A SWORD AND A SHIELD: AN ANTIDISCRIMINATION ANALYSIS OF ACADEMIC FREEDOM PROTECTIONS

Apratim Vidyarthi[*]

Academic freedom is an essential principle undergirding education in the United States. Its purpose is to further the freedom of thought and inquiry in the academic profession by advancing knowledge and the search for truth. Academic freedom goes back more than a century, and is now intertwined with First Amendment doctrine. Yet today's academic freedom doctrine suffers from serious problems, some of which perpetuate discrimination in the classroom and systemically in educational institutions.

The definition of academic freedom in theory is misaligned with that in case law. Courts have done little to analyze what protections academic freedom provides, and case law generally provides too much protection in some cases, and too little in others. Worse, academic freedom for universities and professors has been hotly debated and thus well-defined and protected in case law, whereas students' academic freedom has received less attention, making it a "second-tier" academic freedom. Often, protecting university and professors' academic freedom comes at the expense of students' academic freedom, though courts have never truly struggled with multistakeholder academic freedom questions or tried to create a clear process to determine whose academic freedom prevails when the two conflict. This results in academic freedom being used as a sword to promote discriminatory behavior, and as a shield to protect acts of discrimination from being punished. Existing constitutional and statutory antidiscrimination protections do not provide adequate support against discrimination, especially for students' academic freedom. Constitutional protections for students' academic freedom often take the back seat to free speech doctrine, and antidiscrimination protections are often parried by using academic freedom to protect problematic behavior.

A few solutions abound: first, the definition of academic freedom is nearly a century old, and needs to be redefined to incorporate antidiscrimination principles to be relevant for the present. Second, students' academic freedom rights need to be understood and defined more clearly. Third, courts must find a way to balance competing stakeholders' academic freedom interests, ultimately looking to the purpose of academic freedom to advance knowledge. Finally, universities must play their part by creating systems and structures to ensure that discrimination is remedied as early as possible, and that university processes help clarify the extent of academic freedom definitions and support application of antidiscrimination law.

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INTRODUCTION

Professors occupy a vaunted role in American society and culture. The title of 'professor' brings great power: to teach the next generation of Americans about critical subjects, to further humankind by conducting research, and of having their speech and research be protected by academic freedom. It also brings great responsibilities: to teach competently, to maintain fairness in the classroom, and to ensure that the classroom remains the bedrock of American democracy and liberty.[1] Ultimately, these great powers and great responsibilities serve the goal of instilling free thought, free expression, and independent thought in students and society alike.

But American university classrooms are changing. They are becoming more diverse,[2] more involved in issues of social justice,[3] and more often engaged with difficult issues of race,[4] politics,[5] and truth.[6] These changes, combined with the increasingly tumultuous American political diaspora, have raised age-old questions about what professors can say, what universities can

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1 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (arguing Boards of Education are "educating the young for citizenship" and should not "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes").

2 LORELLE L. ESPINOSA ET AL., RACE AND ETHNICITY IN HIGHER EDUCATION A STATUS REPORT xvi (2019) ("Between 1996 and 2016, the non-White share of undergraduates grew from 29.6 percent to 45.2 percent.").

3 *See, e.g.*, Nick Anderson & Susan Svrluga, *College Faculty are Fighting Back Against State Bills on Critical Race Theory*, WASH. POST (Feb. 19, 2022), https://www.washingtonpost.com/education/2022/02/19/colleges-critical-race-theory-bills/ [https://perma.cc/V8UZ-Z4X5] (discussing college faculty advocating against state bills that ban the teaching of critical race theory).

4 *See, e.g.*, Amy Harmon, *BIPOC or POC? Equity or Equality? The Debate Over Language on the Left*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2021/11/01/us/terminology-language-politics.html [https://perma.cc/NG4M-CTE6] (describing the debate on college campuses about the language used in classrooms).

5 *See, e.g.*, Laura Pappano, *In a Volatile Climate on Campus, Professors Teach on Tenterhooks*, N.Y. TIMES (Oct. 31, 2017), https://www.nytimes.com/2017/10/31/education/edlife/liberal-teaching-amid-partisan-divide.html [https://perma.cc/TMK8-6QUM] (discussing the difficult topics being discussed on college campuses).

6 *See, e.g.*, Kitson Jazynka, *Colleges Turn 'Fake News' Epidemic Into a Teachable Moment*, WASH. POST (Apr. 6, 2017), https://www.washingtonpost.com/lifestyle/magazine/colleges-turn-fake-news-epidemic-into-a-teachable-moment/2017/04/04/04114436-fd30-11e6-99b4-9e613afeb09f_story.html [https://perma.cc/AC5U-TTV2] (discussing the teaching of media literacy and the need for students to be "skeptical, critical, and probing").

do, and what rights students have when facing discrimination in the classroom. For example, are professors permitted to bring problematic ideas or speakers into the classroom?[7] Can they be embroiled in controversy,[8] make disparaging race-based claims,[9] or spread misinformation[10] outside the classroom? And can they actively discriminate against students within the classroom?[11] These

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[7] *See, e.g.*, Susan Snyder, *Penn Law Dean Seeks 'Major Sanction' Against Professor Amy Wax*, PHILADELPHIA INQUIRER (July 17, 2022), https://www.inquirer.com/news/amy-wax-penn-law-professor-sanction-20220717.html [https://perma.cc/5X2S-MMFJ] ("In 2021, [Professor Amy Wax] invited "renowned white supremacist" Jared Taylor to speak to her class and then have lunch with her and students . . . ."); Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 FAM. L.Q. 567, 575 (2007) (claiming, without a source, that "births outside marriage are far more common among black than white women at all levels of education and income").

[8] For example, Harvard Law School professor Alan Dershowitz represented rapist Harvey Weinstein, and alleged pedophile Jeffrey Epstein, in negotiating a non-prosecution agreement. *See* Connor W. K Brown, *Harvard Law Prof. Emeritus Alan Dershowitz Joins Weinstein Defense Team in Class Action Lawsuit*, HARV. CRIMSON (Feb. 18, 2019), https://www.thecrimson.com/article/2019/2/18/dershowitz-weinstein/ [https://perma.cc/NP2K-HZUZ] (noting that Dershowitz and Dean Ronald S. Sullivan, Jr. represented Weinstein, and that Dershowitz defended Dean Sullivan against student outcry over the Dean's decision to represent Weinstein in criminal proceedings); Anna North, *Alan Dershowitz helped sex offender Jeffrey Epstein get a plea deal. Now he's tweeting about age of consent laws*, VOX (July 31, 2019), https://www.vox.com/identities/2019/7/30/20746983/alan-dershowitz-jeffrey-epstein-sarah-ransome-giuffre [https://perma.cc/G3GB-876N] (noting Dershowitz's representation of Jeffrey Epstein, which garnered "widespread attention," and Dershowitz's work discrediting Epstein's victims, in the process becoming embroiled in controversy over Dershowitz's own role in the Epstein saga).

[9] Anemona Hartocollis, *A Conservative Quits Georgetown's Law School Amid Free Speech Fight*, N.Y. TIMES (June 6, 2022), https://www.nytimes.com/2022/06/06/us/georgetown-ilya-shapiro.html [https://perma.cc/5HQG-N3BY] (discussing that Ilya Shapiro, a lecturer at Georgetown Law, made controversial statements about then-judge Ketanji Brown Jackson, but ultimately was not fired); Isaac Chotiner, *A Penn Law Professor Wants to Make America White Again*, NEW YORKER (Aug. 23, 2019), https://www.newyorker.com/news/q-and-a/a-penn-law-professor-wants-to-make-america-white-again [https://perma.cc/L6F7-W49V] (explaining that Penn Law Professor Amy Wax aligns with Adam Garfinkle by stating "if you go, for example, to Muslim countries or Arab countries, the indoor spaces are impeccable. People's homes are pristine, but the outdoor space is a mess. These are hoary generalizations. I had a relative who went up to North Dakota, to a very poor part, and said, 'My God, it's so clean there you can eat off the street. There's order. There's care.'").

[10] Angela Bunay, *Students Weigh in on Critical Race Theory Database Launched by Law School Professor*, CORNELL SUN (Feb. 24, 2021), https://cornellsun.com/2021/02/24/students-weigh-in-on-critical-race-theory-database-launched-by-law-school-professor/ [https://perma.cc/C8TB-MFHP] (describing a Cornell Law professor being accused by various student groups as spreading misinformation about critical race theory).

[11] Catherine Thorbecke & Benjamin Siu, *Georgetown law professor terminated after remarks about Black students*, ABC NEWS (Mar. 21, 2021), https://abcnews.go.com/US/georgetown-law-professor-terminated-remarks-black-students/story?id=76413267 [https://perma.cc/R34Z-A25R] (describing that one adjunct Georgetown Law professor was fired after making racist statements caught on

are just some of the many controversies on American universities regarding speech, discrimination, and power.

The answers to these questions begin with the concept of academic freedom, which undergirds the promise and premise of the classroom at all educational levels. Academic freedom upholds "not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession."[12] While the concept of academic freedom arose more than a century ago, its contours remain unclear, both in theory and in case law.[13] In part, this is because students, teachers, and institutions of learning all have academic freedom, all of which can clash.[14] Nowhere is this more true than in the increasing instances of discrimination at institutions of education, from book bans,[15] to bans on the usage of specific language,[16] to debates about the permissibility of critical race

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camera, another was placed on administrative leave and ultimately resigned; note that these professors were not protected by tenure); Jared Mitovich, *Penn Law Dean Requests Faculty Senate Impose 'Major Sanction' Against Amy Wax*, DAILY PENNSYLVANIAN (July 14, 2022), https://www.thedp.com/article/2022/07/amy-wax-penn-law-dean-report-major-sanctions-faculty-senate [https://perma.cc/8KYZ-7RKF] ("The Penn Law alumni . . . detail instances of Wax making racist remarks in front of them against people of color and LGBTQ individuals . . . . Wax allegedly told 2012 Penn Law graduate Lauren O'Garro Moore, who is Black, that she had only become a double Ivy 'because of affirmative action.'").

[12] American Association of University Professors (AAUP), *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, AAUP (last visited May 2, 2022), https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf [https://perma.cc/9FBJ-VGBT].

[13] *See, e.g.,* MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 124 (2009) (hereinafter "FINKIN & POST, PRINCIPLES OF ACADEMIC FREEDOM").

[14] *Id.* at 132–34.

[15] *See, e.g.*, Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES (Jan. 30, 2022), https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html [https://perma.cc/F6G3-V8KL] (discussing the ban of books about sexual and racial identity in public libraries and K-12 public education institutions).

[16] Sarah Mervosh, *DeSantis Faces Swell of Criticism Over Florida's New Standards for Black History*, N.Y. TIMES (July 21, 2023), https://www.nytimes.com/2023/07/21/us/desantis-florida-black-history-standards.html [https://perma.cc/SA5A-VSYX] ("Florida's rewrite of its African American history standards comes in response to a 2022 law signed by Mr. DeSantis, known as the "Stop W.O.K.E. Act," which prohibits instruction that could prompt students to feel discomfort about a historical event because of their race, sex or national origin.").

theory in the classroom,[17] to outright racist words[18] and behavior against students.[19]

One original purpose of academic freedom was to protect professors and universities when they explore unpopular ideas and theories. Were the notion of academic freedom around in the sixteenth and seventeenth centuries, Galileo Galilei's championing of Copernican heliocentrism would likely have been protected, despite the concept's alleged heresy.[20] And academic freedom likely protected professors and educators in the twentieth century from being punished for critiquing racist and xenophobic decisions like *Korematsu v. United States* or laws like former President Trump's 'Muslim Ban',[21] fighting homophobia and the failure to adequately address the AIDS crisis,[22] and supporting civil rights causes like desegregation.[23]

But where academic freedom is a shield that protects unpopular ideas, it may also be a sword used to perpetuate discrimination by cutting down calls to remove professors alleged to discriminate within the classroom, hurting students. A colorful example is a professor who believes and propagates the

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17 Nick Anderson & Susan Svrluga, *College Faculty Fight Back Against Critical Race Theory Bills*, WASH. POST (Feb. 19, 2022), https://www.washingtonpost.com/education/2022/02/19/colleges-critical-race-theory-bills/ [https://perma.cc/V8UZ-Z4X5] ("These declarations show that the heated debate over state regulation of lessons on race, centered so far largely on K-12 public schools, is rapidly expanding onto college campuses.").

18 Susan Snyder, *Penn Law Professor Amy Wax Makes More Inflammatory Comments On National TV*, PHILADELPHIA INQUIRER (Apr. 11, 2022), https://www.inquirer.com/news/amy-wax-university-of-pennsylvania-law-school-20220411.html [https://perma.cc/RJG9-XB9M] (detailing professor Amy Wax's numerous comments against Black and immigrant communities).

19 Elizabeth Redden, *Georgetown Professor Fired For Statements About Black Students*, INSIDE HIGHER ED (Mar. 12, 2021), https://www.insidehighered.com/news/2021/03/12/georgetown-terminates-law-professor-reprehensible-comments-about-black-students [https://perma.cc/Q8RC-99TE].

20 *See generally* MAURICE A. FINOCCHIARO, RETRYING GALILEO, 1633–1992 (2005) (describing Galileo's trial for heresy after his support for a variety of scientific theories, including Copernican heliocentrism).

21 *See, e.g.*, Sarah Lyons-Padilla & Michele J. Gelfand, *The Social Scientific Case Against a Muslim Ban*, N.Y. TIMES (Feb. 18, 2017), https://www.nytimes.com/2017/02/18/opinion/sunday/the-social-scientific-case-against-a-muslim-ban.html [https://perma.cc/MA6D-44GT] (detailing two professors' arguments against Trump's proposed Muslim Ban).

22 *See, e.g.*, Gilbert Elbaz, *Beyond Anger: The Activist Construction of the AIDS Crisis*, 22 SOC. JUST. 62 (1995) (advocating for a more humane, equitable, and research system to combat the AIDS epidemic).

23 *See, e.g.*, Amicus Curiae for American Federation of Teachers, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Docket nos. 1, 2, 4, & 10), *available at* https://reuther.wayne.edu/ex/Brown/Brownbrief.pdf [https://perma.cc/Z62D-W37N] (discussing the American Federation of Teachers' support for integration of schools).

idea that Black students are unable to succeed in elite classrooms and implies that they do not belong in that professor's classroom,[24] provides social commentary on the need for more white immigrants,[25] or thinks that women are "too emotional" for university classrooms.[26] Are the boundaries of academic freedom so expansive that they protect stakeholders who may discriminate, because of the benefit that arises when academic freedom protects professors and universities who propagate often ostracized or discredited ideas?

This paper explores the contours of academic freedom in theory and in case law, and makes the following arguments. First, academic freedom theory and academic freedom case law do not completely overlap, and the case law often undercuts or contradicts the theory. Second, there are three strains of academic freedom: that for universities, professors, and students. When academic freedom for universities or professors case law permits discrimination based on protected class,[27] that ultimately undermines the fundamental purpose of academic freedom of furthering knowledge,[28] and harms students' academic freedom. Third, our current conception of academic freedom and its three strains would benefit by incorporating certain antidiscrimination principles to help protect the academic freedom rights of students.

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[24] Madeline Lamon, *After 'Disparaging' Comments on Black Students, Amy Wax Barred from Teaching First-Year Course*, DAILY PENNSYLVANIAN (Mar. 13, 2018), https://www.thedp.com/article/2018/03/penn-law-dean-ted-ruger-professor-amy-wax-removed-racial-conservative-graduate-upenn-philadelphia [https://perma.cc/Z724-D3PT] ("'Here's a very inconvenient fact, Glenn,' Wax said . . . . 'I don't think I've ever seen a black student graduate in the top quarter of the [Penn Law School] class and rarely, rarely in the top half,' . . . . 'I can think of one or two students who've graduated in the top half of my required first-year course.'").

[25] *See supra* note 119.

[26] *See, e.g.*, Michael Brice-Saddler & Deanna Paul, *University Says a Professor's Views are Racist, Sexist, and Homophobic—But it Can't Fire Him*, WASH. POST. (Nov. 22, 2019, 11:06 AM), https://www.washingtonpost.com/education/2019/11/20/university-says-professors-views-are-racist-sexist-homophobic-they-cant-fire-him/ [https://perma.cc/P3EE-5VQ6] (stating that the professor tweeted the following quote from an article arguing that women are probably destroying academia, "'geniuses are overwhelmingly male because they combine outlier high IQ with moderately low Agreeableness and moderately low Conscientiousness.'").

[27] Note that for the purpose of this paper, "discrimination" is against any protected class as outlined in our statutory and case law—race, gender, sexuality, ethnicity, nationality, and religion. A deeper analysis that looks at different types of discrimination is beyond the scope of this paper, but will likely provide a more rewarding analysis.

[28] FINKIN & POST, FOR THE PRINCIPLES OF ACADEMIC FREEDOM, *supra* note 1313, at 125.

To set the stage, Part I provides the backstory: a (somewhat) brief history of academic freedom theory and case law, with the latter analyzing cases that directly implicate academic freedom. It outlines academic freedom's necessary intersection with the First Amendment and then introduces the main characters. These are the three strains of academic freedom: academic freedom for universities (which I call "institutional academic freedom"), professors ("professorial academic freedom"), and students (creatively named "students' academic freedom"). Part II pits these three characters against two sometimes friends, sometimes foes: constitutional protections against discrimination, and statutory antidiscrimination law. It examines case law and recent instances of discrimination in the university context,[29] and concludes that academic freedom often overrides antidiscrimination principles, though the case law is often incoherent or undermines the goals of academic freedom, at the expense of antidiscrimination principles. Finally, Part III suggests some reforms to the definition of academic freedom and of students' academic freedom, the courts' approach to academic freedom, and universities' antidiscrimination protections that may be able to balance academic freedom with principles of antidiscrimination law.

Because of the intense and energetic debate around issues of academic freedom, I find it valuable to disclaim what this paper is not.[30] First, this paper does not contend that academic freedom is a force for bad or that it should be done away with. Rather, my argument is that academic freedom in its current form falls short of achieving the goals that it was intended to attain, and should be refined. As a corollary, academic freedom for professors is important, and does not make them omnipotent tyrants. For proponents of academic freedom, myself included, this should be a welcome conversation, since academic freedom would want to propagate this search for the truth and would tolerate dissent against the conventional theories of academic freedom.[31] Second, this paper is not meant to provide a thorough constitutional analysis of academic freedom, nor to distinguish the role of academic freedom in schools versus higher education institutions or in private versus public

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[29] However, for brevity, this paper will not Wax on about the details of such instances moving forward.

[30] I sincerely apologize for the burden this disclaimer places on word count, considering that no one—including lawyers—likes reading disclaimers. *See, e.g.*, David Berreby, *Click to Agree With What? No One Reads Terms of Service, Studies Confirm*, GUARDIAN (Mar. 3, 2017, 8:38 AM), https://www.theguardian.com/technology/2017/mar/03/terms-of-service-online-contracts-fine-print [https://perma.cc/XNM6-JV8E].

[31] *See infra* note 5149.

institutions, both of which have been deeply explored elsewhere.[32] Finally, this paper is not meant to address broader issues of equity and equality at universities, including instances where student activism clashes with *administrators'* beliefs and extramural speech.[33] While important and relevant, the issue of academic freedom for universities, professors and students, and their relation to discrimination is separate and deserves its own discussion, as this paper intends to do.

I. A SOMEWHAT BRIEF HISTORY OF ACADEMIC FREEDOM

While universities and schools have been around for millennia, academic freedom is a more recent theory, but one essential to American life. This section first gives a brief introduction to the history and theoretical/philosophical underpinnings of academic freedom, and then outlines how the First Amendment and case law interact with academic freedom. Finally, this section addresses the critical question of who academic freedom applies to.

A. ACADEMIC FREEDOM THEORY

The Founding Fathers considered our educational institutions to be the "soul of the Republic" and a cornerstone of our political liberty.[34] But the theoretical seedlings of academic freedom only began to take root more than a century later, when universities transformed their mission from being mere instructors of young men to acquiring, conserving, refining, and distributing knowledge, ultimately to advance knowledge.[35] And under the North Star of advancing knowledge arise some subsidiary goals: checking conventional truth,

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[32] For a deeper analysis of both the constitutional aspects and the division of public and private academic freedom, *see generally* FREEDOM AND TENURE IN THE ACADEMY (William W. Van Alstyne ed. 1993).

[33] *See, e.g.*, Jan Ransom & Michael Gold, *'Whose Side Are You On?': Harvard Dean Representing Weinstein is Hit With Graffiti and Protests*, N.Y. TIMES (Mar. 4, 2019), https://www.nytimes.com/2019/03/04/nyregion/harvard-dean-harvey-weinstein.html [https://perma.cc/Q9EX-HLAT] (discussing student calls to remove a dean who was representing rapist Harvey Weinstein).

[34] Comment, Guillermo S. Dekat, *John Jay, Discrimination, and Tenure*, 11 SCHOLAR 237, 238 (2009).

[35] FINKIN & POST, FOR THE PRINCIPLES OF ACADEMIC FREEDOM, *supra* note 1313, at 124–25.

hunting for the truth, and training others to develop the critical thinking skills that will perpetuate these goals in the future.[36]

Advancing knowledge requires at least two actors: the teacher, who conveys the knowledge, and the student, who absorbs it. Naturally, the first precepts of the theory of academic freedom, proposed by Wilhelm von Humboldt's German educational reforms, suggested that academic freedom (*akademische freiheit*) encompassed the freedom to teach (*lehrfreiheit*) and the freedom to learn (*lernfreiheit*).[37] This foundational precept itself signals multiple strains of academic freedom, foreshadowing potential tension between the two. This multi-pronged conception of academic freedom also made it across the pond as the purpose of American higher education changed, with the idea of academic freedom captured in John Dewey's groundbreaking article on academic freedom, though the article did not center in on a complete definition.[38]

The first institutional enunciation of academic freedom principles in American higher education came in the form of the American Association of University Professors' (AAUP's) 1915 *Declaration of Principles on Academic Freedom*.[39] The *Declaration*, written by a committee of fifteen white male professors, noted that faculty need "complete and unlimited freedom to pursue inquiry and publish its results" in order to "promote inquiry and advance the sum of human knowledge."[40] And to advance the sum of human knowledge, faculty must have "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action."[41]

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[36] William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 87.

[37] Mitchell G. Ash, *Bachelor of What, Master of Whom? The Humboldt Myth and Historical Transformations of Higher Education in German-Speaking Europe and the US*, 41 EUR. J. EDUC. 245, 246 (2006). And of course, Germans have (long) words for everything in their language.

[38] John Dewey, *Academic Freedom*, 23 EDUC. REV. 1, 1–14 (1902).

[39] American Association of University Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, AAUP (last visited May 2, 2022), https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf [https://perma.cc/9FBJ-VGBT] [hereinafter "*1915 AAUP Declaration*"].

[40] *Id.* at 295.

[41] *Id.* at 292.

In time, the AAUP refined and condensed these principles into a *Statement of Principles on Academic Freedom and Tenure*, which was originally formulated in 1940 but revised in 1970,[42] and became "soft law" akin to a restatement.[43] The *Statement* prefaces by noting that "[i]nstitutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition."[44] It then highlights the purpose of academic freedom: the "advancement of truth . . . . the protection of the rights of the teacher in teaching and of the student to freedom in learning."[45] Finally, the *Statement* discusses what academic freedom for professors entails: first, that teachers are entitled to full freedom of research and publication of results.[46] Second, that teachers are entitled to freedom in the classroom *in discussing their subject*, although teachers should avoid "persistently intruding" controversial "material which has no relation to their subject."[47] Third, teachers should be free from institutional censorship or discipline when writing and speaking, but should "at all times be accurate, should exercise appropriate restraint, [and] should show respect for the opinions of others."[48]

Taken together, the theoretical origins of academic freedom and the modern formulation of academic freedom's purpose and constrictions provide three governing principles. First, academic freedom's goal is to advance knowledge and facilitate the search for truth, and in the process protect teachers and students.[49] Second, there are multiple types of academic

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[42] American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP (last visited Aug. 29, 2022), https://www.aaup.org/file/1940%20Statement.pdf [https://perma.cc/EDY5-CRMG] [hereinafter "*1940 AAUP Statement*"].

[43] *See, e.g.*, William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, in FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 79–80.

[44] *1940 AAUP Statement*, *supra* note 4242, at 14.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] This search for truth may have three First Amendment-related goals: critical inquiry, the search for knowledge, and the toleration of dissent. David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, in FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 230.

freedom: those for teachers and for students.[50] Finally, academic freedom is not an unlimited, unconstrained freedom. Instead, it only applies to teachers when they discuss topics they are experts on, and that teachers have a responsibility to be accurate, restrained, and contribute to the ultimate goal of academic freedom.[51]

These three governing principles raise as many questions as they answer. First is a question of hierarchy: between a teacher and student's academic freedom, which prevails? How do universities, professors, and students deal with instances in which the academic freedom of a teacher stifles a student's academic freedom, or vice versa? Second, line-drawing questions arise. As knowledge and academia become more interdisciplinary,[52] how do we delineate the boundaries of a teacher's expertise, and does enforcing this boundary further the goal of advancing the truth? Third are issues of enforcement. What happens when a teacher's speech is not achieving the goals of academic freedom? Should institutions or courts respond with punishment or withdrawing the protections of academic freedom, and if so, how? Fourth, and finally, is the ultimate philosophical question: without hindsight, how do we know whether an act is in service of the search of truth? How can we settle what is "true," considering that our understanding of the truth—much like the move from geocentrism to heliocentrism—is constantly being revised? Worse yet, by identifying some basic truths and engaging in a

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[50] Commentators on academic freedom often forget that multiple variations of it exist. *See, e.g.*, Graham Piro, *Penn Law Dean Asks for 'Major Sanction' Against Professor Amy Wax, Creating Tenure Threat for All Penn Faculty*, FIRE (July 13, 2022), https://www.thefire.org/penn-law-dean-asks-for-major-sanction-against-professor-amy-wax-creating-tenure-threat-for-all-penn-faculty/ [https://perma.cc/57SD-9NWL]. Piro notes that "Penn cannot use [university] policies to pretextually punish Wax for her speech or political views — and much of Wax's speech described in Ruger's report concerns her views on issues of political importance. These views, while offensive to many, are undoubtedly protected." *Id.* The article fails to note that such commentary often comes at the expense of students within the classroom, and that universities have academic freedom to hire and fire. *See infra* Part I.D.4.

[51] Similarly, commentators forget that *all* speech by professors is not protected under the awning of academic freedom. Piro notes that Wax cannot be fired for her "views on issues of political importance," forgetting that these views must be related to her expertise to be protected by academic freedom. Graham Piro, *Penn Law Dean Asks for 'Major Sanction' Against Professor Amy Wax, Creating Tenure Threat for All Penn Faculty*, FIRE (July 13, 2022), https://www.thefire.org/penn-law-dean-asks-for-major-sanction-against-professor-amy-wax-creating-tenure-threat-for-all-penn-faculty/ [https://perma.cc/57SD-9NWL].

[52] *See, e.g.*, Alan L. Porter & Ismael Rafols, *Is Science Becoming More Interdisciplinary? Measuring and Mapping Six Research Fields Over Time*, 81 SCIENTOMETRICS 719 (2009) (noting that science has become a more interdisciplinary field over the previous 30 years).

line-drawing exercise, are we inherently discriminating against some ideas? To answer these questions, we look to the law.

B. ACADEMIC FREEDOM DOCTRINE: THE GENESIS IN CASE LAW

The Constitution says nothing about academic freedom, but courts have provided substantial protection to it under constitutional law because of academic freedom's intimate relationship with free speech and free thought.[53] Soon after the AAUP's *Declaration* in 1915, the Nebraska Supreme Court tangentially referenced academic freedom, noting that the state should only ensure that citizens understand the "language of their country" and the nature of the government under which they live, but beyond that, "education should be left to the fullest freedom of the individual."[54] In the years that followed, several cases related to the freedom of the state to determine curriculum (*Scopes v. State*), what languages can be taught in public school (*Meyer v. Nebraska*), and the permissibility of school segregation (*Berea College v. Kentucky*) that tangentially implicated academic freedom were decided.[55]

But the first mention of the words "academic freedom" and genuine articulation of the concept was in 1940 in a New York state court, which denied philosopher Bertrand Russell's appointment to the chair of philosophy at the College of the City of New York, because he was a noncitizen.[56] The court rejected his appointment because Russell "has taught in his books immoral and salacious doctrines" like encouraging premarital sex.[57] In rejecting the Board of Education's academic freedom defense, the court reasoned that academic freedom cannot be used "as a cloak to promote the popularization in the minds of adolescents of acts forbidden by the Penal

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[53] *See generally* WILLIAM W. VAN ALSTYNE, *Introduction*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at VIII.

[54] Neb. Dist. of Evangelical Lutheran Synod of Mo., Ohio v. McKelvie, 175 N.W. 531, 534 (Neb. 1919).

[55] *See* WILLIAM W. VAN ALSTYNE, *Introduction*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 84–92 for a deeper exploration of the case law leading up to the fleshing out of academic freedom. Both for brevity and focus, this section and paper is not meant to be a full accounting of the history of academic freedom, but rather to trace its defining principles and how they stand today in comparison to antidiscrimination law.

[56] Kay v. Bd. of Higher Educ., 18 N.Y.S.2d 821 (Sup. Ct. 1940).

[57] *Id.* at 827. *See also The Daily Show with Jon Stewart: Abstinence of Malice* (Comedy Central television broadcast Dec. 15, 2004) (discussing the Bush Administration's promotion of abstinence in the face of increasing premarital sex, which was one of the biggest threats to the nation at the time).

Law," such as encouraging premarital sex.[58] Appalled by Russell's philosophy, the court's final word was that academic freedom cannot be used to teach philosophy that is not "good for the community" and that undermines the "norms and criteria of truth which have been recognized by the founding fathers."[59] Academic freedom's first foray into the courts was shaky, with the court rejecting the rights of a teacher whose ideas were unpopular according to a subjective moral standard. In doing so, the court prevented Russell from advancing knowledge and the search for truth—in this case, perhaps whether the social mores of 1940 were too conservative.

When the Supreme Court first addressed issues of academic freedom, its doctrine was just as shaky, providing no direction. The first case to directly deal with academic freedom was in 1952 in *Adler v. Board of Education*, where the Court upheld as constitutional a New York state law that prevented current or former members of the Communist Party from obtaining employment in public schools.[60] The Court reasoned that the state "must preserve the integrity of the schools," and "school authorities have the right and duty to screen the officials, teachers, and employees as to their fitness."[61] This conception of academic freedom seems like the antithesis of the AAUP's definition, ultimately limiting the search for knowledge by forbidding communist-affiliated teachers from engaging in critical thought and exploring whether communism's tenets reflected the truth. Recognizing this, in his dissent Justice Douglas called out the law's potential impact on academic freedom, noting that teachers will be "under constant surveillance," casting a pall over the classroom and undermining any notion of academic freedom.[62] Referencing the purpose of academic freedom, Douglas noted that the system of spying and surveillance in the New York state law replaces free inquiry with "deadening dogma," and "produces standardized thought, not the pursuit of truth . . . which the First Amendment was designed to protect."[63]

Less than four years later, however, academic freedom had its first taste of success. In *Slochower v. Board of Higher Education*, the Court reversed the dismissal of an associate professor who invoked his Fifth Amendment right

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58 18 N.Y.S.2d at 829.

59 *Id.*

60 342 U.S. 485, 486–90 (1952).

61 *Id.* at 493.

62 *Id.* at 509–11 (Douglas, J., dissenting).

63 *Id.*

against self-incrimination when refusing to answer questions about his past membership in the Communist Party, during a hearing before the Senate Judiciary Committee.[64] However, the Court did not use academic freedom (rooted in, or tied to, the First Amendment) as justification for the ruling, instead focusing on the Fifth Amendment's due process rights.[65] Regardless of the underlying reasoning, the outcomes of *Adler* and *Slochower* are in tension with each other, at least with respect to the ramifications on academic freedom.

The final genesis case is *Sweezy v. New Hampshire*, which is the wellspring of modern First Amendment and academic freedom doctrine. Like in *Slochower*, Sweezy was investigated for his prior involvement in the Progressive Party, and the Attorney General of New Hampshire ordered Sweezy to disclose the nature of his past expressions and associations.[66] The Court found that compelling Sweezy to disclose the nature of his past expressions was in violation of the Bill of Rights and the Fourteenth Amendment—and that the investigation invaded Sweezy's "liberties in the areas of academic freedom and political expression."[67] In so holding, the Court also noted the essentiality of academic freedom under the First Amendment to American universities, reiterating the arguments made by Justice Douglas' dissent in *Adler*.[68] Finally, the Court proposed a test: the government "must abstain from intrusion into this activity of freedom . . . except for reasons that are exigent and obviously compelling."[69] With *Sweezy*, the Court finally began to protect academic freedom under the First Amendment.[70] But then things got messy.

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64 350 U.S. at 552–54.

65 *Id.* at 557–59.

66 354 U.S. at 237–45.

67 *Id.* at 250.

68 *Id.* at 250–51. Note that the Court's opinion more broadly stated does not leave the government without power; rather, "the social imperatives of academic freedom operate through the first amendment to require close judicial superintendence of such inquiries because of their implicitly chilling effects." WILLIAM W. VAN ALSTYNE, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 110.

69 354 U.S. at 262 (Frankfurter, J., concurring).

70 Note that there are additional cases that address issues surrounding academic freedom, but do not further flesh out the contours of the concept as pertains to the subject of this paper. Examples include Yellin v. United States, 374 U.S. 109 (1963) (overturning a contempt conviction of a witness who declined to respond to questioning about their affiliations to political parties), Whitehill v. Elkins,

C. THE FIRST AMENDMENT AND ACADEMIC FREEDOM DOCTRINE

Sweezy was just the start of the Court's foray into protecting academic freedom under the First Amendment. The Court's doctrine around academic freedom subsequently became complicated. This was primarily because the Court never completely defined academic freedom or investigated its meaning, but instead made decisions derived from First Amendment protections of political expression and Fifth Amendment due process protections and protections against self-incrimination.[71] Because of this weak foundation, the First Amendment-related principles around academic freedom are conflicting and confusing. This section highlights three issues: the lack of definitional clarity; the tension between the First Amendment and academic freedom; and the Court's iffy drawing of boundaries around academic freedom.

First, the Court has not consistently defined what academic freedom consists of or entails. For example, in *Sweezy*, the Court notes the essentiality of academic freedom and *why* it should be protected, but does not define who academic freedom protects, or what its outer limits are.[72] Similarly, in *Barenblatt v. United States*, the second seminal case about academic freedom, the Court found that First Amendment protections did not afford Barenblatt—an instructor at the University of Michigan—a right to resist a Congressional inquiry about his involvement with the Communist Party.[73] Here, the Court tried to flesh out the contours of academic freedom, stating that there is "academic teaching-freedom" and a corollary "learning-freedom," (analogical to *lehrfreiheit* and *lernfreiheit*)[74] and that both do not provide for a "constitutional sanctuary" from investigations that are within Congress' power,

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389 U.S. 54 (1967) (Maryland oath-based case leading to a similar result as *Keyishan*, *infra* note 93), Bagett v. Bullitt, 377 U.S. 360 (1964) (similar oath-based case in Washington), and Shelton v. Tucker, 364 U.S. 479 (1960) (overturning an Arkansas statute requiring teachers in state-supported schools and colleges to submit lists of organizational affiliations). For a deeper constitutional analysis, *see* WILLIAM W. VAN ALSTYNE, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 113–18.

71 DAVID M. RABBAN, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 235–37.

72 354 U.S. at 250–52.

73 360 U.S. 109, 111–15 (1959).

74 *See supra* note 3737 and accompanying discussion.

simply because someone at a university is being questioned.[75] Finally, in *Keyishan v. Board of Regents*, the Court struck down a law that required teachers to sign a certificate attesting that they were not communists.[76] The Court noted that academic freedom is a "transcendent value to all of us and not merely to the teachers concerned," and that academic freedom protects the "marketplace of ideas" that is the classroom.[77] Taken together, these cases iterate that (1) academic freedom is constitutionally protected; (2) there are multiple strains of academic freedom such as teaching and learning academic freedom; and (3) academic freedom is intended to protect everyone by protecting the marketplace of ideas. But the boundaries of academic freedom remain mysterious: what kind of speech is protected; when is it protected; and for and against whom is it protected? *Sweezy*, *Barenblatt*, and *Keyishan*'s progeny similarly fail to truly define what falls under academic freedom.[78]

Second, although cases like *Sweezy* ostensibly protect a not-fleshed-out academic freedom, the First Amendment's underlying principles often conflict with academic freedom. Where the First Amendment's purpose is to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,"[79] academic freedom's structure is fundamentally gatekeeping: it permits those within educational institutions to have one sort of freedom that those outside the institution do not, making it nothing like an uninhibited marketplace of ideas.[80] The marketplace of ideas is only open to those within the academy, by definition excluding laypeople and non-tenured professors.[81] Further, those with stronger academic freedom protections might be able to undermine those with weaker academic freedom protections, effectively creating an asymmetrical market. In short, it provides scholars with some elevated, protected form of speech that a layperson does not have. And some courts support this belief, noting that the First Amendment may give professors more protection than the layperson because professors are

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75 360 U.S. at 112.

76 385 U.S. at 592–93.

77 *Id.* at 603.

78 *See, e.g.*, DAVID M. RABBAN, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 238–41 (noting the lack of guidance provided by *Sweezy* and *Keyishian*).

79 Red Lion Broad. v. FCC, 395 U.S. 367, 390 (1969).

80 FINKIN & POST, PRINCIPLES OF ACADEMIC FREEDOM, *supra* note 1313, at 127–28.

81 *See, e.g.*, RALPH S. BROWN & JORDAN E. KURLAND, *Academic Tenure and Academic Freedom*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3532, at 349–51 (discussing academic freedom for those without tenure).

protected in how they express ideas in nonpublic forums (such as universities and classrooms) where laypersons would not have a First Amendment-protected right to express those ideas on such platforms.[82]

But this view is wrongheaded. Academic freedom protects scholars' intellectual inquiries, but only as long as they are "held in a scholar's spirit" and are the "fruits of competent and patient and sincere inquiry."[83] Where the First Amendment protects against the government "abridging the freedom of speech" (without conditions on what kind of speech is being abridged),[84] academic freedom only protects limited forms of speech.[85] Specifically, as noted, academic freedom protects speech related to the teacher's expertise,[86] and that speech must be restrained, respectful, and accurate.[87] And as a corollary, academic freedom provides no support for non-scholarly speech or speech that does not aim to search for the truth.[88] Although the First Amendment and academic freedom's ultimate goals are similar—to facilitate truth seeking,[89] self-governance,[90] and self-realization[91]—the First Amendment protects speech unconditionally against government encumbrance. Academic freedom draws lines on what speech is protected, and so provides a subset of First Amendment protections.

Finally, beyond these divergent protections, the Court has often held that academic freedom *can* be curtailed. First, if a law undermining academic freedom satisfies heightened scrutiny, it is constitutional. In *Barenblatt*, the Court applied heightened scrutiny, noting that the "'subordinating interest of the State must be compelling' in order to overcome individual constitutional rights at stake," and finding that Congress's interests in protecting the national

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82 Piarowski v. Ill. Cmty. Coll. Dist. 515, 759 F.2d 625, 629 (7th Cir. 1985).

83 *1915 AAUP Declaration*, *supra* note 39, at 298.

84 U.S. CONST. amend. I.

85 *See also* FINKIN & POST, FOR THE COMMON GOOD, *supra* note 13, at 125–26 (describing the essentiality of discipline in the definition of academic freedom).

86 *1940 AAUP Statement*, *supra* note 42, at 14.

87 *Id.*

88 FINKIN & POST, FOR THE COMMON GOOD, *supra* note 13, at 128 ("Universities cannot fulfill their social function unless they are authorized to evaluate scholarly speech based upon its content and professional quality.").

89 Hustler Mag. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas.").

90 Cohen v. California, 403 U.S. 15, 24 (1971) (noting the First Amendment's intent is to create "a more capable citizenry and more perfect polity").

91 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[F]reedom to . . . speak as you think [is a] means indispensable to the discovery and spread of political truth.").

security of the country by investigating the Communist Party were a compelling interest.[92] But scrutiny requires not only a legitimate governmental interest, but also narrow tailoring. In *Keyishian*, the Court struck down a law that required teachers to certify that they were not communists, and that required the removal of a teacher for "treasonable or seditious utterances or acts."[93] Because "treasonable or seditious" were vague, as were other sections of the law,[94] the Court struck the law down, stating that even though the goal of protecting the education system from subversion was a legitimate governmental interest, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[95]

And even without applying heightened scrutiny, there are instances in which academic freedom is not relevant as a defense for teachers. In *Beilan v. Board of Public Education*, the Court held that firing a teacher for being incompetent—where refusing to answer questions about alleged past subversive activities constituted incompetence—did not undermine any notion of academic freedom.[96] Similarly, in *Nelson v. County of Los Angeles*, Nelson was fired for refusing to give testimony regarding subversive activity and the Communist Party, because such an act was one of insubordination in refusing to give information regarding the field of security.[97] The Court held that the state's interest in securing such information was a legitimate one.[98] Other valid reasons for curtailing a professor's academic freedom—potentially by revoking their tenure—include just cause, which includes violations of the institution's code of behavioral conduct, such as academic dishonesty, fraud, and immorality; and *unlawful* discrimination and harassment of students,

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92 360 U.S. at 127–29 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring)).

93 385 U.S. at 592, 597 (cleaned up).

94 *Id.* at 598–600.

95 *Id.* at 602 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)). Notably, *Keyishian* also inextricably linked academic freedom to the First Amendment, noting that academic "freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* at 603.

96 357 U.S. at 405–09.

97 362 U.S. at 1–8 .

98 *Id.* at 8.

employees, and peers.[99] But existing statutory and case law that defines "unlawful" discrimination often falls woefully short of preventing actual discrimination.[100]

In sum, the Court's academic freedom decisions, both First Amendment-related and otherwise, follow some consistent themes. The Court has never clearly defined academic freedom, meaning that case law and academic freedom in theory are divergent. This may explain why the Court's First Amendment protections of academic freedom are more expansive than the protection that academic freedom in theory ought to provide. But while academic freedom in theory places some boundaries on what speech is and isn't protected, so too does the Court's doctrine, though the theory's and case law's exceptions are different. Academic freedom in theory does not protect speech that is not in furtherance of the pursuit of knowledge, speech unrelated to the teacher's expertise, or speech that is disrespectful, unrestrained, or inaccurate. Academic freedom doctrine does not protect speech where the teacher was insubordinate, incompetent, unlawfully discriminatory, or where the institution would otherwise have just cause. Now that we have some idea of what academic freedom is, the obvious next question is who possesses academic freedom.

D. ACADEMIC FREEDOM FOR WHOM?

Academic freedom theory suggests that there are two strains of academic freedom—teachers have the freedom to teach, or *lehrfreight*, and students have the freedom to learn, or *lernfreiheit*.[101] Predictably, the case law does not map cleanly on, and the law creates *three* strains of academic freedom exist to achieve the goals of promoting inquiry and the advancing the sum of human knowledge.[102] These three strains arise from Justice Frankfurter's "four essential freedoms" of a university: the freedoms "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught,

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99 Daniel E. Hall, *The First Amendment Threat to Academic Tenure*, 10 U. FLA. J. L. & PUB. POL'Y 85, 93–94 (1998). But just because a professor *can* be fired for discriminatory behavior does not mean that they are, as we shall see, *infra* Section II0.

100 *See infra* Section II0.

101 *See supra* note 3737 and accompanying discussion.

102 *1915 AAUP Declaration*, *supra* note 3939, at 292.

and who may be admitted to study."[103] First, institutions—in the context of this paper, universities—need academic freedom to be able to create an environment where inquiry takes place.[104] Second, professors need academic freedom to be able to do the inquiring. And finally, students need to be able to learn, so that the sum of human knowledge can be advanced. But the academic freedom of one may trample upon that of another.

1. Institutional Academic Freedom

The business of a university is to advance knowledge in the pursuit of academic freedom.[105] In *Sweezy*, Justice Frankfurter's concurrence defined universities' role in academic freedom through the "four essential freedoms."[106] Thus, universities are a critical stakeholder of academic freedom, since they have the power to make hiring decisions ("who may teach"), decide who goes to the university ("who may be admitted to study"), and decide the curriculum ("what" and "how" things shall be taught).[107] While the extent of academic freedom granted by law may be different for public and private universities, with private universities having greater freedom because they are not closely related to the government, all universities have the institutional academic freedom granted to public universities.[108]

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[103] 354 U.S. at 263 n.1 (Frankfurter, J., concurring) (citing to a statement of a conference of senior scholars from South African universities).

[104] *See* FINKIN & POST, FOR THE COMMON GOOD, *supra* note 1313, at 133 (noting that academic freedom applies to institutions which "protect the application of professional scholarly standards to advance knowledge").

[105] *Id.* at 124.

[106] 354 U.S. at 263 (Frankfurter, J., concurring) (citing to a statement of a conference of senior scholars from South African universities).

[107] *Id.*

[108] The case law under this section deals primarily with public universities, at least at the Supreme Court level. Issues of academic freedom regarding private universities, at least with respect to a private university's academic freedom, have not reached the Supreme Court, mostly being resolved in appellate courts. For example, the Court denied certiorari in Princeton University v. Schmid, 455 U.S. 100 (1982), a case which dealt with private universities' rights to dictate who is permitted on campus, and other private university rights. *See also* David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 257–68 (discussing the saga of *Schmid*, including the claims that Princeton made and why professors criticized those claims, and how private and public universities might have different rights). Regardless, the underlying principles of academic freedom can be considered separate from these institutions' relationships to the state, with private universities' academic freedoms inclusive of those of a public university. *Id.* at 266–71.

First, universities as institutions have the power to make hiring and administrative decisions, including granting tenure to professors, in service of academic freedom. According to the AAUP, tenure is essential to academic freedom.[109] But tenure is a two-party process: a university offers tenure, and the professor accepts (or rejects) it. And since the university is also a critical stakeholder in promulgating academic freedom, it stands to reason that universities get deference to decide whom to grant tenure to. The Court has generally supported this proposition, though never explicitly, starting with *Pickering v. Board of Education*.[110] There, the Board fired Pickering, a teacher, for writing a letter criticizing the Board's financial decisions.[111] The Court held that the school's interest was the "need for orderly school administration," but that Pickering's First Amendment rights to public speech outweighed this need.[112] Similarly, in *Board of Regents v. Roth*, the Court deferred to state law, which "leaves the decision whether to rehire a *nontenured* teacher for another year to the unfettered discretion of university officials," when addressing respondent's denial of rehiring.[113]

But, aside from *Roth*, these cases only deal broadly with public institutions and not specifically universities. Unfortunately, no Supreme Court decision has directly addressed whether the hiring decisions of *universities per se* receive deference due to academic freedom,[114] and Appeals Courts strongly defer to tenure decisions of all universities,[115] but are split over how deferential they must be to these decisions. Of note, the Second Circuit stated in *Faro v.*

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[109] Hall, *supra* note 99, at 88 (citation omitted).

[110] 391 U.S. 563 (1968).

[111] *Id.* at 564, 568–70.

[112] *Id.* at 569–75; *see also* Edwards v. Aguillard, 482 U.S. 578, 583 (1987) ("States and local school boards are generally afforded considerable discretion in operating public schools . . . . At the same time . . . we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.") (internal quotation marks and citations omitted).

[113] 408 U.S. 564, 567 (1972) (emphasis added). While *Roth* has to do with the rehiring of a non-tenured professor, the underlying principle that the Court defers to university officials in the hiring and firing process still applies.

[114] *Roth* only deals with the rehiring of a professor, and its underlying reasoning stands in state law. *Id.* at 567. Note also that there could be a significant difference between the rights of private and public universities when it comes to hiring decisions. *See supra* note 108.

[115] *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69, 80 n.4 (1984) (Powell, J., concurring) ("[T]he Courts of Appeals generally have acknowledged that respect for academic freedom requires some deference to the judgment of schools and universities as to the qualifications of professors, particularly those considered for tenured positions.").

New York University that "education and faculty appointments at a University level are probably the least suited for federal court supervision."[116] The Circuit went further in *Weinstock v. Columbia University*, stating that if "there is no evidence of discriminatory intent, this Court will not second-guess" the decision to deny tenure.[117] The First,[118] Fourth,[119] Fifth,[120] Sixth,[121] Seventh,[122] Eighth,[123] Eleventh[124] Circuits are similarly deferential. In contrast, the Third Circuit is not as deferential, at least when dealing with allegations of discriminatory hiring at universities. In *Kunda v. Muhlenberg College*, the court noted that "academic institutions and decisions are not ipso facto entitled to special treatment under federal laws prohibiting discrimination" such as Title VII of the Civil Rights Act.[125] The Ninth and Tenth Circuits have not ruled on the issue. All this is to say that universities have wide leeway in

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116 502 F.2d 1229, 1231–32 (2d Cir. 1974).

117 224 F.3d 33, 43 (2d Cir. 2000).

118 Brown v. Trustees of Boston Univ., 891 F.2d 337, 359 (1st Cir. 1989) ("We agree that courts should be 'extremely wary of intruding into the world of university tenure decisions.'") (internal citation omitted).

119 Saleh v. Upadhyay, 11 F. App'x 241, 260 (4th Cir. 2001) ("We continue to 'review professorial employment decisions with great trepidation' . . . . We will not 'substitute [our] judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure.'") (internal citations omitted).

120 In re Dinnan, 661 F.2d 426, 431 (5th Cir. 1981) ("Wherever the responsibility lies within the institution, it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure.").

121 Stein v. Kent State Univ., No. 98-3278, 1999 U.S. App. LEXIS 9152, at *22 (6th Cir. May 11, 1999) ("[C]ourts are not to sit as super-tenure committees and substitute judgment for that of the university in the absence of a strong showing of discrimination.") (internal quotation marks and citation omitted).

122 EEOC v. Univ. of Notre Dame Du Lac, 715 F.2d 331, 339 (7th Cir. 1983) ("Courts have no more business in substituting their judgment for that of a legitimate peer review determination than they do in determining whether a particular physician or surgeon is qualified to practice in a particular hospital.").

123 Qamhiyah v. Iowa State Univ. of Sci. & Tech., 566 F.3d 733, 747–48 (8th Cir. 2009) ("[In the context of an employment discrimination action], we accord a high degree of deference to the judgment of university decision-makers regarding candidates' qualifications for academic positions . . . . [W]e will not sit as a super personnel council to review tenure decisions.") (internal citations and quotation marks omitted).

124 Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991) ("[W]e cannot supplant our discretion for that of the University. Federal judges should not be ersatz deans or educators. In this regard, we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom.").

125 621 F.2d 532, 545 (3d Cir. 1980).

choosing their professors, which is a critical factor in promulgating institutional academic freedom.

Beyond granting tenure, universities have discretion in choosing which students are accepted and dismissed—as the Supreme Court has often commented upon in its historic cases on affirmative action.[126] Critically, in *Regents of the University of California v. Bakke*, the Court decided in a plurality opinion that the University of California at Davis's medical school's race quota-based admissions policy was unconstitutional.[127] Even so, Justice Powell's plurality opinion noted that the university's academic freedom entailed it the "freedom . . . to make its own judgments . . . includ[ing] the selection of its student body."[128] Unlike most academic freedom cases, however, *Bakke*'s ultimate decision about the admissions policy was rooted in the Fourteenth Amendment's Equal Protection Clause, while the assessment about the permissible goals of the policy was grounded in academic freedom as a "special concern of the First Amendment."[129] Nevertheless, in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, the Supreme Court noted that a university's academic "freedom [is] not unlimited," and that academic freedom does not go so far as to permit race-based discrimination that is "inherently suspect."[130]

Regardless of the complicated jurisprudence around affirmative action, and as discussed below, this nexus of the Equal Protection Clause and the First Amendment's academic freedom protections has significant implications regarding antidiscrimination issues. And unlike *Bakke*'s Fourteenth Amendment-based ruling, in *Regents of University of Michigan v. Ewing*, the Court was tasked with deciding whether the University of Michigan violated Ewing's constitutional rights in refusing to readmit him after he had failed out of one of the programs at the university.[131] The Court ruled that the university had suitable discretion to dismiss a student as long as it did so nonarbitrarily,

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126 *See generally* Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) (serving as the genesis case that provided a template for race-based admissions); Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the University of Michigan Law School's race-based admissions policy); Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down the University of Michigan's race-based admissions policy); Fisher v. Univ. of Texas, 136 S.Ct. 2198 (2016) (upholding the University of Texas's race-based admissions policy).

127 438 U.S. 265 (1978).

128 *Id.* at 312.

129 *Id.* at 289–99, 312.

130 600 U.S. 181, 209 (2023) (internal quotation marks omitted).

131 474 U.S. 214 (1985).

and that courts should "show great respect for the faculty's professional judgment."[132] Justice Powell, this time concurring, noted that courts should accord "respect and deference" to academic decisions.[133] In short, universities have the academic freedom to decide who gets to enter the classroom.

Finally, universities have discretion in management (such as governance and policy)[134] and in determining what their curriculum consists of. For example, in *Edwards v. Aguillard*, the Court struck down a Louisiana act that forbade the teaching of evolution in classrooms unless accompanied by instruction in creationism.[135] In doing so, the Court noted the importance of teachers to have the flexibility to determine curriculum.[136] Once again, Justice Powell concurred and summarized that the Court has given "traditionally broad discretion . . . in the selection of the public school curriculum" to state and local school officials.[137] As a corollary, in *Board of Education v. Pico* the Court noted that the government has constitutional limits on its "control [of] the curriculum and classroom,"[138] referencing seminal cases like *Meyer v. Nebraska* and *Pierce v. Society of Sisters* as the origins of these principles, at least as applied to schools.[139] In *Board of Regents v. Southworth*, the Court reaffirmed these principles as applied to universities, stating that universities have academic freedom "to make decisions about how and what to teach."[140]

In all three of these categories, universities have wide discretion to run their institutions in whatever manner best achieves the goals of academic freedom. But this shield from the government is also a sword, as we shall see in Part II0. Where universities have broad discretion to hire who they see fit, admit who they see fit, and teach who they see fit, they also have a blank—and opaque—

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132 *Id.* at 224–27.

133 *Id.* at 230 (Powell, J., concurring).

134 William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, *in* FREEDOM AND TENURE IN THE ACADEMY 144 (William W. Van Alstyne ed., 1993) ("But this Court has never recognized a constitutional right of faculty to participate in policymaking in academic institutions . . . . [T]here is no constitutional right to participate in academic governance.") (quoting Minnesota State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 287–88 (1984)).

135 482 U.S. 578, 581–82 (1986).

136 *Id.* at 587 (holding that a state statute forbidding the teaching of evolution in public schools violated the First Amendment).

137 *Id.* at 597 (Powell, J., concurring).

138 457 U.S. 853, 861 (1982).

139 *Id.* at 863.

140 529 U.S. 217, 237 (2000) (Souter, J., concurring).

slate to discriminate against those applying for tenure or applying for admissions, whose ideas they find distasteful or disagreeable.[141]

2. Professorial Academic Freedom

Where there is some lack of clarity regarding institutional academic freedom, the academic freedom of professors suffers from no such deficit. Professors bear the heavy burden of fulfilling "their function by precept and practice, by the very atmosphere they generate; they must be exemplars of open-mindedness and free inquiry."[142] The Court's decisions fairly consistently require that educators remain "free to inquire,"[143] which includes some flexibility to determine their own in-classroom curriculum.[144] To protect this freedom to inquire, universities grant professors tenure, which guarantees professors a long-term or lifetime employment at the institution.[145] Tenure ensures that professors are not punished for their academically-protected speech,[146] thus becoming an enforcement mechanism for ensuring that the goals of academic freedom are achieved.[147] However, there are limits to tenure: faculty can be fired for cause, but have the right to a pretermination hearing. Professors also have no right under academic freedom to participate

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[141] Another troubling but ancillary issue is that religiously-affiliated universities have discretion to teach and design their curriculum according to religious precepts. There are significant benefits to providing discretion to religious universities and ensuring that they flourish. *See generally* Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 303–05. But the First Amendment's protections for religion also permit religious universities to hire based on the beliefs of applicants, which might require the applicants to disavow support for LGBTQ individuals or other protected classes. *See, e.g.*, Judith Jarvis Thomson, *Ideology and Faculty Selection*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 172–74 (discussing that a school of theology could reject a candidate on the content of their beliefs). This might also facilitate discrimination, but the topic of antidiscrimination and academic freedom in religious universities is beyond the scope of this paper.

[142] Weiman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

[143] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[144] Edwards v. Aguillard, 482 U.S. 578, 587 (1987) (discussing that the purpose of the unconstitutional statute was to narrow the science curriculum which would impede academic freedom).

[145] Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 323236, at 325–26 (comparing two competing definitions of tenure, both of which award long-term employment).

[146] *See 1940 AAUP Statement*, *supra* note 4242, at 14 ("Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities.").

[147] Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 323236, at 326–27 (discussing how tenure is linked to the protection of academic freedom).

in school governance and policymaking. And even the academic freedom protections for their speech have outer bounds.

Although it happens infrequently, professors can be fired.[148] The generally recognized reasons for termination include administrative necessity (such as a university going bankrupt);[149] just cause, which includes academic dishonesty, fraud, and immorality;[150] incompetence;[151] insubordination,[152] if the professor's behavior impairs their ability to perform their duties or disrupts the functioning of the university;[153] and *unlawful* discrimination and harassment of students, employees, or peers.[154] But tenured professors have due process rights, including the right to a pretermination hearing, to protect their academic freedom.[155]

Pretermination hearings generally require notice of dismissal for cause *that does not include a professor's exercise of academic freedom*, access to information, and rights to appeal—but these are standards suggested by the AAUP, and the Court has pointedly not enshrined these procedural protections in doctrine.[156] Nonetheless, the standards also give the faculty

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148 James C. Wetherbe, *It's Time for Tenure to Lose Tenure*, HARV. BUS. REV. (Mar. 13, 2013), https://hbr.org/2013/03/its-time-for-tenure-to-lose-te ("While tenure's proponents argue that it can always be revoked, in fact only 50 to 75 professors out of 280,000 lose it annually, said a study published in 1994 in the *Chronicle of Higher Education*. The number has likely not changed, according to Harvard University researcher Cathy A. Trower."). For individual examples, see Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 344, n.111.

149 Hall, *supra* note 99 at 93.

150 *Id.* at 94.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.* Note that *unlawful* means that the discrimination or harassment must violate some constitutional or statutory law. However, as we shall see in Part II0, both constitutional and statutory law are underinclusive and do not find all forms of problematic discrimination as harmful.

155 Board of Regents v. Roth, 408 U.S. 564, 564 (1972). Some commentators note that pretermination hearings are part of a "First Amendment 'due process,'" which includes notice, access to information, and rights to appeal during the tenure process. David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 297. But the Court has put limits on the constitutional requirement to such due process. *Id.* at 298 (referencing a Supreme Court decision which held that holding a teaching position at a university is not itself a free speech interest).

156 For a detailed statement of procedures, see AM. ASS'N UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE (2018), https://www.aaup.org/sites/default/files/JA18_RIR_rev.pdf [https://perma.cc/M9RK-73PJ]; *see also*

member the right to a full hearing before a faculty committee, with the burden of proof for dismissal resting on the university,[157] and other evidentiary and trial standards similar to those in most administrative procedures.[158] Where a university dismisses a professor for an improper reason, the faculty member may be entitled to judicial review,[159] and generally, review by a judicial body is not precluded in case law.[160] The standard of review is "loose rationality,"[161] though some courts apply a *de novo* standard.[162] In quick terms, this boils down to a curious mix of some doctrinally-guaranteed pretermination processes, and others recommended by the soft law of the AAUP.[163]

And while faculty have academic freedom regarding their academic inquiries, faculty are not constitutionally entitled to participate in school governance, policymaking, and curriculum design.[164] The Court has suggested that teachers do not have unbounded discretion to teach whatever they please, especially where the school has policies that limit content taught in the

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David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 297–300 (discussing the formation of these procedures and the Court's refusal to protect them in law).

157 Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 328.

158 AM. ASS'N UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE at 17–19 (2018), https://www.aaup.org/sites/default/files/JA18_RIR_rev.pdf [https://perma.cc/KG34-JGKR] (suggesting regulations for tenure).

159 Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 346–47 (discussing cases that held a faculty member was entitled to a hearing after a layoff for potentially improper reasons).

160 Matthew W. Finkin, *"A Higher Order of Liberty in the Workplace": Academic Freedom and Tenure in the Vortex of Employment Practices and Law*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3236, at 363–65 (explaining the level of deference given to employers in various circumstances).

161 *Id.* at 364.

162 *Id.* at 365.

163 Note, however, that universities use other ways to get rid of professors. I'm not suggesting that universities provide offers that professors cannot refuse. *See* THE GODFATHER (Paramount Pictures 1972) ("I'm going to make him an offer he can't refuse."). Instead, institutions have used "threats of dismissal," encouraged professors to take leave "to pursue other interests," transferred them to another institution, paid them to leave, and used inter-office politics as means to force a professor's hand. Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 344.

164 *See* Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 287 (1984) ("But this Court has never recognized a constitutional right of faculty to participate in policymaking in academic institutions."). Instead, this right is reserved for the university itself. *See* Alstyne, *supra* note 32, at 145.

classroom, and the AAUP's 1915 *Statement* concurs with this.[165] Further, courts have not recognized that professors "recognized a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so."[166] Of course, this doesn't mean that there is no right for professors to determine so—the Court has simply never made a definitive decision in either direction. Lower courts have adhered to what universities define as academic freedom, which often includes limitations that permit professors "to full freedom in research and in the publication of results, subject to the adequate performance of [their] other academic duties."[167] These limitations differ between doctrine and theory: scholars have noted that universities should not be able to regulate the communication of research within the classroom, on grounds that the university disagrees with the content of the research.[168]

But there is significant dispute as to *what* teachers' speech is protected under academic freedom. The goal of academic freedom is to promulgate professional standards that advance knowledge,[169] so much so that professors are often burdened with the responsibility of ensuring that their speech is accurate and satisfies ethical standards.[170] But if a professor is using academic freedom as a shield for promulgating views that have nothing to do with their

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165 *See* Epperson v. Arkansas, 393 U.S. 97, 113–14 (1968) (Black, J., concurring) ("I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed. This Court has said that the rights of free speech 'while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.'"). The AAUP agrees that academic freedom does not give professors unlimited freedom of speech, stating that "academic freedom [does not imply] that individual teachers should be exempt from all restraints as to the matter or manner of their utterances, either within or without the university." *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, *supra* note 3939 at 300.

166 Urofsky v. Gilmore, 216 F.3d 401, 414 (4th Cir. 2000).

167 McAdams v. Marquette Univ., 914 N.W.2d 708, 730 (Wis. 2018).

168 FINKIN & POST, PRINCIPLES OF ACADEMIC FREEDOM, *supra* note 1313, at 139 ("If faculty experience their institutions as repressive, they will be vulnerable to forms of self-censorship and self-restraint that are inconsistent with the confidence necessary for research and teaching.").

169 *See id.* at 133 ("[I]t is difficult and dangerous to set artificial limits on faculty expertise.").

170 *See, e.g.*, Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 255 ("[T]he same professional responsibilities that justify additional first amendment rights of professors may also allow limitations on their speech that do not apply to others. For example, a professor who plagiarizes a scholarly paper may be disciplined for a gross violation of professional ethics, while a prisoner, who in many respects has fewer first amendment protections than other citizens, could probably not be punished for copying verbatim the clemency petition of a fellow inmate.").

research or teaching, the use of academic freedom in such a case would not align with its purpose of advancing knowledge and searching for the truth in the subject of their expertise.[171] For example, a nuclear physics professor's public comments denigrating California as the home of the devil would not be protected under academic freedom.[172] The Court seems to implicitly agree. In *Pickering*, the Court distinguished between teachers' speech that was related to the teacher's work at school, and speech that made the teacher a "member of the general public . . . ."[173] The latter, the Court noted, had full First Amendment protections, rather than academic freedom protections, and could not "furnish the basis for his dismissal from public employment."[174] Commentators have read the Court's decisions to mean that academic freedom must protect speech and action "made on academic grounds," and not much else beyond.[175]

This First Amendment protection of public speech is independent of the protections granted under academic freedom, which protects the teacher's work in the academy.[176] Because the teacher is no longer commenting on something they are considered an expert on and are no longer advancing knowledge on that topic, they are no longer wearing their "academic" hat.[177] Instead, their extramural speech in this case, unrelated to their expertise, indicates that they are wearing the badge of a citizen, and speaking in that capacity.[178] Where this kind of speech has to do with a "public concern," at public universities it is protected by the First Amendment, even if

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171 FINKIN & POST, PRINCIPLES OF ACADEMIC FREEDOM, *supra* note 1313, at 136 ("[A]cademic freedom of research and publication does not concern the freedom of faculty to speak in public 'as citizens.'"); *see generally supra* Part 0I.A0. for a detailed discussion.

172 California is the best state in the nation. *See, e.g.*, Golden State Warriors (@warriors), X, https://twitter.com/warriors [https://perma.cc/MU9L-NLRY] (last visited Sept. 6, 2022) (showing off the seven-time NBA championship-winning, era-defining, California-based Golden State Warriors).

173 Pickering v. Bd. Educ. Twp. High School Dist. 205 Will County, 391 U.S. 563, 574 (1968).

174 *Id.*

175 William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 137.

176 *See generally supra* Part 0I.A0.

177 In fact, even Pickering himself noted in his letter that he was writing his letter criticizing his school board "as a citizen, taxpayer and voter, and not as a teacher, since that freedom has been taken from the teachers by the administration." 391 U.S. at 578.

178 *See* FINKIN & POST, PRINCIPLES OF ACADEMIC FREEDOM, *supra* note 1313, at 137 ("[W]hether faculty speech is by contrast unrelated to any professional scholarship, and hence constitutes extramural speech."). Of course, the First Amendment and related case law protects teachers' public speech unrelated to their work under separate doctrine.

discriminatory to the point of questioning the professor's ability to teach objectively.[179] However, because professors are considered the guardians and propagators of knowledge, the AAUP suggests that even in their extramural utterances, they speak cautiously and in a measured tone.[180] Here again we see a misalignment: the AAUP suggests that extramural speech is protected by academic freedom,[181] and the Court indicates that it is only protected by the First Amendment.

But to suggest that such extramural speech is protected by academic freedom, rather than just by general First Amendment principles, would be to say that teachers can use the pretext of advancing knowledge even when the topic of their speech is something entirely unrelated to their expertise. It would mean that once a teacher is inducted into the academy, their speech is fully protected, regardless of whether it achieves the aims of academic freedom.[182] This would be overprotective and overinclusive. Yet four circuits—the Fourth,[183] Fifth,[184] Sixth,[185] and Ninth[186]—protect a professor's speech under the guise of academic freedom if it is of public concern, regardless of whether it is related to their expertise. This could undermine the goals of academic freedom by permitting experts in one field—say, law—to commentate on issues

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179 *See* Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992) (finding that Professor Levin's writing of letters denigrating the intelligence of African Americans published in the New York Times and in journals—discriminatory to the point where the University created a shadow section for one of his classes—was protected by the First Amendment); *see also* Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994) (finding that Professor Jeffries' comments discussing racial bias in the New York public school system, which involved making a derogatory comment about Jewish people, was protected by the First Amendment because it had to do with a public concern), *vacated, remanded to* 115 S. Ct. 502 (1994).

180 *See 1915 Declaration of Principles on Academic Freedom and Academic Tenure*, *supra* note 39 at 299 ("In their extramural utterances, it is obvious that academic teachers are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression.").

181 *Id.*

182 *Id.*

183 *See* Adams v. Trs. Univ. of N. Carolina-Wilmington, 640 F.3d 550, 561 (4th Cir. 2011) ("The district court, in granting summary judgement to the Defendants, considered . . . whether Adams' speech was that of 'a citizen [speaking] upon a matter of public concern.'").

184 *See* Buchanan v. Alexander, 919 F.3d 847, 853 (5th Cir. 2019) ("To establish a . . . claim for violation of the First Amendment . . . they must show that they were disciplined or fired for speech that is a matter of public concern.").

185 *See* Meriwether v. Hartop, 992 F.3d 492, 505 (6th Cir. 2021) ("And when the state stifles a professor's viewpoint on a matter of public import, much more than the professor's rights are at stake.").

186 *See* Demers v. Austin, 746 F.3d 402, 411 (9th Cir. 2014) (choosing not to apply *Garcetti* in the academic context of a public university).

of biology and sociology, and in the process portray themselves as experts in that field. That could set back knowledge, by permitting a legitimated expert in one field to spew misinformation in another.[187] And it may also distract the professor, "spending valuable class time" on issues of public concern instead of devoting time to the subject of their expertise and ultimately furthering knowledge in that field.[188]

To sum, professors and tenured faculty have academic freedom that is wide-ranging, though that freedom is not unlimited. Tenure protects their academic freedom by ensuring that they are not punished for their speech. Due process and pretermination hearings provide a further layer of protection, providing only limited reasons for the revocation of tenure, and even then requiring that the university do so in a structured, pseudo-legal fashion. But even a professor's academic freedom does not grant them the right to be involved in school governance and policymaking. Most worryingly, the doctrine and theory are not in harmony on exactly what professorial speech is protected. At minimum, the doctrine and theory agree that speech related to a professor's expertise, within the classroom or the university, is protected under academic freedom. But where a professor is speaking beyond the bounds of their expertise, or where they are speaking extramurally, doctrine leans towards that speech not being protected under academic freedom, where theory suggests that extramural speech regarding matters of a professor's expertise are protected under academic freedom.

Finally, note that non-tenured faculty, who make up almost half of all educators at higher-education institutions,[189] tautologically do not have the bulwark of tenure to provide them with protection for their academic freedom. While beyond the scope of this paper, non-tenured faculty face myriad issues, including low pay, a lack of job security that creates economic instability, overwork, discrimination in hiring and rehiring, and general lack of workplace

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[187] For example, famous neuroscientist and professor Ben Carson made controversial political statements about President Obama's tax and healthcare policies in 2013. *See* Frank James, *Ben Carson Says No Apology Needed After Controversial Speech*, NPR (Mar. 11, 2013, 4:41 PM), https://www.npr.org/sections/itsallpolitics/2013/03/11/174026740/ben-carson-says-no-apology-needed-after-controversial-speech [https://perma.cc/NSV6-VKP6]. Then-professor Carson's stature as a renowned professor may have given his political statements more legitimacy, but the latter statements were not protected by academic freedom.

[188] *See, e.g.*, Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 838 (1987).

[189] American Association of University Professors, *The Status of Non-Tenure-Track Faculty*, AAUP, https://www.aaup.org/report/status-non-tenure-track-faculty [https://perma.cc/V9VL-NRA2] (last visited Sept. 6, 2022).

rights.[190] Considering the number of non-tenured faculty at universities, the lack of workplace protections and of tenure undermines academic freedom by creating an avenue by which universities can punish non-tenured faculty for speech related to their expertise.[191] Some commentators suggest that the presence of a strong tenured faculty, combined with procedural protections that allow for review if tenure is denied, protect non-tenured faculty.[192] But these may only be half-steps, and a more comprehensive set of protections is needed to protect academic freedom by protecting non-tenured faculty.[193]

3. Academic Freedom for Students

Students are the final stakeholder in the realm of academic freedom, despite commentators often painting the academic freedom landscape as a dichotomy between institutions and professors.[194] Because of this faulty two-dimensional conception of the topology of academic freedom, students' academic freedom is less fleshed out in both doctrine and in theory.[195] Even so, through doctrine and theory, we can fashion a rough outline of what rights are granted by academic freedom for students. Where universities are the institutions that ensure the advancement of knowledge and professors are the agents of advancing knowledge, students ultimately receive that knowledge. Students have protection in their own academic freedoms, as first alluded to

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190 *Id.*

191 *See, e.g.*, Katie Robertson, *Nikole Hannah-Jones Denied Tenure at University of North Carolina*, N.Y. TIMES (May 19, 2021), https://www.nytimes.com/2021/05/19/business/media/nikole-hannah-jones-unc.html [https://perma.cc/L5ZV-F7AQ] (describing a 2021 incident where the University of North Carolina's denied tenure to Nikole Hannah-Jones, a Pulitzer Prize-winning author); Charlotte Klein, *"An Embarrassment": Did Conservatives Bully UNC Into Stripping Nikole Hannah-Jones's Tenure?*, VANITY FAIR (May 20, 2021), https://www.vanityfair.com/news/2021/05/did-conservatives-bully-unc-into-stripping-nikole-hannah-joness-tenure [https://perma.cc/H89L-57ZK] (questioning whether the denial may have been attributed to backlash from conservative groups regarding Hannah-Jones' involvement in the New York Times' 1619 Project, which discussed the legacy of slavery in the United States). UNC eventually reversed their decision after pressure from academics, but Professor Hannah-Jones accepted a tenure offer at Howard University instead. Laurel Wamsley, *After Tenure Controversy, Nikole Hannah-Jones Will Join Howard Faculty Instead of UNC*, NPR (July 6, 2021), https://www.npr.org/2021/07/06/1013315775/after-tenure-controversy-nikole-hannah-jones-will-join-howard-faculty-instead-of [https://perma.cc/W6AS-S8DR].

192 *See, e.g.*, Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 L. & CONTEMPORARY PROBLEMS 325 (1990).

193 A detailed discussion about non-tenured faculty is beyond the scope of this paper.

194 Rabban, *supra* note 16932, at 229. Because of this, there is less doctrine and theory regarding students' academic freedom.

195 Meaning that this section might, for your sanity, be short.

in *Sweezy*, where the Court noted that both "teachers *and* students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[196] But these students' rights might clash with institutional and professorial academic freedom.

First, as a baseline, students have fundamental First Amendment-related rights (at public institutions), including the right to free speech, which may not be confined in the classroom.[197] Relatedly, association with student groups, even if abhorrent, is protected, unless those groups make concrete threats of disruptive actions or intimidation.[198] Students' religious expressions are also protected under the First Amendment, reflecting both protections for speech and association.[199] Beyond their own expression, students' liberty of conscience cannot be infringed by state authorities or official control, because it violates the sphere of intellect and spirit.[200] And students have a right to receive information under the First Amendment, which cannot be infringed upon by the state, for example by removing books from a library in a narrowly partisan or political manner.[201] Although these are all First Amendment rights, they may be protected under the First Amendment-right of academic freedom, although neither Courts nor scholars have explored which umbrella these rights are protected by.

Any limitations on these freedoms—at the very least, limitations on speech—are subject to some scrutiny, requiring that the forbidden conduct would "materially and substantially interfere with the requirements of

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196 354 U.S. at 250. Note that both theory and doctrine claim that there are differences between the academic freedom for school students and university students, because educational suitability is an important consideration in what is permitted to be taught in primary and secondary schools, but less important in higher-education institutions. *See, e.g.*, Alstyne, *supra* note 32, at 148–49 & 149 n.246. This section lays out the common denominator of academic freedom rights for higher-education students.

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

198 Healy v. James, 408 U.S. 169, 187 (1972) ("As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights.").

199 Widmar v. Vincent, 454 U.S. 263, 269 (1981) ("Here the UKMC has discriminated against student groups and speakers based on their desire to use generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment.").

200 319 U.S. at 640–42; *see also* PINK FLOYD, ANOTHER BRICK IN THE WALL (Columbia Records 1979) ("We don't need no education; we don't need no thought control . . . [t]eachers, leave them kids alone.").

201 457 U.S. 853, 868–72.

appropriate discipline in the operation of the school . . . ."[202] However, this standard, coming from *Tinker v. Des Moines Independent Community School District*, applies to secondary education.[203] Unlike high schools, universities are not acting *in loco parentis*, and most university students are adults, giving them a more expansive slate of rights than those of secondary school students. The Supreme Court has not addressed what standard applies to universities, but lower courts have tried. One standard applied by the Eleventh Circuit is whether the curtailment of student speech is "reasonably related to legitimate pedagogical concerns."[204]

Second, beyond academic freedom-related rights that are tied to the tenets of the First Amendment, students also have a more direct academic freedom-related right: the right to a learning environment that fairly achieves the goals of the academic process. As such, lower courts have held that a learning environment that is hostile, for example by permitting speech that "rises to the level of harassment—whether based on sex, race, ethnicity, or other invidious premise" is speech that the university should curtail *even at the cost of free speech*.[205] In the same vein, students cannot be denied educational benefits by the behavior of the professor.[206] Though the Supreme Court has not explicitly delineated this as a student's academic freedom rights, in *Pickering* the Court noted that a school can punish a teacher for speech that is shown to or presumed to "have in any way either impeded the teacher's proper performance of his daily duties in the classroom . . . ."[207] Similarly, commentators have interpreted *Edwards v. Aguillard* as indicating that students have a right to access and receive the "benefit of each teacher's best professional good faith judgment, understanding, and skills."[208] This implies that the proper performance of an educator in a classroom, such as advancing and transferring knowledge and using professional good faith judgment,[209] is protected by academic freedom. The ultimate beneficiaries of this "proper performance" are students, so as a corollary of the Court's ruling in *Pickering*

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202 393 U.S. at 509.

203 *Id.* at 504.

204 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

205 Bonnell v. Lorenzo, 241 F.3d 800, 823–24 (6th Cir. 2001).

206 Meriwether v. Hartop, 925 F.3d 492, 511 (6th Cir. 2021).

207 Pickering v. Bd. Educ. Twp. High Sch. Dist. 205 Will County, 391 U.S. 563, 572–73 (1968).

208 *See e.g.*, Alstyne, *supra* note 32, at 152–53 (analyzing *Edwards v. Aguillard*'s decision that school officials have the academic freedom to decide school curriculum).

209 *Id.*

and *Edwards*, students are entitled to "proper performance" and "good faith judgment" which here can be inferred to be the academic freedom-related duties of a professor in a classroom.[210] Nonetheless, the Court has never explicitly ruled so.

Even though students have this implied right to a fair learning environment, this right has limits. For example, in *Burt v. Gates*, the Second Circuit ruled that the Solomon Amendment, which required that universities receiving federal funding permit the military—which at that time barred LGBTQ people from service—from recruiting on campus, did not violate students' First Amendment academic freedom rights.[211] In *Burt*, plaintiffs were Yale Law faculty who claimed that the school should be able to exclude "employers that engage in invidious discrimination" because it is "crucial to their educational mission of inculcating a commitment to equal justice among their students, ensuring a diverse student body, and helping students find appropriate careers," which are goals supported by academic freedom.[212] But the Second Circuit held that the Supreme Court had not held that the First Amendment's academic freedom doctrine made the Solomon Amendment unconstitutional, and that the Solomon Amendment "undermines educational autonomy in a much less direct and more speculative way than do policies addressed in *Sweezy*, *Keyishian*, *Grutter*, and *Ewing*."[213] *Burt* stands for the principle that only policies that directly and concretely affect students' academic freedom—which *may* include an educational mission of equal justice and inculcating diversity *arising from the university's mission*, though the Second Circuit never stated that these goals fall within the ambit of students' academic freedom—are impermissible.[214]

Finally, and most obviously, where universities discriminate against certain groups or students because of their protected class, such as race, ethnicity, gender, sexuality, or religion, the Court applies heightened scrutiny to determine whether the policy is constitutional. However, this is attributable to the First Amendment's religious and speech protections and the Fourteenth Amendment's Equal Protection Clause. Although some Appeals Courts, including the First and Second Circuits, have noted that "[a]cademic freedom

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210 391 U.S. at 572–73; Alstyne, *supra* note 32, at 152–53.

211 Burt v. Gates, 502 F.3d 183 (2d Cir. 2007).

212 *Id.* at 190.

213 *Id.* at 189, 191.

214 *Id.* at 191–93.

does not embrace the freedom to discriminate," such courts have not delineated whether that applies in the context of professors' or students' academic freedom.[215] Similarly, the Sixth Circuit has noted that limitations in the classroom on speech or grades "in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion" are permissible, though it is unclear whether this is an academic freedom principle.[216]

Instead, non-discrimination rules generally arise from other constitutional principles. For example, in *Widmar v. Vincent*, the Court ruled that regulations that singled out religious organizations for disadvantageous treatment are subject to strict scrutiny under the First Amendment's religious protections.[217] Similarly, viewpoint discrimination (which might include political orientation or protected-class-related viewpoints) is subject to a strict scrutiny analysis.[218] The affirmative action cases stand for the principle that race-based discrimination is subject to strict scrutiny under the Fourteenth Amendment's Equal Protection Clause.[219] And sex-based discrimination at universities is subject to intermediate scrutiny "plus" (an "exceedingly persuasive justification") under *United States v. Virginia*.[220]

In sum, students, like professors and universities, have some fundamental academic freedom rights, but what exactly these rights are and how far they go is less clear because of the Court's and commentators' lack of focus on students' academic freedom. From what the Court has decided, students must have the freedom to inquire, which involves the right to free speech and free association in the classroom, as well as a non-hostile learning environment

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215 Cohen v. Brown Univ., 101 F.3d 155, 185 (1st Cir. 1996); Villaneuva v. Wellesley Coll., 930 F.2d 124, 129 (1st Cir. 1991); Powell v. Syracuse Univ., 580 F.2d 1150, 1154 (2d Cir. 1978). Note that these three cases also deal with antidiscrimination statutes. *See infra* Part II0.

216 Settle v. Dickson Cnty. Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995).

217 Widmar v. Vincent, 454 U.S. 263, 269–70.

218 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995) (holding that universities may not withhold benefits from student groups because of their religious outlook or because of viewpoint discrimination). Of course, this line of religious discrimination cases also implies that a viewpoint-neutral policy is constitutional, even if it ends up hurting religious organizations who do not comply. For example, where a university's policy required *all* student organizations to have an "all-comers" policy that forbade discrimination based on sexual orientation and religion, the simple fact that it harmed a Christian group did not make the policy unconstitutional. Christian Legal Soc'y. Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 671–73, 694 (2009).

219 *See supra* note 126.

220 518 U.S. 515, 531 (1996).

where the student receives the "proper performance" of a professor in the classroom.[221] Beyond this, academic freedom generally does not permit discrimination on the base of protected characteristics, though this principle arises only in part from academic freedom doctrine and theory, and otherwise through constitutional law. Even with these antidiscrimination principles, if the discriminatory effect of a policy is highly attenuated or speculative, that policy is not unconstitutional.

Taken together, this gives us the general shape of students' academic freedom rights, but raises additional questions. A students' academic freedom to express themselves freely and learn concepts without bias could directly encroach on professors' rights within the classroom.[222] For example, a student who argues that LGBTQ people should not have the right to marry (perhaps for political or religious reasons) when the professor is advocating for it or teaching about LGBTQ rights and their significance may be considered disruptive, and the professor may refuse to let that student continue to speak. While both students and professors have a right to inquire, at what point does a discussion of two opposing viewpoints become disruptive or actively harmful to the academic freedom rights of either side? In contrast, a teacher's speech inherently has a "coercive effect upon students" given the nature of the classroom and the stature of the professor in the classroom.[223] Does that mean that a professor who advocates for religious liberty, perhaps supporting the rights of cakemakers who wish not to make wedding cakes for LGBTQ individuals, is inherently facilitating discrimination through their elevated stature and their advocacy for a discriminatory cause?[224] Finally, students' freedom—for example, students' rights to meet as part of a religious group in university buildings—may undermine the academic freedom of (public) universities.[225] If an anti-LGBTQ religious organization is permitted to host events at a university, could that create a "hostile learning environment" that harms LGBTQ students?[226] To put mildly, students' academic freedom sets

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221 Pickering v. Bd. Educ. Twp. High Sch. Dist. 205 Will County, 391 U.S. 563, 572–73 (1968).

222 Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991).

223 *Id.*

224 *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n., 138 S. Ct. 1719 (2018) (describing this right and hypothetical in detail).

225 Widmar v. Vincent, 454 U.S. 263, 278 (1981) (Stevens, J., concurring).

226 Bonnell v. Lorenzo, 241 F.3d 800, 823–24 (6th Cir. 2001).

up a three-way tug of war raising the question: whose academic freedom wins, when, and where?[227]

4. Summary

The academic freedom rights of universities, professors, and students differ both in the kinds of acts that are protected under academic freedom, and how fleshed out they are under doctrine and in theory. Universities have wide discretion to hire and fire professors, choose which students get admitted, and manage the university and its curriculum. These rights are mostly well-defined, with courts deferring to universities in these decisions. Similarly, professors have well-defined rights when they are advancing knowledge in their field of expertise. But academic freedom does not protect non-academic public or extramural speech unrelated to the professor's expertise, both of which are instead protected by the First Amendment—though there is a lack of consensus in doctrine and theory about this divergence. And, although professors can be fired, they have procedural protections including the right to a pretermination hearing. Finally, students have First Amendment rights to free speech and free association in the classroom, which arise from the academic freedom right of the freedom to inquire. There are also more direct academic freedom-related rights: the right to a non-hostile and fair learning environment, the right to receive a professor's proper performance, and the right to a generally non-discriminatory environment.

But this short summary re-raises several questions that theory also does not answer.[228] First, what is the hierarchy of these rights? As noted,[229] whose academic freedom prevails in an instance of discrimination? The Court has generally never undertaken the difficult exercise of creating a schema to solve this problem.[230] Second, taken too far, academic freedom rights can be abused,

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[227] FINKIN & POST, PRINCIPLES OF ACADEMIC FREEDOM, *supra* note 1313, at 138.

[228] *See also* the final paragraphs of Part 0I0, with parallel questions.

[229] *See supra* notes 222222–227227 and accompanying discussion.

[230] David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 281. Rabban notes that the closest the Court came to addressing the issue was in a footnote in *Ewing*, where Justice Stevens noted that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, . . . but also, and *somewhat inconsistently*, on autonomous decisionmaking by the academy itself . . . ." 474 U.S. 214, 226 n.12 (1985) (emphasis added).

and so should we draw lines as to how far courts and policy protect academic freedom? These conflicts arise from all three stakeholders' rights.

For example, a university's academic freedom provides discretion to determine who is granted tenure, who is granted admissions, and what is part of the curriculum. Judicial deference to this can be beneficial if universities are outwardly working to combat discrimination or increase diversity. But where a university does the opposite—discriminates in the hiring of professors, the admission of students, or in the contents of a curriculum[231]—the lack of judicial scrutiny may allow discrimination to go unchecked, making academic freedom a shield for discrimination.

Similarly, professors have the right to determine what their curriculum constitutes of, conduct research as they see fit, and have a pretermination hearing if their tenure is in jeopardy. But this clashes with the university's right to determine what its curriculum consists of.[232] Worse, it permits professors to create curricula that could be construed as outwardly or implicitly discriminatory—and permits in-classroom teaching discrimination. For example, if a professor wanted to teach an immigration law course or share research that emphasized the superiority of one race, that could be construed as discriminating against other races. But it could also allow professors to teach antidiscrimination law in a university where the broader curriculum is biased against a protected class.

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[231] For example, if a university wanted to omit mentions of LGBTQ rights, or outwardly design policies punishing LGBTQ individuals and advocates, that could be construed as outwardly discriminatory. *See, e.g.*, Courtney Tanner, *These 3 Former BYU And BYU-Idaho Students Are Suing Over LGBTQ Discrimination. This Is What They Experienced On Campus.*, SALT LAKE TRIBUNE (May 30, 2021), https://www.sltrib.com/news/education/2021/05/30/these-former-byu-byu/ [perma.cc/ED8D-97W2] (describing BYU's honor code, which banned "all forms of physical intimacy that give expression to homosexual feelings").

[232] *See, e.g.*, Hardy v. Jefferson Cmty. Coll., 260 F.3d 671 (6th Cir. 2001). In *Hardy*, the Court considered whether Hardy, a professor fired from Jefferson Community College for a lecture discussing "how language is used to marginalize minorities and other oppressed groups in society," and invoking the N-word in the process, had academic freedom rights in presenting the lecture. *Id.* at 674–75. The Court balanced competing interests, looking at Hardy's academic freedom rights versus the school's "need to control course curriculum and the pedagogical methods of the College's instructors." *Id.* at 680. The court held that the lecture and use of the N-word was germane to the classroom subject matter and advanced an academic message, and that "[o]n balance, Hardy's rights to free speech and academic freedom outweigh the College's interest in limiting that speech." *Id.* at 679, 682.

And students have a right to speak freely in the classroom, freely associate, not have their "intellect and spirit" impinged upon by "official control,"[233] and have the right to receive information freely. But a student's right to speak freely may be restricted by a professor who discriminates, showing an explicit or implicit preference of students from a preferred class or race; although the student *could* speak freely, instances of discrimination may disincentivize them from doing so, or altogether make them fearful of repercussions from professors.[234] This would undermine the goal of academic freedom to have an "independent and uninhibited exchange of ideas among teachers and students,"[235] instead creating a hostile environment. Additionally, if a professor or university's curriculum is biased towards a certain interpretation of history that paints a race in a negative light, and does not provide a holistic view of that subject, that could further the professor and university's academic freedom at the expense of students' academic freedom.[236] Finally, the academic freedom rights of one student could infringe on that of another: a student who believes that transgender people do not have the right to use their preferred bathrooms, and advocates for a policy that prevents them from using their preferred bathrooms, might create a hostile environment for transgender students. The next section explores these dynamics and how antidiscrimination statutory law fares against the constitutionally-protected principles of academic freedom.

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233 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640–42 (1943).

234 *See, e.g.*, *Following Troubling Reports of Discrimination and Retaliation Targeting a Student's Family, Attorney General Becerra Secures Settlement with the Mojave Unified School District to Implement Wide-Ranging Reforms*, OFF. OF THE ATT'Y GEN. OF CALIFORNIA (July 22, 2020), https://oag.ca.gov/news/press-releases/following-troubling-reports-discrimination-and-retaliation-targeting-student%E2%80%99s [https://perma.cc/8Q4Q-KTG9] ("The settlement follows findings that the District failed to investigate a report that a principal threatened immigration consequences against the employer of a student's parents in retaliation for advocacy efforts to address a complaint of discriminatory treatment against the student.").

235 474 U.S. 214, 226 n.12 (1985).

236 Stephanie Saul, *A College Fights 'Leftist Academics' by Expanding Into Charter Schools*, N.Y. TIMES (Apr. 10, 2022), https://www.nytimes.com/2022/04/10/us/hillsdale-college-charter-schools.html [perma.cc/9XFX-H8WT] ("Hillsdale has been criticized for its glossy spin on American history as well as its ideological tilt on topics like affirmative action. Educators and historians have also raised questions about other instruction at Hillsdale's charter schools, citing their negative take on the New Deal and the Great Society and cursory presentation of global warming.").

II. ACADEMIC FREEDOM IN THEORY; DISCRIMINATION IN FACT

This clash of different academic freedoms sets up ways in which universities, professors, and even students can discriminate in the classroom, using academic freedom as a sword to effect discrimination, or as a shield to deflect investigations into instances of discrimination. The first part of this section establishes why this matters: discrimination harms learning, which hurts students. The second part of this section assesses how constitutional protections against discrimination fare against academic freedom. The third part assesses how statutory antidiscrimination laws—the Titles VI and VII of the Civil Rights Act and Title IX of the Education Amendments of 1972—fare when facing constitutional and constitutionally-adjacent academic freedom rights. The section then assesses whether these results are problematic.

A. WHY IS DISCRIMINATION RELEVANT?

Although tomes of scientific and social science papers have been written on the effects of discrimination, this section briefly explains why discrimination in the university context is problematic, such that combating discrimination through the use of academic freedom is a worthwhile pursuit. Broadly, there are three categories of harms. First, there are direct harms to the victims of discrimination in the university context. Second, discrimination calls into question the fairness of the system that is supposed to be the "soul of the Republic."[237] Finally, discrimination also causes systemic harms by reducing diversity and weakening our educational system.

Direct harms to the victims of the discrimination are broad-ranging. Being discriminated against consistently in the classroom has tangible professional impacts: it is *at least* correlated with unfavorable grades, a lower chance of on-time graduation, and reduced satisfaction from schooling.[238] It also has health impacts, causing depressive symptoms, anxiety, a greater likelihood of suicidal ideation, more problematic alcohol use, higher blood pressure, and higher stress levels.[239] For younger students, experiencing discrimination can provoke

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[237] Comment, Guillermo S. Dekat, *John Jay, Discrimination, and Tenure*, 11 SCHOLAR 237, 238 (2009).

[238] Juan Del Toro & Diane Hughes, *Trajectories of Discrimination across the College Years: Associations with Academic, Psychological, and Physical Adjustment Outcomes*, 49 J. YOUTH & ADOLESCENCE 772, 772 (2020).

[239] *Id.* at 774.

psychological responses akin to post-traumatic stress disorder (PTSD).[240] Beyond these tangible health impacts, extreme forms of discrimination can worsen educational outcomes, causing negative attitudes towards school, reducing academic motivation and performance, and increasing the likelihood of school drop-out.[241] It may also create more behavioral problems in school.[242] Simply put, discrimination is not a fuzzy, "woke" issue:[243] it creates significant physical, mental, and economic harms.

Discrimination in the classroom also undermines notions of fairness that should be inherent to the classroom. Outright discrimination or extreme forms of discrimination, such as segregated schooling, can generate "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[244] But it may also create a feeling of superiority among races that benefit from such discrimination.[245] Even less outward forms of discrimination—such as implicit bias—create misjudgments and inappropriate reactions towards the subjects of discrimination, and can lead to overpenalizing such students.[246] And discrimination in the classroom has a modeling effect: it creates a permission structure for others to discriminate, creating a cycle of intolerance. So beyond

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240 Christa Spears Brown, *The Educational, Psychological, and Social Impact of Discrimination on the Immigrant Child*, MIGRATION POL'Y INST. (Sept. 2015), https://www.migrationpolicy.org/sites/default/files/publications/FCD-Brown-FINALWEB.pdf [perma.cc/RM4L-WXRT].

241 *Id.* Dropping out of school has impacts not just for that student, but entrenches the drop out's family in a cyclical system of poverty. *See, e.g.*, Monica Privette Black, *Intergenerational Poverty in the United States*, BALLARD BRIEF (Spring 2021), https://www.ballardbrief.org/our-briefs/intergenerational-poverty-in-the-us-83scy [perma.cc/97XW-UZ6J] ("[T]he problem of cyclical poverty starts the first day of kindergarten and has the potential to affect a child's entire life, since a child who is struggling academically is statistically more likely to drop out of high school and even less likely to attain a college degree.").

242 Seanna Leath, Channing Matthews, Aysa Harrison & Tabbye Chavous, *Racial Identity, Racial Discrimination, and Classroom Engagement Outcomes Among Black Girls and Boys in Predominantly Black and Predominantly White School Districts*, 56 AM. EDUC. RSCH. J. 1318 (Aug. 2019).

243 *See, e.g.*, Stephen Gandel, *A Judge Blocks the Workplace Provision of Florida's 'Stope WOKE Act.'*, N.Y. TIMES (Aug. 19, 2022), https://www.nytimes.com/2022/08/19/business/judge-blocks-florida-stop-woke.html [perma.cc/X2U5-2SDC] (discussing Florida's "Stop WOKE Act," which forbade discussion of racial bias during diversity training).

244 Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

245 Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How* Brown v. Board of Education *Helped to Further White Supremacy*, 105 VA. L. REV. 343, 355–57 (2019).

246 Ambria Mahomes, *You Rolled Your Eyes at Me: The Effects of Stereotypes and Implicit Bias on Black Girls and Discipline in the Classroom*, 10 J. RACE GENDER & POVERTY 39, 46 (2018-2019).

the direct impacts to the victims of discrimination, discrimination also perpetuates systemic inequalities and cycles of harm.

Not only does discrimination have negative impacts on those being discriminated against, but it harms an essential goal of the classroom that has wide-ranging benefits: diversity. Far from being a buzzword, diversity is critical to raising the quality of education, and thus the quality of students who turn out to be future leaders, scientists, and artists. Diversity in the classroom creates an "atmosphere of 'speculation, experiment, and creation'" that provokes a "robust exchange of ideas."[247] Diversity also helps promote cross-racial understanding, breaking racial stereotypes, improving workforce performance, improving national security, and improving civic participation.[248] Generally, diversity is an inherent part of an effective classroom.[249] When students graduate, the businesses,[250] governments,[251] and armed forces[252] they work at also benefit from diversity. Discrimination undermines diversity, both by creating an environment where subjects of discrimination are discouraged from participating or even attending,[253] and facilitating dropping out.[254] In short, discrimination does not simply have short-range harms; it affects the quality of education, which effectively undermines the goal of institutions and academic freedom to promote knowledge.

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[247] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (quoting (Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring) and Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

[248] Grutter v. Bollinger, 539 U.S. 306, 33–32 (2003).

[249] Sweatt v. Painter, 339 U.S. 629, 634 (1950).

[250] *See, e.g.*, MCKINSEY & CO., DIVERSITY WINS: HOW INCLUSION MATTERS 3 (2020), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf?shouldIndex=false [perma.cc/LFQ6-DHAJ] ("The business case for inclusion and diversity (I&D) is stronger than ever. For diverse companies, the likelihood of outperforming industry peers on profitability has increased over time, while the penalties are getting steeper for those lacking diversity.").

[251] *See, e.g.*, Anne R. Williamson & Michael J. Scicchitano, *Minority Representation and Political Efficacy in Public Meetings*, 96 SOC. SCI. Q. 576 (2015) (finding that when minorities participated in public meetings, they were more likely to report political efficacy).

[252] *See, e.g.*, JASON LYALL, DIVIDED ARMIES: INEQUALITY & BATTLEFIELD PERFORMANCE IN MODERN WAR (2020) (finding that the higher the inequality in a military force, the higher the rates of desertion, side-switching, casualties, and the need to use coercion to force soldiers to fight).

[253] Jonathan Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 71, 84, 86–90 (2013) (noting a correlation between a campus' racial climate and the diversity of the members of the institution).

[254] *See supra* notes 240240-241241 at 10 and accompanying discussion.

Taken together, this assortment of harms creates significant problems for our classrooms and broader society. Preventing discrimination is a critical part of reducing tangible harms and increasing the efficacy of our classrooms. Both these goals are not simply laudable: they are essential to ensuring that academic freedom exists and is achieved.

B. CONSTITUTIONAL PROTECTIONS AGAINST DISCRIMINATION

The Constitution contains two avenues of prohibitions of discrimination based on protected classes such as race, gender, national origin, and religion. First, the First Amendment's Establishment Clause prevents the government from "establishing" a religion.[255] Generally, this extends to preventing the government from enacting laws that are not religiously neutral[256] or imposing a religion on individuals.[257] Applied to academic freedom, this prevents public universities from making hiring and firing decisions that discriminate against teachers based on their religion, and similarly prevents public universities from discriminating against students' speech based on their religion. Second, the Fourteenth Amendment's Equal Protection Clause requires that public universities treat similarly situated individuals similarly. As noted, the Equal Protection Clause generally addresses issues of discrimination based on race, gender, national origin, and sexual orientation.[258] But the Court's rulings raise more questions than they answer about how to balance Equal Protection and First Amendment academic freedom rights. Finally, note that both the First Amendment and the Equal Protection Clause only apply to government entities, so this section necessarily deals with a limited framing of academic freedom. Specifically, First Amendment religious protections do not apply to private universities, as evidenced by the continued growth of religious

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255 U.S. CONST. amend. I.

256 *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice.").

257 *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (holding that the mandatory recitation of prayer in a public school breached the separation of church and state and violated the Establishment Clause).

258 *See supra* notes 217218-221 and accompanying discussion. Note that sexual orientation is likely protected by the Equal Protection Clause, though further clarity may be required to interpret the Supreme Court's ruling; *see* Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the fundamental right to marry is guaranteed to same-sex couples through the Due Process and Equal Protection Clauses, but not providing clarity on the level of scrutiny or whether both clauses are needed to grant those protections).

universities.[259] Generally, the Equal Protection Clause does not apply to private entities either.[260] But because constitutional protections provide more foundational protections than statutory protections,[261] the First and Fourteenth Amendments might provide more sturdy antidiscrimination support and outline the outer boundary protections of constitutional antidiscrimination principles at universities (since private universities can provide less protection). They also create the fundamental framework from which the antidiscrimination statutes being analyzed arise.

1. Religious Protections

When it comes to religious protections, the Court's rulings on the Establishment Clause provide strong support for religious neutrality, which supports academic freedom by preventing the government from making laws that trounce on schools' ability to determine their curriculum. This protects academic freedom and prevents state-based religious discrimination. However, when it comes to institutions themselves, the Court is highly deferential to religious institutions' claims that they adhere to academic freedom principles. It is also highly protective of religious students' academic freedom rights on campus. This section provides a brief overview of the Court's Establishment Clause and academic freedom cases.[262]

The Court is highly protective of academic freedom in the classroom, especially against state-based religious discrimination. For example, in *Epperson v. Arkansas*, the Court ruled as unconstitutional Arkansas' anti-

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259 *See, e.g.*, Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 316 ("Others have made the case that the first amendment [sic] protects religious institutions, especially their theology schools and seminaries, from regulation designed to enforce secular academic freedom . . . .").

260 *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) ("The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State . . . .").

261 *See* Marbury v. Madison, 5 U.S. 137, 180 (1803) ("It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank."). I hope Professor Mitchell Berman, my Constitutional Law professor, is amused and proud that I cited this.

262 For a more thorough discussion, *see generally* Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232 (arguing that the underlying goals of academic freedom are not served by its "indiscriminate extension" to religious college and universities).

evolution statute that prohibited teachers from using textbooks that supported evolution.[263] The Court found that the statute violated the Establishment Clause by supporting one religion's theories about the origin of man.[264] Alluding to students' academic freedom, the Court stated that because "the vigilant protection of constitutional freedoms" is most vital in the classroom, the Court needed to intervene to protect the "constitutional guarantees" of the classroom.[265] Similarly, in *Edwards v. Aguillard*, the Court struck down the Louisiana Creationism Act which required that public school teachers must teach "creation science" alongside the theory of evolution.[266] Although the state justified the Act by using academic freedom as a shield, stating that it provided teachers with flexibility to determine their curriculum, the Court found it hard to swallow that reasoning, noting that such a law would instead hinder their academic freedom.[267] The Court ultimately struck down the law because requiring the teaching of "creation science" undermined the scientific theory of evolution, and instead supported the religious beliefs of one religion.[268] In both *Epperson* and *Edwards*, the Court bolstered its Establishment Clause reasoning with its support for academic freedom for students and teachers, respectively.[269] And this support for students' and professors' academic freedom might undercut institutional academic freedom. For example, in *Pico*, the Court invalidated a school board's decision to remove library books that the board characterized as "anti-American, anti-Christian, [and] anti-[Semitic]."[270] While the school board had "significant discretion to determine the content of their school libraries," the board could not remove books "simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in . . . religion.'"[271] Instead, students' First Amendment right to receive information

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

264 *Id.* at 102–03.

265 *Id.* at 104–05 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

266 482 U.S. 578, 581 (1987).

267 *Id.* at 587.

268 *Id.* at 587–93.

269 There are a host of other cases that also support religious neutrality in school issues like mandatory school prayer, but that do not use academic freedom as a rationale. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (holding unconstitutional Alabama statutes that authorized time for voluntary prayer and for teachers to lead "willing students" in a prescribed prayer); Engel v. Vitale, 370 U.S. 421 (1962)257; Stone v. Graham, 449 U.S. 39 (1980) (holding unconstitutional Kentucky's statute requiring a copy of the Ten Commandments to be posted on the wall all state public classrooms).

270 Board of Education v. Pico, 457 U.S. 853, 857 (1982).

271 *Id.* at 870–72 (quoting W. Va. State Bd. of Ed. V. Barnette, 319 U.S. 624, 642 (1943)).

overrode the board's academic freedom right to determine the content of their libraries.[272]

However, where a law or government program is religiously neutral, the Court favors religious organizations and institutions receiving the benefits of these programs. For example, in *Tilton v. Richardson*, the Court held that a federal statute which provided federal aid to colleges including church-related institutions was constitutional.[273] The Court reasoned that such aid did not advance religion through government action, and that the religious institutions that were receiving aid were "characterized by an atmosphere of academic freedom rather than religious indoctrination."[274] But the Court went further, stating that "[m]any church-related colleges and universities are characterized by a high degree of academic freedom," indicating that without facts on the record suggesting otherwise, religious institutions are presumed to have academic freedom.[275] Similarly, in *Widmar v. Vincent*, the Court held that the (state) university could not exclude religious groups from using its facilities, because of protections in the Establishment Clause and the Free Exercise clause.[276] Justice Stevens noted in his concurrence that the use of the Establishment Clause strict scrutiny test for public forums could harm institutional academic freedom.[277] The Court responded that institutional academic freedom is limited to universities being able to make "academic judgments as to how best to allocate scarce resources" or to make hiring, admissions, and curriculum decisions, and that the public forum test is not subject to academic freedom limits.[278] A corollary of this reasoning is that *Widmar* protects students' academic freedom by ensuring that religious students do not have a hostile learning environment.[279] But if a religious organization—which under *Widmar* has a right to a public forum—is actively preaching against another protected class, that may create a hostile environment for the victims of the organization.[280] This presents a difficult

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272 *Id.* at 867–70.

273 403 U.S. 672, 674 (1971).

274 *Id.* at 680–81.

275 *Id.* at 686, 694.

276 454 U.S. 263, 273 (1981).

277 *Id.* at 277–78 (Stevens, J., concurring).

278 *Id.* at 276 & 276 n.20.

279 *See supra* notes 208-212 and accompanying discussion.

280 *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 447–50 (2011) (describing the Westboro Baptist Church's homophobic and emotionally distressing behavior at a soldier's funeral).

problem, where religious neutrality principles support religious tolerance, but may end up perpetuating other forms of discrimination.[281] In this case, what best advances knowledge is unclear. But *Widmar*'s line that protects religious student groups might be a reasonable one, simply because balancing discrimination of different student groups would be too subjective and would vary case-by-case, leading to an unadministrable, infeasible test. And of course, if First Amendment protections precede Equal Protection protections, then *Widmar*'s line is constitutionally sound.[282]

Finally, lower courts have used the *Lemon* test to determine whether institutional conduct regarding religious activity has an adequate secular object, assessing whether the rule has a secular purpose, whether the rule's primary effect advances or inhibits religion, and whether the rule results in excessive government entanglement with religion.[283] While *Lemon v. Kurtzman* has likely been overruled by *Kennedy v. Bremerton School District*,[284] *Lemon*'s implications on academic freedom may still be relevant and are worth briefly discussing. First, courts are hesitant to micromanage curricula and individual statements by teachers, and presume that institutional academic freedom protects such statements and curricula, erring towards assuming that such statements have educational and secular objectives.[285] Second, institutional policies that ban all religious activities of a specific type, such as banning religious holiday music, do not inherently disfavor religion and are within the purview of school administrators to decide.[286] Finally, consistent with *Tilton*, courts do not look behind the veil of a religious institution's statement of academic freedoms because examining whether statements of religious beliefs are consistent with scholarly objectivity would be excessive entanglement into religious affairs.[287] In short, under the *Lemon* test's secular objectives, courts

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281 *See, e.g.*, Masterpiece Cakeshop v. Colo. C.R. Comm., 138 S. Ct. 1719 (2018) (upholding a baker's refusal to bake a cake for a same-sex wedding under the First Amendment's Free Exercise Clause, even though the baker's decision discriminated against LGBTQ individuals).

282 *See infra* notes 291-294 291and accompanying discussion.

283 Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

284 142 S. Ct. 2407, 2427 (2022).

285 *See, e.g.*, Wood v. Arnold, 915 F.3d 308, 315–17 (4th Cir. 2019) (finding that a school's teaching of Islam in a comparative religion class was protected by academic freedom and had a secular purpose).

286 *See, e.g.*, Stratechuk v. Bd. of Educ., 587 F.3d 597, 606–08 (3d Cir. 2009) ("The constitutionality of a school board's policy toward religion cannot be decided by reference to popular opinion.").

287 *See, e.g.*, Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1265–66 (10th Cir. 2008) (rejecting a Colorado state official's second-guessing of the Christian University's statement of academic freedom).

are generally deferential to institutions and their decisions, which benefits and bolsters institutional academic freedom.

These Establishment Clause decisions provide us with a few overarching principles. First, where states try to impose bias towards one religion through curricular changes, teachers' and students' academic freedom support the Establishment Clause in preventing this type of bias. But when it comes to institutions themselves, the Court is deferential to an institution's professed adherence to academic freedom, and rightly errs on the side of preventing religious discrimination, even if the religions themselves have discriminatory beliefs. Finally, lower courts are also deferential to institutions when assessing whether institutional policies are secular in objective, raising the burden of proof for those claiming that they are being discriminated against based on religion. This topology is uneven: when it comes to states, teachers' and students' academic freedom prevails in preventing religious bias imposed by the government. But when it comes to institutions, institutional academic freedom supports a presumptive reading of institutional policies as secular, even if they are not.

2. Equal Protection Clause Protections Regarding Protected Classes

Few cases have addressed the intersection of the First Amendment's protections for academic freedom and the Fourteenth Amendment Equal Protection Clause's protections against discrimination. This creates some ambiguity as to what protections exist, and how far they go. Two principles arise: while the Supreme Court has only used academic freedom to assess affirmative action policies as subject to strict scrutiny under the Equal Protection Clause, lower courts have found that First Amendment principles generally are more protective than Equal Protection principles. Second, there is a fundamental misalignment: those who are excluded from the university, such as professors or students whose exclusion violates the Equal Protection Clause, do not have academic freedom because they are not tenured or admitted.

First, the Court has never directly addressed what prevails between constitutional academic freedom protections and antidiscrimination protections. However, in *Bakke*, the Court did use the idea of academic freedom to determine whether the University's policy survived heightened

scrutiny under the Equal Protection Clause.[288] The Court fleshed this out in *Grutter*, where it reasoned that "in keeping with [the] tradition of giving a degree of deference to a university's academic decisions," the Court would accept that "diversity is essential to [the University's] educational mission" as satisfying the compelling interest prong of strict scrutiny under the Equal Protection Clause.[289] In short, academic freedom helps support a university's race-based policies to promote diversity, furthering its antidiscrimination goals. However, lower courts have noted that "simply invoking a university's legitimate, but hardly dispositive, interest in academic freedom" is not enough to help survive strict scrutiny—it is simply a factor.[290]

Lower courts have been more active in this space. Of note, the Ninth Circuit recently addressed the issue in *Rodriguez v. Maricopa County Community College District*, where a certified class of the school district's Hispanic employees sued the defendant school district for failing to enforce existing anti-harassment policies when a professor at the school sent arguably racist or xenophobic emails that created a hostile work environment.[291] Plaintiffs claimed that the professor's speech was unlawful harassment, to which the court responded that plaintiff's "entire objection to [the professor's] speech is based entirely on his point of view . . . . There is no categorical 'harassment exception' to the First Amendment's free speech clause."[292] In addressing Equal Protection safeguards against harassment, the court noted that "First Amendment principles must guide our interpretation under the Equal Protection Clause. When Congress enacted the Fourteenth Amendment, it enshrined a concept of liberty that has been understood to include the 'general principle of free speech.'"[293] Thus, free speech principles—including academic freedom principles—prevail over Equal Protection considerations. Continuing, the court stated:

> Free speech has been a powerful force for the spread of equality under the law; we must not squelch that freedom because it may also be harnessed by those who promote retrograde or unattractive ways of thought . . . . Harassment law generally

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288 *See supra* notes 129-131 and accompanying discussion.

289 Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

290 Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237, 248 (6th Cir. 2006).

291 605 F.3d 703, 705–08 (9th Cir. 2010).

292 *Id.* at 708.

293 *Id.* at 709.

> targets conduct, and it sweeps in speech as harassment only when consistent with the First Amendment.[294]

Thus, the *Rodriguez* court seems to be indicating a distinction between words, thoughts, and ideas that are harassing, which are protected despite the Equal Protection Clause, and harassing acts, which are not protected. This idea/act line is a reasonable one to draw, considering the difficulty and arbitrariness of policing words that may only be subjectively problematic. Even so, one may imagine that these protections may allow hostile environments to flourish or persist.

Second, where the Equal Protection Clause *could* protect against discrimination, the multistakeholder nature of academic freedom creates problems. Where a law or policy chooses to exclude certain classes of people for hiring as teachers, those excluded people do not have any academic freedom to speak of. For example, in *Ambach v. Norwick*, the Court considered whether a New York state law that excluded noncitizen teachers from being allowed to teach in New York public schools was constitutional.[295] The Court found the law constitutional and found that it did not infringe upon academic freedom.[296] Specifically, the law did not "inhibit aliens from expressing freely their political or social views or from associating with whomever they please."[297] Because the excluded non-immigrant class of people were not tenured teachers, they had no academic freedom to protect. Similarly, because the schools themselves were not discriminating against tenured teachers, institutional academic freedom was not under scrutiny. And schools and institutions would have no way to bring an Equal Protection claim, since they are not the entities being discriminated against. *Ambach* represents an issue of misalignment: schools cannot bring Equal Protection claims on behalf of their teachers; those excluded from being hired cannot bring academic freedom claims in service of Equal Protection goals; and if students are excluded from a university, they similarly do not have academic freedom that needs to be protected.

In short, the Equal Protection Clause's intersection with the First Amendment's protections for academic freedom is unclear. At the Supreme Court, the intersection has hardly been tested. Lower courts provide some

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294 *Id.* at 709–10.

295 441 U.S. 68, 69 (1979).

296 *Id.* at 79 n.10.

297 *Id.*

clarity, but their answers are not definitive. However, when it comes to how academic freedom fares against antidiscrimination statutes, the answer is much easier to discern.

C. STATUTORY ANTIDISCRIMINATION PROTECTIONS

So far, the topology of academic freedom and the underlying stakeholders creates conflicting structures that may promote discrimination, and constitutional law provides some unclear and uncertain defenses against discrimination. This section analyzes statutory antidiscrimination law, looking at how statutory claims against universities regarding discriminatory acts have fared. The short answer is that antidiscrimination statutes have a mixed record, and academic freedom is one reason for that.

Three relevant statutes apply in academic freedom cases. Title VI of the Civil Rights Act prohibits "discrimination on the basis of race, color, or national origin in any program or activity that receives Federal funds or other Federal financial assistance."[298] This prohibits universities from discriminating against students and in tenure decisions based on protected classes. Title VII of the Civil Rights Act prohibits discrimination by covered employers on the bases of these protected classes.[299] This prohibits hiring and firing practices conducted by universities, thus protecting professors' academic freedom. And Title IX of the Education Amendments of 1972, modeled after Title VI,[300] prohibits sex-based discrimination in any school or educational program receiving funding from the federal government.[301] This prohibits universities from discriminating against students based on sex, thus protecting students' academic freedom. Taken together, these statutes provide some protection against discrimination for both students and professors.

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298 42 U.S.C. § 2000d.

299 42 U.S.C. § 2000e-2.

300 Alfred Dennis Mathewson, *Remediating Discrimination Against African American Female Athletes at the Intersection of Title IX and Title VI*, 2 WAKE FOREST J.L. & POL'Y 295, 305 & 305 n.76 (2012).

301 20 U.S.C. §§ 1681-1688.

1. Titles VI and Title IX: Protecting Against Discriminatory Admissions and Discriminatory Behavior Against Students

Generally, Title VI claims are brought against universities receiving federal funding where their admissions policies violate the Equal Protection Clause with respect to racial classifications.[302] Title VI also prohibits intentional discrimination and discrimination in administrative procedures (such as admissions processes) that are facially neutral but have a discriminatory effect against protected classes.[303] But few claims succeed under Title VI claims, both because plaintiffs need to show *intentional* discrimination, and because the reach of Title VI is narrow, especially in comparison to Title VII.[304] Where precedent exists, it indicates that—infrequently—institutional academic freedom can permit discrimination against students, or at least shield the discrimination under scrutiny when it comes to allegations of discrimination under Title VI. For example, where a faculty advisor supported allegedly antisemitic movements and allegedly made anti-Zionist comments, the advisor's speech was protected under academic freedom,[305] even though this could create a hostile learning environment for students. Effectively, the professor's academic freedom was used to cut against antidiscrimination principles. Even where there are substantial allegations of discrimination, courts are hesitant to trounce upon academic freedom unless there is a high likelihood of the discrimination claim prevailing.[306] Finally, the intent

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[302] *See, e.g.*, Regents of California v. Bakke, 438 U.S. 265, 284 (1978). Note also that Title VI does not apply to universities which do not receive federal funds; but the number of universities in that category is small: only 19 universities categorically do not receive federal funding and are thus not limited by Title VI. *See, e.g.*, Jay Schalin, *Breaking Away from Levithan: Colleges Can Thrive Without Federal Funding*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Aug. 10, 2022), https://www.jamesgmartin.center/2022/08/breaking-away-from-leviathan-colleges-can-thrive-without-federal-funding/ [perma.cc/6U9U-ZNMJ].

[303] *See, e.g.*, *Civil Rights Requirements – A. Title VI of the Civil Rights Act of 1964*, DEP'T OF HEALTH AND HUMAN SERVS. (July 26, 2013), https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/civil-rights-requirements/index.html [perma.cc/RA2R-FMX7].

[304] *See, e.g.*, Otero v. Mesa County Valley School Dist., 450 F. Supp 326, 331 (Dist. Colo. 1979).

[305] Mandel v. Bd. of Trs. of the Cal. State Univ., Case No.17-cv-03511-WHO, 2018 U.S. Dist. LEXIS 185871 at *49 (N.D. Cal. 2018). Note, however, that in this case the court did not assess whether the statements actually were antisemitic, but just that those statement are protected by academic freedom.

[306] *See, e.g.*, Equity in Ath., Inc. v. Dep't of Educ., 504 F. Supp. 2d 88, 101 (W.D. Va. 2007) ("While '[a]cademic freedom, of course, does not immunize defendants from civil liability, including injunctive relief, for any violations of the law . . . courts should be very cautious about overriding, even temporarily, a school's decisions [as to its athletic offerings], especially absent a showing that plaintiffs are likely to ultimately prevail.'") (citations omitted).

requirement under Title VI means that even where the learning environment is hostile (such as through the use of racial slurs and harassing behavior by other students), if plaintiffs cannot show intent, the claim will fail[307]—even though a racially hostile environment harms students' academic freedom by chilling their own First Amendment-protected speech.[308] Even getting to the intent aspect of a Title VI claim is difficult: only "severe, pervasive, and objectively offensive" and discriminatory harassment is actionable,[309] meaning that any "weak" harassment is not covered by the statute, despite it likely affecting students' performance in the classroom.[310]

While the case law under Title VI is mixed, the same cannot be said for Title IX case law, which deals with sex discrimination.[311] Common claims filed under Title IX have to do with gender-based and sexual harassment in the university environment.[312] Such harassment affects students' academic freedom in a multitude of ways: it creates a hostile learning environment because such harassment causes depressive symptoms, stress, anger, and negatively impacts self-esteem.[313] Further, where a teacher harasses students, the student is not receiving the "benefit of [the] teacher's best professional

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307 Fennell v. Marion Indep. Sch. Dist., 804 F.3d 398, 408–11 (5th Cir. 2015).

308 *See supra* Part 0.A, note 253, and accompanying discussion.

309 Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 665–66 (2d Cir. 2012).

310 *See supra* note 241.

311 The Court has interpreted Title IX to give individuals discriminated on the basis of sex a private right of action. Cannon v. Univ. of Chi., 441 U.S. 677 (1979). Ironically, Justice Powell, who had written the consequential opinion in *Bakke* that was the bedrock anti-discrimination affirmative action policies, dissented in favor of institutional academic freedom, noting that the Court's ruling "trenches on the authority of the academic community to govern itself . . . . Arming frustrated applicants with the power to challenge in court his or her rejection inevitably will have a constraining effect on admissions programs." *Id.* at 747.

312 Notably, 19% of students reported experiencing sexual harassment from faculty/staff and 30% reported experiencing sexual harassment from peers. Leila Wood, Sharon Hoefer, Matt Kammer-Kerwick, Jose Ruben Parra-Cardona & Noel Busch-Armendariz, *Sexual Harassment at Institutions of Higher Education: Prevalence, Risk, and Extent*, 36 J. INTERPERSONAL VIOLENCE 4520 (2021). One prominent example of this is former Princeton Professor Joshua Katz's dismissal, which was related to his "inappropriate conduct with a female student." Anemona Hartocollis, *Princeton Fires Tenured Professor in Campus Controversy*, N.Y. TIMES (May 23, 2022), https://www.nytimes.com/2022/05/23/us/princeton-fires-joshua-katz.html [perma.cc/J2LE-VMLC].

313 Jason N. Houle, Jeremy Staff, Jeylan T. Mortimer, Christopher Uggen & Amy Blackstone, *The Impact of Sexual Harassment On Depressive Symptoms During The Early Occupational Career*, 1 SOC'Y MENTAL HEALTH 89 (2011).

good faith judgment."[314] And instances of harassment certainly undermine the goals of the academic process[315] and of academic freedom because victims suffer from mental health problems, PTSD, physical pain, impaired career opportunities, reduced motivation, reduced productivity, and stress[316]—all of which are not conducive to learning or furthering knowledge.

Even though gender-based and sexual harassment impact students' academic freedom, Title IX claims often fail in court. First, because students are transient populations and because injuries from sexual harassment are difficult to "prove," courts have been hesitant to find such claims justiciable.[317] Second, plaintiffs also have a hard time showing that harassment took place, especially where the harassment is caused by professors or those of stature within the university.[318] This is partially because professors may play more than one role—they may be supervisors *and* teachers, both of which are subject to different standards of harassment. Thid, plaintiffs have a hard time holding institutions accountable, because universities claim that imposing liability on *universities* for verbal harassment would restrict the academic freedom of *professors*.[319] Fourth, where plaintiffs do bring a claim, they are worried about denial or retaliation from professors,[320] about plausible deniability from translucent institutional administrative processes,[321] and about having to answer to whether disciplining professors could constitute a burden on the professors' academic freedom.[322] And finally, where outright sexual assault has taken place on campus, students suffer mental and physical health problems that directly

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314 William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 153.

315 *See supra* notes 205207–208206 and accompanying discussion.

316 Fredrik Bondestam & Maja Lundqvist, *Sexual Harassment in Higher Education – A Systematic Review*, 10 EUR. J. HIGHER ED. 397, 404–05 (2020).

317 Alexander v. Yale Univ., 631 F.2d 178, 184–85 (2d Cir. 1980).

318 Kracunas v. Iona Coll., 119 F.3d 80, 87 (2d Cir. 1997).

319 *Id.* at 86–88.

320 Hayut v. State Univ. of N.Y. 352 F.3d 733, 749 (2d Cir. 2003) ("[I]t is entirely reasonable to believe that Hayut, in her first semester at SUNY New Paltz, was herself intimidated by Professor Young, and was hesitant to speak out for fear of potential verbal and academic backlash."). For an example of a denial or outright dishonesty regarding a sexual harassment investigation, see *supra* note 311 about Princeton Professor Joshua Katz. Interestingly, perhaps because of the difficulty of firing a professor under Title IX, Princeton found other reasons to fire him. *Id.*

321 Doe v. St. Francis Sch. Dist., 694 F.3d 869 (7th Cir. 2012).

322 Bonnell v. Lorenzo, 241 F.3d 800, 803–07, 822–24 (6th Cir. 2001).

affect their self-expression (and thus academic freedom)[323] and make the process of filing a claim and going through the arbitration, mediation, or litigation process challenging. And beyond these general structural challenges, bringing a successful sexual assault claim under Title IX is also difficult, if not impossible.[324]

Beyond harassment claims, academic freedom is also invoked where more subtle instances of gender-based discrimination take place within the classroom. For example, in *Meriwether v. Hartop*, Professor Meriwether refused to use a student's preferred gender pronouns when addressing her in class, because of the Professor's religious beliefs.[325] The court ruled that this was not discriminatory under Title IX, because Title IX requires "'that the discrimination occur under any education program or activity'," meaning that the behavior needs to have a systemic effect that denies the "victim equal access to an educational program or activity."[326] The court held that the professor's behavior was not serious enough to cause these problems, and the professor had rights to academic freedom and free speech protections that permitted his behavior.[327] While the underlying merits of the case are debatable, *Meriwether* represents the proposition that academic freedom is used by professors to protect their behavior, even when not directly related to their area of expertise or related to the purpose of furthering knowledge.[328]

In sum, the case law around Titles VI and IX in the context of university admissions is mixed. On the one hand, Title VI prohibits discriminatory policies by universities. On the other hand, the showing of intentional discrimination under Title VI makes it difficult to bring discrimination claims against universities. Similarly, claims under Title IX are difficult to bring because of the inherent difficulties in proving, for example, harassment.[329] But

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323 *See, e.g.*, Emily R. Dworkin, Suvarna V. Menon, Jonathan Brstrynski & Nicole E. Allen, *Sexual Assault Victimization and Psychopathology: A Review and Meta-Analysis*, 56 CHILD PSYCH. REV. 65 (2017) ("[Sexual Assault] was associated with increased risk for all forms of psychopathology assessed, and stronger associations were observed for posttraumatic stress and suicidality. Effects endured across differences in sample demographics.").

324 *See generally* Erika Weiler, *The Growing Plague: Title IX, Universities, and Sexual Assault*, 8 ARIZ. ST. U. SPORTS & ENT. L.J. 138 (2019).

325 992 F.3d 492, 498–501 (6th Cir. 2021).

326 *Id.* at 511.

327 *Id.* at 503–05.

328 *See supra* notes 185-191 182and accompanying discussion.

329 *See, e.g.*, Emily Suski, *The Title IX Paradox*, 108 CALIF. L. REV. 1147, 1147–48 (2020) (discussing difficulties in filing harassment claims under Title IX from a psychological perspective).

courts have also been skeptical of the injuries that arise from harassment, and the dynamic at universities makes it doubly difficult to bring harassment claims under Title IX. To top it all off, instances of discrimination and harassment affect students' academic freedom, chilling their speech or cutting their speech off altogether; universities use their own academic freedom, or the academic freedom of professors, as a shield to prevent these claims from moving forward; and professors may use academic freedom as a sword to cut down discrimination claims.

2. Title VII: Tenure-Granting and Tenure-Revoking Decisions

Title VII claims apply to tenure-granting and tenure-revoking decisions.[330] Under Title VII, a complainant—here a professor who has not been granted tenure—carries the burden to establish a prima facie case of facial discrimination.[331] The burden then shifts to the employer to provide nondiscriminatory and legitimate reasons for the employee's rejection, after which the employee must show that the employer's interests could have been achieved via less discriminatory means or that the employer's decision was pretextual.[332] This framework applies in the university employment context,[333] but with an addition: tenured professors have the right to a pretermination hearing—"'something less' than a full evidentiary hearing."[334]

The problem under Title VII claims is getting to the latter steps of the burden-shifting framework. In instances where professors are not granted tenure for allegedly discriminatory reasons, universities try to hide behind the veil of academic freedom in preventing the legal process from shedding light on why the professor was not granted tenure. This means that achieving the burden of establishing a prima facie case of discrimination becomes incredibly difficult, especially subject to the *Twombly* and *Iqbal* pleading standard.[335] For example, in *University of Pennsylvania v. EEOC*, the University denied tenure

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330 Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 333–34 (1990).

331 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).x

332 *Id.* at 802–04.

333 Hall, *supra* note 9999, at 99–100.

334 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985). *See supra* notes 155158–166163 and accompanying text for a detailed discussion.

335 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'").

to a Chinese-American female professor, who filed a complaint with the Equal Employment Opportunity Commission (EEOC) under Title VII.[336] The University refused to provide peer-review files and documents reflecting internal deliberations during the tenure process to the EEOC, claiming the First Amendment right of academic freedom prevented the disclosure of these documents.[337] The Court rejected the University's academic freedom argument, noting that the EEOC was not attempting to shape the *content* of the University's speech, and that the EEOC was not usurping the discretion of the University to hire as it pleased.[338] The Court noted that protecting peer-review would be an expansion of academic freedom, and that disclosure to the EEOC would have an attenuated, remote, and speculative impact on the University's First Amendment rights.[339] Although the Court decided in favor of the professor and EEOC, the case represents how Universities attempt to use academic freedom to perpetuate discrimination, raising the challenges of bringing litigation.

Where the veil of peer-review has been pierced, establishing the prima facie case is difficult. This is partially because it is hard to "prove" discrimination in evaluations that are a factor in granting tenure, especially where evaluations cover mixed ground, some of which can be racially motivated (for example, critiquing a professor's focus on racial topics) and some of which can be pedagogically-related (for example, critiquing a professor for not being able to cover all the course materials because of their focus on racial topics). For example, in *Jiminez v. Mary Washington College*, petitioner had received negative student-evaluations—although there was evidence that there was a concerted and racist effort by students to negatively evaluate him.[340] But because student evaluations are anonymous and proving racial animus in these evaluations is difficult, if not impossible, those evaluations were nonetheless taken into consideration in the petitioner's tenure hearing.[341] Similarly, where retaliation for filing suit or sexual harassment is involved, it is nearly impossible to show the creation of a

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336 493 U.S. 182, 185 (1990).

337 *Id.* at 186–88.

338 *Id.* at 198.

339 *Id.* at 199–201.

340 57 F.3d 369, 373–74 (4th Cir. 1995).

341 *Id.* at 375.

"material disadvantage" that leads to a "tangible change in . . . working conditions."[342]

Further in the burden-shifting process, professors have a difficult time showing that the reason for not granting tenure is pretextual. First, getting to the "showing pretext" part of the process is difficult because the professor has to show that the original reason for not being hired was false, *and* that discrimination was the real reason.[343] Second, showing that discrimination was the real reason is difficult because tenure standards are not objective and quantifiable, meaning that the standards can be unclear and can easily be used pretextually; and because, unlike other jobs, there are few objective ways of measuring a professor's performance outside of subjective peer- and student-evaluations.[344] Generally, pretext for not hiring is only easily established when there is evidence of outright racism in the evaluation process, such as the use of racial slurs or stereotyping.[345] While *University of Pennsylvania* held that institutional academic freedom cannot be used to protect peer-evaluation information in a discriminatory hiring claim, these limitations are not enough. The tenure-granting process is still conducted by the university and is opaque by definition, and those without tenure often have a hard time understanding what evidence can be accessed and whether the tenure-granting process has been entirely fair and non-selective in looking at the evidence.[346]

Even so, in some instances, courts will pierce the veil of university hiring decisions to determine whether a decision was pretextual. But in these cases, *how* courts analyze whether a university's decision was pretextual is often

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342 Jill Bodensteiner, *Employment Discrimination in Higher Education - A Review of the Case Law from 2000*, 28 J. COLL. & UNIV. L. 347, 360–64 (2002).

343 Adams v. Trs. of the Univ. of N. Carolina-Wilmington, 640 F.3d 550, 559–60 (4th Cir. 2011).

344 Fisher v. Vassar Coll., 70 F.3d 1420, 1435 (2d Cir. 1995).

345 Bodensteiner, *supra* note 342342, at 371 (describing evidence of racial slurs and stereotyping as adequate evidence to establish pretext). But even this is difficult where there are multiple layers of review that mask the effect of racial animus, though such layers of review could also diminish the effect of such animus. *See, e.g.*, Sun v. Bd. of Trs. of the Univ. of Ill., 473 F.3d 799, 813 (7th Cir. 2007) (observing that the "numerous levels of review . . . broke any connection between . . . possible discriminatory motive and the ultimate decision").

346 70 F.3d at 1435 ("The district court found that the biology department had distorted Fisher's teaching recommendations by 'selectively excluding favorable ratings,' by 'focusing on the two courses in which Dr. Fisher had difficulties' and by 'applying different standards to her than were applied to other tenure candidates.'") (internal brackets omitted).

subjective and hard to predict.[347] And plaintiffs attempting to prove discriminatory intent have a heavy burden of proof, needing to show not just discrimination within the tenure committee, but also bias by university administrators, which might require detailed non-public evidence and is generally subjective evidence that juries do not always find convincing.[348] Additionally, showing pretext might require comparing the rejected plaintiff applicant's expertise with that of a comparable professor who was promoted or hired. However, in academia, professors often do not have comparable peers because they have unique specializations and because it is hard to objectively measure comparative skill and ability.[349]

There are similar difficulties in having a professor removed for discriminatory behavior as a tenured professor. First, because of the expansive perception of academic freedom and the confusion surrounding whether professors' extramural speech is protected under academic freedom or under general First Amendment principles, the lines are blurred when it comes to whether a professor's discriminatory extramural speech is protected by academic freedom.[350] For example, in *McAdams v. Marquette University*, petitioner professor's tenure contract was revoked because he wrote a blog post criticizing an encounter between an instructor and student, where the instructor said that gay rights are not up for debate.[351] McAdams called the instructor's attitude "totalitarian," and directed people to contact the instructor, who ultimately received offensive and violent messages from third parties.[352] Although the court correctly decided that Marquette wrongly fired McAdams, the underlying reasoning is concerning. First, the court stated that McAdams' statements were protected by academic freedom, though it is

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347 David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 289 ("[E]vidence of pretext has frequently involved familiar judicial analysis of motivation based on factors that are not unique to a university environment, such as the timing of a decision and objective quantitative data.").

348 *See, e.g.*, Brown v. Trs. of Boston Univ., 891 F.2d 337, 346–52 (1st Cir. 1989) (where the plaintiff showed detailed evidence of the tenure committee's deliberations, as well as remarks by the university president, and a letter from the program's dean regarding his attitude towards Brown's scholarship); Whiting v. Jackson State Univ., 616 F.2d 116, 126 (5th Cir. 1980) (discussing the subjectivity of the evidence offered to show pretext).

349 Smith v. Univ. of N.C. at Chapel Hill, 632 F.2d 316, 342–44 (4th Cir. 1980).

350 FINKIN & POST, *supra* note 1313, at 136–37; *see supra* notes 180-184 and accompanying discussion.

351 914 N.W.2d 708, 713–14 (Wis. 2018).

352 *Id.* at 714.

unclear whether his speech was related in any way to his professed expertise, or whether it was plainly extramural speech that should not be protected by academic freedom but by the First Amendment.[353] Worse, the court deferred to the university's definition of academic freedom, even though that definition clearly limited McAdams' speech by requiring that he "should at all times be accurate [and] should exercise appropriate restraint."[354] By that very standard, McAdams' behavior violated the university's own academic freedom policies. Here, the court was exceedingly deferential to the professor's academic freedom, even when his speech violated the university's own code of conduct and had little to do with the goals of academic freedom.

Additionally, the need for pretermination hearings[355] creates hurdles in bringing claims of just cause, incompetence, insubordination, and discrimination.[356] There are no court-mandated fixed procedural standards for how these hearings are held in practice, leaving vague the specific evidentiary procedures, transparency requirements, what constitutes adequate cause,[357] and burdens of proof and production.[358] The AAUP has guidelines which provide general recommendations of how to design these procedural standards, but that means the implementation of these standards may vary from university to university, hindering the creation of comparable precedent and predictable procedure.[359] And because professors so rarely have their tenure revoked, there is little internal precedent to provide guidance.[360] Additionally, universities have no incentive to be transparent about these hearings, especially where instances of harassment and discrimination take place, leading to bad press.[361] And plaintiffs—likely students, or non-tenured

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353 *Id.* at 712.

354 *Id.* at 730.

355 Board of Regents v. Roth, 408 U.S. 564, 564 (1972).

356 *See supra* note 148157163 and accompanying discussion.

357 Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 328.

358 *See, e.g.*, *Statement on Procedural Standards in Faculty Dismissal Proceedings*, AAUP, https://www.aaup.org/report/statement-procedural-standards-faculty-dismissal-proceedings (last visited May 5, 2022) [perma.cc/K9KB-VARQ].

359 *See supra* Section III.B.2.

360 *See supra* note 148 (noting that only 50 to 75 revocations of tenure take place annually, which creates little precedent).

361 Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 345 n.118 (1990) (noting that universities are not incentivized to publicize instances where professors are fired for harassment, permitting those professors to commit similar acts at other universities).

faculty or staff—are also transient populations with little time to bring such claims against faculty, and have little familiarity with the systems and procedures involved in bringing such claims. Finally, these transient populations have more at stake: they must balance their responsibilities as students or non-tenured staff with bringing these claims against professors, while also fearing for retaliation from established scholars in the field.[362] Taken together, the deck is stacked heavily in favor of professors involved in misconduct and who should otherwise be fired. At best, this means an undeserving professor keeps their job. At worst, this lack of justice might perpetuate a cycle of discrimination and misconduct.

D. CONCLUSION

Both constitutional protections and statutory antidiscrimination protections provide some support against discrimination in universities. They also provide some answers to the four issues noted in Part 0.0: what is the hierarchy of academic freedoms; what are the boundaries of each academic freedom; how should acts that violate academic freedom be curtailed; and how do we determine which truths to protect?

First, the Establishment Clause protects teachers' and students' academic freedom against state action that creates curricular religious bias. It also requires that institutions do not discriminate against students based on their religious beliefs. On the other hand, the Court also presumes that institutions—whether religious or secular—adhere to the principles of academic freedom. This sets up a conflict: the Court could defer to an institution's professed adherence to academic freedom, even where it is discriminating against a specific religion.

Second, the Equal Protection Clause provides little in the way of antidiscrimination protections. Institutional academic freedom can be used as a factor for surviving Equal Protection strict scrutiny in justifying protected class-based admissions policies. But where a teacher or student creates a hostile work or learning environment, harassing words are protected by the First Amendment, even if they undermine other students' academic freedom

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[362] *See, e.g.*, Esteban Bustillos, *Lawsuit Alleges Harvard Ignored A Decade Of Professor's Sexual Harassment, Retaliation*, GBH NEWS (Feb. 8, 2022), https://www.wgbh.org/news/education/2022/02/08/lawsuit-alleges-harvard-ignored-a-decade-of-professors-sexual-harassment-retaliation [perma.cc/ZBE8-M7NK].

right to a non-hostile learning environment. Harassing acts, however, could violate the Equal Protection Clause. More problematically, where universities discriminate in hiring or admissions, academic freedom provides little protection. Non-hired teachers who are discriminated against have no academic freedom to speak of, since they are not hired. Similarly, non-admitted students do not have academic freedom, since they are not students.

While Titles VI (protection based on race), VII (hiring protections), and IX (protections against sex discrimination) provide stronger textual protections, in practice academic freedom blunts these tools. Title VI requires showing intentional discrimination, which has a steep evidentiary burden. Where faculty make discriminatory statements, that speech might be protected by professors' academic freedom (at the expense of students' academic freedom), and courts are generally hesitant to trounce upon that academic freedom unless there are *substantial* allegations of discrimination. Second, Title IX claims regarding sexual harassment are difficult to bring because of systemic hurdles. Title IX claims regarding sex discrimination by professors are difficult to bring because the line between what speech is protected by professors' academic freedom and what isn't is hard to discern—but ultimately, that sex discrimination harms students' academic freedom. Finally, Title VII claims regarding discriminatory hiring also face an uphill battle. Candidates need to show that their lack of hiring was pretextual, which requires piercing the veil of the peer-review process, which the Court has permitted despite claims of institutional academic freedom. But even then, because the tenure process is subjective and opaque, "proving" pretext is difficult. However, these claims are easier to bring than universities' moves to remove professors for cause. If a professor's speech is discriminatory, it may still be protected by academic freedom—at the expense of a university's own academic freedom rights to hire and fire.

Hierarchically, this means that professors' academic freedom receives deference across both constitutional and statutory law. Institutional academic freedom receives deference under constitutional law, and institutions attempt to use academic freedom to protect their hiring and firing decisions—but courts are willing to pierce the veil of academic freedom in preventing discrimination in employment decisions. Ultimately, this deference to institutional and professorial academic freedom, combined with the lack of focus in the legal sphere about the contours of students' academic freedom, means that students' academic freedom is the victim and falls to a "second tier" of

academic freedom. This two-tiered structure of academic freedom might perpetuate instances of discrimination against students, partially because discriminatory language is protected by the First Amendment.[363] For example, if a university chooses to hire a professor known for problematic racial statements, that decision receives deference in courts. If a student is victim to discriminatory speech by the professor within the classroom because the professor expresses ideas or beliefs that are discriminatory, that speech is protected by the First Amendment. But both acts harm students: they are now situated in a hostile learning environment, and are no longer able to participate in the transfer of knowledge that academic freedom intended to facilitate.

In terms of line-drawing, it is clear from this analysis that courts generally are expansive in their reading of professorial and institutional academic freedom. Although professorial academic freedom should only protect speech related to the professor's expertise and made on academic grounds, courts protect professors' extramural speech even if unrelated to their expertise. This does not advance the ultimate purpose of academic freedom to advance knowledge and the truth.

Finally, in terms of enforcement, courts simply do not analyze the underlying goals of academic freedom, and err on the side of caution when deciding whether to contract the boundaries of academic freedom. By doing so, they escape addressing whether there should be any lines drawn: it does not matter whether an act is in service of the search for the truth, because academic freedom for professors and institutions is expansive and overinclusive. Thus, whether a professor or institution uses their speech to undermine the truth—contrary to the goals of academic freedom—does not matter, and so defining the underlying truth is an irrelevant exercise.

These conclusions are concerning. First, students' academic freedom matters, even if not fleshed out in theory or in the law. At the very least, the original definition of academic freedom included the freedom to learn (*lernfreiheit*).[364] Second, the definition of academic freedom varies across theory and law, which furthers the two-tiered hierarchy by making academic

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[363] Rodney A. Smolla, *Academic Freedom, Hate Speech, and The Idea of a University*, in FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 202–05. Note that only *some* harmful speech is protected by the First Amendment. Discriminatory speech encourages or causes violence, that is unprotected; but most discriminatory speech falls within the realm of "reactive harms" such as the infliction of emotional distress, and such speech is protected by the First Amendment.

[364] *Supra* note 37.

freedom protections for professors and institutions overinclusive, and prevents us from discerning the boundaries of academic freedom. The varying definitions of academic freedom "have developed in response to actual historical circumstances."[365] But if our current definition and structure of academic freedom perpetuates discrimination, or at the very least allows discriminatory behavior to be furthered or shielded by academic freedom, perhaps a redefinition or refinement is in order. This is especially true because the original definition of academic freedom, in the AAUP's 1915 *Statement*, was written by fifteen white male university presidents and administrators.[366] The 1940 *Declaration* was signed on to by a variety of academic interest groups, but it is likely that antidiscrimination was not a critical issue at a time when school segregation was the norm and few, if any non-white and non-male professors existed.[367] The current university environment is fraught with issues of discrimination, especially as the U.S. reckons with issues of police brutality,[368] gender-based violence,[369] attacks on

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[365] David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, in FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 229.

[366] *1915 AAUP Declaration*, *supra* note 39.

[367] The 1940 *Declaration* was written by professors and university presidents. Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 L. & CONTEMP. PROBS. 3 (Summer 1990). In 1940, only four colleges had women as presidents, most of which were small institutions. *List of women presidents or chancellors of co-ed colleges and universities*, WIKIPEDIA (last accessed Sept. 14, 2022), https://en.wikipedia.org/wiki/List_of_women_presidents_or_chancellors_of_co-ed_colleges_and_universities [perma.cc/EBA2-JGS2]. At that time, there were zero Black female presidents. Sandra Jackson & Sandra Harris, *African American Female College and University Presidents: Career Path to the Presidency*, 165 J. WOMEN IN ED. LEADERSHIP 7 (2005).

[368] *See, e.g.*, *George Floyd: Timeline of Black Deaths and Protests*, BBC (Apr. 22, 2021), https://www.bbc.com/news/world-us-canada-52905408 [perma.cc/QXS8-S8AW] (describing recent publicized cases of police shootings).

[369] Emiko Petrosky et. al, *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence – United States, 2003-2014*, 66 MORBIDITY AND MORTALITY WEEKLY REP. 741, 741 (2017), https://www.cdc.gov/mmwr/volumes/66/wr/pdfs/mm6628a1.pdf [perma.cc/RHC9-GP9V] ("Over half of all homicides (55.3%) were [intimate partner violence] related . . . .").

women's rights,[370] societal inequalities,[371] and immigration crises.[372] Perhaps this change in our present "historical circumstances" requires a reframing of how we define academic freedom. If the original theorists of academic freedom also had issues of discrimination at the forefront of their minds—as professors, students, and universities alike now do—the definition may have been more adequate for our times. This reframing could incorporate antidiscrimination principles to ensure that the "marketplace of ideas" that is the classroom is accessible by all, making it a true free marketplace.[373]

III. REDEFINING ACADEMIC FREEDOM AND RETHINKING ITS PROTECTIONS

Academic freedom is one of the foundational principles of this country, fueling not simply independence of thought and the strength of our democracy, but also ensuring that this country progresses intellectually. There is no question that academic freedom provides inherent value and protects us against state overreach and needless and harmful restrictions on speech. But our current conception of academic freedom falls short. I propose four solutions to refine our academic freedom jurisprudence and theory so that it better achieves its goals, while ensuring that acts of discrimination are prevented. First, universities and lawyers need to more clearly define academic freedom to align academic freedom with its goals, and need to incorporate antidiscrimination principles when doing so. Second, more attention needs to be given to defining and protecting students' academic freedom. Third, there needs to be an effective judicial test that balances the interests of different stakeholders of academic freedom. Finally, universities need to create systems that can help further antidiscrimination litigation while protecting professors' and universities' academic freedom.

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370 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling *Roe v. Wade* and ruling that there is no constitutional right to an abortion).

371 *Trends in Income and Wealth Inequality*, PEW (Jan. 9, 2020), https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/ [perma.cc/YT97-5UXT] ("The growth in income in recent decades has tilted to upper-income households. At the same time, the U.S. middle class, which once comprised the clear majority of Americans, is shrinking.").

372 Ana Raquel Minian, *The Long History of the U.S. Immigration Crisis*, FOREIGN AFFAIRS (Mar. 14, 2022), https://www.foreignaffairs.com/articles/mexico/2022-03-14/long-history-us-immigration-crisis [perma.cc/SV86-RJJR].

373 Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

A. REFINING THE DEFINITION OF ACADEMIC FREEDOM

At their core, universities and professors together further the precepts of academic freedom. But universities' own codes of conduct are ambiguous as to the definition and scope of academic freedom, and to whom it applies.[374] Universities also do not clearly outline how behavioral standards for professors reconcile with professors' academic freedom, and whether the university's academic freedom in hiring and firing trumps the professor's academic freedom in teaching and defining their curriculum.[375] They also hardly, if ever, discuss students' academic freedom.

First, universities, professors, students, and the AAUP need to participate in a process to rethink our current conception of academic freedom. The 1940 *Statement* states that the goal of academic freedom is the "advancement of truth . . . . the protection of the rights of the teacher in teaching and of the student to freedom in learning."[376] But the *Statement* only discusses what academic freedom entails for teachers,[377] and provides no guidelines for what freedoms students have. A refined statement can create clarity and parity between the different stakeholders by beginning to define students' rights. A refined definition should also include antidiscrimination considerations, including ensuring fair treatment within the university. The definition should also allude to an outer boundary: that *acts* of discrimination against protected classes cannot be protected.

Opponents of incorporating these principles might argue that institutions of higher education will fail to welcome new ideas.[378] But this proposed redefinition—which should be written through a multistakeholder process—is not limiting what ideas should be explored. Rather, it is simply suggesting that

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374 *See, e.g.*, *University of Pennsylvania Faculty Handbook § II.A Academic Freedom and Responsibility*, U. OF PA., https://catalog.upenn.edu/faculty-handbook/ii/ii-e/ [perma.cc/V54D-LUJ5] (last visited May 5, 2022) (defining the tenure process and procedures for defining and enforcing academic freedom, but not actually defining what academic freedom means and how far it extends).

375 *See, e.g.*, *University of Pennsylvania Principles of Responsible Conduct, Principle One: Ethical and Responsible Conduct*, https://oacp.upenn.edu/oacp-principles/ethical-and-responsible-conduct/ [perma.cc/H6JF-NBQV] (last visited May 5, 2022) (similarly not providing context about how academic freedom is reconciled with the guidelines for behavioral conduct).

376 *Id.*

377 *See supra* note 42–48 and accompanying discussion.

378 Judith Jarvis Thomson, *Ideology and Faculty Selection*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 155–56.

students' interests—which are part of academic freedom—be considered when determining how to optimize the search for the truth. That fairness is one factor in this search is likely to make academic freedom more effective, by attempting to minimize the harms arising from discrimination.[379] Notably, this proposal is not suggesting that the ideas themselves be "fair"—if a professor wants to explore theories of eugenics or racial superiority, that is unfortunately protected by academic freedom. Even so, if that professor is attempting to raise spurious theories that have already been discredited as defined by other experts in the field, perhaps that is no longer part of the search for the truth and should not be protected.[380] Regardless, that research and exploration should not trounce upon how students are treated within the classroom, nor should it (consistent with the current *Statement*) protect professors' non-academic non-expertise-related extramural speech. In fact, this redefinition shouldn't be used to limit ideas at all; only acts of discrimination against protected classes. Finally, limiting this redefinition to protect only protected classes forecloses politicizing what ideas are protected, because political preference is not a protected class—so the definition cannot be used to favor a political agenda.[381]

Additionally, universities need to provide more clarity in their codes of conduct and faculty handbooks. While there are some advantages to ambiguity, such as providing flexibility to the university when it comes to complex issues of discrimination, harassment, or employment generally, those advantages are outweighed by the current issues surrounding race and discrimination on campus. By providing clearer definitions of what academic freedom covers and how to balance the academic freedom of different stakeholders, universities can provide clearer guidance to professors and students on permissible behavior. This isn't to further litigation against universities; rather, it is to help more clearly model conduct in classrooms and provide guardrails and guidance both for professors and students who are currently reaching in the dark.

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379 *See supra* Part 0.0.

380 *Id.* at 162–63.

381 *See, e.g.*, *Who is Protected from Employment Discrimination*, EEOC (last visited Sept. 15, 2022), https://www.eeoc.gov/employers/small-business/3-who-protected-employment-discrimination [perma.cc/VB2J-SDYY] ("Applicants, employees and former employees are protected from employment discrimination based on race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, age (40 or older), disability and genetic information (including family medical history).").

Finally, universities should also ensure that academic freedom protects a professor's speech when that speech is concerned with their area of (democratic) competence.[382] Academic freedom should not protect a professor's speech when they participate in matters of public concern *as citizens*, rather than as experts in their field. To do so would be both to damage the goals of academic freedom by legitimizing professors as experts of everything rather than their specific subjects, and by furthering the image of elitism that already surrounds universities.[383] Lawyers have a significant role to play: our legal system permits too many instances of using academic freedom as a defense for all professorial speech, thus reducing its value by its omnipresence.[384] Both lawyers and universities need to work together to delineate the scope of academic freedom accurately and not overinclusively. To do so will promote academic freedom's legitimacy, while ensuring it achieves its goals of advancing knowledge.

B. REFOCUSING ON STUDENTS' ACADEMIC FREEDOM

As noted, students' academic freedom is neither fleshed out in theory or in doctrine. Providing clarity as to what students' academic freedom covers, as well as providing that information to students, might help ensure that students are better-equipped to fully realize these rights. This is especially true because discriminatory behavior by the university or professors could violate students' academic freedom rights to proper performance and a non-hostile learning environment. Further, where professors' speech violates university policy regarding behavior that could be construed as insubordination and a just cause for firing; or where a professor's speech is not protected by academic freedom, students ought to know what remedies are available to them.

First, to advance antidiscrimination goals and to protect students' academic freedom, universities should include student academic freedom rights as part

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382 FINKIN & POST, FOR THE PRINCIPLES OF ACADEMIC FREEDOM, *supra* note 1313, at 135.

383 *See, e.g.*, Stephanie Marken, *Half in U.S. Now Consider College Education Very Important*, GALLUP (Dec. 30, 2019), https://www.gallup.com/education/272228/half-consider-college-education-important.aspx [perma.cc/E9MK-695E] ("[I]f a college education continues to feel out of reach for many and its value or political neutrality/integrity is questioned, fewer may take advantage of this unique and transformative experience."); Benjamin Wermund, *University Presidents: We've Been Blindsided*, POLITICO (Dec. 19, 2017), https://www.politico.com/story/2017/12/19/college-university-backlash-elitism-296898 [perma.cc/TRS8-XW9M] (discussing the current debate about universities being a bastion for elitism).

384 Similar to the boy who cried wolf.

of a student handbook, akin to the faculty handbook.[385] This information should also include information about how to report faculty misconduct, what kinds of recourse are available, and what faculty behavior is protected. Although this runs the risk of increasing litigation, most students do not have the resources or time to engage in unfounded litigation. On the other hand, access to this information may increase student complaints against faculty members. But this may be because students are currently underreporting misconduct due to not knowing about their rights. And it may also help to preserve evidence, especially where the transience of student populations may make it difficult to gather evidence *ex post* because the students are no longer at the university,[386] do not have university email accounts, or simply have clouded memories.

Additionally, universities should go beyond simply providing information, and instead engage with students when discussing students' academic freedom. Actively communicating their rights to them is important. But equally important is having a dialogue with students or student leaders to have the student body be involved in shaping how far their academic freedom rights go, and helping fine-tune the details of this as-yet-unsculpted right. This is especially relevant considering the transience of student populations, and the lack of incentives for students to unilaterally engage with universities proactively unless they are actively facing discrimination on campus. And considering how students' academic freedom rights are the least defined of the three, having students provide their input as to what kinds of discrimination they are facing within the classroom or the university might help administrators proactively address those problems, rather than leaving it to institutional or professorial academic freedom to perpetuate and protect problematic behavior.

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385 *See, e.g.*, *University of Pennsylvania Faculty Handbook*, U. OF PA., https://catalog.upenn.edu/faculty-handbook [perma.cc/HZL6-J2XW] (last visited Sept. 14, 2022). *See* Matthew W. Finkin, *"A Higher Order of Liberty in the Workplace:" Academic Freedom and Tenure in the Vortex of Employment Practices and Law*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 3232, at 360–61 for a discussion on what faculty handbooks generally contain, and their legal validity.

386 This is the case both when dealing with sexual harassment issues, *supra* Part 0.0.0, and when a professor's discriminatory behavior takes place across years or decades. *See, e.g.*, Irin Carmon, *The Tiger Mom and the Hornet's Nest*, N.Y. MAG. (June 7, 2021), https://nymag.com/intelligencer/2021/06/amy-chua-jed-rubenfeld-yale-law.html [perma.cc/JHW3-FV38] (detailing allegations of sexual harassment against Yale Law School Professor Jed Rubenfeld, with "[t]he oldest formal allegation against him [involving] events as far back as 20 years ago, and as recently as 2017").

C. RETHINKING THE TWO-TIERED HIERARCHY

With or without a more sculpted academic freedom for students, the two-tiered hierarchy of academic freedom, with institutional and professorial academic freedom often taking precedence over students' academic freedom, creates problems as noted in Part 0.0. As of now, courts have rarely dealt explicitly with competing claims of academic freedom, though their decisions often implicitly favor institutional or professorial academic freedom at the expense of students' academic freedom. But lower courts have also proposed some ways of assessing competing interests.

In *Hardy v. Jefferson Community College*, the Sixth Circuit used a balancing test that looked at competing interests between the professor's academic freedom rights in his speech, and the university's academic freedom rights to control course curriculum and its pedagogical methods, ultimately looking at whether the professor's speech advanced an academic message.[387] Such a balancing test, coupled with a clearer definition of student academic freedom, might be one way to resolve instances in which multistakeholder academic freedom problems arise. But it may also be too subjective, because it is ultimately for the court to determine what the value of the factors on each side of the scale are. *Brown v. Li* provides an alternate approach, where Judge Reinhardt in dissent suggested "adopt[ing] an intermediate level of scrutiny for regulations of student speech in college and graduate programs. Under an intermediate level of scrutiny, the university would have the burden of demonstrating that its regulation of college and graduate student speech was substantially related to an important pedagogical purpose."[388] This suggestion provides stronger support for students' academic freedom when it comes to their speech, but may not protect them *against* discriminatory acts, behavior, or policies from the university or professors. While it helps enable one right, it may not holistically protect students' academic freedom. Similarly, the Supreme Court's test on secondary education-related administrative curtailments of school speech in *Hazelwood School District v. Kulheimer* asks whether the curtailment of student speech is "reasonably related to legitimate pedagogical concerns."[389] However, as noted, university students have more

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387 260 F.3d 671, 679 (6th Cir. 2001).

388 308 F.3d 939, 964 (9th Cir. 2002) (Reinhardt, J., dissenting).

389 484 U.S. 260, 273 (1988).

expansive academic freedom than secondary school students, so this test might be underprotective of students' academic freedom rights.

Fine-tuning these proposed tests is best left to the courts, considering that many variables must be evaluated, including how students' academic freedom develops. But a balancing test that strives to determine which competing academic freedoms best serve the underlying goals of a refined definition of academic freedom, including the goals of advancing knowledge and the search for truth, might produce optimal outcomes. Such a balancing test might look at three factors: (1) whether each competing academic freedom helps advance knowledge and the search for truth; (2) whether each competing academic freedom achieves any legitimate pedagogical concerns as noted under *Kulheimer*; and (3) whether each competing academic freedom harms another by promulgating discrimination or unfairness.

Ultimately, however, courts should be involved in the process of developing academic freedom doctrine, albeit with restraint. Although institutional academic freedom may be strained if courts pierce the veil, this pressure might also create incentives for institutions to amicably solve disputes under their own roofs, or at least develop procedures that are more likely to solve them. But courts are best positioned to flesh out the outer limits of the three strains of academic freedom, and ensure that they hew closely to the theoretical underpinnings of academic freedom.[390] However, courts must be careful to ensure that the academic judgment of universities, including hiring decisions, should not be subject to the compelling state interest test that controls the government's regulation of speech.[391] More specifically, deferring to judicial review means hoping that judges are restrained enough not to inject state interests in their decisions.

Finally, note that a rethinking of the definition of academic freedom, a clearer definition of the outer bounds of students' academic freedom, and a better judicial test to balance the multistakeholder process will still raise several questions about the "permissibility" of certain ideas in the classroom. There will always be a gray zone between "unpopular" ideas and ideas that actively

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[390] *See* David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 290–94 (discussing how judicial review might be beneficial in some cases).

[391] *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69, 80 n.4 (1983).

perpetuate discrimination and cause harm.[392] For example, statements about Israel's skirmishes in Gaza could be unpopular, or could verge on being anti-Semitic.[393] Although unsatisfying, whether to protect the statement or protect the victims will ultimately depend on the specifics of the case, but we can look to several signposts to navigate this veritable minefield.

First, at the very least, universities and courts should not punish professors for their beliefs alone.[394] The underlying reason for those beliefs matters.[395] For example, if a professor thinks that Israel's behavior with respect to Gaza is problematic because they don't think Israel has a right to exist, that would raise questions regarding anti-Semitism. But if they hold such a belief simply because they are appalled at the tactics on the ground, that could be considered less problematic.[396] Second, if that belief raises questions about that professor's competence in their field, that may also be reason to punish.[397] For example, if a physics professor believes that the Earth is flat, that is likely a reason to fire or not hire them. Third, if that belief causes a professor's attitude towards certain students, colleagues, or staff to be unfair or unequal, that moves from belief to behavior, which should be punishable.[398] Similarly, behavior matters: where an individual has misbehaved in the past, that may be

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[392] David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 267–68 ("In universities protected by academic freedom, . . . unpopular ideas . . . remain available to the broader society.").

[393] *See, e.g.*, Robert Mackey, *Professor's Angry Tweets on Gaza Cost Him a Job*, N.Y. TIMES (Sept. 12, 2014), https://www.nytimes.com/2014/09/13/world/middleeast/professors-angry-tweets-on-gaza-cost-him-a-job.html [perma.cc/25KL-EQLQ] (describing this incident).

[394] *See* Judith Jarvis Thomson, *Ideology and Faculty Selection*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 167–68 (detailing why holding beliefs by themselves are inconclusive to indicate problematic outcomes).

[395] *Id.*

[396] Of course, how to decipher what motivates a belief is a difficult task, and one beyond the scope of this paper.

[397] *Id.* at 171. *See also* David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 242 ("[A] professor speaking within his field of expertise may be disciplined without violating constitutional academic freedom for speech that otherwise would be protected under the free speech clause of the first amendment. 'The price of an exceptional vocational freedom to speak the truth as one sees it,' Professor Van Alstyne astutely observes, 'is the cost of exceptional care in the representation of that 'truth,' a professional standard of care.' Grossly inaccurate speech about the Holocaust, for example, could be cause for dismissing a historian for incompetence, but not for taking any adverse action against a professor in the school.").

[398] Judith Jarvis Thomson, *Ideology and Faculty Selection*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 165.

reason to expect future misbehavior.[399] Academic freedom makes professors intellectual free agents, but not behavioral ones.[400] Finally, the tenor of the speech matters: if the professor makes repeatedly problematic statements that are not in line with the AAUP's protection of accurate, respectful, or restrained speech may indicate problematic behavior, attitude, or a hostile learning environment.[401] Even if a professor believes in a loathsome idea, that does not give them permission to "engage in racist, sexist, or homophobic attacks during class, even though those attacks may be protected in the open marketplace," because such behavior would undermine students' academic freedom.[402]

Despite these guideposts preventing an outright war on academic freedom, there are reasons to be concerned. Professors will be skeptical of a multifactorial test to determine whether their behavior is "appropriate," especially given all the other burdensome duties they are responsible for. However, this approach is likely to protect professors for controversial statements more than it is likely to punish them for innocent statements. Further, it encourages care when it comes to extramural speech unrelated to their discipline, which is not protected by academic freedom theory. In the long run, this might improve the credibility of professors and universities. Besides professors, universities and the academic community are likely to be concerned that this type of analysis will also bear attack from those wishing to weaponize academic freedom to punish ideologies that lean liberal or promote diversity and antidiscrimination. But this multifactorial analysis is meant to be independent of ideology, only finding speech coupled with problematic behavior, attitude, incompetence, lack of accuracy, or hostility to be worth curtailing. The problem is simply not the idea that a professor holds, but how that impacts students and the university, and how it is expressed. Such an analysis hardly chooses which "truths" are the "right truths," instead looking at circumstances and all stakeholders to determine whether behavior is harmful.

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399 *Id.* at 168–69.

400 Rodney A. Smolla, *Academic Freedom, Hate Speech, and The Idea of a University*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 222.

401 *1940 AAUP Statement*, *supra* note 38.

402 Rodney A. Smolla, *Academic Freedom, Hate Speech, and The Idea of a University*, *in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 32, at 221. As Smolla notes, lewd, obscene, profane, libelous, or insulting speech is not protected by the First Amendment, and should not be protected within the classroom. *Id.* at 207–08, 221.

D. CREATING PROCESSES TO PROTECT ACADEMIC FREEDOM AND MITIGATE DISCRIMINATION

Definitional clarity and improved judicial implementation of these definitions will be impotent if universities lack processes to mediate and resolve instances of discrimination where they flourish. Universities must facilitate systemic change to ensure that where discrimination takes place, it is easier to sort through whether that discrimination infringed upon a student's academic freedom, and in the process violated university behavioral standards.

First, as noted, professors can have their tenure revoked for just cause (academic dishonesty, fraud, and immorality); incompetence; insubordination; and unlawful discrimination.[403] But each of these just causes is undefined. Stakeholders in the educational system do not need precise definitions for each of these, but they do need guideposts to help determine where a professor's behavior goes too far. Additionally, professors need these guideposts to ensure that universities do not punish them for doing what academic freedom permits them to do. Without examples or definitional clarity, universities effectively are giving professorial academic freedom a carte blanche: because universities are risk-averse and because professorial academic freedom is the most expansive and well-defined of the three strains of academic freedom, that freedom is likely to override some of these just causes.

Second, universities need to define and standardize pretermination processes and develop regulations, guidelines, or internal case law. As noted, only 0.03% of professors have their tenure revoked annually.[404] This provides little precedent for either professors or universities to work with, and universities should not be making these rules up on the fly. Although courts have not specified what constitutes an adequate pretermination process, that should not prevent universities from defining it.[405] Some of the pertinent issues that need clarity include evidentiary standards, burdens of proof and production, standards of proof, rights to counsel, timelines, and transparency requirements. Of note, transparency may help ease the growing distrust of

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403 *See supra* notes 148–157 and accompanying discussion.

404 James C. Wetherbe, *It's Time For Tenure To Lose Tenure*, HARV. BUS. REV. (Mar. 13, 2013).

405 *See supra* note 334 and accompanying discussion.

universities to handle these processes,[406] and may help reassure minority communities that discriminatory acts are being handled fairly and in a timely manner.

Third, universities should create processes to collect complaints of discrimination and harassment, and evidence of such behavior. As noted, non-tenured stakeholders are transient populations at universities, and their fleeting presence at a university contrasts with the lengthy time it takes to conduct a pretermination hearing or post-termination court hearing. By creating a process by which universities can keep track of such acts, universities are advantaged on two fronts. First, they can attempt to address discriminatory issues in a de-escalatory manner when they first appear—for example, by providing a professor with resources to fix their behavior, or providing mediation between the professor and aggrieved students or other faculty. Second, they can track a pattern or practice of discrimination and a failure of the professor to correct themselves, which can facilitate rooting out problematic professors by revoking their tenure. By doing this *ex ante*, rather than *ex post*, universities can create a smoother and more effective internal legal system.

Finally, universities must collect statistics of both their hiring processes and instances of discrimination. Although this creates a risk of another discoverable material in potential court cases, it also provides universities with mechanisms to regulate themselves and root out discrimination both at the hiring level and the teaching level. By monitoring the diversity of faculty and the rate of hiring across different protected classes (race, gender, sexuality, ethnicity, and religion), universities can improve their hiring practices to improve the diversity of their faculty, thereby creating a better education system.[407] This also promotes self-regulation, mitigating the need for judicial piercing of the veil. And by monitoring instances of discrimination on campus, universities can improve on-campus atmosphere, and therefore improve the learning environment—and academic freedom—for students.

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[406] *See, e.g.*, Adrienne Green, *The Cost Of Balancing Academia And Racism*, ATLANTIC (Jan. 21, 2016), https://www.theatlantic.com/education/archive/2016/01/balancing-academia-racism/424887/ [perma.cc/6ECK-C4P5] ("That black students utilize mental-health services much less may also reflect a cultural mistrust of the universities, according to some research. The racism that students experience on their campuses suggests that colleges and universities are systems that perpetuate their pain.").

[407] *See supra* notes 247–49 and accompanying discussion.

CONCLUSION

The terrain of academic freedom is far more complex than its original theorizers likely intended it to be. The three strains of academic freedom—institutional, professorial, and students'—have varying degrees of clarity in both theory and in doctrine. And doctrine provides little guidance as to how to balance the clash of these academic freedoms. Worse, constitutional and statutory law provide conflicting and weak protections against discrimination, especially when one of the proponents of that discrimination holds a form of academic freedom.

While there is no doubt that academic freedom for all three stakeholders is invaluable, as individual instances of racism rise and proof of systemic discrimination in our institutions of education emerges, modifications to our understanding of academic freedom are necessary if we are to create a more just and fair educational system, which ultimately will better serve the purpose of academic freedom to advance knowledge. These improvements include refining the definition of academic freedom to incorporate antidiscrimination tenets that are more suitable for our current historical era. They also include fleshing out how far students' academic freedom goes, and ensuring that courts are equipped to address this multistakeholder environment through some test. Finally, universities must implement systemic improvements.

But these are minor changes, and are addressing an undefined, unexplored space. And even with this theorizing, problematizing, and ideating, this article raises the need for more research. First, there may be distinctions between academic freedom in private and public institutions. Second, more nuance may be needed to address whether academic freedom in cases addressing secondary institutions is the same as academic freedom at universities. Third, there is a distinct lack of data regarding how institutions use academic freedom in their own internal processes to prevent or cover-up discrimination, and deeper analysis might reveal whether academic freedom is used as a sword or shield in such cases. But most importantly, more discussion and debate is needed about whether this article's proposals and arguments will harm academic freedom in the future. The ideas in this piece are solutions to a genuine problem causing harm to millions, but may also be weaponized by those who want to quash a spectrum of political thought and allow more illiberal ideas to prevail. Whether that happens in the future depends on the multitude of unknowns this paper has identified.

Ultimately, however, the increasing number of conflicts between professors, students, and institutions regarding speech, behavior, and protections indicates that something needs to change. Too much harm is being caused because of discrimination, and too little has been done to adapt our conception of academic freedom to be more inclusive to everyone on a university's campus. Such changes will only make the concept of academic freedom more fruitful to all its stakeholders, and in the process, advance the search for the truth—which is preferable to lies.