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Renewing Educational Autonomy

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RENEWING EDUCATIONAL AUTONOMY

Johanna Kalb*

ABSTRACT

American colleges and universities are facing an unprecedented wave of state legislative actions calling into question the freedom that these institutions have long enjoyed, as well as their ability to serve increasingly diverse student populations. Current constitutional protections for academic freedom under the First Amendment are proving an inadequate defense from these types of incursions. This Article argues for a reexamination and reinvigoration of a constitutional theory of educational autonomy protected by substantive due process, drawing on both the pre-colonial models that informed the creation of American colleges, as well as the earliest cases involving state efforts to control them. Substantive due process protections for educational autonomy would enhance and reinforce First Amendment academic freedom to ensure that American colleges and universities can continue to fulfill their important historical mission, while being responsive to the educational needs of today's students.

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I. INTRODUCTION

IN 2022, following the Supreme Court's decision in *Dobbs v. Jackson Women's Health*,¹ the "No Public Funds for Abortion Act" went into effect in Idaho.² Among its provisions detailing limits on the use of public funds, the law prevents public entities and their employees from engaging in the provision or performance of abortions, counseling in favor of or promoting abortion, making referrals for abortion, or providing facilities and training for abortion.³ A separate provision of the statute specifically extends these restrictions to employees of Idaho's public institutions of higher education and their health clinics.⁴ The penalty for a conviction or guilty plea under this statute is automatic termination and a permanent ban from public employment in the state.⁵ For university employees, the challenges of compliance with these statutes extend far beyond the bounds of the usual academic freedom debates. Among those at risk of prosecution under this statute are not only those who teach and research about abortion, but also faculty, staff, and students (like resident assistants) who may be called upon to talk to, counsel, and support students facing the possibility of pregnancy. As anyone who has spent time in higher education knows, the work of guiding and caring for students extends far beyond the classroom and engages people with a wide range of job descriptions.

This statute is part of an unprecedented trend of state actions seeking to fundamentally reshape the operations of American colleges and universities, inside and outside the classroom, calling into question the relative autonomy that these institutions, whether public or private, have long enjoyed. The protections of academic freedom, as they have been instantiated in First Amendment law, are proving inadequate to protect our colleges and universities from these types of incursions. This is because in its current incarnation, academic freedom serves primarily as an employment protection for faculty in their teaching and research, excluding from constitutional protection a wide variety of educational decisions made outside this scope. The message of the current moment, however, is that the teaching and scholarship we produce are inseparable from the communities we build that make those activities possible.

In this Article, I suggest that we should bolster First Amendment protections for academic freedom by reinvigorating an older strand of the Supreme Court's jurisprudence that protected educational autonomy. In its earliest cases, the Court examined government incursions into academic life by looking at its impacts on the rights of donors, trustees, and administrators and their institutional vision, adopting arguments that came later to be associated with the constitutional doctrine of substantive due process. This line of jurisprudence withered in the mid-twentieth century as the

1. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

2. IDAHO CODE § 18-8705.

3. *See id.*

4. *Id.* at § 18-8707.

5. *See id.* at § 18-8709; *id.* at § 18-5702.

First Amendment became the central focus of academic freedom protections. Perhaps not coincidentally, this correlated with a time when American colleges and universities were ascendant, and the individual rights of faculty were under threat.⁶ Today's challenges make clear that these individual and institutional protections are interdependent.

Part II of this Article very briefly tracks the historical development of the Court's approach to the regulation of colleges and universities. I begin, as the substantive due process analysis requires, with the history and tradition that shaped our nation's earliest institutions of higher education, then review the Court's jurisprudence from its early focus on due process liberties to its current position in First Amendment doctrine, illustrating how this transition has shaped the idea of academic freedom and its protections. In Part III, I describe more fully the significant limits to current conceptions of academic freedom in First Amendment doctrine. Finally in Part IV, I illustrate how these limits intersect with the challenges of the current moment for American colleges and universities, and I suggest possibilities to explore for resurrecting a more robust version of educational autonomy under substantive due process theory to enhance and reinforce First Amendment academic freedom.

II. FROM INSTITUTIONAL AUTONOMY TO ACADEMIC FREEDOM

Current debates about the governance of American institutions of higher education echo debates about the role of college and universities dating back hundreds of years prior to this nation's founding. During the Middle Ages, "universities were centers of power and prestige," operating as "largely autonomous institutions, conceived in the spirit of the guilds."⁷ Their independence "was linked to the perceived integrity of reason and scholarly expertise."⁸ Nonetheless, while generally their faculty "elected their own officials and set their own rules," the scope of their inquiry was limited by and "anchored in Christian dogma."⁹

During the Reformation, in a challenge to papal hegemony, colleges and universities began to transform from ecclesiastical to secular "territorial" institutions, although still with religious character.¹⁰ This evolution in oversight preserved some independence for colleges and universities even as new governance structures were created. Notably, some of these new models incorporated a significant role for academic faculty. At Oxford and Cambridge, "the appointment of Regius professors and the centralization of administrative power in the heads of colleges assured the influence of

6. See HENRY REICHMAN, UNDERSTANDING ACADEMIC FREEDOM 18 (2021).

7. Geoffrey R. Stone, *A Brief History of Academic Freedom*, in WHO'S AFRAID OF ACADEMIC FREEDOM 1, 1 (Akeel Bilgrami & Jonathan R. Cole eds., 2015).

8. MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 20 (2009).

9. Stone, *supra* note 7, at 1–2.

10. JURGEN HERBST, FROM CRISIS TO CRISIS: AMERICAN COLLEGE GOVERNMENT, 1636–1819, at 2–3 (1982).

the crown over the universities while at the same time it preserved, to a degree, the autonomy of the academic corporations.”¹¹ German and other continental universities “were highly organized” with “senates empowered to make academic policy” and “professorial rectors or deans” who shared “real authority over curriculum and teaching.”¹² By contrast, Scottish universities adopted the model of using “an external board—rather than faculty control—to give legal definition to the college as an incorporated institution.”¹³ Each of these models informed the establishment of the colonial colleges.

Following in the Reformation tradition, the earliest colleges were “provincial” in that they were affiliated with their territorial governments; nonetheless, they were not creatures of the state.¹⁴ Rather, the early colleges were established, beginning with Harvard, as corporations with external boards.¹⁵ The board model removed control of college operations from the academics in favor of other civil society actors.¹⁶ In Harvard’s case, the motivation for this step was financial.¹⁷ At its founding, the college was overseen by a committee of the General Court of the Massachusetts Bay Colony.¹⁸ When the college president requested incorporation, it was to create a structure to address “the rapid accumulation of gifts, bequests, and revenues in the hands of trustees who met only infrequently.”¹⁹ The College of William and Mary similarly incorporated with an external board, modeled after the College of Edinburgh, with “eighteen Virginia gentlemen” in addition to members elected by the General Assembly as trustees.²⁰ In the first half of the eighteenth century, both colleges faced and rejected challenges from their teachers, seeking to assert more control over governance.²¹ Notably, in each case, this also meant a rejection of increased clerical control over the colleges, given that the staffing of the colleges reflected their religious associations. Like their precursors, the colonial colleges were religiously affiliated, albeit with a variety of Protestant denominations.²² Thus, these battles over board structure often reflected efforts (not always successful) to limit religious influence on the college’s administration.²³ Ultimately, the board model meant that colonial colleges operated in relation to, but also in tension with, both government and religion. As a result, these colleges

11. *Id.* at 3.

12. Paul F. Grendler, *The Universities of the Renaissance and Reformation*, 57 *RENAISSANCE Q.* 1, 10 (2004).

13. JOHN R. THELIN, *A HISTORY OF AMERICAN HIGHER EDUCATION* 11 (3rd ed. 2019).

14. In fact, there is a robust and continuing debate about how to characterize the public/private status of these institutions. See generally John S. Whitehead & Jurgen Herbst, *How to Think about the Dartmouth College Case*, 26 *HIST. OF EDUC. Q.* 333, 336 (1986).

15. HERBST, *supra* note 10, at 11.

16. *Id.* at 6.

17. See *id.* at 11.

18. *Id.* at 6.

19. *Id.* at 11.

20. *Id.* at 33.

21. *Id.* at 48.

22. See THELIN, *supra* note 13, at 13–15.

23. See HERBST, *supra* note 10, at 48.

“[t]ogether with civil state and established church . . . constituted the three great public institutions of their societies.”²⁴

The question of what level of direct control governments could exert over the colleges first came to the Supreme Court in *Trustees of Dartmouth College v. Woodward*.²⁵ Around 1754, Reverend Eleazor Wheelock founded at his own expense and on his own land an “Indian charity school.”²⁶ The endeavor proved so successful that Wheelock sent a representative to England, along with an Indian minister educated in his school, to solicit donations for its expansion and to invite those donors to serve on its board of trustees.²⁷ Wheelock further invited the donors to participate in deciding on a permanent home for the school, deciding among offers made by several American governments.²⁸ John Wentworth, then Royal Governor of Hampshire, offered Wheelock a township, and his uncle, a former colonial governor, volunteered 500 acres of land.²⁹ This offer was accepted, and Dartmouth College was incorporated under the state’s law, with all powers related to managing the school vested in the trustees.³⁰

The dispute in *Dartmouth College* arose out of an attempt by the New Hampshire legislature to exert control over the governance of the college by expanding its board of trustees to include nine new members appointed by the governor and council, dissolving the original corporation, and creating a new one which would take over all the rights and privileges of the prior corporation.³¹ The case came to the court on the issue as to whether the college’s charter was a contract, and if so, whether the legislation unconstitutionally impaired the right of contract in violation of the Federal Constitution.³² Daniel Webster argued the case on behalf of the original trustees before the United States Supreme Court, emphasizing the impact of upholding the legislation on the burgeoning educational system.³³ This is an extraordinary case, he explained, in that “[i]t affects not this college only, but every college, and all the literary institutions of the country.”³⁴ Moreover, Webster warned, “It will be a dangerous, a most dangerous, experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuation of political opinions” with the result that “[c]olleges and halls will be deserted by all better spirits, and become a

24. *Id.* at 4.

25. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). *See generally* David M. Rabban, *From Impairment of Contracts to Institutional Academic Freedom: The Enduring Significance of the Dartmouth College Case*, 18 U.N.H. L. REV. 9 (2019).

26. *Dartmouth College*, 17 U.S. (4 Wheat.) at 519–20.

27. *Id.* at 520–21.

28. *See* Charles R. T. O’Kelley, *What Was the Dartmouth College Case Really About?*, 74 VAND. L. REV. 1645, 1666 (2021).

29. *See id.*

30. *See id.*

31. *Dartmouth College*, 17 U.S. (4 Wheat.) at 544–55.

32. *Id.* at 551–52.

33. *See id.*

34. *Id.* at 598.

theatre for the contention of politics; party and faction will be cherished in the places consecrated to piety and learning.”³⁵

Chief Justice Marshall declined to take the bait, choosing instead to emphasize the importance of honoring the college founders’ intention in creating the corporation establishing Dartmouth. He wrote that the legislative changes to the charter meant that “[t]he will of the state is substituted for the will of the donors, in every essential operation of the college.”³⁶ Justice Marshall found that the impact of the legislation would be “to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government.”³⁷ Justice Marshall was willing to concede that such changes might advantage the college and the public, but found that argument unpersuasive when weighed against the property instincts at stake, writing: “This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.”³⁸

Reading this case through a present-day lens, Justice Marshall seems to be relying on a familiar and obvious distinction between private and public institutions. But these lines were not so easily drawn about Dartmouth either before or after the Court’s decision. Like the other provincial colleges, Dartmouth was created with the support of its state government and had monopoly power over higher education in the state. This did not change after the decision or in the years immediately following when the college aligned with members of the same legislature to ward off a challenge to its monopoly. The disconnect between the Court’s reasoning and the reality on the ground at the time suggests that the Justices “were not really interested in making a public/private distinction” but rather “wanted to protect educational institutions from legislative tampering.”³⁹

The Court returned to these themes twenty years later in *Vidal v. Girard’s Executors*.⁴⁰ This time the case involved a significant bequest to the City of Philadelphia to operate a college educating White male orphans that prohibited “ecclesiastic, missionary, or minister of any sect whatsoever” from working or even visiting its campus.⁴¹ The challenge was brought by the donors’ own relatives, frustrated at losing such a substantial part of their inheritance, who argued in part that the condition was in violation of the

35. *Id.* at 599.

36. *Id.* at 652.

37. *Id.* at 653.

38. *Id.*

39. Whitehead & Herbst, *supra* note 14, at 339. Interestingly, even the scholar Whitehead mentions as disagreeing with him on this point, argues that the motivating force behind the decision was a desire to protect Dartmouth from government attacks. *See id.* at 339 n.1 (citing Bruce A. Campbell, *Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy*, 70 Ky. L.J. 643–706 (1982)).

40. *Vidal v. Girard’s Ex’rs*, 43 U.S. 127 (1844).

41. *Id.* at 132–33.

state's public policy.⁴² Writing for the Court, Justice Story again sidestepped the issue:

[T]he question is whether the exclusion be not such as the testator had a right, consistently with the laws of Pennsylvania, to maintain, upon his own notions of religious instruction. Suppose the testator had excluded all religious instructors but Catholics, or Quakers, or Swedenborgians; or, to put a stronger case, he had excluded all religious instructors but Jews, would the bequest have been void on that account?⁴³

Ultimately, Justice Story concluded,

that in cases of this sort, it is extremely difficult to draw any just and satisfactory line of distinction in a free country as to the qualifications or disqualifications which may be insisted upon by the donor of a charity as to those who shall administer or partake of his bounty.⁴⁴

Once again, the Court leaned on a public/private distinction that was, in this case, entirely illusory given that the bequest had been made to the city with instructions to execute its very specific provisions.⁴⁵ Michael McConnell characterizes this aspect of Justice Story's opinion as "perplexing" and even "oblivious."⁴⁶ Read together with *Dartmouth College*, however, it seems plausible that the Court intentionally elided these practical realities to draft another opinion protecting the developing pluralism of American education.

Over the course of the following century, lower courts regularly drew on these early cases to address the relationship between legislative power and college governance. In *Allen v. McKean*, for example, Justice Story, sitting as a circuit justice, held that the Maine legislature had overstepped in its firing of Bowdoin College's president, even though the college had been created with public funds and its charter reserved substantial rights to the legislature.⁴⁷ Justice Story determined, relying on *Dartmouth College*, that a legislature is not exempt from being bound by the authority granted to a chartered corporation, and thus the Maine legislature could not make decisions given by the state of Massachusetts to the Bowdoin College trustees at the time of its establishment.⁴⁸ Conversely, in 1871, the Supreme Court of Missouri held that its state legislature had the ability to fire the entire faculty of its university because its founding legislation explicitly "provided for its control and government, through its own agents

42. *See id.* at 197–98.

43. *Id.* at 199.

44. *Id.*

45. *See* Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 *TULSA L. REV.* 7, 27 (2001).

46. *Id.*

47. *See* *Allen v. McKean*, 1 F. Cas. 489, 497–98, 503 (C.C.D. Me. 1833).

48. *See id.* at 496–500.

and appointees,” with power vested in its board “made subject to the pleasure of the Legislature.”⁴⁹

By the time the question of the legislative role in higher education reached the United States Supreme Court again, the country was in a much different place and far more was at stake. In the years immediately preceding the Civil War, abolitionist John G. Fee established Berea College in Kentucky dedicated to integrated education and opposition to slavery.⁵⁰ After being forced out by threats of violence, Fee returned following the Civil War to incorporate his racially integrated, co-educational college in 1866.⁵¹ In 1904, the state passed legislation prohibiting interracial education.⁵² The Kentucky courts upheld the legislation against Berea’s challenges based on the Kentucky Bill of Rights and the Fourteenth Amendment, finding that the State had an interest in discouraging interracial marriage and preventing racial conflict.⁵³ The Supreme Court affirmed,⁵⁴ but only by willfully ignoring the clear intent of Berea’s founders.⁵⁵ The Court held that the legislation did not interfere with the Berea’s charter providing for interracial education because Berea could still educate both White and Black students, just not in the same classrooms.⁵⁶

In short, in these early cases concerning the role of public oversight in higher education, the Court was largely unwilling to accept entreaties by either governments or colleges to make broad pronouncements about the role of institutions of higher education, choosing to focus instead on rather detailed interpretations of wills and charters. Nonetheless, its decisions make most sense when understood as relying on structure and mission to provide some protections from political interference for the nascent community of colleges. These protections were codified over the course of the nineteenth century in both state constitutional law and a common law doctrine of academic abstention.⁵⁷

Following the Civil War, U.S. academics began to travel to Europe and found universities ordered not according to donors’ desires or their teachings of their sponsoring denomination, but rather infused with a commitment to academic freedom, both for faculty and students, reinforced by a system of internal self-government. They returned to this country eager to transplant these ideals and norms into the American system of higher education. In 1915, the American Association of University Professors Declaration of Principles proposed “not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of

49. *Head v. Curators of the Univ. of Mo.*, 47 Mo. 220, 224 (1871).

50. *Early History: The Berea Story*, BERE A COLL., <https://www.berea.edu/about/early-history> [<https://perma.cc/K96M-VRAE>].

51. *Id.*

52. *Id.*

53. *Berea Coll. v. Commonwealth*, 94 S.W. 623, 628 (Ky. 1906).

54. *Berea Coll. v. Kentucky*, 211 U.S. 45, 58 (1908).

55. *See generally id.* at 59–60 (Harlan, J., dissenting) (discussing the intent of the founders).

56. *Id.* at 57–58.

57. *See* J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 YALE L.J. 251, 322–30 (1989).

discussion, and of teaching.”⁵⁸ The drafters of the declaration understood that ensuring these individual freedoms would require a level of institutional autonomy.⁵⁹ They sought to “construct institutions of higher education as instruments of the common good rather than as organizations promoting the private views of wealthy donors or the passionate commitments of transient political majorities.”⁶⁰ These discussions provided the backdrop for the Court’s earliest substantive due process cases.

In the 1920s, several Midwestern states passed legislation prohibiting schools from teaching languages other than English.⁶¹ The challenge that reached the Supreme Court first was in *Meyer v. Nebraska*, which challenged a Nebraska law banning non-English instruction in both private and public schools.⁶² The case arose as an appeal of the criminal conviction of an instructor hired to teach German.⁶³ In reversing his conviction, the Court relied on the theory of substantive due process as articulated in the case of *Lochner v. New York*.⁶⁴ In *Lochner*, the Court struck down a New York law forbidding employees from working more than ten hours a day in commercial bakeries on the grounds that the legislation interfered with the liberty right of employers and employees to engage in mutually agreeable contract.⁶⁵ *Meyer v. Nebraska* picked up on this thread, referencing the Fourteenth Amendment’s protection of the liberty right “to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, [and] establish a home and bring up children”⁶⁶ The Court explained, “The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”⁶⁷ Thus, “it is the natural duty of the parent to give his children education suitable to their station in life”⁶⁸ Noting the importance of “qualified” teachers to the success of the academic endeavor “essential . . . to the public welfare,” the Court determined that the educator’s “right . . . to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the [A]mendment.”⁶⁹

Only two years later, in *Pierce v. Society of the Sisters*, the Court considered a challenge to an Oregon statute requiring all children to participate in public education.⁷⁰ The case was brought by two private schools

58. *Free Speech and Academic Freedom*, COLUM. L. SCH., <https://www.law.columbia.edu/news/archive/free-speech-and-academic-freedom> [<https://perma.cc/P5K2-RFFF>].

59. *Cf. id.*

60. FINKIN & POST, *supra* note 8, at 8.

61. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 396–97 (1923).

62. *Id.*

63. *Id.*

64. *See id.* at 399–401 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

65. *Lochner*, 198 U.S. at 52–53.

66. *Meyer*, 262 U.S. at 399.

67. *Id.* at 400.

68. *Id.*

69. *Id.* In *Bartels v. Iowa*, the Court applied the reasoning of *Meyer* to reverse similar convictions of teachers in Iowa and Ohio. *See Bartels v. Iowa*, 262 U.S. 404, 411 (1923).

70. *Pierce v. Soc’y of the Sisters of the Holy Name of Jesus and Mary*, 268 U.S. 510, 530 (1925).

where enrollment was declining as a result of the new statute.⁷¹ Relying on its holding in *Meyer*, the Court struck down the statute as “unreasonably interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”⁷² The Court acknowledged that the plaintiffs in this case were corporations not teachers, but found that “they have business and property for which they claim protection” that was “threatened with destruction” by the legislation.⁷³ While *Lochner* proceeded to fall out favor for decades, insofar as it limited governmental power to engage in economic regulation,⁷⁴ these cases remain good law in the Court’s line of substantive due process doctrine. Notably, *Meyer* is significant because the regulated behavior (the teaching of German for hire) stretches the boundaries of what would qualify as expressive activities warranting First Amendment protection.

By the time the concept of academic freedom appeared explicitly in the Supreme Court’s jurisprudence, the McCarthy era was in full swing, and the First Amendment was newly invigorated. In *Adler v. Board of Education of the City of New York*, the Court considered the constitutionality of a statute excluding from employment in public schools persons who “advocate the overthrow of the Government by unlawful means or who are members of organizations which have a like purpose.”⁷⁵ The statute, known as the Feinberg Law, provided that membership in an identified subversive group would constitute *prima facie* evidence sufficient to disqualify a current or prospective employee.⁷⁶ The Court’s majority sustained the statute, noting that while members of these organizations had the right to “speak, think and believe as they will,” they did not have the “right to work for the State in the school system on their own terms.”⁷⁷ Dissenting, Justice Douglas wrote movingly of the harms posed by the statute, not only to schools, but also to American national identity and government. Justice Douglas explained,

This system of spying and surveillance with its accompanying reports and trials cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect. A system which directly or inevitably has that effect is alien to our system and should be struck down. Its survival is a real threat to our way of life.⁷⁸

Later that same term, the Court again had the opportunity to reflect on academic freedom in *Wieman v. Updegraff*, a case arising out of an Oklahoma statute requiring all public employees to adopt a loyalty oath as a condition of employment.⁷⁹ The majority distinguished *Adler* in striking

71. *Id.* at 531–34.

72. *Id.* at 534–35.

73. *Id.* at 535.

74. See generally *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

75. *Adler v. Bd. of Educ. of N.Y.*, 342 U.S. 485, 490 (1952).

76. *Id.* at 490–91.

77. *Id.* at 492.

78. *Id.* at 510–11 (Douglas, J., dissenting).

79. *Wieman v. Updegraff*, 344 U.S. 183, 184–85 (1952).

down the requirement,⁸⁰ with Justice Frankfurter, joined by Justice Douglas, writing separately in concurrence to address its applicability to teachers, “the priests of democracy.”⁸¹ Justice Frankfurter emphasized the importance of the teacher’s role “to the effective exercise of the rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment.”⁸² These types of regulations on teachers, he explained, have “an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice.”⁸³ He concluded by noting, “The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and national power.”⁸⁴ The *Wieman* case was notable in that Justice Frankfurter linked protection of academic freedom for the first time explicitly to the First and Fourteenth Amendments, with the effect of limiting government intrusions on public as well as private teaching institutions. In addition, he drew the connection between protecting the rights of individual teachers to the broader role of educational institutions in society.

Justice Frankfurter further elaborated on these themes in *Sweezy v. New Hampshire*.⁸⁵ Paul Sweezy was convicted for failure to answer questions from the New Hampshire Attorney General, including some that focused on his lectures at the University of New Hampshire.⁸⁶ A plurality of the Court reversed the conviction, focusing on the absence of legislative authorization justifying the infringement on Sweezy’s constitutional liberties.⁸⁷ Justice Frankfurter, joined by Justice Harlan, concurred, making special note of the problem of “governmental intervention in the intellectual life of a university.”⁸⁸ In so doing, Justice Frankfurter drew a parallel to a statement by the faculties of the open universities of South Africa, resisting the government’s efforts to set racially discriminatory admissions policies, which read:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.⁸⁹

While disclaiming the view that New Hampshire’s actions were equal to those of the South African government, Justice Frankfurter warned that

80. *Id.* at 191–92.

81. *Id.* at 196 (Frankfurter, J., concurring).

82. *Id.* at 195.

83. *Id.*

84. *Id.* at 197.

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

86. *Id.* at 238–45.

87. *Id.* at 254–55.

88. *Id.* at 262 (Frankfurter, J., concurring).

89. *Id.* at 263 (quoting *THE OPEN UNIVERSITY IN SOUTH AFRICA* 10–12 (1957)).

“in these matters of the spirit inroads on legitimacy must be resisted at their incipiency.”⁹⁰

In the following years, the Court solidified its commitment to academic freedom for teachers. At the same time, however, it sometimes drew boundaries around the classroom that seemed to exclude protections for other forms of academic decision-making. One such case involved Lloyd Barenblatt, who refused to testify before the House Committee on Un-American Activities regarding his political affiliations during his time as a graduate student.⁹¹ At the time of his appearance before the committee, Barenblatt had no formal affiliation with a university.⁹² Nonetheless, he relied on the *Sweezy* concurrence to argue that requiring him to testify posed a threat to the intellectual life of the university.⁹³ Justice Harlan’s opinion for the narrow majority, which was joined by Justice Frankfurter, rejected this claim:

[B]roadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary . . .⁹⁴

Nonetheless, by the time the Court was again asked to review the Feinberg Law, in *Keyishian v. Board of Regents*, First Amendment protections for academic freedom were firmly established.⁹⁵ In departing from its holding in *Adler*, Justice Brennan noted: “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”⁹⁶ The following term the Court struck down an anti-evolution statute with Justice Fortas concluding: “It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees.”⁹⁷

In the years that followed, the Supreme Court and circuit courts occasionally considered cases falling into the penumbra of First Amendment academic freedom rights, generally involving decisions made by faculty as part of academic governance processes like admissions.⁹⁸ The approach in these cases reflected “a reluctance to trench on the prerogatives of state

90. *Id.*

91. *Barenblatt v. United States*, 360 U.S. 109, 113–14 (1959).

92. *See* Brief for Petitioner at 5, *Barenblatt v. United States*, 360 U.S. 109 (1959) (No. 35), 1958 WL 91978, at *5.

93. *Id.* at 25–27.

94. *Barenblatt*, 360 U.S. at 112.

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

96. *Id.*

97. *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968).

98. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 327–29 (2003); *Lieberman v. Gant*, 630 F.2d 60, 67–68 (2d Cir. 1980); *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 547–48 (3d Cir. 1980) (giving deference to tenure decisions).

and local educational institutions and our responsibility to safeguard their academic freedom, ‘a special concern of the First Amendment.’”⁹⁹ More generally, the Court has emphasized the importance of deference to the expertise of school administrators on a range of academic and operational decisions, except insofar as constitutional protections were implicated¹⁰⁰ (and sometimes even then).¹⁰¹ In these cases, the basis of the conflict was generally a challenge to school policy by faculty or students. Thus, the development of the jurisprudence turned toward understanding the rights of educational institutions *vis-a-vis* the people who populate them. This shift in focus meant that even as the scope of academic freedom became more defined, the contours of the states’ ability to shape and control college and universities has remained uncertain.

III. THE LIMITS OF THE FIRST AMENDMENT (AND OF ACADEMIC FREEDOM)

By the turn of the twenty-first century, the concept of academic freedom was established in First Amendment law,¹⁰² expanded and reinforced by the soft law of the AAUP, well-recognized by accreditors as being a significant component of a well-run college or university, and an integral part of faculty governance in American institutions of higher education. This right to academic freedom attaches to individual faculty members, protecting the right to teach and write free from state control or retaliation. Nonetheless, locating academic freedom in the individual protections of the First Amendment has not been without its drawbacks. First, subsequent developments in the law governing the speech rights of government employees have raised questions about how the modern Court would interpret the scope of academic freedom rights of the faculty at public universities. Second, the singular focus on protecting faculty in the classroom has left a wide variety of crucial educational decisions open to government intervention.

99. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (quoting *Keyishian*, 385 U.S. at 603).

100. *See, e.g.*, *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 685–86 (2010); *Grutter*, 539 U.S. at 308 (“The Court defers to the Law School’s educational judgment that diversity is essential to its educational mission.”); *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 211 (1982); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1998) (noting the Court’s “oft-expressed view that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges”); *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]his Court has long recognized ‘the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.’” (quoting *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 507 (1969))).

101. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 419–21 (2007) (Thomas, J., concurring).

102. And even this is still open to conflicting interpretations. *See, e.g.*, *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) (“Despite these accolades [for academic freedom], the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom.”). *See generally* Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J. COLL. & U.L. 79, 90–91 (2004).

A. ACADEMIC FREEDOM AFTER *PICKERING* AND *GARCETTI*

Faculty at public colleges and universities are also state employees. In *Pickering v. Board of Education*, the Court considered the case of a school teacher who wrote a critical letter to the newspaper related to the funding policies of his school board.¹⁰³ The *Pickering* Court explained its reasoning as attempting to strike the “balance 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.”¹⁰⁴ In reaching this holding, the Court noted that allowing public employees to participate in civic debate was important to ensuring an informed populous and an effective democracy.¹⁰⁵ In this case, the Court noted that teachers are among those most likely to have useful information about the impacts of school board operations.¹⁰⁶ Ultimately, the Court concluded that the teacher’s letter impeded neither his performance in the classroom, nor the orderly administration of the school; therefore, “the interest of the school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.”¹⁰⁷

The *Pickering* framework thus asks whether the employee’s speech was made “as a citizen commenting on matters of public concern” and, if so, whether that speech was sufficiently disruptive to the operations of the relevant government entity to justify an employment action.¹⁰⁸ Notably, however, *Pickering* seemed to indicate that speech made in the course of public employment, even if important to the public debate, might be outside the protections of the First Amendment. The challenges of limiting First Amendment protections only to speech made outside the course of employment became apparent in *Garcetti v. Ceballos*.¹⁰⁹

Garcetti involved the case of a supervising district attorney, Richard Ceballos, who was asked by defense counsel in a case to review the accuracy of an affidavit used to obtain an important warrant.¹¹⁰ Ceballos did so and found what he believed to be serious misrepresentations, which he documented in a memo to his supervisors, who nonetheless chose to prosecute the case.¹¹¹ Ceballos was called by defense counsel and testified on the contents of the memo.¹¹² Subsequently, he was demoted from his supervisory position, transferred, and denied a promotion.¹¹³ Ceballos then filed a lawsuit contending that these employment actions violated his First and

103. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.* 205, 391 U.S. 563, 564–65 (1968).

104. *Id.* at 568.

105. *Id.* at 571–72.

106. *Id.*

107. *Id.* at 573.

108. *See id.* at 568.

109. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

110. *Id.* at 413–14.

111. *Id.* at 414.

112. *Id.* at 414–15.

113. *Id.* at 415.

Fourteenth Amendment rights.¹¹⁴ Writing for a narrowly divided Court, Justice Kennedy held that because drafting a memo was an ordinary job duty for Ceballos, it was not protected by the First Amendment.¹¹⁵ In his dissent, Justice Souter reiterated the importance of the information public employees contribute to democratic discourse,¹¹⁶ and Justice Stevens noted the perverse incentive created by the Court's decision, which might encourage disgruntled employees to raise their concerns in a public forum rather than by bringing them first to their supervisors.¹¹⁷ Justice Souter went on to highlight the way that the Court's decision might be read to include the speech of faculty at a public university, posing a serious threat to the entire concept of academic freedom within state systems of higher education.¹¹⁸

The majority responded only briefly to Justice Souter's concerns about public colleges and universities, limiting its decision to the facts before the Court.¹¹⁹ Thus, the applicability of *Garcetti* and *Pickering* in higher education has yet to be clarified, even as attacks on faculty academic freedom are mounting.¹²⁰

B. EXPRESSIVE AND ASSOCIATIONAL RIGHTS AFTER *RUMSFELD V. FAIR*

The second challenge to situating academic freedom entirely in the First Amendment has to do with the limits of what courts are willing to understand as expressive activity. This problem is well illustrated by the case of *Burt v. Gates*, which involved a challenge by Yale Law School (YLS) faculty to the constitutionality of the Solomon Amendment, which denies federal funding to colleges and universities that refuse to allow the Department of Defense (DOD) the same access and assistance other employers receive in recruiting students for job opportunities.¹²¹ Since 1978, YLS has had a non-discrimination policy that forbids discrimination based on sexual orientation.¹²² At the time of this case, the U.S. military still excluded LGBTQ persons from its ranks, a position that had been softened somewhat by the adoption of the policy popularly known as "Don't Ask, Don't Tell."¹²³ This policy allowed queer persons to participate in U.S. military if they were willing to be secretive about their sexual orientation.¹²⁴ Because of its

114. *Id.*

115. *Id.* at 426.

116. *Id.* at 428 (Souter, J., dissenting).

117. *Id.* at 427 (Stevens, J., dissenting).

118. *Id.* at 438 (Souter, J., dissenting).

119. *Id.* at 425.

120. See generally Keith E. Whittington, *Professorial Speech, the First Amendment, and the "Anti-CRT" Laws*, WAKE FOREST L. REV. (forthcoming) (advocating for a clarification of the doctrine protecting professorial classroom speech in light of the mounting attacks on teaching); see also Sohrab Ahmari, *The Right Should Cheer the End of Academic "Freedom"*, AM. CONSERVATIVE (Mar. 14, 2023, 12:03 AM), <https://www.theamericanconservative.com/the-right-should-celebrate-the-end-of-academic-freedom> [<https://perma.cc/FMD5-QYLC>].

121. *Burt v. Gates*, 502 F.3d 183, 185 (2nd Cir. 2007).

122. *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 166 (D. Conn. 2005).

123. *Id.* at 168, 186.

124. See *id.* at 178.

unequal treatment of the LGBTQ people in its ranks, the DOD was unable to meet the requirements of the YLS non-discrimination policy, and therefore had more limited access and support in recruiting Yale Law students.¹²⁵ The case came about when the DOD threatened YLS with the enforcement of the Solomon Amendment, putting significant funding across the university at risk.¹²⁶

Forty-five faculty members at YLS filed suit, challenging the constitutionality of the Solomon Amendment on the grounds that it violated their First Amendment rights against compelled speech and association, as well as their Fifth Amendment right to educational autonomy.¹²⁷ The district court granted the faculty's motion for summary judgment on their First Amendment claims while denying summary judgment on their Fifth Amendment claims.¹²⁸ In so doing, the district court acknowledged the precedent in support of "a substantive due process right both to educate and to an education," but then denied its applicability to "a law governing who may participate in college recruiting programs,"¹²⁹ finding the latter insufficiently "rooted in the traditions and conscience of our people as to be ranked as fundamental."¹³⁰ The court concluded that the faculty's "substantive due process . . . claim is functionally a First Amendment academic freedom claim," and therefore "the court need not create, and must forgo creating, a new substantive due process right."¹³¹

On appeal, however, the Second Circuit took a different view of the First Amendment's academic freedom protections,¹³² informed by the Supreme Court's decision in a recent, parallel case challenging the Solomon Amendment, *Rumsfeld v. FAIR*.¹³³ In *FAIR*, the Court held that the First Amendment was not implicated by the government's requirement that military recruiters be given equal status on campus because neither the law school's decision to allow recruiters on campus nor the conduct regulated by the Solomon Amendment was sufficiently expressive to trigger First Amendment concerns.¹³⁴ The Court also rejected *FAIR*'s argument that allowing military recruiters to be present on campus implicated faculty's expressive associational rights.¹³⁵

The Second Circuit in *Burt v. Gates* concluded that *FAIR* applied to the claims of the YLS faculty, rejecting their efforts to distinguish the two cases.¹³⁶ Writing for the panel, Judge Pooler noted that even if *FAIR* were not controlling, the faculty's First Amendment claims would still fail on the

125. *Id.* at 173–74.

126. *Id.* at 160.

127. *Id.* at 170–71.

128. *Id.* at 189.

129. *Id.* at 188.

130. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

131. *Id.* at 189.

132. *See Burt v. Gates*, 502 F.3d 183, 185 (2d Cir. 2007).

133. *See Rumsfeld v. F. for Acad. & Institutional Rts.*, 547 U.S. 47, 51 (2006).

134. *Id.* at 64–67.

135. *Id.* at 69–70.

136. *See Gates*, 502 F.3d at 189–90.

merits.¹³⁷ Judge Pooler characterized the relevant precedent as protecting only the “core academic decisions” from “government intrusion that would otherwise ‘cast a pall of orthodoxy over the classroom.’”¹³⁸ She went on to explain that “[t]he Solomon Amendment places no restriction on the content of teaching, the membership of teachers in organizations, the selection of students, or evaluation and retention of students.”¹³⁹ The Yale faculty had chosen not to appeal the district court’s rejection of their educational autonomy claim, therefore the case was at an end.

The intersection between *Gates* and *FAIR* illustrates the second way in which situating academic freedom entirely in the First Amendment can narrow protections for colleges and universities. The district court in *Burt v. Rumsfeld* rejected the Yale faculty’s educational autonomy claims principally on the grounds that they were sufficiently cognizable under the First Amendment.¹⁴⁰ The Second Circuit in *Gates* and the Supreme Court in *FAIR* disagreed on the grounds that the decisions involved were inadequately expressive to trigger First Amendment scrutiny. While the decision on whether to allow on-campus recruiting by the military might have seemed somewhat peripheral to the core functioning of the law schools and therefore easily dismissed as a threat to academic freedom, the logic of these cases may exclude from First Amendment protection many significant decisions necessary to operate a successful and competitive college or university: decisions on curricular and co-curricular offerings, the hiring of faculty and staff tasked with promoting diversity and inclusion on campus, the selection of an appropriate accreditor, or the offering of health counseling to ensure the well-being of those on campus. And, as described in Part IV, the ability of our institutions of higher education to make these decisions is increasingly threatened by states around the country.

IV. REINVIGORATING EDUCATIONAL AUTONOMY FOR THE MODERN UNIVERSITY

As the protections of academic freedom seem to be narrowing under the First Amendment, the responsibilities of colleges and universities are growing. The size and composition of our institutions of higher education have changed significantly since the time the concept of academic freedom entered the constitutional discourse.¹⁴¹ Just in the period from 1996–2016, enrollment at the undergraduate level increased from 14.3 million to nearly 20 million students,¹⁴² with most of the growth coming from students of color and those living in poverty. In 2015–2016, students of color made up about 47% and students in poverty 31% of total undergraduate enrollment, with those populations concentrated in for-profit, public two-year,

137. *Id.* at 190.

138. *Id.* at 191 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

139. *Id.*

140. *See Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 189 (D. Conn. 2005).

141. *See, e.g.*, THOMAS D. SNYDER, CRISTOBAL DE BREY & SALLY A. DILLOW, *DIGEST OF EDUCATION STATISTICS 2017*, at 9–10 (53d ed. 2019).

142. *Id.* at 55 tbl.105.30.

and less selective public four-year institutions.¹⁴³ The impact of the American with Disabilities Act has also been significant. As of 2015–2016, the National Center for Educational Statistics estimated that 19% of undergraduates and 12% of graduate students had disabilities, a number that will likely continue to grow as the promise of the ADA continues to be realized.¹⁴⁴ More than 20% of college students are also parents.¹⁴⁵ Approximately 40% of college students and 33% of graduate students are the first in their family to attend college.¹⁴⁶ And while longitudinal data is hard to come by, a 2020 survey of more than 180,000 students by the Association of American Universities reported that approximately 17% identified as gay, lesbian, bisexual, asexual, or questioning, while 1.7% identified their gender as transgender, nonbinary, or questioning.¹⁴⁷

The changing demographics of higher education have challenged colleges and universities to improve the environment and services offered to meet the needs of an increasingly diverse student population who face hurdles to successful degree completion that were largely foreign to earlier generations.¹⁴⁸ Colleges and universities are making tremendous investments in improving diversity and inclusion on campus in a variety of areas including the hiring of new personnel, building new systems of data collection, and expansion of curriculum.¹⁴⁹ Driven by exploding student demand, institutions are expanding counseling¹⁵⁰ and other health services.¹⁵¹ Colleges and universities are working to improve the safety and security of vulnerable populations on campus.¹⁵² Many are also struggling to serve the increasing

143. Richard Fry & Anthony Cilluffo, *A Rising Share of Undergraduates Are From Poor Families, Especially at Less Selective Colleges*, PEW RSCH. CTR. (May 22, 2019), <https://www.pewresearch.org/social-trends/2019/05/22/a-rising-share-of-undergraduates-are-from-poor-families-especially-at-less-selective-colleges> [https://perma.cc/L2LF-N8RH].

144. SNYDER ET AL., *supra* note 141, at 380.

145. INST. FOR WOMEN'S POL'Y RSCH., PARENTS IN COLLEGE: BY THE NUMBERS 1 (2018), https://iwpr.org/wp-content/uploads/2020/08/C481_Parents-in-College-By-the-Numbers-Aspen-Ascend-and-IWPR.pdf [https://perma.cc/QAY6-MBCN].

146. Dick Startz, *First-Generation College Students Face Unique Challenges*, BROOKINGS (Apr. 25, 2022), <https://www.brookings.edu/blog/brown-center-chalkboard/2022/04/25/first-generation-college-students-face-unique-challenges> [https://perma.cc/LZ9D-ZULZ].

147. *LGBTQ Students in Higher Education*, POSTSECONDARY NAT'L POL'Y INST., <https://pnpi.org/factsheets/lgbtq-students-in-higher-education> [https://perma.cc/9V95-4BM3].

148. See U.S. DEP'T OF EDUC., ADVANCING DIVERSITY AND INCLUSION IN HIGHER EDUCATION 6 (2016), <https://www2.ed.gov/rschstat/research/pubs/advancing-diversity-inclusion.pdf> [https://perma.cc/Q49C-UC24].

149. See, e.g., Benjamin Wachs, *Colleges are Learning How to Make DEI Programs Effective*, CALBRIGHT COLL. (Apr. 25, 2023), <https://www.calbright.org/newsroom/blog/colleges-are-learning-how-to-make-dei-programs-effective> [https://perma.cc/FL2C-HDAQ].

150. See Maria Carrasco, *Colleges Seek Virtual Mental Health Services*, INSIDE HIGHER ED (Sept. 19, 2021), <https://www.insidehighered.com/news/2021/09/20/colleges-expand-mental-health-services-students> [https://perma.cc/6277-UMEF].

151. See Elizabeth Redden, *The View from Student Health Services*, INSIDE HIGHER ED (Oct. 13, 2021), <https://www.insidehighered.com/news/2021/10/14/student-health-centers-report-high-demand-services> [https://perma.cc/8S5B-ARZY].

152. See generally KATHRYN K. O'NEIL, KERITH J. CONRON, ABBIE E. GOLDBERG & RUBEEN GUARDADO, EXPERIENCES OF LGBTQ PEOPLE IN FOUR-YEAR COLLEGES AND GRADUATE PROGRAMS 34 (2022), <https://williamsinstitute.law.ucla.edu/publications/lgbtq-colleges-grad-school> [https://perma.cc/J5RP-CS4M].

number of students who lack safe and stable housing.¹⁵³ Notably, improving the well-being and performance of students is not just an aspiration; increasingly, it is a directive included in the standards for accreditation.¹⁵⁴

Responding to these challenges has increasingly blended decision-making by administrators and faculty, as the recognition has grown that what is happening outside the classroom is impacting what goes on inside it. At the same time, the latest waves of government attacks on higher education seem designed to block universities from modifying their operations and offerings to meet the needs of increasingly pluralistic communities.¹⁵⁵ From the challenges to affirmative action and the use of diversity statements in hiring,¹⁵⁶ to the attacks on the teaching of critical race theory, history, and gender and women's studies,¹⁵⁷ to the targeted defunding of initiatives and services focused on diversity and inclusion,¹⁵⁸ to bans on transgender athletes competing in college athletics and laws separating bathrooms on college campuses by sex,¹⁵⁹ to bills requiring reporting on gender dysphoria or prohibiting reproductive health counseling or treatment,¹⁶⁰ these laws strike at the choices universities are making to ensure equitable access to all of their students. Recent attacks on college and university governance processes and tenure protections would take these decisions away from the academic community entirely.¹⁶¹ Some of these laws have been success-

153. See Aaron Smithson, *At Universities Nationwide, Housing Shortages Take a Toll*, ARCHITECTURAL REC. (Oct. 18, 2022), <https://www.architecturalrecord.com/articles/15893-at-universities-nationwide-housing-shortages-take-a-toll> [<https://perma.cc/NCJ4-T39W>].

154. See Mariah Bohanon, *DEI in Accreditation*, INSIGHT INTO DIVERSITY (Mar. 16, 2022), <https://www.insightintodiversity.com/dei-in-accreditation> [<https://perma.cc/85PW-NDA4>].

155. See generally Shaun Harper, *Why Politicized Attacks on DEI in Schools are Occurring, and How They're Bad for America*, FORBES (June 9, 2023, 3:21 PM), <https://www.forbes.com/sites/shaunharper/2023/06/09/why-politicized-attacks-on-dei-in-schools-are-occurring-and-how-theyre-bad-for-america> [<https://perma.cc/8VMC-U9W4>].

156. See Josh Moody, *Texas Governor Warns Against DEI in Hiring Practices*, INSIDE HIGHER ED (Feb. 8, 2023), <https://www.insidehighered.com/news/2023/02/09/texas-latest-state-attack-dei-targeting-hiring> [<https://perma.cc/8892-Q4N5>].

157. See Rose Horowitz, *Florida Bill Would Target Diversity Studies at State Universities*, NBC NEWS (Feb. 24, 2023), <https://www.nbcnews.com/politics/politics-news/florida-bill-target-diversity-programs-state-universities-rcna72242> [<https://perma.cc/FZH6-HMXH>].

158. See Jeremy Bauer-Wolf, *Texas Bill Would Ban Diversity Offices at Public Colleges*, HIGHER ED DIVE (Dec. 19, 2022), <https://www.highereddive.com/news/texas-bill-ban-diversity-offices-public-colleges/639000> [<https://perma.cc/K5VJ-TNNZ>]; Brian Lopez, *Texas Higher Education Leaders Say Equitable Access is Key for Graduation Goals*, TEX. TRIB. (Feb. 23, 2023), <https://www.texastribune.org/2023/02/09/texas-higher-education-budget> [<https://perma.cc/Y5EK-VVQM>]; *University of Texas System Halts New DEI Policies*, INSIGHT INTO DIVERSITY (Feb. 24, 2023), <https://www.insightintodiversity.com/university-of-texas-system-halts-new-dei-policies> [<https://perma.cc/8MUE-BGBW>].

159. See, e.g., H.B. 1473, 68th Legis. Assemb., Reg. Sess. (N.D. 2023).

160. See The Associated Press, *DeSantis Seeks Transgender University Students' Health Care Information*, NBC NEWS (Jan. 19, 2023, 2:27 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/desantis-seeks-transgender-university-students-health-care-information-rcna66495> [<https://perma.cc/U5TZ-QFRE>].

161. See Curt Anderson, *DeSantis-Backed New College Board Scraps 5 Professors Tenure*, AP NEWS (Apr. 26, 2023, 5:42 PM), <https://apnews.com/article/new-college-florida-tenure-conservatives-desantis-ce711c9169ebe84e9d062ebbb281ebce> [<https://perma.cc/3MA5-WFR9>] (describing the rejection of tenure for five faculty members by trustees appointed by Governor DeSantis); Ian Hodgson, *Florida Again Targets Faculty Tenure at Universities. Here's Why that Matters.*, TAMPA BAY TIMES (Mar. 24, 2023), <https://www>

fully challenged in court.¹⁶² Others target university actions that—like the non-discrimination policy in *Burt*—are likely inadequately expressive to trigger First Amendment review but are nonetheless intimately connected to building a successful teaching and learning environments. To protect the work of colleges and universities, it is going to require going beyond protecting faculties' rights to engage in teaching and research.

One path would be to argue for educational autonomy under the First Amendment. This approach, ably advocated by Paul Horwitz,¹⁶³ has obvious advantages, not least of which is that the modern cases described above draw the explicit connection between the individual and institutional aspects of academic freedom. Professor Horwitz argues persuasively that colleges and universities should be recognized as First Amendment institutions, similar to the press, deserving of special protection from government interference due to their importance in our democratic system of government.¹⁶⁴ A challenge with this framework (as Professor Horwitz acknowledges) is in drawing the appropriate line between academic freedom and educational autonomy.¹⁶⁵ As he notes, attempting to tie educational autonomy to academic freedom—itsself a continuously contested concept—could ultimately undermine both.¹⁶⁶ Horwitz avoids this problem by arguing that courts should “defer substantially to universities’ own sense of what their academic mission requires, and their own sense of what academic freedom entails, rather than evaluate those claims against a top-down, judicially imposed understanding of academic freedom.”¹⁶⁷ This answer raises two additional concerns. First, despite Professor Horwitz’s clear direction to the contrary, courts might well merge their analysis of these separate but related concepts in ways that would undermine core academic freedom protections. In other words, the courts might adopt a deferential approach to university operations that would then undermine the rights of faculty.

tampabay.com/news/education/2023/03/23/ron-desantis-tenure-track-academic-freedom-uf-usf-fsu-professor [https://perma.cc/S3PH-LS3B] (describing legislation passed to institute post-tenure review of faculty every five years at all public colleges and universities and proposed legislation to make a tenured faculty member reviewable by the trustees “at any time”); Kate McGee, *An Effort to Ban Faculty Tenure in Public Universities Has Failed in the Texas Legislature*, TEX. TRIB. (May 27, 2023), <https://www.texastribune.org/2023/05/27/texas-university-faculty-tenure-ban-fails> [https://perma.cc/E5ZJ-6JX2] (describing the failed bill that would have eliminated tenure in Texas and the alternative bill that was adopted, which centralizes control over the tenure process in the legislature rather than the independent boards). The Supreme Court has held that faculty at public colleges and universities have no constitutional right to participate in faculty governance. *See* *Minn. State Bd. for Comty. Colls. v. Knight*, 465 U.S. 271, 273 (1984). *But see generally* Judith C. Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945 (2009).

162. *See, e.g.*, Rose Horowitz, *Florida’s “Stop WOKE” Law to Remain Blocked in Colleges, Appeals Court Rules*, NBC NEWS (Mar. 17, 2023, 1:02 PM), <https://www.nbcnews.com/politics/politics-news/floridas-stop-woke-law-remain-blocked-colleges-appeals-court-rules-rcna75455> [https://perma.cc/U65H-FUU8].

163. Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007).

164. *See id.* at 1502.

165. *See id.* at 1545–49.

166. *See id.* at 1546–47.

167. *Id.* at 1547–48.

Second, to ensure university autonomy on decisions like those challenged in the *FAIR* case, Professor Horwitz's approach seems to untether educational autonomy from existing First Amendment doctrine entirely. Courts may well reject the invitation to allow universities to define for themselves the scope of the authority to which deference is due.

A better home for this inquiry might therefore be in a resurrected substantive due process framework, which could reinforce existing First Amendment protections. In deciding whether a fundamental right is implicated, "the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"¹⁶⁸ As the brief survey above indicates, there are arguments to be made that the educational autonomy of our colleges and universities emerge from long-standing traditions that predate our nation's founding. Our courts have a long history of understanding that government intrusion into university operations must be carefully balanced against the range of liberty interests that coalesce in the educational environment.¹⁶⁹ Embedded in these early decisions was the understanding that schools are created with particularized missions, that they hire a range of people with the skills to help them meet those objectives, and that donors, parents, and students select and support them because of the particular values they claim to represent and serve.¹⁷⁰ This approach has been reinforced by the modern posture of deference to some types of educational decision-making.¹⁷¹

Substantive due process claims based on educational autonomy could take two mutually reinforcing forms: a broader one drawing on the pre-colonial historical traditions that informed the earliest American colleges, or a more limited one as set out in the early cases. In the former, claims would track the historical influence of the English, Scottish, and German models on the founding of American colleges and universities and their development to illustrate a long (although not unbroken) tradition of limiting political influence that has helped to frame the ideals of modern institutions of higher education. In the latter, the scope of the educational autonomy right would be more particularized, determined as it was in the early cases through a close examination of the structure and mission of the institution, with appropriate deference given to the places in which decision-making authority is located.¹⁷² Notably, these inquiries would require courts to go beyond the crude distinction between public and private to a more sophisticated understanding of the way that a college or university is constructed. The early cases also offer some indication about how

168. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (alteration in original) (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019)).

169. *See generally* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335 (2000).

170. *See generally id.* at 1340.

171. *See generally id.* at 1377.

172. This type is not entirely foreign even to the modern Court's examination of academic freedom questions. *See, e.g., NLRB v. Yeshiva Univ.*, 444 U.S. 672, 673–75 (1980) (determining after close examination of the university's governance structure that university faculty were "managerial employees" who could not form a union).

courts might resolve the challenging questions of identifying appropriate plaintiffs and how the rights of institutions that are themselves part of the state could be vindicated. Cases like those involving Bowdoin College and Missouri illustrate that claims may be brought by plaintiffs who themselves have been harmed by the legislative or executive usurpation or misuse of decision-making authority, but the resolution would be in the return of power to the proper body.¹⁷³ Given that public colleges and universities are unlikely to sue the government that funds them, this structure is more likely to create some check on egregious abuses than one that demands that these institutions act on their own behalf.

This understanding of educational autonomy would demand more tolerance of pluralism in our colleges and universities. In particular, it would require more tolerance of religiously oriented institutions given the historic role different Christian denominations played in the creation of higher education at home and in Europe.¹⁷⁴ This pluralism could positively contribute to the “diversity of thought” that the protections of academic freedom are designed to foster¹⁷⁵ but would raise challenging questions of equity, particularly in cases when an institution’s founding mission is itself discriminatory.¹⁷⁶ Of course, even a strengthened right of educational autonomy is unlikely to act (and has not historically acted) as a complete bar to laws of general applicability.¹⁷⁷ However, it is likely that a robust concept of educational autonomy would and should protect some exclusionary institutional choices,¹⁷⁸ although the adoption of discriminatory policies and practices would likely be mitigated by professional norms (including those of accreditation). In any event, these trade-offs may be worth it. Recent developments indicate that relying on the federal courts to enforce these commitments consistently is unlikely to be a successful strategy.¹⁷⁹

173. See generally *Allen v. McKean*, 1 F. Cas. 489 (C.C.D. Me. 1833); *Head v. Curators of the Univ. of Mo.*, 47 Mo. 220, 224 (1871).

174. *Christianity’s Role in the Development of Modern Institutions*, WESLEYAN UNIV., <https://www.wesleyan.edu/christianitystudies/pathways/development.html> [<https://perma.cc/Y7Y4-XKJ4>] (noting that “[a]lmost every university and college founded in the U.S. and Europe until the mid-19th century—and many afterwards—was founded by some religious organization”).

175. Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 L. & CONTEMP. PROBS. 303, 312 (1990).

176. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 164 (1976); *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983).

177. See, e.g., *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (acknowledging “the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils”).

178. And in fact, in the past the Court has taken a nuanced approach even to the most odious of educational decisions. For example, the Court in *Runyon*, in holding that the Civil Rights Act barred racial discrimination even in private schools, also noted that this would not prevent the school from continuing to educate students consistent with its own values. See *Runyon*, 427 U.S. at 176.

179. See generally *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1872 (2021) (holding that the city violated the First Amendment by refusing to contract with a Catholic foster care agency that refused to certify same-sex couples as foster parents); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–98 (2021) (holding that state had failed to justify COVID pandemic restrictions on at-home gatherings for religious purposes); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2049 (2020) (extending the ministerial exception to deny

Endorsing pluralism, on the other hand, might help protect the educational autonomy for the many universities and colleges whose commitments to equity and access are currently under attack.

Returning to the example with which I began, an educational autonomy lens would necessitate a different conversation about the limits that Idaho has placed on abortion speech for public employees in the context of higher education. Relevant factors to the inquiry might be the structure of the oversight and decision-making for Idaho's colleges and universities, a dive into their founding mission and purpose, accreditation standards that govern the provision of healthcare services on colleges and universities in the state, the liberty interests of parents and students who selected a residential institution, and views of the faculty governing bodies about the impacts on the teaching and learning environment. These questions would be asked within a framework that takes seriously our deeply embedded tradition of preserving some distance and autonomy from state power for our institutions of higher education, even those that are state-created or funded. Whether the outcome tended more toward Bowdoin College or Missouri, the effect would be much deeper understanding of the university's purpose and role in the state. This is significant given that ultimately, as Justice Story noted in *Allen*, publicly funded universities cannot survive without the support of the legislatures in their states.¹⁸⁰ The most that litigation could do would be to check or slow some of the worst political excesses in the very short run. But perhaps by creating a space in which governmental actions are assessed against the history, structure, and purpose, the cases would help to facilitate more thoughtful and particularized engagement around the significance of a university in a community, helping to allay popular (and increasingly widespread) concerns about the isolation and irrelevance of what is happening in the ivory tower.

V. CONCLUSION

Today's colleges and universities bear little resemblance to those early colonial colleges. They are far more numerous and diverse, serving a much broader range of students, including many whose humanity was not recognized at the time of the founding. Our colleges and universities are more ambitious, both in the training provided for students and the research produced for society. In their comparatively short history, American institutions of higher education have become, by many accounts, the best in the world,¹⁸¹ a development made possible in part by an understanding of educational autonomy that predates the nation and is now under threat. Substantive due process theory, despite facing its own challenges in the Court,

employment claims to two lay teachers at religious schools); *Espinoza v. Mont. Dept. of Revenue*, 140 S. Ct. 2246, 2246 (2020) (holding that the state could not fund scholarships for private education while excluding religious schools).

180. See generally *Allen v. McKean*, 1 F. Cas. 489 (C.C.D. Me. 1833).

181. See, e.g., Kevin D. Williamson, *American Universities Are the Envy of the World*, NAT'L REV. (Sept. 19, 2019, 6:30 AM), <https://www.nationalreview.com/2019/09/american-universities-envy-of-the-world-wonderful-inspirig-enriching> [<https://perma.cc/8U95-U7VS>].

provides a mechanism for unearthing this history, tying our current debates to those of the founders, and establishing our colleges and universities as a pillar of their communities and of the nation.