusation that University of Wisconsin students were "a bunch of damned traitors!" because, during the wave of anti-German propaganda and national sentiment, the students had not been sufficiently enthusiastic during an organized "loyalty meeting").

that "dozens" of faculty members lost their jobs during the anti-German hysteria.[40]

A similar patriotic fervor was whipped up in the wake of World War Two, during the "McCarthyism" era. During that period, which spanned the 1940s and 1950s, sometimes referred to as the "Red Scare," numerous faculty members were harassed, and some were fired as a result of their perceived sympathy for left-leaning political causes, or for their failure to cooperate with anti-Communist investigations and inquiries.[41] In the case of both the anti-German "hysteria" during World War One and McCarthyism following World War Two, the threat to academic freedom resulted from patriotic fervor that labeled unorthodox views on political topics as a threat to national security and American society.[42]

But this has occurred all over the world, and is not unique to any particular place, time, or culture. In the 1930s-1940s, Nazi Germany exerted significant control over German universities, prioritizing political loyalty over academic ability.[43] They purged thousands of Jewish and politically undesirable scholars, replaced them with Nazi sympathizers, and infused university curricula with Nazi ideology.[44] Similarly, in Stalin's Soviet Union, the state imposed myriad constraints on academic research and teaching where a doctrine clashed with

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[40] Ellen Schrecker, *Political Repression and the AAUP from 1915 to the Present*, ACADEME MAG., https://www.aaup.org/academe/issues/fall-2023/political-repression-and-aaup-1915-present#:~:text=The%20AAUP%27s%20record%20during%20World%20War%20I,furor%20whipped%20up%20by%20the%20Wilson%20administration (last visited Dec. 26, 2025).

[41] *See, e.g.*, Jerry Frug, *McCarthyism and Critical Legal Studies*, 22 HARV. C.R.-C.L. L. REV. 665, 671-74 (1987) (reviewing ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES (1986)) (discussing several individual cases of faculty harassment and firings during the McCarthy era); *see also* Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When Is It Necessary and Who Should Decide?*, 30 CARDOZO L. REV. 1843, 1862 (2009) (noting that, in 1953, the American Association of University Professors "adopted a resolution stating that a faculty member's invocation of the Fifth Amendment in response to questions of legislative committees," such as those presided over by Senator Joseph McCarthy, "placed a heavy burden of proof of his fitness to hold a teaching position and an obligation upon the university to reexamine his qualifications for membership in its society") (internal quotation marks omitted).

[42] *See* Robert B. Conrad & Louis A. Trosch, *Renewable Tenure*, 27 J.L. & EDUC. 551, 555-56 (1998).

[43] For instance, one law passed in the wake of the Nazis taking power resulted in the termination of 1,200 academic jobs, effectively firing all faculty members who held them. *See* Kyle Graham, *The Refugee Jurist and American Law Schools, 1933-1941*, 50 AM. J. COMP. L. 777, 782 (2002).

[44] *See id.*

communist ideology.[45] Faculty members perceived as failing to adhere to state-sponsored orthodoxy were fired and, in some cases, sentenced to death.[46] China's Cultural Revolution from 1966 to 1976 provides yet another example; during that period, the Chinese government closed numerous schools and *most* universities with a focus on "revolutionizing" education.[47] College admission ceased almost entirely for several years.[48] Curricula were replaced with politically oriented concepts, academic meritocracy was de-emphasized, and students from politically favored backgrounds were prioritized, significantly disrupting the pursuit of higher education and academic freedom.[49]

The dangers posed by curtailing academic freedom are clear in hindsight. When a government imposes orthodoxy on researchers, professors, and teachers, requiring them to adhere to state-sponsored ideology, serious harms result. Not only does this directly affect educators and students, but the suppression of unorthodox views in any academic area tends to have a ripple effect of harm that percolates through society.[50]

In short, academic freedom is not an abstract ideal but a practical necessity for a free and flourishing society. Grounded in free speech principles, the pursuit of truth, and hard-won historical lessons, it ensures that universities remain spaces for critical thinking and transformative learning. To abandon academic freedom is to risk silencing voices that may hold the answers to society's most pressing challenges. Therefore, its protection must remain a priority not only for teachers and scholars but for all who value liberty, knowledge, and progress.

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[45] *See* David Acevedo, *In American Academia, Lysenkoism Makes a Comeback*, NAT'L ASSOC. SCHOLARS (Nov. 2, 2021), https://www.nas.org/blogs/article/in-american-academia-lysenkoism-makes-a-comeback; Svetlana A. Borinskaya, Andrei I Ermolaev & Eduard I Kolchinsky, *Lysenkoism Against Genetics: The Meeting of the Lenin All-Union Academy of Agricultural Sciences of August 1948, Its Background, Causes, and Aftermath*, GENETICS, May 2019, at 1-12.

[46] *See* Acevedo, *supra* note 45. Of note was the Soviet government promoting the pseudoscientific concept of Lysenkoism, a theory of genetics that aligned with Marxist-Leninist ideology. This led to the suppression of genuine genetics science and other sound biological research—a major factor in causing millions of deaths from malnutrition and starvation. *See id.*; Borinskaya, Ermolaev & Kolchinsky, *supra* note 45, at 1-12.

[47] *See* Hongbin Li & Lingsheng Meng, *The Scarring Effects of College Education Deprivation during China's Cultural Revolution*, 70 ECON. DEV. & CULTURAL CHANGE 981, 981-84 (2022).

[48] *See id.*

[49] *See* Parris H. Chang, *The Cultural Revolution and Chinese Higher Education: Change and Controversy*, 26 J. GEN. EDUC. 187, 187-94 (1974), http://www.jstor.org/stable/27796435.

[50] For instance, the suppression of Mendelian genetics in the Soviet Union led to a famine that killed millions of people. *See* Borinskaya, Ermolaev & Kolchinsky, *supra* note 45, at 1-4.

II. ORIGINS OF THE LEGAL PROTECTIONS FOR ACADEMIC FREEDOM IN AMERICAN LAW

The doctrine of "academic freedom" in American constitutional law traces its origins to a series of mid-20th-century Supreme Court cases that gradually recognized—although never in a single definitive holding—that the First Amendment protects the autonomy of teachers and educational institutions to inquire, teach, and express ideas without undue government interference.[51] The early roots are often traced to *Wieman v. Updegraff*,[52] where the Court struck down a state loyalty oath for public employees, emphasizing that indiscriminate restrictions on public employment could violate due process and chill free thought.[53] Although the Court in *Wieman* did not use the phrase "academic freedom," it signaled a judicial awareness of the unique role of educators in a democratic society.[54]

The first explicit articulation of an "academic freedom" doctrine came in a 1952 Supreme Court dissent in *Adler v. Board of Education of the City of New York*.[55] There, the Supreme Court upheld a New York statute known as the Feinberg Law, which authorized the dismissal of public school teachers for membership in "subversive" organizations advocating the violent overthrow of the government.[56] The law established procedures for designating such organizations and prohibited their members from being employed in the public school system.[57] In a 6-3 decision authored by Justice Minton, the Court reasoned that public employment is a privilege, not a right, and that the state has broad discretion to set qualifications for those who teach in its schools.[58] It emphasized the government's legitimate interest in protecting students from exposure to subversive influences, concluding that the statute's restrictions did not violate the First Amendment or

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[51] *See, e.g.*, Adler v. Bd. of Educ., 342 U.S. 485, 504 (1952) (Frankfurter, J., dissenting); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[52] Wieman v. Updegraff, 344 U.S. 183 (1952).

[53] *See id.* at 189-91.

[54] *See id.*

[55] *See Adler*, 342 U.S. at 508-11 (Douglas, J., dissenting). According to a Westlaw search, this is the earliest U.S. Supreme Court case in which the term "academic freedom" appears. Research results on file with the author.

[56] *See id.* at 490-93, 496.

[57] *See id.* at 490-91.

[58] *See id.* at 486, 494-95.

due process rights of teachers so long as the procedures for determining subversive affiliation were followed.[59]

Justice Douglas, joined by Justice Black, dissented, arguing that the law imposed a form of "guilt by association" that chilled freedom of speech and association, penalizing individuals for lawful membership in organizations without requiring proof of intent to overthrow the government.[60] Douglas contended that such measures undermined academic freedom by stifling the free flow of ideas essential to a democratic society and warned that teachers would self-censor for fear of losing their jobs.[61] Indeed, according to Douglas, "[t]he very threat of such a procedure," where a teacher may be fired for membership in a group deemed by the government to be "subversive," "is certain to raise havoc with academic freedom."[62] Douglas went on to state:

> What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. 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. Supineness and dogmatism take the place of inquiry. A "party line"—as dangerous as the "party line" of the Communists—lays hold. It is the "party line" of the orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipeline for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.[63]

The *Adler* majority opinion remained precedent for years. Its reasoning, however, was eventually repudiated in later cases—vindicating Justices Douglas and Black—when the Court struck

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[59] *See id.* at 493-96.

[60] *See id.* at 508-11 (Douglas, J., dissenting).

[61] *See* Adler v. Bd. of Educ., 342 U.S. 485, 510-11 (1952) (Douglas, J., dissenting). Notably, Justice Douglas's arguments about the need to keep open the free flow of ideas was crystalized one year later in his much-cited concurring opinion in *Rumely*. *See* United States v. Rumely, 345 U.S. 41, 56 (1953) (Douglas, J., concurring).

[62] *Adler*, 342 U.S. at 508-09 (Douglas, J., dissenting).

[63] *Id.* at 510 (Douglas, J., dissenting).

down similar loyalty provisions as unconstitutional under the First Amendment.[64]

The next major Court decision on this issue came down in 1957, in the case of *Sweezy v. New Hampshire*.[65] There, the Court reversed the contempt conviction of Paul Sweezy, a Marxist economist who had refused to answer questions from the New Hampshire Attorney General about the contents of a lecture he delivered at the University of New Hampshire and about his political associations.[66] The Attorney General was acting under a broad legislative resolution directing him to investigate "subversive persons" in the state.[67] Writing for a plurality, Chief Justice Warren concluded that the investigation violated the Due Process Clause of the Fourteenth Amendment because the state had failed to define the scope of the inquiry or the authority under which it was conducted, leaving Sweezy without fair notice of the relevance or pertinence of the questions asked.[68] The Court stressed that vague and unlimited investigative mandates—which the Court termed "sweeping"—posed serious risks to individual liberties.[69]

In a separate concurring opinion, Justice Frankfurter, joined by Justice Harlan, grounded the decision in the principle of academic freedom, describing the "four essential freedoms" of a university—to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[70] Frankfurter argued that compelling disclosure of classroom content and political associations threatened the independence of universities, noting:

> Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.[71]

This decision marked one of the Court's earliest recognitions of academic freedom as a special concern of the First Amendment,

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64 *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 591-92, 609-10 (1967).

65 Sweezy v. New Hampshire, 354 U.S. 234 (1957).

66 *See id.* at 238, 243-45, 255.

67 *See id.* at 245-46.

68 *See id.* at 235, 254-55.

69 *See id.* at 245-47.

70 *Id.* at 263 (Frankfurter, J., concurring).

71 Sweezy v. New Hampshire, 354 U.S. 234, 262-63 (1957) (Frankfurter, J., concurring).

although the holding itself rested on due process grounds and was, therefore, not an explicit First Amendment ruling.[72]

The doctrine of academic freedom was further expounded upon in *Keyishian v. Board of Regents*.[73] There, the Court struck down a series of New York statutes and regulations, including the Feinberg Law upheld in *Adler*, which barred employment of public university faculty who were members of "subversive" organizations advocating the overthrow of the government by force.[74] Harry Keyishian, an English instructor at the State University of New York at Buffalo, refused to sign an oath affirming he was not a member of the Communist Party.[75] He argued that the requirements violated the First Amendment.[76] Writing for the majority, Justice Brennan held that the provisions were unconstitutionally vague and overbroad, creating a pervasive "pall of orthodoxy" over the classroom and deterring lawful speech and association.[77] The Court emphasized that the State could not impose restrictions on public employment that infringed constitutionally protected freedoms and that vague loyalty provisions impermissibly chilled the exercise of those rights.[78]

The *Keyishian* decision is one of the cornerstones of the constitutional doctrine of academic freedom. In it, the Court explicitly recognized academic freedom as "a special concern of the First Amendment" and declared that the "classroom is peculiarly the 'marketplace of ideas.'"[79] Justice Brennan, who wrote the majority opinion, underscored that academic freedom is vital to the search for truth and the dissemination of knowledge.[80] He added that the imposition of loyalty oaths and membership bars undermines the free exchange of ideas that universities must protect.[81] Indeed, the Court there concluded that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not

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72 *See id.* at 250, 254; *id.* at 262-63 (Frankfurter, J., concurring).

73 Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

74 *See id.* at 593-94, 603-04.

75 *Id.* at 591-92.

76 *See id.* at 592, 594-95.

77 *See id.* at 603-04, 608.

78 *See id.* at 603-04.

79 Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

80 *See id.* at 591, 603.

81 *See id.*

merely to the teachers concerned."[82] By overruling *Adler*, the Court repudiated the earlier view that public employment was merely a privilege and instead affirmed that constitutional protections fully apply in the academic setting.[83] *Keyishian* thus firmly established that state-imposed ideological conformity on faculty is incompatible with the First Amendment, shaping subsequent jurisprudence on the rights of educators and institutions.[84]

III. THE MODERN CONTOURS OF THE ACADEMIC FREEDOM DOCTRINE

Following *Keyishian*, decided in 1967, the Supreme Court clearly recognized academic freedom as "a special concern of the First Amendment."[85] But in the decade that followed, the Court began to grapple with whether this freedom belonged primarily to the individual teacher or to the institution itself, a debate that remained contentious well into the 1980s.[86] Five years after *Keyishian*, the Court in *Healy v. James*[87]—which involved denial of recognition to a student political group at a state college—stressed that "the college classroom and its surrounding environs" are a marketplace of ideas.[88] Although the case

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[82] *Id.*

[83] *See id.* at 604-05; *see also* Leslie C. Griffin, *What Did Those Sixteen Justices Say?*, 58 WILLAMETTE L. REV. 163, 180 (2022) (discussing the effect of *Adler* being overruled by *Keyishian*); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of* Garcetti v. Ceballos *on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 210-11 (2008) (same).

[84] *See Keyishian*, 385 U.S. at 607-08.

[85] *Id.* at 603.

[86] *See, e.g.*, Elizabeth Mertz, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 NW. U.L. REV. 492, 492-93 (1988) ("[T]he nature of the constitutional protection afforded academic institutions and the individuals within them remains a controversial issue. The issue is particularly problematic when individuals within the academy clash with universities and both parties claim a constitutionally guaranteed right to academic freedom.") (internal footnotes omitted); Mary Gray, *Academic Freedom and Nondiscrimination: Enemies or Allies?*, 66 TEX. L. REV. 1591, 1592 (1988) ("Although academic freedom originally amounted to institutional autonomy, no one regarded it as a corporate right; rather, commentators viewed academic freedom as the personal right of faculty and students. Indeed, the faculty and students *were* the university. Because universities did not become 'corporate' entities, there was no need to emphasize the individual faculty member's freedom from restraints by the university itself. Only with the extraordinary development of the professional university administration in the United States did 'the university' become an entity separate from its faculty and students and, as a result, a threat to the academic freedom of its faculty and students.") (internal footnotes omitted).

[87] Healy v. James, 408 U.S. 169 (1972).

[88] *Id.* at 180-81.

focused on student speech, it affirmed the groundwork laid out in *Keyishian*, asserting that universities are not "enclaves immune from the sweep of the First Amendment."[89] The majority noted that "we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[90]

That same year, 1972, the Court in *Perry v. Sindermann*[91] held that a public college professor who lacked formal tenure might still have a property interest in continued employment if a de facto tenure system existed.[92] The Court recognized that the nonrenewal of a professor's contract could not be based on the exercise of protected speech, noting that "a teacher's public criticism of his superiors" is protected.[93] Moreover, the Court had already established that speech in the school context could not be prohibited unless it was "necessary to avoid material and substantial interference with schoolwork or discipline."[94] Although *Perry* did not elaborate on "academic freedom" as a doctrinal category, it reinforced the principle that public educators retain significant First Amendment protections against retaliatory employment actions.[95]

Importantly, the broader framework for public employee speech came from *Pickering v. Board of Education*,[96] which predated the 1970s academic freedom cases but became central in later public employee disputes. Under the *Pickering* balancing test,[97] courts balance the employee's interest in commenting on matters of public concern against the employer's interest in efficiency and avoiding disruption.[98] Although *Pickering* itself involved a high school teacher's letter to a

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89 *See id.* at 180.

90 *Id.* at 180-81.

91 Perry v. Sindermann, 408 U.S. 593 (1972).

92 *See id.* at 599-603.

93 *See id.* at 598.

94 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

95 *See* Lisa R. Allred, *May A Public University Restrict Faculty Expression on Its Internet World Wide Web Sites? Academic Freedom and University Facility Use Restrictions*, 24 J.C. & U.L. 325, 329 n.23 (1997) (discussing the role *Perry* played in the development of the Supreme Court's academic freedom doctrine).

96 Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

97 This test goes by slightly varying names, such as the "*Pickering-Connick* balancing test." *See* Stacy E. Smith, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299, 305 (2002) (using the term); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 587 (2008) (same).

98 *See Pickering*, 391 U.S. at 568, 573.

newspaper, the balancing approach has been repeatedly applied to higher education faculty, creating tension between general public employee speech law and the special solicitude for academic freedom recognized in *Keyishian*.[99]

Then, in 1978, Justice Powell's majority opinion in *Regents of the University of California v. Bakke*[100] addressed institutional academic freedom in the realm of affirmative action in college admissions. There, the Court emphasized "[t]he freedom of a university to make its own judgments as to education," calling it "a special concern of the First Amendment."[101] In *Bakke*, "academic freedom" was framed as an institutional right—the autonomy of the university to select its student body to foster a "robust exchange of ideas."[102] As a result, in the context of colleges and universities, this interpretation shifted the emphasis from individual faculty protection toward the university's First Amendment prerogatives, a theme that would be echoed in later cases into the 2000s.[103]

The Court reinforced this institutional framing in *University of Pennsylvania v. EEOC*,[104] where it rejected a university's claim of a First Amendment "academic freedom" privilege to withhold peer review materials in an employment discrimination investigation.[105] The Court acknowledged the concept of academic freedom, but held that this doctrine did not create a categorical evidentiary privilege.[106] The decision suggested limits to the scope of academic freedom.[107]

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[99] *See, e.g.*, Keith E. Whittington, *Diversity Statements, Academic Freedom, and the First Amendment*, 103 NEB. L. REV. 643, 667 (2025) (arguing that the government cannot use the *Pickering* balancing test to engage in content-based speech censorship "under the guise of managing the government workplace"); Mark Strasser, Pickering, Garcetti, *& Academic Freedom*, 83 BROOK. L. REV. 579, 611 (2018) ("It is precisely [the] kind of case . . . in which a professor's scholarship involves very controversial views[] that makes academic freedom precarious under a *Pickering* analysis.").

[100] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[101] *Id.* at 312.

[102] *Id.*

[103] *See, e.g.*, Univ. of Pa. v. E.E.O.C., 493 U.S. 182, 197-99 (1990); Grutter v. Bollinger, 539 U.S. 306, 328-29 (2003); Gratz v. Bollinger, 539 U.S. 244, 267-69 (2003); Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 388 (2016); Urofsky v. Gilmore, 216 F.3d 401, 409-10 (4th Cir. 2000) (*en banc*); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998).

[104] *Univ. of Pa.*, 493 U.S. 182.

[105] *See id.* at 195-202.

[106] *See id.* at 197-99.

[107] *See id.*

Similarly, although not an academic freedom case, [108] *Rust v. Sullivan*[109] emphasized the government's right to control speech in government-funded programs, underscoring the potential vulnerability of academic speech dependent on public funding.[110]

The most significant modern shift in the academic freedom doctrine came in *Garcetti v. Ceballos*,[111] where the Court held that public employees speaking pursuant to their official duties are not speaking as citizens for First Amendment purposes, and thus receive no protection against employer discipline.[112] Justice Kennedy's majority opinion included a notable caveat, leaving open whether this rule should apply to "speech related to scholarship or teaching," given the First Amendment concerns implicated by academic speech.[113] Moreover, Justice Souter's dissent warned that applying *Garcetti* to academic contexts could "imperil First Amendment protection of academic freedom in public colleges and universities."[114] This explicit reservation created ongoing doctrinal uncertainty and, as a result, produced a circuit split on how *Garcetti* should be interpreted in the academic speech context.[115]

In the absence of a definitive Supreme Court ruling, federal appellate courts have split on whether *Garcetti* applies to faculty speech in teaching and scholarship.[116] Some circuits, such as the Fourth and

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[108] In *Rust v. Sullivan*, recipients of family planning funds under Title X of the Public Health Service Act and doctors who supervised Title X funds brought two suits challenging regulations of the Department of Health and Human Services (HHS) which prohibit Title X projects from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. *See* Rust v. Sullivan, 500 U.S. 173, 177-78 (1991).

[109] *Id.* at 173.

[110] *See id.* at 195-96.

[111] Garcetti v. Ceballos, 547 U.S. 410 (2006).

[112] *Id.* at 421.

[113] *Id.* at 425.

[114] *Id.* at 438 (Souter, J., dissenting).

[115] *See* Oren R. Griffin, *Academic Freedom and Professorial Speech in the Post*-Garcetti *World*, 37 SEATTLE U. L. REV. 1, 7 (2013) (noting that, with the *Garcetti* holding, "the Court left uncertain whether academic freedom remains a special concern of the First Amendment and the scope of academic-freedom protections available to faculty"); Athena Mutua et. al., *The War on Higher Education*, 72 UCLA L. REV. DISCOURSE 344, 354 (2024) (noting the circuit split on interpreting *Garcetti* means that "[u]ncertainty about *Garcetti*'s scope . . . lingers"); Brian Soucek, *Diversity Statements*, 55 U.C. DAVIS L. REV. 1989, 2023 (2022).

[116] *See, e.g.*, Porter v. Bd. of Trs. of N.C. State Univ., 72 F.4th 573, 582 (4th Cir. 2023); Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 334, 340 (6th Cir. 2010); Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014).

Sixth, have extended *Garcetti* to cover most faculty speech,[117] while others, including the Ninth in *Demers v. Austin*,[118] have recognized a "scholarship and teaching" exception grounded in *Keyishian* and *Sweezy*.[119] The Ninth Circuit in *Demers* reasoned that the Supreme Court in *Garcetti* itself had reserved the question of whether its rule—that speech pursuant to official duties is unprotected—applies in the academic context of a public college or university.[120] Relying on that reservation and concerns for academic freedom, the Ninth Circuit carved out an explicit exception: "We conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor."[121] These disparate interpretations produced a patchwork in which the strength of academic freedom protections depends on jurisdiction, with the Supreme Court's open question from *Garcetti* still unresolved.[122]

Another important component of the doctrine appears in Professor David Rabban's argument that individual academic freedom is best understood as a distinct First Amendment right that protects *expert* scholarly and teaching speech because it advances knowledge

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117 For the Fourth Circuit, see *Porter*, 72 F.4th at 582 (treating a professor's intramural governance/collegiality speech as employee speech under *Garcetti*, not protected by the First Amendment) and Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694 n.11, 694-95, 700 (4th Cir. 2007) (applying *Garcetti* to K-12 classroom postings, deeming them part of the teacher's official duties/curriculum and thus unprotected). For the Sixth Circuit, see *Evans-Marshall*, 624 F.3d at 334, 340 (holding that K–12 teachers' in-class "curricular and pedagogical choices" made pursuant to official duties are not protected by the First Amendment; "[w]hen a teacher teaches, the school system does not regulate that speech as much as it hires that speech") (internal quotation marks omitted) and Savage v. Gee, 665 F.3d 732, 735, 738-39 (6th Cir. 2012) (applying *Garcetti* to a public university librarian's speech as a committee member, concluding the speech was made pursuant to his duties and therefore unprotected). *But see* Meriwether v. Hartop, 992 F. 3d 492, 504 (6th Cir. 2021) ("When the state targets professors' academic freedom rather than protects it, scholarship, teaching, and education 'cannot flourish.'") (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

118 *Demers*, 746 F.3d 402.

119 *See id.* at 411.

120 *Id.* (citing Garcetti v. Ceballos, 547 U.S. 410, 438 (2006) (Souter, J., dissenting)).

121 *See id.* at 412.

122 *See*, *e.g.*, Mark Strasser, Pickering, Garcetti, *& Academic Freedom*, 83 BROOK. L. REV. 579, 579 (2018) (noting that, post-*Garcetti*, "[t]he circuit courts have adopted a dizzying set of rules to determine when First Amendment protections are triggered in the academic context"); Robert C. Post, *Academic Freedom and the Constitution*, *in* WHO'S AFRAID OF ACADEMIC FREEDOM? 123 (Akeel Bilgrami & Johnathan R. Cole eds., 2015) (noting that "the doctrine of academic freedom stands in a state of shocking disarray and incoherence").

and democratic citizenship.[123] This view is not Rabban's alone[124]; courts have likewise recognized the importance of allowing academic specialists the freedom to explore their respective fields.[125] Rabban links this constitutional understanding to the American Association of University Professors' (AAUP) professional norm that expertise-based inquiry and teaching require robust independence from nonexpert interference.[126] For decades, courts have recognized professors' academic freedom as a constitutional right tied to teaching and scholarship rather than to all speech by faculty.[127] Not every utterance by a professor necessarily triggers academic-freedom protection; some courts have applied the doctrine narrowly.[128] Thus, to the extent individual professors are deemed to possess special academic freedom for their academic speech, such protections might be limited to expression within their areas of expertise and might not include general commentary or purely administrative workplace talk.[129] Moreover, faculty members' protections to speak within their area of expertise might be somewhat narrower than the general public's right to speak on the same topic.[130] As Professor Robert Post put it, "[a]lthough the First Amendment would prohibit government from regulating the New York Times if the newspaper were inclined to editorialize that the

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123 *See* DAVID M. RABBAN, ACADEMIC FREEDOM: FROM PROFESSIONAL NORM TO FIRST AMENDMENT RIGHT 1-14, 136-70 (2024).

124 *See, e.g.*, ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 67 (2012) ("In contrast to the marketplace of ideas … academic freedom protects scholarly speech only when it complies with professional norms.") (internal quotation marks omitted).

125 *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("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"); Heim v. Daniel, 81 F.4th 212, 226-27 (2d Cir. 2023) ("[P]rofessors at public universities are paid – if perhaps not exclusively, then predominantly – to speak, and to speak freely, guided by their own professional expertise, on subjects within their academic disciplines.").

126 *See* RABBAN, *supra* note 123, at 15, 16; AM. ASS'N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE 292, 294 (1915), *reprinted in* AM. ASS'N. OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 3-12 (11th ed. 2015).

127 *See* RABBAN, *supra* note 123, at 68, 111; *Heim*, 81 F.4th at 226-27.

128 *See* RABBAN, *supra* note 123, at 131-32; *see also* Urofsky v. Gilmore, 216 F.3d 401, 408-09 (4th Cir. 2000) (holding that state-employed professors challenging a statute restricting access to sexually explicit material on state-owned computers were speaking as public employees rather than as citizens, and thus had no First Amendment academic freedom right independent of the university to override the state's regulation).

129 *See* RABBAN, *supra* note 123, at 138.

130 *See id.* at 136.

moon is made of green cheese, no astronomy department could survive if it were prevented from denying tenure to a young scholar who was similarly convinced."[131]

Today, the Supreme Court's academic freedom doctrine is best understood as a hybrid. It draws from *Keyishian*'s recognition of faculty First Amendment rights,[132] *Bakke*'s articulation of institutional autonomy,[133] and *Garcetti*'s unresolved question about special protections for teaching and scholarship.[134] It is also likely limited to academic speech within the speaker's expertise.[135] Although the Court continues to invoke the "special concern of the First Amendment" language,[136] it has not provided a unified doctrinal test. The result is a body of precedent in which academic freedom is acknowledged as constitutionally important but defined in shifting ways. It is sometimes framed as an individual right of faculty to teach and research free from state interference[137]; other times as the university's right to control its educational mission.[138] How these two strands will be reconciled in future Supreme Court cases remains one of the central unanswered questions in First Amendment law.

Moreover, "[i]n the world of higher education, the distinctions between public and private institutions, when it comes to norms of academic freedom, may be highly exaggerated" if one assumes First Amendment freedoms to apply only to public institutions.[139] This is because "the *contractual* arrangement between most faculty members . . .

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131 POST, *supra* note 124, at 67.

132 *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

133 *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

134 *See* Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

135 *See* RABBAN, *supra* note 123, at 9-10, 136, 138; *but see* POST, *supra* note 124, at 84 ("This aspect of professional academic freedom [under the Pickering test] refers to the freedom to 'speak or write as citizens' rather than as experts. Freedom of extramural expression might protect an astronomer who wishes to write in public about NAFTA, or a computer scientist who wishes to speak out about the war in Iraq.") (footnotes omitted).

136 *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 332 (2023) (Sotomayor, J., dissenting) (noting that the principle of "academic freedom" is one which has "long . . . been viewed as a special concern of the First Amendment") (internal quotation marks omitted); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 308 (2013) ("The academic mission of a university is 'a special concern of the First Amendment.'") (quoting *Bakke*, 438 U.S. at 312).

137 *See, e.g.*, Demers v. Austin, 746 F.3d 402, 411 (2014).

138 *See, e.g.*, Univ. of Pa. v. E.E.O.C., 493 U.S. 182, 198-99 (1990).

139 Rodney A. Smolla, *Academic Freedom and Political Correctness in Uncivil Times*, 14 FIRST AMEND. L. REV. 267, 291 (2016).

at private universities effectively imports the First Amendment rights that faculty members . . . have at public universities."[140] Accordingly, "[a] Duke professor is thus likely to possess roughly the same bundle of 'academic freedom' legal rights against Duke as a UNC professor has against the state of North Carolina."[141] While at a state university "the rights stem directly from the Free Speech Clause of the First Amendment," at a private university "the same bundle of rights are imported by reference in the contractual arrangements that govern the relationship between [the university] and its faculty, including whatever guarantees of 'academic freedom' are embedded in the university's regulations and core documents, such as its faculty handbook."[142] Accordingly, although First Amendment rights in general only apply where there is state action, in the academic context, including but not limited to issues of academic freedom,[143] the same analysis arguably will apply in most cases regardless of whether the university at issue is public or private. Some, however, argue that the private-public distinction dictates what free speech rights are available to faculty members teaching at those institutions.[144]

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[140] *Id.* (alteration in original).

[141] *Id.*

[142] *Id.*

[143] *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 222-24, 230 (2023) (applying the same standard to Harvard and UNC in analyzing both universities' affirmative action admissions programs and striking down the affirmative action programs at Harvard and UNC as violating the Equal Protection Clause because the programs discriminated on the basis of race).

[144] *See State of the Law: Speech Codes*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, https://www.thefire.org/in-court/state-of-the-law-speech-codes/ (last visited Nov. 14, 2025) (noting that it is acceptable for a private university to "define itself as being committed to values other than free speech, as long as the school makes it publicly and consistently clear that it holds a certain set of values above a commitment to free speech"). This summary of the law, authored by FIRE, goes on to state: "If a private college clearly does not promise free speech, and the college makes this known publicly and consistently, entering students have given informed consent and have voluntarily chosen to limit their own rights—in much the same way students entering military academies or theological seminaries understand that they are relinquishing many rights they would enjoy at a state college." *Id.*

IV. PROGRESSIVE CRITIQUES OF ACADEMIC FREEDOM PROTECTIONS

A. *The Critiques*

The concept of academic freedom falls within the broader freedom of speech protections of the First Amendment.[145] Free speech protections enjoy support on both sides of the political aisle.[146] But because academic freedom in higher education is often brought up in the context of speakers engaging in controversial and oftentimes offensive speech, some scholars question whether academic freedom is a legitimate basis for protecting teachers' and scholars' expression.[147] In recent years, progressive scholars have issued some strong critiques.[148]

Professor Zamir Ben-Dan, for example, argues that academic freedom should not protect "blatantly racist academic speech" in the twenty-first century.[149] He distinguishes academic freedom from the First Amendment, arguing that speech that is plainly false, unscholarly, and rooted in racial hierarchy, which the author analogizes to long-ago flat-earth theories, falls outside the legitimate scope of academic freedom.[150] He states, for instance, that "[b]latantly racist intellectual speech is unscholarly and has no value in the academic space."[151] Allowing such speech, according to Ben-Dan, "helps preserve racism in America" and betrays the core purpose of academic freedom, which is the truthful pursuit of knowledge.[152]

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145 Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

146 *See, e.g.*, Erwin Chemerinsky, *The Underlying Issues Concerning Free Speech in Schools*, 76 STAN. L. REV. 1427 (2024) (left-leaning—robustly pro-free speech on campus); Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366 (2016) (right/libertarian-leaning—arguing strongly against purpose-based speech restrictions).

147 *See, e.g.*, Zamir Ben-Dan, *supra* note 2, at 163 (arguing that academic freedom "does not bestow upon intellectuals an unqualified right to proffer palpably false ideas supported by distorted, falsified, or otherwise unscientific sources"); Stephen M. Feldman, *Searching for Truth That Speaks to Power: Free Speech and Equality on Campus*, 73 AM. U. L. REV. 807, 816 (2024) (questioning whether academic freedom should protect "hate speech" because such speech "targeting a historically marginalized group undermines the educational opportunities and environment for members of that group in the university community").

148 *See, e.g.*, sources cited *supra* note 146.

149 Ben-Dan, *supra* note 2, at 160-62, 173-75.

150 *See id.* at 204-07.

151 *Id.* at 206.

152 *See id.* at 163, 215, 222.

Another author, Apratim Vidyarthi, argues that courts and doctrine often provide academic freedom with excessive protection, especially when problematic or discriminatory speech is involved.[153] He asserts that "today's academic freedom doctrine suffers from serious problems, some of which perpetuate discrimination in the classroom and systemically in educational institutions," and asserts that in some cases academic freedom provides "too much protection."[154] "Often," he adds, "protecting university and professors' academic freedom comes at the expense of students' academic freedom[.]"[155] Vidyarthi calls for a recalibration, arguing that the doctrine should be bounded by antidiscrimination norms so that it does not serve as a shield for speech that perpetuates harm or inequity.[156]

Other scholars raise critiques that question the balance of academic freedom and potentially harmful speech without explicitly focusing on bigoted expression. For example, Dean Erwin Chemerinsky asserts the need for schools and universities to reconcile free speech with their educational missions.[157] Chemerinsky highlights how speech inconsistent with the educational or moral mission of schools raises distinct concerns—even if not explicitly advocating limits on racist speech, the piece supports a vision of speech that aligns with institutional purposes.[158] These concerns were raised decades ago in legal literature. In 1989, Professor J. Peter Byrne examined the tension between constitutional protections and institutional control.[159] Byrne criticized unchecked academic freedom that may conflict with institutional responsibilities, hinting that some forms of speech—especially harmful or bigoted speech—may justifiably fall outside strong protection.[160]

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153 *See* Apratim Vidyarthi, *A Sword and a Shield: An Antidiscrimination Analysis of Academic Freedom Protections*, 26 U. PA. J. CONST. L. 472, 473-76 (2024).

154 *Id.* at 471.

155 *Id.*

156 *See id.* at 538-43.

157 *See* Chemerinsky, *supra* note 146, at 1430-31.

158 *See id.*

159 *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment*," 99 YALE L.J. 251, 279-83 (1989).

160 *See id.* at 281 (discussing the tension between academic freedom, on one hand, and other higher education missions, such as "broad goals of social mobility and general prosperity"). However, Byrne also acknowledged that one of the "primary" aims of the academic speech doctrine was "a special relationship to the search for truth" which "demand[s] protection from popular prejudices." *Id.* at 273.

Likewise, Professor Frederick Schauer argues there is no free-standing constitutional right to academic freedom for individuals—and even less so when that "freedom" serves harmful ends.[161] He doubts, for instance, there is, or should be, academic freedom for professors asserting "that the decision in *Brown v. Board of Education* was the product of a conspiracy among the Communist Party, the NAACP, and the Jews," or "teaching conspiracy theories in a Constitutional Law class," "teaching astrology in Physics, or the existence of flying saucers in Astronomy, or, free exercise questions aside, Intelligent Design in Biology."[162] This structural limitation, Schauer argues, reinforces the modern progressive argument that academic freedom should not be absolute, especially when speech causes harm, such as racist or hateful expression.[163]

Taken together, these scholarly critiques—which have predominantly come from the Left in recent decades, although many troubling recent attacks on academic freedom have come from the Right[164]—share a common thread: the claim that academic freedom is not, and should not be, an unqualified shield for academic speech that is harmful, hateful, or unintellectual. Whether through explicit rejection of protections for streaming racist ideas (Ben-Dan), institutional or anti-discrimination boundaries (Vidyarthi), mission-based constraints (Chemerinsky), structural limitations (Schauer), or calls for reining in overbroad doctrine (Arnold), these voices collectively affirm that academic freedom must be aligned with truth, equity, and institutional integrity—not misused to perpetuate harm.

B. *The Response*

These contemporary critiques of academic freedom miss the mark on several fronts. To begin with, many of the criticisms rest on the erroneous assumption that free expression is a zero-sum game, such that professors' rights to speak freely inevitably negate students' rights to be free from offense.[165] But individual liberties are not a zero-sum

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161 *See* Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 918-19 (2006).

162 *Id.* at 918.

163 *See id.* at 927; Ben-Dan, *supra* note 2 at 225-25; Feldman, *supra* note 147, at 849.

164 See *infra* Part V.

165 *See, e.g.*, Vidyarthi, *supra* note 153, at 471.

game, nor is free speech. Free expression operates on a simple, time-worn principle that individual freedom is superior to official censorship. Importantly, the freedom of speech includes the freedom to listen, or not,[166] but it does not include the freedom of an audience to shut down or silence speech they find distasteful.[167] Said differently, there is no right under the First Amendment to be free from being offended by speech.[168] The Supreme Court has made clear, moreover, that the First Amendment does not yield to subjective feelings of offense, holding that "speech is powerful" and may inflict great pain but remains protected.[169] As Nadine Strossen has explained, "no matter how great the potential harm of the speech, the potential harm of censorship is even greater," emphasizing that robust speech protections safeguard the rights of all parties.[170] In the academic setting, freedom of expression expands rather than contracts the rights of students and faculty by ensuring that even offensive ideas can be debated and contested.[171]

The suggestion that universities should prohibit "racist," "bigoted," or "marginalizing" speech is constitutionally infirm because such

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166 *See* Close v. Lederle, 424 F.2d 988, 991 (1st Cir. 1970) ("Freedom of speech must recognize, at least within limits, freedom not to listen."); James Grimmelmann, *Listeners' Choices*, 90 U. COLO. L. REV. 365, 379 (2019) (arguing that "any theory of free speech that does not take listener choice seriously fails as a theory of free speech"); Leslie Gielow Jacobs, *Is There an Obligation to Listen?*, 32 U. MICH. J.L. REFORM 489, 499 (1999) (noting that "included within the express guarantee of 'freedom of speech' is the implicit guarantee of a right to listen," as well as "the right of others not to do so").

167 *See* Univ. of Md. Students for Just. in Palestine v. Bd. of Regents, No. CV 24-2683 PJM, 2024 WL 4361863, at *13 n.19 (D. Md. Oct. 1, 2024) (holding that "free speech does not mean hecklers have the right to shut down campus debate; they do not have a so-called 'heckler's veto'"); CASS R. SUNSTEIN, CAMPUS FREE SPEECH: A POCKET GUIDE 42 (2024) ("There is no First Amendment right to shout down speakers."); Terminiello v. Chicago, 337 U.S. 1, 5 (1949) (holding that the First Amendment protects a speaker whose "speech stir[s] people to anger, invite[s] public dispute, or br[ings] about a condition of unrest").

168 *See, e.g.*, Sudha Setty, *Free Speech and Civility in Law Schools*, 76 BAYLOR L. REV. 107, 108 (2024) (noting that "while some other jurisdictions around the world have a greater focus on limiting certain speech that may be offensive or upsetting, U.S. free speech protections do not operate this way").

169 *See* Snyder v. Phelps, 562 U.S. 443, 460-61 (2011).

170 *First Amendment Scholar Nadine Strossen: 'No Matter How Great the Potential Harm of the Speech, the Potential Harm of Censorship is Even Greater'*, FRANKLIN PIERCE SCH. OF LAW (Nov. 7, 2024), https://law.unh.edu/blog/2024/11/first-amendment-scholar-nadine-strossen-no-matter-how-great-potential-harm-speech-potential-harm; *see also* NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 13, 74, 165 (2018) (expressing ideas supporting the same point).

171 *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

categories are vague and overbroad.[172] Moreover, these content-based categories of speech do not align with recognized free speech exceptions, such as obscenity, incitement, or fighting words.[173] The Court has repeatedly invalidated restrictions on speech that are not "clearly defined," because vagueness leads to arbitrary enforcement and chills protected expression.[174] In *Matal v. Tam*,[175] the Court unanimously held that the First Amendment prohibits viewpoint-based exclusions even of disparaging speech containing an ethnic slur, declaring that "the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[176] Attempts to censor vaguely defined categories of academic expression thus collide with the most basic principles of the First Amendment.[177]

One defining feature of institutions of higher learning, and part of what makes them so valuable to democratic societies, is that they are places where students and faculty encounter disagreeable or unsettling ideas that might conflict with their own.[178] Being challenged, and even at times made uncomfortable or offended, is integral to the process of learning, particularly when engaged in the study of topics of great societal or cultural importance.[179] The Court has described the

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[172] *See* ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 56-57 (2017); *see also* Bragg v. Swanson, 371 F. Supp. 2d 814, 826-27 (S.D. W. Va. 2005) (holding that the portion of a West Virginia high school policy prohibiting "items displaying the Rebel flag" within category "racist language and/or symbols or graphics" was an overbroad restriction on speech under First Amendment); State v. Talley, 122 Wn.2d 192, 211 (1993) (noting that "absent criminal conduct, bigoted speech and thought are protected").

[173] *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790-91 (2011) (holding: "[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," subject to narrow "permitted restrictions upon the content of speech in a few limited areas," such as obscenity, incitement, and fighting words) (alteration in original) (internal citations omitted).

[174] Grayned v. Rockford, 408 U.S. 104, 108-09 (1972).

[175] Matal v. Tam, 582 U.S. 218 (2017).

[176] *Id.* at 246 (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

[177] *See* Doe v. Univ. of Michigan, 721 F. Supp. 852, 864-67 (E.D. Mich. 1989) (federal district court struck down a university's anti-harassment speech code, holding that the policy was unconstitutionally overbroad and vague, chilling protected expression, where it prohibited language that might "stigmatize" or "victimize" an individual).

[178] *See* John S. Greenup, *The First Amendment and the Right to Hate*, 34 J.L. & EDUC. 605, 610-11 (2005).

[179] *See* Daniel P. Horan, *Learning Is Almost Always Uncomfortable, and That's a Good Thing*, NAT'L CATH. REP. (Aug. 24, 2023), https://www.ncronline.org/opinion/guest-voices/learning-almost-always-uncomfortable-and-thats-good-thing.

classroom as "peculiarly the marketplace of ideas," where the search for truth depends on uninhibited exchange of viewpoints and opinions.[180] John Stuart Mill observed that "he who knows only his own side of the case, knows little of that," making exposure to opposing arguments essential to genuine understanding.[181] Prohibiting "offensive" speech denies students the opportunity to develop the skills of reasoned debate that democratic citizenship requires.[182] The First Amendment's protection of academic freedom is thus indispensable to the mission of higher education.[183]

Progressive critiques of academic freedom often overlook the fact that censorship undermines equality and other progressive values. Those in power decide what constitutes "marginalizing" or "bigoted" speech, and history shows that this discretion is frequently wielded against dissenters.[184] This underscores the danger of allowing majorities or administrators to silence disfavored ideas.[185] The Court in *R.A.V. v. City of St. Paul*[186] struck down a hate-speech ordinance precisely because selective prohibitions on offensive ideas transform the government into an arbiter of permissible opinion.[187] Preserving academic freedom protections for faculty, by contrast, ensures that all voices may be heard and contested rather than silenced by official fiat.[188]

The First Amendment tradition affirms that the remedy for harmful or dangerous expression is not enforced silence but "more speech."[189] Universities embody this principle when they allow contestation of ideas through scholarship and debate rather than suppression.[190] When institutions of higher learning restrict expression to protect sensibilities, they not only violate constitutional norms but

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180 Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

181 MILL, *supra* note 27, at 35.

182 *See* Byrne, *supra* note 159, at 337.

183 *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

184 *See, e.g.*, Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 492-93 (1991).

185 *See First Amendment Scholar Nadine Strossen: 'No Matter How Great the Potential Harm of the Speech, the Potential Harm of Censorship is Even Greater,' supra* note 170.

186 R.A.V. v. St. Paul, 505 U.S. 377 (1992).

187 *See id.* at 391-92.

188 *See* Post, *supra* note 122, at 130.

189 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

190 *See* Byrne, *supra* note 159, at 260-61.

also impoverish public discourse by removing controversial ideas from the arena of reasoned discussion.[191] A university committed to truth must tolerate even deeply offensive viewpoints, because only in that way can stronger counter-arguments be developed and refined.[192] To censor is to weaken intellectual inquiry and to betray the constitutional commitment to freedom of thought.[193] Ultimately, those who seek to weaken academic freedom protections by prohibiting offensive or hateful speech—or rather, speech that those in charge deem "offensive" or "hateful"—ignore the democratic function of academic freedom and the guidance given by the Supreme Court over the past century.[194] Protecting academic freedom, rather than suppressing disfavored views and opinions, would ensure that universities remain a space where all ideas may be tested, criticized, and improved, which is essential to both scholarly progress and democratic legitimacy.[195]

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191 *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

192 *See, e.g.*, William W. Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 851 (1970).

193 *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

194 *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting):

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting):

Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

195 *See* MILL, *supra* note 27, at 36.

V. RECENT CONSERVATIVE-LED ATTACKS ON ACADEMIC FREEDOM

Attempts to erode academic freedom have come from both sides of the political aisle.[196] The previous Section discussed progressive critiques, which attempt to draw lines around the limits of academic freedom, thereby undermining or restricting it.[197] This Section will discuss conservative attempts to curtail academic freedom. On this front, the discussion will outline three major categories of Republican-led attacks on academic freedom that have occurred in recent years: (1) conservative state-level overhauls in universities, (2) federal-level targeting of elite universities, and (3) censorship and suppression of scholarly expression.

A. *Republican State-Level Overhauls in Universities*

In several U.S. states, including Florida, Indiana, Texas, Ohio, Idaho, and Iowa, Republican officials and legislatures have taken aggressive steps to reshape university governance.[198] In Florida, under Governor Ron DeSantis, public institutions like New College of Florida have faced major government interventions such as trustee overhauls and dismantling of diversity, equity, and inclusion (DEI) offices.[199] A purge of diversity and gender-themed books further alarmed academic communities.[200] Similarly, in Indiana, Governor Mike

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[196] *Compare* Heather Hollingsworth, *Far Beyond Harvard, Conservative Efforts to Reshape Higher Education Are Gaining Steam*, AP NEWS (July 23, 2025), https://apnews.com/article/635834c9e09e4361f319257ab9fa3724 (discussing conservative attempts to diminish academic freedom) *with* Ben-Dan, *supra* note 2, at 164 (advocating, from a progressive perspective, the narrowing of the academic freedom doctrine to exclude "plainly racist" speech); *see also* WES HENRICKSEN, SHOUTING FIRE: POEMS ON FREE SPEECH (forthcoming 2026-27) (observing, in a poem called "Politics or Principle," that attacks on freedom of speech come from both sides of the political aisle).

[197] *See supra* Part IV.

[198] *See, e.g.*, Hollingsworth, *supra* note 196 (detailing actions taken by Republican officials in Florida, Indiana, Ohio, Texas, Iowa, and Idaho to "reshape" higher education in a manner consistent with conservative ideology).

[199] *See id.*

[200] *See* Matt Lavietes, *Florida College Dumps Hundreds of Books, Many on Sexuality, Race and Feminism,* NBC NEWS (Aug. 16, 2024), https://www.nbcnews.com/nbc-out/out-news/florida-new-college-books-removed-lgbtq-race-women-rcna166912; Lisa Tolin, *596 Books Banned by Department of Defense Schools Include Titles on Democracy, Feminism, Racism*, PEN AMERICA (July 17, 2025), https://pen.org/books-banned-by-department-of-defense-schools/.

Braun replaced alumni-elected university trustees with conservative appointees and scrutinized hiring practices, raising concerns about ideological interference in faculty selection.[201] Meanwhile, in Ohio, Texas, and Arizona, state officials moved to ban DEI programs, restrict student protest rights, and give governing boards greater control over curricula.[202] Likewise, Alabama passed a law that "bans diversity, equity and inclusion initiatives in public schools and the teaching of what Republican lawmakers dubbed 'divisive concepts' related to race and gender."[203]

Critics have argued that actions like the ones described above from Republican-led state governments are undermining institutional independence and free intellectual inquiry.[204] They view these actions as a politically motivated assault on academic autonomy for teachers and scholars in universities and high schools.[205] Arguably, these actions undermine academic freedom by attempting to exercise direct political control over academic institutions, diluting shared governance and threatening researchers' and educators' freedom to teach, research, and discuss controversial issues without interference.

B. *Federal-Level Targeting of Elite Universities*

In recent years, Republicans and conservative-leaning journalists have frequently appealed to free speech principles, alleging that Democrats and social media companies used political and corporate power to censor disfavored speech and ideas. For example, Republican members of the House Oversight Committee accused the Biden

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201 *See* Hollingsworth, *supra* note 196.

202 *See id.*; *see also* Gene Nichol, *Political Interference with Academic Freedom and Free Speech at Public Universities*, ACADEME MAG., https://www.aaup.org/academe/issues/105-1/political-interference-academic-freedom-and-free-speech-public-universities (last visited Aug. 18, 2025) (discussing recent state government interference with curricula at Arizona State University and the University of Arizona).

203 Kimberly Chandler, *Federal Judge Refuses to Block Alabama Law Banning DEI Initiatives in Public Schools*, AP NEWS (Aug. 13, 2025), https://apnews.com/article/university-of-alabama-dei-83c48702520d0adf937d9371c1f46b17 (last visited Aug. 18, 2025).

204 *See* Hollingsworth, *supra* note 196; Nichol, *supra* note 202.

205 *See, e.g.*, Hollingsworth, *supra* note 196; Randi Weingarten, *Protecting Academic Freedom and Our Democracy: The Role of Faculty Unions*, AM. FED. TCHRS., https://www.aft.org/ae/summer2025/weingarten (last visited Nov. 22, 2025); Capital News Service, *Virginia University Reform Efforts Mirror Nationwide Conservative Attacks, Experts Say*, VA. MERCURY (May 5, 2025), https://virginiamercury.com/2025/05/05/virginia-university-reform-efforts-mirror-nationwide-conservative-attacks-experts-say/.

administration of undermining free speech through the Cybersecurity and Infrastructure Security Agency's (CISA's) partnerships with third-party organizations.[206] The Republican Committee members alleged these partnerships enabled the labeling of dissenting narratives as "disinformation" and constituted a covert censorship campaign.[207] Republican Senator Rand Paul pledged to eliminate or sharply curtail CISA's role in combating domestic misinformation, arguing that the agency's efforts infringed on free speech by targeting conservative voices under the guise of countering disinformation.[208]

At the state level, the Texas Attorney General, Ken Paxton, defended House Bill 20 before the U.S. Supreme Court, arguing that the law—which prohibits large social-media platforms from engaging in viewpoint discrimination—was necessary to protect Americans from private censorship and uphold free speech as a common-carrier principle.[209] Missouri Attorney General Andrew Bailey, who led a coalition of 20 states, filed a Supreme Court brief supporting Texas and Florida laws that prohibit social-media companies from freely moderating content on their platforms, arguing that to allow social media companies to censor sets a dangerous First Amendment precedent.[210] Journalist Matt Taibbi testified during a congressional hearing that the State Department's Global Engagement Center had overstepped its remit by pressuring social-media platforms to moderate domestic speech, which he characterized as "digital McCarthyism" and a threat to Americans' free-speech rights.[211] Republican lawmakers at the same hearing invoked parental and educator concerns, portraying

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206 *See* Letter from James Comer et al., Comm. on Oversight & Reform Ranking Member, to Alejandro Mayorkas, U.S. Sec'y of Homeland Sec. (Nov. 2, 2022), https://oversight.house.gov/wp-content/uploads/2022/11/DHS-Censorship-Letter-11022022.pdf.

207 *Id.*

208 *See* Martin Matishak, *Cyber Information-Sharing Law and State Grants Set to Go Dark as Congress Stalls Over Funding*, THE RECORD (Sept. 30, 2025), https://therecord.media/cisa-2015-state-cyber-grants-lapse-congress-government-shutdown.

209 *See* Off. of the Tex. Att'y Gen., Attorney General Ken Paxton Defends Texas Law Prohibiting Big Tech Censorship at SCOTUS (Feb. 25, 2024), https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-defends-texas-law-prohibiting-big-tech-censorship-scotus.

210 *See* Press Release, Mo. Off. of the Att'y Gen., Attorney General Bailey Leads 20 States in Filing Supreme Court Brief against Censorship on Social Media Platforms (Jan. 22, 2024), https://ago.mo.gov/attorney-general-bailey-leads-20-states-in-filing-supreme-court-brief-against-censorship-on-social-media-platforms/.

211 Josh Christenson, *'Twitter Files' Journalist Matt Taibbi Spars with Biden's Disinfo Czar in Censorship Hearing: 'We Don't Need a Truth Squad*,' N.Y. POST (Apr. 1, 2025), https://www.aol.com/twitter-files-journalist-matt-taibbi-203423569.html.

Biden administration policies as chilling speech by undermining the ability of parents to advocate for their children's education, framing this as a First Amendment issue of fundamental importance.[212]

After Trump was elected, however, he and other Republicans took action to shut down opposing speech, which flew in the face of free speech—and academic freedom—principles they had appealed to during the prior administration's term. For instance, the Trump administration engaged in sustained, high-profile confrontations with elite universities such as Harvard and Columbia, leveraging federal funding and legal threats to influence academic policy.[213] The administration's actions were in response to alleged left-wing bias at universities with so-called "woke" policies and programs.[214] Indeed, within Trump's first days in office, he signed three executive orders banning DEI and related programs and messaging.[215] Shortly thereafter, the Trump administration froze or threatened to revoke billions in research funding, questioned some universities' tax-exempt status, and challenged international student and diversity-related policies.[216]

Trump further targeted elite universities by directing the Department of Education to compel unprecedented admissions data

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[212] *See* Robert Tait, *Capitol Hill Hearing on "Censorship Industrial Complex" Under Biden Based on "Fiction," Says Expert*, GUARDIAN (Apr. 1, 2025), https://www.theguardian.com/us-news/2025/apr/01/capitol-hill-hearing-biden-censorship-trump.

[213] *See* BRIGHT LINE WATCH, THREATS TO DEMOCRACY AND ACADEMIC FREEDOM AFTER TRUMP'S SECOND FIRST 100 DAYS (2025), https://brightlinewatch.org/threats-to-democracy-and-academic-freedom-after-trumps-second-first-100-days/.

[214] *See id.*

[215] On January 20, 2025, President Trump issued: (1) Executive Order 14151, which required all federal agencies to dismantle DEI programs and place DEI staff on immediate leave, *see* Joshua Nelken-Zitser, *Trump Orders All Federal DEI Staffers on Leave While He Dismantles Their Departments*, BUS. INSIDER (Jan. 20, 2025), https://www.businessinsider.com/trump-orders-federal-dei-roles-terminated-staff-on-leave-immediately-2025-1, and (2) Executive Order 14148, which rescinded numerous DEI-related orders from the Biden administration and instructed agencies to end federal implementation of what it called "radical DEI ideology," Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 20, 2025). The following day, Trump signed a related order rescinding affirmative action requirements in federal contracting and directing agencies to shift toward "merit-based" employment and contracting practices. Megan Cerullo, *Trump Signs Orders Ending Diversity Programs; Federal DEI Staffers Being Placed on Leave*, CBS NEWS (Jan. 22, 2025), https://www.cbsnews.com/news/trump-orders-end-diversity-programs-dei/.

[216] *See* Collin Binkley, *Harvard and the Trump Administration Are Nearing a Settlement Including a $500 Million Payment*, AP NEWS (Aug. 13, 2025), https://apnews.com/article/harvard-trump-agreement-antisemitism-ivy-a84b88a8136a852aa305e508d012afb6; Michel Martin & Elissa Nadworny, *President Trump Threatens Harvard's Tax-Exempt Status*, NPR (Apr. 16, 2025), https://www.npr.org/2025/04/16/nx-s1-5366012/president-trump-threatens-harvards-tax-exempt-status.

transparency in an effort to force universities to comply with the ideologically driven executive orders.[217] The Education Department's Office for Civil Rights opened wide-ranging Title VI investigations into dozens of leading institutions and warned that violations could trigger loss of federal funds.[218] The Department of Justice likewise launched a pattern-or-practice investigation of the University of California system under Title VII, citing an alleged antisemitic hostile work environment for employees.[219] Moreover, the Department of Homeland Security escalated the fight with Harvard by canceling grants, demanding records on foreign student visa holders, and threatening both loss of SEVP certification[220] and challenges to the university's tax-exempt status.[221]

More broadly, the administration has revoked thousands of student visas and sought to freeze or condition federal grants to institutions such as Columbia and Harvard amid disputes over campus protests, DEI, and related ideological issues.[222] Harvard, Columbia, and the University of Pennsylvania discussed entering into large settlement agreements—though not yet final, a proposed settlement of $500 million has been discussed in the case of Harvard—raising alarms about the administration using financial leverage to curtail academic

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217 *See Fact Sheet: President Donald J. Trump Ensures Transparency in Higher Education Admissions*, WHITE HOUSE (Aug. 7, 2025), https://www.whitehouse.gov/fact-sheets/2025/08/fact-sheet-president-donald-j-trump-ensures-transparency-in-higher-education-admissions/.

218 *See* Press Release, U.S. Dep't of Educ., Office for Civil Rights Initiates Title VI Investigations into Institutions of Higher Education (Mar. 14, 2025), https://www.ed.gov/about/news/press-release/office-civil-rights-initiates-title-vi-investigations-institutions-of-higher-education-0.

219 *See* Press Release, U.S. Dep't of Justice, U.S. Justice Department Launches Investigation of University of California Under Title VII of the Civil Rights Act of 1964 (Mar. 5, 2025), https://www.justice.gov/opa/pr/us-justice-department-launches-investigation-university-california-under-title-vii-civil.

220 SEVP certification refers to the Student and Exchange Visitor Program, a program administered by the U.S. Department of Homeland Security that "provides approval and oversight to schools authorized to enroll F and M nonimmigrant students and gives guidance to both schools and students about the requirements for maintaining [the student's] status." Erin N. Grubbs, *Academic Espionage: Striking the Balance Between Open and Collaborative Universities and Protecting National Security*, 20 N.C. J.L. & TECH. ON. 235, 243-44 (2019) (alteration in original).

221 *See* Press Release, U.S. Dep't of Homeland Sec., Secretary Noem Terminates $2.7 Million in DHS Grants; Orders Harvard to Prove Compliance with Foreign Student Requirements (Apr. 16, 2025), https://www.dhs.gov/news/2025/04/16/secretary-noem-terminates-27-million-dhs-grants-orders-harvard-prove-compliance-0.

222 *See* Frances Vinall, *Over 6,000 Student Visas Revoked for Crimes and Overstays, U.S. Says*, WASH. POST (Aug. 19, 2025), https://www.washingtonpost.com/education/2025/08/19/student-visas-revoked-6000-trump/.

freedom.[223] These actions and others have been perceived by many as coercive efforts to impose ideological conformity.[224] Moreover, these actions demonstrated how federal executive power can be used to impose ideological conformity on research-intensive institutions, undermining their independence and chilling discourse, thereby threatening academic freedom.

C. *Censorship and Suppression of Scholarly Expression*

Academic freedom is not only under attack via policy and funding, but it is also threatened by overt censorship in scholarly research and publishing. The Trump administration froze or cut billions of dollars in research funding to elite universities, including Columbia, Harvard, Cornell, Northwestern, Penn, Brown, and Princeton, as part of ideological pressure tactics, violating standard administrative procedures for grant suspension under the Administrative Procedure Act.[225] The administration also imposed drastic cuts to overhead reimbursement rates, reducing National Institutes of Health (NIH) indirect cost support from around 40-50% to just 15%, threatening the viability of university laboratories and operations.[226] Concurrently, the administration ordered the removal or suppression of thousands of federal scientific webpages, datasets, and publications, particularly those related to DEI, LGBTQ research, environmental justice, HIV/AIDS, and long-COVID, thereby censoring key academic resources.[227] Hundreds of scientists responded by accusing the administration

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[223] *See* Binkley, *supra* note 216; Sheryl Gay Stolberg, *Trump Administration Reaches Deal with Columbia, Penn*, N.Y. TIMES (July 24, 2025), https://www.nytimes.com/2025/07/24/us/trump-university-deal-penn-columbia.html.

[224] *See* Gerard Baker, *Trump's Made Harvard Look Like the Underdog*, TIMES (Apr. 17, 2025), https://www.thetimes.com/comment/columnists/article/trumps-made-harvard-look-like-the-underdog-gz3g7ztkl.

[225] *See* Leah Willingham & Michael Casey, *Harvard Scientists Say Research Could Be Set Back Years After Funding Freeze*, AP NEWS (Aug. 7, 2025), https://apnews.com/article/32c1ae9dc542897496974a85aaa07b85; Guardian Staff and Agencies, *White House Freezes Funds for Cornell and Northwestern in Latest Crackdown*, GUARDIAN (Apr. 8, 2025), https://www.theguardian.com/us-news/2025/apr/08/trump-administration-cornell-northwestern-funding.

[226] *See* Meredith Wadman, *Trump Proposes Massive NIH Budget Cut and Reorganization*, SCIENCE (Apr. 17, 2025), https://www.science.org/content/article/trump-proposes-massive-nih-budget-cut-and-reorganization.

[227] *See* Cynthia Cox et al., *A Look at Federal Health Data Taken Offline*, KFF (Feb. 2, 2025), https://www.kff.org/policy-watch/a-look-at-federal-health-data-taken-offline/; Press Release, UCLA Sch. Of Law Williams Inst., Removal of Data and Research from Federal Government

of ideological censorship and targeting of researchers, prompting the National Academies of Sciences, Engineering, and Medicine to condemn the actions and warn of long-term harm to academic freedom.[228] Moreover, a federal judge rebuked these actions by ordering the restoration of major suspended National Science Foundation (NSF) research grants to the University of California, Los Angeles, citing insufficient justification and procedural defects in the administration's grant suspensions.[229] Finally, a federal judge in Alabama endorsed the assertion that in-class faculty speech is government speech, which could allow states to muzzle faculty and dictate state-endorsed orthodoxy, effectively turning faculty into mouthpieces of the government.[230]

The pressure from courts, governments, and administrations on universities to adhere to conservative ideology, however, has stifled open discourse and censored disfavored progressive views in numerous instances. To give one example, in June 2025, Harvard abruptly cancelled a special issue on education in Palestine, even after contracts and editorial work were complete.[231] Contributors believe the decision stemmed from political pressure tied to ongoing federal scrutiny over Palestine-related scholarship.[232] Many see this as institutional

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Websites Threatens the Health and Well-Being of LGBT People (Feb. 27, 2025), https://williamsinstitute.law.ucla.edu/press/federal-data-removal-press-release/.

228 *See* Jessica Glenza, *More Than 1,900 Scientists Write Letter in 'SOS' Over Trump's Attacks on Science*, GUARDIAN (Mar. 31, 2025), https://www.theguardian.com/us-news/2025/mar/31/scientists-letter-trump-administration.

229 *See* Ryan Quinn, *UCLA Researchers Get NSF Grants Back Thanks to Court Order*, INSIDE HIGHER ED (Aug. 14, 2025), https://www.insidehighered.com/news/faculty-issues/research/2025/08/14/federal-judge-orders-nsf-reinstate-suspended-ucla-grants.

230 Simon v. Ivey, No. 2:25-cv-00067-RDP, 2025 WL 2345845, at *58-*59 (N.D. Ala. Aug. 13, 2025); *see also* Alander Rocha, *Federal Judge Denies Injunction Against Alabama's Anti-DEI Law*, ALA. REFLECTOR (Aug. 13, 2025), https://alabamareflector.com/2025/08/13/federal-judge-denies-injunction-against-alabamas-anti-dei-law/ (summarizing the parties' arguments; plaintiffs argued that a new law led to "viewpoint discrimination" and "self-censor[ship]," while the defendants argued that classroom speech is "government speech" and the University of Alabama has the right to "reasonably control the content of their curriculum").

231 *See* William C. Mao & Veronica H. Paulus, *Harvard Journal Abruptly Cancels Issue on Palestine, Sparking Accusations of Censorship*, HARV. CRIMSON (July 24, 2025), https://www.thecrimson.com/article/2025/7/24/harvard-educational-review-palestine/; Alice Speri, *Revealed: Harvard Publisher Cancels Entire Journal Issue on Palestine Shortly Before Publication*, GUARDIAN (July 22, 2025), https://www.theguardian.com/education/2025/jul/22/harvard-educational-review-palestine-issue-cancelled.

232 *See* Alice Speri, *'Censorship': Over 115 Scholars Condemn Cancellation of Harvard Journal Issue on Palestine*, GUARDIAN (Aug. 14, 2025), https://www.theguardian.com/education/2025/aug/14/harvard-journal-israel-gaza-cancellation.

censorship driven by fear of reprisal.[233] Pre-publication cancellations of fully processed academic work signify an alarming degree of editorial censorship.[234] Such pre-publication censorship is particularly troubling when driven by political pressures around sensitive topics.

ANALYSIS

I. APPLYING THE ACADEMIC FREEDOM DOCTRINE TO ADVERSE ACTIONS AGAINST FACULTY FOR ACADEMIC EXPRESSION

Much of the discussion of threats to academic freedom centers on policies and laws that have their greatest effects at the institutional level, or that affect individuals indirectly or cumulatively.[235] At the same time, there have also been some adverse actions taken directly against individual faculty members in retaliation for their academic speech or expression. These faculty members were punished for expressing views or ideas that were deemed so extreme or unacceptable that they justified—in the administrators' point of view—retaliation.[236]

Subsection A of this Section will briefly discuss five recent examples of retaliation against faculty members based on their views. These examples provide a representative sampling of a broader trend and give context to the framework for analyzing speech retaliation actions set forth later in Part VI.C and D. Subsection B will address which interpretation of *Garcetti* is most appropriate in individual academic freedom cases. Subsection C sets forth a four-part framework for analyzing individual such cases, which will be summarized in Subsection D.

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233 *See id.*

234 Indeed, pre-publication censorship is often deemed a "prior restraint"—a restriction that stops speech before it is uttered. In most cases, prior restraints are presumptively unconstitutional under the First Amendment. *See* FW/PBS, Inc. v. Dallas, 493 U.S. 215, 225 (1990) ("[a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity") (quoting Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975)).

235 *See, e.g.*, *supra* notes 159, 161, 213 & 218.

236 *See infra* Section V.A.

A. *Recent Adverse Actions Taken in Response to Faculty Members' Speech*

Amy Wax, University of Pennsylvania. In September 2024, the University of Pennsylvania (Penn) announced the "final determination" in its faculty complaint against law professor Amy Wax. The university imposed a public reprimand, the loss of her named chair and summer pay, and a one-year suspension at half pay to be served in the 2025–26 academic year.[237] The university cited "flagrant unprofessional conduct," including public commentary about student performance by race and repeated derogatory statements about racial and ethnic groups.[238] The sanctions followed years of controversy over Wax's public remarks on race and immigration that officials concluded undermined equitable treatment of students.[239] News coverage at the time likewise reported Penn's decision to suspend Wax for one year at half pay and to issue a public reprimand.[240]

Wax framed the case as retaliation for her conservative viewpoints and sued Penn, but in June 2025, a federal judge denied her request for a preliminary injunction to block the sanctions.[241] According to Penn's official statement, the sanctions addressed professional conduct

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[237] *Final Determination of Complaint Against Professor Amy Wax*, U. PA. ALMANAC (Sept. 24, 2024), https://almanac.upenn.edu/articles/final-determination-of-complaint-against-professor-amy-wax.

[238] *Id.*

[239] *Id.*; *see also* Karlie M. Bischoff, *Advancing Academic Freedom Through State Constitutional Protections*, 52 UC L. CONST. Q. 3, 35-36 (2025) (discussing how the dean at Penn Law deemed Wax's statements "antithetical to the University's mission to foster a diverse and inclusive community," and, according to the dean, "[t]hat eminently reasonable concern has led students to conclude that they cannot take Wax's classes and faculty to call her presence demoralizing and disruptive"); David E. Bernstein & David L. Bernstein, *Supporting Free Speech and Countering Antisemitism on American College Campuses*, 2025 HARV. J.L. & PUB. POL'Y PER CURIAM 11, 23 (2025) (highlighting Penn's hypocritical tolerance, on one hand, for hateful antisemitic speech and harassment, which Penn protects, and on the other hand its intolerance for Amy Wax's speech, which the university "remains committed to punishing" because the university deems her expression "racist").

[240] *University Imposes a One-Year Suspension on Law Professor Over Comments on Race*, AP NEWS (Sept. 29, 2024), https://apnews.com/article/5602521577b9236f0902991dd82e8971.

[241] *See* Karen Sloan, *Penn Law Prof Amy Wax Loses Bid to Stop Sanctions Over Comments Deemed Discriminatory*, REUTERS (June 24, 2025), https://www.reuters.com/legal/government/penn-law-prof-amy-wax-loses-bid-stop-sanctions-over-comments-deemed-2025-06-24/; *see also* Alex Morey, *Amy Wax Is Academic Freedom's Canary in the Coal Mine*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Sept. 24, 2024), https://www.thefire.org/news/amy-wax-academic-freedoms-canary-coal-mine (arguing that Amy Wax's sanction is an egregious violation of academic freedom); Andrew Gillen, *Penn Will 'Eviscerate Academic Freedom as We Know It,'* CATO INST. (Oct. 21, 2024), https://www.cato.org/commentary/penn-will-eviscerate-academic-freedom-we-know-it (same).

and did not punish protected scholarship or classroom discussion conducted consistent with faculty obligations.[242] Other news sources likewise emphasized that the discipline followed a two-year probe into comments about black students and Asian immigration, along with an invitation she extended to a guest speaker in her class labeled by some as a "white nationalist."[243] The controversy continues to be cited nationally as a flashpoint over academic freedom, campus climate, and the bounds of faculty professionalism.[244]

Some supporters of Wax's sanctions view her speech as not merely offensive or distasteful, but "thoroughly anti-intellectual and racist."[245] Others, however, view the issue not as a moral one—that is, one where offensive language is judged as to whether or not it expresses an acceptable viewpoint—but a principled one involving core free speech liberties.[246] The issue, according to many free speech advocates, is that administrators should not be granted the power to adjudge whether a faculty member's speech is too offensive to allow. Instead, as with any government action restricting or punishing speech, content-based decisions should be subject to strict scrutiny and must be struck down unless they satisfy that standard. [247]

Ilya Shapiro, Georgetown University Law Center. On January 31, 2022, Georgetown placed incoming Center for the Constitution executive director and senior lecturer Ilya Shapiro on paid administrative leave after tweets criticizing President Biden's pledge to nominate a black woman to the Supreme Court.[248] Biden had not, at that time, nominated any candidate for the seat, but vowed that whoever he nominated would be a black woman.[249] Some criticized Biden's promise to narrow the

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242 *Final Determination of Complaint Against Professor Amy Wax*, *supra* note 237.

243 *University Imposes a One-Year Suspension on Law Professor Over Comments on Race*, *supra* note 240.

244 *See* sources cited *supra* note 241.

245 Renee Nicole Allen, *Get Out: Structural Racism and Academic Terror*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 599, 630 (2023).

246 *See* Morey, *supra* note 241.

247 *See id.*; *see also* Reed v. Gilbert, 576 U.S. 155, 165 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech.").

248 *See* Lauren Lumpkin, *Incoming Georgetown Law Official Placed on Administrative Leave for Tweets About Supreme Court Pick*, WASH. POST (Jan. 31, 2022), https://www.washingtonpost.com/education/2022/01/31/georgetown-law-ilya-shapiro-administrative-leave/.

249 *See id.*

pool of candidates based on sex and race.[250] Shapiro was among these critics. Specifically, Shapiro tweeted that he supported a particular candidate for the Supreme Court vacancy, Sri Srinivasan, who is a South Asian of Indian descent serving as chief judge of the U.S. Circuit Court of Appeals for the District of Columbia.[251] Shapiro said Srinivasan would be President Biden's "best pick" for the Court opening.[252] He continued, "But alas [Srinivasan] doesn't fit into latest intersectionality hierarchy so we'll get lesser black woman."[253]

After a months-long investigation, Georgetown announced on June 2, 2022, that Shapiro was "not properly subject to discipline" because the tweets predated his employment, and he was cleared to start work.[254] Days later, Shapiro resigned.[255] He asserted that the investigation and administrative statements created a "hostile work environment" incompatible with his role.[256]

The case quickly became a national proxy battle over whether administrators would protect controversial academic speech.[257] Shapiro's tweets, and particularly the one in which he used the phrase "lesser black woman," sparked intense criticism from students and faculty who argued the remarks were demeaning and harmful, while others defended his right to express offensive views.[258] Even as Georgetown cleared him, free-speech groups stressed that retaining him was consistent with academic freedom principles despite the "offensive" nature of the tweets.[259] Shapiro's resignation letter argued that institutional

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250 *See, e.g.*, Danielle Kurtzleben, *Republicans Take Issue with Biden's Pledge to Pick a Black Woman for Supreme Court*, NPR (Feb. 4, 2022), https://www.npr.org/2022/02/04/1078358077/republicans-take-issue-with-bidens-pledge-to-pick-a-black-woman-for-supreme-court.

251 *See* Sabrina Conza, *Ilya Shapiro Resigns from Georgetown Following Reinstatement after 122-Day Investigation of Tweets*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (June 6, 2022), https://www.thefire.org/news/ilya-shapiro-resigns-georgetown-following-reinstatement-after-122-day-investigation-tweets.

252 *Id.*

253 *Id.*

254 Lumpkin, *supra* note 248.

255 *See* Letter from Ilya Shapiro, Geo. Univ. L. Ctr. Exec. Dir. & Senior Lecturer, to William M. Treanor, Geo. Univ. L. Ctr. Dean & Exec. Vice President (June 6, 2022), https://www.thefire.org/sites/default/files/2022/06/05215256/Ilya-Shapiro-Resignation-Letter-to-Georgetown-University-Law-Center-June-6-2022.pdf.

256 *Id.*

257 Conza, *supra* note 251.

258 *See id.*; Lumpkin, *supra* note 248.

259 *ACLU Comment on Georgetown Law School's Decision to Retain Ilya Shapiro*, ACLU (June 2, 2022), https://www.aclu.org/press-releases/aclu-comment-georgetown-law-schools-decision-

DEI enforcement had created a "heckler's veto" chilling dissenting ideological views at the law school.[260] The propriety of Georgetown's response to Shapiro, like Penn's response to Amy Wax's, hinges on how academic freedom is defined and applied.

Joshua Katz, Princeton University. In May 2022, Princeton's Board of Trustees fired tenured classics professor Joshua Katz following an investigation that the university said uncovered new misconduct related to past violations of rules governing faculty–student relationships.[261] Princeton stated that Katz had misrepresented facts during a prior probe and discouraged a former student from seeking mental-health care, which officials cited as grounds for dismissal.[262] Katz and supporters countered that the renewed investigation and firing were retaliation for his 2020 essay criticizing antiracism demands and the student Black Justice League.[263] The Daily Princetonian likewise reported that the university denied the decision was about speech, while critics described the process as a pretext to punish protected expression.[264] Katz's 2020 open letter, which described the Black Justice League as "a small local terrorist organization," prompted high-level criticism from Princeton's president even as the university issued a statement reaffirming its free-speech commitments.[265] After his dismissal, alumni and outside commentators split sharply over whether Princeton enforced conduct

retain-ilya-shapiro.

260 *See* Shapiro, *supra* note 255.

261 Elisabeth H. Daugherty, *Trustees Fire Tenured Professor, Citing Investigation of Misconduct*, PRINCETON ALUMNI WKLY. (June 23, 2022), https://paw.princeton.edu/article/trustees-fire-tenured-professor-citing-investigation-misconduct.

262 *Id.*

263 *Id.* Specifically, in response to an open letter from the Black Justice League at Princeton to enable the university "to become, for the first time in its history, an anti-racist institution," Katz published a letter in response. Kevin T. Baine, *Free Speech on Campus: The Attack from Within*, 51 HOFSTRA L. REV. 397, 402 (2023). Katz said he agreed with some demands but disagreed with others, "including giving faculty of color course relief, summer salary, and an extra semester of sabbatical; creating a faculty committee to investigate and discipline 'racist behaviors, incidents, research, and publication'; and issuing a formal, public apology to the members of the Black Justice League, which had been active on campus from 2014 to 2016." *Id.*

264 *See* Evelyn Doskoch & Paige Cromley, *Princeton Dismisses Professor Joshua Katz 'Effective Immediately' After U. Investigation Finds Policy Violations*, DAILY PRINCETONIAN (May 23, 2022), https://www.dailyprincetonian.com/article/2022/05/princeton-professor-joshua-katz-fired-classics-investigation-board-of-trustees.

265 *See id.*

rules neutrally or punished unpopular views, reflecting broader ideological battles on campuses.[266]

Princeton's official statements emphasized that the dismissal turned on misconduct findings, not the content of speech.[267] The Daily Princetonian detailed the multi-year timeline of speech controversy, press scrutiny, and subsequent investigations culminating in termination.[268] The Katz case, like that of Wax and Shapiro, stands as a touchstone in debates about how misconduct processes intersect with politically charged faculty speech.[269]

Dorian Abbot, University of Chicago; disinvited by Massachusetts Institute of Technology (MIT). In October 2021, MIT canceled its high-profile public Carlson Lecture by University of Chicago geophysicist Dorian Abbot after controversy over his published criticism of campus DEI policies.[270] MIT said the public-outreach event could not be held effectively amid the controversy, while offering Abbot an alternative research talk to faculty and students.[271] The cancellation drew national attention as an example of ideological disputes influencing scientific outreach and university events.[272] MIT's president later addressed the incident, acknowledging the distress it caused and urging a path forward consistent with free expression.[273]

Abbot's public writing had argued for "merit, fairness[,] and equality" in admissions and hiring and against certain DEI practices, positions that supporters and critics alike treated as political and ideological.[274] Following MIT's decision, thousands later watched Abbot deliver the talk elsewhere.[275] MIT's leadership framed the

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266 *See* Daugherty, *supra* note 261.

267 *See id.*

268 *See* Doskoch & Cromley, *supra* note 264.

269 *See* Baine, *supra* note 263; Daugherty, supra note 261.

270 Michael Powell, *M.I.T.'s Choice of Lecturer Ignited Criticism. So Did Its Decision to Cancel*, SEATTLE TIMES (Oct. 20, 2021), https://www.seattletimes.com/nation-world/mits-choice-of-lecturer-ignited-criticism-so-did-its-decision-to-cancel/; *see also* Colleen Flaherty, *A Canceled Talk, and Questions About Just Who Is Politicizing Science*, INSIDE HIGHER ED (Oct. 5, 2021), https://www.insidehighered.com/news/2021/10/06/mit-controversy-over-canceled-lecture (providing Abbot's own account of the campaign to cancel his lecture because of his opinion on DEI).

271 Flaherty, *supra* note 270.

272 *See* Powell, *supra* note 270.

273 *See* Letter from L. Rafael Reif, 17th President of MIT, to MIT Community (Oct. 18, 2021), https://reif.mit.edu/speeches-writing/reflections-and-path-forward-community-and-free-expression.

274 Flaherty, *supra* note 270.

275 *See* Powell, *supra* note 270.

episode as part of a broader need to reaffirm norms of open inquiry while supporting community members who felt targeted.[276] The incident stands as one prominent example of political fights over DEI spilling into decisions about university lectures and scientific communication.[277]

Ken Levy, Louisiana State University (LSU). In January 2025, LSU removed tenured law professor Ken Levy from teaching after he used vulgar language while criticizing Governor Jeff Landry and former President Donald Trump in class, prompting an investigation into alleged inappropriate conduct.[278] On January 30, a state district judge ordered LSU to reinstate Levy pending further proceedings.[279] On February 4, the Louisiana First Circuit Court of Appeals stayed the reinstatement order, allowing LSU's suspension to continue temporarily.[280] A different district judge then ordered LSU to "fully reinstate" Levy on February 11, citing academic-freedom concerns with punishing political commentary in a constitutional law class.[281]

Two days later, Louisiana's First Circuit again blocked the district court's reinstatement order pending an evidentiary hearing, underscoring the legal back-and-forth over LSU's authority to discipline Levy for political speech.[282] Throughout the dispute, LSU maintained that Levy's removal was due to his conduct, not his political views, but Levy contended that LSU was punishing his protected classroom speech.[283] The overly partisan nature of the dispute was criticized by some as political retribution for expressing opinions in a classroom.[284]

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276 Reif, *supra* note 273.

277 *See* Flaherty, *supra* note 270.

278 Piper Hutchinson, *LSU Law Professor Removed from Classes Amid Investigation into Alleged Political Comments*, LA. ILLUMINATOR (Jan. 21, 2025), https://lailluminator.com/2025/01/21/lsu-law-professor-reportedly-removed-from-classes-amid-investigation-into-political-comments/.

279 Piper Hutchinson, *Judge Orders LSU to Reinstate Law Professor Sidelined for Political Comments*, LA. ILLUMINATOR (Jan. 30, 2025), https://lailluminator.com/2025/01/30/judge-orders-lsu-to-reinstate-law-professor-sidelined-for-political-comments/.

280 *See* Chris Nakamoto, *First Circuit Sides with LSU in Law Professor Case*, WAFB (Feb. 4, 2025), https://www.wafb.com/2025/02/04/first-circuit-sides-with-lsu-law-professor-case/.

281 Sara Cline, *Judge Orders LSU to Reinstate Professor Who Was Removed from Class Following Political Comments*, AP NEWS (Feb. 12, 2025), https://apnews.com/article/lsu-professor-louisiana-landry-trump-571c90b3c939ca2d187120957318777a.

282 *See* Greg Larose, *Louisiana Appellate Court Blocks LSU Law Professor from Returning to Class*, LA. ILLUMINATOR (Feb. 13, 2025), https://lailluminator.com/briefs/lsu-law/.

283 *See* Nakamoto, *supra* note 280; see also Cline, supra note 281 (discussing the case's broader academic freedom implications).

284 *See* Hutchinson, *supra* note 278 (quoting one Louisiana attorney as stating: "We cannot live and exist in a country where people are punished because of their opinions, their thoughts[,]

The five examples discussed in this section represent many faculty members who have been retaliated against in recent years because of their academic speech and views. These cases, however, are far from unique. For example, Jason Kilborn, a tenured law professor at the University of Illinois Chicago (UIC), was placed on administrative leave, denied a merit raise, and forced to undergo diversity training and other remediation after including expurgated slurs in an exam question and making other controversial in-class and out-of-class remarks.[285] After publicly announcing Kathleen McElroy's hiring to lead Texas A&M University's journalism program, the university watered down her tenured offer amid regents' concerns and conservative blowback, leading McElroy to decline.[286] Texas A&M later apologized and agreed to pay her a $1 million settlement.[287] The University of Mississippi issued a one-year nonrenewal notice to Garrett Felber in 2020, officially citing communication issues with his chair after he publicly criticized donor influence and the university's ties to carceral institutions.[288] This list could go on for much longer, but these examples suffice to demonstrate that institutional retaliation against disfavored speech on both sides of the political aisle has been too common in recent years.

B. *Determining the Correct* Garcetti *Approach to Individual Academic Freedom*

Each of the instances of interference with academic freedom listed in Section VI.A involves *individual*, rather than *institutional*, academic

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and their words. … This is particularly true in the area of academic freedom. If we take that away, it takes away the cornerstone of this democracy. And then we don't have one anymore.").

[285] *See* Josh Bleisch, *UPDATE: Another Federal Appeals Court Backs Academic Free Speech for Public Employees*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Mar. 14, 2025), https://www.thefire.org/news/update-another-federal-appeals-court-backs-academic-free-speech-public-employees; *see also* Dave Byrnes, *Seventh Circuit Revives Chicago Law Professor's Free Speech Retaliation Claim Against University Officials*, COURTHOUSE NEWS SERV. (Mar. 12, 2025), https://www.courthousenews.com/seventh-circuit-revives-chicago-law-professors-free-speech-retaliation-claim-against-university-officials/ (discussing Kilborn's First Amendment retaliation lawsuit).

[286] *See* Kate McGee, *Top Texas A&M Officials Were Involved in Botched Recruiting of Journalism Professor, Who Will Receive $1 Million Settlement*, TEX. TRIB. (Aug. 4, 2023), https://www.texastribune.org/2023/08/03/texas-am-regents-kathleen-mcelroy/.

[287] *Id.*

[288] *See* Colleen Flaherty, *Outspoken Out of a Job?*, INSIDE HIGHER ED (Dec. 16, 2020), https://www.insidehighered.com/news/2020/12/17/scholars-pledge-not-speak-ole-miss-until-it-reinstates-colleague.

freedom. Accordingly, institutional framing of the doctrine—for example, under *Bakke* or *University of Pennsylvania*[289]—is inapplicable. After narrowing the focus to the individual faculty member's First Amendment rights as applied to academic freedom, courts must confront the circuit split on *Garcetti*'s application.[290] For the following reasons, this Article argues that the Ninth Circuit correctly interpreted *Garcetti* as inapplicable to academic speech, thereby preserving the constitutional protection of academic freedom.

In *Demers*, the Ninth Circuit held that *Garcetti* does not apply to "speech related to scholarship or teaching," and instead, such expression must be analyzed under the *Pickering* balancing test.[291] The Ninth Circuit's interpretation reflects the Supreme Court's recognition that academic freedom is "a special concern of the First Amendment."[292] By explicitly exempting academic speech from *Garcetti*'s categorical rule, the Ninth Circuit protected faculty contributions to public discourse without undue fear of institutional retaliation.[293]

Moreover, the Ninth Circuit's carve-out respects the text and structure of *Garcetti* itself, which expressly left unresolved the question of whether the decision applies to "speech related to scholarship or teaching."[294] In declining to decide that issue, the Court signaled that academic speech implicates distinct constitutional values that require separate consideration.[295] The Ninth Circuit seized on that opening in *Demers*, recognizing that academic expression cannot be equated with routine employee communications without eroding the very principles that make universities "peculiarly the marketplace of ideas."[296] In doing so, the court crafted a doctrine that preserves *Garcetti*'s core holding

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289 *See* Regents of Univ. of Cal v. Bakke, 438 U.S. 265, 312 (1978); Univ. of Pa. v. E.E.O.C., 493 U.S. 182, 197-99 (1990).

290 *See supra* Part III; *see also* Mayhew v. Town of Smyrna, Tennessee, 856 F.3d 456, 462 (6th Cir. 2017) (discussing the circuit split on how to apply the *Garcetti* holding); Jordan Zaia, *Is* Garcetti *Too Cool for School?: Why* Garcetti v. Ceballos *Should Not Apply to School Teachers*, 34 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 734, 754-67 (2024) (discussing and analyzing the *Garcetti*-application circuit split at length).

291 Demers v. Austin, 746 F.3d 402, 411, 412 (9th Cir. 2014).

292 Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

293 *See Demers*, 746 F.3d at 411.

294 *Garcetti*, 547 U.S. at 425.

295 *See id.*; *see also* Byrne, *supra* note 159, at 288-89 (describing how "the Supreme Court came to constitutionalize academic freedom," seeking "to protect the individual scholar against administrators or trustees who are state actors").

296 *See Demers*, 746 F.3d at 412; *Keyishian*, 385 U.S. at 603.

while ensuring that faculty speech retains meaningful constitutional protection.[297]

Placing academic speech outside *Garcetti* and within the *Pickering* framework also aligns with the Supreme Court's longstanding recognition that the government's managerial interests differ in the academic setting.[298] Whereas in ordinary workplaces the state's interest in controlling employee speech may be paramount, universities and schools serve a unique public function in fostering open debate and the advancement of knowledge.[299] By applying *Pickering*, which balances the government's interest in efficiency and avoiding disruption against the employee's interest in commenting on matters of public concern, the Ninth Circuit preserved space for faculty to engage in scholarship, criticism, and instruction without intruding on the university's interests.[300]

By contrast, circuits that have applied *Garcetti* rigidly risk undermining the First Amendment's promise in the university context. For example, the Seventh Circuit in *Renken v. Gregory*[301] held that a professor's complaints about the administration of a federal grant were unprotected because they were made pursuant to his official duties.[302] Similarly, the Sixth Circuit in *Evans-Marshall v. Board of Education*[303] concluded that *Garcetti* foreclosed a high school teacher's claim based on curricular choices.[304] These approaches, by collapsing academic speech into the category of routine employment speech, deprive faculty of constitutional protection precisely where robust discourse is most vital. The Ninth Circuit's refusal to follow that path demonstrates a more principled alignment with the First Amendment's values.

The Ninth Circuit's stance is also consistent with other appellate decisions that have resisted applying *Garcetti* to academic speech. Similarly, in *Adams v. Trustees of the University of North Carolina–Wilmington*,[305] the Fourth Circuit held that a professor's extramural writings were protected speech because they addressed matters of

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297 *See id.* at 412-13.

298 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

299 *See* Post, *supra* note 122, at 124, 127.

300 *See Demers*, 746 F.3d at 412.

301 Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008).

302 *See id.* at 774.

303 Evans-Marshall v. Bd. of Educ., 624 F.3d 332 (6th Cir. 2010).

304 *See id.* at 340.

305 Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011).

public concern and were not part of his official duties.[306] Like the Ninth Circuit, the Fourth Circuit applied the *Pickering* framework, recognizing the importance of protecting faculty who speak as citizens on public issues.[307] These converging lines of authority underscore the correctness of the Ninth Circuit's position that *Garcetti* should not govern academic speech, lest universities be permitted to suppress dissenting scholarly voices.[308]

In fairness, however, there is a case to be made in support of the circuits that have rejected the Ninth Circuit's categorical exemption for faculty expression and have reasoned that *Garcetti* applies fully to academic speech.[309] These are embodied in the Sixth and Seventh circuits' view that academic speech is not fundamentally different from other employee speech when it arises from official duties.[310] Courts adopting this approach emphasize institutional management interests, noting that universities and schools must maintain authority over curriculum, resource allocation, and academic standards.[311] From this perspective, exempting academic speech from *Garcetti* would undermine administrators' ability to ensure coherent policies and educational quality.[312] The concern is that allowing professors to constitutionalize disputes over pedagogy or internal governance would transform routine employment conflicts into constitutional litigation, thereby impeding efficient management.[313]

These courts also invoke *Connick v. Myers*[314] to argue that academic employees, like other public employees, must distinguish between speech on public matters and private grievances.[315] By applying *Garcetti* without exception, these courts seek to ensure that only speech made as citizens, not as employees carrying out official duties, receives constitutional protection.[316] This approach seeks to preserve doctrinal

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306 *See id.* at 563-64.

307 *See id.* at 563.

308 *See* Demers v. Austin, 746 F.3d 402, 412-13 (9th Cir. 2014).

309 *See* Garcetti v. Ceballos, 547 U.S. 410, 421-22 (2006).

310 *See* Renken v. Gregory, 541 F.3d 769, 774 (7th Cir. 2008); Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 340 (6th Cir. 2010).

311 *See Evans-Marshall*, 624 F.3d at 340-41.

312 *See id.* at 341.

313 *See* Nahmod, *supra* note 97, at 580-81.

314 Connick v. Myers, 461 U.S. 138 (1983).

315 *See id.* at 146.

316 *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

clarity by avoiding judicial line-drawing between "academic" and "non-academic" speech, which could otherwise generate uncertainty.[317] From this perspective, the Ninth Circuit's exemption risks creating a special category of speech rights not grounded in *Garcetti*'s text or rationale.[318]

The approach taken by courts applying *Garcetti* to academic speech, such as the Sixth and Seventh circuits, however, ignores three important principles. First, they ignore the caveat in *Garcetti* itself, cautioning against applying the standard to academic speech.[319] Second, they ignore the core purpose of the First Amendment's speech protections, which have always been primarily to guard the individual right to free expression.[320] And third, they ignore the Supreme Court's guidance that not only is academic freedom covered by the First Amendment, but indeed it is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[321] Orthodoxy, in the university context, is often enforced by administrators who retaliate against faculty members who express disfavored views.[322] By allowing retaliation and stripping all protections from academic speech based solely on a professor's employer, these courts' approach undermines First Amendment freedoms and contradicts Supreme Court precedent.[323]

By contrast, the Ninth Circuit's approach promotes doctrinal coherence by harmonizing *Garcetti* with earlier precedents rather than

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317 Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677, 698-99 (2014).

318 *See id.* at 699.

319 *See Garcetti*, 547 U.S. at 425.

320 *See* Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1394 (2017) ("The liberal tradition understands the purpose of the First Amendment as protecting innate individual rights by ensuring individuals are free from the state."); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 534 n.2 (1980) ("Freedom of speech . . . protects the individual's interest in self-expression."); Cohen v. California, 403 U.S. 15, 24 (1971) (stating that free expression stems from the premise of individual dignity and choice which underlies the political system); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (noting that the founding fathers valued liberty as both an end and a means); Peter C. McCabe, Connick v. Myers*: New Restrictions on the Free Speech Rights of Government Employees*, 60 IND. L.J. 339, 356 n.133 (1985) (summarizing several Supreme Court cases that support the idea that free speech is fundamentally an individual liberty).

321 Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

322 *See, e.g.*, Morey, *supra* note 241; Doskoch & Cromley, *supra* note 264.

323 *See* sources cited *supra* notes 320 & 322.

allowing it to displace them.[324] Scholars have warned that extending *Garcetti* to the academy might have devastating consequences for the production of knowledge and the vitality of democratic debate.[325] By exempting scholarship and teaching from *Garcetti*, the Ninth Circuit ensures that public universities remain institutions where professors may engage in critical inquiry without fear of reprisal, thereby serving the democratic function the First Amendment was designed to protect.[326] In this way, the Ninth Circuit's interpretation is both doctrinally faithful and essential to preserving academic freedom.[327]

C. *A Framework for Applying the Individual Academic Freedom Doctrine to Recent Adverse Actions Punishing Faculty Speech*

According to a 2024 survey of more than 6,200 full-time professors at dozens of universities conducted by the Foundation for Individual Rights and Expression (FIRE), "faculty members are four times more likely to self-censor than they were in the 1950s, at the height of the Cold War and McCarthyism."[328] The survey produced several alarming findings. For example, 35% of faculty say they "recently toned down their writing for fear of controversy, compared to 9% of faculty who said the same during the McCarthy era."[329] A notable 14% of faculty "suffered discipline or threats of discipline for either their teaching, research, academic talks, or other off-campus speech."[330] Moreover:

- 27% of faculty feel unable to speak freely for fear of how students, administrators, or other faculty would respond;
- 40% of faculty worry about damaging their reputations because someone misunderstands something they have said or done;

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[324] *See* Keyishian, 385 U.S. at 603; Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[325] *See* Post, *supra* note 122, at 141 (noting that applying *Garcetti* in the academic context could make scholars and professors beholden to state governments, and that "[t]hey could then no longer serve the function of identifying and advancing knowledge"); Harvey Gilmore, *Has* Garcetti *Destroyed Academic Freedom?*, 6 U. MASS. ROUNDTABLE SYMP. L.J. 79, 101 (2011) (concluding "that *Garcetti* is a serious threat to the concept of academic freedom").

[326] *See* Demers v. Austin, 746 F.3d 402, 412-13 (9th Cir. 2014).

[327] *See id.*

[328] *Silence in the Classroom: The 2024 FIRE Faculty Survey Report*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, available at https://www.thefire.org/facultyreport.

[329] NATHAN HONEYCUTT, SILENCE IN THE CLASSROOM: THE 2024 FIRE FACULTY SURVEY REPORT 1 (2024).

[330] *Id.*

- 23% of faculty worry about losing their jobs because someone misunderstands something they have said or done; [and]
- 50% of faculty say it is rarely or never justified to require faculty job candidates to submit statements pledging commitment to diversity, equity, and inclusion.[331]

These findings reveal that the threats to academic freedom today do not center on the few handpicked examples discussed supra in Section V.A. Those were not isolated incidents. Rather, they were part of a large general trend of universities becoming more ideologically homogenous, less tolerant of disfavored or heterodox views, and more tolerant of retaliation against faculty members for expressing those views.[332]

In this environment, courts and policymakers need a more workable framework for analyzing retaliatory actions against faculty speech. A proper framework must begin with the Supreme Court's recognition in *Keyishian* that academic freedom is "a special concern of the First Amendment" and that the vitality of a democratic society depends upon free inquiry and unfettered exchange of ideas in the university.[333] Any doctrinal approach that fails to prioritize this principle risks allowing public universities to impose an orthodoxy of opinion incompatible with the First Amendment. Thus, the foundational presumption must be that academic freedom is not merely derivative of general employee rights, but instead a constitutional value with independent weight.[334] The scope of what kinds of "academic speech" this special consideration applies to should, on one hand, be limited generally to expression on academic topics broadly defined to be within the speaker's areas of interest and expertise,[335] but on the other hand, expansive, in that it should give wide latitude for views outside the mainstream and that

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331 *Id.*

332 *See* Nathan Honeycutt & David Volodzko, *College Faculty Are More Likely to Self-Censor Now Than at the Height of McCarthyism*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Dec. 19, 2024), https://www.thefire.org/news/college-faculty-are-more-likely-self-censor-now-height-mccarthyism; Kate McGee, *Texas Professors Self-Censor for Fear of Retaliation, Survey Found*, TEX. TRIB. (Dec. 12, 2024), https://www.texastribune.org/2024/12/12/texas-university-survey-self-censor/.

333 Keyishian v. Bd. of Regents, 385 U.S. 589, 603-04 (1967).

334 *See* Post, *supra* note 122, at 123, 131.

335 RABBAN, *supra* note 123, at 8-10.

conflict with popular opinion.[336] The latitude given on this front, however, may have some limits.[337]

Another important component of the framework is provided by the Ninth Circuit's correct determination that *Garcetti* does not apply to "speech related to scholarship or teaching."[338] In contrast to circuits that have applied *Garcetti* rigidly, the Ninth Circuit recognized that extending *Garcetti* to academic speech would undermine the constitutional protection established in *Keyishian*.[339] Rather than stripping academic speech of any First Amendment protection, the Ninth Circuit approach—which applies the *Pickering* balancing test—provides a far more balanced approach that better reflects the underlying principles and values involved.[340] This ensures that the core First Amendment value of academic inquiry is preserved even as legitimate institutional interests are respected.[341]

The FIRE survey underscores why robust protection of academic freedom is necessary. Not only did 35% of faculty report self-censorship, which was higher than it was during the McCarthy era, but 14% of faculty were either disciplined or threatened purely for their academic speech.[342] Moreover, the pressures to conform politically are producing a culture of fear and silence within universities.[343] This data shows that without strong constitutional protection, faculty may mute their speech in precisely the contexts where vigorous debate is most critical to a democratic society.[344] The framework, therefore, must incorporate not only doctrinal precedent but also the lived realities of academic life.[345]

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336 *See, e.g.*, Steven W. Bender, *Critical Freedom*, 34 S. CAL. REV. L. & SOC. JUST. 133, 133-34 (2025) (noting that ABA Standard 208, pertaining to academic freedom, "requires law schools to protect faculty rights to communicate controversial or unpopular ideas").

337 *See* POST, *supra* note 124, at 67.

338 Demers v. Austin, 746 F.3d 402, 411 (9th Cir. 2014).

339 *See id.* at 411-12.

340 *See id.* at 412-13; *see also* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (holding that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general," and setting forth the balancing test "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

341 *See* Demers, 746 F.3d at 412-13.

342 HONEYCUTT, *supra* note 329, at 5, 11.

343 *See* sources cited *supra* note 332.

344 *See* Honeycutt & Volodzko, *supra* note 332.

345 *See id.*

Another component of any effective framework must recognize that academic freedom is not merely an individual right but a structural principle essential to the production of knowledge.[346] Universities perform a public function by generating and transmitting knowledge, and their effectiveness depends upon allowing faculty to pursue inquiry free from political or administrative suppression.[347] Consequently, retaliation against a professor for disfavored views constitutes not only an infringement of individual liberty but also an assault on the integrity of the institution's knowledge-producing mission. Therefore, a constitutional framework that upholds the First Amendment's role in protecting democratic self-government must insulate academic discourse from the distorting effects of official orthodoxy.

Finally, the framework must be grounded in the fundamental principle that the First Amendment protects freedom of thought and expression against state interference.[348] As the Supreme Court made clear more than 80 years ago, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[.]"[349] Accordingly, the government may not compel conformity of opinion nor penalize individuals for dissenting viewpoints.[350] As public universities are state actors, their retaliations against faculty speech implicate the core constitutional prohibition against viewpoint discrimination.[351] Any framework for evaluating university retaliation must therefore begin with a strong presumption against restrictions on faculty speech and place the burden squarely on the institution to demonstrate a compelling and narrowly tailored justification.[352] Only by giving full effect to the First Amendment's fundamental guarantee can courts ensure that universities remain bastions of free expression and democratic deliberation.[353]

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346 Post, *supra* note 122, at 124-25.

347 *Id.*

348 *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

349 *Id.*

350 *See id.*

351 *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995).

352 *See* United States v. Alvarez, 567 U.S. 709, 716-17 (2012).

353 *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

D. *Summary of the Proposed Four-Part Test for Academic Retaliation Claims*

1. Step One: Identify Whether the Speech Constitutes "Academic Speech"

Courts should first determine whether the expression falls within the category of "academic speech," which includes scholarship, teaching, and commentary on institutional or societal matters derived from faculty expertise.[354] This inquiry draws on the Supreme Court's holding in *Keyishian*, which recognized academic freedom as "a special concern of the First Amendment."[355] The definition of academic speech should be construed carefully —broad enough to give faculty wide latitude to express unpopular views, including topics not strictly confined to narrow doctrinal categories,[356] but also narrowly enough to preserve the university's authority to define disciplinary standards.[357]

2. Step Two: Exclude *Garcetti* From the Analysis of Academic Speech

If the speech is classified as academic, *Garcetti* should not apply because, as correctly determined by the Ninth Circuit, applying *Garcetti* in this context would erode the constitutional protections long afforded to faculty.[358] Instead, academic speech must be evaluated under the *Pickering* balancing test, which weighs the faculty member's interest in speaking on matters of public concern against the institution's efficiency interests.[359] This preserves the integrity of *Keyishian*, ensuring academic freedom receives the First Amendment protection it deserves,[360] while still respecting legitimate university governance needs.[361]

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354 *See* Demers v. Austin, 746 F.3d 402, 411-12 (9th Cir. 2014).

355 *Keyishian*, 385 U.S. at 603.

356 *See id.*

357 *See* RABBAN, *supra* note 123, at 9; POST, *supra* note 124, at 67.

358 *See* Garcetti v. Ceballos, 547 U.S. 410, 421-22 (2006); *Demers*, 746 F.3d at 412.

359 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

360 *See Keyishian*, 385 U.S. at 603.

361 *See Demers*, 746 F.3d at 412-13.

3. Step Three: Apply a Strong Presumption in Favor of the Faculty Speaker

Academic freedom plays a unique role in sustaining democratic deliberation; therefore, courts should apply the *Pickering* balance with a strong presumption in favor of the faculty member's right to speak.[362] Empirical evidence demonstrates that faculty are increasingly engaging in self-censorship, with recent FIRE surveys showing rates of self-censorship exceeding those during the McCarthy era.[363] This reality justifies judicial caution in crediting institutional assertions of managerial disruption absent concrete evidence.[364]

4. Step Four: Require Narrow Tailoring of Institutional Interests

Where a university asserts managerial interests justifying adverse action, courts should require that such interests be both compelling and narrowly tailored, consistent with the First Amendment's general protection against viewpoint discrimination.[365] The government may not compel ideological conformity nor punish faculty for holding disfavored views.[366] Any claimed disruption must be real, substantial, and demonstrably linked to the specific speech at issue.[367] Only under such circumstances may institutional discipline outweigh the constitutional presumption in favor of academic freedom.[368]

This four-part test ensures that courts protect faculty members against retaliation for disfavored expression while still permitting universities to vindicate legitimate governance interests.[369] It harmonizes

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362 *See Keyishian*, 385 U.S. at 603-04.

363 *See* HONEYCUTT, *supra* note 329, at 1.

364 *See*, *e.g.*, Post, *supra* note 122, at 125 (noting that "[u]niversities produce knowledge *because* they give scholars the freedom to pursue the disciplinary practices that produce the kind of expert knowledge we demand of universities"—i.e., the advancement of knowledge depends on academic freedom) (emphasis added).

365 *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995).

366 *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

367 *See* Brady v. Tamburini, 518 F. Supp. 3d 570, 586 (D.R.I. 2021) (holding that, under the *Pickering* factors, "to succeed in demonstrating its interest, the government must demonstrate, through evidence, 'harm or increased risks'; 'actual disruption' or, at the very least, the speech's potential to disrupt; or 'internal conflict' and that this was in fact caused by the employee's speech").

368 *See* Demers v. Austin, 746 F.3d 402, 412-13 (9th Cir. 2014).

369 *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603-04 (1967)

the Supreme Court's recognition of academic freedom with the Ninth Circuit's refinement of *Garcetti*, incorporates empirical evidence of threats to academic discourse, and affirms the First Amendment's core role in protecting free thought and speech.[370] By applying this structured inquiry, courts can safeguard the university's essential role as a forum for democratic deliberation and intellectual exploration.[371]

CONCLUSION

Academic freedom remains at the heart of the First Amendment's promise to protect the free exchange of ideas, and the jurisprudence in this area reflects a continuing tension between institutional authority and individual rights. From the Supreme Court's holding in *Keyishian* to the Ninth Circuit's decision in *Demers*, courts have recognized that the vitality of higher education depends on safeguarding the ability of faculty to speak, write, and teach without fear of reprisal.[372] These protections are not mere privileges for academics but serve broader societal interests in the search for truth, democratic self-governance, and ensuring the "marketplace of ideas" functions as intended.[373] As this Article demonstrated, constitutional doctrine, empirical data, and scholarly commentary converge on the conclusion that academic freedom must remain a "special concern of the First Amendment."[374]

At the same time, the contemporary landscape reveals serious challenges. Surveys by FIRE show that rates of faculty self-censorship now exceed even those seen at the height of McCarthyism, underscoring the fragility of expressive liberty within the academy.[375] These findings confirm what some have long argued: that academic freedom is essential not merely to protect individual autonomy, but to preserve the integrity of democratic knowledge production.[376] Recognizing an exception to *Garcetti*, as the Ninth Circuit has done, is a crucial piece of the puzzle.[377] This is because the application of *Garcetti* to academic speech, as some circuits have done, threatens to erode the speech rights

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370 *See id.*; *Demers*, 746 F.3d at 412-13.

371 *See Keyishian*, 385 U.S. at 603.

372 *See id.*; *Demers*, 746 F.3d at 412.

373 *Keyishian*, 385 U.S. at 603.

374 *Id.*

375 *See* HONEYCUTT, *supra* note 329, at 1.

376 Post, *supra* note 122, at 124-25.

377 *Demers*, 746 F.3d at 412-13.

of individuals and demonstrates a failure to recognize both the unique character and value of academic speech.[378] These doctrinal divergences, characterized in part by the circuit split,[379] illustrate the pressing need for a coherent framework that affirms the constitutional centrality of academic speech.

Ultimately, this Article has advanced a doctrinal and normative argument for treating academic speech as a core First Amendment freedom, one that requires courts to reject mechanical applications of *Garcetti* in the university setting. Protecting faculty from retaliation for expressing disfavored views ensures not only their individual liberty but also the university's capacity to serve as a forum for democratic deliberation.[380] The stakes extend beyond the academy: when academic freedom is chilled, public discourse itself suffers, narrowing the range of ideas that inform civic life.[381] Suppressing new ideas by imposing an orthodoxy is a surefire way to weaken democracy and foster ignorance. This lesson is clear to those who have carefully studied the history of free speech.[382] By reaffirming that freedom of speech and academic freedom are intertwined, courts can strengthen the constitutional architecture that sustains both higher education and American democracy.

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[378] *See* Renken v. Gregory, 541 F.3d 769, 774 (7th Cir. 2008); Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 340 (6th Cir. 2010).

[379] *Compare* Demers, 746 F.3d at 412, *with Renken*, 541 F.3d at 774, *and Evans-Marshall*, 624 F.3d at 340.

[380] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642-43 (1943).

[381] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995).

[382] *See generally* JACOB MCHANGAMA, FREE SPEECH: A HISTORY FROM SOCRATES TO SOCIAL MEDIA (2022) (providing a sweeping historical examination of the development, cultural contexts, and challenges of free speech, arguing that robust protections for expressive liberty are essential to democratic societies).