

# ADDRESS

## ACADEMIC FREEDOM AND DISCRIMINATION IN A POLARIZING TIME

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### ABSTRACT

Academic freedom is under attack from both the left and the right. The very notion of academic freedom is at stake as liberals and conservatives attack exercises of it that do not align with their political goals. Moreover, those who purport to champion academic freedom frequently end up attempting to restrict it. This trend has accompanied an atmosphere of fear about speaking freely. At this moment, we desperately need explicit discussions about academic freedom.

Those who believe in the value of academic freedom must wrest it from disingenuous invocations and truly defend it by wrestling with its genuine difficulties, including by acknowledging the tensions it may create with evolving antidiscrimination principles and practices.

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In 1856, in the lead up to the Civil War, a chemistry professor was dismissed from the faculty at the University of North Carolina for his antislavery views. Professor Benjamin Hedrick had expressed support for the Republican presidential candidate, who opposed slavery. That led to public calls for so-called “Black Republicans” to “be driven out” of schools, and rumors about

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Hedrick's views circulated at the university. After he responded in a newspaper article explaining himself, the university found him unfit because of his "indiscretion" of making his political opinions public and declared that Professor Hedrick's views were "not those entertained by any other member of this body." The trustees found that he had "destroyed his power to be of further benefit to the University" and removed him. Students burned him in effigy.<sup>1</sup>

This teacher's dismissal for his views on a central conflict dividing the country would of course not be the last.<sup>2</sup> At the time, there was no established concept of "academic freedom" in the United States. Academic freedom as an institutional phenomenon and a legal idea in this country began to develop in earnest in the twentieth century.<sup>3</sup> The law and discourse of academic freedom from that time to today have implicated the deep political conflicts that have characterized each era.

In 2022, we are in an academic freedom crisis. For this, right-wing observers blame the left,<sup>4</sup> and left-wing observers blame the right or claim that there is no real problem.<sup>5</sup> I think it is plain to see that academic freedom is under attack from a

1. *The Hedrick "Indiscretion,"* UNC LIBRS.: A RIGHT TO SPEAK & TO HEAR, [https://exhibits.lib.unc.edu/exhibits/show/academic\\_freedom/19th-century/hedrick-indiscretion](https://exhibits.lib.unc.edu/exhibits/show/academic_freedom/19th-century/hedrick-indiscretion) [<https://perma.cc/BFA5-MHBW>] (last visited Jan. 3, 2022). *See generally* Michael Thomas Smith, "A Traitor and a Scoundrel": Benjamin S. Hedrick and the Making of a Dissenter in the Old South, 76 N.C. HIST. REV. 316 (1999).

2. The problem of free speech on college campuses "is not new but is newly relevant." KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 3 (2018). In 2017, for example, North Carolina legislators attempted to require that the University of North Carolina's (UNC) Board of Governors adopt policies "to ensure [that] ideological balance is part of the experience for [its] . . . students." Sean M. Kammer, *The 'Intellectual Diversity' Crisis that Isn't: Liberal Faculties, Conservative Victims, and the Cynical Effort to Undermine Higher Education for Political Gain*, 39 QUINNIPIAC L. REV. 149, 173 (2021) (alteration in original) (quoting S.B. 528, Gen. Assemb., Reg. Sess. (N.C. 2017)); *see also* Joe Dryden, *Protecting Diverse Thought in the Free Marketplace of Ideas: Conservatism and Free Speech in Higher Education*, 23 TEX. REV. L. & POL. 229, 239 (2018). Academic freedom concerns were also recently raised at UNC when its trustees refused tenure to journalist Nikole Hannah-Jones. Emily J. Levine, *It's Time for an Overhaul of Academic Freedom*, WASH. POST (June 9, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/06/09/its-time-an-overhaul-academic-freedom/> [<https://perma.cc/VT6S-EAS5>]. Professor Keith Whittington notes that "[t]he University of North Carolina has found itself in an ongoing brawl with the Republican political leadership in the state." WHITTINGTON, *supra*, at 150.

3. The idea of academic freedom as we now know it in the United States is usually traced to the dismissal of Professor Edward Alsworth Ross from Stanford in 1900, followed by the establishment of the American Association of University Professors in 1915. Levine, *supra* note 2.

4. Dryden, *supra* note 2, at 233–36.

5. Kammer, *supra* note 2, at 206–08, 210; Aaron Hanlon, *The Real Threat to Free Speech on Campus Isn't Coming from the Left*, WASH. POST (Oct. 15, 2019), <https://www.washingtonpost.com/outlook/2019/10/15/real-threat-free-speech-campus-isnt-coming-left/> [<https://perma.cc/HYS9-82AC>].

number of different political viewpoints, affecting the speech of professors and students of various political directions. Both liberals and conservatives might claim to value academic freedom while attacking exercises of it that are at odds with their political goals. Further, we see attempts to champion academic freedom by attempting to restrict it,<sup>6</sup> thereby decreasing the credibility of defenses of academic freedom.

In my fifteen years of law teaching, an atmosphere of fear about speaking freely has never been more palpable. I see it in my students; I see it in my colleagues. And it is at this moment that explicit discussions about academic freedom are most needed. I'm very grateful to the Houston Law Review and the University of Houston Law Center for inviting me to devote this Frankel Lecture to the subject, for inviting my excellent colleagues Khiara Bridges and Keith Whittington to share their comments on the subject, and for asking my old friend Dave Fagundes to moderate this discussion.

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An event that appears to have triggered the process whereby academic freedom became an established idea in the United States is instructive. In 1900, Stanford University forced out an economics and sociology professor, Edward Alsworth Ross. Ross had made public statements that provoked the university's sole trustee, Jane Stanford, to write to its president that "Professor Ross cannot be trusted and he should go. . . . He is a dangerous man."<sup>7</sup> Ross had first disturbed Mrs. Stanford in 1896 with his support for the Democrat William Jennings Bryan in his presidential campaign championing workers against wealthy capitalists. But her effort to oust Ross finally worked in 1900 when, in the context of organized labor leaders blaming Asian immigration for lower wages, Ross stated that "the Orient is the land of 'cheap men'"; "America will be imperiled if Orientals are allowed to pour into this country in great numbers"; and "[s]hould the worst come to the worst, it would be better for us to turn our

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6. See George R. La Noue, *Can Academic Freedom Survive Critical Race Theory?*, LAW & LIBERTY (June 10, 2021), <https://lawliberty.org/can-academic-freedom-survive-critical-race-theory/> [<https://perma.cc/B5DZ-L9CV>]; Michelle Goldberg, Opinion, *The Social Justice Purge at Idaho Colleges*, N.Y. TIMES (Mar. 26, 2021), <https://www.nytimes.com/2021/03/26/opinion/free-speech-idaho.html> [<https://perma.cc/8G4J-LJ28>]; Ishaan Tharoor, *Trump Joins Dictators and Demagogues in Touting 'Patriotic Education.'* WASH. POST (Sept. 21, 2020), <https://www.washingtonpost.com/world/2020/09/21/trump-patriotic-education-china-orban/> [<https://perma.cc/9BWL-DCFN>].

7. Brian Eule, *Watch Your Words, Professor*, STAN. MAG. (Jan.–Feb. 2015) <https://stanfordmag.org/contents/watch-your-words-professor> [<https://perma.cc/D93M-HSDG>].

guns upon every vessel bringing Japanese to our shores than permit them to land.”<sup>8</sup> Ross’s pro-labor and anti-immigrant statements, along with his calling for municipal ownership of railroads, arguably attacked the legacy of the Stanford family’s business practices. Later, Ross would also become a proponent of eugenics.<sup>9</sup>

The university president was loath to fire Ross and entreated Mrs. Stanford to consider that “the word will go out that he was dismissed for political reasons. Such a statement would do us great injury in the higher circles which make university reputation. We cannot bring good men here, if they believe their positions insecure.”<sup>10</sup> But she was adamant that a professor who associates himself with the discriminatory rhetoric of political demagogues and “plays into the hands of the lowest and vilest elements of socialism” had to go.<sup>11</sup> Ross was dismissed.<sup>12</sup>

That soon fueled protest resignations from other professors who objected to the firing and inspired wider attention to the issue of academic freedom. Years later in 1915 during World War I, a time when free speech controversies were legion, philosophy professor Arthur Lovejoy, who had resigned from Stanford in protest of Ross’s firing, joined John Dewey to establish the American Association of University Professors (AAUP).<sup>13</sup> The purpose of the new organization was to protect academic freedom and tenure for faculty.<sup>14</sup> The organization’s Declaration of Principles of Academic Freedom and Academic Tenure stated that a teacher’s academic freedom comprises “freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action.”<sup>15</sup> This declaration asserted that faculty are “not in any proper sense the employees” of university trustees.<sup>16</sup> Undermining an employer’s simple ability to dismiss an employee was central to how academic freedom

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. MATTHEW J. HERTZOG, PROTECTIONS OF TENURE AND ACADEMIC FREEDOM IN THE UNITED STATES 4 (2017).

13. Levine, *supra* note 2; Arthur O. Lovejoy, JOHNS HOPKINS KRIEGER SCH. ARTS & SCIS., <https://philosophy.jhu.edu/about/early-hopkins-philosophers/lovejoy/> [<https://perma.cc/8NZ6-3KT4>] (last visited Feb. 20, 2022).

14. Levine, *supra* note 2.

15. AM. ASS’N OF UNIV. PROFESSORS, AAUP’S 1915 DECLARATION OF PRINCIPLES 1 (1915), [https://aaup-ui.org/Documents/Principles/Gen\\_Dec\\_Princ.pdf](https://aaup-ui.org/Documents/Principles/Gen_Dec_Princ.pdf) [<https://perma.cc/D7QR-MJ5A>].

16. *Id.*

would primarily be enforced: through job security and insulation from firing.<sup>17</sup>

Universities then gradually developed the system of tenure. After World War II, an influx of veterans attending college on the GI Bill caused universities to need more teachers, and they used the prospect of tenure to recruit faculty.<sup>18</sup> Soon, in the late 1940s and early 1950s, we were in the period of fear of the spread of Communism, known as the Red Scare and the McCarthy Era. In his Senate investigations and hearings, Senator Joe McCarthy accused many academics of supporting the Communist Party and being disloyal to the United States. The existence of tenure by this point shielded at least some academics from being fired for their views or for their refusal to cooperate with McCarthy.<sup>19</sup>

The chilling impact of the McCarthy Era on academia provoked the Supreme Court to make sweeping statements in support of academic freedom in a 1957 case involving a professor who was convicted of contempt for refusing to answer questions by the state legislature about his beliefs on Communism.<sup>20</sup> The Court held that the professor's conviction infringed his liberty under the Due Process Clause.<sup>21</sup> Chief Justice Warren found "almost self-evident" the "essentiality of freedom in the community of American universities," because of "the vital role in a democracy that is played by those who guide and train our youth."<sup>22</sup> Thus, the Court declared: "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."<sup>23</sup> Such imposition would bring dire results: "Teachers and students must always remain free to inquire, to study and to

17. Levine, *supra* note 2.

18. HERTZOG, *supra* note 12, at 5.

19. *Id.* at 6. Tenure, particularly in the humanities and social sciences, has been under threat from legislators in several states including Iowa, Missouri, and South Dakota. Kammer, *supra* note 2, at 172–73. Tenure, however, largely remains a "bulwark of academic freedom." Keith E. Whittington, *Free Speech and the Diverse University*, 87 FORDHAM L. REV. 2453, 2471 (2019).

20. *Sweezy v. New Hampshire*, 354 U.S. 234, 235, 244–45 (1957). Note that *Sweezy* itself drew heavily on *Wieman v. Updegraff*, *id.* at 247–48, which held that an Oklahoma statute requiring state officers and employees (faculty and staff of a state university) to take a loyalty oath violated due process, *Wieman v. Updegraff*, 344 U.S. 183, 184–85, 191–92 (1952). *Wieman*, however, was decided primarily as an employment law case rather than a free (academic) speech case—indeed, the First Amendment is not referenced in the majority but only once in Justice Black's concurrence—and so I treat *Sweezy*, not *Wieman*, as the wellspring of the Court's academic freedom jurisprudence. *Wieman*, 344 U.S. at 194 (Black, J., concurring).

21. *Sweezy*, 354 U.S. at 255.

22. *Id.* at 250.

23. *Id.*

evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”<sup>24</sup> In an influential concurrence,<sup>25</sup> Justice Frankfurter, a former professor at Harvard Law School, also emphasized “the dependence of a free society on free universities.”<sup>26</sup> “For society’s good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible.”<sup>27</sup>

The Supreme Court’s next significant defense of academic freedom came in a 1967 case about New York statutes and regulations that were used to prevent appointment and retention of “subversive” people.<sup>28</sup> Several public university teachers were dismissed or threatened with dismissal for refusing to say whether they had “ever advised or taught,” or been “a member of any society or group of persons which taught or advocated” the violent or unlawful overthrow of the government, or ever been Communists.<sup>29</sup> The Court held that these laws were impermissibly overbroad and violated petitioners’ First Amendment rights.<sup>30</sup> The vagueness of the regime meant that “[i]t would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery.”<sup>31</sup> The uncertainty over what would get one in trouble “ma[d]e it a highly efficient *in terrorem* mechanism.”<sup>32</sup> The Court stated:

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. That freedom is therefore a special concern of the First Amendment, which does not

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24. *Id.*

25. Michael K. Park, *A Matter of Public Concern: The Case for Academic Freedom Rights of Public University Faculty*, 26 COMM’N L. & POL’Y 32, 35 (2021); Clay Calvert, *Rescinding Admission Offers in Higher Education: The Clash Between Free Speech and Institutional Academic Freedom When Prospective Students’ Racist Posts Are Exposed*, 68 UCLA L. REV. DISCOURSE 282, 288–89 (2020).

26. *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring); *Felix Frankfurter*, OYEZ, [https://www.oyez.org/justices/felix\\_frankfurter](https://www.oyez.org/justices/felix_frankfurter) [<https://perma.cc/7VR4-6K3P>] (last visited Jan. 30, 2022).

27. *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring).

28. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 591–92 (1967).

29. *Id.* at 592.

30. *Id.* at 609–10.

31. *Id.* at 601.

32. *Id.*

tolerate laws that cast a pall of orthodoxy over the classroom.<sup>33</sup>

The country would soon enter the era of political protest about civil rights and the Vietnam War, in the late 1960s. And the Supreme Court once again had a chance to address academic freedom in that context, in a case about students who sought to form a local chapter of Students for a Democratic Society (SDS) and were denied recognition by their state college.<sup>34</sup> The Court noted that, in 1969 to 1970, “[a] climate of unrest prevailed on many college campuses in this country,” featuring “widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson.”<sup>35</sup> And “SDS chapters on some of those campuses had been a catalytic force during this period.”<sup>36</sup> But the Court stated that the First Amendment does not “apply with less force on college campuses than in the community at large,” and reiterated “this Nation’s dedication to safeguarding academic freedom.”<sup>37</sup> A college’s denial of official recognition to a college organization, just “because it finds the views expressed by any group to be abhorrent,” violated the First Amendment “right of individuals to associate to further their personal beliefs.”<sup>38</sup>

I also consider the Supreme Court’s affirmative action case from 1978, *Regents of the University of California v. Bakke*, to be an important academic freedom decision, though it is not a First Amendment case.<sup>39</sup> In that case, the Court upheld the use of race-conscious affirmative action to create a diverse classroom environment under the Equal Protection Clause.<sup>40</sup> There, the Court explicitly reaffirmed its previous statements on academic freedom regarding a university’s atmosphere of “speculation, experiment and creation” and “robust exchange of ideas.”<sup>41</sup> The Court connected that academic atmosphere to a university’s ability to enroll a diverse class of students, so as to expose them

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33. *Id.* at 603.

34. *Healy v. James*, 408 U.S. 169, 170, 172, 174 (1972).

35. *Id.* at 171.

36. *Id.*

37. *Id.* at 180–81 (first citing *Keyishian*, 385 U.S. at 603; then citing *Sweezy v. New Hampshire*, 354 U.S. 234, 249–50 (1957) (plurality opinion); and then citing *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring)).

38. *Id.* at 181, 187–88.

39. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

40. *Id.* at 281, 289, 314–15.

41. *Id.* (first quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring); and then quoting *Keyishian*, 385 U.S. at 603).

“to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>42</sup>

The Supreme Court’s statements on academic freedom, from the McCarthy Era<sup>43</sup> through the civil rights and anti-war movements,<sup>44</sup> arose in the face of political attempts *by government* to constrain what academics and students should think and say. Since that time, the legal doctrine of academic freedom has mostly been forged in the application of the First Amendment to teachers and students at public institutions.

The First Amendment framework of academic freedom centers on two main Supreme Court cases about the speech of public employees: *Connick v. Myers*<sup>45</sup> and *Pickering v. Board of Education*.<sup>46</sup> Under *Connick*, the First Amendment applies only if the employee spoke as a citizen “on a matter of public concern,” that is, “any matter of political, social, or other concern to the community.”<sup>47</sup> If so, then under *Pickering*, the employee may have a First Amendment claim but only if the teacher’s interest in commenting on a matter of public concern outweighs the state employer’s interest “in promoting the efficiency of the public services it performs through its employees.”<sup>48</sup> A school’s interest in limiting a teacher’s speech is not great when the speech does not impede the “proper performance of his daily duties in the classroom or . . . the regular operation of the schools generally.”<sup>49</sup>

But in 2006, the Court in *Garcetti v. Ceballos* created an exception to this framework, holding that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>50</sup> After *Garcetti*, courts have allowed states to restrict the speech of public primary and secondary school teachers.<sup>51</sup> But some courts have declined to apply *Garcetti* to teachers at public colleges and universities because of the

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42. *Id.* at 312–13.

43. *Sweezy*, 354 U.S. at 240 n.6.

44. *Keyishian*, 385 U.S. at 601–03; *Healy v. James*, 408 U.S. 169, 170–71 (1972).

45. *Connick v. Myers*, 461 U.S. 138, 140 (1983).

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

47. *Connick*, 461 U.S. at 146–47.

48. *Pickering*, 391 U.S. at 568, 572–73.

49. *Id.* at 572–73 (footnote omitted).

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

51. *See, e.g., Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 970 (9th Cir. 2011).



Supreme Court's clear pronouncements on the importance of academic freedom.<sup>52</sup>

In 2021, the Sixth Circuit decided the case of *Meriwether v. Hartop*, which involved a professor who was disciplined under a public university's Title IX antidiscrimination policy when he refused to address a student, who identified as female, as Ms. or to use her preferred pronouns when calling on her in class because the professor perceived the student as male and did not believe that a person's gender could be different from sex assigned at birth.<sup>53</sup> In the professor's lawsuit against the university, the Sixth Circuit held that the professor "plausibly alleged" that his refusal to use the student's preferred pronouns was protected by the First Amendment.<sup>54</sup>

It is clear that the First Amendment protects a person's expression of views on matters such as gender identity. But I find the decision in *Meriwether* erroneous because the right that the professor was asserting, to use "Mr." notwithstanding requests by the addressee to be called "Ms.," is not the same as the right to express a view on a matter of "public concern,"<sup>55</sup> for example, a view about whether someone's gender can differ from their sex assigned at birth. I found the professor's complaint no more convincing as a First Amendment matter than an insistence on a constitutional right to address a person by, for example, their maiden name instead of their married name. This is about a person's form of address. It's not a free speech right. To be sure, the choice might reflect politics, or underlying views about gender, marriage, immigration, assimilation, or ethnicity, but that does not render it speech on a matter of public concern as the constitutional doctrine requires. But were a school to discipline a person for stating that a person's gender cannot diverge from sex assigned at birth, or that people should not take their spouse's names, that would indeed be a violation of academic freedom.

It's unfortunate that in a year when academic freedom is under attack, a strong judicial defense of academic freedom has come in a case that makes such a basic mistake in what it construes as covered by academic freedom. But that also reveals

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52. See, e.g., *Adams v. Trs. of the Univ. of N.C.—Wilmington*, 640 F.3d 550, 562–63 (4th Cir. 2011); *Buchanan v. Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019); *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014); *Meriwether v. Hartop*, 992 F.3d 492, 504–05 (6th Cir. 2021).

53. *Meriwether*, 992 F.3d at 498–501.

54. *Id.* at 517.

55. Matters of "public concern" include "any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983).

what makes the subject difficult today: the problem of defining what academic freedom is, particularly in relation to discrimination.

Political fights that play out as debates about academic freedom have reemerged following the dramatic cultural shifts of the past two decades.<sup>56</sup> In the past five years, the global social movements of #MeToo and Black Lives Matter, protesting the pervasive harms of discrimination, have affected the contours of academic freedom.<sup>57</sup> Intensifying social turmoil and political polarizations have squarely and explicitly become public fights about what teachers should or should not teach, what students should learn, and what speech should end up with an individual being disciplined, fired, or expelled.

In 2017, the #MeToo movement went viral and global, with public revelations of sexual harassment and discrimination in industry after industry and every conceivable workplace.<sup>58</sup> A form of accountability that quickly emerged was high-profile firings, resignations, and terminations of working relationships.<sup>59</sup> Then in 2020, in the midst of the COVID-19 pandemic, the Black Lives Matter movement went global after the murder of George Floyd by Derek Chauvin. We have now seen the criminal convictions of Chauvin and of Harvey Weinstein. But the broader social impact of these global movements has been measurable in the increased expectations that there will be negative job consequences in response to allegations or revelations of a person's discriminatory wrongdoing.

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56. See, e.g., *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007); *Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 718 (7th Cir. 2016). Meriwether himself "says he is the victim of a culture of political correctness at universities" and characterized his employer's reaction as an attempt to force him to "bow to the new orthodoxy." Derek Hawkins, *A Professor Was Reprimanded for Refusing to Use a Transgender Student's Pronouns. A Court Says He Can Sue.*, WASH. POST (Mar. 27, 2021, 4:54 PM), <https://www.washingtonpost.com/education/2021/03/27/transgender-pronouns-shawnee-state-professor/> [https://perma.cc/RR3Q-B2XE].

57. See generally Philip Lee, *Student Protests and Academic Freedom in an Age of #blacklivesmatter*, 79 OHIO ST. L.J. 223, 225–28, 225 n.9 (2018); Nancy Chi Cantalupo & William C. Kidder, *Systematic Prevention of a Serial Problem: Sexual Harassment and Bridging Core Concepts of Bakke in the #MeToo Era*, 52 U.C. DAVIS L. REV. 2349, 2395–96, 2403 (2019).

58. Catherine Powell, *#MeToo Goes Global and Crosses Multiple Boundaries*, COUNCIL ON FOREIGN REL.: WOMEN AROUND THE WORLD (Dec. 14, 2017, 3:06 PM), <https://www.cfr.org/blog/metoo-goes-global-and-crosses-multiple-boundaries> [https://perma.cc/Y9MZ-UWDE].

59. Lesley Wexler et al., *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 52–53 (2019).

Thus, we've become acculturated in the past several years to the idea that individuals who discriminate, harass, or express views that are racially or sexually offensive may lose their jobs. So where does that leave academic freedom, which has staked its power on making it difficult to fire academics for offensive statements? Recall that a key event that led to the rise of academic freedom in the United States was the reaction to the dismissal of Professor Ross from Stanford in part for his discriminatory statements about Asian immigrants.<sup>60</sup> And today, too, academic freedom is often a defense raised when an individual is alleged to have said something discriminatory and is at risk of discipline.<sup>61</sup>

In recent years, universities have developed a growing commitment to antidiscrimination principles and diversity-and-inclusion practices, including in relation to laws such as Title IX on sex discrimination and Title VI on race discrimination.<sup>62</sup> And university policies on discrimination and harassment of course prohibit conduct that may be verbal, or that may occur in the classroom or in the course of performing duties as a teacher or researcher.<sup>63</sup> And in recent years, definitions of discrimination and harassment have undoubtedly expanded to cover more than before.<sup>64</sup>

You may believe, as I do, that not only must academic freedom be vigorously protected but also that there has to be a limit to a person's academic freedom where their conduct constitutes discrimination or harassment that seriously compromises the environment for teaching and learning.<sup>65</sup> Academic freedom

60. Eule, *supra* note 7.

61. See *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021); Hawkins, *supra* note 56; La Noue, *supra* note 6. Note that this response is not limited to the United States but is also observed in France, Poland, England, and Wales. Anne Corbett, *How Should We Tackle Moral Panics About Free Speech?*, UNIV. WORLD NEWS (Feb. 27, 2021), <https://www.universityworldnews.com/post.php?story=20210224102333620> [<https://perma.cc/4V9F-576V>].

62. See *Title IX and Sex Discrimination*, OFF. FOR CIV. RIGHTS, U.S. DEP'T EDUC. (Aug. 20, 2021), [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) [<https://perma.cc/3Q94-HLMG>]; *Education and Title VI*, OFF. FOR CIV. RIGHTS, U.S. DEP'T EDUC. (Jan. 10, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> [<https://perma.cc/QS2V-PLF9>].

63. See, e.g., *Standard Practice Guide Policies: Discrimination and Harassment*, U. MICH. (Oct. 1, 2020), <https://spg.umich.edu/policy/201.89-1> [<https://perma.cc/5BWV-QR7X>].

64. See Lee, *supra* note 57, at 260–74, for an analysis of recently revised policies from the University of Chicago, University of Minnesota, Harvard Law School, and University of Michigan.

65. Philip Lee adheres to a similar “balancing test” approach to academic freedom, especially as it pertains to campus speakers. *Id.* at 270–71 (“College and university administrators appear to be at a crossroads. On the one hand, they can choose to create

cannot simply mean the right to freely discriminate. Addressing discrimination also cannot mean firing or expelling people for expressing views that offend others. But it is much more complicated than it would seem to distinguish instances of discrimination or harassment from the exercise of academic freedom. And it has become harder in the recent past because of changing ideas of discrimination and harassment, as well as increased political polarization that makes it more difficult for people to give each other the benefit of the doubt.<sup>66</sup>

Perhaps we can start with an easy example. If a professor says in class about a student, “She is a slut,” that is not academic freedom, for a variety of reasons including that it targets an individual for gender-based disparagement and may be defamatory. But if a professor instead makes a statement about the impact of women’s promiscuity on their social standing, that would be an exercise of academic freedom.<sup>67</sup> In between are myriad possible statements that could be made about women, gender, and sex that some people will find objectionable or offensive, or experience as discriminatory and as creating a hostile environment that impairs learning. And that is the contested space in which debates about academic freedom today take place.

What many people perceive as creating a hostile environment in 2022 is different from what they would have understood as such only ten years earlier. We’ve seen the significant growth of university bureaucracies including those dedicated to promoting and enforcing university antidiscrimination policies, through training, investigation, adjudication, and discipline, for reported and alleged incidents.<sup>68</sup> And offices of diversity and inclusion

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rules that cease and deter student activism; on the other hand, they can choose to craft policies that recognize the value of student voices. I argue for the latter. Student activism should be viewed as a developmental component of student learning. As such, protecting student activism through academic freedom is entirely consistent with the AAUP’s 1967 Joint Statement’s focus on *Lernfreiheit*—the students’ freedom to learn. Thus, college and university administrators should take students’ protest rights—framed as an academic freedom right to learn—into account in developing their free speech policies. I propose a balancing test for this purpose.” (footnote omitted)).

66. See *supra* notes 56–57 and accompanying text.

67. Some commentators identify the subject of the course, or the professor’s area of expertise, to be a potentially dispositive factor in the academic freedom analysis. Professor Whittington, for example, writes that “[u]niversity officials and students should expect the professor of computer science . . . to refrain from teaching Christian theology in the introductory programming class.” WHITTINGTON, *supra* note 2, at 145.

68. See Thomas Wesley Williamson et al., *An Exploration of Administrative Bloat in American Higher Education*, 46 PLAN. FOR HIGHER EDUC. J., Jan.–Mar. 2018, at 15, 15–16; Jon Marcus, *The Reason Behind Colleges’ Ballooning Bureaucracies*, ATLANTIC (Oct. 6,

related to this work have grown and become fixtures of university administrations in recent years.<sup>69</sup> The work of those offices necessarily disfavors speech that is discriminatory, and their orientation and training of the university community cannot reasonably be expected to be content neutral since part of their mandate is to be against discriminatory speech.

Realistically, what people experience, report, and expect to be disciplined as discrimination or harassment based on their training and socialization affects what speech they consider illegitimate. And the more speech that is perceived as discriminatory, the more contests there are over the contracting space wherein people may express views without fearing discipline. It is therefore not surprising to see what we are now seeing: that training and discipline on discrimination, harassment, and bullying overseen by diversity and inclusion offices are coming into conflict with academic freedom.<sup>70</sup> We see

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2016), <https://www.theatlantic.com/education/archive/2016/10/ballooning-bureaucracies-shrinking-checkbooks/503066/> [<https://perma.cc/Q2FY-HADJ>]; *Office of Institutional Equity & Accessibility*, YALE U., <https://oiea.yale.edu/> [<https://perma.cc/E7JR-5ADT>] (last visited Mar. 8, 2022).

69. See, e.g., *Expansion of VSB's Office of Diversity, Equity, and Inclusion*, VILL. U., <https://www1.villanova.edu/university/business/about-vsbs/diversity-equity-inclusion/vwpn/newsletter/expansion-of-vsbs-office-of-diversity--equity-and-inclusion.html> [<https://perma.cc/47S6-N4RN>] (last visited Dec. 26, 2021); *Office of Institutional Diversity and Inclusion Centers Expand to Serve More Students*, U.N.C. WILMINGTON (Dec. 9, 2021), <https://uncw.edu/news/2021/12/office-of-institutional-diversity-and-inclusion-centers-expand-to-serve-more-students.html> [<https://perma.cc/CL9M-4YFZ>].

70. See Jeannie Suk Gersen, *How Trump Has Stoked the Campus Debate on Speech and Violence*, NEW YORKER (June 4, 2017), <https://www.newyorker.com/news/news-desk/how-trump-has-stoked-the-campus-debate-on-speech-and-violence> [<https://perma.cc/T4ZU-4N3S>] (“A clash is imminent—not just between ideas and students but also between the campus structures embodied in deans for diversity and inclusion and deans for free speech.”). With respect to anti-“CRT” backlash to trainings in particular, see, for example, Frances Watson, *Missouri's Attorney General Sues Springfield Public Schools over Sunshine Law Violations Concerning Critical Race Theory Request; SPS Responds*, KY3 (Nov. 16, 2021, 10:30 AM), <https://www.ky3.com/2021/11/16/missouris-attorney-general-sues-springfield-public-schools-over-sunshine-law-violations-concerning-critical-race-theory/> [<https://perma.cc/QC5S-892B>], where an attorney general’s office “requested public records from the school district relating to critical race theory and antiracism teaching in Springfield Public Schools”; Mike Hixenbaugh & Antonia Hylton, *Federal Investigators Launch Civil Rights Probe into Southlake, Texas, Schools*, NBC NEWS (Nov. 17, 2021, 9:42 PM), <https://www.nbcnews.com/news/us-news/southlake-texas-critical-race-theory-investigation-rca5839> [<https://perma.cc/KCU2-CGJN>], where “[t]he district’s proposal to address the issues . . . would have required diversity training for all students and teachers”; and Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> [<https://perma.cc/5BE4-8LCC>], noting that Christopher Rufo, the conservative commentator who engineered the “CRT” backlash, was largely inspired by antiracism training resources.

increasing clashes that look like fights between antidiscrimination commitments and principles of academic freedom.<sup>71</sup>

It is in that vein that, for some people, the concept of “academic freedom” is simply associated with the defense of racist or sexist speech that harms vulnerable people. There are myriad examples of professors or students being threatened with discipline for speech that some considered discriminatory and others considered merely provocative, controversial, nonconformist, or ill-phrased.<sup>72</sup> That has fueled the widespread criticism of the supposed atmosphere of censoriousness on campuses, wherein fear of unfair accusation, lack of fair process from administrators, and the lurking threat of investigation and discipline is said to create a general chill on free thinking, inquiry, and expression.<sup>73</sup>

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71. See Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS: FIXGOV (Nov. 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [<https://perma.cc/6L47-5A42>]; Adrian Florido, *Teachers Say Laws Banning Critical Race Theory Are Putting a Chill on Their Lessons*, NPR (May 28, 2021, 9:04 AM), <https://www.npr.org/2021/05/28/1000537206/teachers-laws-banning-critical-race-theory-are-leading-to-self-censorship> [<https://perma.cc/8CCT-UFBD>]; Editorial, *The American Bar Association Attacks Academic Freedom*, NAT'L REV. (Aug. 26, 2021, 6:30 AM), <https://www.nationalreview.com/2021/08/the-american-bar-association-attacks-academic-freedom/> [<https://perma.cc/JF9Q-GFCJ>].

72. See Lee, *supra* note 57, at 246–47, 260 (“[O]ne student’s speech disparaging racial minorities in the marketplace can impede another student’s sense of inclusion and belonging on that campus and prevent that student from even participating in the dialogue. And one student’s demands for inclusion and belonging can come at the expense of another student having to reflect on how his or her speech negatively affects others before speaking and chill speech in that way. In sum, there are a number of competing interests at stake when analyzing free speech issues.”).

73. See, e.g., Eric Kaufmann, Opinion, *Academic Freedom Is Withering*, WALL ST. J. (Feb. 28, 2021), <https://www.wsj.com/articles/academic-freedom-is-withering-11614531962> [<https://perma.cc/W99C-VSAC>] (“Roughly 1 in 3 conservative academics and graduate students has been disciplined or threatened with disciplinary action. A progressive monoculture empowers radical activist staff and students to violate the freedom of political minorities like conservatives or ‘gender-critical’ feminists, who believe in the biological basis of womanhood—all in the name of emotional safety or social justice.”); Jon A. Shields, *The Disappearing Conservative Professor*, NAT'L AFFS., Fall 2018, at 138, 146, <https://nation.alaffairs.com/storage/app/uploads/public/5ba7c77bbe5ba7c7bbeeeae18555223.pdf> [<https://perma.cc/7BZ9-KXNX>] (“[R]esearch shows it is more difficult for scholars to publish work that reflects conservative interests and perspectives.”); Jonathan H. Adler, Opinion, *Academia’s Rejection of Ideological Diversity Has Consequences*, WASH. POST: VOLOKH CONSPIRACY (Oct. 31, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/31/academias-rejection-of-ideological-diversity-has-consequences/> [<https://perma.cc/7CEL-K7BQ>] (“The ideological imbalance that pervades academia fosters groupthink and undermines critical thinking. The dominance of left-leaning perspectives in academic institutions compromises their commitment to open inquiry and effective education.”); Jonathan R. Cole, *The Chilling Effect of Fear at America’s Colleges*, ATLANTIC (June 9, 2016), <https://www.theatlantic.com/education/archive/2016/06/the-chilling-effect-of-fear/486338/> [<https://perma.cc/6MJP-Y24C>].

It has been tempting for liberals to dismiss this dire picture as one that is self-servingly painted by conservatives for political gain, to attack a straw man of liberal-progressive campus hegemony.<sup>74</sup> My own experience as a left-liberal legal academic is that the chill that has descended on the classroom since 2007, when I began teaching, is significant. Left-liberal students, including students who are members of the vulnerable groups that discrimination policies are supposed to protect, tell me that they don't dare try to speak their mind. They say they don't dare engage in genuine exchanges or explorations of views in class. And I feel their fear while leading discussions in criminal law and constitutional law.

Left-liberal academic colleagues at various institutions tell me that they feel at constant risk of self-immolation in the classroom and have greatly curtailed the issues they are willing to explore with students. At the same time that #MeToo and Black Lives Matter have created great opportunities and demand to deepen and strengthen teaching about gender and race, many teachers tell me that they avoid class discussion of topics that touch on gender, race, or anything controversial, lest they misstep and cause pain, cause a scandal, or get reported to the school authorities.<sup>75</sup> And many of those who persist in teaching on the most controversial topics are professors of color, who are then more at risk of allegations of wrongdoing in comparison to peers who assiduously avoid such risk-laden discussions.<sup>76</sup>

What's more, students and professors may not want to express these kinds of concerns about the academic environment out loud lest their peers take them to mean that they are insufficiently committed to antidiscrimination goals.

These constraints on academic freedom are largely ones that those within universities have put on ourselves, through our

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74. Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html> [https://perma.cc/VW2X-K2PY].

75. Jeannie Suk Gersen, *The Importance of Teaching Dred Scott*, NEW YORKER (June 8, 2021) [hereinafter Gersen, *Importance of Teaching Dred Scott*], <https://www.newyorker.com/news/our-columnists/the-importance-of-teaching-dred-scott> [https://perma.cc/8FHT-MQ7U]; Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma*, 130 HARV. L. REV. 2320, 2341 (2017) [hereinafter Gersen, *The Socratic Method*]; Jeannie Suk Gersen, *The Trouble with Teaching Rape Law*, NEW YORKER (Dec. 14, 2014), <https://www.newyorker.com/news/news-desk/trouble-teaching-rape-law> [https://perma.cc/BT8V-V4C3].

76. Sarah Schwartz, *Teachers of Color More Likely than White Peers to Tackle 'Controversial' Civics Topics*, EDUCATIONWEEK (Jan. 5, 2021), <https://www.edweek.org/teaching-learning/teachers-of-color-more-likely-than-white-peers-to-tackle-controversial-civics-topics/2021/01> [https://perma.cc/EX2Z-GARQ].

self-imposed frightened silences or our failures to calibrate internal university policies and practices to account for their effects on free inquiry and free speech.<sup>77</sup>

But the traditional way in which academic freedom has been threatened in the United States over the decades is through government constraints on schools and teachers.<sup>78</sup> And this year, we have seen precisely that again, in the conservative political and legislative movement to ban the teaching of “critical race theory” in schools.<sup>79</sup> (I’m going to bracket for now the substantive gap between what is commonly being referred to as CRT and the actual Critical Race Theory academic movement; in the public debate CRT functions as a floating signifier for ideas that conservative anti-“CRT” folks abhor.)<sup>80</sup> I understand this speech-repressive

77. Gersen, *The Socratic Method*, *supra* note 75, at 2339.

78. *Sweezy v. New Hampshire*, 354 U.S. 234, 236–43 (1957); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 592 (1967).

79. *Map: Where Critical Race Theory Is Under Attack*, EDUCATIONWEEK, <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [<https://perma.cc/9AFP-MNLS>] (Mar. 16, 2022).

80. In *Critical Race Theory: A Primer*, Professor Bridges masterfully outlines core tenets of critical race “theories” as actually conceived by academics. KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 8–9 (2019). In general, Bridges “understands CRT to be a political position,” *id.* at 9, which (1) identifies race as a “social construction” rather than a “biological entity,” *id.* at 10; (2) believes that racism is normal rather than pathological, *id.* at 11; (3) “rejects traditional liberal understandings of the problem of racism and how racism will be defeated,” *id.* at 12; and (4) “believes that scholarship is not, cannot, and should not be disconnected from people’s lives on the ground,” *id.* at 13. In the particular context of primary education, which has been the predominant location of recent right-wing backlash against “CRT,” Bridges notes that

CRT in education has been critical of the content of the lessons that students typically learn in schools. They have been skeptical about what has been taught as well as what has not been taught. Students inevitably read Shakespeare at some point during their time in high school; but, many students will graduate without ever having analyzed the beauty and depth of a Toni Morrison novel. . . . CRT in education proposes that when we analyze the curriculum that commonly is taught in U.S. schools, we will see an erasure of the contributions that people of color have made throughout history, a prioritization of white people’s achievements and works, and a general sanitization of the brutality that is embedded in the fabric of this nation.

*Id.* at 460–61. While Toni Morrison’s *Beloved* has indeed been targeted by “CRT” critics, so have books by White authors that have little to no connection with CRT properly understood but instead align with more general left-wing cultural commentary, such as the graphic novel adaptation of Margaret Atwood’s *The Handmaid’s Tale* and Alan Moore’s *V Is for Vendetta*. See Ron Charles, *In the Va. Governor’s Race, ‘Beloved’ Is Reduced to Its Most Explicit Parts. That’s Obscene.*, WASH. POST (Oct. 27, 2021, 8:53 AM), [https://www.washingtonpost.com/entertainment/books/beloved-toni-morrison-virginia-governor-race/2021/10/27/e3774afa-3668-11ec-91dc-551d44733e2d\\_story.html](https://www.washingtonpost.com/entertainment/books/beloved-toni-morrison-virginia-governor-race/2021/10/27/e3774afa-3668-11ec-91dc-551d44733e2d_story.html) [<https://perma.cc/M5V8-GVNG>]; Matthew Barakat & Sarah Rankin, *Youngkin Looks to Root Out Critical Race Theory in Virginia*, ASSOCIATED PRESS, Feb. 15, 2022, <https://apnews.com/article/education-richmond-race-and-ethnicity-racial-injustice-virginia-8ad5da65b9cb05265f2b8081c41827cd> [<https://perma.cc/8AD5-DA65>].



movement as an intense and virulent backlash against the increased social influence of the idea of racism as systemic, structural, and institutional, as opposed to racism as an individual's idiosyncratic prejudice.<sup>81</sup>

Anti-“CRT” advocates appear to think that they are fighting against discrimination. An Oklahoma law made it unlawful for schools to “make part of a course” the concept that “an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously.”<sup>82</sup> In response, some colleges have paused courses about racial inequality.<sup>83</sup> The anti-“CRT” movement on how race should be taught in schools is now shorthand for the broad and deep cultural, social, and political divisions in this country around race and the legacy of slavery—divisions that harken back to the Civil War. In that context, it makes sense that one of the biggest stories of academic freedom crisis in 2021 was that of Nikole Hannah-Jones, an author of “The 1619 Project,”<sup>84</sup> a *New York Times* series exploring the legacy of slavery, who was offered a chair at the University of North Carolina’s journalism school but was denied tenure for the position

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perma.cc/LP74-XNJN]; *PEN America Calls Out Texas School District for Banning Eleven Books*, PEN AM. (Dec. 2, 2021), <https://pen.org/press-release/pen-america-calls-out-texas-school-district-after-banning-eleven-books/> [https://perma.cc/KB6P-ELN7].

81. See Wallace-Wells, *supra* note 70. Another compelling approach to the backlash against Critical Race Theory, articulated by Zak Cheney-Rice, suggests that racial animus is particularly potent where some idealized concept of “White childhood” is threatened and that the alleged teaching of CRT in schools has been cast by conservative culture warriors as a threat to White children. Zak Cheney-Rice, ‘*Critical Race Theory*’ Has Been a Winner for Decades, N.Y. MAG. (Nov. 3, 2021), <https://nymag.com/intelligencer/2021/11/virginia-election-youngkins-age-old-critical-race-gambit.html> [https://perma.cc/BBY3-SGJH]. Note that this theory allows us to place anti-“CRT” backlash in historical context, alongside other episodes that occurred at the nexus of racial animus and White childhood, litigated in cases like *Brown v. Board of Education*, 347 U.S. 483, 483, 487–88, 490, 492–95 (1954); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15–19, 21 (1971); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 19, 20, 22–28 (1973); *Plyler v. Doe*, 457 U.S. 202, 211–13, 215–17, 230 (1982), *superseded by statutes*, *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. 104–208, 110 Stat. 3009-546, and *Personal Responsibility and Work Opportunity Act of 1996*, Pub. L. 104–93, 110 Stat. 2105, *as recognized in* *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D. Kan. 2005); and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 718–23 (2007).

82. 2021 Okla. Sess. Laws 426.

83. Gersen, *Importance of Teaching Dred Scott*, *supra* note 75.

84. Nikole Hannah-Jones, *Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> [https://perma.cc/J748-69WD].

because of objections from a conservative donor.<sup>85</sup> Indeed, the Trump Administration had created the 1776 Commission as a response to the 1619 Project and issued a report that promoted “patriotic education” that would downplay slavery and condemn progressive politics.<sup>86</sup> Each side in this debate has accused the other of attempting to indoctrinate students and of being against independent thinking.<sup>87</sup>

In the name of fighting an alleged orthodoxy on race, anti-“CRT” laws have plainly attempted to “cast a pall of orthodoxy over the classroom.”<sup>88</sup> Academic freedom in the classroom has become a key battleground in the so-called “culture wars.”<sup>89</sup> The

85. Levine, *supra* note 2; Margaret Sullivan, *Why It's So Important that UNC Trustees Give Nikole Hannah-Jones the Tenure She Deserves*, WASH. POST (June 29, 2021, 7:00 AM), [https://www.washingtonpost.com/lifestyle/media/unc-nikole-hannah-jones-tenure/2021/06/28/cb51a03e-d82a-11eb-bb9e-70fda8c37057\\_story.html](https://www.washingtonpost.com/lifestyle/media/unc-nikole-hannah-jones-tenure/2021/06/28/cb51a03e-d82a-11eb-bb9e-70fda8c37057_story.html) [https://perma.cc/V2CU-4DDD].

86. PRESIDENT'S ADVISORY 1776 COMM'N, THE 1776 REPORT 16, 19, 35–36 (2021), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf> [https://perma.cc/MKG7-VJNM]; see Aamer Madhani & Deb Riechmann, *Trump Downplays Legacy of Slavery in Appeal to White Voters*, ASSOCIATED PRESS, Sept. 17, 2020, <https://apnews.com/article/race-and-ethnicity-media-slavery-cultures-donald-trump-afdfa0b3454d5a7fdf544158ee1f5e1f> [https://perma.cc/8WL5-9UJN].

87. Sarah Schwartz, *Lawmakers Push to Ban '1619 Project' from Schools*, EDUCATIONWEEK (Feb. 3, 2021), <https://www.edweek.org/teaching-learning/lawmakers-push-to-ban-1619-project-from-schools/2021/02> [https://perma.cc/4UW5-AJBY]; PRESIDENT'S ADVISORY 1776 COMM'N, *supra* note 86, at 36.

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

89. See, e.g., Florida, *supra* note 71 (“Conservatives have made the teaching of critical race theory a rallying cry in the culture wars, calling it divisive and unpatriotic for forcing students to consider the influence of racism in situations where they might not see it otherwise.”); Lauren Camera, *Bills Banning Critical Race Theory Advance in States Despite Its Absence in Many Classrooms*, U.S. NEWS (June 23, 2021, 7:00 PM), <https://www.usnews.com/news/education-news/articles/2021-06-23/bills-banning-critical-race-theory-advance-in-states-despite-its-absence-in-many-classrooms> [https://perma.cc/69E2-RHBD] (“While conservative culture wars tend to flash, fizzle and fade, the obsession with critical race theory has proved otherwise and is poised to play a central role heading into the 2022 midterm election.”); Benjamin Wallace-Wells, *The Virginia Governor's Race Will Be the Latest Verdict in the Culture Wars*, NEW YORKER (Oct. 29, 2021), <https://www.newyorker.com/news/annals-of-inquiry/the-virginia-governors-race-will-be-the-latest-verdict-in-the-culture-wars> [https://perma.cc/SJ5M-487X]; James Hohmann, Opinion, *Critical Race Theory Is a Potent Issue in the Virginia Governor's Race*, WASH. POST (Oct. 13, 2021, 6:04 PM), <https://www.washingtonpost.com/opinions/2021/10/13/critical-race-theory-is-potent-issue-virginia-governors-race/> [https://perma.cc/A7DN-8QBW] (“School board meetings . . . have reemerged this year as front lines in the culture war.”); Jack Stripling, *How Far Will Higher Ed's Culture Wars Go? South Dakota Is Running Previews*, CHRON. HIGHER EDUC. (Mar. 17, 2020), <https://www.chronicle.com/article/how-far-will-higher-eds-culture-wars-go-south-dakota-is-running-previews/> [https://perma.cc/3FUN-ELZU]; Thomas B. Edsall, Opinion, *Republicans Are Once Again Heating Up the Culture Wars*, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/11/10/opinion/republicans-democrats-crt.html> [https://perma.cc/73C4-LNPD]; Zack Beauchamp, *How Hatred of Gay People Became a Key Plank in*

strategic importance of academic freedom in that war is clear: those who can exert control over the terms of academic freedom can control the production of future partisans in the culture war. Colleges and universities shape the speech framed as falling within the scope of academic freedom.<sup>90</sup> But championing academic freedom and free inquiry by undermining it has become a salient strategy in the fight. Defenses of academic freedom then become swords rather than shields.

Those who genuinely believe in the value of academic freedom must wrest it from disingenuous invocations and truly defend it by wrestling with its genuine difficulties. What is academic freedom for? I believe that academic freedom is essential to the education of citizens for a democracy and creates the conditions for the production of knowledge.<sup>91</sup> I also believe academic freedom should be defended as including within it the values of nondiscrimination, diversity, and inclusion.

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*Hungary's Authoritarian Turn*, VOX (June 28, 2021, 10:40 AM), <https://www.vox.com/22547228/hungary-orban-lgbt-law-pedophilia-authoritarian> [<https://perma.cc/82F4-R3U7>] (“American bills [banning “CRT”] are not directly inspired by Hungarian policies. But the affinities between right-wing populists in these countries are real, with many leading thinkers on the American right openly admiring Orbán’s willingness to wage culture wars, to the point where they’re willing to downplay his authoritarian abuses.”); Scott Bauer, *Wisconsin Assembly Passes Critical Race Theory Ban*, ASSOCIATED PRESS, Sept. 28, 2021, <https://apnews.com/article/business-wisconsin-education-race-and-ethnicity-racial-injustice-dc73ee7fd8962ea52f56eae2319055d5> [<https://perma.cc/577C-ZGGT>] (“The Assembly’s Democratic minority leader, Gordon Hintz, described the bill as the ‘white supremacy preservation act’ before debate on it began. He said it was ‘part of a national movement to create a new boogeyman in the culture wars to use fear and resentment to motivate base voters.’”).

90. See Kammer, *supra* note 2, at 157–58 (“Much as in the 1950s, professors are relatively liberal (or ‘progressive’) today as compared to the American population at large. A recent study, for example, found that forty percent of professors identified their politics as either ‘radical left’ or ‘progressive,’ with another fourteen percent identifying their views as ‘center left’—a stark contrast to the twenty-seven percent of professors who identified as either an ‘economic conservative’ or a ‘strong conservative.’ Another study found that almost five times as many faculty members identified as liberal than as conservative, though that same study found that a plurality identified as neither.” (footnotes omitted)); Dryden, *supra* note 2, at 235–36 (“According to a recent study by Langbert, Quain, and Klien—which examined the voter registration records of 7,243 professors at the 40 leading U.S. universities—the overall Democrat to Republican ratio is 11.5:1. In New England, the ratio is 28:1, and this dangerous disparity has tripled in the last three decades.” (footnote omitted)).

91. See *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring) (“For society’s good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people’s well-being, except for reasons that are exigent and obviously compelling. These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities.”).

Many think of academic freedom as an individual freedom—the freedom of individual academics or students to express their views and ideas.<sup>92</sup> But academic freedom is an institutional value, not just an individual right.<sup>93</sup> Academic freedom is a public good, not primarily a matter of individual conscience.<sup>94</sup> Properly understood, it does not merely exist to benefit individual professors and students; it enables the production of knowledge that benefits society and humankind.

Universities and colleges participate in the production of knowledge in unsettled areas of inquiry. That frontier of unsettled exploration is a territory in which definitions of academic freedom must be constantly renegotiated in response to evolving social values that change our institutions over time.

As we engage in this negotiation today, we must acknowledge that there has been a change in how a new generation of students coming of age at a time of social upheaval are oriented differently from people of the previous generation to the value of free speech in general and academic speech in particular. Within the university setting today, academic freedom might be perceived as a defense that too often ratifies the infliction of harm on vulnerable people. And in my experience, today's students are more likely to recoil at the notion of the ACLU defending Nazis marching in Skokie, Illinois,<sup>95</sup> perhaps because they are coming of age at a time when White supremacists march openly. I understand why they might resist the notion of an entirely content-neutral defense of academic freedom.

92. See, e.g., James D. Gordon III, *Individual and Institutional Academic Freedom*, 30 J. COLL. & U.L. 1, 2 (2003) (describing academic freedom as having two-dimensions, one of which is “individual academic freedom”).

93. Calvert, *supra* note 25, at 288–89; William E. Thro, *Follow the Truth Wherever It May Lead: The Supreme Court's Truths and Myths of Academic Freedom*, 45 U. DAYTON L. REV. 261, 281 (2020); Michael A. Sloman, “A Kind of Continuing Dialogue”: *Reexamining the Audience's Role in Exempting Academic Freedom from Garcetti's Employee Speech Doctrine*, 55 GA. L. REV. 935, 942–43 (2021).

94. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“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.”); *Sweezy*, 354 U.S. at 250 (“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.”); DIFFICULT DIALOGUES INITIATIVE, A PRIMER ON ACADEMIC FREEDOM 7 (2013), [https://www.alaska.edu/bor/files/Dec2013/131212Add1A\\_AGB\\_Academic\\_Freedom\\_Primer.pdf](https://www.alaska.edu/bor/files/Dec2013/131212Add1A_AGB_Academic_Freedom_Primer.pdf) [<https://perma.cc/2EBC-WAB6>].

95. David Goldberger, *The Skokie Case: How I Came to Represent the Free Speech Rights of Nazis*, ACLU (Mar. 2, 2020), <https://www.aclu.org/issues/free-speech/rights-protesters/skokie-case-how-i-came-represent-free-speech-rights-nazis> [<https://perma.cc/6JKY-JJTD>].

In this era, we must be sober and not in denial about the ways in which antidiscrimination principles and academic freedom principles may come into conflict. At the same time, we should not give up on either set of principles that are essential to the university's mission. The negotiation of this tense balance is difficult and requires vigilance, nuance, sensitivity, and non-absolutism. And this continuous negotiation and the shifting contours of academic freedom must be measured against its status as a public good because its value is to serve something much broader and more important than the desires of individual academics.

The tension between academic freedom principles and antidiscrimination principles is not something to be resolved or eliminated but rather acknowledged and negotiated. Our world will not get better by pretending there is no tension or that we can resolve it with clever arguments. Universities will get better only when we learn to navigate better the tension between two of our most deeply treasured values. It is by openly living with that conflict that we will be able to engage our students in the most vital discussions and our universities will grow stronger.