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Renewing Educational Autonomy

I. Introduction

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

In its earliest articulations, the Court examined government incursions into academic life by looking at its impacts on private rights of donors, trustees, and administrators, adopting arguments that came to be associated with the constitutional doctrine of substantive due process. The concept of academic freedom as a professional value for university faculty did not emerge until the turn of the twentieth century with the founding of the American Association of University Professors. And it was only in the mid-1950s, as the Court began to see cases challenging the abuses of the McCarthy era investigations, that academic freedom gained constitutional dimensions. Within a few decades, these protections for individual instructors against the state (and the institution in the case of the public school or university) were well-established in First Amendment law. This evolution has not come without its challenges. Understanding academic freedom primarily as an employment protection for faculty has created some uncertainty in light of the Court's doctrine First Amendment rights of public employees. Moreover, the important but somewhat narrow focus on the research and teaching of faculty has excluded from protection a wide variety of educational decisions made outside this scope.

In this essay, I suggest that we should reconsider and reinvigorate the concept of educational autonomy under a substantive due process theory. I recognize that this is a counter-intuitive argument at a time when the First Amendment is ascendent, and substantive due process is falling out of favor. Nonetheless, as we face unprecedented attacks on the project of higher education, we need more robust arguments that recognize and protect not only the teaching and scholarship we produce, which are themselves threatened, but also the communities we build that make those activities both possible and accessible. Part II of this essay briefly tracks the historical development of the Court's approach to the regulation of colleges and universities from its early focus on due process liberties to its current position in First Amendment doctrine, illustrating how this transition has shaped the idea of academic freedom and its protections. In Part III, I describe more fully the significant limits to current conceptions of academic freedom in First Amendment

doctrine. Finally in Part IV, I illustrate how these limits intersect with the challenges of the current moment for American colleges and universities, and I suggest possibilities for resurrecting a more robust version of educational autonomy under substantive due process theory.

II. From Institutional Autonomy to Academic Freedom

The debate over the autonomy of colleges and universities has been a preoccupation since early in the history of the American republic. The Court's earliest tangle with the independence of higher education came in *Trustees of Dartmouth College v. Woodward*.[1] Around 1754, a Reverend Eleazor Wheelock founded at his own expense and on his own land an "Indian charity school." The endeavor proved so successful that Wheelock sent a representative to England, along with an Indian minister educated in his school, to solicit donations for its expansion and to invite those donors to serve on its board of trustees. Wheelock further invited the donors to participate in deciding on a permanent home for the school, deciding among offers made by "several American governments." Ultimately, the decision was made to place the school in New Hampshire, and to incorporate it under the state's law, with all powers related to managing the school vested in the trustees.

The dispute in *Dartmouth College* arose out of an attempt by the New Hampshire legislature to place the private college under public control by expanding its board of trustees to include nine new members appointed by the governor and council, dissolving the original corporation, and creating a new one which would take over all the rights and privileges of the prior corporation. The case came to the court on the issue as to whether the college's charter was a contract, and if so, whether the legislation unconstitutionally impaired the right of contract in violation of the federal constitution. Daniel Webster argued the case on behalf of the original trustees before the United States Supreme Court, emphasizing the impact of upholding the legislation on the burgeoning educational system. This is an extraordinary case, he explained, in that "[i]t affects not this college only, but every college, and all the literary institutions of the country. . . ." Moreover, Webster warned, "It will be a dangerous, a most dangerous, experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuation of political opinions. . . ." with the result that "[c]olleges and halls will be deserted by all better spirits, and become a theatre for the contention of politics; party and faction will be cherished in the places consecrated to piety and learning."[2]

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

[1] 17 U.S. (4 Wheat.) 518 (1819).
[2] *Id.* at 598-99.

to the will of the donors, and is subversive of that contract, on the faith of which their property was given.[3]

Twenty years later, in *Vidal v. Girard's Executors*,[4] the Court was again asked to consider what power, if any, the public had over private education. This time the case involved a significant founding bequest to a school educating white male orphans that prohibited "ecclesiastic, missionary, or minister of any sect whatsoever"[5] from working or even visiting its campus. The challenge was brought by the donors' own relatives, who argued in part that the condition was in violation of the state's public policy. Writing for the Court, Justice Story again sidestepped the issue. "[T]he question is," he wrote, "whether the exclusion be not such as the testator had a right, consistently with the laws of Pennsylvania, to maintain, upon his own notions of religious instruction. Suppose the testator had excluded all religious instructors but Catholics, or Quakers, or Swedenborgians; or, to put a stronger case, he had excluded all religious instructors but Jews, would the bequest have been void on that account?" Ultimately, Story concluded, "that in cases of this sort, it is extremely difficult to draw any just and satisfactory line of distinction in a free country as to the qualifications or disqualifications which may be insisted upon by the donor of a charity as to those who shall administer or partake of his bounty."

Over the course of the following century, lower courts regularly drew on these early cases to address the relationship between legislative power and both public and private colleges. In *Allen v. McKean*, Justice Story sitting as Circuit Justice, held that the Maine legislature had overstepped in its firing of Bowdoin's president, even though the college had been created with public funds and its charter reserved substantial rights to the legislature.[6] Story determined, relying on *Dartmouth College,* that a legislature is not exempt from being bound by the authority granted to a chartered corporation, and thus the Maine legislature could not make decisions given by the state of Massachusetts to the Bowdoin College trustees at the time of its establishment.[7] Conversely, in 1871, the Supreme Court of Missouri held that its state legislature had the ability to fire the entire faculty of its university because its founding legislation explicitly "provided for its control and government, through its own agents and appointees,"[8] with power vested in its board "made subject to the pleasure of the Legislature."[9] [10]

By the time the question of the public role in private higher education reached the Court again, the country was in a much different place, and far more was at stake. In the years immediately preceding the Civil War, abolitionist John G. Fee established a college in Kentucky dedicated to integrated education and opposition to slavery. After being forced out by threats of violence, Fee returned followed the Civil War to incorporate his racially integrated, co-educational college in 1859. In 1904, the state passed legislation prohibiting interracial education. The

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[3] *Id*. at 652-53.
[4] 43 U.S. 127 (1844).
[5] *Id*. at 133.
[6] Allen v. McKean, 1. F. Cas. 489, 497 (C.C.D. Me. 1833).
[7] *Id.* at 499-500
[8] Head v. Curators of the Univ. of the State of Mo., 47 Mo. 220, 224-25 (1871).
[9] *Id.* Professor Rabban has performed a helpful survey of these early cases. See David M. Rabban, *From Impairment of Contracts to Institutional Academic Freedom: The Enduring Significance of the* Dartmouth College *Cases*, 18 U.N.H. L. Rev. 9 (2019).

Kentucky courts upheld the legislation against Berea's challenges based on the Kentucky Bill or Rights and the Fourteenth Amendment, finding that the State had an interest in discouraging interracial marriage and preventing racial conflict. The Supreme Court affirmed, by only by willfully ignoring the clear intent of Berea's founders.[11] The Court held that the legislation did not interfere with the Berea's charter providing for interracial education because the College could still educate both White and Black students, just not in the same classrooms.

In short, in these early cases concerning the role of public oversight in higher education, the courts were largely unwilling to accept entreaties by either governments or colleges to make broad pronouncements about the role of institutions of higher education, choosing to focus instead on rather detailed interpretations of wills and charters. On the other hand, they did engage seriously with the pluralistic nature of higher education in the young nation through a willingness to understand the founding structure of an institution as integral to its mission.

Following the Civil War, U.S. academics began to travel to Europe and found universities ordered not according to donors' desires or their teachings of their sponsoring denomination, but rather infused with a commitment to academic freedom, both for faculty and students, reinforcement by a system of internal self-government. They returned to this country, eager to transplant these ideals and norms into the American system of higher education. In 1915, the American Association of University Professors Declaration of Principles proposed "not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion, and of teaching." These discussions provided the backdrop for the Court's earliest cases considering constitutional claims of educational autonomy.

In the 1920s, several Midwestern states passed legislation prohibiting schools from teaching languages other than English. The challenge that reached the Supreme Court first was to a Nebraska law, which banned non-English instruction in both private and public schools. The case arose as an appeal of the criminal conviction of an instructor hired to teach German. In reversing his conviction, the Court relied on the theory of substantive due process as articulated in the case of *Lochner v. New York*. In *Lochner*, the Court struck down a New York law forbidding employees from working more than ten hours a day in commercial bakeries, on the grounds that the legislation interfered with the liberty right of employers and employees to engage in mutually agreeable contract. *Meyer v. Nebraska* picked up on this thread, referencing the Fourteenth Amendment's protection of the liberty right "to contract, to engage in any of the common occupations of life, to acquire useful knowledge . . . and to marry, establish a home, and bring up children . . ."[12] The Court explained that, [t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."[13] Thus, "it is the natural duty of the parent to give his children education suitable to their station in life . . . ."[14] Noting the importance of "qualified" teachers to the success of the academic endeavor "essential . . . to the public welfare," the Court determined that the educator's

[11] 211 U.S. 45 (1908))
[12] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[13] *Id.* at 400.
[14] *Id.*

"right to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the amendment."[15]

Only two years later, in *Pierce v. Society of the Sisters of the Holy Name of Jesus*, the Court considered a challenge to an Oregon statute requiring all children to participate in public education.[16] The case was brought by two private schools where enrollment was declining as a result of the new statute. Relying on its holding in *Meyer*, the Court struck down the statute as "unreasonably interfere[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[17] The Court acknowledged that the plaintiffs in this case were corporations not teachers, but found that "they have business and property for which they claim protection" that was "threatened with destruction" by the legislation.[18] While *Lochner* proceeded to fall out favor for decades, insofar as it limited governmental power to engage in economic regulation, these cases remain good law in the Court's line of substantive due process doctrine. Notably, *Meyer* is significant because the regulated behavior (the teaching of German for hire) stretches the boundaries of what would qualify as expressive activities warranting First Amendment protection.

By the time the concept of academic freedom appeared explicitly in the Supreme Court's jurisprudence, the McCarthy era was in full swing, and the First Amendment was newly invigorated. In *Adler v. Board of Education of the City of New York*, the Court considered the constitutionality of a statute excluding from employment in public schools, persons who "advocate the overthrow of the Government by unlawful means or who are members of organizations having like purpose."[19] The statute, known as the Feinberg Law, went to provide that membership in an identified subversive group would constitute *prima facie* evidence sufficient to disqualify a current or prospective employee.[20] The Court's majority sustained the statute, noting that while members of these organizations had the write to "speak, think, and believe as they will," they did not have the "right to work for the State in the school system on their own terms."[21] Dissenting, Justice Douglas wrote movingly of the harms posed by the statute, not only to schools, but also to American national identity and government. "This system of spying and surveillance with its accompanying reports and trials," he explained, "cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect. A system which directly or inevitably has that effect is alien to our system and should be struck down. Its survival is a real threat to our way of life."[22]

Later that same term, the Court again had the opportunity to reflect on academic freedom in *Wieman v. Updegraff*, a case arising out of an Oklahoma statute requiring all public employees to adopt a loyalty oath as a condition of employment.[23] The majority distinguished *Adler* in

[15] *Id.* In *Bartels v. Iowa*, the Court applied the reasoning of *Meyer* to reverse similar convictions of teachers in Iowa and Ohio. 262 U.S. 404 (1923).
[16] *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925)..
[17] *Id.* at 534-35.
[18] *Id.* 535.
[19] 342 U.S. 485, 490 (1952)
[20] *Id.* at 490-91.
[21] *Id.* at 492.
[22] *Id.* at 501-11.
[23] 342 U.S. 183 (1952).

striking down the requirement,[24] with Justice Frankfurter, joined by Justice Douglas, writing separately in concurrence to address its applicability to teachers, "the priests of democracy."[25] Frankfurter emphasized the importance of the teacher's role, "to the effective exercise of the rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment . . ."[26] These types of regulations on teachers, he explained "ha[ve] an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice."[27] He concluded by noting that "[t]he functions of educational institutions in our national life and the conditions under which they alone can adequately perform them are at the basis of these limitations upon State and National power." [28] The *Wieman* case was notable in that Frankfurter linked protection of academic freedom for the first time explicitly to the First and Fourteenth Amendments, with the effect of limiting government intrusions on public, as well as private teaching institutions. In addition, he drew the connection between protecting the rights of individual teachers to the broader role of educational institutions in society.

Frankfurter further elaborated on these themes in *Sweezy v. New Hampshire*.[29] Paul Sweezy was convicted for failure to answer questions from the New Hampshire Attorney General, including some that focused on his lectures at the University of New Hampshire. [30] A plurality of the Court reversed the conviction, focusing on the absence of legislative authorization justifying the infringement on Sweezy's constitutional liberties. [31] Justice Frankfurter, joined by Justice Harlan, concurred, making special note of the problem of "governmental intervention in the intellectual life of a university."[32] In so doing, Frankfurter drew a parallel to a statement by the faculties of the open universities of South Africa, resisting the government's efforts to set racially discriminatory admissions policies, which read: "'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, and how it shall be taught, and who may be admitted to study.'"[33] While disclaiming the view that New Hampshire's actions were equal to those of the South African government, Frankfurter warned that "in these matters of the spirit inroads on legitimacy must be resisted at their incipiency."[34]

In the following years, the Court solidified its commitment to academic freedom for teachers. At the same time, however, it sometimes draw boundaries around the classroom that seemed to exclude protections for other forms of academic decision-making. One such case involved Lloyd Barenblatt, who refused to testify before the House Committee on Un-American Activities regarding his political affiliations during his time as a graduate student.[35] At the time

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[24] *Id.* at 191-92.
[25] I*d.* at 196.
[26] Id. at 195.
[27] *Id.*
[28] *Id.* at 197.
[29] 354 U.S. 234 (1957).
[30] *Id.* at 243-44.
[31] *Id.* at 244-45.
[32] *Id.* at 262.
[33] *Id.* at 263 (quoting THE OPEN UNIVERSITY IN SOUTH AFRICA 10-12).
[34] *Id.*
[35] *Barenblatt v. U.S.* 360 U.S. 109, 113-14 (1959).

of his appearance before the committee, Barenblatt had no formal affiliation with a university. Nonetheless, he relied on the *Sweezy* concurrence to argue that requiring him to testify posed a threat to the intellectual life of the university.[36] Justice Harlan's opinion for the narrow majority, which was joined by Justice Frankfurter, rejected this claim:

> [B]roadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary . . . .[37]

Nonetheless, by the time the Court was again asked to review the Feinberg Law, in *Keyishian v. Board of Regents*, First Amendment protections for academic freedom were firmly established. In departing from its holding in *Adler*, Justice Brennan noted that: "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."[38] The following term the Court struck down an anti-evolution statute with Justice Abe Fortas concluding that, "It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees."[39]

In the years that followed, the Court occasionally considered cases falling into the penumbra of First Amendment academic freedom rights, generally involving decisions made by faculty as part of academic governance processes like admissions.[40] The approach in these cases reflected "a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, 'a special concern of the First Amendment,'"[41] More generally, the Court emphasized the importance of deference to the expertise of school administrators on a range of academic and operational decisions, except insofar

[36] Brief for the Petitioner, 1958 WL 91978 at *25-27.

[37] *Id.* at 112.

[38] 385 U.S. 589, 603 (1967).

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

[40] See Grutter, ec. See also Lieberman v. Gant, 630 F.2d 60, 67-68 (2d Cir. 1980); Kunda v. Muhlenberg College, 621 F.2d 532, 547-48 (3d Cir. 1980) (deference to tenure decisions).

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as constitutional protections were implicated[42] (and sometimes even then).[43] In these cases, the basis of the conflict was generally a challenge to school policy by faculty or students. Thus, the development of the jurisprudence turned toward understanding the rights of educational institutions *vis a vis* the people who populate them. This shift in focus meant that even as the scope of academic freedom became more defined, the contours of the state's ability to shape and control college and universities has remained uncertain.

III. The Limits of the First Amendment (and of Academic Freedom)

By the turn of the 21st century, the concept of academic freedom was firmly established as in First Amendment law, [44] expanded and reinforced by the soft law of the AAUP, well-recognized by accreditors as being a significant component of a well-run college or university, and an integral part of faculty governance in American institutions of higher education. This right to academic freedom attaches to individual faculty members, protecting the right to teach and write free from state control or retaliation. Nonetheless, locating academic freedom in the individual protections of the First Amendment has not been without its challenges. First, subsequent developments in the law governing the speech rights of government employees have raised questions about how the modern Court would interpret the scope of academic freedom rights of the faculty at public universities. Second, the singular focus on protecting faculty in the classroom has left a wide variety of crucial educational decisions open to government intervention.

A. Academic Freedom after *Pickering* and *Garcetti*

Faculty at public colleges and universities are also state employees. In *Pickering v. Board of Education*, the Court considered the case of a school teacher who wrote a critical letter to the newspaper related to the funding policies of his school board.[45] The *Pickering* Court explained its reasoning in the case as an attempt to strike to "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concerns and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[46] In reaching this holding, the Court noted that allowing public employees to participate in civic debate was important to ensuring an informed populous and effective democracy. In this case, the Court noted that teachers are among those most likely to have useful information about the impacts

[42] Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661 (2010); Grutter v. Bollinger, 539 U.S. 306 (2003) ("The Court defers to the Law School's educational judgment that diversity is essential to its educational mission.") Board of Ed. of Hendrick Hudson Central School Dist. Westchester Cty. v. Rowley, 458 U.S. 176 (1982); Hazelwood School Dist., v. Kuhlemeier, 484 U.S. 260 (1998) (noting the Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges"); Healy, 408 U.S. at 180 ("[T]his Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the school.'") (quoting Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 507 (1969)).
[43] *See, e.g.*, Morse v. Frederick
[44] And even this is still open to conflicting interpretations. *See e.g.*, Urofsky v. Gilmore, 316 F.3d 401 (4th Cir. 2000) ("Despite these accolades [for academic freedom], the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom."). Peter Byrne, The Threat to Constitutional Academic Freedom, 31 J.C
[45] 391 U.S. 563 (1968).
[46] *Id.* at 568.

of school board operations. Ultimately, the Court concluded that the teacher's letter impeded neither his performance in the classroom, nor the orderly administration of the schools, therefore "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[47]

The *Pickering* framework thus asks whether the employee's speech was made "as a citizen on a matter of public concern" and, if so, whether that speech was sufficiently disruptive to the operations of the relevant government entity to justify an employment action. Notably, however, *Pickering* seemed to indicate that speech made in the course of public employment, even if important to the public debate, might be outside the protections of the First Amendment. The challenges of limiting First Amendment protections only to speech made outside the course of employment became apparent in *Garcetti v. Ceballos*.[48]

Garcetti involved the case of a supervising district attorney, Richard Ceballos, who was asked by defense counsel in a case to review the accuracy of an affidavit used to obtain an important warrant. Ceballos did so and found what he believed to be serious misrepresentations, which he documented in a memo to his supervisors, who nonetheless chose to prosecute the case. Ceballos was called by defense counsel and testified on the contents of the memo. Subsequently, he was demoted from his supervisory position, transferred, and denied a promotion. Ceballos then filed a lawsuit contending that these employment actions violated his First and Fourteenth Amendment rights. Writing for a narrowly divided Court, Justice Kennedy held that because drafting a memo was an ordinary job duty for Ceballos, it was not protected by the First Amendment. In dissent, Justice Souter reiterated the importance of the information public employees contribute to democratic discourse and noted the perverse incentive created by the Court's decision, which might encourage disgruntled employees to raise their concerns in a public forum, rather than by bringing them first to their supervisors. He went on to highlight the way that the Court's decision might be read to include the speech of faculty at a public university, posing a serious threat to the entire concept of academic freedom within state systems of higher education.

The majority responded only briefly to Souter's concerns about public colleges and universities, limiting its decision to the facts before the Court. Thus, the applicability of *Garcetti* and *Pickering* in higher education has yet to be clarified, even as attacks on the faculty academic freedom are mounting.[49]

B. Expressive and Associational Rights after *Rumsfeld v. FAIR*.

The second challenge to situating academic freedom entirely in the First Amendment has to do with the limits to what courts are willing to understand as expressive activity. This problem is well-illustrated by the case of *Burt v. Gates*, which involved a challenge by Yale Law School

[47] *Id.* at 573.
[48] 547 U.S. 410 (2006).
[49] *See* Keith Whittington, *Professorial Speech, the First Amendment, and the "Anti-CRT" Laws* (forthcoming Wake Forest L. Rev.) (advocating for a clarification of the doctrine protecting professorial classroom speech in light of the mounting attacks on teaching). *See also* Sohrab Ahmari, The Right should cheer the end of academic 'freedom', The American Conservative (Mar. 14, 2023), https://www.theamericanconservative.com/the-right-should-celebrate-the-end-of-academic-freedom/

("YLS") faculty to the constitutionality of the Solomon Amendment, which denies federal funding to colleges and universities that refuse to allow DOD the same access and assistance other employers receive in recruiting students for job opportunities. Since 1978, YLS has had a non-discrimination policy that forbids discrimination based on sexual orientation.[50] At the time of this case, the U.S. military still excluded out LGBTQ persons from its ranks, a position that had been softened somewhat by the adoption of the policy popularly known as "Don't Ask, Don't Tell." This policy allowed queer persons to participate in U.S. military if they were willing to be secretive about their sexual orientation. Because of its unequal treatment of the LGBTQ people in its ranks, the Department of Defense was unable to meet the requirements of the YLS non-discrimination policy, and therefore had more limited access and support in recruiting Yale Law students. The case came about when the DOD threatened Yale with the enforcement of Solomon Amendment, putting significant funding across the university at risk.

Forty-five faculty members at YLS filed suit, challenging the constitutionality of the Solomon Amendment on the grounds that it violated their First Amendment rights against compelled speech and association, as well as their Fifth Amendment right to educational autonomy. The district court held granted the faculty's motion for summary on their First Amendment claims, while denying their Fifth Amendment claims. In so doing, the district court acknowledged the precedent in support of "a substantive due process right both to educate and to an education,"[51] but then denied its applicability to "a law governing who may participate in a college recruiting program," finding the latter insufficiently "'rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[52] The court concluded that the faculty's "substantive due process claim was functionally a First Amendment academic freedom claim," and therefore "the court need not create, and must forgo creating, a new substantive due process right."[53]

On appeal, however, the Second Circuit took a different view of the First Amendment's academic freedom protections,[54] informed by the Supreme Court's decision in a recent, parallel case challenging the Solomon Amendment, *Rumsfeld v. FAIR*.[55] In *FAIR*, the Court held that the First Amendment was not implicated by the government's requirement that military recruiters be given equal status on campus because neither the law school's decision to allow recruiters on campus nor the conduct regulated by the Solomon Amendment was sufficiently expressive to trigger First Amendment concerns.[56] The Court also rejected FAIR's argument that allowing military recruiters to be present on campus implicated faculty's expressive associational rights.[57]

The Second Circuit in *Burt* concluded that FAIR applied to the claims of the YLS faculty, rejecting their efforts to distinguish the two cases.[58] Writing for the panel, Judge Pooler noted that even if *FAIR* were not controlling, the faculty's First Amendment claims would still fail.[59] Judge

[50] *Burt v. Rumsfeld*, 354 F.Supp.2d 156, 166 (D.Ct. 2005).
[51] *Id.* at 188.
[52] *Id.* (quoting *Palko v. State of Connecticut*, 302 U.S. 319, 325 (1937)).
[53] *Id.* at 189.
[54] *See* Burt v. Gates, 502 F.3d 183 (2d Cir. 2006).
[55] Rumsfeld v. FAIR, 547 U.S. 47, 64 (2006).
[56] *Id* at 64-67.
[57] *Id.* at 69-70.
[58] *See* Burt, 502 F.3d at 189-190.
[59] *Id.* at 190.

Pooler characterized the relevant precedent as protecting only the "core academic decisions" from "government intrusion that would otherwise 'cast a pall of orthodoxy over the classroom.'"[60] She went on to explain that "[t]he Solomon Amendment places no restriction on the content of teaching, the membership of teachers in organizations, the selection of students, or the evaluation and retention of students."[61] The Yale faculty had chosen not to appeal the district court's rejection of their educational autonomy claim, therefore the case was at an end.

The intersection between *Burt* and *FAIR* illustrates the second way in which situating academic freedom entirely in the First Amendment can narrows protections for colleges and universities. The district court in *Burt* rejected the Yale faculty's educational autonomy claims principally on the grounds that they were sufficiently cognizable under the First Amendment. The Second Circuit and the Supreme Court disagreed on the grounds that the decisions involved were inadequately expressive to trigger First Amendment scrutiny. While the decision on whether to allow on-campus recruiting by the military might have seemed somewhat peripheral to the core functioning of the law schools and therefore easily dismissed as a threat to academic freedom, the logic of these cases may exclude from First Amendment protection many significant decisions necessary to operating a successful and competitive college or university, including for example, decisions on curricular and co-curricular offerings,[62] the hiring of faculty and staff tasked with promoting diversity and inclusion on campus, the selection of an appropriate accreditor, or the offering of health counseling to ensure the well-being of those on campus. And, as described in the next part, the ability of our institutions of higher education to make these decisions is increasingly threatened by states around the country.

IV. Reinvigorating Educational Autonomy for the Modern University

As the protections of academic freedom seem to be narrowing under the First Amendment, the responsibilities of colleges and universities are growing. The size and composition of our institutions of higher education have changed significantly since the time at which the concept of academic freedom entered the constitutional discourse. Just in the period from 1996-2016, enrollment at the undergraduate level increased from 16.7 million to 20 million students, with most of the growth coming from students of color and those living in poverty. In 2015-2016, students of color made up 47% and students in poverty 31% of total undergraduate enrollment, with those populations concentrated in for-profit, public two-year, and less selective public four-year institutions. The impact of the American with Disabilities Act has also been significant. As of 2015-2016, the National Center for Educational Statistics estimated that 19 percent of undergraduates and 12% of graduate students had disabilities, a number that will likely continue to grow as the promise of the ADA continues to be realized.[63] More than one-fifth of college students are also parents.[64] Approximately forty percent of college students and thirty percent of

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[60] *Id.* at 191 (citing Keyishian, supra note __ at 603).
[61] *Id.*
[62] *See* note __ *supra* and accompany text.
[63] National Center for Education Statistics, U.S. Department of Education. (2019). *Digest of Education Statistics, 2017*(2018-070)
[64] IWPR, Parents in College: By the Numbers I (undated manuscript on file with author).

graduate students are the first in their family to attend college.[65] And while longitudinal data is hard to come by, a 2018 survey of more than 180,000 students by the American Association of Universities reported that approximately 17 percent identified as gay, lesbian, bisexual, asexual, or questioning, while 1.7% identified their gender as transgender, non-binary, or questioning.

The changing demographics of higher education have challenged colleges and universities to improve the environment and services offered to meet the needs of an increasingly diverse student population who face hurdles to successful degree completion that were largely foreign to earlier generations.[66] Colleges and universities are making tremendous investments in improving diversity and inclusion on campus in a variety of areas including the hiring of new personnel, building new systems of data collection, and expansion of curriculum. Driven by exploding student demand, institutions are expanding counseling[67] and other health services.[68] Colleges and universities are working to improve the safety and security of vulnerable populations on campus.[69] Many are also struggling to serve the increasing number of students who lack safe and stable housing.[70] Notably, improving the well-being and performance of students is not just an aspiration; increasingly, it is a directive included in the standards for accreditation.[71]

Responding to these challenges has increasingly blended decision-making by administrators and faculty, as the recognition has grown that what is happening outside the classroom is impacting what goes on inside it. At the same time, the latest waves of government attacks on higher education seem designed to block universities from modifying their operations and offerings to meet the needs of increasingly pluralistic communities From the challenges to affirmative action and the use of diversity statements in hiring[72], to the attacks on the teaching of critical race theory, history, and gender and women's studies,[73] to the targeted defunding of initiatives and services focused on diversity and inclusion,[74] to bans on transgender athletes

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[65] Dick Startz, *First-generation college students face unique challenges*, Brown Center Chalkboard (April 25, 2022), https://www.brookings.edu/blog/brown-center-chalkboard/2022/04/25/first-generation-college-students-face-unique-challenges/
[66] (data on degree completion)
[67] Zara Abrams, *Student mental health is in crisis. Campuses are rethinking their approach*, 57 Monitor on Psychology 60 (2022), https://www.apa.org/monitor/2022/10/mental-health-campus-care
[68] Elizabeth Redden, *The View from Health Services*, Inside Higher Ed (Oct. 14, 2021), https://www.insidehighered.com/news/2021/10/14/student-health-centers-report-high-demand-services
[69] UCLA SCHOOL OF LAW WILLIAMS INSTITUTE, EXPERIENCES OF LGBTQ PEOPLE IN FOUR-YEAR COLLEGES AND GRADUATE PROGRAMS (May 2022), https://williamsinstitute.law.ucla.edu/publications/lgbtq-colleges-grad-school/
[70] Aaron Smithson, *At Universities Nationwide, Housing Shortages Take a Toll*, ARCHITECTURAL RECORD (Oct. 18, 2022), https://www.architecturalrecord.com/articles/15893-at-universities-nationwide-housing-shortages-take-a-toll
[71] Mariah Bohanon, *DEI in Accreditation*, INSIGHT INTO DIVERSITY (Mar. 16, 2022), https://www.insightintodiversity.com/dei-in-accreditation/
[72] Josh Moody, *Texas Governor warns against DEI in hiring practices*, Inside Higher Ed (Feb. 9, 2023), https://www.insidehighered.com/news/2023/02/09/texas-latest-state-attack-dei-targeting-hiring
[73] Rose Horowitch, *Florida bill would target diversity studies at state universities,* nbcnews.com (Feb. 24, 2023) https://www.nbcnews.com/politics/politics-news/florida-bill-target-diversity-programs-state-universities-rcna72242
[74] Jeremy Bauer-Wolf, *Texas bill would ban diversity offices at public colleges*, HigherEdDive.com (Dec. 19, 2022), https://www.highereddive.com/news/texas-bill-ban-diversity-offices-public-colleges/639000/; Brian Lopez, *Texas higher education leaders say equitable access is key for graduation goals*, Texas Tribune (Feb. 23, 2023), https://www.texastribune.org/2023/02/09/texas-higher-education-budget/; University of Texas system halts new DEI policies (Feb. 24, 2023), https://www.insightintodiversity.com/university-of-texas-system-halts-new-dei-policies/

competing in college athletics and laws separating bathrooms on college campuses by sex,[75] to bills requiring reporting on gender dysphoria or prohibiting reproductive health counseling or treatment,[76] these laws strike at the choices universities are making to ensure equitable access to all of their students. Some of these laws have been successfully challenged in court.[77] Others target university actions that – like the non-discrimination policy in *Burt* – are likely inadequately expressive to trigger First Amendment review but are none the less intimately connected to building a successful teaching and learning environments. To protect the work of colleges and universities is going to require going beyond protecting the rights of faculty to engage in teaching and research, and even traditional faculty governance.[78]

One path would be to argue for educational autonomy under the First Amendment. This approach, ably advocated by Paul Horwitz, [79] has obvious advantages, not least of which is that the cases described above draw the explicit connection between the individual and institutional aspects of academic freedom. Professor Horwitz argues persuasively that colleges and universities should be recognized as First Amendment institutions, similar to the press, deserving of special protection from government interference, due to their importance in our democratic system of government. A challenge with this framework (as Professor Horwitz acknowledges) in drawing the appropriate line between academic freedom and educational autonomy. As he notes, attempting to tie educational autonomy to academic freedom -- itself a continuously contested concept -- could ultimately undermine both. Horwitz avoids this problem by arguing that courts should "defer substantially to universities' own sense of what their academic mission requires, and their own sense of what academic freedom entails, rather than evaluate those claims against a top-down, judicially imposed understanding of academic freedom.[80] This answer raises two additional concerns. First, despite Professor Horwitz's clear direction to the contrary, courts might well merge their analysis of these separate, but related concepts in ways that would undermine core academic freedom protections. In other words, the courts might adopt a deferential approach to university operations that would then undermine the rights of faculty. Second, to ensure university autonomy on decisions like those challenged in the *FAIR* case, Professor Horwitz's approach seems to untether educational autonomy from existing First Amendment doctrine entirely. Courts may well reject the invitation to allow universities to define for themselves the scope of the authority to which deference is due.

A better home for this inquiry might therefore be in a resurrected substantive due process framework. In deciding whether a fundamental right is implicated, "the Court has long asked

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[75] https://www.ndlegis.gov/assembly/68-2023/regular/documents/23-0498-06000.pdf
[76] DeSantis seeks transgender university student's health care information, Assoc. Press (Jan. 19, 2023), https://www.nbcnews.com/nbc-out/out-politics-and-policy/desantis-seeks-transgender-university-students-health-care-information-rcna66495
[77] *See e.g.*, Rose Horowitch, Florida's 'Stop WOKE' law to remain blocked in colleges, appeals court rules," NBC News.com (Mar. 17, 2023), https://www.nbcnews.com/politics/politics-news/floridas-stop-woke-law-remain-blocked-colleges-appeals-court-rules-rcna75455
[78] The Court has held that faculty at public colleges and universities have no constitutional right to participate in faculty governance. *See* Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271, 273 (1984). But see Judy Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 Geo. L.J. 945 (2009).
[79] Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*,54 U.C.L.A. L. Rev. 1497 (2007).
[80] *Id.* at 1547-48.

whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[81] As the brief case survey above indicates, courts have a long history of understanding that government intrusion into university operations must be carefully balanced against the range of liberty interests that coalesce in the educational environment. Embedded in these early decisions was the understanding that schools are created with particularized missions, that they hire a range of people with the skills to help them meet those objectives, and that donors, parents, and students select and support them because of the particular values they claim to represent and serve. This approach has been reinforced by the modern posture of deference to some types of educational decision-making.

Claims based on educational autonomy could operate as a limited shield to some of the most invasive political efforts to undo university decision-making. As in the early cases, the scope of the educational autonomy right would be particularized, determined through a close examination of the structure and mission of the institution, with appropriate deference given to the places in which decision-making authority is located.[82] Notably, these inquiries would require courts to go beyond the crude distinction between public and private to a more sophisticated understanding of that way that a college or university is constructed. The early cases also offer some indication about how courts might resolve the challenging questions of identifying appropriate plaintiffs and how the rights of institutions that are themselves part of the state could be vindicated. Cases like those involving Bowdoin and Missouri illustrate that claims may be brought by plaintiffs who themselves have been harmed by the legislative or executive usurpation or misuse of decision-making authority, but the resolution would be in the return of power to the proper body. Given that public colleges and universities are unlikely to sue the government that funds them, this structure is more likely to create some check on egregious abuses than one that demands that these institutions act on their own behalf.

This understanding of educational autonomy would demand more tolerance of pluralism in our colleges and universities. The challenging cases in this area are of course those in which an institution's founding mission is itself discriminatory.[83] Educational autonomy would not act (and has not historically acted) as a complete bar to laws of general applicability.[84] However, it is likely that a robust concept of educational autonomy would and should protect some challenging institutional choices.[85] At the same time, however, other professional norms (including those of accreditation) would likely minimize the likelihood that these practices would be widely adopted, even if the authority to do so was returned. In any event, these trade-offs may be worth it. Recent developments indicate that relying on the federal courts to enforce these commitments consistently

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[81] *Dobbs*, quoting Timbs v. Indiana, 586 U.S. (2019)).
[82] This type is not entirely foreign even to the modern Court's examination of academic freedom questions. *See e.g.*, NRLB v. Yeshiva University, 444 U.S. 672 (1980) (determining after close examination of the university's governance structure that university faculty were "managerial employees" who could not form a union).
[83] *See, e.g.,* Runyon v. McCrary, 427 U.S. 160 (1976); Bob Jones University v. U.S., 461 U.S. 574 (1983).
[84] *See, e.g.,* Pierce, 268 U.S. at 534 (acknowledging "the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils . . . ").
[85] And in fact, in the past the Court has taken a nuanced approach even to the most odious of educational decisions. For example, in *Runyon*, the Court in holding that the Civil Rights Act barred racial discrimination even in private schools, also noted that this would not prevent the school from continuing to educate students consistent with its own values. *See Runyon*, 427 U.S. at 176.

is unlikely to be a successful strategy.[86] Endorsing pluralism, on the other hand, might help protect the educational autonomy for the many universities and colleges whose commitments to equity and access are currently under attack.

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

V. Conclusion

[86] *See generally*, Fulton v. City of Philadelphia, 141 S.Ct. 1868 (2021) (holding that the city violated the First Amendment by refusing to contract with a Catholic foster care agency that refused to certify same sex couples as foster parents); Tandon v. Newsom, 141 S.Ct. 1294 (2021) (holding that state had failed to justify pandemic restrictions on at-home gatherings for religious purposes); Our Lady of Guadalupe v. School v. Morrissey-Berru, 140 S.Ct. 2049 (2020); 591 U.S. 2020 (extending the ministerial exception to deny employment claims to two lay teachers at religious schools); Espinoza v. Montana Dept. of Revenue, 139 S.Ct. 2777 (2019) (holding that state could not fund scholarships for private education while excluding religious schools).