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In August 2020, NACUA assumed full responsibility for the journal under the editorship of Dr. Barbara A. Lee. From 2016-2020 Rutgers Law School published the Journal. Prior to Rutgers, the Journal was published by Notre Dame Law School from 1986 to 2016, and the West Virginia University College of Law from 1980-1986. Correspondence regarding publication should be sent to the Journal of College and University Law, National Association of College and University Attorneys, Suite 620, One Dupont Circle, N.W., Washington, DC 20036, or by email to barbalee@oq.rutgers.edu.

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ARTICLES

California Dreamin': DACA's Decline and Undocumented College Student Enrollment in the Golden State

William C. Kidder and Kevin R. Johnson

With congressional efforts to pass comprehensive immigration reform mired in gridlock, over the past dozen years the federal effort to provide relief to undocumented young adults has been through the Deferred Action for Childhood Arrivals (DACA) program. DACA may go before the U.S. Supreme Court for the second time in 2025. There is surprisingly little concrete and comprehensive recent data on undocumented and "DACA-mented" college student enrollment patterns.

This is the first article to report hard data on contemporary enrollment trends for undocumented college students, an era marked by increasing constrictions of DACA. Our first main finding is that between 2016-17 (just prior to the partial DACA rescission) to 2022-23, newly enrolled low-income undocumented students declined by half at University of California (UC) and California State University (CSU) campuses. Our second main finding is that for UC and CSU low-income undocumented students overall (new and continuing students) there was a 30% decline between 2018 and 2019 and 2022 and 2023 (the second finding reflects a delayed impact as earlier large cohorts took time to graduate). Our third finding is that there were no notable declines over the same period in our "control" groups—other low- and lower-middle income students at UC and CSU with similar academic profiles—which supports our inference about the causal role of DACA's decline on decreasing undocumented student enrollments.

Part III pivots to several ongoing areas of promising reforms and mitigation strategies that can be pursued by public universities with an interest in supporting undocumented student success. These are strategies to consider regardless of how DACA fares in the Supreme Court. We analyze relevant case law regarding the "Opportunity for All" campaign in the UC, which is based on the claim that public universities may lawfully employ undocumented students. We also summarize innovative public–private partnerships for scholarships and other support for undocumented students and immigrant rights.

The Law of Tenure in the Era of Trump: Attempted Bans, New Reviews, and Threats to Academic Freedom and Property Rights

Michael W. Klein

Beginning in 2015 and continuing over the next decade, legislation aimed at weakening or terminating tenure rights proliferated through Republican-controlled state governments. This rise in partisan challenges to the legal rights of tenured faculty coincided with the culture wars of the 1990s and early 2000s, partly aimed at higher education, that were exploited by Donald Trump and helped get him elected. Trump's policies targeting "divisive issues" like critical race theory, and interpreting diversity, equity, and inclusion (DEI) programs as discriminatory, rippled through state-based legislation that would cripple tenure and stifle academic freedom.

This article traces the early history of tenure in Europe and the United States, and it describes U.S. Supreme Court decisions protecting academic freedom and property rights in tenure. Challenging these rights, Trump's rhetoric and policies, from his first campaign to the first five months in his second term, echoed across state legislation and regulations considered through mid-2025 that jeopardized faculty members' employment if they teach or research diversity or critical race issues (Florida, Alabama), required proof of "intellectual diversity" to attain and retain tenure (Indiana, Ohio), withdrew property rights from tenure (Kansas, Texas), imposed post-tenure reviews (Arkansas, Florida, Georgia, Kentucky), and proposed outright bans on tenure (Iowa, North Carolina, Nebraska).

The Trump administration itself used cuts in federal funding, prohibitions on DEI programs, demands for greater government efficiency, and investigations into alleged violations of Titles VI and IX as leverage to force colleges—and faculty—to comply with its vision of higher education. The situation was compared to the McCarthy era and was called "an existential threat." More broadly, Trump's attempts to control higher education appeared to be part of a more extensive strategy resembling the "illiberal democracy" of Hungary under Prime Minister Viktor Orbán, raising alarms over the rise in the United States of a twenty-first-century model of autocracy called "competitive authoritarianism."

Non-Disciplinary Professorial Speech: The First Amendment and the Decay of Professional Norms

Matthew Finkin

A spate of recent postings on social media have gotten the posting professors into hot water. These expressions are not rooted in their academic disciplines, but address public and institutional controversies: condemning Israel as a "social cancer"; condemning a faculty advisor as "racist" for the campus organization he advised. May they be sanctioned?
In public institutions shelter might be sought in the first amendment. In all institutions shelter might be sought in institutional academic freedom policies rooted in national professional norms. On closer examination, however, the first amendment appears a rather weak reed to lean on; and protective policy appears enervated, the national norms in decay. This article explains how the robust, uninhibited, unfettered campus debate on public and institutional issues is now beclouded, and explores what this trend portends.

BOOK REVIEWS

Review of Hon. David S. Tatel's Vision: A Memoir of Blindness and Justice

Elizabeth Meers

The National Association of College and University Attorneys presented Judge David Tatel with its Distinguished Service Award in 1993. His book *Vision: A Memoir of Blindness and Justice* demonstrates many reasons for that abundantly deserved honor.The book describes his important role in the history of the civil rights movement, including in higher education; his experience moving from private practice for educational institutions into the role of a federal appeals court judge; and most poignantly, his

gradual coming to terms with his loss of his eyesight. Along the way he offers gems of advice, especially for younger lawyers. He also gives loving tribute to his parents; his wife, Edie; and their children and their families. NACUA members will find valuable all of these aspects of this readable memoir.

Review of David Rabban's Academic Freedom: From Professional Norm To First Amendment Right

Neal H. Hutchens and Brandon Williams

While writings on academic freedoms are expansive, David M. Rabban's *Academic Freedom: From Professional Norm to First Amendment*1 makes a noteworthy contribution to the academic freedom literature. Rabban, a faculty member at the University of Texas at Austin's School of Law, is well-positioned to write a consequential book on academic freedom. He previously served as the general counsel and chair of the committee for academic freedom for the American Association of University Professors (AAUP). In the work, Rabban argues for distinctive First Amendment academic freedom protections that apply to individual faculty members, institutions, and students, with the author making a specific argument for each one.

ADMISSIONS AND ACCESS TO HIGHER EDUCATION AFTER SFFA V. HARVARD

*CHARLES R. CALLEROS**

Abstract

In 2023, the Supreme Court sent a seismic shock wave through higher education with its decision in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College. *This decision replaced decades of precedent that had permitted race-conscious admissions with a new requirement of race neutrality. Some universities might overreact to this development, avoiding consideration of any attributes that have their roots in racial diversity or that could contribute to a diverse student body. But the majority opinion describes a race-neutral approach based on individual assessment of valued character traits, even if based on that applicant's experiences inextricably tied to the applicant's race. Coupled with other efforts and policies designed to broaden access to higher education, universities should follow the Supreme Court's race-neutral path, while implementing procedures that require and document decision-making that stays within the new constitutional lines.*

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* Emeritus Professor, Sandra Day O'Connor College of Law at Arizona State University. J.D., Phi Kappa Phi & Order of the Coif honors, Univ. Cal. Davis School of Law;B.A., Highest Honors in Economics, Univ. Cal. Santa Cruz. This article expands on materials prepared for a panel presentation at the Arizona State Bar Convention, June 14, 2024. I thank Christopher R. Kaup, partner at Tiffany & Bosco, for his splendid organization of the panel; Kristen L. Mercado, Asst. Dean of Admission and Financial Aid, UC Davis School of law, and Frank Motley, former Asst. Dean, Indiana Univ. Maurer School of Law, for sharing their views so ably on the panel; and the following for their valuable consultation on the issues: Amy Best, Asst. Dean, Admissions and Financial Aid, Ariz. State Univ. College of Law; Kim Dimarchi, VP for Legal Affairs and Deputy GC, Ariz. State Univ.; and Maya Kobersy, Assoc. GC, Univ. Mich. I thank each of them for their insights and inspiration while taking personal responsibility for any mistakes in this article. Each view or analysis in this article represents my personal views and analysis and are not made on behalf of ASU or any other organization. I also thank Professor Barbara Lee for valuable substantive review, and Maxine Idakus for excellent editing.

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INTRODUCTION

In 2023, the Supreme Court sent a seismic shock wave through higher education with its decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*Harvard*" or "the *Harvard* decision").[1] *Harvard* replaced decades of precedent that had permitted race-conscious admissions, largely adopting a requirement of race neutrality. Nonetheless, the majority opinion in *Harvard* describes an alternative path toward diversity goals, based on individual assessment of each applicant's experiences and resulting perspectives and character traits, even if based on that applicant's race. Coupled with other efforts and policies designed to broaden access to higher education, universities can continue to seek and support meaningful student diversity, like a football running back who sees a bit of daylight in the middle of an otherwise daunting defensive line.

This article will examine the *Harvard* decision and its implications in the following way. Part I traces Supreme Court jurisprudence permitting carefully limited race-conscious admissions in decisions issued from 1978 through 2016. Section II.A explains the rulings in *Harvard* that signal an abrupt shift in application of equal protection to college admissions,[2] and Section II.B describes the majority opinion's silver lining, a passage that defines a race-neutral assessment of applicants that nonetheless permits valuation of character traits developed as a result of an applicant's race and racial experiences. Part III briefly addresses other legislative or state constitutional provisions that independently prohibit racial preference in admissions. Part IV offers the author's views about application of the *Harvard* decision to actions in higher education beyond admissions. Finally, Part V outlines legally permissible measures that a college or university can undertake to recruit, admit, and retain an excellent student body that will be diverse in several ways that strengthen the educational enterprise. This part also emphasizes the need to adopt procedures that ensure that admissions officials are faithfully implementing the approach approved by the Court and that help protect the school from legal challenges.

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1 600 U.S. 181 (2023). Although this decision struck down the admissions policies of both Harvard College and the University of North Carolina, this article will refer to the decision in shorthand as "the *Harvard* decision" or just "*Harvard*."

2 This article does not address a pending issue about whether the principles of the *Harvard* decision should apply to military academies, or whether our military has an elevated interest in racial diversity as a matter of national security. The Due Process Clause of the Fifth Amendment implicitly obligates the federal government to provide equal protection to the same degree as under the Fourteenth Amendment's Equal Protection Clause. *E.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 215, 227 (1995). Nonetheless, the Supreme Court has not decided whether the military and military academies have an especially compelling interest in diversity as a "national security imperative." *Harvard*, 600 U.S. at 379 (Sotomayor, J., dissenting). The *Harvard* majority opinion "does not address the issue, in light of the potentially distinct interests that military academies may present." 600 U.S. at 213 n.4. As of August 2024, a case presenting this question is currently pending in federal district court, which denied the plaintiff's request for a preliminary injunction against West Point's consideration of race and ethnicity in admissions. SFFA v. U.S. Military Acad. at West Point, 709 F. Supp. 3d 118 (S.D.N.Y. 2024). On February 2, 2024, the Supreme Court denied an application for an injunction pending appeal, noting the underdeveloped record and expressly reserving any view on the merits. SFFA v. U.S. Military Acad. at West Point, 144 S. Ct. 716 (2024).

I. SUPREME COURT JURISPRUDENCE, 1978–2016

Under the Fourteenth Amendment's Equal Protection Clause, a state school's consideration of race in admissions is subject to strict scrutiny, requiring a searching inquiry into whether the school's policy is narrowly tailored to serve a compelling state interest.[3] Moreover, Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin "under any program or activity receiving Federal financial assistance."[4] A Reconstruction Era statute, 42 U.S.C. § 1981, also prohibits racial discrimination in contracting, including in contracts between a private school and its students.[5] The Supreme Court, however, has focused on constitutional analysis, while assuming that these statutes follow the same standard.[6]

A. Regents of University of California v. Bakke (1978)

In *Bakke*, the Supreme Court struck down a University of California medical school's race-based set-aside program, which reserved sixteen out of one hundred seats in the entering class for members of racial minority groups, while allowing all applicants to compete for the remaining eighty-four seats. Eight members of the Court divided evenly and sharply, leaving a lone opinion by Justice Powell to announce a middle position that provided a fifth vote striking down the school's program.[7]

1. The Debate in Bakke

The factions on either side of Justice Powell's position disagreed over the way in which nondiscrimination principles should apply to race-conscious efforts to promote equality. Four Justices rejected even limited consideration of race in college admissions, because they favored a uniformly "colorblind" approach in their application of Title VI:

> [I]t seems clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government, … The Act's proponents plainly considered Title VI consistent with their view of the Constitution and they sought to provide an effective weapon to implement that view.[8]

Nearly thirty years later, Justice Roberts summed up this side of the debate with a tautology: "The way to stop discrimination on the basis of race is to stop

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3 Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003).

4 42 U.S.C. § 2000d.

5 Runyon v. McCrary, 427 U.S. 160 (1976).

6 *E.g.*, *Grutter*, 539 U.S. at 343 (2003) (Title VI and § 1981 impose no greater restriction on consideration of race in admissions than do constitutional principles of equal protection); *Gratz v. Bollinger*, 539 U.S. 244, 276, n.23 (2003) (a violation of equal protection under the constitutional also violates Title VI and § 1981); *Harvard*, 600 U.S. 181, 197 n.2 (noting that "no party asks us to reconsider" the proposition in *Gratz* regarding Title VI).

7 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

8 *Id*. at 416 (Justice Stevens, with whom Burger, C.J., Stewart, J., and Rehnquist, J., join, concurring in the judgment in part and dissenting in part).

discriminating on the basis of race."[9]

In contrast, four other Justices in *Bakke* would have approved the medical school's set-aside program,[10] because they interpreted the Fourteenth Amendment to broadly permit voluntary action to redress the continuing effects of a persistent history of discrimination in the United States. In their view, [g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.[11]

In the view of Justice Marshall, a race-conscious approach was necessary to achieve full integration:

> It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. … If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors.[12]

Nearly two decades later, dissenting in a case addressing affirmative action in federal contracting, Justice Stevens explained the view that equal protection should not require courts to conflate subordination of members of a minority group with race-conscious measures to advance equality:

> There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.
>
> ....
>
> The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor.[13]

2. Justice Powell's Resolution of the Debate in Bakke

Justice Powell opined that the medical school's set-aside in *Bakke* was unconstitutional because some students were barred from even competing for

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9 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

10 *Bakke*, 438 U.S. at 325 (Opinion of Justices Brennan, White, Marshall, and Blackmun, concurring in the judgment in part and dissenting in part).

11 *Id*. at 325.

12 *Id*. at 401 (separate opinion of Marshall, J.).

13 Adarand Constructors v. Peña, 515 U.S. 200, 243, 245 (1995) (Stevens, J., dissenting).

those seats based on their race.[14] He also warned that the school could not grant racial preferences to redress general societal discrimination the way it could redress its own intentional and adjudicated discrimination.[15] On the other hand, he rejected the position that the Constitution or other federal laws prohibited a state university from all consideration of race in admissions.[16] By invoking a university's interest in academic freedom to define its educational mission, and by characterizing that freedom as a "special concern" of the First Amendment,[17] Justice Powell recognized that a university could have a compelling interest in achieving the benefits of a racially diverse student body.[18] He explained further that a university could implement a program narrowly tailored to that goal with a flexible, holistic admissions program that considered the race of an applicant as one of several factors; that allowed all applicants to individually demonstrate their qualifications, including their potential for contributing to a diverse exchange of perspectives; and that allowed the racial background of an applicant to serve as a positive factor when needed to attain desired diversity.[19] Justice Powell held out Harvard's undergraduate admissions policy as an example of such a lawful approach.[20]

In 1996, the U.S. Court of Appeals for the Fifth Circuit held that Justice Powell's opinion was not binding on it and did not reflect current law.[21] From 2003 until 2023, however, majority holdings of the Supreme Court recognized an approach substantially following that laid out by Powell in *Bakke*.

B. Grutter v. Bollinger and Gratz v. Bollinger (2003)

In *Grutter*, a majority of five Justices embraced Justice Powell's approach in an opinion authored by Justice O'Connor.[22] The Court emphasized that it would be "patently unconstitutional" for a school to admit specified percentages of racial groups for "outright racial balancing."[23] However, the majority approved the admissions policy of the University of Michigan Law School, in which race was one factor in advancing a compelling interest in enhancing the education of all students through racial diversity in its student body.[24] The benefits included helping students learn from classmates' diverse experiences and perspectives; overcoming racial stereotypes that might be held by some students; and preparing

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14 *Bakke*, 438 U.S. at 319–20 (Opinion of Powell, J., announcing the judgment of the Court).

15 *Id*. at 307–10.

16 *Id*. at 272.

17 *Id*. at 312.

18 *Id*. at 312–14.

19 *Id*. at 311–20.

20 *Id*. at 316–18, 321–25.

21 Hopwood v. Texas (Hopwood I), 78 F.3d 932, 944–45 (5th Cir. 1996).

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

23 *Id*. at 330.

24 *Id*. at 325–28.

for practice and leadership in a multiracial, pluralistic society.[25]

Frequently comparing the Michigan Law School's admissions policy favorably with the Harvard undergraduate program touted by Justice Powell in *Bakke*, the *Grutter* majority found the law school's policy to be narrowly tailored to its diversity goals because it used race flexibly as one of several criteria in broad-based, individualized review; it considered any applicant's contributions to diversity on any basis, without allowing race to dominate; and it had considered race-neutral alternatives and found them to be insufficient to achieve critical masses of minority groups.[26] But narrow tailoring also required that race-conscious policies be limited in duration, which could be monitored through sunset provisions and periodic review.[27] Justice O'Connor even expressed the majority's expectation that "racial preferences will no longer be necessary" in any school twenty-five years from then, or by 2028.[28]

In contrast, in *Gratz*, the University of Michigan's undergraduate admissions process was not narrowly tailored to its goal of admitting a diverse student body.[29] In an overly mechanical and categorical manner, the policy added 20 points, out of a maximum of 150, to all applicants with designated racial backgrounds.[30]

The approaches in *Grutter* and *Gratz* held sway for the next two decades.

C. Parents Involved in Community Schools v. Seattle School District No. 1 (2007)

In the *Seattle* case, the Court struck down a school district's plan for assignment of entering students to its ten public high schools.[31] The school district's plan permitted incoming students to rank any number of the high schools in the order of preference, and to gain priority to a requested school if a sibling was already enrolled in that school. In oversubscribed high schools, the next tiebreaker would give priority to applicants whose race would bring the school's racial composition more in line with the demographics of the district, if the school's racial imbalance exceeded ten percent.[32]

Even if achieving diversity could be a compelling state interest in secondary education, *Grutter* had approved consideration of an individual applicant's race only as one of several factors in a broader, holistic assessment of the applicant's potential to help realize the benefits of diversity,[33] "and not simply … to achieve

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25 *Id*. at 329–33; see *also* Charles Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 U.C. Berkeley La Raza L.J. 140 (1995).

26 *Grutter*, 539 U.S. at 334–41.

27 *Id*. at 342.

28 *Id*. at 343.

29 Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

30 *Id*. at 244, 255, 270–74.

31 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 726–32 (2007).

32 *Id*. at 709–12.

33 *Id*. at 722–23.

racial balance."[34] According to the plurality opinion authored by Chief Justice Roberts, the Seattle district's plan was not narrowly tailored to a compelling state interest because it offered "no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts."[35] The plurality also found fault with the Seattle plan's "limited notion of diversity, viewing race exclusively in white/nonwhite terms" and using race in a mechanical way without individualized assessment.[36] Justice Kennedy provided the fifth vote to support the result advanced by the plurality, though not all its reasoning.[37] In a companion case, the Court found similar faults with racial balancing plans in Jefferson County Public Schools in Louisville, Kentucky,[38] which also defined race in binary terms, "black" and "other."[39]

It was beyond debate that a school could voluntarily adopt a race-conscious remedy for its own past intentional discrimination.[40] However, the record showed no such intentional racial segregation in the Seattle district.[41] Although the Jefferson County public schools were previously operating under a federal court's desegregation decree, the court had since dissolved the decree after finding that the segregation had been remedied.[42]

D. Fisher v. University of Texas at Austin (I & II, 2013 and 2016)

After the Fifth Circuit's 1996 decision in *Hopwood*,[43] the University of Texas at Austin ceased considering an applicant's race as a factor supplementing an applicant's entrance test scores and high school academic performance. In place of race, the university considered several factors relating to an applicant's socioeconomic condition, extracurricular and community activities and leadership, and other special circumstances. The Texas legislature also passed the Top Ten Percent Law, which granted admission to the University, and to any public state college, for students in the top ten percent of their class in Texas high schools that complied with minimum standards.[44]

After the Supreme Court's 2003 decision in *Grutter*, the University of Texas resumed race-conscious admissions as a third tier to its program, considering race

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34 *Id*. at 723.

35 *Id*. at 727.

36 *Id*. at 723.

37 *Id*. at 782–98.

38 *Id*. 728–33.

39 *Id*. at 723.

40 *Id*. at 720.

41 *Id*.

42 *Id*. at 720–21.

43 *See supra* note 21 and accompanying text.

44 Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 304–05 (2013) (*Fisher I*).

as one of several factors to achieve the benefits of racial diversity.[45] In 2013, the Supreme Court reversed the Fifth Circuit's decision to uphold the University's post-*Grutter* admissions program.[46] However, the Supreme Court did not rule on the constitutionality of the admissions policy; instead, it reversed and remanded for full application of strict scrutiny after finding that the court of appeals had improperly deferred to the University on the issue of narrow tailoring.[47]

On remand, the court of appeals again approved the University's admissions program.[48] On certiorari, the Supreme Court in 2016 affirmed on the merits.[49] Petitioner had not challenged the Top Ten Percent Plan, which the Court did not assess.[50] In finding that the racial preferences in a holistic review met the requirement of narrow tailoring, the Supreme Court noted that extensive outreach and recruiting efforts, enhanced reliance on socioeconomic status, and continued application of the Top Ten Percent Plan had proved to be insufficient to achieve the desired diversity in the absence of consideration of race.[51]

II. STUDENTS FOR FAIR ADMISSIONS V. HARVARD (2023)

In 2023, the Supreme Court took an abrupt turn on affirmative action in higher education with *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*.[52] The *Harvard* decision includes six opinions: the majority opinion written Chief Justice Roberts and joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett; separate concurring opinions by Justices Thomas, Gorsuch, and Kavanaugh; a dissent by Justice Sotomayor joined by Justices Kagan and Jackson; and a dissent by Justice Jackson joined by Justices Sotomayor and Kagan, applying only to a companion case from North Carolina[53] because Justice Jackson had recused herself from the Harvard case, having served on the Board of Overseers at Harvard.[54]

The Court's opinion in *Harvard* soundly rejects the approach applied by courts for the nearly half century since Justice Powell's concurring opinion in 1978 in *Bakke*, upheld in *Grutter* and *Fisher II*. Even though the majority opinion does not explicitly overrule that precedent, Justices on opposite ends of the jurisprudential spectrum, Justices Thomas and Sotomayor, expressed their

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45 *Id*. at 305–06.

46 *Id*. at 315.

47 *Id*. at 312–15.

48 Fisher v. Univ. of Texas Austin, 758 F.3d 633 (5th Cir. 2014).

49 Fisher v. Univ. of Texas at Austin, 579 U.S. 365 (2016) (*Fisher II*).

50 *Id*. at 378.

51 *Id*. at 384–88.

52 600 U.S. 181 (2023).

53 *See* https://supreme.justia.com/cases/federal/us/600/20-1199/ (linking to all opinions).

54 Rahem D. Hamid & Neil H. Shah, *Inside the Decision: Here's What the Supreme Court Said About Affirmative Action*, Harv. Crimson (June 20, 2023), https://www.thecrimson.com/article/2023/6/30/scotus-affirmative-action-analysis/.

views that the majority effectively did so.[55] The majority cited approvingly to the statements in *Grutter* about the demanding standards for strict scrutiny of racial classifications, but it applied those standards in ways that are starkly inconsistent with *Grutter* and *Fisher II*.[56] In dissent, Justice Sotomayor lamented the majority's rejection of precedent that was advancing a "racially integrated vision of society, in which institutions reflect all sectors of the American public."[57]

Section II.A below describes four grounds on which the majority found constitutional and corresponding statutory infirmities[58] in the admissions policies of Harvard College and the University of North Carolina. It also briefly discusses whether a school could overcome all four objections with adjustments to an admissions program that uses race as a plus factor. Section II.A concludes that such an effort would be futile, and that *Harvard* ends the era of *Grutter*-style affirmative action. Section II.B, however, describes a new path to diversity approved by the *Harvard* majority, based on an individual applicant's racial experience.

A. Four Bases for the Court's Finding of Constitutional Infirmity

The *Harvard* majority objected to the schools' admissions policies on several grounds, which can be divided into four categories: (1) failure to state a compelling state interest in racial diversity, (2) relying on racial classifications that were insufficiently precise to facilitate searching judicial review, (3) harming nonadmitted students in a zero-sum game, and (4) failing to limit the duration of the race-conscious admissions policies.

In the subsections below, this article reviews each of these objections and comments on whether each of them could be overcome with a race-conscious admissions program that is more carefully crafted. If so, the *Harvard* decision does not fully overturn the *Grutter* line of cases but modifies it by requiring schools to proceed more carefully with race-conscious admissions if they hope to meet a newly demanding level of strict scrutiny. On the other hand, if it appears that a school could not possibly meet one or more grounds for the majority's ruling, and if those grounds alone are sufficient to violate equal protection, then the *Harvard* decision should be interpreted to fully abandon *Grutter* and its approval of race as a plus factor in admissions.

1. Compelling State Interest in Racial Diversity

a. Concrete, Measurable Educational Benefits. In Part IV.A of the Court's opinion, the majority explained that the following benefits of diversity claimed by Harvard and the University of North Carolina were too amorphous to permit meaningful judicial scrutiny:

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55 *Harvard*, 600 U.S. at 287 (Thomas, J., concurring); *id*. at 318, 341–42, 357 (Sotomayor, J., dissenting).

56 *Id*. at 211–26.

57 *Id*. at 361; *see also* Richard D. Kahlenberg, *New Avenues for Diversity After Students for Fair Admissions*, 48 J.C. & U.L. 283, 291 n.27 (citing sources for this conclusion).

58 The Court continued its approach of equating the standards for Title VI with the constitutional standards for Equal Protection. See supra note 6 and accompanying text.

> Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." 980 F. 3d, at 173–174. UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." 567 F. Supp. 3d, at 656.[59]

The majority concluded that these benefits were not sufficiently measurable, focused, concrete, and coherent to permit searching judicial review.[60]

These educational goals were consistent with the discussion in *Grutter* about diversifying the student body in higher education to improve the education for all. Diversity does so, states *Grutter*, by fostering a more robust exchange of ideas and perspectives, which better prepares students for participation and leadership in a pluralistic society.[61] A similar set of benefits from a diverse student body were approved in 2016 by the Court in *Fisher II*, which specifically ruled that the goals were sufficiently concrete.[62] The newly demanding and skeptical assessment of a school's interest in diversity thus is the first ground on which the *Harvard* decision appears to depart sharply from precedent, even though not explicitly overruling it. The *Harvard* majority has either increased the burden of establishing that racial diversity is a genuine compelling component of a school's educational mission, or it determined on the facts of *Harvard* that the schools' stated benefits were not narrowly tailored to achieving that compelling interest.[63]

The question remains whether a school could overcome the Court's skepticism by crafting a more compelling statement of its interest in a diverse student body than those advanced by Harvard and the University of North Carolina.[64] One wonders whether a school could improve its statement if it collected several years of surveys from graduating students, attesting to the ways in which their experiences with a racially diverse class enhanced their education and their confidence to practice in

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59 *Harvard*, 600 U.S. at 214.

60 *Id*. at 214–15.

61 Grutter v. Bollinger, 539 U.S. 306, 329–32 (2003).

62 Fisher v. Univ. of Texas at Austin, 579 U.S. 365, 381–82 (2016).

63 I favor the former interpretation. Michael Dorf appears to favor the latter. Michael Dorf, *Race-Neutrality, Baselines, and Ideological Jujitsu After Students for Fair Admissions*, 103 Tex. L. Rev. 269, 285 (2024).

64 *See, e.g.*, Jeffrey Lehman, *Don't Misread SFFA v. Harvard*, Inside Higher Educ. (July 17, 2023), https://www.insidehighered.com/opinion/views/2023/07/17/dontmisread-sffa-v-harvard-opinion# (encouraging universities to meet this challenge); *see also Kimberly West-Faulcon, Affirmative Action After* SFFA v. Harvard: *The Other Defenses*, 74 Syracuse L. Rev. 1101, 1106–25 (2024) (presenting Lehman's views favorably but recommending that universities establish compelling state interests in addition to diversity in view of the *Harvard* opinion's highly skeptical view of the diversity rationale).

a multiracial society. Such an annual survey might support a compelling interest if reports of positive results increased as the student body grew more diverse over time. Perhaps courts could then meaningfully review the school's statement of compelling interest if the school committed to continue its annual survey for as long as it maintained race-conscious admissions.

Without more guidance from the majority, however, it is purely speculative that such an effort would bear fruit with the current Court. For one thing, how could a school establish that the perceived benefits of racial diversity were any greater than the benefits of admitting a diverse class on a basis other than race, such as geographic, previous academic focus, professional experience, or economic status? Justices Thomas and Sotomayor are likely accurate in their assessments that no conceivable statement of the benefits of racial diversity can pass the Court's new requirement that goals be so concrete and measurable that the Court can directly assess the extent to which they have been met.[65] If so, any race-conscious admissions program would fail the first requirement of strict scrutiny: pursuit of a compelling state interest. The remaining subsections in Section II.A help to explain additional grounds for the result in *Harvard*, but this first holding in *Harvard* likely means that the game is already over for the *Grutter* approach of using race as a plus factor in admissions.

b. Stereotyping About Racial Perspectives. Although discussed in a separate section on the opinion, the *Harvard* decision rests partly on a point closely related to the statement of a compelling interest in a racially diverse student body: the principle that racial stereotyping conflicts with core values of equal protection.[66] Twenty years earlier, the *Grutter* majority had credited evidence in the record that racial diversity *breaks down* stereotypes, not only by fostering cross-racial interactions, but also by demonstrating that the views, experiences, and perspectives of members of an ethnic group can enrich the exchange of ideas but are not monolithic.[67] In contrast, the *Harvard* majority found that each school engaged in impermissible stereotyping by assuming that a racially diverse student body would result in a broader exchange of ideas, because it rested on generalizations about the views of members of a racial group.[68] The majority opinion appears to tacitly overturn *Grutter's* analysis about stereotyping.

To avoid this specific objection in the majority opinion, a school can show that it examines each applicant's experiences to assess how that student can add to the diversity and quality of the exchange of ideas in the classroom, rather than engaging in assumptions about how race determines a student's perspectives and ability to enhance the exchange of ideas. As we shall see in Section II.B, such a

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65 *Harvard*, 600 U.S. at 258 (Thomas, J., concurring); *id*. at 366–67 (Sotomayor, J., dissenting); *cf*. Jonathan Feingold, *Affirmative Action After* SFFA, 48 J.C. & U.L. 239, 256–61 (2024) (exploring possible rationales while expressing doubt about whether they would succeed with the current Supreme Court).

66 *Harvard*, 600 U.S. at 221 (citing to and quoting precedent).

67 Grutter v. Bollinger, 539 U.S. 306, 319–20, 333 (2003); *see also Harvard*, 600 U.S. at 364–65 (Sotomayor, J. dissenting) (admitting critical masses of minority students helps dispel stereotypes).

68 *Harvard*, 600 U.S. at 219–20.

showing might do more than help satisfy one standard for strict scrutiny of race-conscious admissions, because the *Harvard* majority appears to view such an examination as a race-*neutral* process.

2. Imprecise Racial Classifications

In various parts of section IV of its opinion, the majority in the *Harvard* decision relied on three additional grounds that arguably all fall within the narrow tailoring requirement of strict scrutiny. At least one of these additional grounds provides further support for the view that the *Harvard* decision effectively overruled precedent, without explicitly stating that it was doing so.

As its second major conclusion in the case, the Court found fatal imprecision in the following racial and ethnic classifications, employed by the universities to meet the goal of diversifying the student body: "(1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American."[69] The majority characterized these categories variously as "overbroad," "underinclusive," "opaque," and "arbitrary or undefined."[70] As examples, the majority noted the significant racial and ethnic diversity within the expansive classification of "Asian," the "arbitrary or undefined" classification of "Hispanic," and the difficulty of assigning students from Middle-Eastern countries to one of the named racial classifications.[71] The majority rejected the schools' guides to racial diversity, even though the schools employed categories borrowed from the federal Office of Management and Budget (OMB),[72] and though admissions officers could still evaluate each applicant's background and experiences on a more granular basis.[73]

This analysis of narrow tailoring departs from that in previous cases. *Grutter* and *Fisher II*, for example, did not dwell on each university's general references to race or ethnicity, such as African American and Hispanic. Instead, their approach to narrow tailoring focused on factors such as whether a school had considered alternative race-neutral policies and had validly rejected them as inadequate to achieve the school's goals, requirements that were met in *Grutter* and *Fisher II*.[74]

If it is still possible to state a compelling interest in a racially diverse student body,[75] a school might be able to overcome the majority's objection to popular racial classifications by refraining from explicitly using and defining those classifications. An admissions policy could refer more generally to one of several relevant factors as "the extent to which each applicant's unique racial or ethnic background and

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69 *Harvard*, 600 U.S. at 216.

70 *Id*. at 216–17.

71 *Id*. at 216.

72 *See* https://nces.ed.gov/ipeds/report-your-data/race-ethnicity-definitions.

73 *See Harvard*, 600 U.S. at 375–76 (Sotomayor, J., dissenting) (referring to Harvard's recognition and placement of value on the diverse backgrounds and experiences of applicants within the non-monolithic category of Asian applicants).

74 *See supra* notes 26 and 51 and accompanying text.

75 *See supra* Section II.A.1.a.

related experiences can enrich the exchange of ideas and perspectives or otherwise enhance the educational experience for all students."

Alternatively, a school might take a hint from the definition of race ascribed to the 1866 Civil Rights Act, part of which is now 42 U.S.C § 1981, which bars racial discrimination in contracting.[76] That Reconstruction Era Act is "closely related" to the Fourteenth Amendment, because that Amendment was adopted in 1868 partly to supplement the Thirteenth Amendment in providing constitutional support for the 1866 Act, which in turn was reenacted in 1870 to cement its relationship to both Amendments.[77] The Supreme Court has interpreted § 1981 to define race in terms of numerous and relatively narrow ethnic lines of ancestry that Congress had in mind when adopting the 1866 Act.[78] By following that approach, a school's admissions policy could formally recognize numerous variations within the broad racial and ethnic classifications borrowed by universities from the federal OMB. Again, however, a satisfactory definition of racial diversity would not authorize race-conscious admissions in the absence of a compelling state interest.

3. Zero-Sum Game

The *Harvard* majority also broke new ground by emphasizing the nature of admissions as a zero-sum game. According to the majority, whenever an applicant's race was a tipping point resulting in admission, it necessarily excluded an applicant from another racial group, thus operating as a negative factor primarily against Asian American and White students.[79] Theoretically, a school *might* avoid that conclusion by expanding its student body beyond what its target would be in the absence of a diversity goal. Even if that would answer the Court's objection, however, many colleges and most graduate programs would quickly reach limits to their ability to expand on-site education.

The *Grutter* majority recognized that the means chosen to diversify a student body cannot "unduly harm members any racial group,"[80] such as by completely excluding them from consideration for a given seat, as would be the case in a quota system or set-aside. But it was acceptable in *Grutter* to use race in a flexible manner in a holistic assessment in which race might supply the tipping point when comparing applicants, so long as the assessment included consideration of other kinds of diversity aside from race, in which all applicants could compete for a given seat.[81] The *Harvard* decision arguably overturns this precedent by apparently finding that any admission decision in which race operates as a tipping point impermissibly harms members of other races.

It is difficult to identify a way to overcome this objection, at least for graduate programs that have no capacity to increase the number of students served. As

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76 *Supra* note 5 and accompanying text.

77 Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 721–22 (1989).

78 St. Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).

79 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 218–19 (2023).

80 Grutter v. Bollinger, 539 U.S. 306, 341 (2003).

81 *Id.*

much as any other conclusion in the majority opinion, the zero-sum grounding of *Harvard* may erect a total bar against ever using race as a tipping point that changes the demographics of the student body.

4. Time Limit on Affirmative Action

Finally, the *Harvard* decision found fault with the absence of a termination date for the two race-conscious admissions programs.[82] Even periodic review by a school was insufficient in the absence of an end point.[83] The requirement of a "logical end point" for each program is consistent with precedent.[84] If it were possible to meet the *Harvard* majority's other objections to race-conscious admissions, *Grutter* states that schools can satisfy this durational requirement with "sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[85]

Grutter additionally suggested a time when Justice O'Connor expected that race-conscious admissions programs would be unnecessary: twenty-five years after the *Grutter* decision, 2028.[86] Justice Kavanaugh appears to treat that reference to twenty-five years not as a general hope or prediction but as "an outer limit to race-based affirmative action in higher education."[87] Nothing in the Court's majority opinions, however, would preclude a school from demonstrating that progress toward meaningfully diverse representation in its student body will require affirmative action to continue beyond 2028.

5. Conclusions from Harvard

Subsections II.A.2 and II.A.4 above argue that two of the *Harvard* decision's objections to the schools' race-conscious admissions programs might be cured with some careful adjustments if a college hoped to preserve *Grutter*-style race-conscious programs. On the other hand, as discussed in Subsections II.A.1.a and II.A.3, it is difficult to imagine ways to (1) satisfy the majority's newly demanding requirements regarding articulation of suitably concrete and measurable benefits of diversity to establish a compelling state interest; or (2) allay its concerns about the zero-sum nature of admissions, which it believes would cause a race-conscious admission to impermissibly harm rejected applicants. On these bases, at least, it is entirely reasonable to view the *Harvard* decision as implicitly overruling *Grutter* and *Fisher II*. The *Harvard* majority opinion signals the end of race in the abstract as a factor in admissions.

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82 *Harvard*, 600 U.S. at 221–26.

83 *Id.* at 225.

84 *See Grutter*, 539 U.S. at 342.

85 *Id*.

86 *Id*. at 343.

87 *Id*. at 317 (Kavanaugh, J., concurring).

B. Diversity in Admissions Approved in the Harvard Decision

Although *Harvard* rejects *Grutter's* approach to race-conscious admissions,[88] the majority nonetheless ends its opinion with its recognition of a broad conception of an applicant's merit, including in ways related to racial experience. In section VI of its opinion, the majority left the door open for universities to assess qualities such as an individual applicant's character, motivation, or resilience based on that applicant's experiences, even if related to the applicant's race: "[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[89]

Still, a university cannot indirectly engage in preference based simply on membership in a racial group, such as by using a personal statement to identify an applicant's race and then give weight to race itself:[90]

> A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university.[91]

The *Harvard* majority is inviting schools to give weight to relevant racial experiences presented by an individual applicant, rather than to make generalized assumptions about the experiences, perspectives, or traits of members of a racial group. Through individualized review of each applicant's experiences and resulting qualities, schools can achieve truly meaningful diversity,[92] often related to an applicant's racial identity and experience. For example, an applicant's race-related experiences might have created the occasion or necessity to overcome obstacles, demonstrate courage and resilience, assume positions of leadership, or find inspiration and motivation.

Ironically, Harvard University's undergraduate admissions program at the time of *Bakke*, held out by Justice Powell as an example of a policy that satisfied strict scrutiny, includes a statement consistent with assessing an applicant's race-related experience and resulting character traits. The final sentence of that admissions policy, which Justice Powell appended to his opinion in *Bakke*, states that "the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it."[93]

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88 *See supra* notes 55–57 and accompanying text.

89 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 230 (2023). (section VI of the majority opinion).

90 *Id*.

91 *Id*. at 230–31.

92 *See* Steven A. Ramirez, *Students for Fair Admissions: Affirming Affirmative Action and Shapeshifting Towards Cognitive Diversity?*, 47 Seattle U. L. Rev. 1281, 1314 (2024) ("the benefits this process will yield could prove far more powerful because, in the end embracing cultural diversity requires authenticity").

93 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (opinion of Powell, J.).

The approach set forth in section VI of the *Harvard* majority opinion does more than satisfy Justice Powell's view in *Bakke* regarding the requirements of strict scrutiny as applied to college admissions. This approach is race-neutral because it focuses on the desired character traits and will value such qualities in *any* applicant, whether based on racial experiences or on experiences unrelated to the applicant's race. If so, that approach should not trigger strict scrutiny in the first place.[94]

III. OTHER LAWS PROHIBITING RACIAL PREFERENCES IN ADMISSIONS

A. Title VI of the 1964 Civil Rights Act and 42 U.S.C. § 1981

Recall that four Justices took the position in *Bakke* that Title VI, which applies to both public and private programs that accept federal assistance, requires a colorblind approach.[95] *Grutter* rejected this position by approving carefully limited race-conscious decisions in college admissions under the Equal Protection Clause and by ruling that a program lawful under Equal Protection was also lawful under Title VI and 42 U.S.C. section 1981.[96] In *Harvard*, the Court undermined *Grutter*'s approval of limited race-conscious admissions, but it maintained the tie between constitutional and statutory requirements by noting that no party had asked the Court to reconsider its previous rulings and assumptions that a violation of equal protection would also violate Title VI.[97]

The Court likely will continue to view the reach of Title VI and § 1981 to parallel that of the Equal Protection Clause,[98] so that all now require a race-neutral approach in admissions. Consequently, it is noteworthy that the *Harvard* majority appears to have advanced what it deemed to be a race-neutral approach when it approved assessment of an applicant's character traits, even when those valued traits arose out of race-based experiences.[99]

B. State Constitutional Amendments

Some schools have been following the equivalent of the *Harvard* decision's requirements for many years because nine states have adopted state laws forbidding

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94 *See, e.g.*, *infra* notes 110–13 and accompanying text; Ramirez, *supra* note 92, at 1313.

95 *See supra* note 8 and accompanying text.

96 Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

97 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 197 n.2 (2023).

98 Concurring in the *Harvard* decision, Justice Gorsuch, joined by Justice Thomas, urged the Court to "correct course" on Title VI, *Harvard*, 600 U.S. at 310 (Gorsuch, J. concurring), by explicitly holding that Title VI flatly prohibits race-conscious preference, *id*. at 287–310. Accordingly, they might be arguing that the statutory and constitutional analyses should diverge, so that Title VI would prohibit a race-conscious practice that managed to survive constitutional strict scrutiny. *See generally* Dorf, *supra* note 63 (discussing various interpretations of race neutrality under the Equal Protection Clause). Any such debate, however, should not affect the recommendations in this article, which assume a carefully structured race-neutral approach.

99 *See supra* Section II.B (analyzing *Harvard*, 600 U.S. at 230–31).

racial preferences in public education.[100] In 2010, Arizona Proposition 107, for example, added the following section to the Arizona Constitution:

> A. This state shall not grant preferential treatment to or discriminate against any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting.
>
> ....
>
> F. For the purposes of this section, "state" includes this state, a city, town or county, a public university, including the university of Arizona, Arizona state university and northern Arizona university, a community college district, a school district, a special district or any other political subdivision in this state.[101]

California was the first state to adopt such a measure, Proposition 209, in 1996.[102] A study released in 2024 concludes that these "[s]tate-level bans decrease racial diversity by 17 percent and that Black and Hispanic students account for nearly all of this decline."[103] The *Harvard* decision has now nationalized these state bans on racial preferences, as applied to college admissions.

If a state law essentially requires a race-neutral approach, then one can strongly argue that the *Harvard* majority's conclusions should inform a state court's interpretation of the state law. The state law would prohibit *Grutter*-style use of race as a plus factor. However, it should permit a school to value an applicant's character traits, such as resilience, motivation, or leadership, including those shaped by an applicant's race and racial experiences, because the *Harvard* majority endorsed such assessment while requiring race neutrality.[104] Indeed, a state law that operated otherwise would discriminate against an applicant with desired character traits simply because the applicant's race had played a role in shaping those traits.

IV. *HARVARD'S* REACH AND QUESTIONS IT LEAVES OPEN

This part offers some brainstorming about issues not specifically addressed in the *Harvard* decision. Any predictions about future Supreme Court treatment of these issues are only educated guesses.

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100 *E.g.*, Stephanie Saul, *9 States Have Banned Affirmative Action. Here's What That Looks Like*, N.Y. Times (Oct. 31, 2022), https://www.nytimes.com/2022/10/31/us/politics/affirmative-action-ban-states.html.

101 Ariz. Const. art. 2, § 36.

102 Cal. Const. art. I, § 31 (1996) (prohibiting preferences based on race, sex, color, ethnicity, or national origin in state or local employment, education, or contracting).

103 Richard R.W. Brooks et al., *Racial Diversity and Affirmative Action in American Law Schools*, Nw. Pub. L. Res. Paper No. 23-50, pg. 3 (Oct. 30, 2024), https://ssrn.com/abstract=4494741 (studying diversity before and after bans in twelve states but stating that some schools could gain in diversity after a national ban, such as the *Harvard* decision).

104 *See supra* Section II.B.

A. Undergraduate Admissions Based on Geography, Socioeconomic Status, and Status as First Generation to Attend Higher Education

Because of inequities in funding of public schools, secondary schools in low-income communities might not offer the same array of advance placement courses or other academic resources that would allow students to develop a record and perform on entrance exams in a way that competes effectively with students from well-funded schools.[105] Moreover, in the absence of parents who attended higher education institutions, or highly educated role models within their social circles, even well-qualified students from low-income communities might fail to consider higher education as a realistic goal. Consequently, highly intelligent and resilient students from a poorly funded school might fall through cracks in the admissions process even if they earned good grades in high school. Moreover, due to a history of housing segregation and discriminatory obstacles to wealth creation,[106] students of color are disproportionately represented in low-income communities and poorly resourced schools.[107]

To avoid missing highly talented students from underprivileged backgrounds, and to attain a degree of geographic diversity, a school could admit a certain percentage of top students from all high schools in an area, or it could at least place that cohort in a category of applicants who will receive special consideration of individual qualities and accomplishments.[108]

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105 *See generally* Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 334–35 (2023) (Sotomayor, J., dissenting) (referring to unequal school funding resting on property taxes, and citing to Justice Marshall's dissent in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 72–86 (1973)); *Tax Equity Now NY v. City of New York*, 241 N.E.3d 103 (N.Y. 2024) (finding the complaint sufficiently pleads a cause of action against the city for inequities in its property tax system to the detriment of lower-income property owners).

106 *E.g.*, Charles R. Calleros, *A Quick Critique of the Common Law of Contracts and Capitalism*, 53 U. Pac. L. Rev. 706 (2022) 707–08 nn.15–17 (citing to sources discussing redlining, racial discrimination by government officials in farm loans and by banks in mortgage loans, and racial discrimination in property appraisals).

107 *Harvard*, 600 U.S. at 334–35 (Sotomayor, J., dissenting) (underrepresented students are more likely to live in poverty and attend poorly resourced schools); *Tax Equity Now NY, supra* note 105, at 119–23 (finding well-pleaded allegations that, due to racial segregation in New York City, the city's tax system violated federal law by having a disparate impact on lower-income residents in majority-minority neighborhoods); John Rogers Et Al., Univ. Cal. All Campus Consortium On Research For Diversity & Univ. Cal. Los Angeles Inst. For Democracy, Educ., & Access, California Educational Opportunity Report 2006: Roadblocks To College 1 (2006), http://www.edopp.org (inadequate funding of K-12 schools in California disproportionately affect schools "with high concentrations of students of color, many of whom are poor or learning the English language;" Carlos Avenancio-León & Troup Howard, *The Assessment Gap: Racial Inequalities in Property Taxation*, Wash. Ctr. Equitable Growth (June 2020), https://www.dropbox.com/scl/fi/4anobmg09igz1o5dp6396/Troup Howard JMP-Current.pdf?rlkey=zlqannrfogmfd2nby0ozm37d8&dl=1 (based on data for 118,000,000 homes throughout the United States, finding that local governments impose a disproportionately high property tax burden on Black and Hispanic residents).

108 *See, e.g.*, Fisher v. Univ. of Texas at Austin, 579 U.S. 365, 370–72 (2016) (*Fisher II*) (by state legislation, top ten percent of students from a Texas high school could enroll in any public university in the state).

The Top Ten Percent Plan in Texas was neither challenged nor adjudicated in *Fisher II*.[109] In 2023, however, in *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*,[110] the U.S. Court of Appeals for the Fourth Circuit approved an elite public high school's policy of allocating seats in the incoming class, for the students from participating public middle schools, equal to 1.5% of the eighth-grade students in each middle school.[111] The Fourth Circuit applied a rational basis standard of review, rather than strict scrutiny for race-based classifications.[112] Reversing findings by the trial court, a divided panel of the Fourth Circuit found that the high school was *not* motivated by discriminatory intent, such as an intent to achieve racial balancing.[113] Instead, the high school's board lawfully "intended to improve the overall socioeconomic and geographic diversity of the student body," even if it was aware that its race-neutral classification was correlated with race and would have a secondary effect of increasing racial diversity.[114]

The Supreme Court denied the Coalition's petition for certiorari.[115] Joined by Justice Thomas, Justice Alito dissented from the denial of certiorari, stating that he was inclined to "wipe the [Fourth Circuit's] decision off the books."[116] Justice Alito reasoned that the history of the board's development of the policy and the policy's adverse effect on Asian American students supported the trial court's finding of discriminatory intent.[117]

A denial of certiorari does not amount to a decision on the merits of the Fourth Circuit's decision.[118] Nonetheless, the opinions in the case suggest that the percentage approach taken in *Fisher* and in *TJ* can survive a constitutional challenge as a race-neutral program, so long as the program avoids the *Harvard* decision's objection to "indirect" but intentional racial preferences.[119] To avoid the objections in *TJ* from the trial court and from the dissenters on the Fourth Circuit and in the Supreme

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109 *Id*. at 378.

110 68 F.4th 864 (4th Cir. 2023), *cert. denied*, No. 23-170, 218 L.Ed.2d, 712024 WL 674659 (U.S. S. Ct. Feb. 20, 2024).

111 *Id*. at 875, 878-79.

112 *Id*. at 887.

113 *Id*. at 883–86.

114 *Id*. at 886.

115 Coalition for TJ v. Fairfax Cnty. Sch. Bd., No. 23-170, 218 L. Ed. 2d 71, 2024 WL 674659 (U.S. S. Ct. Feb. 20, 2024) (denying petition for writ of certiorari).

116 *Id*. at *5 (Alito, J. dissenting).

117 *Id*., at *2–5.

118 *E.g.*, State of Md. v. Baltimore Radio Show, 338 U.S. 912, 919 (1950).

119 *See supra* notes 90–91 and accompanying text (discussing indirect race-conscious actions; *see also* Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 365–66 (2023) (Sotomayor, J., dissenting) (consistent with positions in Petitioner's brief, majority decision does not disallow consideration of race-neutral criteria such as socioeconomic status, first-generation college status, fluency in multiple languages); *see also* Kahlenberg, *supra* note 57, at 301–05 (discussing indications in the *Harvard* decision that a majority of the Supreme Court would approve of admissions that value socioeconomic disadvantage, geographic diversity, and first-generation status).

Court's denial of certiorari, the legislative history of an admissions program should reveal a genuine interest in finding and admitting highly qualified but otherwise overlooked students from geographically diverse feeder schools, including underfunded ones, for reasons aside from race. Such a motivation should pave the way for a lower level of constitutional review even if the admissions officers gladly recognize that increased racial diversity will likely be an incidental benefit.[120]

The same should be true of a university's policy of directly targeting low-income and first-generation students for recruitment and for special consideration for admission. So long as the admissions officers genuinely seek diversity in terms of those race-neutral characteristics and implement their policies with that motivation, they should be able to defend their policies even if the diversity they achieve also increases racial representation correlated with low-income and first-generation status.

B. Outreach to Potential Applicants

Outreach to potential applicants arguably is distinguishable from the race-conscious admissions programs found unconstitutional in the *Harvard* decision, because outreach is not a zero-sum game, at least not to the same degree as choosing one student over another for a single available admission slot.[121] Special outreach programs targeting students of color will constitute only one part of more general outreach directed to qualified potential applicants of all races.

In analyzing whether the *Harvard* majority would recognize a meaningful distinction between race-conscious outreach and race-conscious admissions, it may be instructive to review California case law interpreting California's Proposition 209, which in 1996 banned preferences by state schools in that state.[122] In *Hi Voltage Wire Works, Inc. v. City of San Jose*,[123] the California Supreme Court found that a city violated the state constitution's ban on race and gender preferences when the city required bidders for public projects to give individualized notice of the project to at least four subcontractors primarily owned and managed by women or minorities ["WBEs" and "MBEs,"], but not requiring such specific outreach to other subcontractors.[124] While concurring with this holding, Justice George noted that the state law would *not* ban a city policy requiring prime contractors "to engage in reasonable, good faith outreach to all types of subcontractor enterprises in a community like the outreach program upheld by this court prior to the adoption of Proposition 209 in *Domar Electric, Inc. v. City of Los Angeles*."[125] *Domar* approved

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120 For a thorough discussion of the uncertain constitutionality of various purposes and motivations that might accompany practices that are race-neutral on their face, *see* Dorf, *supra* note 63.

121 *Compare supra* note 79 and accompanying text (*Harvard* majority describes admissions as zero sum).

122 *See supra* note 102 and accompanying text.

123 24 Cal. 4th 537 (2000).

124 *Id*. at 559–70.

125 *Id*. at 597 (George, J., concurring and dissenting) (citing Domar Electric, Inc. v. City of Los Angeles, 9 Cal. 4th 161 (1994) (In Bank)). *Domar* approved a city policy requiring bidders for city contracts "to take all reasonable steps to ensure that all available business enterprises, including local

a city policy requiring bidders for city contracts "to take all reasonable steps to ensure that all available business enterprises, including local MBEs and WBEs, have an equal opportunity to compete for and participate in city contracts."[126]

We can imagine a university engaging in general outreach to all potential applicants who view its website or printed brochures, participate in guided tours of the campus, or meet with university representatives in open visits to high school campuses (or college campuses for recruitment to graduate programs). If the university supplemented general outreach programs with ones targeting students of color, such as by hosting a special informational and mentoring session on campus for invited students of color, it is unclear whether that race-conscious outreach effort would amount to a preference banned by Proposition 209 or the Equal Protection Clause under the *Harvard* decision. A school that provides additional and valuable guidance to prospective students of color should be ready to respond to a charge that doing so provides an exclusive benefit to some students based on race.

As one possible response, the university could argue that supplementary outreach programming arguably would be consistent with the policy approved in *Domar* and touted by Justice George in *Hi Voltage* if barriers to information or expectations about access to higher education are generally greater for students of color. If so, "reasonable" efforts to reach prospective students of color would include programming that is supplemental to the general outreach that is reasonable and effective for the general student population. Stated differently, special outreach might not even count as preferential if it is simply part of a calibrated effort to reach various audiences to the same degree and effect.

In 2009, in *American Civil Rights Foundation v. Berkeley Unified School District*,[127] a California court of appeal arguably stretched well beyond Justice George's dictum, finding that California's constitutional ban on racial preferences was not violated[128] when a school district assigned students to schools without regard to each individual student's race but partly on the basis of their residence within geographic areas ranked by a combination of three factors: average household income in the area, average education level of adults in the area, and percentage of students in the area who are students of color.[129] The District used these factors to assign students from designated geographic areas, so as "to approximate the racial and socioeconomic diversity of the geographic attendance zone as a whole."[130]

Whether applied to admissions, special recruiting programs, or other higher education benefits, the court of appeal's decision in *Berkeley* suggests that a school

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MBEs and WBEs, have an equal opportunity to compete for and participate in city contracts. *Id*. at 166.

126 *Domar*, 9 Cal. 4th at 166.

127 172 Cal. App. 4th 207 (2009), *review denied*, No. S172258, 2009 CAL. LEXIS 6661 (U.S. S. Ct., June 10, 2009).

128 *Id*. at 211.

129 *Id*. at 211–13.

130 *Id*. at 213–14.

could consider the racial demographics of a prospective student's neighborhood as one of several factors in allocating benefits, while arguably remaining race-neutral with respect to each individual student's race. A college that remains ready to test the limits of *Hi Voltage* and *Harvard* in litigation might be willing to experiment with some version of this approach. However, the statement of the District's goal in *Berkeley* likely would violate federal law after *Harvard* because it included an intent to increase racial diversity and further to accomplish racial balancing.[131] With that stated intent, the *Berkeley* approach could well be viewed by the *Harvard* majority as an "indirect" means of accomplishing what its opinion forbids.[132]

Colleges and universities will be on firmer ground if they expend special efforts and resources to recruit applicants, regardless of race, from low-income and geographically diverse communities, or students who are first in their families to attend higher education. If valued in their own right and not as a marker for race, those categories should qualify as race-neutral.[133] If a college genuinely desires to attract students from low-income, geographically diverse, or first-generation communities, without regard to each student's race, and if it sees the need for special efforts to reach those students, its special efforts should meet the standards of both the *Berkeley* and *Harvard* decisions, even if those populations necessarily include a significant percentage of students of color. In other words, the college must genuinely proceed with the purpose of increasing geographic and socioeconomic diversity, without aiming for racial diversity, even though these efforts might bring secondary benefits of increased racial diversity.

Moreover, universities should bear no legal risk in attempting to correct misperceptions held by students of color that the *Harvard* decision signals that those students are less welcome to apply for and participate in higher education. Universities can and should advertise their existing racial diversity and climate for diversity, make it clear that members of all races are welcome on campus and encouraged to apply, and provide assurances that students of all races and backgrounds will have ample opportunity in the application process to demonstrate their potential and drive for success in their studies.[134]

C. Recruiting Newly Admitted Students

After a school has offered admission to students, it will endeavor to persuade them to enroll, with some of those efforts directed broadly to all newly admitted students. Here, the same principles should apply as discussed in the immediately preceding section for recruiting potential applicants: special attention to some newly admitted students, including those with socioeconomic disadvantage or first-generation status, can be implemented in a race-neutral fashion.

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131 *See supra* notes 23 and 34, and accompanying text.

132 *See supra* note 90 and accompanying text.

133 *See supra* notes 90–94 and accompanying text.

134 *See* Feingold, *supra* note 65, at 276–78 (discussing ways in which universities may proclaim their values and views, including welcoming racial diversity and committing to racial inclusion).

Moreover, a college can spark conversations between newly admitted students and current students, staff, or community members in a way that responds credibly to the questions and concerns of a broadly diverse student population. For example imagine a law school with fifty student organizations, a wide variety of externships offered for credit, and special curricular offerings or concentrations, ranging from clinical programs to a certificate in Federal Indian Law. The law school could publish a web page with links to each of these student organizations and curricular programs, with each linked page listing student, faculty, staff, or community contacts. A newly admitted student who is interested in international law could contact a student officer of the International Law Society to ask probing questions about the school's curriculum, professors, and externships relating to international law.

In addition to such curricular questions, a second admitted student, who is interested in the mission of the Black Law Students Association (BLSA), might contact an officer of that student organization about the atmosphere on campus and in the community for racial minorities, opportunities for pro bono work in the community, and availability of mentoring programs within the school and legal community. This contact with a current student might lead to further conversations with a faculty member or an active member of the local Black Bar Association (BBA). Nothing in this system requires the newly admitted student, the BLSA officer, the faculty member, or the member of the BBA to be Black or any other race; all those groups are open to members of all races, and members of all races could be committed to actively advancing each group's mission. So long as the newly admitted student is directed to those best positioned to answer the student's questions and to recruit the student to the school, this system of identifying contacts remains race neutral, even if a very high proportion of those identified in this second example are Black.

D. Financial Aid or Other Assistance

Although applying its standards to admissions, the *Harvard* decision refers more broadly to "a benefit to a student,"[135] so we can expect that the Court would apply the same standards to a school's grant of financial aid or other forms of valuable assistance to students. As communicated by its Education Departments Office for Civil Rights President Trump's administration has thoroughly embraced that view, threatening denial of federal funding to schools that "distribute benefits or burdens based on race."[136] Consequently, if a private party funds a scholarship

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135 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 230 (2023).

136 *See, e.g.*, Liam Knox, *Ed Department: DEI Violates Civil Rights Law*, Inside Higher Ed. (Feb. 15, 2025), https://www.insidehighered.com/news/diversity/race-ethnicity/2025/02/15/trump-admin-threatens-rescind-federal-funds-over-dei (reporting on U.S. Dept. Educ. Off. for Civ. Rights, *Dear Colleague Letter*, 2 (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf). The Department of Education provided further guidance on its position in Dept. Educ. Off. for Civ. Rights, *Frequently Asked Questions*, (Feb. 28, 2025), https://www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf (hereafter, Dept. Educ., *FAQ*). President Trump wasted no time with his anti-DEI actions: on the first two days of his second term, he signed executive orders banning DEI efforts in the military and federal government, E.O. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025), and making it official U.S. policy to recognize male and female

and then depends on the school to select a recipient and award the scholarship, the school presumably must do so on a race-neutral basis such as outlined in the *Harvard* decision.

Many universities or colleges also offer academic support programs. Some forms of academic assistance, such as access to helpful librarians or writing centers, will be available to all students. But other benefits, such as regular tutoring that is free of cost to the student but funded by the school, might be sufficiently costly or scarce that it is available only to selected students most in need of academic support. The *Harvard* decision's requirement of race neutrality likely would apply to such a tangible benefit. Moreover, such academic support ought not to be allocated by race for other reasons, including avoidance of race-based stereotyping and stigmatization. Scarce academic support resources can always be allocated by GPA after the first semester, or a combination of high school or college GPA and entrance test scores prior to grades in the school providing the support.

On the other hand, a purely private party or for-profit entity, such as a law firm, should be able to directly award financial aid, run pipeline programs, or provide other assistance to students on any basis it chooses, including race, so long as the private entity and student do not form a contract that triggers 42 U.S.C. § 1981,[137] and so long as the private party does not act jointly with a state school or one covered by Title VI.[138] So long as a school did not participate in the private entity's selection of a beneficiary of its support, a school presumably can accept tuition payments from the student without regard to the student's private source of the funds or the criteria for receiving it from a private source.

E. Private Firm Internships

Hiring by a private firm—not acting jointly with a college or university—is regulated by Title VII of the Civil Rights Act of 1964[139] and the 1866 Civil Rights Act,[140]

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as the only sexes or genders, E.O. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025); *see* Stephanie Lai et al., *A Rundown of Trump's Executive Actions*, Fin. Rev. (Jan. 21, 2025), https://www.afr.com/world/north-america/a-rundown-of-trump-s-executive-actions-20250121-p5l66m.

137 *See supra* notes 5–6 and accompanying text; *see also* Am. All. for Equal Rts. v. Fearless Fund Mgmt., 103 F.4th 765, 775–76, 779–80 (11th Cir. 2024) (ordering preliminary injunction against funding competition open exclusively to business entities owed by Black women because contest ended with a contractual relationship to which § 1981 applies).

138 The line between school involvement and purely private assistance likely can be informed by cases addressing whether the actions of private and governmental entities are so jointly executed or otherwise closely intertwined that they constitute state action for purposes of the Fourteenth Amendment or action under the color of state law under 42 U.S.C. § 1983. *See, e.g.*, Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) (Entwinement between public high school and nominally private athletic organization supported findings of state action and action under color of state law.). Even in the absence of state action, certain nonprofit entities, including private schools, must maintain a racially nondiscriminatory policy to qualify for tax-exempt status. Rev. Rul. 71–447, 1971–2 C.B. 230 (1971).

139 42 U.S.C § 2000e to 2000e-17.

140 42 U.S.C. § 1981 (prohibiting racial discrimination in contracting).

with exceptions for firms not meeting Title VII's minimum size requirement.[141] Assuming an employment relationship in a paid summer clerkship or a paid semester-long internship, the circumstances in which Title VII would permit a private firm to engage in race-conscious selection of students for the position are rare and beyond the scope of this article.[142]

However, the *Harvard* decision should inform our analysis of selection criteria when a private firm works jointly with a college or university[143] to select interns for supervised work and training in a curricular offering for credit, or when that arrangement constitutes a contractual relationship triggering § 1981.[144] After *Harvard*, such programs must be race-neutral, although they can seek diversity in the other ways described in this part. Firms presumably can give special consideration to low-income students, first-generation law students, or students who have experiences—including those related to their race—that demonstrate special qualities such as exceptional leadership, inspiration or other motivation, and resilience in overcoming challenges.

In such an internship, a law firm might seek to provide valuable experience, feedback, and mentoring to students who are bright and promising but whose

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141 42 U.S.C § 2000e(b) (statute applies to employers "engaged in an industry affecting commerce" and regularly employing at least fifteen employees, with some additional exclusions).

142 For general standards, *see, e.g., United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979) (approving affirmative action plan using race-conscious training and placement to redress prior racial exclusion in the workforce); EEOC Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, 29 C.F.R. §§ 1608.1, 1608.3 (2024) (finding or admission of discrimination not required to justify appropriate affirmative action); *see also* Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616 (1987) (applying *Weber*'s test to validate local government affirmative action plan to promote women to positions from which they had traditionally been excluded); *compare* Ricci v. DeStefano, 557 U.S. 557, 585 (2009) (Under Title VII, a city's racial discrimination against some candidates for promotion was not justified as a means of voluntary compliance to avoid liability for the perceived unlawful disparate impact of an examination, unless it had a "strong basis in evidence" for that perception.)

For the most part, "affirmative action" in hiring has meant engaging in outreach and taking other affirmative steps to ensure nondiscrimination and equal opportunity. For example, since issued by President Lyndon Johnson, E.O. 11246, 30 Fed. Reg. 12319 (1965), has required government contractors to "take affirmative action" to ensure nondiscrimination in employment, E.O. 11246 § 202(1), and and to provide data to the Secretary of Labor on their employment practices, id. at § 202(5). In his second term, President Trump replaced this long-standing executive order with one requiring that government contractors certify that they do not engage in DEI practices that violate federal antidiscrimination laws. E.O. 17143 § 3(b)(i)&(ii)(B), 90 Fed. Reg. 8633 (Jan. 21, 2025); *see* Isabel Gottlieb, *Trump's DEI Order Creates Dilemma for Federal Contractors*, Bloomberg Law News (Feb. 13, 2025), https://news.bloomberglaw.com/in-house-counsel/trumps-dei-order-creates-dilemma-for-federal-contractors. Although the new requirement presumably does no more than require contractors to continue to abide by antidiscrimination laws, by referring to DEI without further defining it, the new order could induce risk-averse contractors to drop all activity relating to diversity, including lawful outreach. *Id*. President Trump also sought to influence enforcement of antidiscrimination laws by firing two Democratic members of the EEOC prior to expiration of their terms. Rebecca Klar, *Trump Fires Two EEOC Democratic Commissioners in Rare Move*, Bloomberg Law News (Jan. 28, 2025), https://news.bloomberglaw.com/daily-labor-report/trump-fires-eeoc-democratic-commissioner-jocelyn-samuels.

143 *See supra* note 138.

144 *See supra* notes 5, 6, and 137.

access to such benefits has been limited by their circumstances. For example, low-income students who of necessity worked twenty hours each week during college might have earned good grades but lacked the time to polish their writing on assigned papers or to fully absorb feedback provided by their professors. Other students, though bright and industrious, might have been a step behind in their research and writing skills throughout K-12 and college because they attended underfunded primary and secondary schools, which incidentally are frequently found in communities of color.[145] Students in those circumstances might derive the most benefit from an internship designed to provide feedback and mentoring.

Firms can ask applicants to include a personal statement with their materials, just as an admissions committee would, to permit assessment of factors approved in section VI of the *Harvard* decision. In many cases, one would expect the most deserving students to be diverse in a variety of ways, including racially, with some disadvantaged white students meeting the criteria.

Again, a firm or its members may donate benefits—such as financial aid, coaching, or mentoring—in a race-conscious manner, if it acts independently of a school and so long as the relationship with the beneficiary is not contractual.[146]

F. DEI, Including Programs Designed to Support Existing Racial Diversity

Before the *Harvard* decision upended nearly a half century of precedent, campus policies to advance diversity, equity, and inclusion (DEI) began with efforts to achieve diversity through affirmative action in admissions, including race-conscious policies. But the equity and inclusion in DEI has also encompassed curricular, staff, and student organization programs to help maintain a campus that welcomes and supports a diverse community, which will inevitably include students who are adjusting to a very different environment and feel insecure about whether they belong in the college or university. After all, the school has a strong interest in maximizing retention and student well-being while fostering intellectual growth.

Unfortunately for these efforts, the *Harvard* decision not only altered permissible selection criteria for admission and other university benefits, it helped to spur a more general backlash against a wide range of DEI policies and programming on campuses in the United States, resulting in anti-DEI legislation in several states,[147]

145 *Supra* notes 105 and 107.

146 *See supra* notes 137–38 and accompanying text.

147 *See, e.g.*, Erin Gretzinger *et al.*, *Tracking Higher Ed's Dismantling of DEI*, Chron. Higher Educ., https://www.chronicle.com/article/tracking-higher-eds-dismantling-of-dei (last accessed March 6, 2025) (comprehensive tracking of anti-DEI legislation and changes in university policies). Legislation in some states even restricts the kinds of topics that can be taught in schools, raising First Amendment issues. *See, e.g.*, Complaint in *Simon v. Ivey* (N.D. Ala., Jan. 14, 2025), https://www.naacpldf.org/wp-content/uploads/Final-Complaint-Simon-v.-Ivey102.pdf (alleging constitutional defects in Alabama legislation that prohibits the teaching of "divisive concepts"); Complaint in Austin v. Lamb, Case 1:25-cv-00016-MW-MJF (U.S. Dist. Ct. N.D. Fla., Jan. 16, 2025), https://storage.courtlistener.com/recap/gov.uscourts.flnd.529138/gov.uscourts.flnd.529138.1.0.pdf (alleging Florida ban on funding for advocacy of DEI or political advocacy on campus is unconstitutionally vague and viewpoint discriminatory).

and a threat from the Trump administration to withhold federal funding from schools that engage in race-conscious programming, activities, and assignment of benefits or burdens.[148]

When such governmental restrictions apply to programming open to all students, and especially if they object to the content or viewpoint of the programming, they are subject to challenge under the First Amendment.[149] Until litigation clarifies the legal limits of such restrictions, however, threats to withdraw funding will likely have a chilling effect that leads many schools to err on the side of caution. Nonetheless, nothing in the *Harvard* decision imposes a legal impediment to supportive DEI programming that is open to all students.

To avoid stoking division and stereotypically typecasting racial minorities as uniformly and exclusively needing support, and to avoid legal challenges based on the *Harvard* decision's stated disapproval of any race-conscious benefit, a school can offer programming and services that foster inclusion, engagement, and a sense of community and belonging to any and all students who seek it.[150] Even a program or activity exploring or celebrating an ethnic culture, open to all, can be educational, enlightening, and community-building for all. A variety of such programming can do more than create a sense of belonging based on shared cultural backgrounds; it can also foster communication, interaction, collaboration, increased knowledge and understanding, and a *display* of mutual respect and civility between members of diverse groups.[151]

1. Diversity Presents Challenges as Well as Benefits

Assuming that a university enrolls diverse classes in a manner consistent with the *Harvard* decision, it has additional interests in facilitating student collaboration in a common academic enterprise. That enterprise should encourage a robust exchange of a diverse range of ideas and perspectives while maintaining safe and nondiscriminatory educational opportunities for all. At times, tensions between these two values can spark a crisis on campus, requiring administrators to protect free speech voiced in the proper forum while maintaining full and safe access to educational programs.[152]

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148 *See supra* note 136.

149 *See supra* note 147 (citing to complaints in two cases).

150 In the wake of the *Harvard* decision and the backlash against DEI, for example, many of the universities reacting to the backlash have changed the name of DEI programs or offices to ones that appear to reflect a goal of advancing belonging, inclusion, welcoming, and success for all students. *See* Gretzinger, supra note 147.

151 *See* Charles R. Calleros, *Conflict, Apology, and Reconciliation at Arizona State University: A Second Case Study in Hateful Speech*, 27 Cumb. L. Rev. 91, 98–99 (1997) (describing a university program designed to spur such interchange); *see also* Charles R. Calleros, *Reconciliation of Civil Rights and Civil Liberties After R.A.V. v. City of St. Paul: Free Speech, Antiharassment Policies, Multicultural Education, and Political Correctness at Arizona State University*, 1992 Utah L. Rev. 1205, 1221–30, 1289–1301, 1312–13 (1992) (describing several incidents of offensive speech to which the university responded by fostering support, discussion, debate, and a civil exchange of views within relevant communities).

152 Many universities faced this challenge during Pro-Palestinian protests following the October 2023 attack by Hamas in Israel, and Israel's war against Hamas in Gaza in response. *See, e.g.*, Nicholas Fandos

Before a crisis erupts, universities can implement programming to help foster harmonious relations amid a lively exchange of ideas along a broad spectrum of viewpoints. Such programming can educate students about the university's support for legally protected free speech while also encouraging students to relate to one another with mutual respect and civility.[153] This encouragement can extend to helping students appreciate the social and intellectual growth that comes from working with and learning from others on campus who represent different backgrounds and experiences, whether racial, geographic, cultural, political, or otherwise. It can also include student organizations, staff advisors, and training for faculty and staff as part of an effort to help all members of a diverse student body to feel welcome, supported, and emotionally healthy in their pursuit of education.[154]

Of course, programming to advance harmonious working relationships works best if it truly informs the audience, helping them see or experience the workplace or classroom in a more enlightened way, rather than producing counter-productive defensiveness or division. That likely requires a creative pedagogy other than lecturing the audience in an accusatory manner. The aim should be to help participants engage with each other, learn from each other, and better recognize how differences in experiences and perspectives can provide complementary strengths within a group.[155]

& Sharon Otterman, *Inside the Week that Shook Columbia University*, N.Y. Times (May 7, 2024), https://www.nytimes.com/2024/04/23/nyregion/columbia-university-campus-protests.html?te=1&nl=the-morning&emc=edit_nn_20240424; Troy Closson, *Student Protest Movement Could Cause a Tumultuous End to School Year*, N.Y. Times (Apr. 23, 2024), https://www.nytimes.com/2024/04/23/us/columbia-university-remote-classes-protests.html?te=1&nl=the-morning&emc=edit_nn_20240424. In 2025, the Trump administration announced that it was canceling $400,000,000 in federal grants and contracts to Columbia University in response to civil rights complaints filed by Jewish students for harassment during the protests, prompting the university to "pledge to work with the government to restore the funding." Janet Lorin, *Trump Hits Columbia with $400 Million in Cuts Over Antisemitism*, Bloomberg News (March 7, 2025), https://news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMTk1LTcxYmUtZGNlZS1hMzk1LWY5YmY0NmViMDAwMyIsImN0eHQiOiJDVE5XIiwidXVpZCI6InZLRTZZODhSelRqR1hURzhDajdmV3c9PUhCQk42eUE4aFBjSmFoVVVBbUFEN1E9PSIsInRpbWUiOiIxNzQxMzc0MzkyMjc0Iiwic2lnIjoibXg2ZENsSDRCSk4yc1BCODh4YmlTcmlvUXpvPSIsInYiOiIxIn0=?source=newsletter&item=read-text&region=digest&channel=bloomberg-law-news.

153 *See supra* note 151.

154 *See, e.g.*, Yusuf Zakir, *DEI Attacks Betray Professionals Striving for Workplace Fairness*, Bloomberg Law (June 25, 2024), https://news.bloomberglaw.com/us-law-week/dei-attacks-betray-professionals-striving-for-workplace-fairness (law firm's Chief DEI Officer maintains a commitment "to foster a culture where all talented people—including those from traditionally underrepresented communities—can have and can see paths to success."). *Compare* Michelle Del Rey, *Costco Remains Committed to DEI. Its CEO Told a Critic 'I Am Not Prepared to Change'*, Indep. (Jan. 15, 2025), https://www.independent.co.uk/news/world/americas/costco-dei-committed-shareholders-b2680191.html (in the face of pressures against business to abandon their DEI programs, Costco's Board wrote that "Our commitment to an enterprise rooted in respect and inclusion is appropriate and necessary.").

155 Erik Larson, *New Research: Diversity + Inclusion = Better Decision Making at Work*, Forbes Newsletter (Sept. 21, 2017, updated Dec. 10, 2021), https://www.forbes.com/sites/eriklarson/2017/09/21/new-research-diversity-inclusion-better-decision-making-at-work/; David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, Harvard Bus. Rev. (Nov. 4, 2016), https://hbr.org/2016/11/

2. Affinity Groups for Enrolled Students

An affinity student group, such as a Black Law Students Association or a Women's Law Student Association, will typically have a faculty or staff advisor who stands ready to provide support and counseling, while student members enjoy a sense of community through participation in activities related to each group's mission statement. Although an affinity group's mission often includes exploring issues or engaging in activities related to a personal characteristic or cultural heritage—such as exploring issues faced by members of a nearby ethnic community, or gaining inspiration from women who have overcome challenges to succeed in certain professions—a school would not run afoul of the *Harvard* decision by recognizing and supporting these groups so long as membership is open to *any* student who has an interest in the group's mission and activities.[156] Moreover, a college with a student body of at least one thousand students likely will spawn student groups so numerous and diverse that any student should be able to find at least one group that explores issues of interest to the student and that provides a sense of community for the student.[157]

3. Academic Support/Academic Success Programs

Academic support or success programs (ASP) can help students survive, succeed, and sometimes thrive in a challenging academic setting. As discussed in Section IV.D, these programs should not be racially exclusive, but they can help retain and graduate members of a diverse student body.

4. Earlier Interventions

Those who favor greater equity in higher education should not be content with creative admissions programs at the college level. That comes too late to address the headwinds of income inequality, housing segregation, and inequitable funding of public schools. If we wish to redress decades and centuries of discrimination, including obstacles to wealth creation, we should lend our support to universal pr-kindergarten schooling, full and equitable funding of public schools, and pipeline programs that reach diverse students as early as middle school if not earlier.[158]

V. THE OUTLINES OF A RACE-NEUTRAL ASSESSMENT OF MERIT, BROADLY DEFINED

Schools faced for the first time with a requirement of race-neutrality after the *Harvard* decision can learn from the experience of schools in a handful of states that

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why-diverse-teams-are-smarter; Ramirez, *supra* note 92, at 1315–21 (describing various studies of decision-making in groups with diverse experiences, knowledge, and perspectives).

156 The new administration's Department of Education appears to agree with this general analysis. Its February 2025 guidance on frequently asked questions states that Title VI would not prohibit school programs that "focus on interests in particular cultures, heritages, and areas of the world" or that "recognize historical events and contributions, and promote awareness," so long as they do not exclude or discourage participation based on race). Dept. Educ., *FAQ*, *supra* note 136, at 6.

157 For example the website for the Sandra Day O'Connor College of Law at Arizona State University lists more than fifty student organizations at the college. https://law.asu.edu/student-life/organizations (last visited March 6, 2025).

158 *See supra* notes 105–07; Calleros, *supra* note 106, at 714, nn.46–47 and accompanying text.

had adopted state laws banning racial preferences many years prior to *Harvard*.[159] For example, the University of California system suffered a dramatic decline in racial diversity after adoption of Proposition 209 in 1996, but it later made gains in diversity, partly by investing substantial resources in outreach and recruitment to increase the diverse pool of applicants.[160]

Of course, Proposition 209 still succeeded in dampening diversity; gains generally fell short of the diversity previously made possible by race-conscious affirmative action.[161] Moreover, the progress is mixed. For example, efforts to mitigate the effects of Proposition 209 have been more successful in the California State University system than in the flagship University of California campuses.[162] In 2023, California admitted a record high percentage of female and minority attorneys to the bar, at fifty-six percent and fifty-five percent, respectively, but minority representation among all lawyers in California is still much smaller than their representation in the general population, showing the need to make up for lost ground.[163]

Mixed though the results might be, universities that have long labored under restrictive state laws have not thrown in the towel; instead, they've rolled up their sleeves and set examples for others to emulate or surpass.[164] As stated by Justice Sotomayor in her *Harvard* decision dissent,

> The pursuit of racial diversity will go on. Although the court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society's needs for diversity in education.[165]

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159 *See supra* notes 100–02 and accompanying text (referring to laws in nine states that ban racial preferences).

160 *See* Teresa Watanabe, *California Banned Affirmative action in 1996. Inside the UC Sstruggle for Diversity*, L.A. Times (Oct. 31, 2022) https://www.latimes.com/california/story/2022-10-31/california-banned-affirmative-action-uc-struggles-for-diversity#:~:text=California%20banned%20affirmative%20action%20in%201996.%20Inside%20the,10%20campuses%20offers%20lessons%20on%20race-neutral%20admission%20practices.

161 *See generally* Robert A. Garda, Jr., *Students for Fair Admissions Through the Lens of Interest-Convergence Theory Reality, Perception, and Fear*, 77 SMU L. Rev. 93, 120 (2024) (summarizing the experiences of California and Michigan university systems after those states banned racial preferences).

162 Thomas Peele & Daniel J. Willis, *Dropping Affirmative Action Had Huge Impact on California's Public Universities*, EdSource *Investigation* (Oct. 29, 2020), https://edsource.org/?p=642437.

163 Karen Sloan, *California Shows Gains in Minority Lawyers, but Numbers Lag Far Behind General Population*, Reuters (Mar. 26, 2024), https://www.reuters.com/legal/legalindustry/california-shows-gains-minority-lawyers-numbers-lag-far-behind-general-2024-03-26/.

164 *See, e.g.*, Michael Blacher & Gabriella Kamran, *Following in California's Footsteps*, Inside Higher Ed (Mar. 4, 2024), https://www.insidehighered.com/opinion/views/2024/03/04/chart-future-admissions-look-california-opinion; Brandon Busteed, *Why Arizona State University Should Win the Nobel Peace Prize*, Forbes (Mar. 1, 2024) (lauding ASU's innovation, expansion of online learning, and its emphasis on inclusion with success rather than exclusivity), https://www.forbes.com/sites/brandonbusteed/2024/03/01/why-arizona-state-university-should-win-the-nobel-peace-prize/?sh=45d5ee7596ef&utm_campaign=ASU_News_News+3-29-24_6846773&utm_medium=email&utm_source=Media%20Relations%20&%20Strategic%20Communications_SFMCE&utm_term=ASU&utm_content=Forbes&ecd42=518002422&ecd73=172972610&ecd37=Now%20daily&ecd43=3/29/2024.

165 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 384 (2023).

To that end, universities can seek to expand educational opportunities in ways consistent with the *Harvard* decision. This article has addressed two such paths in Sections II.B and IV.A. Section IV.A discussed classes of applicants other than race that deserve special outreach and assessment, including socioeconomic disadvantage, status as the first-generation in higher education, and diverse geographic origin. Section II.B described the *Harvard* majority's approval of admissions criteria that value character traits and accomplishments, even if developed through experiences or perspectives inseparable from the applicant's race. Section V.D addresses factors that a school should consider in choosing between these paths or in pursuing both.

More generally, the sections below recommend steps a school can take to enhance access and diversity, with excellence. Admissions officers should take those steps with a genuine appreciation for the kinds of diversity that current law permits a school to seek and assess, excluding valuation of an applicant's race in the abstract. The likely effect should be diversity of many kinds in the student body, including racial diversity, even if less than was achievable with the now impermissible *Grutter-style* race-conscious holistic approach.[166]

A. Outreach to Potential Applicants and Future College-Bound Students

Universities will employ various means to attract students to apply to their undergraduate and graduate programs, from informative websites to personal visits to high schools and colleges. At this stage, they can cast their net broadly, inviting interest from all qualified potential applicants. Beyond general outreach, universities can specially target certain communities for pathway programs, as discussed above in Sections IV.A and IV.B, based on race-neutral criteria such as socioeconomic status, geographic diversity, and first generation in higher education.

But universities should do more than compete for applicants from the end of the pipeline to higher education. Schools, private organizations, and individual mentors should work to broaden access to higher education by developing or supporting pathway programs that encourage K-12 students to consider higher education, guiding them in preparing for its demands.[167] Again, universities can direct special attention to youth in underrepresented communities, based on race-neutral criteria such as socioeconomic status, geographic diversity, and first generation in higher education. By doing so, pathway programs can address barriers to higher education

(Sotomayor, J. dissenting).

166 *See*, *e.g.*, *supra* note 51 and accompanying text (evidence in *Fisher II* that alternative paths to diversity did not achieve adequate racial diversity). "[I]t's still too early to draw definitive conclusions" about the effect of *Harvard* on the first full admissions cycle after the decision, and any analysis is complicated by an uptick in the percentage of students who decline to disclose their race. Aatish Bhatia et al., *What Happened to Enrollment at Top Colleges After Affirmative Action Ended*, N.Y. Times (Jan. 15, 2025), https://www.nytimes.com/interactive/2025/01/15/upshot/college-enrollment-race.html. Nonetheless, a national survey of average enrollment nationwide shows that Black enrollment dropped from about seven percent of total enrollment in 2023–24 to six percent in 2024–25, and Hispanic enrollment dropped from about fourteen percent to thirteen percent.

167 *See*, *e.g.*, The Education Pipeline to the Professions: Programs that Work to Increase Diversity (Sarah E. Redfield, ed., 2012)).

stemming from relatively few role models, inadequate information regarding admission and financial aid, and possibly even undue pessimism about higher education's commitment to access to a broad spectrum of society.

Finally, universities should dispel any misconceptions among students of color that aspiring to and applying for higher education would be futile after the *Harvard* decision. As discussed in Section IV.B, nothing in the law would prevent a university from hanging out a welcome sign to applicants of all races by advertising a positive climate on campus for racial diversity.[168]

B. Robust Recruiting of Newly Admitted Students

After a college or university has offered admission to students, it will typically engage in substantial efforts to persuade the school's chosen admittees to enroll there rather than in a competing university. As discussed in Section IV.C, some ways of connecting admittees with members of the academic community can be race-neutral while serving the needs of a broadly diverse class of newly admitted student.

C. Magnet Programs

Schools can attract applicants of color and persuade admittees to enroll by offering curricular programs that will likely attract a diverse pool of applicants. A grouping of courses addressing transnational issues related to our border with Mexico, for example, could attract students of any race but might be disproportionately interesting to students with familial or ancestral ties to Latin America.

On a more ambitious scale, in 2024, Sacramento State University inaugurated its Black Honors College for students of any race who have a specific interest in Black studies. In addition to offering more specialized courses relating to the Black and African American experience, the college's general core courses will include coverage of Black history, perspectives, and contributions to the field.[169] Although students of any race could be attracted to at least a sampling of the courses offered by this college, one could expect that Black students especially will be attracted to a curriculum that reflects an effort to include Black history, experience, and contributions. Indeed, it might help influence and inspire some high school students to view college as an attractive option, thus increasing the aggregate pool of applicants.

D. Race-Neutral Admissions Criteria that Promote Diversity

1. A Fork in the Road?

Sections II.B and IV.A of this article describe race-neutral admissions criteria that

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168 *See supra* note 133 and accompanying text.

169 Katy Adams, *Nation's First-Ever Black Honors College Hopes to Inspire Others*, INSIGHT INTO DIVERSITY, 26–28 (Apr. 2024), https://www.insightintodiversity.com/wp-content/media/digitalissues/april2024/index.html. Although President Trump's administration might disapprove of this race-centered curriculum and even threaten to withhold funding, *see supra* note 134, such a content-based restriction on speech and academic freedom would surely face serious legal challenge, *see supra* note 147.

nonetheless can enhance student diversity, broadly defined. Richard Kahlenberg argues that schools should take the path that focuses on socioeconomic disadvantage and geographic diversity, which he believes will also achieve meaningful racial diversity.[170] Kahlenberg discourages schools from pursuing the path that places value of character traits, some related to an applicant's race, because he fears it will invite litigation due to difficulty in taking that path in a truly race-neutral fashion or at least in avoiding the suspicion of race-conscious admissions.[171]

Kahlenberg reasonably warns of the risks of taking the second path. One can imagine that an admissions officer, with years of experience implementing *Grutter*-style race-conscious admissions, might veer into a forbidden trail of valuing race itself, even if only subconsciously, after reading a personal statement in which the applicant's race is revealed. Moreover, even a school that adheres to *Harvard*'s standards for the second path could invite litigation if the high value it places on character traits results in admission of students with significantly lower GPAs and entrance exam scores.[172] For that reason, schools that are risk averse to legal challenges could minimize their risk by taking Kahlenberg's advice.

Nonetheless, I encourage schools who can bear the risk of legal challenges to send "search parties" down both paths. The *Harvard* decision's discussion of character traits reflects a laudable recognition of merit, broadly defined. It would be ironic if schools declined to seriously consider adopting an approach explicitly approved in the *Harvard* decision. If schools adopt and document careful procedures to implement this approach, it should be in a good position to avoid challenges or prevail on a pretrial motion.[173]

The first path, based on geographic diversity and socioeconomic disadvantage is summarized at various places in this article and is explored thoroughly in Kahlenberg's article.[174] Below, subsections V.D.2 and V.D.3 discuss the procedures a university can use to stay within the guardrails of the second path, as defined by the *Harvard* decision, and to defend itself against charges of exceeding those bounds.

2. Defining Desired Traits and Eliciting Stories

In addition to traditional measures of academic achievement, such as GPA,

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170 Kahlenberg, *supra* note 57, at 287, 300–19.170

171 *Id*. at 294–300, 319–20.

172 *See*, *e.g*., Stewart v. Texas Tech. Univ. Health Sci. Ctr., 741 F. Supp. 3d 528, 552–55 (N.D. Tex. 2024) (holding that complaint plausibly alleged that school intentionally granted racial preferences in admissions based on significantly disparate MCAT scores, "despite the potential influence of other admissions factors").

173 Michael Dorf is more pessimistic about the university's litigation position: "Even if a lawsuit … would ultimately fail, it would survive a motion to dimiss and probably survive a motion for summary judgment" because the evaluation of essays "presents a serious evidentiary issue." Dorf, *supra* note 63, at 289–90. Professor Dorf's concern about evidentiary issues garners some support from the new administration's Department of Education Office of Civil Rights, which has set forth "a non-exhaustive list" of six "different kinds of circumstantial evidence that, taken together, raise an inference of discriminatory intent" in Title VI litigation. Dept. Educ., *FAQ*, *supra* note 136, at 8

174 Kahlenberg, *supra* note 57, at 300–19.

colleges and graduate schools should determine the qualities that they seek in an incoming class. For example, a school might value such qualities as

- intellectual diversity within the entering class, including in academic interests, experiences, and perspectives;
- geographic diversity, to avoid parochialism in the class and to extend the reach and reputation of the school;
- socioeconomic diversity, including status as first-generation in higher education, to avoid limiting educational opportunities to the already privileged, and to discover and develop promising students who have not yet reached their full potential;
- work ethic, motivation, and inspiration, because success in higher education requires diligence and commitment;
- resilience and ability to overcome obstacles, because students in higher education may confront daunting challenges and suffer discouraging setbacks on their journey to graduation (feel free to refer to an obstacle in general terms if you wish to keep its precise nature private);
- demonstrated leadership, to develop effective, ethical leaders in business, social, and civic settings; and
- community service, especially important to a university that seeks to be embedded in community.[175]

Schools can encourage applicants to address such qualities in their personal statements, including the full story of how they developed the traits. A personal statement might reveal an individual's experiences that will allow that applicant to advance knowledge and perspectives that will enrich the educational experience for all students. Or it might reveal that an applicant has demonstrated the persistence and work ethic to succeed in the face of headwinds and thus has a better chance of succeeding in higher education than some applicants with higher test scores. In assessing those personal statements, schools can value qualities such as motivation, inspiration, resilience, work ethic, and leadership, including those developed through experiences related to the applicant's race.

All this invites an expansion of our understanding of *merit* beyond an applicant's ability to take an expensive preparation course and then excel on an entrance exam. Consistent with section VI of the *Harvard* decision, admitting an applicant partly due to the presence of such qualities is race-neutral if all applicants have an equal opportunity to demonstrate valued qualities[176] and if the admissions officers placed

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175 For example, as one of nine design aspirations for its model of a "New American University," Arizona State University aspires to "Be Socially Embedded," through connecting "with communities through mutually beneficial partnerships." https://newamericanuniversity.asu.edu/about/design-aspirations (last visited March 6, 2025).

176 Perhaps students of color will more often have compelling stories about inspiration or resilience and persistence in the face of daunting obstacles, often relating to racial experience: "in a society in which race matters, applicants of color will typically have had more and deeper experiences

value on the qualities and the challenging or inspiring circumstances from which they arose, without giving preference to the applicant's race "for race's sake."[177] Further, if these character traits are sufficiently important to a school, it should also consider making entrance exams optional, creating an admissions track based on GPA and character traits developed through experience.[178]

A possible obstacle to this path would be reticence on the part of some applicants to reveal their full stories in their personal statements, especially if their resilience stems from their overcoming headwinds from disturbing or painful events.[179] If so, they should certainly guard their privacy but might be able to highlight their triumphs, and the means of achieving success, while painting the obstacles in broad brush. One way to signal such an approach is provided by the parenthetic at the end of the fifth bullet point near the beginning of this subsection.

3. Staying on the Path with Careful Procedures

To ensure race neutrality, and to defend admissions decisions if later challenged, admissions officers must methodically follow well-crafted procedures, and they should consider keeping a comprehensive record of instructions, decisions, and justifications for admissions decisions, particularly those influenced by a candidate's qualities arising out of the candidate's racial experiences. Ideally, the admissions staff will be led by someone who has carefully studied the requirements and parameters of the *Harvard* decision, especially the fine line it draws concerning qualities gained through racial experiences.

For example, an admissions committee might adopt the following procedures:

- If collected for reporting purposes, the race of each applicant should be removed from the portion of the application viewed by admissions officers who are engaging in preliminary triage of applications.
- The chief admissions officer should regularly instruct and remind other officers about the *Harvard* requirements and the school's procedures, and should record this coaching in the minutes of meetings.

involving race." Dorf, *supra* note 63, at 289. It may also be true that economically disadvantaged students will more often have stories about motivation, work ethic, and resilience, just as first responders or members of the military might have compelling stories about learning to perform capably in exceptionally stressful circumstances. Other applicants might have enjoyed advantages based on wealth and family connections, enabling them to attend the best private schools, to travel the world, and to secure summer employment that provided a wealth of consequential experience. If all students have an opportunity to tell compelling stories about their journey to developing valued character traits, whether based on racial experience or otherwise, it is difficult to complain that some groups of students typically suffer greater adversity in our society and that some of those students emerge from that adversity with qualities that help predict success in law school and bring credit to the school and the profession.

177 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 220 (2023).

178 *See* Feingold, *supra* note 65, at 262–64, 280 (critiquing overreliance on numerical criteria); *see also* Vinay Harpalani, *Secret Admissions*, 48 J.C. & U.L. 325, 361–63 (2023) (predicting that risk averse schools are likely to continue the trend of reducing reliance on numerical criteria).

179 Harpalani, *supra* note 178, at 366–68 (presenting an example of such reticence on the part of a student).

- If a personal statement reveals valued character traits and describes their provenance in racial experiences, admissions officers should be carefully trained to place value on the traits but to avoid placing value on the applicant's race itself. Officers in this position should carefully document their process of assessment, justifying the value placed on a trait and confirming the compartmentalization needed to avoid placing value on the applicant's race itself. The admissions team should also ensure that all applicants with similar qualities and traits are assessed consistently, regardless of race. That consistency, however, need not render irrelevant the experience from which the trait sprang. For example, imagine an applicant who was subjected to especially virulent racism in high school but emerged not with bitterness and defeatism but with resilience and an unflagging motivation to assume leadership positions in projects devoted to advancing civil rights and bridging racial divides in our society. The school primarily will value the applicant's resulting traits of resilience, motivation, and leadership experience. Secondarily, admissions officers can note the nature and gravity of the challenges overcome, helping them gauge the authenticity and durability of the applicant's resilience, positive outlook, and motivation.[180] They would be justified in placing a higher value on those character traits than on those of an applicant whose resilience stems from bouncing back academically in college after earning poor grades due to initially spending excessive time at parties and in computer gaming, and who participated in community service and a leadership position only in satisfaction of his college's graduation requirements. Again, the admissions team should ensure that its members apply consistent standards in considering the relevance and significance of an experience from which a character trait developed, by assessing formative experiences without regard to the race of the applicant or whether the experience was racial in nature.

- To the extent that school considers numerical indicia of merit, a proposal to admit an applicant with valued character traits should present genuine and persuasive reasons for preferring that applicant over a rejected candidate with significantly higher numbers and should submit the proposal to the admissions team for review and discussion.

E. Reducing Unfair Barriers to Admission

Universities should review their admissions criteria to minimize socioeconomic bias. For example, qualified applicants, including those who would add various kinds of diversity, can be crowded out by less qualified applicants if a university departs from meritocratic criteria through legacy preferences.[181] A university can

180 *See generally supra* note 91 and accompanying text (*Harvard* majority providing the example of an applicant having overcome racial discrimination).

181 *See* Feingold, *supra* note 65, at 280 (discussing the disparate impact of legacy admissions against students of color); Garda, *supra* note 160, at n.171 and accompanying text (citing to several studies about the effect of legacy preferences).

erect a similar barrier to access by giving undue weight to an applicant's entrance examination score if this practice causes the university to overlook applicants who have a better chance of success in view of demonstrated qualities not measured by the examination and not given adequate weight when revealed in other application materials.[182] Eliminating or reducing such barriers can advance the search for merit, broadly defined, while likely enhancing diversity.[183]

F. Raising Scholarship Funds

The net cost of attending college could affect whether a student enrolls at an admitting university or whether the student even chooses to pursue a college education.[184] Especially if a school seeks socioeconomic diversity in its student body, success in raising scholarship funds can translate into greater success in achieving admissions goals.

G. Support for Student Success

Success in admissions will be a pyrrhic victory if large numbers of students fail to graduate. Especially for students who are first in their families to seek higher education, or who attended underfunded schools prior to college, academic support systems can help boost graduation rates and enable students to reach their full potential and promise.

VI. CONCLUSION

The *Harvard* decision raises serious questions about the appropriate framework with which to advance equality and equal protection. While it stands as the current law of the land, however, universities must follow its commands, but they should not overreact by abandoning efforts to expand opportunities for students whose merit is reflected in qualities and experiences beyond traditional numerical indicia. By expanding and cultivating the future pool of diverse applicants and assessing individual applicants for a broad range of indicia of merit and potential, schools can advance diversity in meaningful ways, including racial diversity. By following carful procedures that require and document race-neutral decision-making, schools can hope to avoid or quickly resolve legal challenges.

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182 *See* Feingold, *supra* note 65, at 262–64, 280 (discussing "fair appraisal" and the deficiencies of standard metrics, as well as the disparate impact of overreliance on standardized tests).

183 *Id*.

184 *See, e.g.*, Garrett Andrews & Brenna Swanston, *Is College Worth It? Consider These Factors Before Enrolling*, Forbes Advisor (June 4, 2024), https://www.forbes.com/advisor/education/student-resources/is-a-college-degree-worth-it/.

THE ROLE OF CHIEF UNIVERSITY ATTORNEY AS LAWYER, MANAGER, AND HIGHER EDUCATION EXECUTIVE:

A Qualitative Multiple Case Study

*BLAKE C. BILLINGS**

Abstract

Universities' in-house lawyers have accrued broad access and influence within their institutions. Once narrowly tasked with resolving live legal disputes, many chief university attorneys (CUAs) now field calls from decision-makers on all manner of university priorities, seeking legal and extralegal advice. To better understand the expansive role of CUA, a qualitative multiple case study design is employed to consider the cases of six incumbents and explore how they experience their role and influence. The findings reveal participants' experience that the CUA role is ideally composed of three functions: (1) preeminent, efficient lawyering, (2) skillful management of the university's legal enterprise, and (3) influential executive leadership. Further, the findings document participants' shared perception of their executive and extralegal influence as accrued by performing their complex role well and through developing high-quality professional relationships with senior decision-makers. These themes proffer a new role framework depicting CUAs' three contemporaneous functions as lawyer, manager, and executive, and the periodic component activities required to fulfill each of these functions. The framework and knowledge uncovered through this study will empower incumbents, university decision-makers, and other stakeholders in understanding and navigating the expansive role and influence of these traditionally little-known, typically risk averse, and nonacademic university executives.

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INTRODUCTION

The *Chronicle of Higher Education* recently proclaimed, "[a] college's top lawyer has never been more powerful."[1] Modern anecdotes suggest this assertion may be true. When Harvard University president Dr. Claudine Gay was summoned before Congress to testify on campus speech and activism in the wake of the Israel–Hamas war, she turned to lawyers in preparing her testimony.[2] Weeks later, she was forced to resign.[3] When Texas legislators banned diversity offices, programs, and trainings at the state's public universities,[4] the University of Texas at Austin turned to its lawyers to guide compliance efforts.[5] Initially, employees were restructured, retitled, and repurposed, though months later dozens were fired anyway.[6] When West Virginia University sought to address a $45 million budget shortfall, they turned to their lawyer as both advisor and spokesperson in a sweeping academic program overhaul.[7] Twenty-eight programs were shuttered, and 143 positions eliminated.[8] These university lawyers' proximity to presidents and other top decision-makers at times of legal and extralegal crisis demonstrate lawyers' expansive influence over fundamental academic and operational concerns such as campus speech, academic freedom, terms of faculty tenure and employment, program offerings, and institutions' respect for, and exercise of, their institutional values. Further, the complexity of these engagements and the controversial nature of their outcomes depict certain challenges inherent in these attorneys' modern role.

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1 David Jesse, *Your College's Top Lawyer Has Never Been More Powerful*, Chron. Higher Educ. (Feb. 26, 2024), https://www.chronicle.com/article/your-colleges-top-lawyer-has-never-been-more-powerful.

2 Lauren Hirsch, *One Law Firm Prepared Two Colleges for Hearing*, N.Y. Times (Dec. 8, 2023), https://www.nytimes.com/2023/12/08/business/dealbook/wilmerhale-penn-harvard-mit-antisemitism-hearing.html.

3 Emma Pettit, *Debate Follows Harvard President's Resignation Amid Plagiarism Claims and Criticism Over House Hearing*, Chron. Higher Educ. (Jan. 2, 2024), https://www.chronicle.com/article/harvard-president-resigns-amid-plagiarism-claims-and-criticism-over-congressional-hearing.

4 Kate McGee, *Texas Senate Approves Bill that Would Ban Diversity Programs in Public Universities*, Tex. Trib. (Apr. 19, 2023), https://www.texastribune.org/2023/04/19/texas-senate-dei-universities/.

5 *S.B. 17 Guidance*, Univ. Tex. Sys. (Sept. 15, 2023), https://www.utsystem.edu/documents/docs/publication/2023/sb17-guidance.

6 Katherine Mangan, *After DEI Ban, UT-Austin Eliminates a Division and Lays Off Its Former Diversity Staff*, Chron. Higher Educ. (Apr. 2, 2024), https://www.chronicle.com/article/after-dei-ban-ut-austin-eliminates-a-division-and-fires-its-former-diversity-staff.

7 Esteban Fernandez, *West Virginia University Cuts Set Off Wave of Fury at Board of Governors Meeting*, Times W.V. (Sept. 16, 2023), https://www.timeswv.com/news/local_news/west-virginia-university-cuts-set-off-wave-of-fury-at-board-of-governors-meeting/article_91ea6686-541b-11ee-860e-33b99b163f08.html.

8 Ryan Quinn, *WVU Professors Get Their Layoff Notices*, Inside Higher Ed (Oct. 17, 2023), https://www.insidehighered.com/news/faculty-issues/tenure/2023/10/17/wvu-professors-get-their-layoff-notices.

The role of chief university attorney (CUA)[9] has expanded over time.[10] Indeed, these recent anecdotes suggest a CUA's modern role is broader than that of a classic contract negotiator, policy drafter, and litigation manager.[11] In matters of great consequence to their institution, some argue that "[t]oday, the lawyer is not only in the meeting, but increasingly cast[ing] a deciding vote … [They] wield considerable power atop campus organizational charts, sitting in on nearly all high-level meetings and shaping colleges' responses to *everything*."[12] Assuming these claims are at least in part true, the delegation of such broad access and influence to CUAs—many instinctually risk-averse advisors by training, and typically lacking other administrative or scholarly experience within the academy[13]—presents tremendous implications for university faculty, staff, students, and other stakeholders. Conceivably, CUAs' influence can dictate what speech is permitted or prohibited, whether academic freedom is respected or eroded, what topics may be taught or studied, and whether fundamental institutional values may endure.

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9 *Chief university attorney* is the term assigned to the specific role examined in this study: a population university's highest-ranking in-house lawyer. Such lawyer may be directly hired and employed by the university, a parent system or board, or—in the case of certain public institutions—their state's attorney general. In practice, *CUA* is not a commonly used term. Indeed, incumbents are typically designated with title(s) such as general counsel, vice president/vice chancellor for legal affairs, university attorney, university counsel, or chief legal officer. *See* James L. Bess & Beth R. Dee, Understanding College and University Organization: Theories for Effective Policy and Practice (2012); Peter F. Lake, Foundations of Higher Education Law & Policy: Basic Legal Rules, Concepts, and Principles for Student Affairs (2011); Rudolph H. Weingartner, Fitting Form to Function: A Primer on the Organization of Academic Institutions (2d ed. 2011); Craig Parker & Linda Henderson, Nat'l Ass'n Coll. & Univ. Att'ys, Managing Your Campus Legal Needs: An Essential Guide to Selecting Counsel (2016), https://www.nacua.org/docs/default-source/legacy-doc/publications/managingyourcampuslegalneeds.pdf.

The CUA term is employed in this study to emphasize incumbents' role as a population university's highest-ranking in-house lawyer, regardless of their title or the particularities of their respective organization's structure. Note CUAs occasionally hold other administrative roles at their institution, such as secretary of the governing board or supervisor of compliance, ethics, or contracting units. *See* Jerry Blakemore, *Effective Participation as a Member of Senior Leadership*, (Nat'l Ass'n Coll. & Univ. Att'ys Ann. Conf., 2016), https://www.nacua.org/docs/default-source/legacy-doc/conference/june2016/4g.pdf; Stephen Dunham & Madelyn Wessel, *Making Sure the Hat Fits: Juggling the Many Roles of the GC* (Nat'l Ass'n Coll. & Univ. Att'ys Ann. Conf., 2019), https://www.nacua.org/docs/default-source/legacy-doc/conference/february2019/07_19-01-08.pdf. This study focuses exclusively on the CUA role; therefore, any additional administrative roles that certain incumbents may hold are not explored in this study.

10 Like a time-lapse, the evolution of the CUA role is depicted in former Florida State University general counsel and Stetson University legal scholar Robert Bickel's reflections published in 1974, 1994, and 2004. *See* Robert Bickel, *The Role of College or University Legal Counsel*, 3 J.L. & Educ. 73 (1974); Robert Bickel, *A Revisitation of the Role of College and University Counsel*, 3 West's Educ. L.Q. 164 (1994); Robert Bickel & Peter Ruger, *The Ubiquitous College Lawyer*, Chron. Higher Educ. (June 25, 2004), https://www.chronicle.com/article/The-Ubiquitous-College-Lawyer/33466; *see also* Blakemore, *supra* note 9.

11 J. Rufus Bealle, *Delivery of Legal Services to Institutions of Higher Education*, 2 J.C. & U.L. 5 (1974); Roderick Daane, *The Role of University Counsel*, 12 J.C. & U.L. 399 (1985).

12 Jesse, *supra* note 1, ¶ 2 (emphasis added).

13 Alexander Kafka, *Liability Everywhere: Why College Lawyers Will Be Working Overtime*, Chron. Higher Educ. (Feb. 16, 2020), https://www.chronicle.com/article/liability-everywhere/.

Because of CUAs' modern access and influence, it is imperative for leaders, faculty, and other stakeholders—and for incumbents themselves—to understand CUAs' expansive role. Despite the implications of CUAs' modern "power,"[14] empirical literature exploring the role, identity, and mechanisms of university attorneys is extremely limited.[15] This dearth of knowledge deserves empirical attention given CUAs' expansive influence on all matters of legal and extralegal concern and the university's core academic enterprise. Therefore, this qualitative multiple case study seeks to address significant gaps in empirical knowledge regarding university decision-making: What *is* the modern role of a CUA? In particular, what is the nature of a CUA's executive, extralegal influence? And how do the demands of extralegal leadership and advice-giving impact a CUA's continuing duties to manage their cascading lawyering duties and burgeoning in-house legal teams?[16] This study explores these questions, and the results present an empirically derived CUA role framework defining CUAs' primary role functions as well as each function's component duties. The results provide a tool for CUAs, university executives, faculty, staff, and other stakeholders to understand the duties CUAs fulfill and incumbents' points of access and influence over legal and extralegal decisions. Further, these results provide insight into why university stakeholders may be wise to continue consulting their top lawyers for both legal and extralegal advice, or alternatively, where there may be reason to challenge university lawyers' expansive role or influence.

I. REVIEW OF RELEVANT LITERATURE

Little empirical research considers the role of university lawyers, though incumbent CUAs have periodically proffered their anecdotal reflections on their role.[17] Early literature depicts CUAs' role in the 1970s and 1980s as guided by economy and efficiency in conducting traditional lawyering duties.[18] More recent

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14 Jesse, *supra* note 1, ¶ 3. Practitioners may well dispute Jesse's perception that modern CUAs exercise *power*, make decisions, or cast votes. Rather, CUAs tend to describe their role as advisors. Therefore, as revealed in the results of this study, below, CUAs' *power* may be more appropriately framed as a capacity to earn and exercise *soft power* or *influence*. Nonetheless, Jesse's lay perception of CUAs offers insight as to how the expanse of incumbents' *influence* can be perceived by other university observers and stakeholders.

15 *See, e.g.*, Jason A. Block, The Law Comes to Campus: The Evolution and Current Role of the Office of the General Counsel on College and University Campuses (Oct. 2014) (Ph.D. dissertation, University of Kentucky); Craig Cameron, *The University Lawyer as Collaborator and Facilitator: A Study in Work-Integrated Learning*, 44 J.C. & U.L. 209 (2019).

16 Kafka, *supra* note 13.

17 *See, e.g.*, Bealle, *supra* note 11; Bickel (1994), *supra* note 10; Daane, *supra* note 11; Dunham & Wessel, *supra* note 9. Indeed, significant anecdotal contributions to the literature have been published within this *Journal* and by leaders within the National Association of College and University Attorneys community.

18 *See* Bealle, *supra* note 11; Bickel (1974), *supra* note 10; Daane, *supra* note 11; Stephen R. Ripps, A Study of the Perceived Value of In-house Legal Counsel for a College or University in Contrast to that of a Private Law Firm: Controlling Legal Costs and Increasing Efficiency in Policy Formulation and Implementation (Mar. 1980) (Ph.D. dissertation, University of Toledo) (ProQuest); Oliver B. Thompson, The Role of Legal Counsel in Institutions of Higher Education in Texas (June 1978) (Ph.D. dissertation, University of Houston) (ProQuest).

literature describes CUAs as now holding executive status[19] and, more substantively, identifies CUAs as in fact exercising executive influence with regard to their respective institutions' legal and extralegal needs.[20] The following comprehensive review of relevant literature reveals a conceptual framework for the modern CUA that may serve as a starting point for new empirical inquiries exploring the role, relationships, and influence of these higher education executives.

A. Early Role of Chief University Attorneys

> The first law for the proper use of [university] counsel was to have one.[21]

This quip, attributed to observers in and before the 1960s, reflects institutions' leading motivation for directly employing university lawyers: a simple need for localized attorneys to efficiently perform traditional lawyering tasks.[22] In 1925, the University of Alabama was among the first universities to employ an in-house attorney.[23] By 1961, only about fifty institutions had likewise adopted the role.[24] The National Association of College and University Attorneys (NACUA) was founded in 1960, and by 1981, its membership ballooned to over two thousand member-attorneys—paralleling universities' increased adoption of the CUA role.[25] The widespread, accelerated expansion of universities' legal enterprises during this era is attributed to an increasingly litigious populace and transformational legislative and judicial actions that advanced civil rights and expanded institutional access.[26] The effects of these essential legal advancements, together with the impacts of campus activism surrounding the Civil Rights Movement and Vietnam War, upended nearly every operational practice of U.S. universities.[27] It is only logical, then, that institutions responded to these external legal forces—the extension of fundamental constitutional and legislative protections, as well as Congress's decision to condition universities' federal financial assistance on their compliance with those guarantees[28]—by expanding their on-call legal resources.[29]

The earliest empirical research exploring the role of CUAs documents the opportunity for efficient, economical, and convenient lawyering as, in part, motivating

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19 *See* Dunham & Wessel, *supra* note 9; Lake, *supra* note 9; Weingartner, *supra* note 9.

20 *See* Bickel & Ruger, *supra* note 10; Blakemore, *supra* note 9.

21 *See* Bickel & Ruger, *supra* note 10.

22 *See* Daane, *supra* note 11.

23 *See* Bickel & Ruger, *supra* note 10.

24 *See id.*

25 *See id.*; Dunham & Wessel, *supra* note 9.

26 *See* Bickel & Ruger, *supra* note 10; John S. Brubacher, The Courts and Higher Education (1971).

27 *See* Christopher J. Lucas, American Higher Education: A History (2d ed. 2006); Frederick Rudolph, The American College & University: A History (1991).

28 *See* Daane, *supra* note 11; Rudolph, *supra* note 27.

29 *See* J. Rufus Bealle, *Delivery of Legal Services to Institutions of Higher Education*, 2 J.C. & U.L. 5 (1974); Bickel (1974), *supra* note 10.

institutions to first *lawyer up* in the 1960s and 1970s.[30] These studies, quantitatively[31] and qualitatively,[32] highlight the economic and efficiency benefits achieved by hiring in-house lawyers. Ripps and Gregory's respective 1980s research documented financial savings for CUA-employing universities by analyzing the comparative costs of in-house and outside legal services.[33] Other studies relied on qualitative survey approaches to, in part, demonstrate the efficiencies institutions realized by internally retaining lawyers that absorbed and maintained institutional knowledge—legal and otherwise—and relationships.[34] Underlying these empirical studies is a shared assumption that CUAs primarily operate as traditional lawyers—managing their institutions' litigation, contracts, and legal policy.[35] That these assumptions were incorporated into the foundation of early research suggests similar assumptions were broadly attributable to most university leaders' view of the CUA role. In sum, the early empirical research revealing the efficiencies of employing university attorneys explains why some institutions adopted the role in the mid-twentieth century,[36] how the role was initially performed by incumbents,[37] and how other university leaders perceived the CUA role.

Early empirical research is supplemented by early incumbents' anecdotal writings regarding their role.[38] Indeed, a 1974 issue of this *journal* contained numerous incumbents' contributions to the anecdotal literature. University of Alabama general counsel Rufus Bealle observed universities' "definite trend toward increased employment of full-time counsel … particularly in larger institutions."[39] Florida State University's Robert Bickel agreed and noted the driver of that trend, observing simply "[t]he Constitution came to campus."[40] Bealle confirmed early university attorneys' role as that of traditional lawyers through his pseudoempirical survey of CUA peers.[41] His survey identified sixteen functions of a university lawyer, nearly all representing a traditional component of legal practice or area of law.[42]

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30 *See* John P. Geary, The Role of Staff Counsel in Institutions of Higher Education (1975) (Ph.D. dissertation, Vanderbilt University); Dennis E. Gregory, The Role of College and University Legal Counsel as Defined by Operational and Policy Making Responsibilities (1987) (Ph.D. dissertation, University of Virginia); Ripps, *supra* note 18; Thompson, *supra* note 18.

31 *See* Gregory, *supra* note 30; Ripps, *supra* note 18.

32 *See* Geary, *supra* note 30; Thompson, *supra* note 18.

33 *See* Gregory, *supra* note 30; Ripps, *supra* note 18.

34 *See* Geary, *supra* note 30; Thompson, *supra* note 18.

35 *See* Geary, *supra* note 30; Gregory, *supra* note 30; Ripps, *supra* note 18; Thompson, *supra* note 18.

36 *Id.*

37 *See* Bealle, *supra* note 11; Bickel (1974), *supra* note 10.

38 *See id.* Bealle, *supra* note 11; Bickel (1974), *supra* note 10; Norman L. Epstein, *The Use and Misuse of College and University Counsel*, 4 J. Higher Educ. 635 (1974); Richard J. Sensenbrenner, *University Counselor: Lore, Logic and Logistics*, 2 J.C. & U.L. 13 (1974).

39 Bealle, *supra* note 11, at 11.

40 Bickel (1974), *supra* note 10, at 74.

41 *See* id.

42 *See* Bealle, *supra* note 11.

California State University's Richard Sensenbrenner interpreted the early CUA's value as controlling costs by eliminating likely replication of legal tasks by external lawyers.[43] Collectively, these early incumbents depicted the early role of CUAs as increasing in number as a result of major legal developments and social changes,[44] and directed toward the cost-efficient provision of traditional legal services.[45]

The early literature depicts the context through which the role of CUA emerged. These works describe an obvious but imperative primary function performed by CUAs: *lawyer*. Even so, incumbents writing as early as 1974 signaled there may be more than *just* lawyering to the role of CUA.[46] While some argued against university attorneys serving as institutional decision-makers[47] and objected to attorneys' involvement in making policy,[48] Bickel opined CUAs "must be involved" with administrators on major administrative issues "on a day-to-day basis."[49] In fact, he asserted the "primary thrust" of the role of CUA "is the providing of preventative advice."[50] Amplifying Bickel's sentiment, then-University of Illinois president John Corbally asserted CUAs should serve a "major administrative" role as "leader and orchestrator."[51] So, while the CUA role was established with underlying financial and logistical motivations,[52] namely, providing universities an efficient incumbent to perform traditional lawyering tasks,[53] as early as 1974 incumbents and other leaders with an eye toward the future foreshadowed CUAs' emerging executive role function.[54] This idea advanced so quickly at some institutions that by 1985, former Yale University CUA Jose Cabranes commented, "of course" recent legal and environmental changes affecting higher education were "accompanied … by an expansion of the role of the university counsel."[55]

B. Analogous Role Development of Chief Corporate Counsel

While the higher education sector may lag the corporate sector in the conscious enhancement of the general counsel's role, the opportunity and rationale

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43 *See* Sensenbrenner, *supra* note 38.

44 *See* Bealle, *supra* note 11; Bickel (1974), *supra* note 10; Epstein, *supra* note 38.

45 *See* Bealle, *supra* note 11; Sensenbrenner, *supra* note 38.

46 *See* Bickel (1974), *supra* note 10; Sensenbrenner, *supra* note 38.

47 *See* Bealle, *supra* note 11; Bickel (1974), *supra* note 10.

48 *See* Bickel (1974), *supra* note 10; Sensenbrenner, *supra* note 38.

49 *See* Bickel (1974), *supra* note 10, at 76.

50 *Id.* at 77.

51 John E. Corbally, *University Counsel: Lore, Scope and Mission*, 2 J.C. & U.L. 1, 2 (1974).

52 *See* Ripps, *supra* note 18; Thompson, *supra* note 18.

53 *See* Bickel (1974), *supra* note 10; Sensenbrenner, *supra* note 38.

54 *See* Bickel (1974), *supra* note 10; Corbally, *supra* note 51.

55 Jose A. Cabranes, *American Higher Education and the Law: Some Reflections of NACUA's Silver Anniversary*, 12 J.C. & U.L. 261, 266 (1985).

for fuller participation by the general counsel in the business and strategic directions of the university client is clear.[56]

Beginning with an early design as traditional legal practitioner and mechanism for organizational efficiency,[57] the role of chief corporate counsel (CCC) evolved in a manner analogous to the more recent development of the CUA role.[58] Corporations broadly employed in-house counsel decades before universities,[59] and corporate leaders sooner integrated counsel into extralegal spheres.[60] Relative to the literature regarding the role of university attorneys, studies exploring the role of corporate counsel are more numerous and their empirical methodologies more sound.[61] Therefore, the literature exploring the role of CCC offers some insight into the evolving role of CUA.

Like scholars and practitioners exploring the role of CUAs, those exploring the role of CCCs agree: An obvious key function chief in-house lawyers must fulfill is that of *lawyer*.[62] Similar to universities' broad adoption of the CUA role in the wake of civil rights legislation and an increasingly litigious university community, corporations adopted the CCC role in part as a response to increased regulation and litigation driven by early twentieth-century legal developments that transformed corporate management, risk, and responsibility.[63] As early as the "golden age of corporate counsel" from the 1900s through the 1930s, CCCs served as legal and extralegal "leaders" involved in advising—if not deciding—on matters covering every aspect of big business.[64] And despite some perceived fade in CCCs' influence from the 1940s through 1970s, as MBA-wielding business executives and consultants took

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56 Willia R. Kauffman & Charles Robinson, *The University General Counsel: New Roles in a New Era* (Nat'l Ass'n Coll. & Univ. Att'ys Gen. Counsel Inst., 2017), 2, https://www.nacua.org/docs/default-source/legacy-doc/conference/march-2017/the-university-general-counsel-new-roles-in-a-new-era--discussion-context.pdf.

57 *See* Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 Fordham L. Rev. 955 (2005); Sarah H. Duggin, *The Pivotal Role of General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 St. Louis U. L.J. 989 (2007).

58 *See* Daane, *supra* note 11; Kauffman & Robinson, *supra* note 56.

59 *See* Bickel & Ruger, *supra* note 10; Duggin, *supra* note 57.

60 *See* John J. Creedon, *Lawyer and Executive: The Role of the General Counsel*, 39 Bus. Law. 25 (1983); DeMott, *supra* note 57; Carl D. Liggio, *A Look at the Role of Corporate Counsel: Back to the Future—Or Is It the Past?*, 44 Ariz. L. Rev. 621 (2002).

61 *See* John L. Abernathy et al., *General Counsel Prominence and Corporate Tax Policy*, 38 J. Am. Tax. Ass'n 39 (2016); DeMott, *supra* note 57; Duggin, *supra* note 57; Jonathan C. Lipson et al., *Who's in the House? The Changing Nature and Role of In-House and General Counsel*, 2012 Wisc. L. Rev. 237 (2012); Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 L. & Soc'y Rev. 457 (2000).

62 *See* DeMott, *supra* note 57; Ben. W. Heineman, *The General Counsel as Lawyer–Statesman* (Harv. L.S. Program Legal Pro., 2010), http://www.law.harvard.edu/programs/corp_gov/articles/Heineman_HLS_Legal-Profession-Program.pdf; Lipson et al., *supra* note 61.

63 *See* DeMott, *supra* note 57; Duggin, *supra* note 57; Leon E. Hickman, *The Emerging Role of the Corporate Counsel*, 12 Bus. Law. 216 (1957).

64 Liggio, *supra* note 60, at 621, 630.

on new strategic advising roles,[65] most observers document extralegal roles for corporate lawyers that make clear CCCs have maintained and grown their influence within their organizations.[66] Modern CCCs serve as lawyers;[67] managers of in-house legal enterprises;[68] and as executives serving as senior counselor to governing boards, chief executives, and other corporate leaders on legal and extralegal matters.[69]

The emergence of CCCs' *management* function parallels with that of CUAs. In the corporate context, chief counsel hire, develop, direct, and manage teams of in-house lawyers and support staff, including subject-matter specialists, to fulfill their organization's legal needs.[70] When matters require particular time or expertise, CCCs identify and manage outside attorneys to provide additional legal services.[71] While seemingly obvious, this function of chief attorney is critical. As Heineman describes, CCCs' management function requires "hiring the best possible … talent," "creating an inside–outside relationship [with outside counsel] which minimizes conflicts over money," building an "inside legal team … integrated with other staff … and business teams," and establishing "one legal culture" among their team.[72]

In addition to *lawyering* and *managing*, literature exploring the role of CCCs describe an additional *executive* function in advising corporate leadership on both legal and extralegal matters.[73] The literature does not establish a succinct definition for this broad executive function, but scholars and practitioners have described it in various ways. In 1983, Creedon observed that to fulfill a broad executive role, effective CCCs should be "immersed in the company's business … [including all] sensitive and significant phases of the company's operations."[74] This immersion empowers CCCs to "offer[] advice not just on law and related matters but [to] help[] shape discussion and debate about business issues."[75] In fulfilling their executive function, CCCs act "as [a] curious, broad–gauged business partner [who] must help define, debate and develop business positions on broad company issues."[76] Specifically, Heineman states CCCs "should be at the table … on the broad array of … issues" including "key operational initiatives, economic risk assessment and mitigation, major transactions, new strategic directions … important template contracts, resolution of major disputes … and major accounting decisions that

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65 *See id*.

66 *See* Creedon, *supra* note 60; DeMott, *supra* note 57; Duggin, *supra* note 57.

67 *See* DeMott, *supra* note 57.

68 *See* Ben W. Heineman, *The Rise of the General Counsel*, Harv. Bus. Rev. (Sept. 27, 2012), https://hbr.org/2012/09/the-rise-of-the-general-counsel.

69 *See* DeMott, *supra* note 57; Duggin, *supra* note 57; Heineman, *supra* note 62.

70 *See* DeMott, *supra* note 57; Heineman, *supra* note 68; Liggio, *supra* note 60.

71 *See* Heineman, *supra* note 62; Liggio, *supra* note 60.

72 Heineman, *supra* note 62, at 8.

73 *See* DeMott, *supra* note 57; Heineman, *supra* note 62.

74 Creedon, *supra* note 60, at 26.

75 Heineman, *supra* note 68, ¶ 3.

76 Heineman, *supra* note 62, at 8.

have a forensic dimension"[77] as well as matters involving company ethics, public policy, and crisis management. It is essential that CCCs performing their executive function "understand [the organization's] rhythms and personality" and be "in the daily flow of business."[78] According to Heineman, the result of such executive role is an in-house lawyer who is "far more effective, and far more cost-effective."[79]

Nelson & Nielsen's 2000 study articulates the shift of CCC from mere lawyer to complex lawyer–manager–executive and comprehensively illustrates the nuance of this evolved, tripartite role among a spectrum of approaches. Incumbents may perform the role of CCC as traditional "cops," as hybrid traditional-emerging "counsel," or as broadly engaged legal and extralegal "entrepreneurs."[80] Beginning on the least-complex end of this spectrum, as *cops* CCCs act as independent, siloed gatekeepers, focused primarily on the constraints of law, who often "say no."[81] At the midpoint of Nelson & Nielsen's conceptual spectrum, *counsel* "most often confine their advice to legal questions and legitimate their suggestions or demands based on legal knowledge."[82] In effect, this midpoint role attaches a limited extralegal executive role to matters that maintain a direct nexus to concrete legal issues. More comprehensively, the third category of CCCs are "[e] ntrepreneurial lawyers [that] say law is not merely a necessary complement to corporate functions;" rather, CCCs performing as *entrepreneurs* understand that legal issues and the "law … itself" relate to and can themselves be "a source of profits, an instrument to be used [by the organization] in the marketplace, or the mechanism through which major [objectives] are executed."[83] By presenting the cop, counsel, and entrepreneur approaches on a spectrum, this study captures the evolution of in-house lawyers' executive function while acknowledging certain tasks, or leaders may require incumbents to periodically act at discrete positions on the cop, counsel, entrepreneur spectrum.[84]

Collectively, the literature exploring the modern role of CCC reflects senior leaders proactively incorporating their leading lawyers as advisors in all significant organizational operations and decision-making. They do so not only because law or legal policy may be directly affected, but because they could be tangentially implicated or strategically leveraged by nearly all corporate operations and decisions.[85] The evolution of CCC from traditional in-house lawyer to complex

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77 *Id.*

78 *Id.* at 13.

79 *Id.*

80 Nelson & Nielson, *supra* note 61, at 462.

81 *Id.* at 464.

82 *Id.*

83 *Id.* at 467.

84 *See id.*

85 *See* DeMott, *supra* note 57; Duggin, *supra* note 57; Heineman, *supra* note 62; Nelson & Nielson, *supra* note 61.

lawyer–manager–executive is evidenced by the literature[86] and provides a source of comparison to the development of CUAs' role.

C. Modern, Expanded Role of Chief University Attorneys

> [I]f the first law for the proper use of counsel is to have one, the second is to use that counsel wisely.[87]

Recent literature suggests such *wise* use of CUAs amounts to more than engagement on routine legal tasks.[88] As with early literature, recent contributions are limited in quantity and scope,[89] and incumbents' anecdotal contributions provide further context to the modern CUA role.[90] In particular, practitioners' interest in understanding the role is evident through their recurring contributions and discussion of the topic —specifically CUAs' role function as extralegal executive—in their professional development spheres.[91]

The role of CUA as *lawyer* is restated throughout modern literature.[92] In their *Essential Guide to Selecting Legal Counsel*, Parker and Henderson remind university attorneys and leaders that "manag[ing] institutional legal issues" remains the foundation of CUAs' role.[93] Indeed, this study adopts the American Bar Association's (ABA's) definition of lawyer as one who "advises and represents others in legal matters."[94] In the case of CUAs, the *other* represented is the institution the CUA serves.[95] As lawyers representing institutional clients, CUAs must be mindful of the

86 *See* DeMott, *supra* note 57; Duggin, *supra* note 57; Heineman, *supra* note 62; Nelson & Nielson, *supra* note 61.

87 *See* Bickel & Ruger, *supra* note 10, at B1.

88 *See* Blakemore, *supra* note 9; Parker & Henderson, *supra* note 9.

89 *E.g.*, Richard Ludwick, The Role of Legal Counsel in the Decision-Making Process of Presidents at Small, Private Colleges (2005) (Ph.D. dissertation, University of Oregon); Frank A. Sargent, Legal Services Delivery at Public Institutions of Higher Education in a New England State (2010) (Ed.D. dissertation, Johnson & Wales University).

90 *E.g.*, Jerry Blakemore et al., *Can You Hear Me Now? Ethical Considerations in Discharging the Duties of General Counsel* (Nat'l Ass'n Coll. & Univ. Att'ys Ann. Conf., 2012), https://www.nacua.org/docs/default-source/legacy-doc/conference/june2012/08c_v-12-06-16.pdf; Marc Goodman et al., *The Ever-Expanding Role of the General Counsel: Leadership, Governance, Covid & Everything in Between* (Nat'l Ass'n Coll. & Univ. Att'ys Ann. Conf., 2022), https://www.nacua.org/docs/default-source/legacy-doc/conference/2022annualconference/01d-final.pdf.

91 *E.g.*, Laurie E. Barnes et al., *The Value-Added Counsel: Being a Strategic Partner and Institutional Guardian While Minding Ethical Obligations* (Nat'l Ass'n Coll. & Univ. Att'ys Ann. Conf., 2021), https://www.nacua.org/docs/default-source/legacy-doc/conference/june2021/16b_21_30.pdf; Jose D. Padilla et al., *How Do I Become the Next General Counsel? Or President?* (Nat'l Ass'n Coll. & Univ. Att'ys Ann. Conf., 2023), https://www.nacua.org/docs/default-source/legacy-doc/conference/2023ac/05c_23_06_30.pdf.

92 *See, e.g.*, Blakemore, *supra* note 9; Block, *supra* note 15.

93 Parker & Henderson, *supra* note 9, at 26.

94 Am. Bar As'sn, Legal FAQs: What Is a Lawyer (Sept. 10, 2019), https://www.americanbar.org/groups/public_education/resources/public-information/what-is-a-lawyer-/.

95 *See* Am. Bar As'sn, Model Rules of Professional Conduct (2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/

best interest of their university, as typically determined by its governing authority and executives acting in their official capacity.[96] At its core, CUAs' lawyering function requires "clear deliverables" of traditional lawyering tasks such as "counsel on [a] legal issue [or] … litigation risk analysis."[97] These deliverables include those responsive to live legal concerns such as lawsuits, subpoenas, and contracts.[98] More importantly, though, as in-house lawyers, CUAs engage in "preventive" law through deliverables such as prospective legal risk analyses, trainings, and stakeholder relationships leveraged to avoid future matters demanding legal response.[99]

Nonlegal observers have observed colleges lawyering up in response to a cascade of new legal demands by hiring more lawyers.[100] For most institutions, this means building a multilawyer in-house legal team, along with paralegals or other legal support staff.[101] As a result, the role of CUA as *manager* appears as a critical component of their modern role. University of Michigan CUA Roderick Daane noted the imperative to "recruit, train, and manage professional and nonprofessional legal staff"; manage office functions, such as budgeting; and select and manage relationships with outside counsel.[102] Daane articulates this management function; in part, "[l]ike a football quarterback, counsel must decide when to keep the ball and when to hand it off or pass it."[103]

In addition to lawyering and managing, the rise of modern CUA as a university *executive* represents the most significant shift for in-house university lawyers since the role's wide adoption in the 1960s and 1970s. According to University of Michigan CUA Roderick Daane, by 1985,

> Things [had] changed. The student activism of the 1960s and early 70s, federal and state regulation of higher education, advances in technology, and a burgeoning entrepreneurial spirit in the professoriate, to say nothing of the increased litigiousness of society in general—all [had] combined to expand the need for campus legal advice.[104]

The literature reflects a continuing expansion of CUAs' executive-like duties since 1985. As former Washington University CUA Peter Ruger elaborated, the "expand[ed] need" that Daane referenced a decade earlier[105] meant "campus counsel

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model_rules_of_professional_conduct_table_of_contents/.

96 *See id.*; Blakemore *et al*., *supra* note 90.

97 Goodman et al., *supra* note 90, at 1.

98 *See* Parker & Henderson, *supra* note 9.

99 Kathleen Curry Santora & William A. Kaplin, *Preventive Law: How Colleges Can Avoid Legal Problems*, Chron. Higher Educ. (Apr. 18, 2003), https://www.chronicle.com/article/preventive-law-how-colleges-can-avoid-legal-problems/.

100 *See* Kafka, *supra* note 13.

101 *See* Blakemore, *supra* note 9; Daane, *supra* note 11.

102 Danne, *supra* note 11, at 405.

103 *Id.*

104 *Id.* at 399.

105 *Id.*

should not be just an administrator with a law degree."[106] Describing the importance of this modern extralegal role of university attorneys, then-Northern Illinois University CUA Jerry Blakemore observes "the 'counsel' function of the [CUA] … is just as significant if not more so as the attorney function."[107] While incumbents' nomenclature may differ, and none have proposed a concise description of their complex role, they agree that CUAs serve an expanding and important multifunction role as lawyer, manager, and executive, and those functions are inextricably intertwined.[108] Underlying the increasing entanglement of CUAs' role functions is the view that "the line between traditional 'lawyering' and what has historically been viewed as non-legal 'business' advice and decision making has blurred."[109]

Though recent literature has struggled to clearly articulate CUAs' executive function, it does offer various descriptions of this emerging imperative, including the sample listed in *Table 1*. Among the descriptors offered to illustrate CUAs' executive function, incumbents note their appropriate "ubiquitous" participation in discussion and decision-making regarding significant strategic and operational matters.[110] When effective, this presence and influence materialize in a chief attorney's recognition as an "overt leader" at their institution.[111] Some observers perceive the emerging role of CUAs to embrace a practice of both responsive and proactive lawyering[112]—depicted by others as a shift from "lawyer and advocate to policy and operational executive."[113] Jerry Blakemore asserts, "[b]eing an effective member of senior leadership is the essence of [the role of] general counsel."[114] Such effective executive engagement marks a CUA as a "defender and trusted colleague in the trenches" with their executive-level peers.[115] Finally, so significant is the potential confluence of the lawyer and executive functions, in Blakemore's view, that it positions CUAs as "the professional and ethical moral conscious of the organization."[116] There is little room to doubt that incumbents perceive effective CUAs must serve an extralegal executive function; however, a succinct description of this role function is yet to emerge from the literature.

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106 Peter H. Ruger, *The Practice and Profession of Higher Education Law*, 27 Stetson L. Rev. 175, 184 (1997).

107 Blakemore, *supra* note 9, at 2. Note that in addition to his role at Northern Illinois University, Blakemore previously served as CUA at Southern Illinois University and subsequently serves as CUA at University of North Carolina Greensboro. *Jerry D. Blakemore*, U.N.C. Greensboro (last visited Aug. 15, 2023), https://oiigc.uncg.edu/general-counsel/attorneys/jerry-blakemore/.

108 *See id.*; Daane, *supra* note 11; Dunham & Wessel, *supra* note 9; Ruger, *supra* note 106.

109 Dunham & Wessel, *supra* note 9, at 1.

110 Bickel & Ruger, *supra* note 10, at B1.

111 Goodman et al., *supra* note 90, at 1.

112 *See* William A. Kaplin et al., The Law of Higher Education: Student Version (6th ed. 2020).

113 Blakemore et al., *supra* note 90, at 1.

114 Blakemore, *supra* note 9, at 1.

115 Barnes et al., *supra* note 91, at 6.

116 Blakemore, *supra* note 9, at 1.

Table 1. Descriptors Assigned to Chief University Attorneys' Executive Function in Recent Literature

Business advisor[117]	Not just an administrator with a law degree[127]
Change agent[118]	Overt leader[128]
Collaborator and facilitator[119]	Policy and operational executive[129]
Connector of the dots[120]	Political and personnel advisor[130]
Conscience of the institution[121]	Political prophet[131]
Defender and trusted colleague in the trenches[122]	Strategic partner[132]
Effective member of senior leadership[123]	Strategic thinker on the leadership team[133]
Embedded in the decision process[124]	True counselor[134]
Full-service executive[125]	Ubiquitous[135]
Institutional guardian[126]	

The parallels between the executive function of corporate and university lawyers and the utility of the more robust literature considering the role of CCCs are evident; however, the role of CUA is distinguishable from their corporate counterparts. Referencing the experience of then-Ohio State University CUA Larry Thompson, Roderick Daane emphasizes that "differences between the horizontal, collegiate structure of a university and the vertical or pyramidal structure of the corporation" render the corporate and university contexts unique.[136] Specifically, CUAs' role is "more complicated than" CCCs' due to the "decentralized nature of college and

117 Dunham & Wessel, *supra* note 9, at 14.

118 *Id.*

119 Cameron, *supra* note 15, at 211.

120 Dunham & Wessel, *supra* note 9, at 14.

121 *Id.* at 15.

122 Barnes et al., *supra* note 91, at 6.

123 Blakemore, *supra* note 9, at 1.

124 Ludwick, *supra* note 89, at 16.

125 Blakemore et al., *supra* note 90, at 2.

126 Barnes et al., *supra* note 91, at 1.

127 Ruger, *supra* note 106, at 184.

128 Goodman et al., *supra* note 90, at 1.

129 Blakemore et al., *supra* note 90, at 1.

130 *Id.* at 8.

131 Blakemore, *supra* note 9, at 1.

132 *Id.*

133 Parker & Henderson, *supra* note 9, at 23.

134 *Id.*

135 Bickel & Ruger, *supra* note 10, at B1.

136 Daane, *supra* note 11, at 401.

university management" and the complexity of higher education institutions' mission.[137] While the literature suggests an emerging tripartite role framework for CUAs, no empirical works have specifically explored the role. New research is now appropriate and necessary to understand the role and influence of CUAs as lawyers, managers, and—increasingly—executives.

D. Emerging Conceptual Framework: Chief University Attorney as Lawyer, Manager, and Executive

Application of an appropriate conceptual framework orients a study's design and analysis.[138] Comprehensive literature review serves as a useful approach to forming conceptual frameworks.[139] Here, the literature's framing of CUAs' tripartite role as composed of broad lawyering, managerial, and executive functions provided a framework to guide this study's empirical inquiry. Current literature does not define these role functions or describe their components, but a tripartite framing was employed in this study's qualitative design, development of open-ended interview questions, and qualitative data analysis. Application of this, or any, conceptual framework may inherently limit the study's findings;[140] however, potential limitations are mitigated by the definitional breadth of these three functions and the methods employed in conducting this study.

E. Application of Systems Theory Framework to Study of the Chief University Attorney Role

An exploration of the role of CUA is a study within the field of university organizational behavior.[141] CUAs' "ubiquitous" [142] role and potential to exert influence across the silos of complex university organizations can be framed through the lens of systems theory. Unlike the tripartite CUA role framework emerging from the literature, systems theory framework does not emerge from the literature, nor is its application intended to significantly guide the design of this study.[143] Rather, the application of systems theory framework overlays the study design by providing a unified vocabulary for communicating the interconnectedness of individuals, including CUAs, and subsystems within and outside the complex university organization.[144]

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137 *Id.* at 402.

138 *See* John W. Creswell & J. David. Creswell, Research Design: Qualitative, Quantitative, and Mixed Methods Approaches (5th ed. 2018); Sharon M. Ravitch & J. Matthew Riggan, Reason & Rigor: How Conceptual Frameworks Guide Research (2d ed. 2017).

139 *See* Ravitch & Riggan, *supra* note 138.

140 *Id.*

141 *See* Bess & Dee, *supra* note 9; Stephen P. Robbins & Timothy A. Judge, Organizational Behavior (2d ed. 2017).

142 Bickel & Ruger, *supra* note 10, at B1.

143 *See* Bess & Dee, *supra* note 9; Ravitch & Riggan, *supra* note 138.

144 *See* F. Kenneth Berrien, General and Social Systems (1968); Mary E. Conway, *Organizations, Professional Autonomy, and Roles*, *in* Role Theory: Perspectives for Health Professionals (Margaret E. Hardy & Mary E. Conway eds., 2d ed. 1988); Talcott Parsons, The Social System (1951).

This language was uniformly incorporated into qualitative interview questions, data analysis, and presentation of the study's findings.

Systems theory describes a *system* as comprised of multiple component *subsystems*.[145] In turn, each subsystem is in effect its own system that may comprise further subsystems.[146] Each system is bounded by metaphorical—and at times physical—*boundaries* from its external *environment*.[147] Individuals within a system act as *interfaces* when communicating with the outside environment[148] or as *boundary spanners* by operating or communicating across multiple subsystems.[149] Each system or subsystem receives *inputs* from the environment, other systems, or subsystems and transforms and returns them as *outputs*.[150]

Applied to this study's context, CUAs provide counsel by transforming inputs to outputs. Transformations may include a contract negotiated, subpoena fulfilled, lawsuit defended, or compliance certified. As managers, CUAs may provide inputs by assigning legal research to outside or junior attorneys, and receive outputs such as draft pleadings, redlined contracts, or research memoranda. CUAs may interface those outputs by communicating the findings to university executives. Finally, as executives, CUAs act as interfaces and boundary spanners across the university subsystems in working to balance risk and deliver advice. In these ways, the complexities of CUAs' role are highlighted by, and may be organized for research analysis through a systems theory framework.

II. PURPOSE OF THE STUDY

The purpose of this study was to explore the modern composition and context of CUAs' role as lawyer, manager, and—increasingly—executive. Using qualitative multiple case study, incumbents were interviewed to better understand their role. This study was guided by two research questions:

> **Question #1:** How do CUAs experience and describe the primary functions of their role—specifically those functions in addition to traditional lawyering?
>
> **Question #2:** How do CUAs experience their extralegal role in influencing their institution and its decision-makers?

III. RESEARCH METHODOLOGY

This study employed qualitative research design and multiple case study strategy to uncover the *what* of the role of CUAs, as experienced by role incumbents, and

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145 *See* Berrien, *supra* note 144; Daniel Katz & Robert L. Kahn, The Social Psychology of Organizations (2d ed. 1978).

146 *See* Bess & Dee, *supra* note 9.

147 *See id.*

148 *See* Berrien, *supra* note 144; Katz & Kahn, *supra* note 145.

149 *See* Bess & Dee, *supra* note 9.

150 *See id*.

the *why* underlying CUAs' perceptions and experiences of their role.[151] The CUA role was considered in the context of *complex research universities*. Here, such institutions include U.S. nonprofit universities granting undergraduate through doctoral degrees, maintaining brick-and-mortar campuses, enrolling at least ten thousand students, and holding a Carnegie classification of high (R2) or very-high (R1) research activity. This population was identified as of January 1, 2020, using the National Center for Education Statistics' Integrated Postsecondary Education Data System (IPEDS) and includes 191 of the 4000 U.S. degree-granting postsecondary institutions, listed in *Table 2*. These institutions similarly experience myriad complex legal challenges and typically employ offices of in-house attorneys,[152] and the CUAs serving these institutions experience a broad and complex portfolio.[153] By bounding this study to *complex research universities*, a connecting thread emerged between the studies' participants and their experiences.[154]

Table 2. Complex Research Universities (Study Population)

American University	Clemson University
Arizona State University	Cleveland State University
Auburn University	Colorado State University
Ball State University	Columbia University
Baylor University	Cornell University
Binghamton University	CUNY City College
Boise State University	DePaul University
Boston College	Drexel University
Boston University	Duke University
Bowling Green State University	East Carolina University
Brigham Young University-Provo	East Tennessee State University
Carnegie Mellon University	Eastern Michigan University
Case Western Reserve University	Emory University
Central Michigan University	Florida Atlantic University

151 John W. Creswell & Cheryl N. Poth, Qualitative Inquiry & Research Design: Choosing Among Five Approaches (4th ed. 2018).

152 *See* Lake, *supra* note 9; Weingartner, *supra* note 9.

153 *See* Bess & Dee, *supra* note 9; Dunham & Wessel, *supra* note 9.

154 Marilyn Lichtman, Qualitative Research for the Social Sciences (2014). It should be expressly acknowledged that bounding the population of this study to *complex research universities* inherently excludes an exploration of the role of CUAs serving other types of institutions, including the role of many readers of this journal. As discussed below, bounding the population studied is appropriate to ensure the methodological integrity of this project and is necessary to promote the trustworthiness of this study's findings. It is the researcher's hope that many of the findings and implications for practice detailed here will translate beyond the context of *complex research universities* and that further research will specifically explore the distinct role of CUAs serving regional comprehensives, liberal arts colleges, community colleges, faith-based institutions, and other populations of higher education institutions.

Table 2. Complex Research Universities (Study Population) *Continued*	
Florida International University	Oakland University
Florida State University	Ohio State University
Fordham University	Ohio University
George Mason University	Oklahoma State University
George Washington University	Old Dominion University
Georgetown University	Oregon State University
Georgia Institute of Technology	Portland State University
Georgia Southern University	Purdue University
Georgia State University	Rochester Institute of Technology
Harvard University	Rowan University
Howard University	Rutgers University-New Brunswick
Illinois State University	Rutgers University-Newark
Indiana University-Bloomington	Saint Louis University
IUPUI-Indianapolis	San Diego State University
Iowa State University	Southern Methodist University
Johns Hopkins University	Stanford University
Kansas State University	Stony Brook University
Kennesaw State University	SUNY at Albany
Kent State University	Syracuse University
Louisiana State University	Temple University
Loyola University Chicago	Texas A&M University
Marquette University	Texas Christian University
Marshall University	Texas State University
Massachusetts Institute of Technology	Texas Tech University
Miami University-Oxford	The Pennsylvania State University
Michigan State University	The University of Alabama
Mississippi State University	The University of Tennessee
Montana State University	The University of Texas at Arlington
Montclair State University	The University of Texas at Austin
New Mexico State University	The University of Texas at Dallas
New York University	The University of Texas at El Paso
North Carolina A&T State University	The University of Texas at San Antonio
North Carolina State University	The University of Texas Rio Grande Valley
North Dakota State University	Tufts University
Northeastern University	Tulane University of Louisiana
Northern Arizona University	University at Buffalo
Northern Illinois University	University of Akron
Northwestern University	University of Alabama at Birmingham
Nova Southeastern University	University of Arizona

Table 2. Complex Research Universities (Study Population) *Continued*	
University of Arkansas	University of Missouri-Kansas City
University of California-Berkeley	University of Nebraska at Omaha
University of California-Davis	University of Nebraska
University of California-Irvine	University of Nevada-Las Vegas
University of California-Los Angeles	University of Nevada-Reno
University of California-Riverside	University of New Hampshire
University of California-San Diego	University of New Mexico
University of California-Santa Barbara	University of North Carolina
University of California-Santa Cruz	University of North Carolina Charlotte
University of Central Florida	University of North Carolina Greensboro
University of Chicago	University of North Carolina Wilmington
University of Cincinnati	University of North Dakota
University of Colorado	University of North Texas
University of Colorado Denver	University of Notre Dame
University of Connecticut	University of Oklahoma
University of Dayton	University of Oregon
University of Delaware	University of Pennsylvania
University of Denver	University of Pittsburgh
University of Florida	University of Puerto Rico
University of Georgia	University of Rhode Island
University of Hawaii at Manoa	University of Rochester
University of Houston	University of South Alabama
University of Illinois Chicago	University of South Carolina
University of Illinois	University of South Florida
University of Iowa	University of Southern California
University of Kansas	University of Southern Mississippi
University of Kentucky	University of Toledo
University of Louisiana-Lafayette	University of Utah
University of Louisville	University of Vermont
University of Maryland-BC	University of Virginia
University of Maryland	University of Washington
University of Massachusetts-Amherst	University of Wisconsin
University of Massachusetts-Boston	University of Wisconsin-Milwaukee
University of Massachusetts-Lowell	University of Wyoming
University of Memphis	Utah State University
University of Miami	Vanderbilt University
University of Michigan	Virginia Commonwealth University
University of Minnesota	Virginia Polytechnic Institute and State University
University of Mississippi	Washington State University
University of Missouri-Columbia	Washington University in St. Louis

Table 2. Complex Research Universities (Study Population) *Continued*	
Wayne State University	Wichita State University
West Virginia University	Yale University
Western Michigan University	

A. Research Design

Qualitative multiple case study is useful for in-depth exploration of complex social phenomena.[155] The exploration of an organization role, such as a CUA, is a study of a particular complex social phenomenon of organizational behavior.[156] Inherent in an exploration of an organizational role are incumbents' lived experiences, perceptions, and behaviors.[157] Qualitative design produced an in-depth description and analysis of the CUA role through the lived experiences and subjective perspectives of six participants.[158] A social constructivist lens was adopted, where meaning is socially constructed by the participants observing and interpreting their experiences and perceptions.[159] This paradigm permitted deep exploration of individuals' experiences and subjective truths, freed participants to richly describe their perceptions, and relied on analyses that identified emergent themes rather than merely testing for confirmation or rejection of a predicted truth.[160]

Case study strategy permitted a "holistic and real-world perspective" of "organizational and managerial processes" specific to the CUA role.[161] It accounted for the complexity of this inquiry where data cannot easily be compared to a control variable or reduced to simple data points.[162] This inquiry used "in-depth data collection"[163] to ascertain a "holistic and real-world"[164] understanding of the CUA role. As a "multiple" case study,[165] this study holistically examined empirical evidence from multiple cases of incumbent CUAs. The participants' individual contexts and cases were individually explored through in-depth, semistructured qualitative interviews.[166] Using a replication approach, each incumbent was

155 *See* Creswell & Poth, *supra* note 151; Robert K Yin, Case Study Research and Applications: Design and Methods, (6th ed. 2018).

156 *See id.*; Robbins & Judge, *supra* note 141.

157 *See* Creswell & Poth, *supra* note 151.

158 *See id.*

159 *See id.*; Bess & Dee, *supra* note 9.

160 *See id.*

161 Yin, *supra* note 155, at 5.

162 *Id.*

163 Creswell & Poth, *supra* note 151, at 96.

164 Yin, *supra* note 155, at 5.

165 *Id.* at 48.

166 *Id.*

considered as a single case through a within case analysis.[167] Employing a "feedback loop," data and analyses from preceding cases were incorporated into subsequent cases' data collection and analysis.[168] Finally, a "holistic" cross-case synthesis considered data across all six cases to identify themes emerging from the shared perceptions and experiences of the participants.[169]

Trustworthiness was integrated into this study's design using tools that bolster findings' credibility.[170] Credibility is established when a study's findings are believable and credible to its participants; therefore, data was collected using semistructured and open-ended interview questions that minimized bias in participants' responses, and participants were provided copies of their transcripts and summaries of the study's initial findings for feedback, supplement, and credibility check.[171] This study's bounding context limiting the population to 191 complex research universities—together with the researcher's detailing of the study's methodology and the contexts of its design, participants, and researcher—promote transferability, dependability, and confirmability of the study's findings.[172] Further, trustworthiness was enhanced through triangulation of sources and methods by analyzing each of the six cases independently, then collectively, to identify and confirm emerging themes.[173]

Finally, the researcher's individual context is accounted for by relaying and examining how their experiences effect interpretation of the data.[174] Here, the researcher's professional experience includes service as deputy CUA for a population institution. The researcher's occasional service in the stead of a CUA, observations of CUA mentors, and professional relationships frame this study, including its design, data collection, analysis, and conclusions. To promote confirmability, this context was disclosed and the researcher strived to maintain self-awareness and examine for influence of bias at every research stage.

B. Data Sources and Collection

Eight potential CUA participants were identified through snowball sampling within the researcher's professional network.[175] The researcher solicited suggestions for participants possessing relevant experience and perspectives from an experienced

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167 *Id.*

168 *Id.* at 57.

169 Creswell & Poth, *supra* note 151, at 96; *see also* Robert E. Stake, The Art of Case Study Research (1995); Yin, *supra* note 155.

170 *See* Lichtman, *supra* note 154; Yvonna S. Lincoln & Egon Guba, Naturalistic Inquiry (1985).

171 *See id.*; Egon Guba & Yvonna S. Lincoln, *Competing Paradigms in Qualitative Research, in* Handbook of Qualitative Research (Norman K. Denzin & Yvonna S. Lincoln eds., 1994).

172 *See id.*; Lincoln & Guba, *supra* note 170; Lichtman, *supra* note 154.

173 *See id.*; Yin, *supra* note 155.

174 *See* Creswell & Poth, *supra* note 151; Lichtman, *supra* note 154.

175 *See* Michael Quinn Patton, Qualitative Research & Evaluation Methods, (4th ed. 2015).

CUA who did not participate.[176] Initially, three were recommended and solicited, and all agreed to participate. Each of the first three participants were asked to nominate additional participants, producing a list of five additional prospects. All were solicited, three agreed to participate, one declined, and one did not respond.

Qualitative semistructured interviews were designed with open-ended "grand tour"[177] questions, allowing participants' experiences and perceptions to emerge through rich dialogue.[178] Questions and researcher-led dialogue incorporated language intended to contextualize participants' answers onto the systems theory framework. In individual, sixty-minute interviews, participants were first asked to describe their perception of the role of CUA. Following lengthy open-ended dialogue, the researcher introduced the tripartite conceptual role framework emerging from this study's guiding literature: CUA as lawyer, manager, and executive. Participants were asked if they agreed with this framing. Each agreed and engaged in extensive discussion, guided by the researcher using the tripartite framework, exploring the participants' perceptions of the duties composing each of the three role functions. Following discussion of each function, participants were asked again to consider the conceptual framework, whether it fit their perception of the role, whether any broad role functions were omitted, and how much of their time is spent engaged in each. No additional functions were proposed. Finally, any remaining or additional time was utilized to continue exploring participants' experiences and perspectives in their exercise of influence through their *executive* function.

In addition to the primary interview data, secondary documents were collected from archival records of participants' universities—such as organizational charts, position descriptions, and job postings—and analyzed for purposes of context and triangulation.[179] Data mined from these records were used to design the interview protocol, frame interview questions, and provide additional understanding of participants' institutionally defined role. Ultimately, these documents provided additional context for participants' individual cases but offered limited utility in examining answers to this study's research questions.

C. Analytical Approach

Primary interview data were analyzed through individual, within-case analyses and a comprehensive cross-case synthesis. First, an individual within-case analysis was conducted as to each of the six participants' respective cases. For each case, the respective interview transcript and archival documents were coded for descriptions of the participant's experience and perception of the CUA role within the tripartite CUA role framework and systems theory framework. Then, a comprehensive cross-case synthesis was conducted—an approach that embraced a holistic view of the study and searched upward from the data for trends, rather than downward

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176 *Id.*

177 Lichtman, *supra* note 154, at 264.

178 *See* Creswell & Creswell, *supra* note 138.

179 *See* Creswell & Poth, *supra* note 151.

from the results.[180] Documents and transcripts were holistically reviewed and coded based on the researcher's early and emerging observations.[181] "Open coding [is employed as a] starting point" in identifying emergent themes.[182] Documents and transcripts were thus reviewed for "open-ended" phrases and themes from recurring or synonymous key words and phrases that directly answer each of the study's research questions.[183] Additionally, observations about participants' respective commentary, nonverbal cues, tone, and insinuated meanings were noted while conducting interviews and provided additional data to analyze and employ in triangulating the themes that emerged from interview data.[184]

IV. FINDINGS

Clear themes emerged from the six cases, each providing insight into this study's guiding research questions. Because each participant was interviewed on the condition of anonymity, identifying information has been removed from quotations. Pseudonyms listed in *Table 3* were borrowed from attorney-portraying characters in the television shows *Law & Order*, *Damages*, *Suits*, and *Night Court*, then randomly assigned to participants. No inferences regarding the participants' respective identities or personalities can be made based on those of the characters; any overlap is coincidental.

Table 3. Participant Pseudonyms and Their University Contexts

Participant Pseudonym	Governance	Carnegie Classification	Total Enrollment	Total Employees
Arthur Branch	Public	R1	> 50,000	30,000–40,000
Jack McCoy	Private	R2	10,000–20,000	2,500–5,000
Patty Hughes	Private	R2	10,000–20,000	2,500–5,000
Michael Ross	Private	R1	10,000–20,000	30,000–40,000
Dan Fielding	Public	R1	> 50,000	10,000–20,000
Jessica Pearson	Public	R1	> 50,000	10,000–20,000

Note. Some participants serving public institutions are employed by the population university's governing system. However, in each case, the participant serves as the population university's CUA, and the university does not independently maintain a separate CUA or other internal legal advisor.

A. The Six Studied Cases

In addition to participants' pseudonyms, *Table 3* sets forth contextual information specific to each participant's case. Their respective institutional data reflects the

180 *See* Yin, *supra* note 155.

181 *See* Lichtman, *supra* note 154.

182 Johnny Saldaña, The Coding Manual for Qualitative Researchers, 115 (3d ed. 2016).

183 *Id.*

184 *See* Creswell & Poth, *supra* note 151; Yin, *supra* note 155.

university they served at the time of data collection. While participants' individual demographic information and periods of incumbency are omitted from *Table 3* to protect anonymity, collectively the participants have served seventy-four years as CUAs for ten population universities—six public and four private—located in the West, South, Midwest, and Atlantic coast regions of the United States. Participants included two persons of color, four men, and two women. Each serve as a member of their chief executive's cabinet and has managed an office of four or more attorneys. Finally, each is recognized as an industry leader, having served as an elected leader, published author, or speaker associated with the National Association of College and University Attorneys.

B. How Chief University Attorneys Experience Their Role

Participants recognized a persistent expansion of the CUA role. Hughes acknowledged, "the role … is growing increasingly more complicated,"[185] and Ross added CUAs are now "counted on and asked to play a broader role than they were in the past."[186] Each perceive this broad, complex role as "mov[ing] away from [their] traditional legal role to … giving strategic advice through a legal lens."[187] The tripartite role framework of lawyer, manager, and executive emerging from previous literature was accepted by all participants; however, they unanimously noted aspects of these functions are often performed concurrently. As Branch articulated, it is difficult to "create hard and fast lines between the three" functions.[188] In fact, discrete tasks "can be a blend" of the CUA role functions, and "at no point in time are people thinking [a CUA has] stopped being a lawyer."[189] While CUAs are always lawyers, "they're not just technical lawyers … they're not just lawyering … they are higher education leaders and understand where [the industry and their institution] are headed. They understand the challenges, the opportunities, and the role their institution plays in that context."[190]

Mindful of the contemporaneous nature of the three CUA role functions, participants were asked to consider their total work time and assign an approximate percentage to the share they perceive as primarily expended in each of the three functional areas. Their responses, presented in *Table 4*, reflect participants' experience about one-half of their work time performing a primarily *executive* role. Notably, participants generally assigned the smallest share of their time to a traditional *lawyering* function. Each emphasized these percentages are estimates, and their actual time allocation regularly fluctuates.

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185 Interview with Patty Hughes, Chief Univ. Att'y, Anonymized Priv. Univ., via Zoom (Apr. 21, 2020) (transcript on file with author).

186 Interview with Michael Ross, Chief Univ. Att'y, Anonymized Priv. Univ., via Zoom (April 13, 2020) (transcript on file with author).

187 Hughes, *supra* note 185.

188 Interview with Arthur Branch, Chief Univ. Att'y, Anonymized Pub. Univ., via Zoom (Apr. 22, 2020) (transcript on file with author).

189 Ross, *supra* note 186.

190 Branch, *supra* note 188.

Table 4. Participants' Perceptions of Their Work Time as Expended in Their Primary Role Functions (out of 100%)

Participant	Executive	Manager	Lawyer
Arthur Branch	40%	30%	30%
Jack McCoy	60%	20%	20%
Patty Hughes	50%	30%	20%
Michael Ross	60%	25%	15%
Dan Fielding	40%	40%	20%
Jessica Pearson	50%	25%	25%
Mean	50%	28%	22%

In exploring the study's first research question, and given participants' acknowledgment of an expansive CUA role, adoption of the tripartite lawyer–manager–executive role framework, and assignment of the greatest share of their work time to primarily *executive* work, participants were asked to describe their perception of each individual functional area. Themes regarding each role function emerged from their responses, including (1) maintaining "preeminent"[191] standards in performing their *lawyering* role as "the hare, not the tortoise,"[192] (2) performing their *management* role as "grand masters"[193] of their university's legal enterprise, and (3) conducting their *executive* role as "connective tissue"[194] that university leaders can rely on to consistently, collaboratively, and creatively advise and solve complex legal and extralegal problems.

1. *Chief University Attorneys as Lawyers: Preeminent, Efficient Attorneys*

Despite the participant-perceived shift in CUAs' role to emphasize an executive function, each agreed superb lawyering ability remains a prerequisite for CUAs. In some cases, CUAs must regularly engage in a broad swath of traditional lawyering tasks, and in others, CUAs may choose to retain only discrete matters or practice areas relating to sensitive or significant institutional interests. Participants' perceptions are supported by the archival documents relating to their cases. Their archived job posting set forth minimum lawyering experience (e.g., ten years) and incorporate a laundry list of requisite legal knowledge and experience, from contract and policy drafting to dispute resolution. Between two-thirds and three-fourths of the qualifications and job duties required in their job postings and position descriptions relate to traditional lawyering tasks.

In every case, CUAs' lawyering function underlies and is inextricable from their management and executive functions. Branch described CUAs' necessary lawyering

191 *Id.*

192 Interview with Jack McCoy, Chief Univ. Att'y, Anonymized Priv. Univ., via Zoom (Apr. 27, 2020) (transcript on file with author).

193 Branch, *supra* note 188.

194 McCoy, *supra* note 192.

ability as that attributable to "a preeminent type of lawyer."[195] In considering the requisite sophistication of CUAs' lawyering abilities, Hughes observed, "I don't even think there's a threshold level of being a good lawyer that you can meet but just really excel at the [other functions]."[196] Rather, participants perceive top-flight lawyering capabilities are foundational to effectively performing the CUA role.

Intertwined with high-level lawyering skills is participants' perception that a CUA should be "a jack of all legal trades"[197] who obtains and actively maintains broad domain expertise of the law impacting their complex research institutions. Hughes articulated domain expertise as "know[ing] a little bit about everything from A to Z … aviation to zoning, and that's literally true … in the [CUA] role you can't just be a specialist."[198] McCoy explained their perception of the minimum knowledge standards and, if insufficient, the required responsive action as, "you have to be able to do 80% of the job a subject-matter expert could do and be prepared to delegate quickly when 80% is not good enough."[199] Merely obtaining domain knowledge is insufficient in participants' view; actively maintaining domain expertise as the law evolves is equally critical. As Hughes described,

> In a higher education environment, you are repeatedly asked to answer the same questions … I have caught multiple seasoned attorneys … giving misinformation because … they do not review their previous answer [for changes in the law]. They do not look for new cases or to see if any new guidance letters have been issued. It is a seductive trap because you have a clientele that may believe everything you say. So maintaining [current domain knowledge] is crucial when it comes to delivering sound legal advice.[200]

Attaining recognition as a preeminent lawyer and actively maintaining domain expertise assist CUAs in nimbly and efficiently fulfilling their lawyering function. McCoy explained that CUAs must also be "a quick study" and illustrated this distinct, efficient lawyering skill as akin to being "the hare, not the tortoise."[201] In this way, participants agreed CUAs must leverage their high-level abilities and broad knowledge to quickly accrue new knowledge when necessary. Because this particular combination of abilities and knowledge is not universally shared by attorneys, McCoy concluded "not all great lawyers are great [CUAs] … but all great [CUAs] are great lawyers."[202]

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195 Branch, *supra* note 188.

196 Hughes, *supra* note 185.

197 Interview with Dan Fielding, Chief Univ. Att'y, Anonymized Pub. Univ., via Zoom (Oct. 23, 2020) (transcript on file with author).

198 Hughes, *supra* note 185 (crediting the "A to Z … aviation to zoning" descriptor to former NACUA President and Chief Executive officer Kathleen Curry Santora).

199 McCoy, *supra* note 192.

200 Hughes, *supra* note 185.

201 McCoy, *supra* note 192.

202 *Id.*

2. Chief University Attorneys as Managers: Grand Masters of the University Legal Enterprise

Participants noted three primary components of CUAs' function as *managers*: leading an internal team of lawyers and support staff, engaging and managing external counsel, and conducting the administrative duties of a unit leader. Participants' respective job postings and position descriptions echo these sentiments—all but one case's respective archival records summarily list managerial duties, and all include administrative duties as expectations of the CUA. In their interviews, several participants noted the significant independence CUAs are granted as managers relative to other university leaders. Participants credited this autonomy to the university legal enterprise's cross-silo reach and the distinctive nature of lawyers' training, knowledge, and skills that render many nonlawyer executives uncomfortable in second-guessing CUAs' management of the legal enterprise. As a result of universities' deference to CUAs' management, Branch quipped, "I am sort of the grand master, the puppeteer, of the legal enterprise."[203] Each of the three components of CUAs' management function identified by the participants are next described in turn.

Each participant emphasized CUAs' duty to hire, develop, and lead their office of legal affairs team. Except in McCoy's case, these duties were also set forth in participants' job posting or position description. Participants perceive attorney hiring and development as essential to allow CUAs to delegate important legal tasks and allocate a greater share of their own time to executive duties. Branch observed, "if you do a good job in hiring really, really talented lawyers, you will be able to engage in high-level work and not spend your time looking over [other attorneys'] shoulders."[204] Pearson added, "hiring and developing attorneys is the whole ballgame; whether you need generalists, specialists, litigators, deal lawyers, talented speakers, or excellent writers, [the CUA's] role is to build one trustworthy, talented, and cohesive team."[205] Although they perceive building a team fit to receive delegation of many legal matters is paramount, participants indicated a team's abilities, an office's available resources, other administrative demands, and the significance of discrete matters may dictate CUAs' management role to include stepping into a lawyering or hybrid lawyer–manager role with regard to certain legal matters. Two participants described significant reliance on their deputy CUAs to oversee routine matters and elevate issues to the CUA as appropriate. As Branch portrayed, "I'm on the horn with [my deputy CUA] nearly every day."[206] Four separately indicated that nearly all first-draft legal memoranda originate from another attorney before elevating for the CUAs' review. Leaning into the inextricable nature of CUAs' lawyering and management functions, Fielding illustrated their function as legal team leader in baseball terms:

> Baseball is the only sport where coaches wear uniforms. You don't see basketball coaches out there wearing shorts and a tank top, but baseball

203 Branch, *supra* note 188.

204 *Id.*

205 Interview with Jessica Pearson, Chief Univ. Att'y, Anonymized Pub. Univ., via Zoom (Oct. 29, 2020) (transcript on file with author).

206 Branch, *supra* note 188.

> coaches are in full uniform like they are ready to get put in at any time. The genesis of that … relates to the [CUA] role. In early professional baseball, there was a [hybrid] player-manager that could put themselves into the game in unique situations … Being a [CUA] is a bit like being both a player and coach. Most of the time there's a lot of delegation, but sometimes a [CUA] has to put themselves in the game, and that's why they still wear the uniform.[207]

Each participant CUA's commentary insinuated that legal team leadership is the primary component of their management function. However, no single model for team leadership emerges from the data. Instead, each case is dictated by the specific context of an institution, its office of legal affairs' particular personnel and financial resources, the CUA's leadership style and preferences—such as how and when they prefer to meet with their teams and individual lawyers—and the many competing demands for the CUA's time.

Participants also included engagement and management of outside counsel among the components of their management function. This duty appeared in all but Fielding's respective archival records, and that exception may be explained by their institution's reliance on Attorney General representation in most litigation. According to Pearson, "Outside attorneys plug the holes my team cannot because of time or expertise. Like most of my [CUA] colleagues, we outsource courtroom litigation, and finding the resources internally to identify and engage capable outside lawyers is a must."[208] Finally, participants unanimously perceived, and their position postings and descriptions likewise document, routine unit administration as a third component of their management function. They experience these duties as a "necessity but seeming distraction from [their] high-level work."[209] These administrative tasks include managing budgets, securing resources, conducting routine personnel management such as performance reviews, and completing other administrative tasks assigned to university unit heads. As with office leadership, each participant's experience in navigating the management components of outside counsel engagements and unit administration vary based on their university's capacities and expectations.

3. Chief University Attorneys as Executives: Connective Tissue Leaders Can Rely On

Most participants' job postings and position descriptions used terms including *executive* and *senior* in describing the CUA role. These archival records further expressed the incumbents' role as including *strategic* thinking and necessary skills including *communication* and *dispute resolution* skills. In sum, these records insinuate role functions beyond lawyering duties and management, but none specifically outline or define such a third job function. In their interviews, however, participants embraced this "strategic bucket"[210] of executive duties prior to the researcher's introduction of the tripartite role framework.

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207 Fielding, *supra* note 197.

208 Pearson, *supra* note 205.

209 Branch, *supra* note 188.

210 McCoy, *supra* note 192.

In their interviews, participants collectively described a CUA effectively exercising their *executive* function as a senior university leader with an expertise in higher education law and thorough understanding of the higher education landscape, ably navigating complex and interconnected university interests and structures, maintaining and leveraging high-quality professional relationships, and proactively contributing the product of these competencies and relationships to provide and influence decision-makers with timely, reliable, and useful advice spanning the domain of university concerns. This comprehensive description emerged through participants' interview data and is assembled from its component parts. Each is next fully described in turn.

As *senior university leaders with an expertise in higher education law and thorough understanding of the higher education landscape*, participants noted the cabinet-level status associated with their role and connected that positioning to their concurrent function as the university's top lawyer. In the context of their executive function, participants were emphatic in their experience as *leader and lawyer* rather than *administrator.* Asked if they considered CUAs higher education administrators, participants rebuffed the *administrator* taxonomy—some emphatically. Rejection of the term was linked by four participants to a shared perception that *administrator* indicates *decision-maker*, and CUAs "only make significant decisions in their narrow managerial" function.[211] The participants agreed the advisory nature of CUAs' role, combined with their access and potential for influence within the university hierarchy, is more appropriately described as *leadership* than *administration*. Pearson contextualized this perception to highlight the inextricable nature of CUAs' lawyering and executive functions: "I consider myself a higher education … leader because I am always an attorney—that is my administrative arena—but as [CUA] I am also always [advising as] an executive. [So] I think 'professional' or 'leader' better captures the true breadth of what I do."[212] As it relates to their thorough understanding of the higher education landscape, McCoy captured the participants' shared perspective in stating, "you have to know all the internal and external challenges and how they relate to one another within the university."[213]

In describing how they *ably navigate complex and interconnected university interests and structures*, participants highlighted attorneys' cross-silo vantage. McCoy captured participants' shared experience, observing, "one of the things about universities is they are extremely siloed, and there are not many people who cut across all those silos—the lawyers do."[214] Further illustrating how CUAs navigate such complex university structures and intertwined interests, McCoy describes CUAs' as "the connective tissue for the university."[215] With a cross-silo vantage, and "without [their] own turf like the deans and many other cabinet members,"[216] the participants perceive that CUAs' functioning as executive occupy a

211 Pearson, *supra* note 205.

212 *Id.*

213 McCoy, *supra* note 192.

214 *Id.*

215 *Id.*

216 Ross, *supra* note 186.

neutral space within leadership that empowers them to "play a norming function … and reinforce university mission and values across silos where people may not be as integrally connected to the big picture."[217] Ross expounded on this concept of neutrality inherent in CUAs' position within the university leadership team, asserting "in some ways [CUAs are] Switzerland; we're not academic, and we're not finance—we're sort of everything, so our loyalty more easily runs to the best interest of institution."[218] In addition to the framing of the CUAs' executive function as connective tissue, Hughes provided this illustration:

> As an executive … I walk alongside or half a step behind my colleagues in leadership with the flashlight sweeping to illuminate the landscape and make sure they don't step on a landmine. I don't just say, "no, you can't go in that direction." I say, "you want to go in this direction—how do I help you go around or build a bridge over that landmine … to make what you want happen?"[219]

Participants cited additional terms to describe this component of their executive function such as "holistic advisor"[220] and "strategic partner."[221] Regarding the latter —which also appeared in three participants' position posting or description— Ross observed, "I often hear the term 'strategic partner,' but I'm not sure anyone really knows what that means"[222] because—like CUAs' executive function—a definition is difficult to ascertain. Collectively, these several terms and illustrations are most succinctly captured through the concept of CUAs as the *connective tissue* that leaders rely on to consistently, collaboratively, and creatively assist decision-makers in solving complex problems.

To operate as connective tissue, participants emphasized the imperative of relationships—specifically *maintaining and leveraging high-quality professional relationships* across the institution. As Pearson explained, capturing most participants' shared experience, "the whole job, it's all about relationships—if you fail to build them, if you lose your president or peers' trust, it's over."[223] Hughes described the relationship-building process in political terms as "precinct work"[224] that, McCoy explained, assists CUAs in accruing "soft power"[225] and a capacity for influence to enhance CUAs' executive function. In every case, participants perceive building high-quality relationships with university decision-makers as foundational to effectively performing their executive duties.

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217 McCoy, *supra* note 192.

218 Ross, *supra* note 186.

219 Hughes, *supra* note 185.

220 Fielding, *supra* note 197.

221 McCoy, *supra* note 192.

222 Ross, *supra* note 186.

223 Pearson, *supra* note 205.

224 Hughes, *supra* note 185.

225 McCoy, *supra* note 192.

The sum of these executive-function components allows CUAs to exert *influence and provide decision-makers with timely, reliable, and useful advice spanning the domain of university concerns*. The participants share a perception, as articulated by McCoy, that "[CUAs are] just there to help people solve problems."[226] They emphasize, though, that performing the executive function well merely opens a seat at the table for CUAs to utilize in influencing decision-makers. CUAs rarely, if ever, transcend the divide from decision *influencer* to *decision-maker*; therefore, continually practicing the components of the executive function—and the concurrent functions of lawyer and manager—is a professional imperative. "We advise the client, but we are not the client or decision-maker. We tell you what the risks are and make recommendations based on our legal expertise, but it is never 'thus sayeth the lawyer.'"[227]

This study's participants perceive their role as complex and demanding. They describe the CUA role as preeminent lawyer, capable manager, and an executive committed to maintaining expertise in both the law and industry of higher education, functioning as connective tissue across a complex organization through high-quality professional relationships. In sum, they describe their "position [as] one of soft power" where they may effectively influence decision-makers "through persuasion and building consensus."[228]

C. How Chief University Attorneys Experience Their Extralegal Role in Influencing Their Institution and Its Decision-Makers

This study's second research question explored participants' experience of their extralegal influence. However, in exploring the first research question, it became evident that CUAs' executive function is so paramount among their duties, and so intertwined with all manner of university concerns, that their specific *extralegal* influence could not be parsed from their general executive influence. Indeed, the definition of CUAs' executive function emerging from this study requires incumbents, in part, to possess an expertise in the law *and environment* affecting higher education so that they may advise decision-makers across the *domain of university concerns*. Therefore, CUAs' executive function itself requires CUAs to maintain expertise in extralegal matters and proffer extralegal advice. Given this finding, the answer to this study's second research question was considered through participants' perceptions of their overarching, general executive influence within their institution and on its leadership team. The data revealed CUAs (1) accrue extralegal influence by performing the entirety of their complex role well, and (2) enhance their executive and extralegal influence by building and maintaining high-quality professional relationships with senior university decision-makers.

1. Extralegal Influence Is Accrued by Delivering Wins

Participants considered their *extralegal role* and influence as a component of their general influence as an *executive*. As Pearson articulated, "[CUAs] extralegal

226 *Id.*

227 Hughes, *supra* note 185.

228 McCoy, *supra* note 192.

work relates to all those matters … that fall into the executive bucket."[229] When asked to describe what might constitute an extralegal matter on which decision-makers seek CUAs' counsel, participants agreed they could include "[matters] with only a distant or … conceivable connection to legal risk, if any."[230] Often, CUAs are invited to advise on extralegal matters because they are intertwined with top university priorities, and CUAs have been offered or earned a seat at the table where such matters are discussed. As Pearson described, "not just any seat at the table because of [CUAs'] position on the organizational chart, but a respected seat at the table and an invitation to really participate in debate because of … the reputation [they] have built by first being a trusted lawyer on legal matters," then by being an effective executive advising on legal-adjacent matters, and finally "routinely adding value to nonlegal discussions."[231] Pearson's description, echoed by other participants, indicates CUAs establish their executive influence by performing their complex, tripartite role well.

This trust and influence-building sequence describes a roadmap for CUAs expanding a traditional CUA role into the modern role revealed in this study. McCoy framed this process of building influence by successfully performing the CUA role in different terms:

> To do a good job … you understand what [your executive peer] is trying to accomplish. You understand their division and what they're doing in deep detail. You've got relationships with people pretty deep into their division that feel supported by you and [feel] that they're … able to be successful because you're involved. And, so, you've delivered wins for that [team].[232]

This portrayal of "delivering wins"[233] as emblematic of performing the CUA job well directly connects with most components of CUAs' executive function emerging through this study and adds that effective performance is signaled by CUAs' clients experiencing successful results. Through this illustration and other commentary, this study reveals trust and influence are byproducts of effective role performance—particularly CUAs' fulfillment of their executive function.

Two notes supplement this theme. First, participants emphasize that CUAs' role, motivation, and achievement must be to deliver positive results, not to accrue influence. The trust and influence CUAs accrue by effectively performing their role are byproducts of a job well performed that, in turn, provide CUAs the opportunity to do so again. Second, according to three participants, CUAs should "choose their [extra]-legal battles carefully."[234] Although CUAs must possess broad domain knowledge on the challenges, priorities, and opportunities facing their institution and the higher education industry, participants highlighted the risk inherent in

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229 Pearson, *supra* note 205.

230 Branch, *supra* note 188.

231 Pearson, *supra* note 205.

232 McCoy, *supra* note 192.

233 *Id*.

234 Ross, *supra* note 186.

proffering advice when insufficiently informed on an extralegal matter under review. Despite this risk, McCoy noted that "if you're doing the [CUA] role well, you will be asked all sorts of nonlegal questions, and because of the way you perform, leaders will expect you to have knowledge and be able to speak intelligently"[235] to reputational and other nonlegal considerations. Taken together, participants describe a cyclical relationship between effectively performing the CUA role, accruing and exercising influence, and being consulted for advice on concerns spanning the domain of university concerns. CUAs should simply be mindful of their motivations and limitations when engaging in extralegal discussions.

2. Extralegal Influence Is Enhanced by High-Quality Professional Relationships

One component of CUAs' executive function is *maintaining and leveraging high-quality professional relationships* across the institution. Each participant's position solicitation or description included an expectation that CUA will *build* or *develop* relationships with *key* or *senior* university leaders, though no description of these relationships' desired outcomes is articulated. In their qualitative interviews, participants emphasized the necessity of "precinct work"[236] in relationship-building, and relationships themselves, as a form of "soft power."[237] In discussing how they perceive and experience their influence in practice, participants unanimously cited the critical nature of what one CUA termed "cashing in on"[238] or, more plainly, leveraging the soft power accrued through their professional relationships to influence good decision-making by university leaders. As Pearson described, the CUA role and the exercise of extralegal influence, "[are] all about relationships."[239] Participants agreed that their *extralegal* influence, in particular, is enhanced by high-quality professional relationships. As McCoy illustrated,

> A good [CUA], when you walk in the room, the decision-makers are glad you are there. When you walk in, they immediately relax and think 'oh, thank goodness [my CUA] is here, and [they] are going to help me solve this problem and help manage this load with me.[240]

High-quality professional relationships do not emerge after delivering a single win or taking one step toward building an effective relationship, according to participants. Instead, relationships take time. According to Fielding, "you cannot build up a reputation overnight. You cannot build up trust overnight. It's a thousand different conversations and experiences and things until someone finally says, 'do you know what, I trust this [person].'"[241] Collectively, the participants emphasize diligence and patience in building relationships as a tool to enhance their effective role performance.

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235 McCoy, *supra* note 192.

236 Hughes, *supra* note 185.

237 McCoy, *supra* note 192.

238 Fielding, *supra* note 197.

239 Pearson, *supra* note 205.

240 McCoy, *supra* note 192.

241 Fielding, *supra* note 197.

In considering their experience as extralegal influencers, participants clarified the inherent extralegal element of their executive role function. Taken together, participants consider their executive and extralegal influence to accrue and enhance relationships through two focused efforts: *delivering wins* by doing their multifaceted job well and establishing high-quality professional relationships with university leaders and decision-makers. Achieved together, participants suggest these actions serve as a reinforcing cycle for effectively performing the CUA role.

V. DISCUSSION AND APPLICATION

As lawyers for sprawling and complex enterprises, managers of burgeoning legal teams, and executives with access to prime seats at the tables of university power,[242] this study's findings reveal CUAs have amassed significant capacity for influence at complex research institutions. It is therefore critical for university stakeholders—from faculty and staff seeking the advancement of their priorities to executives receiving CUAs' advice—to understand CUAs' role and influence. This study explored the modern role of CUAs and reveals a new and robust role framework, articulates a first-ever definition of CUAs' influence-rich *executive* role, and highlights significant implications of the expansive CUA role in modern higher education practice.

A. A New Conceptual Framework Depicting the Modern Rule of Chief University Attorney

This study's qualitative data depicts the details of three contemporaneous role functions effective CUAs must fulfill: lawyer, manager, and executive. These results align with the tripartite—but previously undefined—conceptual framework emerging from relevant literature.[243] Because most previous literature relied on anecdotal evidence and dated narratives,[244] this study's results provide new and extensive empirical knowledge about each component of the modern CUA role and their respective implications.

These results propose a detailed role framework that accounts for the complexity of CUAs' modern role, set forth in *Figure 1* and *Figure 2*. First, *Figure 1* illustrates CUAs' three role functions. Its torus shape emphasizes the singular role of CUA and evokes the contemporaneous and inextricable nature of CUAs' functions as lawyer, manager, and executive. The relative area of each function's shaded area on the torus corresponds to the study participants' perceived allocation of time primarily expended in the respective functional areas. The complementary *Figure 2* summarizes the primary components of each CUA role function. These are visually listed outside the torus because the individual components were not revealed to require simultaneous performance by CUAs. Specifically, the results of this study propose that CUAs' *role functions* are inextricable from one another and

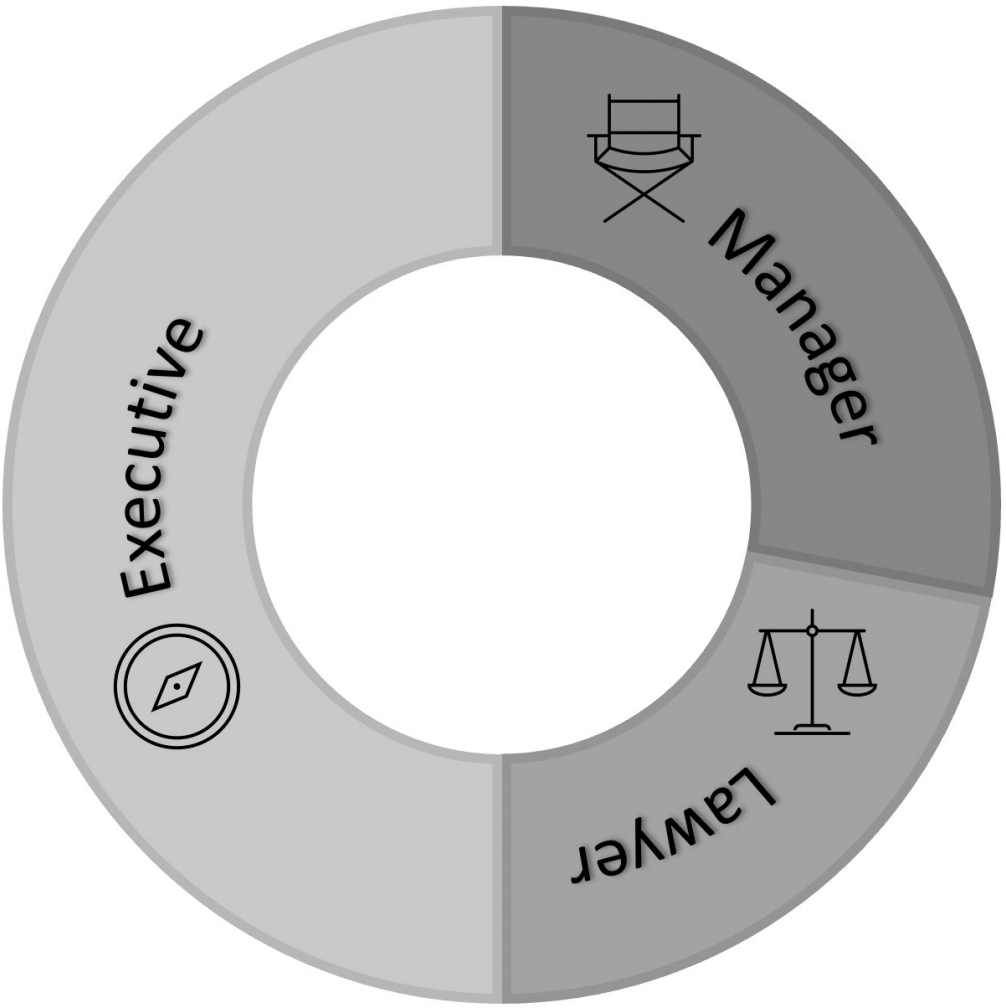
242 *See* Jesse, *supra* note 1; Kafka, *supra* note 13.

243 *See, e.g.*, Blakemore, *supra* note 9; Dunham & Wessel, *supra* note 9.

244 *See, e.g.*, Bickel & Ruger, *supra* note 10; Daane, *supra* note 11.

conducted contemporaneously, but the results do not suggest that a CUA must always actively perform each component of these functions. For example, CUAs are not necessarily expected to constantly engage in general unit administration and participate in a discrete relationship-building activity. Rather, the inextricable and contemporaneous nature of CUAs' role functions should constantly inform how CUAs perform their role through each component activity—whether, in the context of systems theory, in transforming inputs to outputs, acting as executive boundary spanners, interfacing with the external environment, or performing discrete components of CUAs' role functions within the complex university system or office of legal affairs subsystem.[245]

Figure 1. Chief University Attorneys' Contemporaneous Role Functions

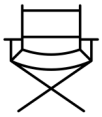


245 *See* Berrien, *supra* note 144; Bess & Dee, *supra* note 9.

Figure 2. Components of Chief University Attorneys' Role Functions

Executive Function

- Lead (not a mere administrator)
- Perform executive function as inextricable from lawyer and manager
- Advise decision-makers through expertise and lens as higher education legal and industry expert
- Serve as *connective tissue* across university silos, leveraging cross-silo position to identify solutions to complex problems
- Build high-quality professional relationships with executive peers
- Accrue and exercise influence through relationships and by *delivering wins*



Management Function

- Hire, develop, and lead legal team
- Engage and manage outside counsel
- Perform general unit administration

Lawyering Function

- Exercise preeminent lawyering skills
- Develop and maintain domain expertise
- Be a *quick study* (hare vs. tortoise)
- Perform sensitive or significant legal tasks or otherwise lawyer as context or resources require

The conceptual framework emerging from the results and depicted in *Figure 1* and *Figure 2*—like the systems theory framework guiding this study[246]—is not a predictor of outcomes. Rather, it simply functions to efficiently conceptualize and communicate the findings of this study of a complex university organizational role.[247] That said, this visual representation highlights specific implications of the uncovered role framework. With CUAs devoting significant time to executive and managerial functions, it is no surprise that universities' legal teams are growing[248] to satisfy their traditional lawyering needs. Further, the framework's visual form depicts the cyclical nature of CUAs' work to build and exert influence through lawyering, administration, and broad-scope advising. And finally, the component duty lists—while numerous—reflect the many components competing for modern CUAs' time. As a tool for university stakeholders, this framework may be utilized by decision-makers engaging with CUAs, faculty and staff seeking to garner their attention or leverage their influence, presidents managing or hiring their next CUA, and incumbent or aspiring CUAs seeking to develop their skills.

B. A Proposed Definition for Chief University Attorneys' Executive Role Function

CUAs' evolving "ubiquitous" role[249] is an increasingly scrutinized topic among higher education legal practitioners,[250] and much of their dialog focuses on CUAs'

246 *See* Bess & Dee, *supra* note 9.

247 *See id.*; Robbins & Judge, *supra* note 141.

248 *See* Kafka, *supra* note 13.

249 Bickel & Ruger, *supra* note 10.

250 *E.g.*, Barnes et al., *supra* note 91; Blakemore et al., *supra* note 90; Blakemore, *supra* note 9; Dunham

previously enigmatic legal-adjacent and extralegal components. In addition to proposing a new CUA role framework, this study—for the first time and through empirical research—proposes a definition of CUAs' executive function:

> In their executive role, a CUA serves as a senior university leader with an expertise in higher education law and thorough understanding of the higher education landscape, ably navigating complex and interconnected university interests and structures, maintaining and leveraging high-quality professional relationships, and proactively contributing the product of these competencies and relationships to provide and influence decision-makers with timely, reliable, and useful advice spanning the domain of university concerns.

This proposal emerges from the rich qualitative data provided by this study's participating CUAs, together with a thorough review of literature exploring the role of university lawyers. It incorporates sweeping elements of leadership, essential competencies, interpersonal skills, and an ability to counsel and engage with decision-makers on an array of consequential university concerns. Each component of this proposed definition is robustly described in this study's *Findings* section, and this comprehensive definition should be considered, tested, and incumbents' performance analyzed, through its component parts. Role incumbents, aspirants, and higher executive leaders and scholars should continue to refine and enhance this definition for the benefit of other CUAs and university leaders.

C. Additional Implications for Practice

This study's results, including the CUA role framework, definition of CUAs' executive function, and themes emerging from CUAs' experiences as executive and extralegal influencers, pose additional implications for higher education practitioners and scholars. In higher education practice, this study's emerging CUA role framework provides university constituents a new framework for understanding their lawyers' impact—legal and extralegal—on university operations, decision making, and even institutional values. Constituents may, based on this study's results, adopt new methods for engaging lawyers as problem solvers, connective tissue, or influential advocates. Or they may assess the expansive influence of these nonacademic executives as misaligned in some way and seek opportunities to challenge their extralegal impact. CUAs' fellow executives may utilize these results to better utilize their lawyers—whether in fulfilling their *lawyering* or other *executive* needs. Governing boards, presidents, and search committees may apply this framework to develop stronger CUA position solicitations and descriptions, assess applicants, measure incumbents' performance, and determine the resources needed to operate an effective in-house legal enterprise.

CUA practitioners may utilize the role framework other findings documented in this study to adapt their practices with the broad, empirically derived role of CUA revealed in this study. They may apply these results to assess their performance

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& Wessel, *supra* note 9.

and effectiveness holistically and within each of the three CUA role functions. Such analyses can reveal opportunities for growth and direct a personalized professional development agenda. In leading their legal affairs teams, CUAs may adapt the conceptual framework and themes emerging from this study to articulate and implement office-wide principles for delivering legal advice in a relevant and effective way. Aspiring CUAs may lean on these findings to guide their development for CUA roles. In these ways, this study produced a new resource for college lawyers to measure their approach to the CUA role and direct their professional growth.

Finally, scholars may rely on this research as a foundation to further inquiry. While this study reveals *what* a complex and influential role CUAs perform and *why* that role matters to campus stakeholders, the results prompt further inquiry. What qualifies or prepares these nonacademic professionals for highly influential roles within the academy? How should CUA search practices be aligned to account for the legal complexities and extralegal implications of the modern CUA role? How do CUAs develop the sort of relationships this study reveals are essential to performing their modern role? And are the results of CUAs' extralegal access and influence leading to positive or negative outcomes for the universities they serve?

VI. CONCLUSION

This study explored the role of CUA and sought to understand the three role functions suggested, but not empirically explored, by preceding literature: lawyer, manager, and executive.[251] Through the cases of six incumbent CUAs, including their individual experiences and perceptions of their role, a new and robust role framework emerged that technically defines and visually depicts these three functions within a single role and details the primary components of each contemporaneous function. Further, this study's results proffered the first empirically driven definition of CUAs' emerging executive—and frequently extralegal—role. Incumbents, aspirants, and other higher education leaders should examine, challenge, and build on this proposed definition.

CUAs' expansive modern role has been described as wielding significant "power."[252] Incumbents in this study may challenge that view, insisting their power is *soft* or that they merely have access to influence without decision-making authority. Nonetheless, their access and influence are now visible in matters of significance to university stakeholders.[253] When presidents and other leaders next consider the weight of political and legislative forces in university decision-making, the value and associated risks of academic freedom and free speech, and the core academic and research mission of their institutions, recent anecdotal evidence and this study reveal that the university lawyers may play a critical role in shaping the president's decisions. Understanding their role is therefore critical, and this study's results represent a step forward in uncovering that knowledge.

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251 *See, e.g.*, Bickel (1974), *supra* note 10; Blakemore, *supra* note 9; Daane, *supra* note 11; Dunham & Wessel, *supra* note 9.

252 Jesse, *supra* note 1, ¶ 3.

253 *See* Jesse, *supra* note 1; Kafka, *supra* note 13.

CALIFORNIA DREAMIN': DACA'S DECLINE AND UNDOCUMENTED COLLEGE STUDENT ENROLLMENT IN THE GOLDEN STATE

WILLIAM C. KIDDER AND KEVIN R. JOHNSON***

Abstract

With congressional efforts to pass comprehensive immigration reform mired in gridlock, over the past dozen years the federal effort to provide relief to undocumented young adults has been through the Deferred Action for Childhood Arrivals (DACA) program. DACA may go before the U.S. Supreme Court for the second time in 2025. There is surprisingly little concrete and comprehensive recent data on undocumented and "DACA-mented" college student enrollment patterns.

This is the first article to report hard data on contemporary enrollment trends for undocumented college students, an era marked by increasing constrictions of DACA. Our first main finding is that between 2016-17 (just prior to the partial DACA rescission) to 2022-23, newly enrolled low-income undocumented students declined by half at University of California (UC) and California State University (CSU) campuses. Our second main finding is that for UC and CSU low-income undocumented students overall (new and continuing students) there was a 30% decline between 2018 and 2019 and 2022

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* Research Associate, Civil Rights Project/Proyecto Derechos Civiles (UCLA); Senior Investigator and Special Advisor to the Chief Compliance Officer, UC Riverside. B.A. and J.D., UC Berkeley. Neither author has any ongoing financial conflicts of interest to report here. The views expressed in this article reflect Kidder's own research views and are not intended to represent the UCR (nor UC) administration. Mr. Kidder and the Civil Rights Project submitted extensive public comments on the Biden administration's proposed DACA regulations in 2021.

This article is dedicated to the late Michael A. Olivas, a legendary immigrants rights advocate and scholar. We are grateful to Ahilan Arulanantham, Lisa García Bedolla, Jennifer Chacón, Erwin Chemerinsky, Patricia Gándara, Jonathan Glater, Hiroshi Motomura, and anonymous *JCUL* reviewers for comments on drafts of this article. We thank the following for participating in fact-gathering interviews or email exchanges that were very helpful in developing the ideas reflected in this piece, including Shawn Brick (UC Office of the President, Financial Aid), Cathy Cha and Elica Vafaie (Evelyn & Walter Haas Jr. Fund), Miriam Feldblum (Presidents Alliance on Higher Education and Immigration), Jeanne Batalova (Migration Policy Institute), Liliana Iglesias (UC Berkeley Undocumented Student Program), and Pablo Reguerin (UC Davis Student Affairs). We also thank Barbara Lee, anonymous reviewers and the editing team at *JCUL*.

and 2023 (the second finding reflects a delayed impact as earlier large cohorts took time to graduate). Our third finding is that there were no notable declines over the same period in our "control" groups—other low- and lower-middle income students at UC and CSU with similar academic profiles—which supports our inference about the causal role of DACA's decline on decreasing undocumented student enrollments.

Part III pivots to several ongoing areas of promising reforms and mitigation strategies that can be pursued by public universities with an interest in supporting undocumented student success. These are strategies to consider regardless of how DACA fares in the Supreme Court. We analyze relevant case law regarding the "Opportunity for All" campaign in the UC, which is based on the claim that public universities may lawfully employ undocumented students. We also summarize innovative public–private partnerships for scholarships and other support for undocumented students and immigrant rights.

** Dean and Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies, University of California at Davis, School of Law; A.B., UC Berkeley; J.D., Harvard University. In full disclosure, Dean Johnson helped organize and draft an amicus brief challenging the lawfulness of the rescission of DACA in the 2020 U.S. Supreme Court case and he signed the support letter for the "Opportunity for All" legal memorandum in 2022 discussed in Part IV.A.

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I keep moving forward even though I cannot see what future is in front of me. I will keep working to find a way to illuminate the path.

– Maria Ortega Rodriguez,
undocumented college freshman without DACA[1]

1 Maria Ortega Rodriguez, *I'm An Undocumented College Student. No Matter How Hard I Work, There's 1 Reality I Can't Escape*, Huff Post (May 31, 2023), https://www.huffpost.com/entry/undocumented-college-student-citizenship-work_n_647652f2e4b02325c5dd76e9.

INTRODUCTION

In the landmark 1982 ruling in *Plyler v. Doe*, the Supreme Court held that a Texas statute authorizing K-12 public schools to deny enrollment to undocumented children violates the Equal Protection Clause of the Fourteenth Amendment.[2] Although stopping just shy of holding education to be a right, the Court declared that "education has a fundamental role in maintaining the fabric of our society."[3] Years spent in U.S. elementary schools, junior highs, and high schools interweave the strands of undocumented students' identities into the fabric of our (and their) American society. Some learn along the way that American society will not be experienced as a seamless fabric, but rather as a patchwork of inclusionary and exclusionary encounters, such as learning that one cannot participate in the federally funded academic preparation program at their middle school.[4] Many U.S. undocumented students who aspire to go to college first learned of their immigration status when they were applying for college and financial aid,[5] as high school graduation marks the abrupt transition from the K-12 educational world protected by *Plyer* to the liminal world of higher education that is the focus of this article, with its broad possibilities and also "transitions to illegality"[6] that vary greatly according to the state where one resides and whether one has Deferred Action for Childhood Arrivals (DACA) relief.

Challenges to DACA have been percolating in the lower courts for several years. As the Supreme Court may rule on the legal merits of DACA as soon as next year, what are the educational outcomes of thousands of undocumented students who enrolled in U.S. colleges and universities in recent years, some with DACA and some without DACA? In fact, we will show that this is a surprisingly difficult question to answer.

Officials at U.S. public universities and higher education boards making administrative choices about collecting data on undocumented students must navigate between competing hazards. Most public university systems have chosen (or defaulted to) procedures and policies that absorb some known degree of harm in order to avoid the risk of catastrophic harm. More specifically, most university

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2 457 U.S. 202, 202 (1982).

3 *Id*. at 202.

4 Roberto. G. Gonzales, Lives in Limbo: Undocumented and Coming of Age in America 97–98 (2015).

5 *Id*. at 99 tbl. 2; Carmen Monico & David Duncan, *Childhood Narratives and the Lived Experiences of Hispanic and Latinx College Students with Uncertain Immigration Statuses in North Carolina*, 15 (supp) Int'l J. Qualitative Stud. Health & Well-Being 1, 6 (2020).

6 Gonzales, *supra* note 4, at 11 ("For undocumented youth, the transition to adulthood is accompanied by a *transition to illegality*. Difficult transitions stem from conflicting and contradictory laws that provide undocumented children access to K-12 schools but deny them the means to participate in the polity once they become adults.") (italics in original); Rachel Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 U.C. Davis L. Rev. 1905, 1917 (2020) ("*Plyler's* protections permit these youth to become de facto Americans through their early educational experiences, but graduation brings home the harsh reality of their de jure denial of citizenship.").

systems with sizeable numbers of undocumented students knowingly forego the potential educational benefits of being able to integrate undocumented status with their financial aid and registration record systems because there are offsetting ethical concerns. By not collecting data, universities protect undocumented students' identities in the face of the sensitive nature of immigration status and negative contingencies such as future hostile subpoenas or other coercive data disclosure obligations.[7]

As we show in Part II, the three states known to have the largest numbers of undocumented college students in the United States—California, Texas, and Florida—do not directly provide contemporary enrollment counts or estimates about undocumented college students.[8]

The experiences of these three states with the largest relevant populations underscore that data nationwide about undocumented college students that could otherwise inform judicial and policy-maker judgments is not available. Given this patchwork of partial and fuzzy estimates of undocumented students for some but not all states and with incongruous methodologies and various years reported, it necessarily follows that there are not national figures for undocumented college student enrollments from the typical sources used more generally (e.g., federal IPEDS [Integrated Postsecondary Education Data System] data).[9] In lieu of hard data at the national level, the best national estimates we have come from a series of reports utilizing a population-based estimation methodology anchored to the

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7 *See, e.g.*, UC Regents, Discussion Item A5: Undocumented Student Support and Student Experience, at 2 n.3 (Jan. 20, 2021), https://regents.universityofcalifornia.edu/regmeet/jan21/a5.pdf ("As a special population within the University community, undocumented students are not coded or tracked with this factor in any student information system due to the sensitive and vulnerable nature of immigration status. However, through point of service contacts such as visits to the undocumented student services offices, combined with the number of completed California Dream Act Applications, campuses have been able to estimate the number of undocumented students in order to plan services"); Adam Echelman, *Fewer Undocumented Students Have DACA. California's Colleges Want to Help, Even if the Options Are Limited*, Cal Matters (Nov. 30, 2023), https://calmatters.org/education/higher-education/2023/11/undocumented-students/ ("UC, Cal State and the community college system do not officially track the number of undocumented students and instead use various proxies to estimate it. They don't track the number of DACA recipients either."); *cf.* Manuela Ekowo & Iris Palmer, Predictive Analytics in Higher Education: Five Guiding Practices for Ethical Use 8 (Mar. 2017), https://www.newamerica.org/education-policy/reports/predictive-analytics-in-higher-education/ ("Be vigilant that data are well protected so that the information does not get into the hands of those who intend to misuse it. It is especially important to protect the data privacy of vulnerable student groups, such as … undocumented students…").

8 However, estimates are sometimes possible based on, for example, absence of Social Security Numbers.

9 Stella M., Flores & Leticia Oseguera. *The Community College and Undocumented Immigrant Students Across State Contexts: Localism and Public Policy*, 111 Tchrs. Coll. Rec. 63, 69 (2009) ("As IPEDS data do not provide detailed citizenship data or non-resident status by race and ethnicity, we rely on non-resident aliens as a measure of foreign-born nonresident status among the institutional data."); Johanna K. P. Dennis, *Just Beyond Reach: A Study on Access to in-State Tuition and Enrollment After Deferred Action for Childhood Arrivals: Part III: Individually Reported Hispanic Non-Citizen Student Persistence*, 20 J.L. Soc'y 103, 110, 116 (2020) (using Hispanic noncitizen status as a proxy for undocumented status).

American Community Survey (ACS), but as we show in Section II, there are limitations to these national estimates.

I. THE RISE AND DECLINE OF DACA

After a decade of unsuccessful efforts by Congress and the U.S. Senate to pass versions of a Development, Relief, and Education for Alien Minors (DREAM) Act or other comprehensive immigration reform, the Obama administration took executive action in 2012 through DACA.[10] That policy formalized a long-standing practice of prosecutorial discretion.[11] DACA meant eligible undocumented immigrants would be spared the government's removal/immigration enforcement efforts for two years with renewals possible. Under the Obama and Biden administrations, the Department of Homeland Security (DHS) has interpreted DACA as conferring a temporary form of lawful presence, even though that is distinct from lawful status.[12] For reasons detailed below in this part, the substantive legality of DACA may be reviewed by the U.S. Supreme Court next year.

Moreover, in several states, DACA interacted with state laws and administrative practices and thereby opened up additional important benefits such as access to driver's licenses, eligibility for in-state tuition and financial aid, and more favorable conditions for professional licenses and credentials (e.g., lawyers, doctors, school teachers, etc.).[13] In Virginia, for example, soon after DACA the State Attorney General advised that DACA (and only DACA) students could be eligible for waivers to pay in-state tuition at colleges and universities in the Commonwealth.[14]

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10 Michael A. Olivas, Perchance to DREAM: A Legal and Political History of the DREAM Act and DACA (2020); Jennifer M. Chacón et al., Legal Phantoms: Executive Action and the Haunting Failures of Immigration Law (2024).

11 Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 Am. U. L. Rev. 1285 (2014). An important factor behind the need for DACA was in response to the resistance of field-level immigration enforcement personnel to carrying out President Obama's enforcement priorities and prosecutorial discretion guidelines. Hiroshi Motomura, Immigration Outside the Law 204–05 (2014).

12 *See* U.S. Citizenship & Immgr. Servs., Frequently Asked Questions, Consideration of Deferred Action for Childhood Arrivals (DACA), https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions (last updated Nov. 13, 2023) ("An individual who has received deferred action is authorized by DHS to be in the United States for the duration of the deferred action period. Deferred action recipients are also considered to be **lawfully present** as described in 8 C.F.R. sec. 1.3(a)(4)(vi) for purposes of eligibility for certain public benefits (such as certain Social Security benefits) during the period of deferred action. However, deferred action does not confer **lawful immigration status** upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence they may have. … Under 8 CFR 274a.12(c)(33), an individual who has been granted deferred action under 8 CFR 236.21 through 236.23, Deferred Action for Childhood Arrivals, may receive employment authorization for the period of deferred action, provided they can demonstrate "an economic necessity for employment") (bold in original).

13 Olivas, *supra* note 10, at 86-91.

14 *See* Gabriel R. Serna et al., *State and Institutional Policies on In-State Resident Tuition and Financial Aid for Undocumented Students: Examining Constraints and Opportunities*, 25 Educ. Pol'y Analysis Archives 1, 6–7 (2017). This was later eclipsed by H.B. 1547 in 2020, which set forth criteria for access to in-state tuition rates and by S.B. 1347 signed in 2021, which made qualifying

Under the Trump administration, in 2017 the DHS attempted to rescind DACA, which began a slow strangulation of the program (i.e., no new DACA requests were being accepted). In a 5–4 ruling in *Department of Homeland Security v. Regents of the University of California*,[15] the U.S. Supreme Court in 2020 held that the Trump administration DHS' rescission of DACA was arbitrary and capricious in violation of the Administrative Procedure Act (APA) and vacated the rescission of DACA. The Court found the Trump administration failed to consider the reliance interests of DACA recipients and others that had accumulated since the program began in 2012.[16] The Court majority did not reach the legality of DACA. [17]

The Trump administration defied the U.S. Supreme Court ruling.[18] Binding federal court rulings should have returned treatment of DACA applications to the *status quo ante* before the September 2017 unlawful rescission of DACA.[19] However, Acting DHS Secretary Wolf issued a new memorandum directing the agency "to take all appropriate actions to reject all pending and future initial requests for DACA, to reject all pending and future applications for advance parole absent exceptional circumstances, and to shorten DACA renewals consistent with the parameters established in this memorandum."[20]

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undocumented students eligible for state financial aid the following year, https://www.higheredimmigrationportal.org/state/virginia/ (last visited March 1, 2025)).

15 140 S. Ct. 1891 (2020).

16 *Id.* at 1913–15.

17 However, in Justice Thomas's dissenting opinion (joined by Justices Alito and Gorsuch), he declared the view that DACA was unlawful because "DHS created DACA during the Obama administration without any statutory authorization and without going through the requisite rulemaking process." Justice Kavanaugh, in a separate dissent, referenced legislative gridlock, noting that the uncertainty faced by DACA recipients is "a result of Congress's inability thus far to agree on legislation." *Id.* at 1935.

18 *See, e.g.*, Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 Yale L.J. 948 (2021); Mark Joseph Stern, *Trump Is Now Openly Defying the Supreme Court*, Slate (July 28, 2020), https://perma.cc/D4L8-YYLL.

19 *See, e.g.*, Casa De Maryland v. U.S. Dep't of Homeland Sec., No. 8:17 -cv-02942-PWG at 3 (D. Md. July 17, 2020), https://storage.courtlistener.com/recap/gov.uscourts.mdd.403497/gov.uscourts.mdd.403497.97.0.pdf.

20 Acting DHS Secretary Chad Wolf, Reconsideration of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" at 1–2 (July 28, 2020), https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf. This action was all the more controversial because Wolf's appointment as Acting DHS Secretary itself was found by several federal courts to not lawfully comply with the Homeland Security Act. *See* Casa de Maryland, Inc. v. Wolf, 2020 WL 5500165, at *23 (D. Md. Sept. 11, 2020) ("By extension, because Wolf filled the role of Acting Secretary without authority, he promulgated the challenged rules also 'in excess of ... authority,' and not 'in accordance with the law.'"); Batalla Vidal v. Wolf, 501 F. Supp. 3d 117, 123 (E.D.N.Y. 2020) (holding that the acting DHS Secretary was not lawfully appointed); Immigrant Legal Res. Ctr. v. Wolf, 491 F. Supp. 3d 520 (N.D. Cal. 2020) (same). The Government Accountability Office reached the same conclusion as the courts above. *See* General Accountability Office-General Counsel, Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security (Aug. 2020), https://www.gao.gov/assets/710/708830.pdf.

Upon taking office in January 2021 President Biden issued a directive to preserve and fortify DACA, with DHS announcing that it would move forward with a notice of proposed rulemaking process to fashion new DACA regulations.[21] The Biden DHS issued proposed regulations in September 2021 that in key respects maintained the status quo with DACA.[22]

While the Biden administration's rulemaking process for DACA was underway, district court judge Hanen ruled that DACA violates the APA. He issued a nationwide injunction blocking DHS from processing any new DACA applications while permitting the continued processing of current DACA renewals.[23]

Texas v. United States was assigned to a conservative Fifth Circuit panel, and the Fifth Circuit affirmed the district court's decision, but directed Judge Hanen to now review and consider the final regulations codifying DACA that were promulgated while the litigation appeal was pending.[24] The Fifth Circuit also reaffirmed continuation of a partial stay covering existing DACA recipients.[25] Judge Hanen found that the final DACA regulations did nothing to improve infirmities that he and the Fifth Circuit identified in the original 2012 DHS Secretary Napolitano memorandum:

> [T]he easy response to the assignment given to this Court on remand is: there are no material differences between the Final Rule and the 2012 DACA Memorandum, and while the record underlying the Final Rule certainly supports the argument that DACA has been beneficial for the DACA recipients and that the DACA recipients are, with certain exceptions, beneficial to the country, DHS did nothing to change or resolve the substantive problems found by this Court or the Fifth Circuit.[26]

In his most recent district court ruling Judge Hanen focused on advance parole and the planned indefinite nature of DACA as two problem areas with the final

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21 *See Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)*, 2021 Daily Comp. Pres. Doc. 64 (Jan. 20, 2021), https://perma.cc/7RT9-7K5M; Statement by Homeland Security Secretary Mayorkas on DACA, U.S. Dep't of Homeland Sec. (Mar. 26, 2021) https://perma.cc/Q8FD-P8Q4.

22 Preserving and Fortifying Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736 (Sept. 28, 2021) (later codified at 8 C.F.R. pts. 106, 236, 274a).

23 Texas v. United States, 549 F. Supp. 3d 572, 624 (S.D. Tex. 2021).

24 50 F. 4th 498, 512 (5th Cir. 2022) ("[W]e affirm the district court's judgment with regard to the procedural and substantive provisions of the DACA memorandum. Assuming without deciding that we presently have jurisdiction to review the Final Rule, we decline to do so at this juncture. We do not have the administrative record before us. We cannot determine whether there are material differences in that record and the record before the district court regarding the 2012 DACA Memorandum. … A district court is in the best position to review the administrative record in the rulemaking proceeding and determine whether our holdings as to the 2012 DACA Memorandum fully resolve issues concerning the Final Rule.").

25 *Id*. at 531–32.

26 Texas v. United States, 691 F. Supp. 3d 763, 782 (S.D. Tex. 2023). The district court additionally referenced at footnote 44: "the Final Rule is flawed for the same substantive reasons as the 2012 DACA Memorandum. *See Texas II, 549 F.Supp.3d at 603–21; Texas II, 50 F.4th at 525–28." Id*. at 782 n.44.

DACA regulations.[27] The *Texas v. United States* case then went before the Fifth Circuit a second time, with the court addressing jurisdiction, standing, and the substantive merits of DACA in a January 2025 ruling.[28]

Regarding jurisdiction, the Fifth Circuit ruled that jurisdiction was appropriate under the APA, rejecting the argument by the Biden administration that the Immigration and Nationality Act (INA) limited judicial review to noncitizens exclusively.[29] With respect to standing, the court found that that the State of Texas's financial injuries were "concrete" and "real," that the costs were linked to DACA and would be redressed by the elimination of DACA, and that the Fifth Circuit's earlier standing precedents relied upon by the district court were not clearly overturned by the U.S. Supreme Court's recent *Immigration Priorities* ruling.[30] The Fifth Circuit, with respect to the substantive legality of DACA, ruled that the DHS final rule on DACA that was for the most part identical to the 2012 Secretary Napolitano memorandum was not consistent with the INA's comprehensive classification scheme for noncitizens.[31] In total, the Fifth Circuit struck down the work authorization and "lawful presence" pillars of DACA, but acknowledging the severability clause in the Biden DHS regulations,[32] the Fifth Circuit (reversing the district court) held that the DACA's policy of forbearance from removal should not be disturbed.[33] The Fifth Circuit also narrowed the district court's injunction to Texas because other states aligned with Texas had not proven a pocketbook injury, and the court took into account that New Jersey intervened to defend DACA and twenty-two states filed an amicus brief in support of DACA.[34] If the Fifth Circuit's latest ruling is appealed and if certiorari is granted, the DACA case would likely be heard in the U.S. Supreme Court's 2025 Term.

Figure 1 displays annual DACA intakes that were approved by the DHS between 2012 and 2023, separated into new approvals and approved renewals. These data cover all DACA recipients rather than the subset who are college students (which DHS and other federal agencies do not report separately). Starting in fall 2017 during the Trump administration, approval of new DACA applications basically ended. After a minor uptick in the first half of 2021 when almost eight thousand were approved under the Biden administration before the *Texas v. United States*

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27 *Id.* at 785–88.

28 126 F.4th 392 (5th Cir. 2025.

29 *Texas*, 126 F.4th at 416-17.

30 *Id.* at 405-15 (discussing *United States v. Texas*, 599 U.S. 670 (2023) and other cases).

31 *Id.* at 416.

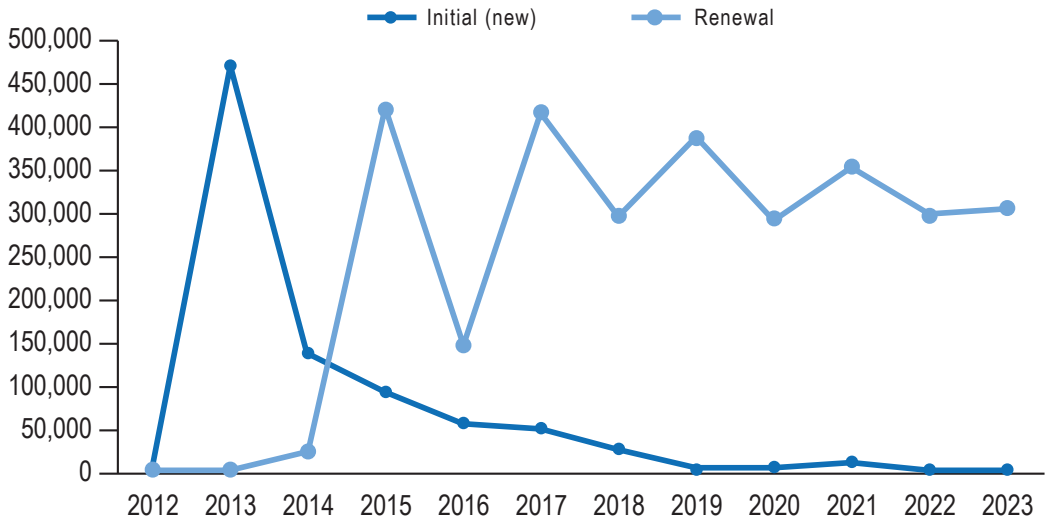
32 "[A]lthough there are significant benefits to providing work authorization alongside forbearance, forbearance remains workable and desirable without work authorization, and DHS would have adopted the forbearance portion of the policy even if it did not believe that the work authorization portion of the rule were legally authorized." 87 Fed. Reg. 53,248–49 (August 30, 2022).

33 *Texas*, 126 F.4th at 419-20. Likewise, in the 2020 case *Dep't of Homeland Sec. v. Regents of the University of California*, the U.S. Supreme Court recognized that "forbearance and benefits are legally distinct and can be decoupled." 140 S. Ct. 1891, 1913 (2020).

34 *Texas*, 126 F.4th at 421.

district court's national injunction in July 2021 prohibited further processing of new DACA intakes, in 2022 and 2023 combined there were only *three* new DACA applications approved by DHS.

FIGURE 1: DACA Intake Requests Approved by DHS in FY 2012 to 2023[35]



Consequently, the population still being approved to have "DACA-mented" status are those who are renewing their previously approved DACA applications, a group of Millennials and older Generation Z individuals who have now largely aged out of high participation rates in undergraduate education. Today an eighteen year-old high school graduate who is undocumented and aspires to go to college will almost invariably not be able to participate in DACA.[36] In fact, potential college students today face multiple overlapping barriers: (1) nearly all eighteen year-old undocumented high school graduates by 2024 did not arrive in the United States by DACA's 2007 cut-off; and (2) even those in their twenties who would have become DACA eligible, but only after the date of the attempted rescission of

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35 Department of Homeland Security, U.S. Citizenship and Immigration Services, DACA Performance Data (Dec.2023),https://www.uscis.gov/sites/default/files/document/reports/daca_performancedata_fy12_fy23_q4.csv (last visited March 1, 2025). Based on DHS/USCIS's fiscal year, these data correspond to the period of August 15, 2012, through September 30, 2023. The "sawtooth" pattern for renewals in Figure 1 is an artifact of renewals being on a two-year cycle for the most part.

36 Phillip Connor, *The Post-DACA Generation Is Here, Nearly All This Year's 120,000 Undocumented New High School Graduates Are Ineligible for the Policy*, FWD.US News (May 23, 2023), https://www.fwd.us/news/undocumented-high-school-graduates/; Nina Rabin, *Second-Wave DREAMers*, 42 Yale L. & Pol'y Rev. 107, 134 (2023) ("Diego, Juan, and Laura, whose profiles opened this section, were the last high school students our clinic [at the UCLA Law School] has assisted with DACA. As of June 2022, there were no new applicants in the under-fifteen age group because they would not have been born in 2007."); UC Immigrant Legal Services Center, Annual Progress Report 9 (Sept. 2022), https://ucimm.law.ucdavis.edu/sites/g/files/dgvnsk12741/files/inline-files/UCIMM-2022-Annual-Report-FINAL_0.pdf ("In the last two fiscal years, we have seen an expected increase in the number of undocumented clients without DACA and a decline in the number of DACA clients. This is because, with few exceptions, every incoming class of first-year UC students since Fall 2020 has been ineligible for DACA and accompanying work authorization.").

DACA in September 2017, were eligible in theory only because the processing of new applications was halted except for the brief small-level reopening in 2021 referenced above.

At the time of this writing the second Trump administration returning to the executive branch in 2025 adds substantial uncertainty and precarity for college students with DACA, for undocumented college students without DACA, and for their families.[37] For instance, DHS may attempt to lawfully rescind the DACA executive order before there is a ruling by the U.S. Supreme Court in the pending *Texas v. United States* case, which underscores our discussion of post-DACA pathways and reforms in Part III.

II. MEASURABLE ENROLLMENT DECLINES SINCE DACA'S DEMISE

Here we provide "hard numbers" on actual enrollment trends for the two public university systems in California. For reasons detailed in the Appendix, our data are a good measure of enrollment trends for undocumented students, yet they come from the California Student Aid Commission (CSAC) and cannot be linked back with enrollment records of individual students on each university campuses that could place those undocumented individuals at risk of removal from the United States.[38]

As a "level set" to aid readers in understanding the meaning and context of our findings further below, Table 1 categorizes all fifty states plus the District of Columbia and Puerto Rico as of 2024 in a continuum from most restrictive to most supportive/accessible policies for in-state tuition and state financial aid eligibility. These categories and ratings are from the Higher Ed Immigration Portal by the Presidents Alliance based on measurable definitions. This is a very dynamic space because of changes to state laws,[39] so while Table 1 is a snapshot as of April 2024, the states that shifted categories compared to April 2021 are shaded in grey. To emphasize the point about changes in state law, in February 2025 Florida reversed

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37 *See, e.g.*, Presidents' Alliance on Higher Education and Immigration, Tips for Advising Campuses in a Time of Immigration Uncertainty (Dec. 18, 2024), https://www.presidentsalliance.org/wp-content/uploads/2024/12/Tips-for-Advising-Campuses-in-a-Time-of-Immigration-Uncertainty-2024.pdf; Li Zhou, *Trump Says Ge Supports DREAMers. His Past Actions Say Differently*, Vox (Dec. 11, 2024), https://www.vox.com/politics/390702/trump-dreamers-daca-supreme-court; Ahilan Arulanantham, *Trump's Immigration Agenda: A Closer Look*, Just Security (June 26, 2024), https://www.justsecurity.org/97146/trumps-immigration-agenda/; Chris Cameron, *Vance Vows an End to Programs for Legal Immigrants*, N.Y. Times, Oct. 22, 2024.

38 CDE and CSAC Joint Statement, Protection of Student Information for CADAA [California Dream Act Application] Applicants (2022), https://www.csac.ca.gov/post/joint-message-cde-and-csac-protection-student-information-cadaa-applicants ("The California Department of Education (CDE) and CSAC want to assure CA Dream Act applicants and their families that it is safe to apply for the CADAA. Information provided on the CADAA application is used solely to determine eligibility for state financial aid. Information provided on the CADAAA is not shared with the federal government and it is not used for immigration enforcement. CSAC will work to the fullest extent of the law to protect all students that share their information through the CADAA.").

39 William C. Kidder, *Dreaming with Dreamers When DACA Is at Risk: An Innovative and Legally Defensible Student-Community Partnership Model to Bolster Financial Support for Undocumented College Students*, 36 Geo. Immigr. L.J. 571, 585 (2022).

course and passed a new law prohibiting undocumented students who attended Florida public high schools from eligibility for waivers of out-of-state tuition.[40] The degree of variation in Table 1 calls to mind the line in *Grutter v. Bollinger* that "States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."[41] However, here we add the proviso that congressional inaction on immigration reform such as a DREAM Act over the past two decades is the "but for" cause for why the best solution is far from clear.

TABLE 1: State Tuition and Financial Aid Policies for Undocumented College Students in 2024[42]

Prohibitive Enrollment	Restrictive	No State Policy	Limited to DACA	Limited	Accessible	Comprehensive Access
AL, GA, SC	IN, MO, NH, NC, TN, WI	AL, LA, MT, ND, PR, SD, VT, WV, WY	AR, ID, ME, MS, OH	DE, IA, MI, PA	AZ, FL, KS, KY, NE, OK	CA, CO, CT, DC, HA, IL, MD, MA, MN, NV, NJ, NM, NY, OR, RI, TX, UT, VA, WA

The importance of our present findings is underscored by the absence of official and contemporary counts for public university systems in California, Texas, and Florida, home to the largest populations of interest. In California the most commonly cited estimates for undocumented students are from six years ago or more, when it was estimated there were about 4000 undocumented students enrolled at the University of California (UC) and 10,000 to 12,000 enrolled at the California State University (CSU).[43] These estimates were cited in the run-up to the DACA litigation culminating in the Supreme Court's 2020 ruling in which UC relied on data counts

40 Sara Weissman, *Has Florida Sparked a Trend of Ending In-State Tuition for Undocumented Students?*, Inside Higher Ed, Feb. 20, 2025.

41 539 U.S. 306, 342 (quoting *United States v. Lopez*, 514 U. S. 549, 581 (1995) (Kennedy, J., concurring).

42 Adapted from https://www.higheredimmigrationportal.org/states/ (Apr. 2024) and https://web.archive.org/web/20210422104104/www.higheredimmigrationportal.org/states/ (archived Apr. 2021). The definitions are as follows:

Comprehensive Access: Policies provide statewide access to in-state tuition and some state financial aid or scholarships for the state›s resident DACA recipients and undocumented students.

Accessible: Policies provide statewide access to in-state tuition for the state›s undocumented students, including DACA recipients.

Limited: Policies provide the state's undocumented students, including DACA recipients, with access to in-state or reduced tuition in at least some public institutions.

Limited to DACA: Policies provide the state's DACA recipients with access to in-state tuition in at least some public institutions.

No State Policy: No known policies on access to in-state tuition or state financial aid for the state›s DACA recipients and undocumented students.

Restrictive: Policies actively bar access to in-state tuition or state financial aid for the state›s undocumented students, including DACA recipients.

Prohibitive Enrollment: Policies actively bar enrollment in all or certain public institutions for the state's undocumented students, but may still allow DACA recipients to enroll.

43 Campaign for Coll. Opportunity, Higher Education Affordability for Undocumented Students in California 2 n.5 (2018), https://collegecampaign.org/wp-content/uploads/imported-files/CCO_Undoc.pdf.

for those filing California Dream Act financial aid applications (a data source not integrated with the University's internal enrollment records) to arrive at a figure of 4200 undocumented students at UC and then applied "additional criteria to approximate the subset of 1,700 students who [then] appear[ed] to have DACA work authorization."[44] Due to the absence of updated reporting elsewhere, these same figures get repeated in the press.[45] Similarly, the CSU Chancellor's office estimated in 2019 that there were 9500 undocumented students in the CSU and has not reported updated estimates in the five years since.[46]

Likewise, in Texas (estimated to have the second largest population of undocumented college students), comprehensive enrollment statistics on public university students who are eligible for the in-state tuition waiver (and who sign a related affidavit, a group that is mostly but not entirely undocumented) were last estimated in 2017.[47] Financial aid data for undocumented college students in Texas are not tracked by their higher education board.[48] In Florida (estimated to have the third largest population of undocumented college students), undocumented students are ineligible for state financial aid but are eligible for in-state tuition rates

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44 Declaration of UC financial aid director Shawn Brick in *Regents of the University of California v. U.S. Department of Homeland Security*, Case No. 17-CV-05211-WHA, in support of the University's motions for preliminary injunction and summary judgment, October 23, 2017 (declaration on file with the authors). Illustrative of reporting on these figures in the press and University community, see Gretchen Kell, *As Supreme Court ruling on DACA looms, Berkeley Is Students' Steadfast Ally*, UC Berkeley News (June 16, 2020), https://news.berkeley.edu/2020/06/16/supreme-court-ruling-on-daca-looms-berkeley-is-students-steadfast-ally.

45 Mikhail Zinshteyn, *UC Rejects Proposal to Allow Campuses to Hire Undocumented Students*, Cal Matters (Jan. 25 2024), https://calmatters.org/education/higher-education/2024/01/undocumented-students-2/.

46 CSU Chancellor's Office—Public Affairs, California State University to Roll Out Delivery of Immigration Legal Services for Students and Employees (Aug. 28 2019), https://www.jfssd.org/wp-content/uploads/2019/08/2019-08-28-California-State-University-to-Roll-Out-Delivery-of-Immigration-Legal-Services-for-Students-and-Employees.pdf.

47 Tex. Higher Educ. Coordinating Bd., Overview: Eligibility for In-State Tuition and State Financial Aid Programs 3 (Dec. 2018), https://reportcenter.highered.texas.gov/reports/data/overview-eligibility-for-in-state-tuition-and-state-financial-programs/. In June 2025 just as this article was being finalized for JCUL publication, the Attorney General for Texas ended undocumented students' eligibility for in-state tuition in a coordinated manner within hours of being sued by the Trump administration's Department of Justice. Sara Weissman, Texas Ends In-State Tuition for Undocumented Students INSIDE HIGHER ED, June 5, 2025, https://www.insidehighered.com/news/government/politics-elections/2025/06/05/texas-ends-state-tuition-undocumented-students?utm_source=Inside+Higher+Ed&utm_campaign=6092210ee6-DNU_2021_COPY_02&utm_medium=email&utm_term=0_1fcbc04421-6092210ee6-236931822&mc_cid=6092210ee6&mc_eid=77e6ccf0c6 (last visited June 5, 2025).

48 Tex. Higher Educ. Coordinating Bd., Meeting Agenda for January 2020, https://reportcenter.highered.texas.gov/meeting/board-agendas/board-agenda-january-2020/ (minutes at page 47: "The agency does not maintain documentation of the amount of state funding received by undocumented students. Affidavit students are not all undocumented students."); José Iván Rodríguez-Sánchez, Undocumented Immigrants in Texas: A Cost-Benefit Assessment 14 (2020), https://www.bakerinstitute.org/research/undocumented-immigrants-texas-cost-benefit-assessment ("However, the number of undocumented students attending higher education in Texas is unknown …").

under certain conditions.[49] The Florida Board of Governors overseeing its public universities report system and campus headcount data on "non-resident"[50] tuition waiver students, and the same goes for the State's Division of Florida Colleges[51] that oversees its community colleges, but the "non-resident" category is mostly but not entirely made up of undocumented students (this category also includes a slice of citizen students who temporarily lost their Florida residency). The scholarly research on undocumented students has not focused on Florida in part because of the more difficult financial aid environment and absence of better data.[52]

As further context for our findings about California universities, the best national estimates are in a series of reports by the American Immigration Council and the Presidents' Alliance on Higher Education and Immigration. The latest report in this series estimated that there are approximately 408,000 undocumented college students in the United States in 2021, with the most (one-fifth of the national total) in California (83,000), followed by Texas (59,000), Florida (40,000), New York (30,000), Illinois (20,000), and New Jersey (19,000).[53] However, even the best population-based estimation methodologies have limits. For example, the data in the Presidents' Alliance estimates are not granular enough to specify the proportion of students likely enrolled in community colleges versus four-year public institutions; and for the 23% of undocumented students estimated to be at private institutions, it is not known what proportion attend for-profit career/trade colleges versus nonprofit (including religiously affiliated) institutions many of which provide a high quality undergraduate education and have solid alumni networks.[54]

California is in the "comprehensive access" group in Table 1, and even within that category is toward the high end of access based on the extent of financial aid available to both citizen and undocumented students. Our data for this article

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49 Florida Stat. § 1009.26(12)(a) (2014). This law was passed in 2014 (https://www.flsenate.gov/Session/Bill/2014/0851), and is under recurring threat. *See* Higher Ed Immigration Portal, Florida Update (Apr. 2023), https://www.higheredimmigrationportal.org/effective_practice/floridas-in-state-tuition-waiver-for-dreamers/. In fact, this law was rescinded in 2025. Nancy Guan, *Florida Ends Program that Allowed Some Immigrant Students to Pay In-state Tuition*, NPR, May 26, 2025, https://www.npr.org/2025/05/26/nx-s1-5406213/florida-ends-program-that-allowed-some-immigrant-students-to-pay-in-state-tuition.

50 https://www.flbog.edu/resources/data-analytics/dashboards/fee-waiver-summary/ (last visited March 1, 2025). Note that Florida has mandatory fee waivers for a wide range of populations (veterans, foster youth, dual-enrolled in high school, children of state employees, etc.) and in 2022–23 "non-resident" waivers represented only 5.3% of the total for all these programs at Florida public universities.

51 Fla. Dep't Educ.—Div. Fla. Colls., FCS Resident and Nonresident Enrollment Report 2022–2023, https://www.fldoe.org/schools/higher-ed/fl-college-system/about-us/policy-data.stml.

52 Given Florida's 2014 law and how it coincided with DACA's peak years, the absence of empirically orientated research articles on Florida undocumented students is a little surprising. This likely relates to the concern about data privacy ethics for this vulnerable population under political attack and scapegoating, mentioned at the outset of this section.

53 Am. Immigration Council & Presidents' All. Higher Educ. & Immigr, Undocumented Students in Higher Education: How Many Students Are in U.S. Colleges and Universities, and Who Are They? Fig.1,3(updatedAug.2023),https://www.americanimmigrationcouncil.org/sites/default/files/research/undocumented_students_in_higher_education_2023.pdf.

54 *Id*. at 7 ("Private schools include both non-profit and for-profit institutions.").

come from CSAC, which administers the Cal Grant and Dream Act financial aid awards in California in partnership with university and college campuses. Table 2 provides an overview of average financial aid awards for a low-income student who is a California resident. Cal Grants are one of three "legs of the stool" of need-based financial aid, along with federal Pell Grants and UC Grants (University funds earmarked for return to aid) such that a low-income student's tuition and fees can be covered by a Cal Grant ($13,000), and the total cost of attendance of $38,000 can be covered by the combination of a Cal Grant, Pell Grant, and UC Grant plus a modest part-time employment or loans to cover the remaining $8,000. The basic structure of CSU financial aid is similar, but with Cal Grants and CSU institutional aid amounts being lower to sync with CSU's lower tuition and costs of attendance.[55]

TABLE 2: Typical UC Financial Aid Packages in 2022–23 Covering Average Total Cost of Attendance (In-State Student with On-Campus Housing) of $38,000[56]

		If undocumented & A.B. 540 eligible?
CA resident citizen student w/ family income of $30,000	Work $8,000 (to stay debt free) or loan	Depends on DACA, Dream Loans*
	UC Grant $10,000	✓ UC Grant Aid
	Pell Grant $7,000	– Not eligible
	Cal Grant $13,000 (tuition/fees)	✓ Dream Act = Cal Grant

In the right column of Table 2 (and likewise in the CSU), undocumented students are not eligible for federal Pell Grants, which underscores the importance of access to Dream Act awards (the equivalent to other Cal Grant awards) and UC Grants by virtue of a series of California laws (A.B. 130, 131 et seq.). If an undocumented student has DACA, it opens up authorized work opportunities on campus and off-campus that are not available to undocumented students without DACA (and both groups are restricted from federally subsidized work–study jobs on campus).[57] There are also some funds for Dream Loans under California law (which contrasts with undocumented students' ineligibility for federal Stafford Loans), but the take-up rate on Dream Loans is modest given the loan aversion choices by undocumented students and their families in the current liminal environment.[58] Undocumented students are more likely to adopt other cost-saving strategies out of financial necessity that place additional stressors on their

55 Cal. State Univ. Chancellor's Off., 2021–2022 Financial Aid Program Report (Apr. 2023), https://www.calstate.edu/impact-of-the-csu/government/Advocacy-and-State-Relations/legislativereports1/Institutional-Financial-Aid-Programs-Report-2023.pdf.

56 UC Off. President, Institutional Financial Aid Report to the Legislature 13 fig. 3 (Jan. 2024), https://www.ucop.edu/operating-budget/_files/legreports/2023-24/uc_institutional_financial_aid_prgms_legrpt.pdf.

57 Kidder, *supra* note 39, 585–86.

58 CSAC Undocumented Student Affordability Work Group, Renewing the Dream 7, 11, 17 (March 2023), https://www.csac.ca.gov/sites/default/files/file-attachments/renewing_the_dream_full_report.pdf (last visited March 1, 2025)

educational learning (e.g., food insecurity, living at home with a lengthy commute to campus).[59]

The 2022 study by Gurantz and Obadan using CSAC Dream Act data is the closest in the scholarly literature to the data we use for this article (their data are more fine-grained but focus on older 2013–14 and 2014–15 cohorts of students).[60] We also obtained campus-level data that heretofore have not been publicly reported from the CSAC on California Dream Act[61] awards. Dream Act awards do not robustly capture all undocumented students, but they are a good measure of low-income undocumented students who typically have lived in California for much/most of their lives and attended California high schools (the numerically predominant group of undocumented students of greatest interest to most policy makers) inclusive of transfers from the California community colleges. Again, our data cannot be linked back to individual identifiable enrolled students on campuses based on immigration status.

Of additional comparative relevance for the data in this article is another pocket of high-quality data that exist on undocumented students in the two-year and four-year colleges in the City University of New York (CUNY) system.[62] However, the CUNY data may not be generalizable in terms of student demographics, state law characteristics, college profiles, and local labor markets.[63] Moreover, research on these CUNY undocumented students has tended to focus on years leading up to the initial introduction of DACA over a decade ago.[64] The same is true in California focusing on the early days of DACA and California's Dream Act financial aid.[65]

We report Dream Act recipient data on all nine UC campuses with undergraduates and at fifteen of the CSU campuses where 89.6% of the CSU system's Dream Act students enrolled in 2022–23 (the other eight CSU campuses represent only 10.4% combined). As detailed in the Appendix, we erred on the side of not separately

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59 UCLA Inst. Rsch. on Lab. and Emp. et al., How Can Universities Foster Educational Equity for Undocumented College Students: Lessons from the University of California 6 (2019), https://irle.ucla.edu/wp-content/uploads/2019/01/Enriquez-Educational-Equity-Final.pdf (last visited March 1, 2025).

60 Oded Gurantz & Ann Obadan, *Documenting Their Decisions: How Undocumented Students Enroll and Persist in College*, 51 Educ. Researcher 524 (2022).

61 For some time, Dream Act awards have been tracked and reported for the UC and CSU systems (https://www.csac.ca.gov/post/cal-grant-paid-awards (last visited March 1, 2025)) but not for individual campuses.

62 CUNY includes ten colleges granting A.A. degrees and fourteen granting B.A./B.S. degrees, https://www.cuny.edu/about/colleges/ (last visited March 1, 2025).

63 Amy Hsin & Francesc Ortega, *The Effects of Deferred Action for Childhood Arrivals on the Educational Outcomes of Undocumented Students,* 55 Demography 1487, 1504 (2018).

64 A. Nicole Kreisberg & Amy Hsin, *The Higher Educational Trajectories of Undocumented Youth in New York City*, 47 J. Ethnic & Migration Stud. 3822, 3828 (2021) ("We focus on five cohorts of Latino immigrant students who first enrolled in CUNY from 2002 to 2012.").

65 Federick Ngo & Samantha Astudillo. *California DREAM: The Impact of Financial Aid For Undocumented Community College Students*, 48 Educ. Researcher 5 (2019) (using a difference-in-difference framework for students "likely to be undocumented" at one large urban community college district in California, focusing on cohorts entering in 2005–14).

reporting Dream Act data for these campuses with smaller numbers of undocumented students. We also report UC and CSU systemwide totals.

We adopt a social science "difference-in-difference" analytic strategy[66] that compares enrollment changes for undocumented Dream Act students with the corresponding pattern for a closely matched group of non-undocumented students. For this we use CSAC data on the low-income Cal Grant awardees at UC and CSU, respectively (see Appendix). These control groups of students going to UC and CSU are also coming from California high schools and have similar grade point averages (GPAs) and age distributions etc. The control group comparisons help address alternative hypotheses and confounders impacting low-income students more generally (e.g., impact of a budget downturn or COVID-related shift in available financial aid). At the same time, we caution that we do not have the granular data to perform a robust causal model that eliminates confounders in a more systematic way.

Most notably, the Cal Grant comparison groups are not a strategy for assessing the possible confounder of change over time in the population of undocumented high school graduates in California that is the rootstock for those undocumented students going on to enroll at UC and CSU (though ways of assessing that possibility are discussed further below in the Appendix). We also cannot empirically deny the possibility of unique indirect effects of COVID impacting undocumented students' likelihood of enrolling at California universities in the past couple years (e.g., disproportionate impact of job losses among undocumented student's family members in 2020 and 2021; greater high school learning losses in 2020 and 2021 for those without reliable internet access or computers at home).

A. University of California Campuses

Our main focus further below is on the overall undocumented student population at UC (and CSU), but we begin by looking at the smaller numbers of new Dream Act awardees each year at UC because it provides interpretative context for the data discussion that follows.[67] *Figure 2 documents an alarming linear downward trend in UC's newly enrolled low-income undocumented students. In 2016–17 there were 1181 new Dream Act awardees at UC, compared to 579 in 2022–23, a decline of 51.0%*. By comparison, new Cal Grant awardees to (non-undocumented) low-income students at UC were relatively stable over this period, declining only 3.3% between 2016 and 2017 and 2022 and 2023.[68] The 51% drop in UC's new Dream Act

66 *See, e.g.*, Grant H. Blume & Mark C. Long, *Changes in Levels of Affirmative Action in College Admissions in Response to Statewide Bans and Judicial Rulings*, 36 Educ. Eval. & Pol'y Analysis 228, 238 (2014) ("Difference-in-difference estimates 'difference out' what Murnane and Willett (2010) call a 'secular trend' [citing Richard J. Murnane & John B. Willett, Methods Matter: Improving Causal Inference in Educational and Social Science Research 154 (2010)] Secular trends are those which occur outside the scope of the policy of interest but may affect the dependent variable."); Liliana M. Garces & David Mickey-Pabello, *Racial diversity in the medical profession: The Impact of Affirmative Action Bans on Underrepresented Student of Color Matriculation in Medical Schools*, 86 J. Higher Educ. 264, 272–73 (2015).

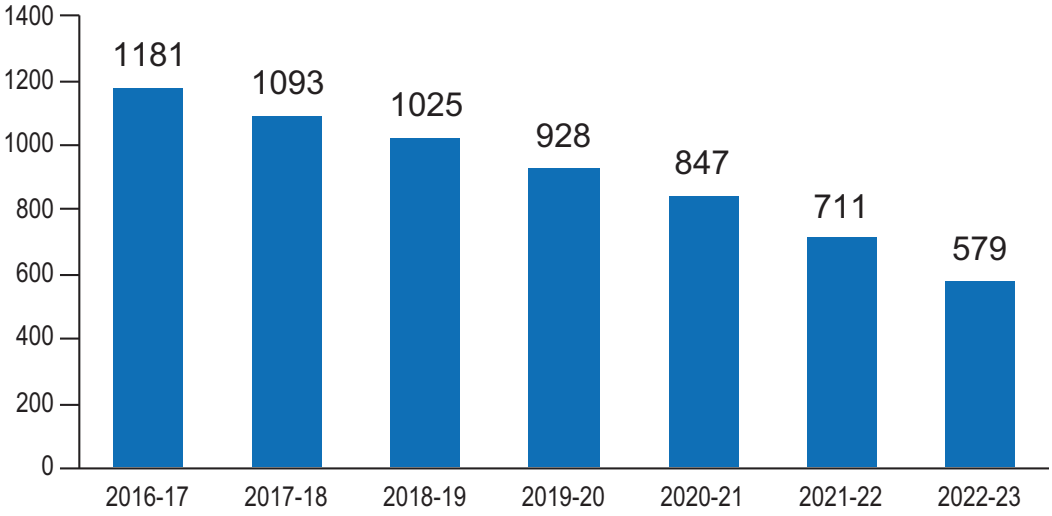
67 For these new awardees in Figure 2 for UC and Figure 5 for CSU, we have that data at the university system level but not the campus level.

68 For the data discussed here and reflected in Figure 4, we do not have new UC Cal Dream Act award data for the 2015–16 year (https://www.csac.ca.gov/post/cal-grant-paid-awards) (last visited March 1, 2025).Nonetheless, we are highly confident that 2016–17 is the appropriate "high water mark" for discussion in the paragraph above because the CSAC data we do have

awards compared to UC's other new Cal Grant awards is statistically significant.[69] The latest data for the UC system confirms that this downward trend in new Dream Act awards at UC continues somewhat in 2023–24.[70]

Recall from Part I that 2016–17 represented the last year that meaningfully large numbers of new DACA applications were approved by DHS, with the Trump administration halting new DACA approvals in fall 2017. Also keep in mind in that Figure 2 includes both incoming freshmen and transfers with Dream Act awards, though freshmen outnumbered transfers four-to-one.

FIGURE 2: New California Dream Act Recipients at UC



The data above in Figure 2 sets the stage for understanding two overall trends for Dream Act awardees at UC (Figures 3–4 and Table 1). The first trend might seem paradoxical or counterintuitive, especially if presented absent the context about a linear decline in new undocumented students at UC. This first trend was also underappreciated at the time for reasons likely connected to the absence of data reporting mentioned earlier. We find that low-income undocumented student enrollments at UC actually climbed by nearly one thousand between 2015 and 2016 (late Obama era) and the peak period of 2018 to 2019, even in the face of the "existential threat" posed by the Trump administration's anti-immigrant policies and efforts to rescind DACA.[71] UC's Cal Dream Act awardees increased 35.4%

indicate that those *offered* new UC Dream Act awards (a group about one-tenth larger than those who ultimately accept the awards) was 15% larger in 2016–17 than in 2015–16.

69 Comparing UC Dream Act awardees to the other UC Cal Grant awardees yields a two-tailed *p-value* significant at < 0.01 when comparing 2016–17 with 2022–23.

70 Late in the journal editing process, system data for UC and CSU became available for 2023–24 from CSAC, but we did not amend the charts and tables in this article in order to report the data in an internally consistent manner, as we do not have the corresponding new campus-level data for 2023–24. In 2023–24 new UC Dream Act numbers leveled off at 580, but other UC Cal Grants reached a record high (23,968, up 7.5% from the prior year) so this was a decline in relative terms.

71 *See* Nicole Freeling, *Undocumented Programs Offer Students a Lifeline in an Uncertain Era,* U. CAL.:

between 2015 and 2016 and 2018 and 2019, far outpacing the 4.8% increase in other Cal Grant (FAFSA) awardees at UC during the same period.

The explanation underlying this paradox is that UC undocumented Dream Act freshmen (a much larger group than transfers) who entered UC in the peak years for DACA purposes of 2014–16 in the late Obama years then progressed through the University as juniors and seniors during the Trump administration years. In 2017, UC estimated that 40% or more of its enrolled undocumented students had work authorization from DACA.[72] Many of those students had or could get DACA renewals and were not in that way impacted by the Trump administration's efforts to rescind DACA beginning in mid-2017. Thus, even though new Dream Act students at UC were very much in decline by 2017–18, for a time those enrollment losses were being offset by the large cohorts of continuing Dream Act students making progress toward graduation amidst the tumult in our national politics over immigration in 2017–19.

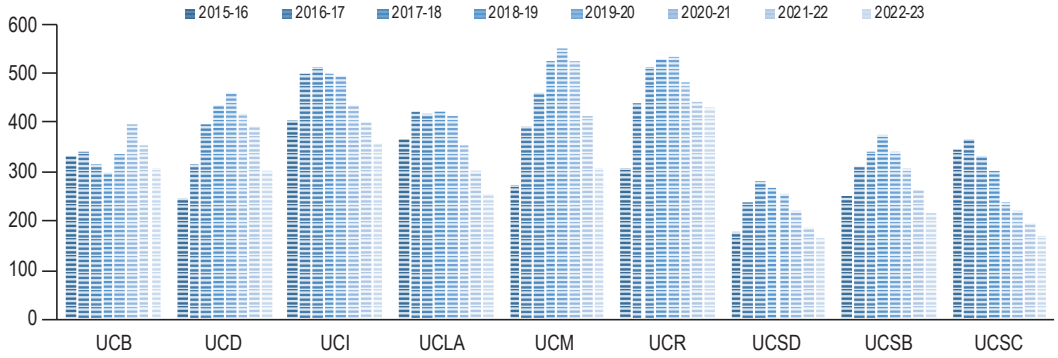
Underpinning the trend of overall Dream Act increases up to 2018–19 (driven by an upward trend of *new* Dream Act student enrollment several years earlier) was a constellation of powerful community support and activism within California universities for and with undocumented students during the Trump era (discussed more below in Part III). Thus, the holistic explanation has to do with the increased awareness and routinization of the Dream Act application process, growth, and maturity in tandem with UC undocumented student support centers and the UC Immigrant Legal Services Center[73] (centrally run from the UC Davis School of Law but with immigration attorneys available on site at other UC campuses; UC Berkeley separately provided similar services).

NEWS (Sept. 20, 2017), https://perma.cc/DK8L-ZK6Y; see also Amanda Frost, *Alienating Citizens*, 114 Nw. U. L. Rev. 241, 244 (2019) ("[T]he Trump Administration's approach to immigration generally. … has embraced a policy known as 'attrition through enforcement,' under which immigration policies are designed to encourage immigrants to self-deport and discourage would-be immigrants from coming to the United States.").

72 Shawn Brick declaration in *Regents of the University of California v. U.S. Department of Homeland Security*, Case No. 17-CV-05211-WHA .

73 *See also* UC Immigrant Legal Servs. Ctr., Annual Progress Report 2 (Sept. 2017), https://ucimm.sf.ucdavis.edu/sites/g/files/dgvnsk12741/files/media/documents/2017_UCImm_Annual_Report.pdf ("The UC Immigrant Legal Services Center (UC Center, or UCIMM) was founded in January 2015 by UC President, Janet Napolitano, and exists to provide quality immigration legal services to undocumented UC students and undocumented family members of UC students, as well as students and family members who are United States citizens and lawful permanent residents. Based at UC Davis School of Law, the UC Center currently provides free immigration legal services at all UC campuses, other than UC Berkeley: UC Davis, UC Irvine, UCLA, UC Merced, UC Riverside, UC San Diego, UC Santa Cruz, UC San Francisco, and UC Santa Barbara. The Center began with an Executive Director, two law fellows, and a paralegal. By Fall 2015, the UC Center doubled its staff. This staffing allowed us to quickly offer immigration legal services to all the target campuses for the full 2015–2016 academic year. In the 2016–2017 Academic Year with additional support from the UC Office of the President, the UC Center continued to grow and it now has eight (8) full time attorneys."). *See also Moving Forward After DACA: Student Stories and Town Hall*, 15 Hastings Race & Poverty L.J. 120, 127 (2018) (summary shared at town hall by UCIMM's then executive director María Blanco). Note that UC Berkeley provided undocumented students with immigration legal services separately through its Law School's East Bay Community Law Center, as discussed further below.

FIGURE 3: California Dream Act Recipients at UC Campuses



The second trend at UC evident in Figures 3–4 and Table 1, which is our primary focus for policy makers given the current state of affairs, is the troublesome decline in UC Dream Act awardees since 2018–19 (we use 2018–19 and 2019–20 as benchmarks because those years represented the high water mark for Dream Act enrollments in both the UC and CSU). *The data in Table 3 shows that compared to 2018–19, UC Dream Act awardees at UC dropped by 31.4% by 2022–23 (and by 30.9% comparing 2019–20 with 2022–23). There are declines of 40% or more at UCLA, UC Merced, UC Santa Barbara, and UC Santa Cruz (Figure 4).* Essentially, this is turning back the clock a full decade in terms of opportunities for low-income undocumented students at UC, notwithstanding all of the earlier efforts in state law and university programs to support undocumented students.

The data at the far right side of Figure 4 shows other Cal Grant awardees at UC (FAFSA filers) as a "control group" to help lessen confounding patterns and shore up our focus on the recent worsening of DACA inaccessibility as causing (or being a lead cause of) the decline. As detailed in the Appendix, students at UC who receive Dream Act awards have virtually identical high school grade profiles as those other low-income students receiving Cal Grant awards, making the latter a reasonably matched "natural experiment" control group. At UC there was a 1.3% increase in other Cal Grant awardees between 2018 and 2019 and 2022 and 2023 (74,714 versus 75,665) and a 1.0% drop between 2019 and 20 and 2022 and 23 (76,428 versus 75,665). Thus, the pattern of decline at UC since 2018–19 is unique among undocumented low-income students. These drops in UC Dream Act awards compared to UC other Cal Grant awards are also statistically significant.[74] Looking at all undergraduate enrollment, at UC between fall 2019 and fall 2023 overall undergraduate enrollment increased by 3%.[75]

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74 Comparing UC Dream Act awardees to the other UC Cal Grant awardees yields a two-tailed *p-value* significant at < 0.01 when comparing 2018–19 with 2022–23 and when comparing 2019–20 with 2022–23. Because Dream Act award eligibility is capped at four years for both freshmen and for transfers inclusive of their prior community college years, comparing cohorts four years apart (2018–19 with 2022–23) involve virtually zero overla, and thus does not violate assumptions of independent samples for purposes of statistical testing. Comparing 2019–20 with 2022–23 starts to strain that assumption because of freshmen who progressed to seniors.

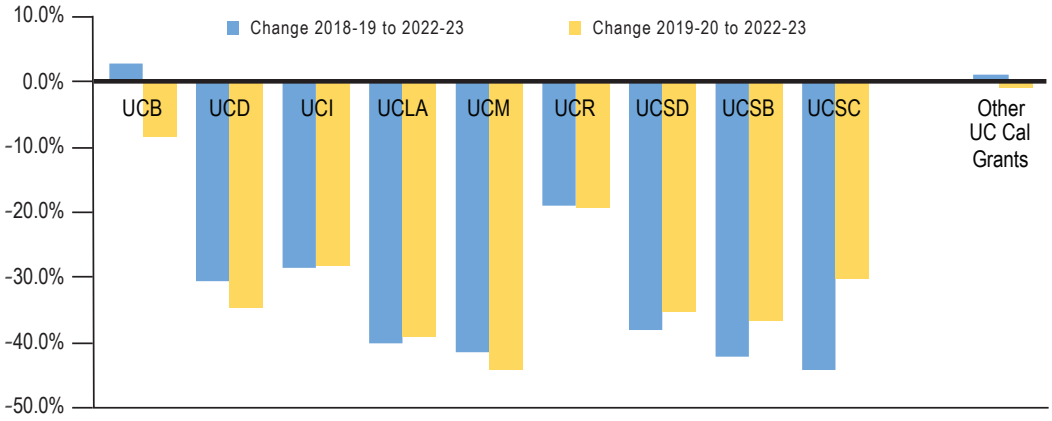
75 Campaign for Coll. Opportunity, Illuminating Innovations: Advancing Enrollment at California State University 4–8 (Feb. 2024), https://web.archive.org/web/20240222105651/https://collegecampaign.org/wp-content/uploads/2024/02/2023_CSU_EnrollmentReport_single-pages_r9_i18.pdf.

TABLE 3: California Dream Act Recipients at UC Campuses

	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23
UC Berkeley	331	339	313	297	334	394	354	306
UC Davis	244	315	394	434	460	419	391	301
UC Irvine	406	497	510	498	494	433	399	355
UC Los Angeles	364	422	418	422	414	354	302	252
UC Merced	272	391	459	526	551	523	411	307
UC Riverside	306	439	513	529	531	483	441	428
UC San Diego	175	237	281	265	254	218	185	164
UC Santa Barbara	251	312	339	373	342	304	262	216
UC Santa Cruz	343	364	331	300	239	221	194	167
UC Totals	**2692**	**3316**	**3558**	**3644**	**3619**	**3349**	**2939**	**2499**

The latest UC data for 2023–24 (not shown because we only have the system and not campus-level data) shows that overall UC Dream Act awards continued to decline but at a slower pace (to 2308) at the same time that other Cal Grant awards to UC students climbed to record high in 2023–24.[76]

FIGURE 4: Declines in UC Dream Act Awards



B. California State University Campuses

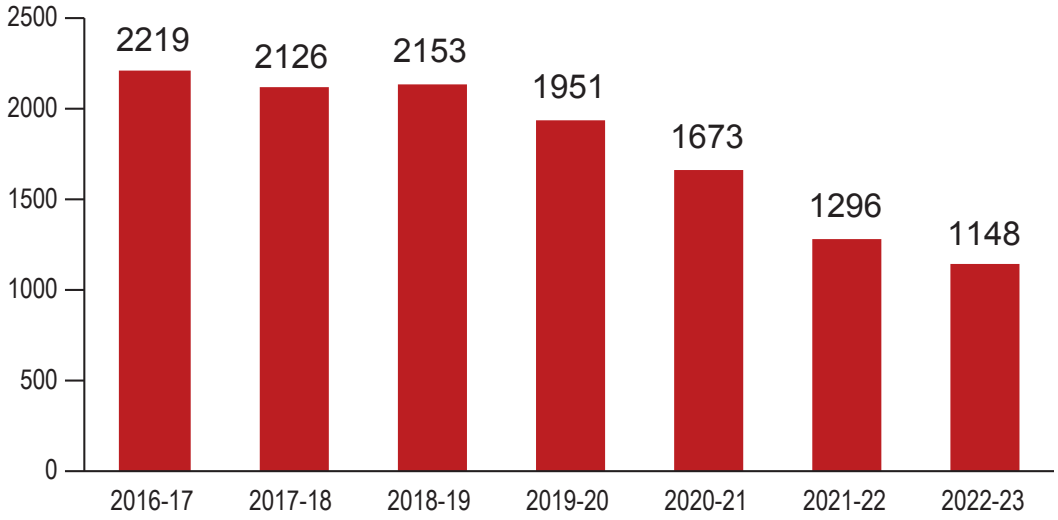
The same large-scale patterns for low-income undocumented students evident within the UC system are also found within the CSU system. *Figure 5 documents an alarming downward trend in CSU's newly enrolled low-income undocumented students. In 2016–17 there were 2219 new Dream Act awardees at CSU, compared to 1148 in 2022–23, a decline of 48.3%*. By comparison, new Cal Grant awardees to CSU low-income students were flat (+0.6%) between 2016 and 2017 and 2022 and 2023. The drop in CSU's new Dream Act awards compared to CSU's other new Cal Grant awards are again statistically significant.[77] Additional data (not displayed in Figure 5) confirms

76 In 2023–24 overall UC Dream Act numbers declined to 2308, but other UC Cal Grants reached a record high (78,153, up 3.3% from the prior year).

77 Comparing CSU Dream Act awardees to the other CSU Cal Grant awardees yields a two-tailed

that this downward trend continued in 2023–24 with new CSU Dream Act awards dropping to 1008.[78] As noted earlier, 2016–17 corresponds with the last year that meaningfully large numbers of new DACA applications were approved by DHS.

FIGURE 5: New Cal Dream Act Recipients at CSU



As with UC, the CSU data in Figure 5 set the stage for understanding two overall trends for Dream Act awardees at CSU (Figure 6 and Table 4). The first trend is that low-income undocumented student enrollments at CSU climbed by about thousand (a gain of 41.2%) between 2015 and 2016 (late Obama era) and the peak period of 2018–19. Again, this reflects how relatively large cohorts of low-income undocumented freshmen entered CSU during the peak DACA years of 2014–16, then later as continuing junior and seniors those students were (for a few years) offsetting the declines in new undocumented enrollment evident in Figure 5. These overall gains at CSU outpaced the 6.0% increase in other Cal Grant (FAFSA) awardees at CSU during the same period.

The second trend at CSU is that after the peak in 2019–20, the CSU system experienced a decline of 30% (almost two thousand undocumented students) by 2022–23. This pattern is fairly consistent among all fifteen CSU campuses shown in Table 4 (all fifteen CSU campuses had fewer Dream Act students in 2022–23 than in 2019–20, though there is some variation in the degree of decline and CSU Dominquez Hills is somewhat of an outlier in that it was the only campus to have peak Dream Act enrollments in 2020–21 before declining thereafter). Looking again at the same "control group" analysis as before, at CSU there was a 0.0% change in other Cal Grant awardees between 2018 and 2019 and 2022 and 2023 (133,128 versus 133,257) and a 5.0% drop between 2019 and 2020 and 2022 and 2023 (140,325 versus 133,257). Given such large samples, these drops in CSU's Dream Act awards

p-value significant at < 0.01 when comparing 2016–17 with 2022–23.

78 New Dream Act awards at CSU dropped in 2023–24 even though CSU new Cal Grant awards increased 1.7% in 2023–24 (to 43,451).

compared to CSU's other Cal Grant awards are statistically significant.[79] Placing things in perspective, the 30% drop in low income-undocumented students at CSU since 2019-20 is six times larger than the drop for other Cal Grant awardees at CSU, a pattern that is consistent with our hypothesis that the shrinkage in DACA participation among today's incoming college students likely explains more of the overall pattern in enrollment declines for undocumented students. The recent 5.0% decline in Cal Grant awardees at CSU mirrors a 6.5% drop in total undergraduate enrollment at CSU between fall 2019 and fall 2023 (several Bay Area campuses encountered the greatest declines).[80]

FIGURE 6: California Dream Act Recipients at CSU Campuses

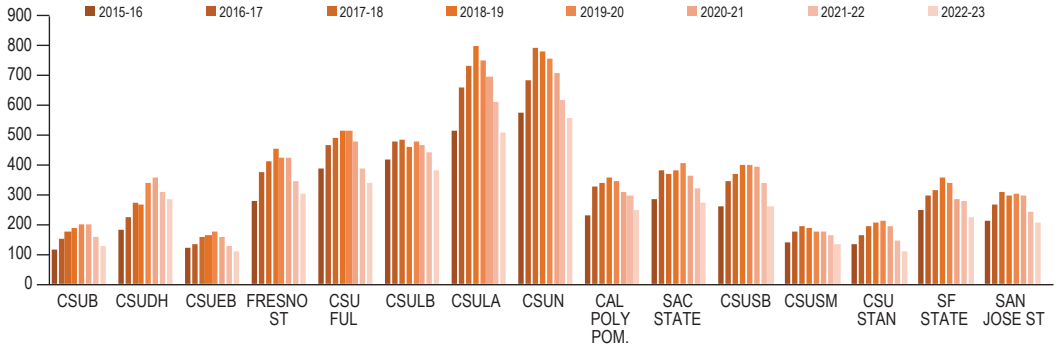


TABLE 4: California Dream Act Recipients at CSU Campuses

	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23
CSU Bakersfield	*113	153	174	185	198	196	*158	*125
CSU Dom. Hills	179	220	272	*266	336	356	305	285
CSU East Bay	119	132	157	161	175	158	126	110
Fresno State	274	372	411	451	423	422	344	303
CSU Fullerton	387	461	489	514	510	477	387	336
CSU Long Beach	414	474	480	459	478	461	442	380
CSU Los Angeles	512	656	729	794	749	694	611	506
CSU Northridge	574	679	791	780	755	703	613	556
Cal Poly Pomona	229	324	336	356	345	308	295	249
Sacramento State	281	378	370	379	401	363	317	273
CSU San Bernardino	259	341	365	395	398	393	335	260
CSU San Marcos	140	174	*190	184	176	176	163	133
CSU Stanislaus	130	164	192	202	210	193	144	106
San Francisco State	249	292	313	358	339	285	278	223
San Jose State	209	267	308	295	303	295	242	207
CSU Totals (23)	**4573**	**5716**	**6217**	**6457**	**6501**	**6159**	**5309**	**4524**

79 Comparing CSU Dream Act awardees to the other CSU Cal Grant awardees yields a two-tailed *p-value* significant at < 0.01 when comparing 2018–19 with 2022–23 and when comparing 2019–20 with 2022–23.

80 Campaign for Coll. Opportunity, *supra* note 75.

The latest CSU data for 2023–24 (not shown in Table 4 and Figure 6 because we only have the system and not campus-level data) indicate that overall CSU Dream Act awards continued to decline (to 3839, down 40.5% from the peak in 2018–19) at the same time that other Cal Grant awards to CSU students barely declined in 2023–24.[81]

Our findings of a 48% drop in new CSU Dream Act awardees since 2016–17 and an overall 30% drop in CSU Dream Act awardees since 2019–20 comes amidst new threats to support programs for CSU undocumented students due to shortfalls in California's budget. In 2018–19, hard-fought political efforts that were years in the making resulted in securing State funding for CSU's Immigration Legal Services Project that provides free immigration legal services to students at CSU campuses and their family members.[82] But this year the Governor's budget proposal would slash funding for this vital program by 75% (from $7.0M to $1.8M annually) of the State's budget funding.[83] At a campus like Fresno State, which has already seen a drop of 28% in Cal Dream Act awardees since 2019–20 according to our Table 4 data, such budget cuts threaten to dramatically reduce the quality and timeliness of legal services run through Fresno State's Dream Success Center, thereby exacerbating access barriers for undocumented students at a time of heightened vulnerability. In a final agreement between the Governor and the Legislature this funding for CSU was restored,[84] but this issue is likely to reoccur in the near future if the State budget does not improve.

C. An Encouraging Sign in Discouraging Data?

The data we reviewed earlier (Figure 4 and Table 3) show that the decline in Dream Act awards at UC Berkeley was significantly (statistically and practically) smaller than at any other UC or CSU campus in our sample.[85] Our data set does not allow us to establish the cause(s) of this difference, but we note that there is a substantial body of qualitative analysis indicating that UC Berkeley is widely recognized for being an early innovator in developing a robust set of institutional commitments and practices to support the success of its undocumented students. In partnership with private philanthropy (discussed in Part III.C), the qualitative

81 In 2023–24 total other CSU Cal Grants were 132,413, down 0.6% from the prior year.

82 Immigrant Legal Defense, Summary of the California State University Immigration Legal Services Project (2024), https://www.ild.org/csu-immigration-legal-services-project; Cal. State Univ., Legal Support Services, https://www.calstate.edu/attend/student-services/resources-for-undocumented-students/pages/legal-support-services.aspx (last visited March 1, 2025.

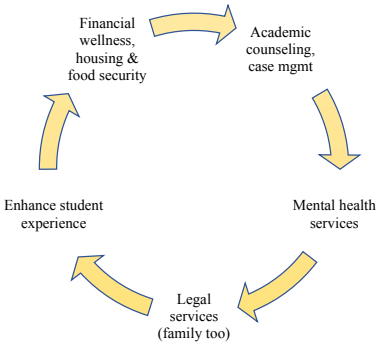
83 Rebecca Plevin, *This Cal State Immigration Clinic Provides Free Legal Advice. It Might Come to a 'Full Stop'*, L.A. Times (Mar. 15, 2024), https://www.latimes.com/california/story/2024-03-15/immigration-clinic-cal-state; Cal. Leg. Analyst's Office, The 2024-25 Budget—Department of Social Services Immigration and Equity Programs, https://lao.ca.gov/Publications/Report/4885 (last visited March 1, 2025).

84 Rebecca Plevin, *Newsom's Budget Plan Saves Vital Programs for Immigrants, but Kids and Hungry Seniors May Suffer*, L.A. Times, June 26, 2024.

85 Comparing UCB to the other eight UC campuses combined yields a two-tailed *p-value* significant at < 0.01 when comparing 2018–19 with 2022–23 and when comparing 2019–20 with 2022–23. UC Berkeley did have one year of higher numbers in 2020–21 that was phase-delayed compared to all other UC (and CSU) campuses.

data suggests UC Berkeley is among the national leaders in developing scholarship support for undocumented students in tandem with an Undocumented Student Program (USP) that coordinates comprehensive services and support.[86] Through the UC Berkeley School of Law, via its human rights clinic and later via its community-based clinic, the East Bay Community Law Center, UC Berkeley was one of the first to secure full-time on-campus immigration attorney services for undocumented students.[87] In Figure 7 we highlight some key elements of UC Berkeley's holistic model to support undocumented students through the USP.[88]

FIGURE 7: UC Berkeley's Holistic Model to Support Undocumented Students[89]



While policy makers (and university leaders) should not be naïve about the ease with which all elements of the robust UC Berkeley USP model scale-up at other campuses with more systemic resource constraints (and without a law school) and different campus cultures,[90] the value of holistic and intentional support services rooted in authentic and durable community partnerships is worth emphasizing.

III. PROMISING PATHWAYS AND POLICY REFORMS TO BRIDGE TO THE FUTURE

Part III turns to policy recommendations in a post-DACA environment. We analyze the "Opportunity for All" Immigration Reform and Control Act of 1986 (IRCA) employment issue that is currently under evaluation by university leaders and California lawmakers. We then outline in a more abbreviated way a few other innovative pathways worthy of consideration now and after a final ruling on DACA by the Fifth Circuit and/or the Supreme Court.

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86 *See* Ruben Elias Canedo Sanchez & Meng L. So, *UC Berkeley's Undocumented Student Program: Holistic Strategies for Undocumented Student Equitable Success Across Higher Education*, 85 HARV. EDUC. REV. 464 (2015); CHANCELLOR'S TASK FORCE ON UNDOCUMENTED MEMBERS OF THE ON-CAMPUS COMMUNITY, RECOMMENDATIONS TO CHANCELLOR BIRGENEAU (May 2011), https://diversity.berkeley.edu/sites/default/files/undocumented-students-task-force-2011-recommendations.pdf; ALBERTO LEDESMA, A PERSONAL HISTORY OF UNDOCUMENTED STUDENT SUPPORT AT U.C. BERKELEY (2013), https://comunidadatcal.wordpress.com/2013/09/18/a-personal-history-of-undocumented-student-support-at-u-c-berkeley/.

87 Prerna Lal & Mindy Phillips, *Discover Our Model: The Critical Need for School-Based Immigration Legal Services*, 106 CAL. L. REV. 577 (2018).

88 *See, e.g.*, Jeremy Peña, *Undocumented Students: History and Implications for Higher Education Administrators*, 20 J. HISPANIC HIGHER EDUC. 33 (2021); H. Kenny Nienhusser et al., *UndocuCare: Strategies for Mental Health Services that Affirm Undocumented College Students' Psychological Needs*, 203 NEW DIRECTIONS FOR HIGHER EDUC. 93 (2023); Kyle G. Southern, *Institutionalizing Support Services for Undocumented Students at Four-Year Colleges and Universities*, 53 J. STUDENT AFFS. RSCH. & PRAC. 305 (2016).

89 UC OFF. PRESIDENT, INSTITUTIONAL FINANCIAL AID REPORT TO THE LEGISLATURE 13 fig. 3 (Jan. 2024), https://www.ucop.edu/operating-budget/_files/legreports/2023-24/uc_institutional_financial_aid_prgms_legrpt.pdf.

90 *Cf.* Sanchez & So, *supra* note 86, at 468–69.

A. Opportunity for All: Does IRCA Apply to State Universities like UC?

In partnership with the "Opportunity for All" campaign by UC undocumented student organizers,[91] in fall 2022 faculty and immigrant rights attorneys with the UCLA School of Law's Center for Immigration Law and Policy issued a legal memorandum signed by dozens of leading U.S. immigration and constitutional law scholars arguing that IRCA—which makes it "unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States" unauthorized individuals[92]—does not apply to state entities like UC.[93] The 2022 legal memorandum is buttressed by a new article by Arulanantham and Hairapetian analyzing these legal arguments in greater detail.[94]

For purposes of the question of federal legislation (IRCA or otherwise) and sovereign immunity, UC is unquestionably an arm of the State.[95] The text of IRCA does not define "entity" and perhaps even more telling, the 1996 Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) that amended IRCA added specific language that an "entity" "includes an entity in any branch of the Federal Government"[96] but IIRIRA was again silent on applicability to the states. The immigration and constitutional law scholars providing the legal analysis that was the foundation for the "Opportunity for All" campaign argue that the question of a state university system's sovereign immunity from IRCA is an unexplored legal question that has been "hidden in plain sight" for many years.[97]

Most recently, the "Opportunity for All" campaign led to proposed legislation introduced by California Assemblymember Alvarez, Assembly Bill 2586,[98] that would codify the same principles in state law about not excluding undocumented students from being hired at California's public universities and community colleges. In September 2024, California Governor Gavin Newsom vetoed the Opportunity for

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91 https://undocstudentnetwork.org/home/opportunity-for-all/ (last visited March 1, 2025).

92 8 U.S.C. § 1324a(a)(1).

93 Ahilan Arulanantham et al., Memo Analyzing Whether IRCA Applies to States (Oct. 2022), https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Opportunity_for_All_Campaign_Law_Scholar_Sign-On_Letter.pdf.

94 Ahilan T. Arulanantham & Astghik Hairapetian, *State Employment Authorization*, 38 Geo. Immig. L.J. 279 (2024).

95 Regents of the Univ. Cal. v. Doe. 519 U.S. 425, 431 (1997) ("The Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party."); BV Eng'g v. Univ. Cal., 858 F.2d 1394, 1395 (9th Cir. 1988) ("The University of California and the Board of Regents are considered to be instrumentalities of the state,"); Mitchell v. L.A. Cmty. Coll. Dist., 861 F.2d 198, 201–02 (9th Cir. 1988); United States *ex rel*. Ali v. Daniel, Mann, Johnson & Mendenhall, 355 F.3d 1140, 1147 (9th Cir. 2004).

96 8 U.S.C. § 1324a(a)(7). *See also Illegal Immigration Reform and Immigration Responsibility Act*, Pub. L. No. 104-208, § 412, 110 Stat. 3009 (1996).

97 UCLA Law Sch. News Rel., (Oct. 19, 2022), https://law.ucla.edu/news/undocumented-uc-student-organizers-professors-ucla-cilp-labor-center-launch-groundbreaking-campaign-equal-access-job-opportunities; Arulanantham & Hairapetian, *supra* note 94, at 293–84.

98 California Legislative Information, A.B. 2586 (see Assembly Floor analysis of May 20, 2024), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240AB2586.

All bill, citing concerns that state employees could be found in violation of federal laws for employing undocumented students.[99]

There are two related doctrinal questions here. First, does the IRCA statute reveal a clear indication of Congress's intent to overcome the states' (and thus public universities') Eleventh Amendment immunity from IRCA lawsuits? Second, does the IRCA law even apply to state governments when they act as employers (unlike private sector employers)? We pose the two questions in this order (others might reverse the sequence) because strong statutory and case law evidence of Congress choosing to override the states' sovereign immunity would also be solid evidence that IRCA applies to state governmental entities acting as employers. Conversely (and as we show below), the absence of case law confirming that IRCA waived sovereign immunity represents important (but not sufficient) disconfirmation evidence about the underlying question of the applicability of IRCA to state governmental employers.

Relevant in both abrogation contexts and more broadly regarding the regulation of state governments (discussed further below), the U.S. Supreme Court has repeatedly declared, "The standard for finding a congressional abrogation is stringent. Congress, this Court has often held, must make its intent to abrogate sovereign immunity 'unmistakably clear in the language of the statute.'"[100] This clear statement standard is satisfied "in only two situations. The first is when a statute says in so many words that it is stripping immunity from a sovereign entity … The second is when a statute creates a cause of action and authorizes suit against a government on that claim."[101] The immigration and constitutional law scholars supporting "Opportunity for All"[102] argue that IRCA fails the clear statement rule, unlike several other statutes that satisfy the clear statement rule about the intent to abrogate the states' sovereign immunity by defining entities or persons in such a way as to bind the states, including the 1972 amendments to Title VII of the

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99 Governor Newsom's veto message (Sept. 22, 2024), https://www.gov.ca.gov/wp-content/uploads/2024/09/AB-2586-Veto-Message.pdf.

Immigration Prof, *California Governor Newsom Vetoes Opportunity for All Act*, Immigration Prof Blog, https://lawprofessors.typepad.com/immigration/2024/09/california-governor-newsom-vetoes-opportunity-for-all-act-.html.

100 Fin. Oversight and Mgm't Bd. for Puerto Rico v. Centro De Periodismo Investigativo, Inc., 143 S. Ct. 1176, 1183 (2023) (quoting *Kimel v. Florida Board of Regents*, 528 U.S. 62, 73 (2000)).

101 *Id.* at 1184. In George Fishman's critique of the "Opportunity for All" legal scholars, he writes that citation to the ADEA amendments coverage of the states under the clear statement rule "is inapposite because the pre-amendment ADEA specifically excluded States." George Fishman, *California Dreamin': Can State Universities Legally Hire Non-Work Authorized Aliens*, 48 J.C. & U.L. 95, 133 (2023). Fishman's criticism is a *non sequitur,* which the Court's ruling in the Puerto Rico case highlighting the example of ADEA abrogation underscores. If the Congress validly expresses a clear intent to waive sovereign immunity of the states in an amendment to the ADEA (or other legislation), then the *status quo ante* from the preamendment version of the ADEA no longer matters. Fishman makes the same unpersuasive criticism of the Family Medical Leave Act, *id*. at 135, which the Supreme Court likewise cites in the Financial Oversight and Management Board for Puerto Rico case (quoted above).

102 Arulanantham & Hairapetian, *supra* note 94 at 286–99.

Civil Rights Act of 1964,[103] the 1966 amendments to the Fair Labor Standards Act (FLSA),[104] and the Rehabilitation Act.[105]

This clear statement rule requires Congress to invoke that abrogation of sovereign immunity must be "unmistakably clear in the language of the statute."[106] Passage of IRCA in 1986 was the year after the Supreme Court's clear statement rule that was part of the holding of *Atascadero State Hospital v. Scanlon*.[107]

We highlight IRCA-related Eleventh Amendment sovereign immunity legal cases not mentioned in the Opportunity for All legal scholars' memorandum nor in Fishman's critique. This small body of cases addresses the question of whether public universities and other state agencies have Eleventh Amendment sovereign immunity from private lawsuits brought under IRCA's protection against employers discriminating based on national origin and/or citizenship status.

An important case in this regard is *Hensel v. Office of Chief Administrative Hearing Officer*, in which the Tenth Circuit held that IRCA had not waived the states' Eleventh Amendment immunity, resulting in the dismissal of Hensel's claims against the University of Oklahoma.[108] The Tenth Circuit's ruling closely tracks the aforementioned immigration and constitutional law scholars' arguments, citing *Atascadero State Hospital*.[109]

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103 Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(a), 78 Stat. 241, 253, as amended by Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 2(1), (5), 86 Stat. 103 (Congress amended the definition of "person" to include "governments, governmental agencies, [and] political subdivisions," and also amended the definition of "employee" to include "employees subject to the civil service laws of a State government, governmental agency or political subdivision."). *See also* Fitzpatrick v. Bitzer, 427 U.S. 445, 448–49 (1976) (finding Title VII abrogated State sovereign immunity because the 1972 amendment "br[ought] the States within [Title VII's] purview."); Sosa v. Hiraoka, 920 F.2d 1451, 14661 n.4 (9th Cir. 1990) ("Congress's evident purpose in authorizing Title VII suits against states, state subdivisions, and state officials.").

104 Fair Labor Standards Amendments of 1966, Pub. L. 89-601, § 102(b), 80 Stat. 831; *see also* Emps. of Dep't of Pub. Health & Welfare, Mo. v. Dep't of Pub. Health & Welfare, Mo., 411 U.S. 279, 283 (1973).

105 29 U.S.C. § 794 ("Program or activity" includes "a department, agency, special purpose district, or other instrumentality of a State or of a local government," *id*. §794(b)(1)(A), and "a college, university, or other postsecondary institution, or a public system of higher education," *id*. § 794(b)(2)(A)). *See* also Phiffer v. Columbia River Corr. Inst., 384 F.3d 791, 793 (9th Cir. 2004) (A state "waives Eleventh Amendment immunity by accepting federal funds" under section 504 of the Rehabilitation Act and may be sued.).

106 Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 388 (2023) (quoting *FAA v. Cooper*, 566 U. S. 284, 291 (2012)); *see also* Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 144 S. Ct. 457, 461, 466 (2024).

107 473 U.S. 234, 242 (1985). Recently, a unanimous Supreme Court characterized that case this way: "*Atascadero* stands only for the now-familiar proposition that Congress must, at a minimum, mention the government when it wishes to scrap sovereign immunity and permit claims for damages." Dep't of Agric. Rural Dev. Rural Hous. Serv., 144 S. Ct. at 470.

108 [108] 38 F.3d 505, 508–09 (10th Cir. 1994). The panel also reached the predicate question that the University was an arm of the state for purposes of IRCA. *Id*. at 508.

109 "In order for the state to be subject to suit, Congress must have made "its intention unmistakably clear in the language of the statute." *See* Dellmuth v. Muth, 491 U.S. 223, 228 (1989) (quoting *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242). "[E]vidence of congressional intent must be both unequivocal and textual. ... Legislative history generally will be irrelevant to a judicial

More recently in 2023 (after the immigration and constitutional law scholars' memorandum) the federal district court in *Hossain v. Job Service North Dakota* reached a similar conclusion in rejecting plaintiff's claim that a state agency/department he previously worked for had waived its Eleventh Amendment immunity vis-a-vis IRCA (citing *Hensel*):

> Hossain asserts that JSND has generally waived its sovereign immunity because it has accepted federal funds. However, given the explicitness Congress has employed with respect to other statutes, Hossain has not shown that Congress unequivocally intended to abrogate the Eleventh Amendment in IRCA. IRCA is devoid of any textual support by definition or reference for the proposition that a "person" or "entity" includes the State. Absent explicit language, the court cannot find that IRCA was intended to subject the state to suit in federal court.[110]

The district court's ruling in *Hossain* was recently affirmed without comment by the Eighth Circuit.[111] While the Ninth Circuit did not reach the exact state agency IRCA question referenced above in *Hensel* and *Hossain*, it did apply parallel reasoning in *General Dynamics Corp. v. United States*[112] in rejecting the party's implied waiver argument about IRCA and federal sovereign immunity.[113]

In addition to the above cases, neither the "Opportunity for All" immigration and constitutional law scholars' memo nor the critique by Mr. Fishman delve into administrative law rulings that reach questions of IRCA and Eleventh Amendment–based state sovereign immunity. As we show below in Table 5, the strong preponderance of these administrative law rulings provide support for the "Opportunity for All" advocates in the same way as the *Hensel* and *Hossain* cases discussed above—by finding that public universities and other branches of state government have Eleventh Amendment immunity from private lawsuits brought under section1324b of IRCA.

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inquiry into whether Congress intended to abrogate the Eleventh Amendment." *Id.* at 230.

110 Hossain v. Job Service N.D., 2023 WL 2894349 *8 (D.N.D. April 11, 2023) (citing *Hensel*, 38 F.3d at 508 and Fitzpatrick v. Bitzer, 427 U.S. 445, 449 n.2 (1976)).

111 Hossain v. Job Service N.D., 2023 WL 8232205 (8th Cir. November 28, 2023).

112 49 F. 3d 1384 (9th Cir. 1995). In the underlying administrative law case (before the amended definition in IRIRA), the federal Office of Special Counsel brought a case of unfair labor practices and the ALJ found in favor of the defendant employer, but the ALJ denied the employer's request for attorney fees as the prevailing party.

113 49 F. 3d at 1386 ("General Dynamics asks us to imply a waiver, arguing that because § 1324b(h) allows attorney's fees to be awarded in 'any complaint' where the losing party's position is unreasonable, the provision necessarily encompasses complaints filed by the United States. A showing of ambiguity, however, is insufficient to support a claim that Congress waived sovereign immunity…. The Supreme Court consistently has held that liability attaches to the United States only if Congress's intent to waive the government's immunity is 'unequivocally expressed.'").

TABLE 5: Adminstrative Law Judge (ALJ) Rulings on IRCA Section1324b Finding State Entities Have Immunity[114]

State Universities[115]	Other State Entities[116]
Reffell v. Prairie View A&M University, 9 OCAHO 1057 (2000)	*Hossain v. Job Service North Dakota*, 14 OCAHO 1352 (2020), related district court opinion discussed above
Elhaj–Chehade v. University of Texas, Southwestern Medical Center at Dallas 8 OCAHO 1022 (1999), *aff'd Elhaj–Chehade v. Chief Admin. Hearing Officer*, 235 F.3d 1339 (5th Cir. 2000) (table case)	*Ugochi v. North Dakota Department of Human Services*, 12 OCAHO 1304 (2017)
McNier v. San Francisco State University, 8 OCAHO 1030 (1999)	*Omoyosi v. Lebanon Corr. Inst.*, 9 OCAHO 1119 (2005)
Kupferberg v. University of Oklahoma Health Sciences Center, 4 OCAHO 709 (1994), 1994 WL 761187	*Wong-Opasi v. Tennessee Governor Don Sundquist*, 8 OCAHO 1054 (2000)
	United States v. New Mexico State Fair, 6 OCAHO 898 (1996), 1996 WL 776504

We did not identify ALJ cases where public university systems were deemed not to have immunity from IRCA. However, unlike the ALJ cases in the table above, we did find three ALJ cases where either a city or a community college were public entities not deemed to be an arm of the state, and thus other ALJ rulings find those entities do not have sovereign immunity from IRCA lawsuits.[117] In the Ninth Circuit, community colleges are often regarded as "dependent instrumentalities"[118] of the state for Eleventh Amendment immunity purposes, but there may be more variation on that question nationwide. For these reasons, there is more nuance to the question of community colleges—which may be relevant in a state like California should there be future legislative efforts along the lines of the

114 Our identification of these cases stems from multiple search methods, but a starting point is the DOJ's Office of the Chief Administrative Hearing Officer (OCAHO) archive of decisions, https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions, including the Cumulative Topical Index of Published and Indexed Decisions Volumes 1–18 (last updated Feb. 2024), https://www.justice.gov/d9/2024-02/topical_index_02_14_2024.pdf (last visited March 1, 2025).

115 https://www.justice.gov/sites/default/files/eoir/legacy/2005/12/08/1057.pdf (last visited March 1, 2025); https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/28/1022.pdf (last visited March 1, 2025); https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/28/1030.pdf (last visited March 1, 2025). Similarly, a federal higher education institution was found by an ALJ to have sovereign immunity from an IRCA lawsuit in *Shen v. Defense Language Institute*, 9 OCAHO no. 1117 (2006), https://www.justice.gov/sites/default/files/eoir/legacy/2006/11/09/1117.pdf (last visited March 1, 2025).

116 https://www.justice.gov/eoir/page/file/1269296/dl?inline (last visited March 1, 2025); https://www.justice.gov/sites/default/files/pages/attachments/2017/08/07/1304_0.pdf (last visited March 1, 2025); https://www.justice.gov/sites/default/files/eoir/legacy/2006/11/09/1119.pdf (last visited March 1, 2025); https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/28/1054.pdf (last visited March 1, 2025).

117 D'Amico v. Erie Cmty. Coll., 7 OCAHO 948 (1997); Smiley v. City of Philadelphia Dep't of Licenses and Inspections, 7 OCAHO 925 (1997); Iwuchukwu v. City of Grand Prairie, 6 OCAHO 915 (1997).

118 Cerrato v. San Francisco Cmty. Coll. Dist., 26 F.3d 968, 972 (9th Cir. 1994); Lauser v. City Coll. of San Francisco, 2008 WL 2357246 (N.D. Cal. June 6, 2008). *But see* Stannard v. State Ctr. Cmty. Coll. Dist., 733 F. Supp. 3d 946, 958-59 (E.D. Cal. 2024) (college withdrew immunity defense and case proceeded against individual officials under *Ex Parte Young*).

A.B. 2586 "Opportunity for All" bill that was vetoed in 2024.[119]

The aforementioned cases regarding IRCA and the absence of abrogation of sovereign immunity are relevant disconfirmation evidence grappling with the text and statutory intent of IRCA but are not dispositive evidence regarding the underlying question of IRCA's application to state governmental entities as employers.[120] Regarding this second question we reiterate that the text of the IRCA statute does not specify that it applies to state governments even though that should be obligatory under the Supreme Court's long-standing "clear statement" rule, that there is not (and should not be) what might be called an "anti-immigration *ex ante* policy preference exception" to the clear statement rule, and we refer readers to the recent article by Arulanantham and Hairapetian for a detailed analysis of these legal arguments.[121]

The fact that the 1987 IRCA regulations define "entity" as including "governmental body"[122] (without specifying state governments) is not persuasive because a federals agency's interpretive gloss in the regulation (not derived from the statutory text and contra the "clear statement" rule) simply begs the question about whether the DHS agency's reliance on such an interpretation amounts to exceeding its statutory authority (including because of the 1996 IIRIRA's amended definition that "entity" for IRCA purposes included the federal government but once again was silent about state governments[123]). Consistent with the arguments about IRCA by the Opportunity for All immigration and constitutional law scholars, the 1986 House Report for IRCA does not contain clear indications that IRCA was intended to apply to state governments as employers.[124] Finally, after the Court's recent repudiation of the *Chevron* doctrine (troublesome in a host of other administrative law areas where an agency's scientific expertise matters more than here) courts are not permitted to defer to an agency's interpretation simply because a statute is ambiguous.[125]

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119 *Dhillon v. Regents of the University of California*, 3 OCAHO 497 (1993), is the only published IRCA ALJ case we could find involving the University of California as a party (this was over thirty years ago, before sovereign immunity was more of a settled issue in light of *Hensel* and the Table 4 cases); it appears the sovereign immunity defense was not raised or briefed by the University, which prevailed on other grounds.

120 For example, in the FLSA context noted earlier, decades ago the Court declared "By holding that Congress did not lift the sovereign immunity of the States under the FLSA, we do not make the extension of coverage to state employees meaningless…..Section 16 (c) gives the Secretary of Labor authority to bring suit." Emps. of Dep't of Pub. Health & Welfare, Mo. v. Dep't of Pub. Health & Welfare, Mo., 411 U.S. 279, 285–86 (1973) (citations omitted). Unlike IRCA, the FLSA clearly applied to state hospitals. For further discussion, see Arulanantham & Hairapetian, *supra* note __ at 294.

121 Arulanantham & Hairapetian, *supra* note 94, at *passim*.

122 8 C.F.R. § 274a.1(b) (1987).

123 Arulanantham & Hairapetian, *supra* note 94 at 287–88.

124 H.R. Rep. No. 99-682(I and II). *See also Jenkins v. I.N.S.*, 108 F.3d 195, 200 (9th Cir. 1997) (in dicta suggesting another provision of the IRCA regulations reflected agency overreach where not justified by the text of the statute and reinforced by the absence of confirming information in the IRCA House Report); Arulanantham & Hairapetian, *supra* note 94 at 288 n.36, 291.

125 Loper Bright Entersl v. Raimondo, 144 S. Ct. 2244 (2024).

B. Private-ish Activism: Voluntary Fee to Unlock Private Matching Funds

The idea in this section carries less legal risk compared to the sovereign immunity argument in Part IV.A but also has not yet been tried at public universities in California or elsewhere. The core idea here—which is detailed in a separate article by one of us[126]—is a campus-level scholarship fundraising model that (1) starts with undocumented students and allies organizing support for a *voluntary student fee* to support undocumented students and (2) attempts to build private philanthropy and community matching support so that the cumulative dollars raised ends up being much larger. This voluntary fee-matching fund concept is informed by several design principles, especially organizing around undocumented college students' strengths and resilience in social justice organizing/leadership and human capital.[127]

The main legal strategy attraction of this proposal is that because the fee is *voluntary* at the individual student level, opponents should fail to satisfy federal court standing requirements even if one is clear-eyed that the conservative judicial movement over the years has "moved the goalpost" in other areas related to standing.[128] A completely voluntary fee inherently does not generate standing opportunities for those students who are merely invited to pay such a fee. Here, students—and groups or associations of students and their parents—who choose *not* to pay a voluntary fee would not have a "concrete and particularized" injury-in-fact.[129] In *Day v. Bond* the Tenth Circuit found that out-of-state students did not have federal standing to challenge in-state tuition for undocumented students under a tuition cross-subsidy theory of harm/injury,[130] and the logic of *Day v. Bond*

126 Kidder, *supra* note 39, at 595–604.

127 *See, e.g.*, Gloria Itzel Montiel, *Navigating the Ivy League: Funds of Knowledge and Social Capital of Undocumented Ivy League Students*, 28 Harv. J. Hisp. Pol'y 64, 73 (2016); Ali Borjian, *Academically Successful Latino Undocumented Students in College: Resilience and Civic Engagement*, 40 Hisp. J. Behav. Scis. 22 (2018); Nicholas Hudson, Undocumented Latino Student Activists' Funds of Knowledge: Transforming Social Movements (Aug. 31, 2017) (Ed.D. dissertation, George Washington University).

128 *See, e.g.*, Mark A. Lemley, *The Imperial Supreme Court*, 136 Harv. L. Rev. 97, 108 (2023) (The U.S. Supreme Court "has repeatedly violated its own rules for standing and mootness, dismissing actual controversies between parties with a concrete interest for lack of standing in *TransUnion* and *Whole Woman's Health v. Jackson* while overlooking problems of standing and even mootness when the Court has decided it wants to rule on a particular issue, as it did in *West Virginia v. EPA*.").

129 Spokeo, Inc. v. Robins, 578 U.S. 330, 338–39 (2016) (holding that a plaintiff invoking federal jurisdiction bears the burden of establishing standing that includes the injury-in-fact requirement, which requires a plaintiff to show they suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical").

130 500 F.3d 1127, 1131–34 (10th Cir. 2007) (in a challenge by out-of-state students and parents to a Kansas law allowing undocumented students to be eligible for in-state tuition, University of Kansas officials prevailed on summary judgment on grounds about lack of injury in fact; the court rejected plaintiffs' theories of injury about "the burden of subsidizing illegal alien beneficiaries" and about "competition for scarce tuition resources" for lack of a concrete injury and granting summary judgment to the university on other parts of plaintiff's claims for other reasons). Recently in *Young Conservatives of Texas Found*ation *v. Smatresk*, 73 F.4th 304 (5th Cir. 2023) the Fifth Circuit ruled that a group of out-of-state students paying higher tuition did have standing to bring a legal theory of injury related to the University of North Texas charging in-state tuition to certain undocumented students under a 2001 Texas law. However, the Fifth

would apply *a fortiori* here because a voluntary fee policy (which many public universities have[131]) like UC's PACAOS 90 expressly directs that the "actual costs" (i.e., overhead costs of collecting the fee via the University billing system) are to be "borne by the Registered Campus Organization"[132] so there is not a cross-subsidy of University funds. Along somewhat similar lines, in *Marderosian Trust*, the estate of a donor's private scholarship fund administered through the University of Illinois's foundation sought to exclude undocumented students[133] with a very attenuated claim of standing in an effort to enjoin the Illinois in-state tuition law for Dreamers, and the district court dismissed for lack of standing.[134]

Conversely, if other students were to tactically choose to pay a voluntary fee they really opposed in an attempt to preserve federal court standing, the cases from the Supreme Court,[135] within the Ninth Circuit[136] and elsewhere,[137] indicate that such students would lack standing for having created a self-inflicted injury (i.e., one not "fairly traceable" to the conduct of the university or student organization raising funds).[138] The core requirements of federal standing—injury in fact, causation by defendant and redressability—were reinforced in the Supreme Court's latest ruling related to mifepristone (the pregnancy termination drug), *FDA v. Alliance for Hippocratic Medicine*.[139]

Circuit panel (overruling the district court) found in favor of the University on the merits and positively cited *Day v. Bond* for other reasons. *Id*. at 313.

131 For examples of voluntary fee policies in other states, see Kidder, *supra* note 39, at 599–601.

132 Univ. Cal., Policies Applying to Campus Activities, Organizations and Students Section 90, § 90.13 (July 28, 2004), https://perma.cc/2BPM-7C3X.Univ. *See also* Univ. Cal. Office of the President, *Guidelines for Implementing a Voluntary Student Fee Pledge System*, Univ. Cal. (Dec. 28, 1992), https://perma.cc/NTR9-AZWW.

133 Ardash Marderosian Tr. v. Quinn, No. 12 C 6869, 2013 WL 5405705 (N.D. Ill. Sept. 25, 2013). *Marderosian Trust* was a refiled version of an earlier lawsuit, *Marderosian v. Topinka*, No. 1:12-cv-2262 (N.D. Ill. June 19, 2012).

134 *Marderosian Tr*., 2013 WL 5405705, at *2–4.

135 Clapper v. Amnesty Int'l USA, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves[.]"); Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976) (per curiam) ("The injuries to the plaintiffs' fiscs were self-inflicted .... No state can be heard to complain about damage inflicted by its own hand.").

136 Mendia v. Garcia, 768 F.3d 1009, 1013 n.1 (9th Cir. 2014) (immigration detainee lacked standing to seek damages for a portion of his pretrial detention because "the loss of liberty he experienced after being granted release on his own recognizance is ... a self-inflicted injury"); Woulfe v. Universal City Studios LLC, 2023 WL 6151727 at *4–5 (C.D. Cal. Aug. 2023).

137 *See, e.g.*, Nat'l Family Plan. and Reprod. Health Ass'n v. Gonzales, 468 F.3d 826, 831 (D.C. Cir. 2006) ("We have consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing."); Zimmerman v. City of Austin, 881 F.3d 378, 389 (5th Cir. 2018) ("standing cannot be conferred by a self-inflicted injury.").

138 13A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 3531.5 (3d ed. 2008 & Supp. 2022) ("Standing is defeated only if it is concluded that the injury is so completely due to the plaintiff's own fault as to break the causal chain."); Red v. General Mills, Inc., 2015 WL 9484398 at * 4–5 (C.D. Cal. Dec. 29, 2015) (consumer claimed injury from eating mashed potatoes with hydrogenated oil that was properly labeled on the box, court ruled they lack standing for reasons of self-inflicted injury).

139 602 U.S. 367, 378–79 (2024).

Turning to state law in California, there are more permissive standing requirements than in federal court,[140] but it is also true that there are more favorable substantive law rulings in California and other state courts that have reached relevant questions related to PRWORA and IIRIRA.[141]

C. Partnering with Progressive Philanthropy Matters

Given the gridlock at the federal legislative level with respect to immigration reform and the legal difficulties of DACA in the current legal environment, one important area to look at (as part of an ensemble of strategies) to improve prospects for undocumented college students is progressive philanthropy acting as "institutional entrepreneurs" that advance change via community investments and partnerships.[142] As Cass Sunstein observed many years ago, learning from "norm entrepreneurs" and the processes by which norms can change (sometimes rapidly) is an important ingredient in the successful change of law and policy.[143] The role of progressive philanthropy in partnering with community and undocumented student/ally activists and with university administrators to advance the larger social movement for undocumented student rights in higher education is an underanalyzed area of scholarship; Kyle Southern's doctoral dissertation, discussed below, is a notable exception.[144]

Southern found manifestations of institutional entrepreneurship in two case studies, including a single former foundation program officer who had disproportionate influence in founding a multistate network of community colleges dedicated to growing the movement to support undocumented students[145] and a different

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140 Anne Abramowitz, *A Remedy for Every Right: What Federal Courts Can Learn from California's Taxpayer Standing*, 98 Cal. L. Rev. 1595 (2010); *see also* Laura Bakst, *Constitutionally Unconstitutional? When State Legislatures Pass Laws Contrary to Supreme Court Precedent*, 53 U.C. Davis L. Rev. Online 63, 88 (2019).

141 *See* Kidder, *supra* note 39, at 608–12 (discussing *County of Alameda v. Agustin*, No. A115092, 2007 WL 2759474 (Cal. Ct. App. Sept. 24, 2007); *Garcia v. Dicterow*, No. G039824, 2008 WL 5050358 (Cal. Ct. App. Nov. 26, 2008); *Caballero v. Martinez*, 897 A.2d 1026, 1031 n.1 (N.J. 2006); *City Plan Development, Inc. v. Office of Labor Commissioner*, 117 P.3d 182, 190 (Nev. 2005); *Rajeh v. Steel City Corp.*, 813 N.E.2d 697, 707 (Ohio Ct. App. 2004); *Dowling v. Slotnik*, 712 A.2d 396, 412 n.17 (Conn. 1998)).

142 Rand Quinn et al., *Beyond Grantmaking: Philanthropic Foundations as Agents of Change and Institutional Entrepreneurs*, 43 Nonprofit & Voluntary Sector Q. 950 (2014). *See also* Cassie L. Barnhardt, *Philanthropic Foundations' Social Agendas and the Field of Higher Education*, *in* Michael B. Paulsen, Ed), Higher Education: Handbook of Theory and Research 181 (2017).

143 Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903, 909 (1996).

144 Kyle Southern, "Private Foundations and the Undocumented Student Movement in Higher Education" (2019) (Ph.D. dissertation, University of Michigan), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/151622/kgsouth_1.pdf?sequence=1. This study has extensive discussion of an anonymized "Western Public Research University" with rolling creeks and many Nobel laureates and a model undocumented student center that is obviously the same UC campus that we discuss in Part II.C.

145 *Id.* at 70 ("I conducted an extensive interview with a former foundation program officer credited by all parties with conceiving of [the network]. Now an independent consultant working on immigrant integration issues, this former program officer served as perhaps the critical institutional entrepreneur planting seeds that ultimately bore fruit as a field of immigrant and undocumented student support"); *see also id*. at 39, 70.

partnership modality, a leading flagship public research university (clearly UC Berkeley, though anonymized), that "'didn't have any' internal dollars for this work when it began; the institution's chief executive officer elevated student experiences in a way that compelled an initial grant investment to make Undocumented Student Services possible" in tandem with "a set of on-campus institutional entrepreneurs who brought their personal identities and professional values to bear to establish an undocumented student resource center. … Without a willing national foundation partner, they 'hustled' their way toward building a comprehensive model that larger foundations eventually sought out as a potential grant recipient."[146] More recently the $40 Million California Campus Catalyst Fund[147] carried forward this work of expanding undocumented student services centers,[148] as do no-profits like FWD.US.[149] Such efforts tend to focus investment where there is "skin in the game" in matched institutional commitment, and where there are ground conditions of student and community activism and networks sharing best practices.[150]

Some in progressive philanthropy distinguish between foundations investing in "retail" (direct scholarship assistance) versus activities at the "wholesale" (community service grants to groups close to the point of activity),[151] but this dichotomy is somewhat of an oversimplification. For example, TheDream.US is the largest private scholarship program for undocumented college students and presently awards substantial scholarships covering tuition and fees to several thousand (freshman-to-senior) students at American universities and colleges.[152] TheDREAM.US affiliates with scores of partner colleges where selected undocumented scholarship recipients may enroll, and partner colleges go through a benchmarking and strategic assessment process with the fund in order to assess strengths and weaknesses in order to build up their profile of support services and characteristics for undocumented students.[153]

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146 *Id.* at 142.

147 Cathy Cha & Katharine Gin, *Reflections on the California Campus Catalyst Fund* (Oct. 2022), https://www.haasjr.org/perspectives/reflections-on-the-california-campus-catalyst-fund (last visited March 1, 2025).

148 *See, e.g.*, Jesus Cisneros et al., *"I'm Here to Fight Along with You": Undocumented Student Resource Centers Creating Possibilities*, 15 J. Diversity in Higher Educ. 607 (2022).

149 https://www.fwd.us/highered/ (last visited March 1, 2025).

150 Cha & Gin, *supra* note 147 ("The funders' plans to step down funding after three years were communicated clearly to campuses, as was the requirement that campuses put some 'skin in the game' through dedicated funding of their own, in-kind support, and other commitments."). These themes came up in a background interview one of us conducted with the President and immigration portfolio director of the Walter and Evelyn Haas Jr. Fund and are also consistent with findings in Southern, *supra* note 144 at 77, 158–59.

151 Southern, *supra* note 144, at 134.

152 TheDream.US, https://perma.cc/22JA-G8M5 (last visited March 1, 2025).

153 One of us (Mr. Kidder) was involved in this process as the relationship manager/liaison with TheDream.US at Sonoma State University several years ago. Many of the features of this process mirror best practice guides that classify institutions into a few broad categories based on measures of institutionalized support across multiple dimensions. *See, e.g.*, Nancy Jodaitis et al., Undocu-college Guide: California (2016), https://immigrantsrising.org/wp-content/uploads/Immigrants-Rising_CA-UndocuCollege-Guide-and-Equity-Tool_Full-Report.pdf.

A half-dozen of the CSU and UC campuses in Northern California included in our data set had scholarship partnerships with TheDream.US in the late 2010s, until 2020 when TheDream.US made the difficult decision to sunset new scholarships with California and Washington universities and to redeploy those funds to states where undocumented students face even larger challenges and lack of financial aid.[154] We did not have the granular data on the number and duration of TheDream.US scholarships to test if this decline in private scholarships was a contributing factor (less salient than the fall of DACA) for our results in Part II, but the magnitude of UC and CSU new Dream Act awards declining by half since 2016–17 poses the policy question of whether as a matter of comparative return on investment (i.e., "moving the needle" on number of students reaching graduation per dollar expended) if it would be sound fund stewardship to have some kind of successor/different scholarship partnership program for some public universities in California (even if smaller on a per student basis than what is being offered in "red states" without financial aid).

In a financial support environment without DACA and without comprehensive immigration reform or a federal Dream Act, progressive philanthropy dollars could make a difference with seed funding to scale up campus centers that effectively train and position undocumented students for entrepreneurial success *after* graduation.[155]

IV. CONCLUSION

For nearly a quarter-century as efforts to pass versions of a federal DREAM Act ultimately failed to become law,[156] experimentation at the state level took on greater significance in response to gridlock at the federal level.[157] For example, the

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154 Sadhana Singh, *Important News from TheDream.US in California*, TheDream.US (Sept. 14, 2020), https://perma.cc/86J9-FZHC ("Going forward, we will no longer award NEW scholarships to California DREAMers. California now has generous state aid, institutional aid, scholarships and loans that are available to DREAMers. This is not true in a number of other states—where DREAMers have little to no access to financial aid to help pay for college. We have decided that we need to shift our focus in helping DREAMers in these states.").

155 UCLA Institute for Research on Labor and Employment et al., How Can Universities Foster Educational Equity for Undocumented College Students: Lessons from the University of California 9 (2019), https://irle.ucla.edu/wp-content/uploads/2019/01/Enriquez-Educational-Equity-Final.pdf ("undocumented students face uncertainty about their future ability to be legally employed. Eighty-four percent of survey participants agreed that thinking about life after graduation gives them anxiety. Those who did not have DACA worried about not having employment eligibility, and those who had DACA worried about losing their eligibility."); *cf,* Immigrant Rising, Spark Hub for Immigrant Entrepreneurs, https://web.archive.org/web/20250324051210/https://spark.immigrantsrising.org/ (archived March 24, 2025); German A. Cadenas et al., *An Educational Program Affirming Immigrant Entrepreneurship, Critical Consciousness, and Cultural Strengths*, 71 Career Dev. Q. 284 (2023).

156 Olivas, Perchance to DREAM, *supra* note 10, at 48–51.

157 *See, e.g.*, Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 Drexel L. Rev. 297, 318 (2017) (the 1996 immigration laws, including PRWORA and IIRIRA, "ultimately created a paradigm where states and localities are exercising great power in shaping the lived experience of their residents as a result of their immigration status. This has happened at the very same time that immigration enforcement has ramped up and national borders have hardened.").

first state to figure out how to pass a law that overcame the legal restrictions of the 1996 immigration laws (IIRIRA and PRWORA) and provided in-state college tuition rates for long-time residents who are undocumented was Texas in 2001 (in an era of greater legislative bipartisanship).[158] Over the years, other states followed suit, and today about half of the states have some kind of out-of-state tuition waiver law for which some undocumented students are eligible.[159]

California is an upper bound test case with the strongest, longest, and arguably most robust set of state laws and university-level aid policies to support undocumented college students, including in the realm of financial aid. Even so, given the gradual demise of DACA for recent cohorts of young Gen Z undocumented students hoping for access to quality higher education opportunities, the data in this article are the first to show that new California Dream Act awards dropped by half at UC and CSU campuses between 2016-17 and 2022-23. We make reasonable efforts to use "difference in difference" methods to support the inference that the demise of DACA is most likely the main cause, but with the caveat that we do not have the granular data to definitively establish the causal role of DACA's decline in worsening enrollment outcomes for undocumented students at California public universities.

If DACA is nullified by the U.S. Supreme Court, that will only reinforce the need to once again seek experimentation and solutions at the state and university/college level until federal legislative reform in this area can finally become a reality. After all, the Supreme Court observed not too long ago that "public universities, like the States themselves, can serve as 'laboratories for experimentation.'"[160] In Part III we outline several innovative pathways for further reform in support of undocumented students, including ideas that may make some university trustees and administrative leaders uncomfortable, and areas where progressive philanthropy could make some seed funding investments that can be leveraged for larger impact. For both state-level reforms and for federal advocacy efforts with Congress and with DACA, the groundswell of undocumented student activism has always been a central part of the story,[161] and this vital work by young people fighting for the inclusion of their dreams and aspirations as part of the fabric of American society will no doubt continue in the years ahead regardless of the legal fate of DACA.

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158 This history behind H.B. 1403, including the role of the late Michael Olivas advising Texas lawmakers, is captured in Kevin J., Dougherty et al., *Undocumented Immigrants and State Higher Education Policy: The Politics of In-State Tuition Eligibility in Texas and Arizona*, 34 Rev. Higher Educ. 123, 138–42 (2010); *see also* Olivas, Perchance to DREAM, *supra* note 10.__.

159 *See infra* Table 1; see also https://www.higheredimmigrationportal.org/states/ (Apr 2024).

160 Fisher v. Univ. Tex., 136 S. Ct. 2198, 2214 (2016) (plurality opinion).

161 Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 116 Nw. U. L. Rev. ONLINE 1, 13 (2021–2022) ("[U]ndocumented immigrants and other immigrant activists today are at the center of political activity. It is difficult to pinpoint the precise time, but immigrant activism increased as versions of the DREAM Act, which would create a path to legalization for undocumented youth, were introduced in Congress over the last twenty years.").

APPENDIX: ADDITIONAL INFORMATION ON OUR DATA SET AND METHODS

A. Empirical Methods and Choices

As noted earlier, we employ a social science "difference-in-difference" analytic strategy[162] that compares enrollment changes for undocumented Dream Act students with the corresponding pattern for a reasonably matched group of non-undocumented students, which are the low-income Cal Grant awardees at UC and CSU, respectively, over an eight-year span. Appendix Tables 1 and 2 provide an overall profile of the subset of Dream Act recipients in 2022–23 who were new (rather than continuing) awardees.[163] These profile data are for those *offered* Dream Act and Cal Grant awards (about 11% of this group at UC choose not to accept the award[164]).

Appendix Tables 1 and 2 show that undocumented students to UC have 3.66 high school GPAs, which are equivalent to the 3.67 GPAs for other UC freshmen receiving Cal Grants. Those at CSU have 3.24 high school GPAs, similar to the 3.30 GPAs for other CSU freshmen receiving Cal Grants.[165] The average ages are very similar. Dream Act students come from somewhat larger families and have lower family incomes in Appendix Tables 1 and 2, though if more of their parents' work is in the informal economy[166] compared to Cal Grant recipients, then the magnitude of the family income gap might be somewhat overstated. At the upper end of the distributions (e.g., eightieth and ninetieth percentiles), there will be a larger gap in family income reflective of the lower-middle income status of many Cal Grant award recipients as compared to Dream Act undocumented award recipients.

Comparison data like Appendix Tables 1 and 2 but for earlier years are substantially equivalent, confirming that these Dream Act and Cal Grant students are reasonably well matched academically.[167] It is theoretically possible that there

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162 Furquim et al. do an effective job of discussing various considerations with difference-in-difference methods using the example of higher education enrollment impacts of Hurricane Katrina. Fernando Furquim et al., *A Primer for Interpreting and Designing Difference-in-Differences Studies in Higher Education Research*, 35 HIGHER EDUC.: HANDBOOK OF THEORY AND RSCH. 1, *passim* (2019).

163 CAL. STUDENT AID COMM'N, CAL GRANT PROGRAM NEW OFFERED AWARDEES AND ELIGIBLE NON-OFFERED AWARDEES AVERAGE INCOME, GPA, FAMILY SIZE, AND AGE BY SEGMENT AWARD YEAR 2022–23 3–4 (2023), https://www.csac.ca.gov/sites/main/files/file-attachments/cal_grant_program_averages_2022-23.pdf?1674837311. There are a trivial number of students receiving Dream Act awards under the separate "CCC entitlement" category that are not included in Appendix Tables 1–2.

164 CAL. STUDENT AID COMM'N, RENEWING THE DREAM: IMPROVING FINANCIAL AID AND COLLEGE AFFORDABILITY FOR CALIFORNIA'S UNDOCUMENTED STUDENTS 20 (Mar. 2023), https://www.csac.ca.gov/sites/main/files/file-attachments/renewing_the_dream_full_report.pdf?1677607402. ("[S]tudents applying for CADAA for the first time are successfully applying for aid and receiving financial aid offers, but not receiving aid. A significant portion are either not enrolling in college after applying for aid or not able to complete the final additional steps to ensure their aid is disbursed."). This group is relatively smaller at UC and larger at the CCCs and has grown since 2016–17. *Id*. at 20 fig. 4.

165 *Id*. at 2–3.

166 *See, e.g.*, Jennifer J. Lee, *Legalizing Undocumented Work*, 42 CARDOZO L. REV. 1893 (2020).

167 *See, e.g.*, CAL. STUDENT AID COMM'N, CAL GRANT PROGRAM NEW OFFERED AWARDEES AND ELIGIBLE

are "selection on unobservable" differences between Dream Act and Cal Grant students with equivalent academic credentials, but we are not able (and there is scant data in the national literature) to robustly test such possibilities. However, our data indirectly address that concern by including students at a fairly broad distribution of institutions ranging from large hyperselective research universities like UC Berkeley and UCLA to smaller and modestly selective regionally focused teaching universities like CSU Stanislaus and CSU San Marcos.

APPENDIX TABLE 1: UC Profile Comparisons of Newly Offered Dream Act Awardees and Cal Grant (FAFSA Filer) Awardees in 2022–23

	From High School		Transfers	
	Dream Act	**Cal Grant**	**Dream Act**	**Cal Grant**
Average Income	$32,438	$46,823	$28,580	$43,373
Average GPA	3.66	3.67	3.34	3.47
Average Family Size	4.4	4.0	3.5	3.1
Average Age	18	18	23	22
Totals	**602**	**28,314**	**144**	**3,736**

APPENDIX TABLE 2: CSU Profile Comparisons of Newly Offered Dream Act Awardees and Cal Grant (FAFSA Filer) Awardees in 2022–23

	From High School		Transfers	
	Dream Act	**Cal Grant**	**Dream Act**	**Cal Grant**
Average Income	$28,381	$42,461	$28,618	$39,561
Average GPA	3.24	3.30	3.14	3.21
Average Family Size	4.5	4.0	3.2	2.9
Average Age	18	18	23	23
Totals	**1,092**	**45,991**	**502**	**11,992**

In other circumstances where difference-in-difference methods are employed with undocumented students what is being studied are before-and-after a decisive point in time (e.g., an increase in tuition or the date a new in-state tuition law takes effect[168]), but here we have the challenge that we seek to assess impacts from the gradual strangulation of college students with DACA over a span of several years (see Figure 1). We address this to some extent by looking at both overall Dream Act counts as well as new Dream Act awardees. Relatedly, difference-in-difference strategies can be limited when adopting a one-versus-one period/group

NON-OFFERED AWARDEES AVERAGE INCOME, GPA, FAMILY SIZE, AND AGE BY SEGMENT AWARD YEAR 2019–20 3–4 (2020), https://www.csac.ca.gov/sites/main/files/file-attachments/cal_grant_program_averages_2019-20.pdf?1578529549 .

168 Dylan Conger & Lesley J. Turner, *The Impact of Tuition Increases on Undocumented College Students' Attainment* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21135, 2015); Stella M. Flores, *State Dream Acts: The Effect of In-State Resident Tuition Policies and Undocumented Latino Students*, 33 REV. HIGHER EDUC. 239, 253–56 (2010).

framework, so empirical scholars instead encourage testing multiple bandwidths to evaluate whether results are sensitive to the width of the analytic window.[169] We were able to address that concern in a limited way by measuring UC and CSU campus declines from two starting points (2018–19 and 2019–20).

Given our focus on DACA as an explanatory factor, we note there is convergent evidence nationally using a different enrollment estimation methodology. The Presidents' Alliance on Higher Education and Immigration estimated that there were approximately 408,000 undocumented college students in the United States in 2021 and 2022,[170] which represents a drop compared to 427,000 undocumented college students in 2019 and 450,000 in 2018.[171] (more recent national estimates are forthcoming, but not available at the time of this writing.)

Unlike our data set on low-income undocumented students, some other difference-in-difference studies must use proxy measures for college students who are undocumented.[172] Still other surveys of California undocumented college students must rely on networking outreach strategies to connect with participants and thus pose the challenges of unrepresentative sampling that is inherent in scholarly research with precarious undocumented students.[173]

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169 *See, e.g.*, Michael Lechner, *The Estimation of Causal Effects by Difference-In-Difference Methods*, 4 Foundations & Trends in Econometrics 165, 185 (2010).

170 Am. Immigration Council & Presidents' All. on Higher Educ. & Immigr, Undocumented Students in Higher Education: How Many Students Are in U.S. Colleges and Universities, and Who Are They? Fig. 1, 3 (updated Aug. 2023),

https://www.americanimmigrationcouncil.org/sites/default/files/research/undocumented_students_in_higher_education_2023.pdf; Presidents' All. on Higher Educ. & Immigr, Undocumented Students in U.S. Higher Education (June 2024), https://www.presidentsalliance.org/wp-content/uploads/2024/07/Undocumented-Students-in-Higher-Education.pdf.

171 *Id*. at fig. 2; *see also* the April 2020 version of this same Presidents' Alliance report, https://www.presidentsimmigrationalliance.org/wp-content/uploads/2020/07/Undocumented-Students-in-Higher-Education-April-2020.pdf. The Presidents' Alliance report estimated that 34.4% of undocumented college students were DACA-eligible in 2021 (an upper-bound estimate that should not be confused with those who *actually have* DACA), down from 42.6% in 2019 and 47.6% in 2018.

172 Michel Grosz & Annie Hines, *In-State Tuition Policies and the College Decisions of Undocumented Students: Evidence from Colorado*, 17 Educ. Fin. & Pol'y 232, 238 (2022) ("We cannot observe undocumented students directly, so we consider a treatment group of students who are likely to be affected by the policy based on race/ethnicity and tuition classification flags.").

173 Erin R. Hamilton et al., *Transition into Liminal Legality: DACA's Mixed Impacts on Education and Employment Among Young Adult Immigrants in California*, 68 Soc. Probs. 675 (2021) (cautioning that other surveys "may over-estimate DACA's impact by sampling among more privileged—largely activist, college-going—youth" (*id*. at 676), but while their DACA study captured a large share of noncollege individuals, it was also the case that 97% of those surveys were Latinx and 100% of those interviewed were Latinx (*id*. at 681 tbl. 1). Another recent and important survey of California undocumented students at UC and CSU was based on a response sample that was 94% Latinx (i.e., undersampling Asian Americans and Pacific Islanders). *See* UC Collaborative to Promote Immigrant and Student Equity (UC PromISE) and the Undocumented Student Equity Project, Persisting Inequalities and Paths Forward: A Report on the State of Undocumented Students in California's Public Universities 4–5 (Dec. 2020), https://bpb-us-e2.wpmucdn.com/sites.uci.edu/dist/4/3807/files/2020/12/State_Of_Undocumented_Students_2020report.pdf.

The extent to which our data set shows there are many more undocumented Dream Act students enrolling from California high schools (i.e., freshmen) compared to transfers from California community colleges (4:1 ratio at UC and 2.2:1 ratio at CSU in Appendix Tables 1 and 2) may surprise or otherwise be of interest to policy makers. These data patterns reflect the ambitions and choice patterns of undocumented students.[174]

B. Additional Information on our Data Set of California Dream Act Awardees

We characterize our figures overall on California Dream Act awardees as "lower-middle" estimates for the number of enrolled undocumented students at UC and CSU. These numbers have sufficient reliability and internal consistency over time as to be a trustworthy measure of the real trends in the undocumented student population at California public universities, though patterns may be different in other states given differences in state laws and local conditions.

In California the A.B. 540 in-state tuition bill can lead to the intuition that studying "A.B. 540 students" would be empirically preferable. We disagree because it is too often overlooked that California's A.B. 540 nonresident tuition waiver law (by legislative design) includes both undocumented students as well as a significant plurality of "California-ish" documented/citizen students who lost their California residency.[175] Thus, A.B. 540 per se is an unsatisfactory proxy for undocumented student status unless it is linked with, for example, filing a Dream Act application.

Our Dream Act award data set from CSAC do not include the following types of undocumented students:

- Undergraduates who previously had a Dream Act award but no longer have one because they exhausted their four years of eligibility (e.g., fifth-year seniors). This also applies to undocumented transfer students age twenty-eight and older. This group of previously eligible students likely accounts for a large share of the gap (discussed below) between Dream Act applicants and awardees.

- Very small numbers of undocumented students who are from middle-income families and thus did not apply for a Dream Act award or applied and were not eligible.

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174 This finding is in conversation with Ngo and Astudillo's study of undocumented students in one California Community College district, where they noted, "It is also likely that the highest achieving undocumented students chose instead to enroll in 4–year colleges given the possibility of receiving state merit aid. We were unable to examine this with our community college data." Ngo & Astudillo. *supra* note 65 at 15 n.8.

175 "California-ish" documented students is our term for students who met the A.B. 540 requirement of years in a California high school or community college but who lost their California residency for such reasons as, for example, moving out-of-state in their senior year of high school because of parental divorce or a family job-related move, or students from California who then went out-of-state for undergraduate studies and now are seeking an in-state tuition waiver their first year coming back to California. California's A.B. 540 law is intended to include these documented student populations as a central feature of its legal permissibility vis-à-vis the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 8 U.S.C. § 1623(a). Martinez v. Regents of the Univ. Cal., 50 Cal. 4th 1277, 1284 (2010).

- Small-middle but growing numbers of graduate and professional school students.

As a practical example integrating some of the points above, recall UC's aforementioned estimate in the run-up to the DACA case that there were approximately 4200 undocumented students at UC in 2016–17.[176] With that context, here is why we report a lower figure of 3316 undocumented students in 2016–17 when both we and UC were relying on similar strategies tethered to data from the CSAC:

- The 4200 figure refers to the number of UC students who filed Dream Act applications;
- Of that number about 3641 were offered Dream Act awards because they met eligibility criteria (of those 500+ who were not eligible, most are low-income undocumented students who missed age/year and other eligibility cut-offs);
- Of that number 3316 UC students were actually paid Dream Act awards (the drop-offs at each stage are similar in other years).

From correspondence with the UC system's financial aid director, of those who submitted Dream Act applications, he believes that approximately 95% either get a Dream Act or a UC Grant award, and thus are low-income students. Moreover, among Dream Act/CADAA filers at UC there are very few who are not undocumented students (e.g., those who filed this application by mistake).

Because the Student Aid Commission's data are reported with breakdowns by subtype of Dream Act (Cal Grant A, Cal Grant B), in our campus data request we asked that small samples (below ten) be masked in order to facilitate access to the data and to protect the privacy interests of undocumented students (i.e., to prevent imputed identification of individual undocumented students). This data limitation did not impact reporting precision for any of the nine UC system campuses with undergraduates. Note the caveat that we do not have data on UCSF, the tenth UC campus focused on health science graduate education that has a very small population of undocumented students.

This data masking of samples below ten did impact reporting precision for a small number of CSU campuses and was handled as described herein. The CSU campuses had small numbers of Dream Act students under Cal Grant A and large numbers under Cal Grant B (the reverse of UC). Thus, if in a given year a smaller CSU campus had 135 Cal Grant B undocumented students and its number of Cal Grant A students was masked because it was less than ten but not zero, we made the simplifying assumption that the number was five so that the total Dream Act awardees for that campus in that year would be estimated as 140 (135 + 5). These small imprecisions in our estimates for some CSU campuses would have been more prevalent if we listed data for all twenty-three CSU campuses. Instead, for data privacy and other reasons, we made a prudential choice to report separate

176 Brick Declaration, *supra* note 44.

data only for the fifteen CSU campuses with the largest number (89.6% of CSU's total) of undocumented students attended by applying a threshold of reporting campuses if there were at least 150 undocumented students during the peak years in our data set. We did not separately report on eight CSU campuses with smaller numbers of undocumented students (representing 10.4% of CSU's total).

C. A Closer Look at Alternative Hypotheses

This article attempts a "first pass" analysis of very recent data on trends with low-income undocumented students at California universities and the possible relationship with the slow demise of DACA. We do not utilize the type of granular individual student records researchers preferred when studying undocumented student enrollments many years in the past.[177] Our "difference in difference" control groups of other UC and CSU Cal Grant students are important in likely disconfirming some kinds of rival hypotheses, but are not sufficient for other kinds of alternative hypotheses for which trends for citizen/resident high school or college students are not relevant.

One competing (or partly competing) hypothesis we take seriously is that the recent decline in UC and CSU Dream Act students could be partly a reflection of declines in college-ready undocumented students graduating from high schools in California. This question weaves together two strands—one parallels our DACA-decline hypothesis but is beyond our direct measurement, and one is a genuine alternative hypothesis.

Regarding the former, multiple studies show that the introduction of DACA over a decade ago had a net positive effect on inducing undocumented youth to achieve higher high school graduation rates,[178] so the gradual constriction of DACA in more recent years poses the converse question about weakening undocumented students' high school graduation rates. Likewise, immigration enforcement actions and arrests by ICE, which accelerated during the Trump era, correlate with greater absenteeism and lower academic achievement by K-12 undocumented students[179] (which can dampen the number of high school graduates years later).

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177 *See, e.g.*, Gurantz & Obadan, *supra* note 60; Hsin & Ortega, *supra* note 63; Ngo & Estudillo, *supra* note 65.

178 Elira Kuka et al., *Do Human Capital Decisions Respond to the Returns to Education? Evidence from DACA*, 12 Am. Econ. J: Econ. Pol'y 293, 320 (2020) ("Using a difference-in-difference design, we show that DACA altered the education decisions of undocumented youth. The policy increased school attendance by 2.2 [percentage points] and high school graduation rates by 6 [percentage points], an effect that was more pronounced among Hispanic men."); Briana Ballis, *Dreamers and Beyond: Examining the Broader Educational Effects of DACA*, __ J. Hum. Res. __ (forthcoming 2025) (analyzing Los Angeles Unified School District data, finding "I find that among likely undocumented youth DACA increased 12th grade enrollment by 6 percent, high school graduation by 12 percent…"); Erin R. Hamilton et al., *The Life-Course Timing of Legalization: Evidence from the DACA Program*, 7 Socius 1, 4–5 (2021).

179 Patricia Gándara & Jongyeon Ee, eds., Schools Under Siege: The Impact of Immigration Enforcement on Educational Equity 31–54 (2022); Benjamin Meadows, *Undocumented and Under Threat of Deportation: Immigrant Students in the Classroom,* 58 J. Hum. Res. 1974 (2023); Nicole Chávez et al., Still at Risk: The Urgent Need to Address Immigration Enforcement's Harms to Children (2023), Center for Law and Social Policy Report, https://files.eric.ed.gov/fulltext/ED629499.pdf.

The second strand of this question is whether a possible decline in undocumented high school graduates reflects decreased immigration patterns from earlier years,[180] which is a genuine alternative hypothesis. This question is more difficult to assess directly than one might suppose for a combination of reasons: (1) The Presidents Alliance's (and similar) estimates of undocumented high school graduates only go back a few years, and the ACS microdata sample from 2021 (showing much lower totals in California than in 2019) used for these estimates are better at the national level and tend to become more "choppy" when using thin slices of cohort data at the state level[181]; (2) the Presidents' Alliance relied on MPI estimates from the ACS for 2019 but switched to FWD.US estimates (using a similar methodology) for 2021; (3) California's Department of Education and other official sources do not longitudinally track undocumented high school graduates per se;[182] (4) undocumented high school graduates in California are of course heterogenous with respect to when they came to the United States (age of two, seven, eleven, etc.) so that broader estimates on the total population of undocumented people living in the United States and California are only indirectly informative for this question of interest.

We can triangulate data around this question and thereby provide some sense of its plausibility and parameters. One test is by widening our focus beyond UC and CSU to also look at new Dream Act Awards for students in the California community colleges (CCCs). Appendix Figure 1 displays new Dream Act awardees at the CCCs alongside our earlier findings on UC and CSU. Unlike the 51% and 48% declines at UC and CSU, there was only a 5.3% decline for the larger group of CCC Dream Act awards between 2016 and 2017 and 2022 and 23 (with a larger one-year dip in 2020–21, likely due to the educational and economic hardships of COVID). Such Dream Act awards are open to students going directly to the CCCs out of high school (and recent high school graduates).[183] Thus, the CCC data in

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180 *See, e.g.*, Gurantz and Obadan, *supra* note 60, at 533 n.7 ("Although it is challenging to construct precise statistics on undocumented immigrants….California's undocumented population shrank by more than 20% from 2010–2019, with even larger drops among school-age children (Capps et al., 2020, Warren, 2021)."). Warren's latest study indicates a slight uptick in the undocumented population in the United States and in California in 2022. Robert Warren, *After a Decade of Decline, the US Undocumented Population Increased by 650,000 in 2022*, 12 J. Migration & Hum, Sec. 85, tbl. 3 (2024).

181 For example, the Presidents Alliance reports noted earlier estimated for California 27,000 undocumented high school graduates in 2019 but only 14,000 in 2021, while conversely Florida was estimated to have 5000 in 2019 and 13,000 in 2021, which is a lot of bounce in the data estimates. The year 2021 was the first full year of COVID school and labor market closures, which also could have uniquely impacted undocumented students and their families; the 2021 ACS sample may also have been impacted by the 2020 Census concern about undercounting undocumented residents. Another estimate of 2019 is in Jie Zong & Jeanne Batalova, How Many Unauthorized Immigrants Graduate from U.S. High Schools Annually? (2019), MPI [Migration Policy Institute] Factsheet, https://www.migrationpolicy.org/sites/default/files/publications/UnauthorizedImmigrant-HS-Graduates-FactSheet-Final.pdf. A newer set of MPI estimates for the Presidents Alliance is forthcoming but was not yet available at the time of this writing.

182 In lieu of official government estimates, *see* Presidents Alliance and MPI estimates in the immediately preceding footnote.

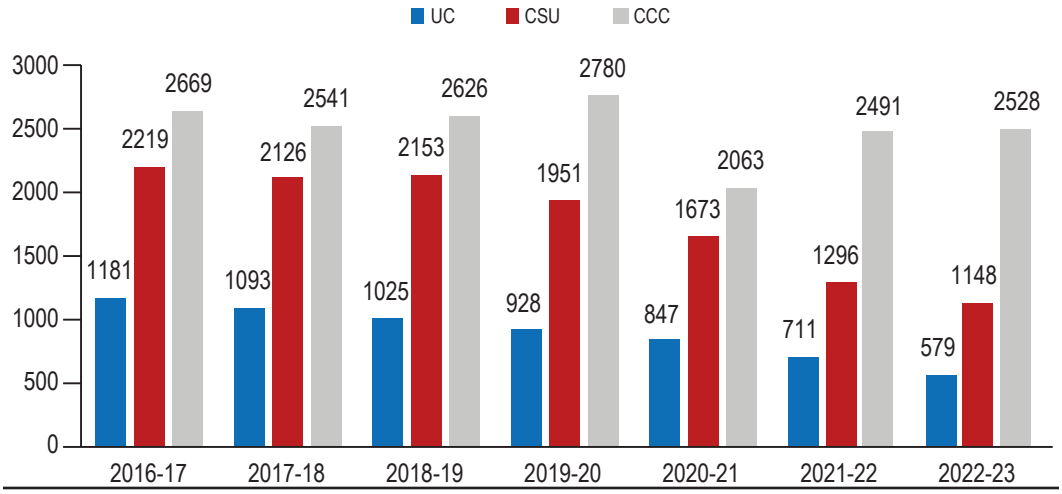
183 CSAC, California Dream Act FAQ's for Students and Parents, https://www.csac.ca.gov/sites/main/files/file-attachments/california_dream_act_faq.pdf?1694549553.

Appendix Figure 1 do not suggest major declines in undocumented high school graduates in California.

On the other hand, the total number of new California Dream Act applications (driven by the larger numbers at the CCCs) were relatively stable in 2015–16 to 2019–20 but then declined in more recent years (again, this may be partly related to COVID but it continued in 2023–24).[184] Concurrently, the percentage of CCC Dream Act offerees who accept these awards has increased substantially (from 61.5% in 2016–17 to 88.8% in 2022–23),[185] which helps to explain the smaller net decline in those receiving CCC Dream Act awards.

Relatedly, it is possible in theory that a higher share of undocumented students in recent years are choosing the CCCs over UC and CSU based on affordability perceptions and ability to lower expenses by staying at home.[186] However, there are large differences in the average high school grades of the CCC Dream Act students (2.97 GPAs) compared to the Dream Act students at UC (3.67 GPAs) and CSU (3.24 GPAs), and the convergence in those average profiles compared to 2016–17 is modest[187], which do not fit with that "cascade to community colleges" hypothesis although we do not have granular data) to test this idea further.[188]

APPENDIX FIGURE 1: New California Dream Act Recipients at UC, CSU and CCC



184 Cal. Student Aid Comm'n, *supra* note 164, at 20 fig. 4.

185 *Id.* (comparing the 2022–23 and 2016–17 versions of this report). Yield rate behavior reflects prior patterns of applications plus students' decisions once a financial aid award is made.

186 In 2016–17, 56% of new Dream Act students attended a UC or CSU (freshmen + transfers), while 44% attended a CCC. However, by 2022–23 only 40% were at UC and CSU, while 60% of new Dream Act students were in the CCCs.

187 The 2022–23 figures above compare to the following averages in 2016–17 for Dream Act offerees: CCCs (2.76 GPAs), UC (3.57 GPAs), and CSU (3.13 GPAs), thus all three segments saw increased GPAs by 2022–23.

188 Cal. Student Aid Comm'n, CAL GRANT PROGRAM New Offered Awardees and Eligible Non-Offered Awardees Average Income, GPA, Family Size, and Age by Segment Award Year 2022–23 2–4 (2023), https://www.csac.ca.gov/sites/main/files/file-attachments/cal_grant_program_averages_2022-23.pdf?1674837311.

A second data source that is longitudinally tracked by the California Department of Education is English Learners[189] by grade, here focusing on twelfth graders because high school graduates are not reported (English Learners includes both documented and undocumented students, but the CCC and English Learner data can be thought of as two bookends, one underinclusive and one overinclusive). Here, too, the English Learner data for twelfth graders in California (see Appendix Table 3 below) do not suggest there was likely a major downward trend in California undocumented high school students, as the twelfth grade English Learner totals were stable in 2015–16 through 2019–20, dipped for one year in 2020–21 (again, likely COVID related), and then reached new highs in 2021–22 and 2022–23.

APPENDIX TABLE 3: Twelfth Grade English Language Learners in California[190]

2015–16	2016–17	2017–18	2018-19	2019–20	2020-21	2021–22	2022–23
49,995	48,053	49,862	50,239	49,012	47,260	51,440	53,928

All told, the evidence reviewed above about alternative hypotheses are mixed. There is some suggestion of decline in California undocumented high school graduates (particularly the Presidents Alliance's microdata estimate for 2021, which may be subject to wider error bands for COVID and other reasons) but not good evidence of dramatic declines, and some of that decline is presumably DACA decline related. More and better data are needed on this question, which will take more time to accumulate.

189 Cal. Dep't Educ., Glossary of Terms, https://dq.cde.ca.gov/dataquest/longtermel/Glossary.aspx (defining an English Learner) (last visited March 1, 2025).

190 Cal. Dep't Educa., English Learners by Language and Grade (2024), from https://dq.cde.ca.gov/dataquest/ (last visited March 1, 2025). English Learner totals for California twelfth graders are here, starting one year prior than the earlier college charts discussed in this article. About 82% of these students have Spanish as their first language.

THE LAW OF TENURE IN THE ERA OF TRUMP:

Attempted Bans, New Reviews, and Threats to Academic Freedom and Property Rights

*MICHAEL W. KLEIN**

Abstract

Beginning in 2015 and continuing over the next decade, legislation aimed at weakening or terminating tenure rights proliferated through Republican-controlled state governments. This rise in partisan challenges to the legal rights of tenured faculty coincided with the culture wars of the 1990s and early 2000s, partly aimed at higher education, that were exploited by Donald Trump and helped get him elected. Trump's policies targeting "divisive issues" like critical race theory, and interpreting diversity, equity, and inclusion (DEI) programs as discriminatory, rippled through state-based legislation that would cripple tenure and stifle academic freedom.

This article traces the early history of tenure in Europe and the United States, and it describes U.S. Supreme Court decisions protecting academic freedom and property rights in tenure. Challenging these rights, Trump's rhetoric and policies, from his first campaign to the first five months in his second term, echoed across state legislation and regulations considered through mid-2025 that jeopardized faculty members' employment if they teach or research diversity or critical race issues (Florida, Alabama), required proof of "intellectual diversity" to attain and retain tenure (Indiana, Ohio), withdrew property rights from tenure (Kansas, Texas), imposed post-tenure reviews (Arkansas, Florida, Georgia, Kentucky), and proposed outright bans on tenure (Iowa, North Carolina, Nebraska).

The Trump administration itself used cuts in federal funding, prohibitions on DEI programs, demands for greater government efficiency, and investigations into alleged violations of Titles VI and IX as leverage to force colleges—and faculty—to comply with its vision of higher education. The situation was compared to the McCarthy era and was called "an existential threat." More broadly, Trump's attempts to control higher education appeared to be part of a more extensive strategy resembling the "illiberal democracy" of Hungary under Prime Minister Viktor Orbán, raising alarms over the rise in the United States of a twenty-first-century model of autocracy called "competitive authoritarianism."

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* Lecturer, Rutgers University, Ph.D. Program in Higher Education Program; instructor, Colorado State University, Student Affairs in Higher Education Program; director of government relations, Pinelands Preservation Alliance. I am grateful to NACUA Editor Barbara Lee and the Editorial Board for inviting me to contribute this article, to Neal Hutchens and an anonymous reviewer for their thoughtful suggestions, to my Princeton mentor Stan Katz for once again helping me answer, "So what?", and to the current political climate for—to paraphrase Yogi Berra—"making this article necessary." YOGI BERRA, THE YOGI BOOK: "I REALLY DIDN'T SAY EVERYTHING I SAID!" 10 (1998). As is the case with every article published in this journal, the views expressed by the author are his alone and not necessarily the views of the National Association of College & University Attorneys.

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Those who won our independence … knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination.

– U.S. Supreme Court Justice Louis Brandeis[1]

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1 Whitney v. Cal., 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

INTRODUCTION

In her 2025 State of the State address, Sarah Huckabee Sanders, the governor of Arkansas who had served as White House press secretary under President Donald Trump from 2017 to 2019,[2] squarely placed tenure within the culture wars of the twenty-first century. She said: "Arkansas students go to our colleges and universities to learn, not to be bombarded with anti-American, historically illiterate, woke nonsense. We will make it so that any professor—tenured or not—that wastes time indoctrinating instead of educating can be terminated from their job."[3] One month later, Senate Bill 246—named the "ACCESS bill" for Acceleration, Common Sense, Cost, Eligibility, and Scholarships[4]—was introduced in the Arkansas Legislature. Among its provisions, the bill allowed a post-tenure review process to result in "removal of tenure status," and it would also allow state-supported institutions of higher education to "require an immediate for[-] cause review of a faculty member, including a faculty member with tenure, at any time"—if among other circumstances—the institution determines that the faculty member "[e]xhibited professional incompetence in the performance of his or her mandatory job duties," or "[e]ngaged in unprofessional conduct that adversely affects the state-supported institution of higher education or the faculty member's performance of duties or meeting of responsibilities."[5] The bill passed quickly through the Arkansas Legislature, and Governor Sanders signed it on March 18, 2025.[6]

The legislation in Arkansas followed an anti-tenure trend that arguably began in 2015 in Wisconsin, and at least seven states in 2025 alone considered legislation "to crack down on tenure at public institutions, either by effectively eliminating it, calling for a stricter system of post-tenure review, or some combination."[7] Building on that foundation, this study scans the decade between 2015 and the spring legislative sessions in 2025 for legal attacks on tenure, encompassing legislation, regulations, and lawsuits challenging the constitutionality of those laws.

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2 Archives of Women's Pol. Comm., Carrie Chapman Catt Center for Women and Politics, Iowa State University, Sarah Huckabee Sanders (2025), https://awpc.cattcenter.iastate.edu/directory/sarah-huckabee-sanders/.

3 Press Release, Arkansas Governor's Office, Governor Sanders Delivers State of the State Address (Jan. 15, 2025), https://governor.arkansas.gov/news_post/governor-sanders-delivers-state-of-the-state-address-2/.

4 Press Release, Arkansas Governor's Office, Sanders Announces Arkansas ACCESS, Higher Education Reform Legislation (Feb. 14, 2025), https://governor.arkansas.gov/news_post/sanders-announces-arkansas-access-higher-education-reform-legislation/.

5 S.B. 246, 95th Gen. Assem., Reg. Sess. (Ark. 2025).

6 Ainsley Platt, *Sanders Signs Higher Education ACCESS Act into Law During Economic Conference*, Ark. Democrat Gazette (Mar. 19, 2025), https://www.arkansasonline.com/news/2025/mar/19/sanders-signs-higher-education-access-act-into/; *see* 2025 Ark. Acts 340.

7 Maya Stahl, *States Are Once Again Taking Aim at Tenure. This Time Might Be Different*. Chron. Higher Educ. (Feb. 27, 2025), https://www.chronicle.com/article/states-are-once-again-taking-aim-at-tenure-this-time-might-be-different.

The backdrop to these state-based actions is the influence of the policies and rhetoric of Donald Trump, as a candidate and as president during each of his terms in office, regarding higher education. His first term's criticism of "divisive concepts,"[8] and his second term's ban on "diversity, equity, and inclusion" programs,[9] spawned legislation in many Republican-led states that jeopardized tenure at public institutions. In 2025, federal civil rights investigations and cuts in federal research funding under the Trump administration put the work of faculty at several Ivy League institutions at risk, with the objective "to shift the ideological tilt of the higher education system, which [Trump and his top aides] see as hostile to conservatives and intent on perpetuating liberalism."[10] This "campaign to expunge 'woke' ideology from college campuses"[11] was just one move in a larger project. From the perspective of "some of Mr. Trump's closest advisers and key donors, leftists have seized control of America's most powerful institutions, including pillars of higher education, and wresting back power is key to the future of Western civilization."[12]

Scholars see the "ideological threads of authoritarianism" in Trump's views of culture and history that threaten to "overturn American democracy."[13] Unlike a dictatorship, however, Trump's approach resembled "a more 21st-century model of autocracy: competitive authoritarianism—a system in which parties compete in elections but incumbent abuse of power systematically tilts the playing field against the opposition."[14] Incumbents under competitive authoritarianism "deploy the machinery of government to punish, harass, co-opt, or sideline their opponents—disadvantaging them in every contest, and, in so doing, entrenching themselves in power."[15]

Hungary under Viktor Orbán's second stint as prime minister, starting in 2010, is a quintessential example of competitive authoritarianism. Orbán himself defined "the new state" he was constructing in Hungary as "an illiberal state, a non-liberal state. It does not reject the fundamental principles of liberalism such as freedom, … but it does not make this ideology the central element of state organization, but instead includes a different, special, national approach."[16] Through "a precise and

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8 Exec. Order No. 13,950, § 2, 85 Fed. Reg. 60,683 (Sept. 28, 2020), revoked by Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

9 Exec. Order No. 14,173, 90 Fed. Reg. 8,633 (Jan. 31, 2025).

10 Michael C. Bender et al., *Inside the Plan to Target Funds for Universities*, N.Y. Times, Apr. 16, 2025, at A1.

11 *Id*.

12 *Id*.

13 Heather Cox Richardson, Democracy Awakening: Notes on the State of America 141 (2023).

14 Steven Levitsky, *The New Authoritarianism*, The Atlantic (Feb. 10, 2025), https://www.theatlantic.com/ideas/archive/2025/02/trump-competitive-authoritarian/681609/. *See also* Steven Levitsky & Lucian A. Way, Competitive Authoritarianism: Hybrid Regimes After the Cold War 5 (2010) ("Such regimes are competitive in that opposition parties use democratic institutions to contest seriously for power, but they are not democratic because the playing field is heavily skewed in favor of incumbents. Competition is thus real but unfair.").

15 Levitsky, *supra* note 14.

16 Prime Minister Viktor Orbán, Speech at the 25th Bálványos Summer Free University and Student

fundamental transformation of political institutions," Orbán and his party, Fidesz, passed a new constitution that increased their power, recast the judiciary, and brought universities and religious groups "under control with registration and other requirements."[17] Orbán's specific actions toward higher education, and the parallels between Orbán and Trump to control universities as one play within a larger authoritarian playbook, are explored in Parts IV and V.

This article relies on the modern conception of tenure, which means a conditional guarantee of faculty employment without a mandatory date of termination.[18] To attain tenure, faculty must persist through a probationary period of peer review, and after attaining this "'Holy Grail' of academic employment,"[19] they may continue to work at their institution until they want to leave, subject to termination only for adequate cause, and with procedural due process protections.[20] As a cornerstone of higher education, tenure protects faculty members' academic freedom to engage in independent scholarly inquiry without fearing political or ideological interference.[21]

I. TENURE: THE FIRST 800 YEARS

A. European Roots of Tenure: From the Holy Roman Empire to Mid-Nineteenth Century Prussia

Laws have protected, at least in some way, the professional status of instructors of higher learning for over eight hundred years. Emperor Fredrick I Barbarossa of Germany and the Holy Roman Empire, to assure that the scholars who taught in medieval universities known as *studia generalia* (universal places of study) could move freely throughout the empire, provided them a type of job security under

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Camp (July 26, 2014), https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp.

17 Ann Grzymala-Busse, *Global Populisms and Their Impact*, 76(S1) Slavic Rev. S3, S7 (2017).

18 William Van Alstyne, *Tenure: A Summary, Explanation, and "Defense,"* 57 AAUP Bull. 328, 328 (1971).

19 Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 Cath. U. L. Rev. 67, 68 (2006).

20 *Id*. at 67. It is important to distinguish between the rights of faculty at public and private institutions. While "the faculty contract … is the starting point for determining both a public and a private institution's responsibilities," "[p]ublic institutions must be concerned … with constitutional considerations under the First and Fourteenth Amendments," including the right to free speech under the First Amendment and the due process clause under the Fourteenth Amendment. William A. Kaplin et al., The Law of Higher Education: Essentials for Legal and Administrative Practice 294, 303, 304 (2024).

21 Michael S. McPherson & Morton Owen Schapiro, *Tenure Issues in Higher Education*, 13 J. Econ. Perspectives 85, 94 (1999). While this article broaches academic freedom, its major focus is the protection of employment under tenure. For an in-depth examination of the law of academic freedom and its five "zones"—"classrooms and laboratories," faculty as "a citizen in the academy," "faculty members as citizens in society," "institutional academic freedom," and "academic freedom for others on campus"—*see* Michael A. Olivas & Amy Gajda, The Law and Higher Education: Cases and Materials on Colleges in Court 135–274 (4th ed. 2016). *See also* Keith E. Whittington, You Can't Teach That! The Battle Over University Classrooms (2024).

a decree issued in 1155 known as the *Authentica Habita*, which guaranteed that scholars traveling within the Holy Roman Empire would receive safe passage, and if they suffered an unlawful injury during their travels, the person committing the unlawful act would reimburse them for their lost wages.[22] As word of the *Authentica Habita* spread through Europe, heads of surrounding nations, including the Roman Papacy, extended similar protection to scholars within their countries.[23]

The protection of a faculty member's freedom of expression has its roots in a major reform made by Wilhelm von Humboldt when he was the minister of education in Prussia between 1809 and 1810: the need for freedom in teaching and learning.[24] This reform led to the establishment of three principles undergirding German universities, which included the unity of teaching and research, self-governance by professors, and academic freedom, or *Lehrfreiheit*.[25]

The concept of *Lehrfreiheit* was enshrined in the Prussian constitution adopted in 1850, which declared that "Science and its teachings shall be free."[26] While the idea of *Lehrfreiheit* did not provide unconditional employment for faculty, "it did institute the belief of freedom of speech within the classroom, as well as establishing a professional environment that promoted research and instruction as the responsibilities of a faculty member without fear of recrimination."[27]

B. Higher Education in the United States: From Colonial Terms of Employment to the Birth of the AAUP

1. Terms of Employment

The issue of "term of employment" for faculty within the American colonial colleges started at Harvard in 1716. The Corporation for Harvard College adopted the Triennial Act, which limited tutor (faculty) appointments to three-year terms with an option for renewal.[28] The Triennial Act addressed a limitation in Harvard's charter. Before its adoption, the Corporation had the authority to dismiss a tutor only for cause.[29] In 1760, Harvard's Corporation added language to its charter limiting the amount of time that a tutor could spend within a specific academic rank to a maximum of eight years.[30]

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22 Matthew J. Hertzog, Protections of Tenure and Academic Freedom in the United States: Evolution and interpretation 24 (2017); *see also* 548 The Heritage of European Universities (Nuria Sanz & Sjur Bergan eds., 2006).

23 Hertzog, *supra* note 22.

24 *Id*. at 29.

25 *Id*.; *see also* Wilhelm Humboldt, The Sphere and Duties of Government (Joseph Coulthard, Jr. trans.) (London: John Chapman, 1854).

26 Prussia Constitution of January 31, 1850, title II, art. 20.

27 Hertzog, *supra* note 22, at 38.

28 *Id*. at 35; *see also* 1 Josiah Quincy, The History of Harvard University (Cambridge: J. Owen, 1840).

29 Hertzog, *supra* note 22, at 38.

30 *Id*.; *see also* 2 Josiah Quincy, The History of Harvard University (Boston: Crosby, Nichols, Lee & Co., 1860).

Like Harvard, other colonial colleges—principally Yale and William and Mary—entered contractual agreements with their faculty members in the mid-eighteenth century, introducing "the concept of faculty retention based on duration of time served in the profession rather than collegial consensus."[31] A common practice was to hire a faculty member to a one-year contract that renewed automatically at the end of the year.[32]

In the nineteenth century, at institutions of higher education across the country, professorships comprising various levels of employment status replaced the tutor system. From lowest to highest, the ranks were instructor, assistant professor, associate professor, and professor.[33] Tutors were now ranked below instructor, creating "a two-class system where a non-promoted tutor could be reappointed after a 3-year term; however, the tutor wouldn't receive the benefit of job security that was awarded to his academically ranked colleagues."[34]

2. The Evolution of Academic Freedom from the Nineteenth Century to the Early Twentieth Century

During the nineteenth century, thousands of Americans who studied at the non-sectarian universities in Germany brought home not only their academic credentials,[35] but also the concept of *Lehrfreiheit*, which provided "academic professionals the freedom to research and present their findings without the fear of retribution from the administration."[36] Before the twentieth century, universities in the United States expected faculty to adhere to the beliefs of the institution, of donors, and of their governing boards.[37]

Academic freedom expanded at the dawn of the twentieth century, but it had its limits, as described by University of Chicago President William R. Harper in his 1903 report to his board of trustees. Quoting a recent convocation address of his, Harper wrote, "Freedom of expression must be given the members of a university faculty, even though it be abused; for, as has been said, the abuse of it is not so great an evil as the restriction of such liberty."[38] Harper proceeded to list six examples of abuse, including when a faculty member "proclaim[s] to the public a truth

31 Hertzog, *supra* note 22, at 36.

32 *Id*.; *see also* Ryan Amacher & Roger Meiners, Faulty Towers: Tenure and the Structure of Higher Education (2004).

33 Hertzog, *supra* note 22, at 36–37; *see also* Fredrick Rudolph, The American College & University (1990).

34 Hertzog, *supra* note 22, at 37; *see also* Christopher Lucas, American Higher Education: A History (2006).

35 Between 1870 and 1900, about 8,000 U.S. college students studied in Germany. Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex L. Rev. 1265, 1269 (1988).

36 Hertzog, *supra* note 22, at 38–39.

37 *Id*. at 14; *see also* Amacher & Meiners, *supra* note 32; Benjamin Ginsberg, The Fall of the Faculty 132, 137–39 (2011).

38 William R. Harper, President's Report (1903), *reprinted in* 1 The Decennial Publications of the University of Chicago, at xxiii (A Committee Appointed by the Senate ed., University of Chicago Press, 1903).

discovered which is yet unsettled and uncertain;" "takes advantage of a classroom [sic] exercise to propagate the partisan views of one or another of the political parties;" "seeks to influence his pupils or the public by sensational methods;" "undertakes to speak authoritatively on subjects which have no relationship to the department in which he was appointed to give instruction;" "undertakes to instruct his colleagues or the public concerning matters in the world at large in connection with which he has had little or no experience;" and "fails to exercise that quality ordinarily called common sense, which, it must be confessed, in some cases the professor lacks."[39] While a professor could "do all of these things and yet remain an officer in the University," Harper wrote that a professor's "resignation will be demanded, and will be accepted, when, in the opinion of those in authority, he has been guilty of immorality, or when for any reason he has proved himself to be incompetent to perform the service called for."[40]

President Nicholas Butler of Columbia University added "loyalty" as a key consideration to retain faculty. In 1921, Butler wrote:

> Security of tenure is desirable, but competence and loyalty are more desirable still, and a secure tenure purchased at the price of incompetence and disloyalty must sound a death-knell to every educational system or institution where it prevails. These are all matters of grave importance in the government of an educational system or an educational institution. They cannot be dismissed with phrases or formulas, but must be met and decided in accordance with sound principle and the public interest.[41]

A prominent case highlighting faculty members' vulnerability over academic freedom, especially when it clashed with a university's administration, occurred in 1900, when Stanford University fired economist Edward Ross. Recruited in 1893, Ross increasingly took public positions—such as opposing the use Asian laborers and supporting railway union strikes—that were sensitive to Jane Stanford, a trustee of the university and the widow of Leland Stanford, the founder of the university who made his fortune building railroads.[42] After Jane Stanford demanded Ross's resignation, university president David Jordan fired Ross in June 1900.[43]

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39 *Id*.

40 *Id*.

41 Nicholas Murray Butler, Scholarship and Service: The Policies and Ideals of a National University in a Modern Democracy 170–71 (1921).

42 William G. Tierney & Estela Mara Bensimon, Promotion and Tenure: Community and Socialization in Academe 23–24 (1996). Ross's opposition to Asian laborers was actually based on White supremacy. As Chinese workers began leaving the United States after enactment of the Chinese Exclusion Act of 1882, Japanese immigrants replaced them, and in a public speech, Ross said Japanese immigrants represented a threat to American workers and should be banned. Champions of capitalism, like the Stanfords, preferred the cheap source of labor provided by immigrants over native-born workers. Sunmin Kim, *Edward A. Ross*, Am. Soc. Ass'n, (Mar. 18, 2024), https://www.asanet.org/edward-a-ross.

43 Hertzog, *supra* note 22, at 4.

3. The AAUP and the Principles of Academic Freedom and Tenure

The precariousness of faculty members' job security led to the creation of the American Association of University Professors (AAUP). In 1915, Arthur Lovejoy, a philosophy professor at Johns Hopkins University who had investigated violations of academic freedom, organized a meeting in New York of 650 faculty members from across the country "with the stated goal of defining academics as professionals and not simply as employees."[44] At the end of the two-day meeting, the attendees established the AAUP, and by the end of 1915, the organization adopted its founding document, the 1915 Declaration of Principles on Academic Freedom and Academic Tenure.[45] The document defined "academic freedom" to have three elements: "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action."[46] With regard to tenure, the document stated: "the tenure of professorships and associate professorships, and of all positions above the grade of instructor after ten years of service, should be permanent (subject to … removal upon charges)."[47] Institutions "gradually began to recognize tenure as a right of faculty" in the years following the publication of the 1915 principles.[48]

The probationary period of ten years was not consistently adopted by institutions,[49] and in 1940, the AAUP issued a new document called the *Statement of Principles on Academic Freedom and Tenure* that reduced the probationary timeframe from ten years to no more than seven years.[50] At the end of the probationary period, "teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies."[51]

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44 *Id*. *See also* Hans-Joerg Tiede, University Reform: The Founding of the American Association of University Professors 2 (2015) ("the AAUP was not founded specifically as the primary defender of academic freedom that it subsequently became: in addition to bringing about changes to the prevailing mode of governance, the association was founded to serve as a national body to speak for the profession as a whole in response to efforts to organize and standardize American higher education").

45 Am. Ass'n Univ. Professors, History of the AAUP, https://www.aaup.org/about/history-aaup (last visited July 8, 2025).

46 Am. Ass'n Univ. Professors, Policy Documents and Reports 292 app. I (10th ed. 2006).

47 *Id*. at 300.

48 Hertzog, *supra* note 22, at 5.

49 *Id*.

50 Am. Ass'n Univ. Professors, 1940 Statement of Principles on Academic Freedom and Tenure 15, https://www.aaup.org/file/1940_Statement_of_Principles.pdf. The 1940 statement was itself a restatement of the principles adopted following a conference organized by the American Council on Education in 1925 to craft a statement of principles on academic freedom and tenure that was shorter than the AAUP's 1915 declaration. This 1925 Conference Statement on Academic Freedom and Tenure was endorsed by the AAUP in 1926. *Id*. at 13.

51 *Id*. at 15. Adequate cause includes incompetence, neglect of duty, moral turpitude, criminal behavior, poor performance, dishonesty, ethical violations, breach of institutional policy, or improper personal conduct, such as sexual harassment or substance abuse. *See* Cathy A. Trower, *What Is Current Policy?*, *in* The Questions of Tenure 32, 57 (Richard P. Chait ed., 2002). For a legal

The 1940 document also fleshed out the meaning of academic freedom. The document stated:

> 1. Teachers are entitled to full freedom in research and in the publication of the results … .
>
> 2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject… .
>
> 3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.[52]

C. Post–World War II, the Red Scare, and Tenure as a Property Right in the 1970s

1. The G.I. Bill, Increases in Enrollment, and the Growth in Faculty

Recognizing a need to help the 15 million returning servicemembers integrate into civilian life as World War II came to an end,[53] Congress passed, and Franklin Roosevelt signed, the Servicemembers' Readjustment Act of 1944, better known as the G.I. Bill.[54] Among other benefits, the G.I. Bill paid for tuition, books, and supplies for one year of college for almost all veterans with one year's service or less, and an additional year of college for each additional year served.[55] The program attracted 2.2 million former servicemembers to enroll in college between 1945 and 1949.[56] This influx of new students led to a hiring spree for faculty members. Between the academic years 1939–40 and 1949–50, the number of faculty at postsecondary institutions in the United States increased 69%, from 146,929 to 246,722.[57]

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examination of the meaning of "financial exigencies," see Michael W. Klein, *Declaring an End to "Financial Exigency"?: Changes in Higher Education Law, Labor, and Finance, 1971–2011*, 38 J.C. & U.L. 221 (2011).

52 Am. Ass'n Univ. Professors, *supra* note 50, at 14.

53 National Archives, Servicemen's Readjustment Act (1944), https://www.archives.gov/milestone-documents/servicemens-readjustment-act.

54 Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, § 400, 58 Stat. 284.

55 Richard M. Freeland, *The World Transformed: A Golden Age for American Universities, 1945–1970*, in The History of Higher Education 590 (Lester F. Goodchild & Harold S. Wechsler eds., 2d ed. 1997).

56 *Id*.

57 Nat'l Center for Educ. Statistics, *Historical Summary of Faculty, Enrollment, Degrees Conferred, and Finances in Degree-Granting Postsecondary Institutions: Selected Academic Years, 1869–70 Through 2020–21*, Dig. Educ. Statistics, table 301.20 (2022), https://nces.ed.gov/programs/digest/d22/tables/dt22_301.20.asp.

2. McCarthyism and the Protection of Academic Freedom by the Supreme Court

The advent of the Cold War, and high-profile cases of Soviet espionage in the United States,[58] tested the strength of tenure policies. Senator Joseph McCarthy of Wisconsin and others accused professors of supporting the Communist Party and, in turn, the Soviets. Accusations—featuring little evidence—against professors at fifty-eight institutions were made between 1947 and 1956,[59] and in 1949, the University of California required faculty to sign a loyalty oath and swear that they were not members of the Communist Party.[60] Although many targeted professors who had been members of the Communist Party had left the party by the 1940s, colleges and universities dismissed them anyway, with tenure providing little protection.[61]

During the McCarthy era, a faculty member in New Hampshire charged under state law with being subversive brought his case to the U.S. Supreme Court to assert his rights under the Fourteenth Amendment, and the decision has become a cornerstone of academic freedom.[62] In 1951, New Hampshire enacted a law under which an individual was identified as a "subversive person" if they aided in any act intended to assist in the alteration of the constitutional form of government or overthrow the government by force or violence.[63] The law prohibited a "subversive person" from state employment, including as teachers at a public educational institution, and it required public employees and candidates for elective office to make a sworn statement that they were not "subversive persons."[64]

On January 5, 1954, the attorney general of New Hampshire, as part of an investigation authorized by the legislature, subpoenaed Paul Sweezy, a guest lecturer at the University of New Hampshire, to testify about his past conduct and associations, including his service during World War II with the Office of Strategic Services.[65] Sweezy denied ever being a member of the Communist Party or part of any program to overthrow the government by force or violence,[66] but he declined to answer questions that "were not pertinent to the subject under inquiry as well

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58 "Ever since Hiroshima, Americans had been taught to depend on nuclear superiority, to assume that the technology involved was uniquely their own. When the Russians matched it, the people felt betrayed. Someone must have given these secrets away. Certainly the Soviets could not have developed such a weapon by themselves. On July 18[, 1950] . . . FBI agents arrested a New York engineer named Julius Rosenberg. A month later his wife Ethel and his friend Morton Sobell joined him in prison. All were charged with transmitting atomic secrets to Russia." David M. Oshinsky, A Conspiracy So Immense: The World of Joe McCarthy 172 (1983).

59 Lionel S. Lewis, Cold War on Campus: A Study of the Politics of Organizational Control 235 (1988).

60 George R. Stewart, The Year of the Oath: The Fight for Academic Freedom at the University of California 20 (1950).

61 Ellen Schrecker, No Ivory Tower: McCarthyism and the Universities 265–66 (1986).

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

63 New Hampshire Subversive Activities Act of 1951, N.H. Rev. Stat. Ann., 1955, ch. 588, *repealed* 1973, N.H. Laws 1011, ch. 532:26, XVIII.

64 N.H. Rev. Stat. Ann., 1955, ch. 588, *supra* note 63.

65 *See Sweezy*, 354 U.S. at 238.

66 *Id*.

as those which transgress the limitations of the First Amendment," including his knowledge of the Progressive Party in New Hampshire and people with whom he was acquainted in the party.[67]

The attorney general summoned Sweezy for a second round of questioning on June 3, 1954, during which Sweezy was asked about a guest lecture he delivered on March 22, 1954 to a class of one hundred students in a humanities course at the University of New Hampshire.[68] Sweezy declined to answer the following questions, saying again that they were not pertinent to the inquiry and they infringed on his rights under the First Amendment:

> "What was the subject of your lecture?"
>
> "Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?"
>
> "Did you advocate Marxism at that time?"
>
> "Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?"
>
> "Did you in this last lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialism?"
>
> "Do you believe in Communism?"[69]

The attorney general brought Sweeny before a trial court, where Sweezy continued to refuse to answer the questions, and the court held him in contempt.[70] Sweezy appealed to the Supreme Court of New Hampshire, alleging his right of political affiliation under the Fourteenth Amendment had been violated, but the court affirmed the lower court's decision.[71] Sweezy appealed again, to the U.S. Supreme Court.

Chief Justice Earl Warren, writing the majority decision, overturned the New Hampshire courts and agreed that the state had infringed Sweezy's constitutional rights and academic freedom. Warren wrote:

> Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.

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67 *Id*. at 239–40, 241–42.

68 *Id*. at 243.

69 *Id*. at 243–44.

70 *See id.* at 244–45.

71 *Id*. at 245; *see also* Wyman v. Sweezy, 100 N.H. 103, 121 A.2d 783 (1956), *rev'd*, Sweezy v. New Hampshire, 354 U.S. 234 (1957).

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. … Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[72]

Going a step further, Justice Felix Frankfurter, quoting a statement from a conference in South Africa in his concurring opinion, articulated the "four essential freedoms" of the university:

> "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[73]

3. The 1970s: Is Tenure a "Property Right"? It Depends

With tenure firmly entrenched nationwide by the mid-to-late 1960s,[74] the next major legal battle involved faculty members' rights to due process when their contracts were not renewed. In *Board of Regents v. Roth*[75] and *Perry v. Sindermann*,[76] the U.S. Supreme Court considered whether faculty members have a right to a fair hearing under the due process clause of the Fourteenth Amendment when the loss of their position deprives them of a "property interest" or a "liberty interest."[77]

In *Roth*, David Roth was hired as an assistant professor of political science at Wisconsin State University-Oshkosh for a fixed term of one academic year, beginning September 1, 1968, and ending June 30, 1969, and he was informed at the end of that year that he would not be rehired.[78] Wisconsin's tenure law at the time made it clear that Roth was in a probationary period, stating: "All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher."[79] Rules promulgated by the Board of Regents required that nontenured teachers must be notified before February 1 whether they would be retained, while "no reason for non-retention need be given,"

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72 *See Sweezy*, 354 U.S. at 250.

73 *Id*. at 263 (quoting The Open Universities in South Africa 10–12. (A statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand)).

74 HERTZOG, *supra* note 22, at 7.

75 408 U.S. 564 (1972).

76 408 U.S. 593 (1972).

77 U.S. CONST. amend. XIV, § 1: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

78 *Roth*, 408 U.S. at 566.

79 *Id*. n.2 (citing Wis. Stat. § 37.31(1) (1967)).

and "[n]o review or appeal is provided in such case."[80] Complying with the rules, the president of Wisconsin-Oshkosh "informed the respondent before February 1, 1969, that he would not be rehired for the 1969–70 academic year," giving "no reason for the decision and no opportunity to challenge it at any sort of hearing."[81] Roth sued in federal court, alleging that the university's failure both to give him notice of any reason for his dismissal and an opportunity for a hearing violated the right to procedural due process under the Fourteenth Amendment.[82]

The key issue framed by the Supreme Court was "whether the [professor] had a constitutional right to a statement of reasons and a hearing on the university's decision not to rehire him for another year."[83] The Court ruled that Roth had no such right because the nonrenewal had not violated either a "liberty" or a "property" interest. With regard to "liberty," the Court wrote:

> The state, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. … In the present case … there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.
>
> Similarly, there is no suggestion that the state, in declining to reemploy the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.[84]

Concluding its consideration of liberty rights, the Court wrote that "all that clearly appears is that [Roth] was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."[85]

Analyzing Roth's property interest, the Court considered Roth's underlying right to a hearing. The Court reasoned:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it … It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
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> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims

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80 *Id*. at 567.

81 *Id*. at 568.

82 *Id*. at 568–69. Roth also asserted rights under the First Amendment, alleging he was not retained because he had made critical statements about the university. *Id*. at 568 n.5.

83 *Id*. at 569.

84 Bd. of Regents v. Roth, 408 U.S. 564, 573–74 (1972).

85 *Id*. at 575.

> of entitlement to those benefits … . Respondent's "property" interest in employment at Wisconsin State University–Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.[86]

The Court determined that under Roth's circumstances, he "surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the university authorities to give him a hearing when they declined to renew his contract of employment."[87]

In a case decided the same day as *Roth*, Robert Sindermann fared better against the Texas state college system than Roth had against the Wisconsin system. Over a ten-year period between 1959 and 1969, Perry worked at three institutions under one-year contracts, serving the last four years at Odessa Junior College. In the 1968–69 academic year, Sindermann was elected president of the Texas Junior College Teachers Association, through which he testified several times before the Texas Legislature and advocated, among other issues, to change Odessa's status from a two-year to a four-year institution, which the Board of Regents opposed.[88] In May 1969, the Board of Regents voted not to offer Sindermann a new contract, and, despite issuing a press release charging him with insubordination, it did not offer an official reason for not renewing his contract and provided no opportunity for a hearing.[89]

Like Roth, Sindermann argued that his administration's failure to provide an opportunity for a hearing had denied him his right to procedural due process under the Fourteenth Amendment.[90] Unlike *Roth*, the Supreme Court found "an interest in continued employment" at the college under "a *de facto* tenure program, and that [Sindermann] had tenure under that program" because he had "legitimately relied upon an unusual provision that had been in the college's official Faculty Guide for many years," which said:

> *Teacher Tenure*: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his coworkers and his superiors, and as long as he is happy in his work.[91]

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86 *Id*. at 577–78.

87 *Id*. at 578.

88 Perry v. Sindermann, 408 U.S. 593, 594–95 (1972).

89 *Id*. at 595.

90 *Id*. Also like Roth, Perry argued that he was not rehired because of his public criticism of the institution, which violated his right to free speech. *Id*.

91 *Id*. at 600.

Sindermann had also relied on guidelines adopted by the Coordinating Board of the Texas College and University System that provided that teachers employed in the state college and university system for seven years or more had "some form of job tenure."[92]

Because of Sindermann's reliance on Odessa College's de facto tenure system, the Court found he had a property interest. According to the Court:

> We have made clear in *Roth* … that "property" interests subject to procedural due process protection are not limited by a few rigid technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." … A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing… . In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." … [W]e agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution." … [S]uch proof would obligate officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.[93]

Taken together, the *Roth* and *Perry* cases provide clear guidance to colleges and universities regarding due process. "Whenever a nonrenewed faculty member has a basis for making a liberty or property interest claim, administrators should consider providing a hearing."[94] Such a hearing reflects the seriousness of potential dismissal, which can "effectively end the individual's academic career."[95] Therefore, "the termination decision should require a detailed, fair review conducted and supported by the judgment of peers."[96]

II. EROSION OF TENURE IN THE RUN-UP TO THE TRUMP ERA

A. The Fragility of Higher Education Finance, Plus the Culture Wars

Before examining efforts between 2015 and 2025 to dilute or dismantle tenure, it is important to understand the shrinking numbers of tenured and tenure-track faculty at institutions of higher education in the United States. According to the American Association of University Professors' analysis of National Center for Education Statistics data, about 39% of all faculty members either had tenure or

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92 *Id*.

93 *Id*. at 601–03.

94 Kaplin et al., *supra* note 20, at 320.

95 Adams, *supra* note 19, at 76.

96 *Id*.

were on the tenure track in 1987, but that share fell to 24% in 2021.[97] Institutions are increasingly relying on contingent faculty who are ineligible for tenure.[98] In 1987, about 47% of faculty at colleges and universities in the United States held contingent appointments, and that number increased to 68% in 2021. Put succinctly by Timothy R. Cain, a professor of higher education at the University of Georgia: "Any conversation about tenure should start with the understanding that most faculty don't have it."[99]

Cost savings significantly explain why institutions employ fewer tenured faculty. A study of changing faculty employment at four-year colleges and universities in the United States found that higher education institutions tend to "employ faculty whose salaries and benefits are relatively less expensive."[100] Explaining further, the authors wrote, "The large gap in compensation between part-time faculty and full-time faculty has certainly contributed to the increasing use of part-time faculty over time … . [T]he slowly deteriorating financial situations at most colleges and universities have led to an over-reliance on contingent academic workers."[101]

In the twenty-first century, the Great Recession of 2007–2009 and then the 2020 recession caused by the COVID-19 pandemic hit higher education hard and led to significant staff reductions. As a result of the Great Recession, in 2010, "state and locally financed educational appropriations for public higher education hit the lowest level … per FTE … in a quarter century, driven by accelerating enrollment growth and modest inflation, and the failure of state and local funding to keep pace with either during the previous two years."[102] At the start of the Great Recession, there was a "relatively widespread announcement of hiring freezes, salary freezes, and work furloughs—particularly at public universities," which "amount to reductions in real earnings."[103] In response to the coronavirus pandemic in spring 2020, colleges and universities suspended in-person classes, causing them to lose "billions of dollars in revenue, and these losses … continued to mount during the subsequent year," while at the same time revenue from campus services like housing and dining shriveled.[104] As enrollment declined by 2.5% between fall 2019 and fall

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97 Am. Ass'n of Univ. Professors, *Data Snapshot: Tenure and Contingency in US Higher Education* (Mar. 2023), https://www.aaup.org/sites/default/files/AAUP%20Data%20Snapshot.pdf.

98 Contingent faculty include those with contract-renewable appointments, who are usually full-time and non-tenure track, and adjunct appointments, who are usually part-time and fixed-term or temporary. *Id*.

99 Stahl, *supra* note 7.

100 Liang Zhang et al., *Changing Faculty Employment at Four-Year Colleges and Universities in the United States*, 22–23 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21827, 2015).

101 *Id*. at 23.

102 St. Higher Educ. Executive Officers, *SHEF: FY2015, State Higher Educ. Finance* 19 (2016). Available at https://sheeo.org/wp-content/uploads/2019/03/SHEF_FY15-2.pdf

103 Sarah E. Turner, *The Impact of the Financial Crisis on Faculty Labor Markets*, *in* How the Financial Crisis and Great Recession Affected Higher Education 175,185 (Jeffrey R. Brown & Caroline M. Hoxby eds., 2015).

104 Robert Kelchen et al., *The Lingering Fiscal Effects of the COVID-19 Pandemic on Higher Education* 2 (Fed. Reserve Bank of Phila., Discussion Paper No. 21–01, 2021).

2020,[105] colleges and universities laid off hundreds of thousands of workers: higher education employment fell 13% between February 2020 and February 2021.[106]

In addition to institutional financial constraints, some scholars ascribe the antipathy toward tenure in part to the "culture wars" of the late twentieth- and early twenty-first centuries.[107] The "culture wars" have been defined as "a conflict between advocates of traditional and progressive values roiling every level of state and civil society" starting around the 1990s, as the "biggest wave of immigration since the first decade of the twentieth century and the changing demographic face of America created a great deal of worry about what 'multiculturalism' meant for national unity."[108] Within the culture wars, scholars identified "a multi-pronged campaign against the so-called liberal academy" by conservative business leaders and foundations that "helped shift U.S. public discourse to the right" and "put the entire academic community on the defensive,"[109] charged with undermining "the basis of Western civilization."[110] The conservative campaign against higher education "demonized professors by stereotyping them as overpaid deadbeats and radicals who indoctrinate their students, write incomprehensible prose, and only work twelve hours a week."[111]

The conservative campaign against higher education appeared to help sway public opinion. Americans' confidence in higher education fell to 36% in 2023, down from 48% in 2018 and 57% in 2015.[112] A poll in 2017 found that only 33% of Republicans and Republican-leaning independents had "a great deal or quite a lot of confidence" in colleges and universities, compared to 56% of Democrats and Democratic-leaning independents.[113] The Republicans cited "their belief that colleges and universities are too liberal and political, that colleges don't allow students to think for themselves and are pushing their own agenda, or that students are not taught the right material or are poorly educated."[114]

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105 *Id*. at 2.

106 Dan Bauman, *A Brutal Tally: Higher Ed Lost 650,000 Jobs Last Year*, Chron. Higher Educ. (Feb. 5, 2021), https://www.chronicle.com/article/a-brutal-tally-higher-ed-lost650-000-jobs-last-year.

107 Ellen Schrecker, *Academic Freedom in the Corporate University*, 93 Radical Tchr. 38, 42 (2012); John Ganz, When the Clock Broke: Con Men, Conspiracists, and How America Cracked Up in the Early 1990s 14–16 (2024).

108 Ganz, *supra* note 107, at 14–15 (citing James Davison Hunter, Culture Wars: The Struggle to Define America (1991)).

109 Schrecker, *supra* note 107, at 42.

110 Ganz, *supra* note 107, at 16.

111 Schrecker, *supra* note 107, at 93.

112 Megan Brenan, *Americans' Confidence in Higher Education Down Sharply*, Gallup (July 11, 2023), https://news.gallup.com/poll/508352/americans-confidence-higher-education-down-sharply.aspx.

113 Frank Newport & Brandon Busteed, *Why Are Republicans Down on Higher Ed?*, Gallup (Aug. 16, 2017), https://news.gallup.com/poll/216278/why-republicans-down-higher.aspx.

114 *Id*.

B. Wisconsin and Governor Scott Walker, 2015

The twenty-first century legislative campaign against tenure arguably began in Wisconsin in 2015. Governor Scott Walker, a political conservative who would soon enter the race for the 2016 Republican nomination,[115] used the deliberations over Wisconsin's 2015–17 biennial budget to remove "the notion of tenure in the university system from state statute" and give authority over tenure to the state's Board of Regents, which oversees the system's thirteen four-year universities.[116]

Within language embedded in the budget, Walker amended the Wisconsin statute governing the University of Wisconsin System by vesting the chancellors of each institution "with the responsibility of administering board policies," including—"in consultation with their faculties"—"defining and administering institutional standards for faculty peer evaluation and screening candidates for appointment, promotion and tenure."[117]

The 2015–17 Wisconsin budget made another significant change to the state's tenure laws. The statute titled "Lapse of appointments" was retitled "Termination due to certain budget or program changes," and the amendment broadened the authority of the Board of Regents to terminate faculty and academic staff. Instead of requiring "a financial exigency to exist," the amendment said "the board may, with appropriate notice, terminate any faculty or academic staff appointment when such an action is deemed necessary due to a budget or program decision requiring program discontinuance, curtailment, modification, or redirection."[118]

In his line-item veto message on the 2015–17 budget, Walker wrote that the tenure-related language "[m]odernizes the concept of tenure by authorizing the Board of Regents to enact such policies."[119] In other remarks, Walker said the changes to tenure were needed "to give the state university system more flexibility and financial leverage," and he also emphasized the cost savings to students

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115 Patrick Healy, *Walker Enters Race, Pledging Unwavering Conservative Agenda*, N.Y. Times, June 14, 2015, at A1. "Mr. Walker described himself as a former Boy Scout and son of the heartland who would defend the 'unborn,' the Americans who oppose same-sex marriage on religious grounds, and more broadly the conservative and traditional citizens who feel under attack from what they consider coastal elites." *Id*.

116 Monica Davey & Tamar Lewin, *Unions Subdued, Walker Turns to Tenure at Wisconsin Colleges*, N.Y. Times, June 2, 2015, at A1.

117 2015 Wis. Sess. Laws 333. The session law, 2015 Wis. Act 55 § 1139g, amended Wis. Stat. § 36.09(3)(a). The Board of Regents adopted the tenure policies in March 2016. Peter Schmidt, *Wisconsin Regents Approve New Layoff and Tenure Policies Over Faculty Objections*, Chron. Higher Educ. (Mar. 10, 2016),https://www.chronicle.com/blogs/ticker/wisconsin-regents-approve-new-layoff-and-tenure-policies-over-faculty-objections.

118 2015 Wis. Sess. Laws 335. The session law, 2015 Wis. Act 55 § 1214g, amended Wis. Stat. § 36.21. In 2016, the Board of Regents adopted policies that eliminated the right for faculty to review proposed program cuts and authorized administrators "to base programmatic decisions solely on profitability concerns rather than on a combination of financial and educational factors." Joseph W. Yockey, *Resolving Regulatory Threats to Tenure*, 57 U. Rich. L. Rev. 579, 603 (2023).

119 Scott Walker, Wis. Act 55 veto message at xi (2015), https://doa.wi.gov/budget/SBO/2015-17%20Veto%20Message.pdf.

resulting from a two-year tuition freeze and a $250 million cut over two years to the University of Wisconsin System under the budget.[120]

Wisconsin's weakening of tenure was "perceived as a bellwether for public universities across the country."[121] Indeed, a national study of thirteen pieces of state legislation to ban tenure that were introduced but not enacted between 2012 and 2022—all but one of which were introduced after 2015—found that "[i]nstead of responding to budget problems, tenure bans seemed to be associated with underlying political hostility toward higher education," and with a state "with unified Republican control of government[,which] was likelier than a state with other governing arrangements to entertain a tenure ban."[122] Moreover, the bills "were concentrated in states where partisan political arrangements and social dynamics suggested skepticism of public higher education… . Such legislation seems intended to remake a higher education system that political partisans dislike rather than to improve operations within that system."[123]

III. STATE-BASED LEGISLATION TO ROLL BACK TENURE IN THE TRUMP ERA, 2017–25

Scott Walker dropped out of the Republican presidential primary race in September 2015 and was among the speakers at the Republican National Convention in 2016 that formally nominated Donald Trump as the party's candidate for president.[124] Trump went on to defeat Hillary Clinton in the general election,[125] and scholars observed that by the end of his term, Trump "had radicalized the Republican Party, and Republican governors competed to pick up his voters."[126] Animating the conservative wing of the Republican Party were ideas from Russian President Vladimir Putin and Hungarian Prime Minister Viktor Orbán that "liberal democracy was obsolete. Because democracy welcomes minorities, immigrants, women, and LGBTQ people as equal, they argue, it undermines the virtue necessary for society to function."[127] During Trump's first term, "the American right openly embraced this ideology," which was reflected in Trump's higher education policies and in several Republican-led states.[128]

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120 Kimberly Hefling, *Walker Erodes College Professor Tenure*, Politico (July 12, 2015), https://www.politico.com/story/2015/07/scott-walker-college-professor-tenure-120009.

121 Karen Herzog, *Tenure at UW System Now Seen as Bellwether by Educators Across U.S.*, Milwaukee J. Sentinel (June 30, 2015), https://archive.jsonline.com/news/education/tenure-at-uw-now-seen-as-bellwether-by-educators-across-us-b99527146z1-310977231.html.

122 Barrett J. Taylor & Kimberly Watts, *Tenure Bans: An Exploratory Study of State Legislation Proposing to Eliminate Faculty Tenure, 2012–2022*, Rev. Higher Educ. 519, 537 (2025).

123 *Id*. at 538.

124 Nick Gass, *Walker 'Absolutely' Endorses Trump*, Politico (July 20, 2016), https://www.politico.com/story/2016/07/rnc-2016-scott-walker-donald-trump-endorsement-225914.

125 Fed. Elections Comm'n, *Federal Elections 2016: Election Results for the U.S. President, the U.S. Senate, and the U.S. House of Representatives* (Dec. 2017), https://www.fec.gov/resources/cms-content/documents/federalelections2016.pdf.

126 Richardson, *supra* note 13, at 250.

127 *Id*. at 141.

128 *Id*. at 142.

A. Influence of Donald Trump and His Evolving Agenda for Higher Education

1. Trump's First Campaign and First-Term Higher Education Policies, 2015–21

During the 2016 campaign, after winning the Nevada caucuses, Donald Trump said, "We won with young. We won with old. We won with highly educated. We won with poorly educated. I love the poorly educated."[129] Trump "rose to prominence by symbolizing, modeling, and espousing particular cultural values," including "anti-intellectualism while attacking traditionally acknowledged authorities on truth, such as (climate) scientists and (mainstream) journalists."[130] By "strategically utilizing fault lines about gender, race/ethnicity, nativism, and authorities on truth," Trump "benefited politically."[131] A study of public opinion data from October 2016 from a large national U.S. sample found that "Trump was able to garner trust and support by tapping into growing anti-intellectual and anti-science strains in American culture and politics," and he "continued to solidify his status by openly criticizing college professors, scientists, journalists, and educators; calling the press 'enemies of the people;' and designating all media reports critical of Trump 'fake news.'"[132]

Once in office, Trump and his administration did not consider "the ability of higher education to support broader goals of the entire nation."[133] In fact, Trump proposed and enacted policies criticizing the cost and value of college, taxing institutional endowments, purportedly enforcing free speech, and targeting the teaching of critical race theory. This skepticism toward higher education influenced legislation in several Republican-led states over the next decade.

a. **Workforce Training Over a College Degree.** Trump expressed a "preference for workforce training over traditional higher education."[134] This position was reflected in an executive order promoting apprenticeships and workforce development programs, which stated, "Higher education … is becoming increasingly unaffordable. Furthermore, many colleges and universities fail to help students graduate with the skills necessary to secure high-paying jobs in today's workforce. Far too many individuals today find themselves with crushing student debt and no direct connection to jobs." [135]

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129 Jennifer C. Kerr, *Trump Overwhelmingly Leads Rivals in Support from Less Educated Americans*, PBS News (Apr. 3, 2016), https://www.pbs.org/newshour/politics/trump-overwhelmingly-leads-rivals-in-support-from-less-educated-americans. In the general election, the fifty counties with a minimum population of 50,000 where the smallest share of the population has bachelor's degrees "are really the places that won Donald Trump the presidency, especially given that a fair number of them are in swing states such as Ohio and North Carolina." Nate Silver, *Education, Not Income, Predicted Who Would Vote for Trump*, FiveThirtyEight (Nov. 22, 2016), https://fivethirtyeight.com/features/education-not-income-predicted-who-would-vote-for-trump/.

130 Chris Knoestera & Matthew Knoestera, *Social Structure, Culture, and the Allure of Donald Trump in 2016*, 45 New Pol. Sci. 33, 34 (2023).

131 *Id*.

132 *Id*. at 55.

133 Allison L. Palmadessa, Higher Education Divided: National Expectations and the Bifurcation of Purpose and National Identity, 1946–2016 at 133, 134 (2020).

134 *Id*. at 134.

135 Exec. Order No. 13,801, 82 Fed. Reg. 28,229 (June 15, 2017), *revoked by* Exec. Order No. 14,016, 86

b. **Tax on Endowments.** Turning to elite colleges and universities, Trump's Tax Cuts and Jobs Act of 2017 took aim at university endowments. In addition to reducing the rate of five of the seven individual income tax brackets and creating a single flat corporate tax rate of 21%,[136] the law imposed a 1.4% excise tax on the net investment income of private institutions with at least five hundred students and with endowments (defined as "the aggregate fair market value of the assets" of the institution) worth at least $500,000 per student.[137] In 2023, fifty-six universities paid about $380 million under the endowment tax.[138] Republican Congressman Tom Reed of New York, a long-time advocate of taxing large college endowments, believed the new tax would "force colleges to open their books" and said, "Hopefully, through this process we bring more transparency to the issue" because endowments accumulate tax-free dollars, and lawmakers should "ask the hard questions of accountability and oversight to say, 'We want to know where the money is going.'"[139]

c. **The First Amendment and "Diverse Debate" on Campus.** In 2019, an executive order threatened colleges and universities with cuts in federal research funding if they violated the First Amendment. The order seemed a reaction to free-speech incidents at the University of California Berkeley, including violent protests that caused the cancelation of an appearance by far-right political commentator Milo Yiannopoulos in 2017,[140] and to a 2018 article by authors from the American Enterprise Institute, a conservative think tank, that suggested, "Taxpayer funds should not be subsidizing research at higher education institutions where the conditions of free inquiry are compromised."[141]

Broadly describing the executive order, Trump said at the signing ceremony, "If a college or university does not allow you to speak, we will not give them money. It's that simple."[142] The executive order itself stated that the policy behind it was to "encourage institutions to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First

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Fed. Reg. 11,089 (Feb. 17, 2021).

136 Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017). The law has been described as "arguably the most sweeping realignment of the US tax code since the Tax Reform Act of 1986." William G. Gale et al., *Sweeping Changes and an Uncertain Legacy: The Tax Cuts and Jobs Act of 2017*, 38 J. Econ. Perspect. 3, 3 (2024).

137 Tax Cuts and Jobs Act, *supra* note 136, at 131 Stat. 2167.

138 Garrett Watson & Daniel Bunn, *New Efforts on Taxing Endowments Raise Questions on Neutrality and Revenue Collection*, Tax Found. (Jan. 28, 2025), https://taxfoundation.org/blog/taxing-endowments-revenue-analysis/.

139 Michael Stratford & Benjamin Wermund, *The New Tax on Harvard*, Politico (Dec. 22, 2017), https://www.politico.com/story/2017/12/22/harvard-tax-college-endowments-252892.

140 Scott Jaschik, *Trump Vows Executive Order on Campus Free Speech*, Inside Higher Ed (Mar. 3, 2019), https://www.insidehighered.com/news/2019/03/04/president-trump-vows-issue-executive-order-barring-research-funds-colleges-dont.

141 Frederick M. Hess & J. Grant Addison, *Restoring Free Inquiry on Campus*, Nat'l Aff. (2018), https://www.nationalaffairs.com/publications/detail/restoring-free-inquiry-on-campus.

142 Andrew Kreighbaum, *Trump Signs Broad Executive Order*, Inside Higher Ed (Mar. 21, 2019), https://www.insidehighered.com/news/2019/03/22/white-house-executive-order-prods-colleges-free-speech-program-level-data-and-risk.

Amendment for public institutions and compliance with stated institutional policies regarding freedom of speech for private institutions."[143]

The enforcement of the executive order was more ambiguous than its intent. The order directed twelve federal grant-making agencies—including the Department of Defense, the Department of Education, the National Science Foundation, and NASA—to coordinate with the Office of Management and Budget to "take appropriate steps, in a manner consistent with applicable law, including the First Amendment, to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies."[144] Anticipating "inconsistent interpretations at federal agencies," Jonathan Friedman, the project director for campus free speech at PEN America, said, "It's essentially an order designed to create a lot of chaos and confusion."[145]

d. **Trump in the Classroom: Critical Race Theory and the 1619 Project.** In his last year in his first term, Trump focused attention on classroom instruction, first at the U.S. military academies and then, more broadly, by invoking the American Revolution. In an executive order titled "Combating Race and Sex Stereotyping," Trump complained about critical race theory and about diversity, equity, and inclusion (DEI) programs without naming either directly, stating:

> many people are pushing a different vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans. This destructive ideology is grounded in misrepresentations of our country's history and its role in the world. … Such ideas may be fashionable in the academy, but they have no place in programs and activities supported by Federal taxpayer dollars.[146]

The executive order prohibited "the United States Uniformed Services"—including the Armed Forces—from teaching any member, including those "attending a military service academy," to "believe any of the divisive concepts" defined in the order. The definitions in the order covered "divisive concepts," "race or sex stereotyping," and "race or sex scapegoating," defined as follows:

> "Divisive concepts" means the concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an

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143 Exec. Order No. 13,864 § 2, 84 Fed. Reg. 11,401 (Mar. 26, 2019).

144 *Id*. § 3.

145 Kreighbaum, *supra* note 142.

146 Exec. Order No. 13,950, *supra* note 8, at § 1.

> individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term "divisive concepts" also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.
>
> "Race or sex stereotyping" means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.
>
> "Race or sex scapegoating" means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.[147]

This executive order quickly inspired several states to replicate its language and prohibitions. By November 2021, nine states passed legislation to ban the teaching of critical race theory, and almost twenty other states introduced or plan to introduce similar legislation.[148]

Trump concluded his first term combatting "a series of polemics grounded in poor scholarship" that "vilified our Founders and our founding," under which "many students are now taught in school to hate their own country, and to believe that the men and women who built it were not heroes, but rather villains."[149] Without naming it, Trump was criticizing the 1619 Project, an initiative of *The New York Times* marking "the 400th anniversary of the beginning of American slavery" that "aims to reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative."[150]

Trump answered the 1619 Project with the President's Advisory 1776 Commission. An executive order signed in November 2020 charged the commission with

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147 *Id*. at § 2. The executive order also prohibited federal contractors from using "use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating." *Id*. at § 4.

148 Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, Brookings Inst. (Nov. 2021), https://www.brookings.edu/articles/why-are-states-banning-critical-race-theory/.

149 Exec. Order No. 13,958, 85 Fed. Reg. 70,951 (Nov. 5, 2020), *revoked by* Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 25, 2021).

150 N.Y. Times Magazine, The 1619 Project (Aug. 8, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html.

producing a report "regarding the core principles of the American founding and how these principles may be understood to further enjoyment of 'the blessings of liberty' and to promote our striving 'to form a more perfect Union'." [151] The commission published its report in January 2021 and criticized how colleges and universities teach the "scholarship of freedom":

> Universities in the United States are often today hotbeds of anti-Americanism, libel, and censorship that combine to generate in students and in the broader culture at the very least disdain and at worst outright hatred for this country.
>
> The founders insisted that universities should be at the core of preserving American republicanism by instructing students and future leaders of its true basis and instilling in them not just an understanding but a reverence for its principles and core documents. Today, our higher education system does almost the precise opposite. Colleges peddle resentment and contempt for American principles and history alike, in the process weakening attachment to our shared heritage.[152]

Without specifying secondary or postsecondary education, the commission outlined elements of a curriculum for civics and government classes. Such classes "should rely almost exclusively on primary sources," including the Declaration of Independence, the U.S. Constitution, and the Federalist Papers.[153] They should "teach students about the philosophical principles and foundations of the American republic, including natural law, natural rights, human equality, liberty, and constitutional self-government" in the following way:

> Students should learn the reasons why our constitutional order is structured as a representative democracy and why a constitutional republic includes such features as the separation of powers, checks and balances, and federalism. They should study the benefits and achievements of our constitutional order, the Civil War's challenge to that order, and the ways the Constitution has been changed—not only by amendment and not always for the better—over the course of time. Finally, these classes ought to culminate in the student's understanding and embracing the responsibilities of good citizenship.[154]

e. **Support for HBCUs.** Despite Trump's intrusions into the curricula and finance of higher education, it must be noted that the first Trump administration implemented several policies that benefited historically black colleges and universities (HBCUs). Trump signed an executive order that established the White House Initiative on HBCUs to "work with agencies, private-sector employers, educational associations, philanthropic organizations, and other partners to

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151 Exec. Order No. 13,958, *supra* note 149, at § 2.

152 President's Advisory 1776 Comm'n, The 1776 Report 18 (2021), https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf.

153 *Id*. at 38, app. IV.

154 *Id*.

increase the capacity of HBCUs to provide the highest quality education to an increasing number of students."[155] In 2018, the Department of Education forgave over $300 million in hurricane relief loans that four HBCUs had incurred to recover from hurricanes Katrina and Rita in 2005.[156] And in 2019, the Fostering Undergraduate Talent by Unlocking Resources for Education (FUTURE) Act provided permanent federal funding for minority serving institutions through the Higher Education Act.[157]

2. Trump's 2024 Campaign and the First One Hundred Days of His Second Term: Escalating Rhetoric and Action Against Higher Education

During his campaign to reclaim the White House in 2024, Donald Trump upped his attack on higher education. During a campaign video in 2023, he said, "The time has come to reclaim our once great educational institutions from the radical Left, and we will do that."[158] He promised to "fire the radical Left accreditors that have allowed our colleges to become dominated by Marxist Maniacs and lunatics," and "impose real standards on colleges" that would include "defending the American tradition and Western civilization, protecting free speech, eliminating wasteful administrative positions that drive up costs incredibly, [and] removing all Marxist diversity, equity, and inclusion bureaucrats."[159] Trump also promised "to direct the Department of Justice to pursue federal civil rights cases against schools that continue to engage in racial discrimination," and institutions "that persist in explicit unlawful discrimination under the guise of equity will not only have their endowment taxed, but through budget reconciliation, I will advance a measure to have them fined up to the entire amount of their endowment."[160] Trump concluded: "Colleges have gotten hundreds of billions of dollars from hard-working taxpayers[,] and now we are going to get this anti-American insanity out of our institutions once and for all."[161]

Trump's nominee to be vice president, Ohio Senator J.D. Vance, shared and perhaps exceeded Trump's antipathy toward higher education. In a keynote address to the National Conservatism Conference in 2021, Vance—then a candidate for the Senate—said, "I think if any of us want to do the things that we want to do for our country and for the people who live in it, we have to honestly and aggressively attack the universities in this country."[162] He declared that "universities do not

155 Exec. Order No. 13,779, 82 Fed. Reg. 12,449 (Mar. 3, 2017).

156 Danielle Douglas-Gabriel, *Education Department Forgives $322 Million in Loans to Help Historically Black Colleges Recover from Hurricanes*, Wash. Post (Mar. 15, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/03/15/education-department-forgives-322-million-in-loans-to-help-historically-black-colleges-recover-from-hurricanes/.

157 Pub. L. No. 116-91, 133 Stat. 1189 (2019).

158 Agenda47, *Protecting Students from the Radical Left and Marxist Maniacs Infecting Educational Institutions* (May 2, 2023), https://www.donaldjtrump.com/agenda47/agenda47-protecting-students-from-the-radical-left-and-marxist-maniacs-infecting-educational-institutions.

159 *Id*.

160 *Id*.

161 *Id*.

162 National Conservatism, *J.D. Vance | The Universities are the Enemy | National Conservatism Conference*

pursue knowledge and truth, they pursue deceit and lies," and he stated that universities "care more about fake culture wars[,] … identity politics[, and] … diversity, equity, and inclusion than they do their own society and … the people who live in it."[163] Vance concluded his speech by quoting Richard Nixon:[164] "The professors are the enemy."[165]

During his campaign, Trump pledged to eliminate the Department of Education,[166] and he took early steps to do just that. Although legislation is constitutionally required to eliminate a federal department—"[p]rimary constitutional responsibility for the structural organization of the executive branch, as well as the creation of the principal components of that branch, rests with Congress"[167]—Trump signed an executive order on March 20, 2025, that required Secretary of Education Linda McMahon "to the maximum extent appropriate and permitted by law, take all necessary steps to facilitate the closure of the Department of Education and return authority over education to the States and local communities."[168] Trump's first proposed budget would start starving the Department of Education of funding, cutting $12 billion, [169] or 15.3%,[170] after the staff had already been pared by 1,900 employees through a combination of layoffs, deferred resignations, and buyouts.[171]

In addition to proposing to dismantle the Department of Education, the Trump administration, in its first weeks in office, employed a "flood the zone" strategy to enact its agenda "at breakneck speed as part of an intentional plan to knock his

II, YouTube (Nov. 10, 2021), https://www.youtube.com/watch?v=0FR65Cifnhw.

163 *Id*.

164 Vietnam, October 1972–January 1973, at 678 (John M. Carland ed., 2010).

165 *Id*.

166 Steve Inskeep & Taylor Haney, *What Trump's Pledge to Close Dept. of Education Means for Students, GOP-Led States*, Morning Edition (Nov. 15, 2024), https://www.npr.org/2024/11/14/nx-s1-5181966/a-look-at-the-potential-impact-of-shutting-down-the-department-of-education.

167 Henry B. Hogue, *Abolishing a Federal Agency: The Interstate Commerce Commission*, Cong. Res. Serv. 24 (Jan. 10, 2024), https://www.congress.gov/crs_external_products/R/PDF/R47897/R47897.2.pdf. "Congress, in exercising its powers to legislate under Article I, Section 8, and other provisions of the Constitution, is empowered to provide for the execution of those laws by officers appointed pursuant to the Appointments Clause (art. II, § 2, cl. 2). In addition, under the Necessary and Proper Clause (art. 1, § 8, cl. 18), Congress has the authority to create and locate offices, establish their powers, duties, and functions, determine the qualifications of officeholders, prescribe their appointments, and generally promulgate the standards for the conduct of the offices." *Id*. at 24 n.151.

168 Exec. Order No. 14,242, 90 Fed. Reg. 13,679 (Mar. 25, 2025).

169 Katherine Knott, *What Trump's Proposed Budget Cuts Mean for Education, Research*, Inside Higher Ed (May 2, 2025), https://www.insidehighered.com/news/government/student-aid-policy/2025/05/02/trump-proposes-deep-cuts-education-and-research.

170 Natalie Schwartz, *Trump's FY26 Budget Plan Slashes Education Department Programs*, Higher Ed Dive (May 2, 2025), https://www.highereddive.com/news/trumps-fy26-budget-plan-slashes-education-department-programs/747060/.

171 Eric Kelderman, *Trump's Education Secretary Described a 'Final Mission.' Now She's Enacting Mass Layoffs*, Chron. Higher Educ. (Mar.11, 2025), https://www.chronicle.com/article/trumps-education-secretary-described-a-final-mission-now-shes-enacting-mass-layoffs.

opponents off balance and dilute their response."[172] With regard to higher education, that agenda included eliminating DEI programs, punishing the recognition of transgender athletes, and addressing antisemitism on college campuses.

a. **Continued Attacks on DEI.** On his first full day back in office, Trump signed an executive order terminating DEI programs in the federal government and calling for the enforcement of civil rights laws against DEI programs in the "private sector."[173] Moreover, the executive order required each federal agency to "identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars."[174]

The following month, the Department of Education's Office of Civil Rights distributed a "Dear Colleague" letter asserting that the U.S. Supreme Court's decision in *Students for Fair Admissions v. Harvard*[175]applied not only to admissions but also to the consideration of race in "hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life."[176]

Another executive order aiming to reform accreditation prohibited institutional DEI programs and claimed, dubiously, to protect academic freedom.[177] The order authorized the Department of Education to deny, monitor, suspend, or terminate an accreditor's recognition if it requires institutions "seeking accreditation to engage in unlawful discrimination in accreditation-related activity under the guise of 'diversity, equity, and inclusion' initiatives."[178] The Department is also required to ensure that "accreditation requires that institutions support and appropriately prioritize intellectual diversity amongst faculty in order to advance academic freedom, intellectual inquiry, and student learning."[179]

b. Transgender Athletes and Title IX. Trump signed an executive order directed against trans women athletes that, among other provisions, prioritized Title IX enforcement actions "against educational institutions … that deny female students an equal opportunity to participate in sports and athletic events by requiring them, in the women's category, to compete with or against or to appear unclothed

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172 Luke Broadwater, *Trump's 'Flood the Zone' Strategy Leaves Opponents Gasping in Outrage*, N.Y. Times (Jan. 28, 2025), https://www.nytimes.com/2025/01/28/us/politics/trump-policy-blitz.html.

173 Exec. Order No. 14,173, *supra* note 9.

174 *Id*.

175 600 U.S. 181 (2023).

176 U.S. Dep't Educ., Dear Colleague Letter (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf. On April 24, 2025, a federal court enjoined the Department of Education from "enforcing and/or implementing" the Dear Colleague letter. Nat'l Educ. Ass'n v. United States Dep't of Educ., No. 25-CV-091-LM (D.N.H. Apr. 24, 2025).

177 Exec. Order No. 14,279, 90 Fed. Reg. 17529 (Apr. 23, 2025).

178 *Id*.

179 *Id*.

before males."[180] This executive order built on an executive order signed by Trump on his first day back in office that declared a national policy "to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality."[181] The executive order defined "sex" to "refer to an individual's immutable biological classification as either male or female. 'Sex' is not a synonym for and does not include the concept of 'gender identity.'" Moreover, the executive order directed the attorney general to provide guidance to federal agencies to undo the Biden administration's position that *Bostock v. Clayton County*—which held that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sexual orientation or gender identity[182]—requires "gender identity-based access to single-sex spaces under, for example, Title IX."[183]

c. **Antisemitism Investigations.** Another executive order required federal agencies to report authorities and actions within their jurisdiction that could "curb or combat anti-Semitism," and to report "all pending administrative complaints …against or involving institutions of higher education alleging civil-rights violations related to or arising from post-October 7, 2023, campus anti-Semitism."[184] Pursuant to the executive order, the Department of Education's Office of Civil Rights quickly opened Title VI investigations into five institutions "where widespread antisemitic harassment has been reported": Columbia University, Northwestern University, Portland State University, the University of California, Berkeley, and the University of Minnesota, Twin Cities.[185] The investigations were "in response to the explosion of antisemitism on American campuses following the Hamas massacre of Israeli civilians on Oct. 7, 2023."[186]

The antisemitism executive order also spurred the formation of the Task Force to Combat Anti-Semitism, composed of representatives from the departments of Justice, Education, and Health and Human Services, with a priority to "root out anti-Semitic harassment in schools and on college campuses."[187] On February 28, 2025, the task force announced it would be "visiting 10 university campuses that have experienced antisemitic incidents since October 2023" and "may have failed

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180 Exec. Order No. 14,201, 90 Fed. Reg. 9,279 (Feb. 11, 2025).

181 Exec. Order No. 14,168, 90 Fed. Reg. 8,615 (Jan. 30, 2025).

182 590 U.S. 644 (2020).

183 Exec. Order No. 14,168, *supra* note 181.

184 Exec. Order No. 14,188, 90 Fed Reg. 8,847 (Feb. 3, 2025). October 7, 2023, was the day Hamas attacked Israel, sparking a war in Gaza. Patrick Kingsley & Isabel Kershner, *Palestinian Militants Stage Attack on Israel*, N.Y. Times (Oct. 8, 2023), at A1.

185 Press Release, U.S. Dep't Educ., U.S. Department of Education Probes Cases of Antisemitism at Five Universities (Feb. 3, 2025), https://www.ed.gov/about/news/press-release/us-department-of-education-probes-cases-of-antisemitism-five-universities.

186 *Id*.

187 Press Release, U.S. Dep't Just., Justice Department Announces Formation of Task Force to Combat Anti-Semitism (Feb. 3, 2025), https://www.justice.gov/opa/pr/justice-department-announces-formation-task-force-combat-anti-semitism.

to protect Jewish students and faculty members from unlawful discrimination."[188]

On March 10, 2025, the Education Department sent warning letters to sixty universities under investigation for Title VI violations related to "antisemitic harassment and discrimination."[189] The sixty institutions included the five institutions already being directly investigated,[190] plus fifty-five additional universities "under investigation or monitoring in response to complaints" filed with the department's Office of Civil Rights.[191]

d. **Extended Reach into Classrooms and Cultural Institutions.** Extending the reach of the executive order from his first term that prohibited the Armed Forces from teaching "divisive concepts,"[192] Trump signed an executive order on January 27, 2025 mandating specific concepts to be taught and a review of curriculum and instructors at the U.S. military academies. The new executive order prohibited the "Department of Defense and the Armed Forces, including any educational institution operated or controlled thereby … from promoting, advancing, or otherwise inculcating the following un-American, divisive, discriminatory, radical, extremist, and irrational theories."[193] In addition to repeating the definition of "divisive concepts" and "race or sex stereotyping" from the 2020 executive order, the 2025 order prohibited the military academies from teaching "that America's founding documents are racist or sexist."[194] It further ordered the secretaries of Defense and Homeland Security to "review the leadership, curriculum, and instructors of the United States Service Academies and other defense academic institutions associated with their respective Departments to ensure alignment with" the order, and required the institutions "to teach that America and its founding documents remain the most powerful force for good in human history."[195]

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188 Press Release, U.S. Dep't Just., Federal Task Force to Combat Antisemitism Announces Visits to 10 College Campuses that Experienced Incidents of Antisemitism (Feb. 28, 2025), https://www.justice.gov/opa/pr/federal-task-force-combat-antisemitism-announces-visits-10-college-campuses-experienced. The ten institutions were Columbia University; George Washington University; Harvard University; Johns Hopkins University; New York University; Northwestern University; the University of California, Los Angeles; the University of California, Berkeley; the University of Minnesota; and the University of Southern California. *Id*.

189 Press Release, U.S. Dep't Educ., U.S. Department of Education's Office for Civil Rights Sends Letters to 60 Universities Under Investigation for Antisemitic Discrimination and Harassment (Mar. 10, 2025), https://www.ed.gov/about/news/press-release/us-department-of-educations-office-civil-rights-sends-letters-60-universities-under-investigation-antisemitic-discrimination-and-harassment.

190 Press Release, *supra* note 185.

191 Press Release, *supra* note 189.

192 Exec. Order No. 13,950, *supra* note 8.

193 Exec. Order No. 14,185, 90 Fed. Reg. 8,763 (Feb. 3, 2025).

194 *Id*.

195 *Id*. One faculty member at West Point described the executive order and a subsequent implementation memo from the Secretary of Defense as "brazen demands to indoctrinate, not educate," which led to "a sweeping assault on the school's curriculum and the faculty members' research." Graham Parsons, *West Point Is Supposed to Educate, Not Indoctrinate*, N.Y. Times, May 12, 2025, at A22.

Mirroring the language of the President's Advisory 1776 Commission, an executive order from March 2025, titled "Restoring Truth and Sanity to American History," lamented "a concerted and widespread effort to rewrite our Nation's history, replacing objective facts with a distorted narrative driven by ideology rather than truth."[196] The executive order singled out the Smithsonian Institution for coming "under the influence of a divisive, race-centered ideology. This shift has promoted narratives that portray American and Western values as inherently harmful and oppressive."[197] The order called on the leadership of the Smithsonian to "remove improper ideology," and it pledged that future appropriations would prohibit "exhibits or programs that degrade shared American values, divide Americans based on race, or promote programs or ideologies inconsistent with Federal law and policy."[198] Beyond the Smithsonian, the order directed the Secretary of the Interior to determine whether "public monuments, memorials, statues, markers, or similar properties within the Department of the Interior's jurisdiction have been removed or changed to perpetuate a false reconstruction of American history, inappropriately minimize the value of certain historical events or figures, or include any other improper partisan ideology."[199]

Many of these measures, and their direct effect through federal actions on tenure and academic freedom, are explored in Part IV. This article, with its focus on tenure, does not provide a comprehensive list of all the initiatives taken by the second Trump administration against higher education. The American Council on Education maintains a thorough accounting of the Trump administration's higher education initiatives, encompassing federal funding and government restructuring; the Department of Education and civil rights; DEI; immigration and international students; and gender and Title IX.[200]

Against this federal backdrop, there was also "[a]n equally important revolution … occurring at the state and local level" challenging "the status quo in higher education."[201] Between 2017 and 2025, Republican-controlled states, some explicitly following Trump's lead, pursued legislation targeting higher education, particularly faculty. To be clear, no state has yet "fully banned tenure at public institutions."[202] But the parade of initiatives included attempting to end tenure, removing property rights from tenure, and imposing post-tenure reviews that could result in the dismissal of tenured faculty. Academic freedom was in jeopardy, too, with requirements for intellectual diversity in teaching, and mechanisms for students to report faculty interference with intellectual diversity.

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196 Exec. Order No. 14,253, 90 Fed Reg. 14,563 (Apr. 3, 2025).

197 *Id*.

198 *Id*.

199 *Id*.

200 Am. Council on Educ., *Higher Education & The Trump Administration* (2025), https://www.acenet.edu/Policy-Advocacy/Pages/2025-Trump-Administration-Transition.aspx.

201 Richard Vedder, *Ohio Takes the Lead Against Woke Schools*, Wall St. J., Mar. 28, 2025, at A13.

202 Ryan Quinn, *A General Counsel Seeks to Eviscerate Tenure After Being Sued for Ignoring It*, Inside Higher Ed (Feb. 25, 2025), https://www.insidehighered.com/news/faculty-issues/tenure/2025/02/25/top-lawyer-targets-tenure-after-being-sued-ignoring-it.

B. Threats to Academic Freedom

1. Florida, 2023 Legislation

Building on Trump's first-term policies and filling the void while he was out of office, Florida seemed to become "the center of gravity for a lot of conservative policymaking."[203] Florida Governor Ron Desantis, who had presidential aspirations of his own, pursued many policies "as part of an explicit new culture war, which he frames as pitting conservative values against 'woke' policies and perspectives," which had "significant and negative implications for freedom of expression in the state."[204]

In reviewing state legislation across the country in 2021, PEN America coined the phrase "educational gag orders" to describe legislation that restricts teaching issues related to race, racism, gender, and American history "designed to chill academic and educational discussions and impose government dictates on teaching and learning."[205] Two years later, Florida enacted "arguably 2023's most censorious gag order."[206]

The legislation, coupled with its accompanying regulations, potentially imperiled faculty members' pay if they taught or researched certain concepts. The legislation, enacted on July 1, 2023, prohibited two ways in which Florida's public colleges and universities could expend "any state or federal funds to promote, support, or maintain any programs or campus activities."[207] First, programs or campus activities cannot violate the Florida Educational Equity Act, which prohibits discrimination "on the basis of race, color, national origin, sex, disability, religion, or marital status against a student or an employee in the state system of public K-20 education."[208] Discrimination under the act includes subjecting "any student or employee to training or instruction that espouses, promotes, advances, inculcates, or compels such student or employee to believe" any of eight specific concepts—quite similar to "divisive concepts" delineated in Trump's 2020 executive order[209]—including

> A person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex. …
>
> A person, by virtue of his or her race, color, national origin, or sex, bears responsibility for, or should be discriminated against or receive adverse

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203 Tim Craig, *GOP Lawmakers Follow Florida's Lead with DeSantis Copycat Bills*, Wash. Post (Feb. 9, 2023), https://www.washingtonpost.com/nation/2023/02/09/ron-desantis-florida-governor-bills/.

204 PEN Am., *The Florida Effect: How the Sunshine State is Driving the Conservative Agenda on Free Expression* (Nov. 28, 2023), https://pen.org/report/the-florida-effect/.

205 PEN Am., *Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach* 4 (2021), https://pen.org/wp-content/uploads/2021/11/PEN_EducationalGagOrders_01-18-22-compressed.pdf.

206 PEN Am., *America's Censored Classrooms 2023* (Nov. 9, 2023), https://pen.org/report/americas-censored-classrooms-2023/.

207 2023 Fla. Laws 1015, 1020–21.

208 Fla. Stat. § 1000.05(2)(a) (2025).

209 Exec. Order No. 13,950, *supra* note 8; *see also supra* text accompanying notes 146–47.

> treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex.
>
> A person, by virtue of his or her race, color, national origin, or sex, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.
>
> A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.
>
> Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, national origin, or sex to oppress members of another race, color, national origin, or sex.[210]

Second, public colleges and universities cannot expend funds on programs or campus activities that "[a]dvocate for diversity, equity, and inclusion, or promote or engage in political or social activism, as defined by rules of the State Board of Education and regulations of the Board of Governors."[211]

Four definitions under the Board of Governors' regulations implementing the second category of prohibited expenditures are the key to understanding the law's effect on the protections of tenure. First, the regulations define "diversity, equity and inclusion" as "any program, campus activity, or policy that classifies individuals on the basis of race, color, sex, national origin, gender identity, or sexual orientation and promotes differential or preferential treatment of individuals on the basis of such classification."[212] The regulations define "political or social activism" as "any activity organized with a purpose of effecting or preventing change to a government policy, action, or function, or any activity intended to achieve a desired result related to social issues, where the university endorses or promotes a position in communications, advertisements, programs, or campus activities."[213] "Social issues" are "topics that polarize or divide society among political, ideological, moral, or religious beliefs."[214]

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210 Fla. Stat. § 1000.05(4)(a). The law states that the provision regarding training or instruction "may not be construed to prohibit discussion of the concepts listed therein as part of a larger course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts." *Id*. at § 1000.05(4)(b). These provisions regarding training and instruction were added by H.B. 7, 2022 Leg. (Fla. 2022); 2022 Fla. Laws 534. In *Pernell v. Florida Board of Governors of the State University System*, 641 F. Supp. 3d 1218, 1287 (2022), the court imposed a preliminary injunction against enforcement of the law, finding that its provisions "unconstitutionally discriminate on the basis of viewpoint in violation of the First Amendment and are impermissibly vague in violation of the Fourteenth [Amendment]." The Eleventh Circuit denied the Board of Governor's motion to stay the injunction pending appeal. Pernell v. Florida Bd. of Governors of the State Univ., 2023 U.S. App. LEXIS 6591 (11th Cir. Mar. 16, 2023).

211 2023 Fla. Laws 1021.

212 Fla. Bd. Governors Regul. ch. 9.016(1)(a).1. (2025).

213 *Id*. at ch. 9.016(1)(a).2.

214 *Id*. at ch. 9.016(1)(a).3.

The regulations list three categories of programs and campus activities.[215] The first and most significant category is "[a]cademic programs subject to review as outlined in sections 1001.706(5)(a) and 1007.25, Florida Statutes, other than classroom instruction." Statutory section 1001.706(5)(a), part of the 2023 legislation, requires the Board of Governors to "periodically review the mission" of each public university, after which the board must review "existing academic programs for alignment with the mission."[216] This review of academic programs must include

> a directive to each constituent university regarding its programs for any curriculum that violates [the Florida Educational Equity Act] or that is based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social political, and economic inequities.[217]

Statutory section 1007.25, amended by the 2023 legislation, focuses on the curriculum for "general education core courses."[218] The 2023 amendment added the following language:

> General education core courses may not distort significant historical events or include a curriculum that teaches identity politics, violates [the Florida Educational Equity Act], or is based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities.[219]

The second and third categories of "programs or campus activities" that cannot receive state or federal funds involve "[s]tudent participation, other than classroom instruction," and "[h]iring, recruiting, evaluating, promoting, disciplining, or terminating university employees or contractors."[220]

These regulatory definitions have been criticized as "overly vague, broad, and punitive," and for going "far beyond the requirements of the law; they will chill speech of faculty and students and are primed for over-application and abuse."[221] PEN America has noted, "The Supreme Court has long held that the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.'"[222]

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215 *Id*. at ch. 9.016(1)(a).4.

216 Fla. Stat. § 1001.706(5)(a) (2025).

217 2023 Fla. Laws 1015, 1017; Fla. Stat. § 1001.706(5) (2025).

218 Under Florida law, "general education core courses" consist of "a maximum of five courses within each of the subject areas of communication, mathematics, social sciences, humanities, and natural sciences," and "must contain high-level academic and critical thinking skills and common competencies that students must demonstrate to successfully complete the course." Fla. Stat. § 1007.25(a), (b) (2025).

219 2023 Fla. Laws 1015, 1026; Fla. Stat. § 1007.25(3)(c).

220 Fla. Bd. of Governors Regul. ch. 9.016 (2025).

221 PEN America, PEN America Submits Comment to Florida Board of Governors on Policy that "Will Chill Speech of Faculty and Students" (Dec. 21, 2023), https://pen.org/pen-america-submits-comment-to-florida-board-of-governors-on-policy-that-will-chill-speech-of-faculty-and-students/.

222 PEN America, *The Florida Effect* (Nov. 28, 2023), quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

2. Alabama, 2024 Legislation

Described as "a 'classic' educational gag order, with language drawn from the Trump administration's 2020 executive order 'combating race and sex stereotyping,'"[223] Senate Bill 129 became law in Alabama in 2024 and put tenured faculty at risk.[224] The law prohibits public institutions of higher education from requiring "its students, employees, or contractors to attend or participate in any diversity, equity, and inclusion program or any training, orientation, or course work that advocates for or requires assent to a divisive concept."[225] "Divisive concept" means any of the following eight concepts, which bear a striking resemblance to the divisive concepts delineated in Donald Trump's "Combating Race and Sex Stereotyping" executive order:[226]

> a. That any race, color, religion, sex, ethnicity, or national origin is inherently superior or inferior.
>
> b. That individuals should be discriminated against or adversely treated because of their race, color, religion, sex, ethnicity, or national origin.
>
> c. That the moral character of an individual is determined by his or her race, color, religion, sex, ethnicity, or national origin.
>
> d. That, by virtue of an individual's race, color, religion, sex, ethnicity, or national origin, the individual is inherently racist, sexist, or oppressive, whether consciously or subconsciously.
>
> e. That individuals, by virtue of race, color, religion, sex, ethnicity, or national origin, are inherently responsible for actions committed in the past by other members of the same race, color, religion, sex, ethnicity, or national origin.
>
> f. That fault, blame, or bias should be assigned to members of a race, color, religion, sex, ethnicity, or national origin, on the basis of race, color, religion, sex, ethnicity, or national origin.
>
> g. That any individual should accept, acknowledge, affirm, or assent to a sense of guilt, complicity, or a need to apologize on the basis of his or her race, color, religion, sex, ethnicity, or national origin.
>
> h. That meritocracy or traits such as a hard work ethic are racist or sexist.[227]

The law authorizes public institutions of higher education to "discipline or terminate" any employee "who knowingly violates" the law.[228]

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223 PEN America, *America's Censored Classrooms 2024* (Oct. 8, 2024), https://pen.org/report/americas-censored-classrooms-2024. *See supra* text accompanying notes 131–32.

224 S.B.129 enrolled (Ala. 2024); Ala. Code § 41-1-91 (2024).

225 Ala. Code § 41-1-91(3).

226 Exec. Order No. 13,950, *supra* note 8. *See supra* text accompanying notes 146–47.

227 Ala. Code § 41-1-90(2) (2024).

228 Ala. Code § 41-1-92.

The law provides exceptions based on objectivity and historical accuracy, and it claims it upholds academic freedom. The law explicitly states that it does not prohibit

- public institutions of higher education "from authorizing the teaching or discussion of any divisive concept in an objective manner and without endorsement as part of a larger course of academic instruction, provided the institution and its employees do not compel assent to any divisive concept," or
- "the teaching of topics or historical events in a historically accurate context."[229]

Moreover, the law asserts that no provision "[m]ay be construed to inhibit or violate the First Amendment rights of any student or employee, or to undermine the duty of a public institution of higher education to protect, to the greatest degree, academic freedom, intellectual diversity, and free expression."[230]

The exception for teaching a divisive concept "in an objective manner" may not, in the end, prove helpful. Tyler Coward, lead counsel for government affairs at the Foundation for Individual Rights and Expression, said the carveout "doesn't really do the job."[231] First, the legislation does not define "objectivity." Second, academic freedom includes the right for faculty to take positions in classroom discussions,[232] which the law seems to forbid. Ultimately, the language of the bill makes it "unclear to faculty what they can or cannot say in the classroom," Coward said.[233]

3. Indiana

a. **2024 Legislation and Subsequent Court Challenges.** Directly engaging in the culture wars and invoking the student protests that followed the October 2023 Hamas attack on Israel and the subsequent war in Gaza, Indiana Senator Spencer Deery introduced Senate Bill 202 in 2024 to address "the hyper-politicalization and monolithic thinking of American higher education institutions."[234] While acknowledging that "infringing on academic freedom is a red line we should not cross," Deery said "we don't need to give up on those values to curb the excessive politicalization and viewpoint discrimination that threaten our state's workforce goals."[235]

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229 Ala. Code § 41-1-93.

230 *Id*.

231 Ryan Quinn, *As Alabama Republicans Target DEI, They Propose 'Gag Order' on Professors*, Inside Higher Ed (Mar. 1, 2024), https://www.insidehighered.com/news/faculty-issues/academic-freedom/2024/03/01/ala-gop-targets-dei-it-proposes-professor-gag-order.

232 Am. Ass'n Univ. Professors, *supra* note 50.

233 Quinn, *supra* note 231.

234 Laura Spitalniak, *Indiana Proposal to Overhaul Tenure Moves Forward*, Higher Ed Dive (Feb. 9, 2024), https://www.highereddive.com/news/indiana-proposal-to-overhaul-tenure-moves-forward/707155/.

235 *Id*.

Senate Bill 202, signed into law on March 13, 2024, and effective July 1, 2024,[236] embedded faculty viewpoints into the processes for granting and reviewing tenure. The legislation required each board of trustees of the public four-year colleges and universities in Indiana[237] to establish a policy providing that a faculty member may not be granted tenure or a promotion if, based on past performance or other determination by the board of trustees, the faculty member is

> 1. unlikely to foster a culture of free inquiry, free expression, and intellectual diversity within the institution;
>
> 2. unlikely to expose students to scholarly works from a variety of political or ideological frameworks that may exist within and are applicable to the faculty member's academic discipline; or
>
> 3. likely, while performing teaching duties within the scope of the faculty member's employment, to subject students to political or ideological views and opinions that are unrelated to the faculty member's academic discipline or assigned course of instruction.[238]

The law also required the boards of trustees to establish a five-year post-tenure review process to determine whether a faculty member meets the following criteria:

> 1. Helped the institution foster a culture of free inquiry, free expression, and intellectual diversity within the institution.
>
> 2. Introduced students to scholarly works from a variety of political or ideological frameworks that may exist within the curricula established by the [board of trustees or faculty].
>
> 3. While performing teaching duties within the scope of the faculty member's employment, refrained from subjecting students to views and opinions concerning matters not related to the faculty member's academic discipline or assigned course of instruction.
>
> 4. Adequately performed academic duties and obligations.
>
> 5. Met any other criteria established by the board of trustees.[239]

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236 Bill Text: IN SB0202, 2024, Regular Session, Enrolled, LegisScan https://legiscan.com/IN/text/SB0202/2024.

237 These institutions are Ball State University, Indiana State University, Indiana University, Ivy Tech Community College, Purdue University, the University of Southern Indiana, and Vincennes University. 2024 Ind. Acts 1742, 1746; IND. CODE § 21-39.5-1-2 (2024).

238 2024 Ind. Acts 1742, 1748; IND. CODE § 21-39.5-2-1. The law prohibits the board from considering the following actions by a faculty member: "(1) Expressing dissent or engaging in research or public commentary on subjects. (2) Criticizing the institution's leadership. (3) Engaging in any political activity conducted outside the faculty member's teaching or mentoring duties at the institution." 2024 Ind. Acts 1742, 1747-48; IND. CODE § 21-39.5-2-1.

239 2024 Ind. Acts 1742, 1748; IND. CODE § 21-39.5-2-2. The post-tenure review may not consider the same three activities not to be considered for the granting of tenure. *See supra* note 238; 2024 Ind. Acts 1742, 1748–49; IND. CODE § 21-39.5-2-2 (2024)

If, during a post-tenure review, the board of trustees determines that a tenured faculty member has failed to meet one or more of the criteria, it can take disciplinary actions that include "(1) termination; (2) demotion; (3) salary reduction; (4) other disciplinary action as determined by the institution; or (5) any combination of subdivisions (1) through (4)."[240]

In addition to a post-tenure review, faculty could also face complaints from students and employees, which could affect whether they gain tenure, are promoted, or pass their five-year review. Senate Bill 202 required the board of trustees to establish a procedure "that allows both students and employees to submit complaints that a faculty member … is not meeting the criteria" considered during post-tenure review.[241] The complaints would be "considered "in employee reviews and tenure and promotion decisions."[242]

Senate Bill 202 could be viewed as both ambiguous and disingenuous. The law did not define "free inquiry" or "free expression," but it defined "intellectual diversity" to mean "multiple, divergent, and varied scholarly perspectives on an extensive range of public policy issues."[243] And despite all the provisions detailed above, the law purports to uphold academic freedom. It says that nothing in the statute "may be construed to … [l]imit or restrict the academic freedom of faculty members or prevent faculty members from teaching, researching, or writing publications about diversity, equity, and inclusion or other topics."[244]

The bill has raised concerns about how faculty teach in their classroom and where they choose to work. The post-tenure review could cause faculty members to "refrain from opening up dialogue on controversial topics out of fear that a student might accuse them of not living up to the trustees' standard of 'viewpoint diversity.'"[245] In addition, faculty with "public-facing scholarship and high-impact research" could leave Indiana, "lest they become targets of frivolous campaigns by political groups whose values and aims might be at odds with scholarship on any given subject," resulting in a chilling effect on all teaching and research.[246]

Rather than flee the state, two faculty members at Purdue University Fort Wayne and one at Indiana University Bloomington sued in federal court under 42 U.S.C. § 1983, seeking a preliminary injunction to enjoin enforcement of the law.[247]

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240 2024 Ind. Acts 1742, 1749; IND. CODE § 21-39.5-2-2.

241 2024 Ind. Acts 1742, 1749; IND. CODE § 21-39.5-2-2.

242 2024 Ind. Acts 1742, 1750; IND. CODE § 21-39.5-2-4.

243 2024 Ind. Acts 1742, 1747; IND. CODE § 21-39.5-1-5.

244 2024 Ind. Acts 1742, 1753–54; IND. CODE § 21-39.5-6-1.

245 Clare Carter, *"Viewpoint Diversity" Indiana Law Denies Students the Ability to Digest This Election Season in the Classroom*. PEN America (Dec. 17, 2024), https://pen.org/viewpoint-diversity-indiana-law-denies-students-the-ability-to-digest-this-election-season-in-the-classroom/.

246 Hussein Banai, *Bill to Make Indiana Colleges More Conservative Would Cause Conformity, Fleeing Faculty*, INDIANAPOLIS STAR (Feb. 16, 2024), https://www.indystar.com/story/opinion/columnists/2024/02/16/senate-bill-202-indiana-republicans-want-conservative-universities/72617947007/.

247 Carr v. Trs. of Purdue Univ., No. 1:24-cv-00772-SEB-MJD, 2024 U.S. Dist. LEXIS 144534, at *1–2, *7 (S.D. Ind. Aug. 14, 2024).

Joined by two more professors, they alleged that the law violated their academic freedom under the First Amendment "to determine the content of their instruction without state interference" and the Fourteenth Amendment's due process clause because the law was "impermissibly vague."[248] In their complaint, the plaintiffs claimed:

> they do not know what it means to 'foster a culture of free inquiry, free expression, and intellectual diversity within the institution,' and, consequently, they "cannot discern what they are required to do or refrain from doing to avoid running afoul of the statute" and risking exposure to adverse employment actions.[249]

The State of Indiana, after moving to intervene, moved to dismiss the complaint for lack of subject matter jurisdiction, claiming the faculty members lacked standing and that their claims—characterized as a "pre-enforcement challenge"—were not ripe.[250] The court agreed with the state and granted its motion to dismiss on August 14, 2024.[251]

The court focused on two issues under the case-or-controversy requirement of Article III: demonstration of an injury-in-fact to determine standing and the doctrine of ripeness, which requires "that the case stand independent of 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'"[252] The court found no injury to the plaintiffs because the law "governs the Boards [of Trustees], not individual faculty members," and—because the policies required under Senate Bill 202 were not yet in place—the professors' "speculations as to how the Boards might interpret and apply [Senate Bill] 202's goals of fostering free inquiry, free expression, and intellectual diversity within the academy—standing alone—do not suffice to demonstrate that they are being harmed by [Senate Bill] 202 now or will be in the future."[253]

With regard to ripeness, the court said that "contingencies abound": the board of trustees had not promulgated, implemented, and enforced any final policies, and without the policies in place, it remained unknown whether they "conflict with Plaintiffs' conceptions of intellectual diversity; compel changes in their curricula; or otherwise infringe on their asserted constitutional right to academic freedom."[254] In summary, the court wrote, "Our decision today obviously turns on the premature timing of Plaintiffs' claims" and that "[t]he source of Plaintiffs' alleged injury/injuries lies in university policies that do not yet exist, rendering their allegations unfit for judicial review."[255] Ultimately, the court said, "[W]e

248 *Id*. at *7–8.

249 *Id*. at *8.

250 *Id*. at *9.

251 *Id*.

252 *Id.* at *10 (citing Trump v. N.Y., 592 U.S. 125, 131 (2020); *see* U.S. Const. art. III, § 2, c. 1.

253 *Carr*, 2024 U.S. Dist. LEXIS 144534, at *15, *16–17.

254 *Id*. at *17.

255 *Id*. at *18.

express no view as to the merits of their constitutional claims, which must await further factual development."[256]

Two of the plaintiffs from the dismissed case filed a subsequent case on September 13, 2024, after Indiana University adopted the policies required under the law.[257] The causes of action mirror those in the dismissed case: violations of the First Amendment and due process.[258]

b. **2025 Biannual Appropriation Bill: "A Sweeping Takeover of Higher Education in Indiana."** In late April 2025, the Indiana legislature made swift and significant changes to the state's higher education system through the budget process, reminiscent of the maneuver used by Wisconsin ten years earlier. In addition to cutting funding for the state's public institutions of higher education by 5%,[259] the biennial appropriation bill revised the post-tenure policy established just the year before, required the review of academic programs for possible closure, diminished shared governance, and provided the governor with greater control over Indiana University's Board of Trustees.

The bill required each state institution to establish a post-tenure review process for tenured faculty members that "measures productivity" and includes a minimum of four elements: "faculty member's teaching workload," the "total number of students who the faculty member teaches at the graduate and undergraduate level," the "time spent on instructional assignments and the time spent on overseeing graduate students," and the "research and creative scholarship productivity of the faculty member."[260] The policy must include "a requirement that the institution place a faculty member on probation, which may result in dismissal of the faculty member, if productivity requirements established by the institution are not met."[261]

Question rose immediately over how "productivity" would be measured, especially regarding the number of courses and students taught. A leader of the Bloomington Faculty Council at Indiana University asked, "Will there be some consideration of the vast differences between, say, a scientist compared to a humanist compared to a performing artist? Their types of productivity look vastly different."[262]

The bill dictates criteria and processes for program closures, which could jeopardize tenured positions. First, state institutions must ask the Commission for Higher

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256 *Id*.

257 Complaint at 6–8, McDonald v. Trs. of Ind. Univ., 1:24-cv-01575 (S.D. Ind. Sept. 13, 2024).

258 *Id*. at 17–18.

259 Laura Spitalniak, *'A Complete Takeover': Indiana Lawmakers Pass Last-Minute College Governance Overhaul*, Higher Ed Dive (Apr. 29, 2025), https://www.highereddive.com/news/a-complete-takeover-indiana-lawmakers-pass-last-minute-college-governanc/746654.

260 House Enrolled Act 1001, 124th Gen. Assem. (Ind. 2025), § 267.

261 *Id*.

262 Christa Dutton, *In Indiana, Last-Minute Additions to the Budget Take Aim at Higher Ed*, Chron. Higher Educ. (Apr. 29, 2025), https://www.chronicle.com/article/in-indiana-last-minute-additions-to-the-budget-take-aim-at-higher-ed.

Education for approval to continue a degree program if the average number of students who graduate over the immediately preceding three years is fewer than:

A. ten (10) students for a particular associate degree program;

B. fifteen (15) students for a particular bachelor's degree program;

C. seven (7) students for a particular master's degree program;

D. three (3) students for a particular education specialist program; or

E. three (3) students for a particular doctorate degree program.[263]

If the commission does not grant approval, the institution must eliminate the program.[264]

The legislation also establishes a State Educational Institution Degree Program Review that could also lead to program closures.[265] Each state institution must conduct a degree program review every seven years, which must include "an analysis of enrollment and both quantitative and qualitative data."[266] The review must "evaluate the effectiveness of the institution's degree programs to address the quality, viability, and productivity" in teaching and learning, scholarship, and service, "as appropriate to the institution's mission."[267] Institutions must use the results from the degree program reviews "for the progressive improvement and adjustment of degree programs in the context of the institution's strategic plan," with such adjustments including "degree program enhancement," "maintenance of a degree program at its current level," "degree program reduction in scope," or "consolidation or elimination of a degree program."[268] Institutions must also submit the program reviews to the Commission for Higher education, and post the reviews on their website.[269]

The speed of approval of the legislation was as extraordinary as the breadth of the changes within it. As one news article described it, "The Republican-controlled Indiana General Assembly passed the legislation—which runs more than 200 pages—less than two days after revealing it Wednesday, April 23. The state House approved it around 12:45 a.m. Friday, followed by the Senate's agreement at about 1:20 a.m." [270] Governor Mike Braun signed the budget bill on May 7, 2025, touting that it delivered "key priorities—including education, public safety, and tax relief."[271]

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263 House Enrolled Act 1001, *supra* note 260, at § 248.

264 *Id*.

265 *Id*. at § 269.

266 *Id*.

267 *Id*.

268 *Id*.

269 *Id*.

270 Ryan Quinn, *Indiana Budget Bill Contains Sweeping Higher Ed Changes*, Inside Higher Ed (Apr. 30, 2025), https://www.insidehighered.com/news/faculty-issues/academic-freedom/2025/04/30/indiana-budget-bill-contains-sweeping-higher-ed.

271 Leslie Bonilla Muñiz, *Gov. Braun Signs Indiana's Next $44B Budget into Law*, Ind. Cap. Chron. (May 7, 2025), https://indianacapitalchronicle.com/2025/05/07/gov-braun-signs-indianas-next-44b-budget-into-law/.

One faculty member directly tied Indiana's higher education overhaul to the influence of President Trump. He said, "This Legislature is following the Trump lead—wishing to put an airtight lid on free expression. And if you're wishing to do that, universities are an obvious place to start."[272]

4. Ohio, 2025 Legislation

In 2024, Ohio narrowly failed to pass "a wide-ranging piece of public higher education legislation"[273] that was similar in several ways to Indiana's 2024 law. Ohio Senate Bill 83 of 2023–24, in the version reported by the House Higher Education Committee that then stalled and was not posted for vote in the House,[274] would have required institutional policies on "intellectual diversity,"[275] defined as "multiple, divergent, and varied perspectives on an extensive range of public policy issues."[276] Ohio Senate Bill 83 would have also required each state college and university to adopt a post-tenure review policy,[277] and it would have required state colleges and universities to "respond to complaints regarding any administrator, faculty, member, staff, or student who interferes with the intellectual diversity rights … of another."[278]

Taking another swing, the sponsor of the 2023–24 legislation introduced a similar bill in 2025, this time with greater success. Senate Bill 1,[279] like its predecessor, aimed to overhaul public higher education, with the 2025 legislation including provisions that ban the state's public colleges and universities from having DEI offices, prohibit institutional positions on "controversial" topics—such as "climate policies, electoral politics, foreign policy, diversity, equity, and inclusion programs, immigration policy, marriage, or abortion"—and mandate a U.S. American civic literacy course with prescribed readings, including the U.S. Constitution and at least five essays from the Federalist Papers.[280]

The bill requires boards of the state institutions of higher education to adopt a policy that includes at least three provisions endangering academic freedom

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272 Quinn, *supra* note 270.

273 Ryan Quinn, *GOP State Lawmakers Targeting DEI and Tenure Again*, Inside Higher Ed (Feb. 11, 2025), https://www.insidehighered.com/news/diversity/2025/02/11/gop-state-lawmakers-again-targeting-dei-and-tenure. In addition to the tenure provisions described here, the bill would have banned mandatory DEI programs and—in some iterations of the bill—prohibited faculty strikes. *Id*.

274 Megan Henry, *Ohio House Speaker Stephens Said He Won't Bring Massive Higher Education Bill to House Floor*, Ohio Cap. J. (Nov. 24, 2024), https://ohiocapitaljournal.com/2024/11/20/ohio-house-speaker-stephens-said-he-wont-bring-massive-higher-education-bill-to-house-floor/.

275 Substitute S.B. 83, 135th General Assem., Reg. Sess. (Ohio 2023–2024), § 3345.0217(B)(3).

276 *Id*. at § 3345.0217(A)(2).

277 *Id*. at § 3345.453.

278 *Id*. at § 3345.0218 (B).

279 Substitute S.B. 1, 136th Gen. Assem., Reg. Sess. (Ohio 2025).

280 Laura Spitalniak, *Ohio Senate Passes Bill to Ban DEI and Faculty Strikes at Public Colleges*, Higher Ed Dive (Feb. 13, 2025), https://www.highereddive.com/news/ohio-senate-sb1-bill-ban-dei-faculty-strikes-tenure-review/740139/.

and the security of tenured faculty. First, the policy must declare that "faculty and staff shall allow and encourage students to reach their own conclusions about all controversial beliefs or policies and shall not seek to indoctrinate any social, political, or religious point of view."[281] The bill defines a "controversial belief or policy" to mean "any belief or policy that is the subject of political controversy, including issues such as climate policies, electoral politics, foreign policy, diversity, equity, and inclusion programs, immigration policy, marriage, or abortion."[282] Second, the policy must "[d]emonstrate intellectual diversity for course approval, approval of courses to satisfy general education requirements, student course evaluations, common reading programs, annual reviews, strategic goals for each department, and student learning outcomes."[283] Like the previous year's bill, Senate Bill 1 defines "intellectual diversity" to mean "multiple, divergent, and varied perspectives on an extensive range of public policy issues."[284] Third, and also similar to Senate Bill 83, Senate Bill 1 requires state colleges and universities to "respond to complaints from any student, student group, or faculty member about an alleged violation of the prohibitions and requirements included in the policy" regarding controversial belief and policy and intellectual diversity.[285]

With regard to tenure, the final version of SB 1 imposes policies encompassing annual workloads, annual reviews, post-tenure reviews, and collective bargaining. Since 1994, Ohio has required state universities to adopt a faculty workload policy,[286] and SB 1 extended the requirement to "all state institutions of higher education" and specified four elements that must be in the policy:

> a. An objective and numerically defined teaching workload expectation based on credit hours …;
>
> b. A definition of all faculty workload elements in terms of credit hours … with a full-time workload minimum standard …;
>
> c. A definition of justifiable credit hour equivalents for activities other than teaching, including research, clinical care, administration, service, and other activities as determined by the state institution of higher education;
>
> d. Administrative action that a state institution of higher education may take, including censure, remedial training, for-cause termination, or other disciplinary action, regardless of tenure status, if a faculty member fails to comply with the policy's requirements.[287]

The legislation requires state institutions of higher education to adopt "a faculty annual performance evaluation policy" and "conduct an annual evaluation for each

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281 Substitute S.B. 1, *supra* note 279, at § 3345.0217(B)(4).

282 *Id*. at § 3345.0217(A)(1).

283 *Id*. at § 3345.0217(B)(5).

284 *Id*. at § 3345.0217(A)(2).

285 *Id*. at § 3345.0217(C).

286 Ohio Rev. Code Ann. § 3345.45 (LexisNexis 2025).

287 Substitute S.B. 1, *supra* note 279, at §§ 3345.45(A), (D)(2).

full-time faculty member who it directly compensates."[288] The evaluation must assess the performance for each of the following areas on which that the faculty member spent at least 5% of their annual work time over the preceding year: teaching, research, service, clinical care, administration, and other categories determined by the institution.[289] At least 25% of the "teaching" component is accounted by student evaluations of faculty, [290] which are mandated by the legislation and must focus on "teaching effectiveness and student learning" and include the question: "Does the faculty member create a classroom atmosphere free of political, racial, gender, and religious bias?"[291] Each of the performance areas is assessed as "exceeds performance expectations," "meets performance expectations," or "does not meet performance expectations."[292]

The legislation mandates post-tenure review policies at each state institution of higher education.[293] Post-tenure reviews are triggered under three circumstances. An institution must conduct a post-tenure review "if a tenured faculty member receives a 'does not meet performance expectations' evaluation within the same evaluative category for a minimum of two of the past three consecutive years" on their annual performance evaluation.[294] If a faculty member maintains tenure after a post-tenure review and then receives an additional "does not meet performance expectations" assessment on any area of their annual performance evaluation in the next two years, then the state institution must subject the faculty member to an additional post-tenure review.[295] If a faculty member "has a documented and sustained record of significant underperformance" outside of the their annual performance evaluation, the department chair, dean of faculty, or provost of their institution "may require an immediate and for cause post-tenure review at any time."[296]

At the conclusion of a post-tenure review, the state institution's provost must submit a recommended outcome "to the institution's entity that is responsible for the final decision of post-tenure review pursuant to the institution's policy." [297] Institutions can take administrative action that includes "censure, remedial training, or for-cause termination, regardless of tenure status, and any other action permitted by the institution's post-tenure review policy."[298]

The for-cause trigger for post-tenure review, and the possibility of termination,

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288 *Id*. at §§ 3345.452(B), (C).

289 *Id.* at § 3345.452(D)(2).

290 *Id.* at § 3345.452(D)(4)

291 *Id*. at § 3345.451.

292 *Id*. at § 3345.452(D)(3).

293 *Id.* at § 3345.453.

294 *Id*. at § 3345.453(C).

295 *Id*. at § 3345.453(D).

296 *Id.* at § 345.453(E). In these instances, "for cause" cannot "be based on a faculty member's allowable expression of academic freedom." *Id.*

297 *Id.* at § 345.453(G).

298 *Id.*

caused the head of the executive director of the Ohio Conference of the AAUP to say, "This bill eliminates tenure. If certain administrators can call for post-tenure review at any time and fire a faculty member without due process, that is not real tenure, that is tenure in name only."[299]

Finally, the legislation excludes issues regarding tenure from collective bargaining. The bill prohibits state college and university employees from collectively bargaining with their institution over faculty workload policies, faculty annual performance evaluation policies, post-tenure review policies, and policies on tenure and retrenchment.[300]

Despite vociferous opposition throughout the legislative process,[301] the bill passed the Ohio Senate February 12, 2025, passed the Ohio House on March 19, 2025, and was signed by Governor Mike DeWine on March 28, 2028. Earlier that week, DeWine said:

> One of the goals of this bill is to make sure that we do everything that we can so that a student feels free to express their point of view, whether that be in a classroom or whether that be someplace else on campus. That should be part of what we're doing in higher education.[302]

Litigation over the new law is expected. The American Civil Liberties Union of Ohio called Senate Bill 1 a "confusing and contradictory mix of language and provisions," and also warned that the legislation threatened faculty members' First Amendment rights.[303] It is likely that any legal challenge would be filed in federal court rather than state court, since the Ohio Supreme Court has a 6–1 Republican supermajority.[304]

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299 Ryan Quinn, *Ohio and Kentucky Ban DEI, Reduce Tenure Protections*, Inside Higher Ed (Apr. 1, 2025), https://www.insidehighered.com/news/faculty-issues/academic-freedom/2025/04/01/ohio-and-kentucky-ban-dei-reduce-tenure-protections.

300 Substitute S.B. 1, *supra* note 279, at § 3345.455. State colleges and universities must "develop policies on tenure and retrenchment" under § 3345.454(B). The law also requires state institutions to eliminate undergraduate degree programs that confer an average of fewer than five degrees annually over a three-year period. The chancellor can grant a waiver to continue the program. *Id.* at § 3345.454.

301 In the Senate Higher Education Committee on February 11, 2025, "hundreds of critics spoke out against the proposal during an hours-long hearing." Spitalniak, *supra* note 280. During the vote on the bill in the Ohio House on March 19, 2025, "students marched from Ohio State University's campus to the Ohio Statehouse to protest the changes." Jessie Balmert, *Ohio House Passes Higher Education Overhaul, DEI Ban*, Columbus Dispatch (Mar. 19, 2025), https://www.dispatch.com/story/news/politics/2025/03/19/ohio-house-passes-higher-education-overhaul-dei-ban/82368545007/.

302 Jessie Balmert, *Ohio Gov. Mike DeWine Signs Higher Ed Bill that Eliminates DEI, Bans Faculty Strikes*, Columbus Dispatch (Mar. 28, 2025), https://www.dispatch.com/story/news/politics/2025/03/28/dewine-signs-higher-ed-bill-that-eliminates-dei-bans-faculty-strikes/82688476007/.

303 Balmert, *supra* note 301.

304 Tom Hodson, *Senate Bill 1 Guts Academic Freedom and Reshapes Ohio's Public Universities*, Ohio Cap. J. (Mar. 20, 2025), https://ohiocapitaljournal.com/2025/03/20/senate-bill-1-guts-academic-freedom-and-reshapes-ohios-public-universities. In addition to a possible court challenge, professors at Youngstown State quickly organized a signature-gathering campaign for a referendum to repeal SB 1. Laura Hancock, *Ohio Colleges Could Lose State Funding if They Don't Implement New*

5. Texas, 2025 Legislation

When the University of Texas at Austin's faculty council passed a resolution in 2022 opposing the state's new law prohibiting high school social studies classes from discussing tenets of critical race theory, it ignited a firestorm aimed at ending tenure in Texas's public institutions of higher education.[305] The tenure ban was amended to curtail property interests only.[306] But the ban on courses using "identity politics" boomeranged back onto higher education in 2025.

In 2021, Texas enacted a public education law that, "[f]or any social studies course in the required curriculum," barred teachers from requiring or making part of a course ten delineated concepts.[307] These ideas included "an individual, by virtue of the individual's race or sex," is "inherently racist, sexist, or oppressive, whether consciously or unconsciously," or "bears responsibility for actions committed in the past by other members of the same race or sex;" that "the advent of slavery in the territory that is now the United States constituted the true founding of the United States;" and that "with respect to their relationship to American values, slavery and racism are anything other than deviations from, betrayals of, or failures to live up to, the authentic founding principles of the United States, which include liberty and equality."[308]

In 2025, legislation echoing the 2021 K-12 law pitched a "bruising battle over academic freedom" in Texas that conservative lawmakers said "would hold institutions more accountable and ensure curriculum is 'free from ideological bias.'"[309] The final version of the bill would require the governing board of each institution of higher education, at least once every five years, to conduct "a comprehensive review of the general education curriculum established by the institution" to ensure courses in the curriculum—among other standards—"are foundational and fundamental to a sound postsecondary education," and "ensure a breadth of knowledge in compliance with applicable accreditation standards."[310] Separate legislation passed in 2025, effective September 1, 2025, removed the statutory requirements under Texas law for institutions of higher education to be accredited by the Southern Association of Colleges and Schools, and defined "recognized accrediting agency" to mean "any association or organization so designated" by the Texas Higher Education Coordinating Board.[311]

Higher-Ed Law, Bill Architect Says, CLEVELAND.COM (Apr. 17, 2025), https://www.cleveland.com/news/2025/04/ohio-colleges-could-lose-state-funding-if-they-dont-implement-new-higher-ed-law-bill-architect-says.html.

305 *See infra* text accompanying notes 383–91.

306 Comm. Substitute S.B. 18, 88th Leg., Reg. Sess. (Tex. 2023).

307 H.B. 3979, 87th Leg. (Tex. 2021).

308 *Id*.

309 Molly Hennessy-Fiske, *Texas Lawmakers Moving to Greatly Increase Control of State Universities*, WASH. POST (May 5, 2025), https://www.washingtonpost.com/nation/2025/05/05/texas-universities-legislature-state-control/.

310 S.B. 37 Sub., 89th Leg. Reg. Sess. (Tex. 2025).

311 S.B. 530, 89th Leg. Reg. Sess. (Tex. 2025).

"Minor degree and certificate programs" would undergo a review every five years by the president of their institution, and those with low enrollment would face "consolidation or elimination."[312] To avoid consolidation or elimination, minor degree and certificate programs must have "specific industry data to substantiate workforce demand."[313]

Senate Bill 37 would also expand the power of institutional governing boards over certain hiring decisions, and it would dilute shared governance. The bill granted governing boards with the authority to "approve or deny the hiring of an individual for the position of provost or deputy, associate, or assistant provost by each institution under" the governing boards' control and to "overturn any hiring decision for the position of vice president or dean."[314] Regarding shared governance, the bill declared a "faculty council or senate is advisory only and may not be delegated the final decision-making authority on any matter," and that "[s]hared governance structures may not be used to obstruct, delay, or undermine necessary institutional reforms or serve as a mechanism for advancing ideological or political agendas."[315]

The bill sidelined faculty regarding academic decisions and hiring. It states that faculty "may provide recommendations on academic matters, but that input is only advisory in nature, ensuring that governing boards and institutional leadership retain clear and ultimate decision-making authority," and faculty who do not "serve in an administrative leadership position may not have final decision-making authority on the hiring of an individual for any faculty or administrative leadership position at the institution."[316]

Finally, the bill would establish the Office of Ombudsman under the Texas Higher Education Coordinating Board that could investigate actions by faculty. The ombudsman would "receive and, if necessary, investigate complaints … regarding an institution of higher education's failure to comply" with provisions of the legislation regarding the review of general education curriculum; faculty councils or senates; presidential responsibilities; grievance, hiring, and discipline decision-making authority; and curriculum advisory committees;[317] as well as the law prohibiting DEI initiatives.[318] Written complaints could be submitted by a "student or faculty or staff member at an institution of higher education who has reason to believe an institution of higher education has failed to comply" with the provisions of the Education Code enumerated in the legislation. If a governing board does not resolve a noncompliance issue within the legislation's timeline, the ombudsman is authorized "to recommend to the legislature that the institution of higher education not be allowed to spend money appropriated to the institution

312 S.B. 37 Sub., *supra* note 310.

313 *Id*.

314 *Id*.

315 *Id*.

316 *Id*.

317 *Id*.

318 Tex. Educ. Code Ann. § 51.3525 (2025).

for a state fiscal year until the institution's governing board certifies compliance and the state auditor confirms the institution's compliance."[319]

Governor Gregg Abbott signed the bill on June 20, 2025. Two weeks earlier, the governor's press secretary hinted that the governor would sign the bill, saying, "Governor Abbott was clear in his State of the State address: Woke college professors have too much influence over who is hired to educate our kids… . Texas needs legislation that prohibits professors from having any say over employment decisions."[320]

C. Proposed Bans on Tenure that Failed (So Far)

1. Iowa

The election of 2016 in Iowa brought Republican majorities to both chambers of the state legislature and to the governor's office for the first time since 1998,[321] causing the faculty at the state's public universities to worry that Iowa might follow the lead of its neighbor Wisconsin and attack tenure rights.[322] They had good cause to be concerned. State Senator Brad Zaun introduced a bill on January 10, 2017, that would have prohibited, "at each institution of higher learning governed by the state board of regents, the establishment or continuation of a tenure system for any employee of the institution."[323] The Iowa Board of Regents governs the University of Iowa, Iowa State University, and the University of Northern Iowa.[324] Zaun's aim was straightforward: he said, "My thoughts are obviously to end tenure. I think the university should have the flexibility to hire and fire professors and then I don't think that bad professors should have a lifetime position guaranteed at colleges. It is as simple as that."[325]

Similar legislation in 2021 progressed farther than its predecessor, getting past the introductory stage.[326] House File 49 passed the House Committee on

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319 S.B. 37 sub., *supra* note 310.

320 Ryan Quinn, *In Texas, University Presidents May Soon Control Faculty Senates*, Inside Higher Ed(June 9, 2025), https://www.insidehighered.com/news/faculty-issues/shared-governance/2025/06/09/texas-presidents-may-soon-control-faculty-senates. *See* Tex. Senate J., 89th Leg., Reg. Sess. 3862 (2025).

321 William Petroski & Brianne Pfannenstiel, *2017 Iowa Legislature Convenes Amid Pomp, Speeches*, Des Moines Reg. (Jan. 9, 2017), https://www.desmoinesregister.com/story/news/politics/2017/01/09/2017-iowa-legislature-convenes-amid-pomp-color/96338210/.

322 Jeff Charis-Carlson & William Petroski, *Iowa Lawmaker Looking to End Tenure at Public Universities*, Des Moines Reg. (Jan. 12, 2017), https://www.desmoinesregister.com/story/news/education/2017/01/12/iowa-lawmaker-looking-end-tenure-public-univerisities/96460626/.

323 S.F. 41, 87th Gen. Assem., Reg. Sess. (Iowa 2017).

324 Iowa Board of Regents, Institutions (2025), https://www.iowaregents.edu/institutions.

325 Charis-Carlson & William Petroski, *supra* note 322.

326 Eric Kelderman, *Why Would Iowa Want to Kill Tenure?*, Chron. Higher Educ. (Feb. 21, 2021), https://www.chronicle.com/article/why-would-iowa-want-to-kill-tenure.

Education,[327] while its Senate companion passed a subcommittee.[328] Ultimately, however, the legislation "failed to survive a fixed procedural cut-off date."[329]

Despite the legislation's failure to move forward, the majority leader in the Iowa House of Representatives said the initiative to ban tenure was "a live round" that would stay on the Republican's agenda beyond 2021.[330] Legislators said ending tenure was necessary "so institutions can fire faculty members who discriminate against students expressing conservative political views."[331] One Republican legislator said his party needed to limit tenure because "there is no longer diversity of thought" at the state's public universities.[332] The legislation reappeared in 2023 but was tabled by a subcommittee.[333]

2. North Carolina

An effort in 2023 to ban tenure in North Carolina followed the initial refusal of the Board of Trustees of the University of North Carolina at Chapel Hill between 2020 and 2021 to vote to grant tenure upon the hiring of Nikole Hannah-Jones—a UNC alumna, MacArthur "genius" grant recipient, and Pulitzer Prize-winning journalist behind the 1619 Project—for the Knight Chair in Race and Investigative Journalism.[334] Board members and conservative alumni objected to hiring Hannah-Jones largely because of the 1619 Project, which included upending-historical statements such as, "Conveniently left out of our founding mythology is the fact that one of the primary reasons some of the colonists decided to declare their independence from Britain was because they wanted to protect the institution of slavery."[335] To avoid the issue of tenure, the trustees attempted to hire Hannah-Jones as a contract employee, but they eventually voted to offer tenure, which Hannah-Jones declined and instead accepted a tenured position at Howard University.[336]

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327 H.F. 49, 89th Gen. Assem., Reg. Sess. (Iowa 2021). Procedurally, the bill was renumbered as H.F. 496 after it passed the House Education Committee. H.F. 496, 89th Gen. Assem., Reg. Sess. (Iowa 2021).

328 S.F. 41, 89th Gen. Assem., Reg. Sess. (Iowa 2021).

329 Yockey, *supra* note 118, at 583.

330 Katarina Sostaric, *Bill to Ban Tenure 'A Live Round' in Iowa House, Advances in Both Chambers*, Iowa Pub. Radio (Feb. 12, 2021, 7:05 AM), https://www.iowapublicradio.org/state-government-news/2021-02-12/bill-to-ban-tenure-a-live-round-in-iowa-house-advances-in-both-chambers.

331 Kelderman, *supra* note 326.

332 Shane Vander Hart, *Iowa House Committee Passes Bill Eliminating Tenure at Regent Universities*, Iowa Torch (Feb. 10, 2021), https://iowatorch.com/2021/02/10/iowa-house-committee-passes-bill-eliminating-tenure-at-regent-universities/.

333 H. F. 48, 90th Gen. Assem., Reg. Sess. (Iowa 2023).

334 Scott Jaschik, *Hannah-Jones Turns Down UNC Offer*, Inside Higher Ed (July 6, 2021), https://www.insidehighered.com/news/2021/07/07/nikole-hannah-jones-rejects-tenure-offer-unc-job-howard-u.

335 Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. Times Magazine, *supra* note 150. Several prominent historians wrote an open letter to the editor of the *New York Times Magazine* objecting to this and other historical claims. *The Thread*, N.Y. Times Magazine, Dec. 29, 2019, at 6.

336 Joe Killian, *New Bill Targets Tenure, Calls for Scrutiny of Research at UNC System Campuses, Community Colleges*, NC Newsline(Apr. 19, 2023), https://ncnewsline.com/2023/04/19/new-bill-targets-tenure-calls-for-scrutiny-of-research-at-unc-system-campuses-community-colleges/.

In the wake of this controversy, House Bill 715 of 2023 would have eliminated tenure for University of North Carolina System and community college faculty hired after July 1, 2024.[337] The bill would have required the Board of Governors to adopt a policy on faculty contracts that allowed employment at will or term contracts for one, two, three, or four years. If an institution decided not to renew the contract of a faculty member, it had to provide "timely notice." Faculty could not be discharged, suspended without pay, or demoted except for incompetence, neglect of duty, serious misconduct, unsatisfactory performance, institutional financial exigency, or "[m]ajor curtailment or elimination of a teaching, research, or public-service program."[338]

The sponsor of the legislation, Representative David Willis, when describing the rationale for the bill, made no mention of the Nikole Hannah-Jones controversy, but instead focused on cost savings. "Salaries are one of the biggest expenses for constituent institutions of the UNC System and the North Carolina Community College System, and they need to be better managed and regularly evaluated through rigorous study," he said.[339] The bill did not pass committee.[340]

3. Hawaii

Legislation in Hawaii in 2022 would have required the University of Hawaii Board of Regents to adopt the report of a task force it formed in February 2021 that recommended several significant changes to the tenure system.[341] Chief among the provisions was a required procedure that could be seen as reducing the number of tenure-track positions. It said,

> Before recruitment for tenure-track positions occurs, and before award of tenure, the administration shall ensure that: (1) the position fulfills current enrollment requirements and strategic growth priorities for the university and the State; (2) there are no qualified faculty in other units that are available and that could meet the needs of the hiring unit; (3) the balance of tenure-track and other faculty is appropriate given enrollment, mission, and accreditation standards; and (4) the unit is successful and relevant in contributing to the institutional mission and goals.[342]

Another provision would have created a new class of faculty called "Support Faculty and Extension Agents" that would not be eligible for tenure. This new classification was defined as "faculty that are not primarily engaged in direct instruction, but are engaged in academic support including student, research, and

337 H.B. 715, 156th Leg. (N.C. 2023).

338 *Id*.

339 Ned Barnett, *NC Republicans Launch 'Most Egregious' Attack in the Country on UNC. Why?*, Raleigh News & Observer (Apr. 23, 2023), https://www.aol.com/nc-republicans-launch-most-egregious-080000272.html.

340 N.C. Gen. Assem., House Bill 715 (2023), https://www.ncleg.gov/BillLookup/2023/HB715.

341 S.B. 3269, 31st Leg. (Haw. 2022).

342 Univ. of Haw. Bd. Regents, Permitted Interaction Group on Tenure, attach. A, § III.B.2. (Sept. 10, 2021), https://www.hawaii.edu/offices/bor/regular/materials/202109160830/BOR_09_16_2021_Materials.pdf.

academic program support, or are engaged in agricultural extension activities."[343] The report also recommended requiring tenured faculty to "participate in a periodic review at least once every five years."[344]

Senator Donna Mercado Kim, the sponsor of the bill and chair of the Senate Higher Education Committee, echoed lawmakers in Wisconsin and North Carolina (although she is a Democrat) by citing cost savings as the legislation's goal. "My priority is to keep education affordable. That is my No. 1 priority," she said.[345] In her view, the current tenure system allows researchers not to teach or not attract sufficient research funds, in turn requiring the university to hire more instructors, thereby increasing instructional costs that get passed down to students.[346] Emphasizing the importance of keeping the University of Hawaii affordable for students, Kim said, "The only way we can do that is to make sure the university is being very efficient."[347]

The Hawaii Senate amended the bill twice before passing it on March 8, 2022. The Hawaii House of Representatives, however, did not act on the bill.[348]

4. Nebraska

A state senator in Nebraska, after failing to completely eliminate tenure in 2024, took a slightly more measured approach in 2025, which still drew "nearly universal opposition" during a committee hearing.[349] Senator Loren Lippincott, attempting to address what he called a "woke ideology" at the University of Nebraska,[350] introduced a bill in 2024 that would have replaced tenure with "employee agreements" at state colleges and universities that required "[a]nnual performance evaluations," "[m]inimum standards of good practice," "[s]tandards for review and discipline," and "[p]rocedures for dismissal for cause, program discontinuance, and financial exigency."[351]

In 2025, Lippincott sponsored a bill that would prohibit the University of Nebraska, the Nebraska State Colleges, and the state's community colleges from establishing or authorizing "an academic system of tenure for any employee"

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343 *Id*. at attach. B, § III.E.2.c.

344 *Id*. at attach. C, § IIIB.

345 Josh Moody, *Hawaii Senator Takes Aim at Tenure—and More*, Inside Higher Ed (Mar. 7, 2022), https://www.insidehighered.com/news/2022/03/08/hawaii-senator-takes-aim-tenure%E2%80%94and-more.

346 *Id*.

347 *Id*.

348 Haw. St. Legis., 2022 Archives, SB3269 SD2, https://www.capitol.hawaii.gov/session/archives/measure_indiv_Archives.aspx?billtype=SB&billnumber=3269&year=2022.

349 Josh Reyes, *Tenure, DEI Bills Draw Sharp Opposition*, Omaha World-Herald, Mar. 18, 2025, at A3.

350 Paul Hammel, *Senators Seek to Eliminate Tenure for College Professors, End State Inheritance Tax*, Neb. Examiner (Jan. 8, 2024), https://nebraskaexaminer.com/2024/01/08/senators-seek-to-eliminate-tenure-for-college-professors-do-away-with-state-inheritance-tax/.

351 L.B. 1064, 108th Leg., 2d Sess. (Neb. 2024).

"who is not tenured prior to the effective date" of the bill.[352] Employees not yet tenured would have "employee agreements" similar to those outlined in the previous year's legislation.[353]

At a hearing in the Education Committee on March 17, 2025, the heads of University of Nebraska Board of Regents and the Nebraska State Colleges Board of Trustees, faculty, and students testified against the bill.[354] Nebraska University President Jeffrey Gold said enacting the bill would jeopardize the university's membership in the Big Ten conference and its aspirations to rejoin the Association of American Universities. He called it a "reality that would severely harm our standing and our reputation as a leader in research and education."[355] The committee took no action on the bill.[356]

D. Property Rights Removed from Tenure

1. Kansas

Legislation in Kansas in 2025 specifying that tenure is not a property right (which was ultimately unsuccessful) had its roots in emergency workforce management rules adopted by the Kansas Board of Regents in response to the COVID-19 pandemic, followed by Emporia State University's adoption of policy under those rules, and then a lawsuit by professors laid off by Emporia State. On January 20, 2021, the Board of Regents—which has authority over seven public universities, including the University of Kansas and Kansas State University—adopted rules effective until December 31, 2022, that allowed institutions to suspend, dismiss, or terminate "any state university employee, including a tenured faculty member" under "a framework for the university's decision-making" based on factors including "performance evaluations, teaching and research productivity, low service productivity, low enrollment, cost of operations, or reduction in revenues for specific departments or schools."[357] The rules specified that "[d]eclaration of financial exigency and the processes associated with declaration of financial exigency shall not be a prerequisite to any suspension, dismissal, or termination authorized by this provision."[358] Employees given notice of termination under the authority of these workforce management rules could appeal to the Office of

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352 L.B. 551, 109th Leg, 1st Sess. (Neb. 2025).

353 *Id.*

354 Reyes, *supra* note 349; Justin Diep, *NU Officials, UNL Faculty, Students Testify Against Anti-Tenure, DEI Bills*, Daily Nebraskan (Mar. 19, 2025), https://www.dailynebraskan.com/news/nu-officials-unl-faculty-students-testify-against-anti-tenure-dei-bills/article_df530a7c-d4e0-4674-b891-9d0b96211035.html.

355 Diep, *supra* note 354.

356 *Id*.

357 Emma Pettit, *Kansas Regents Make It Easier to Dismiss Tenured Professors*, Chron. Higher Educ. (Jan. 21, 2021, https://www.chronicle.com/article/kansas-regents-allow-sped-up-dismissals-of-tenured-faculty-members/; Kan. Bd. Regents, Board Policy Manual, ch. II, § C.6.b.iii. (2025), https://www.kansasregents.gov/about/policies-by-laws-missions/board_policy_manual_2/chapter_ii_governance_state_universities_2/chapter_ii_full_text.

358 Kan. Bd. Regents, *supra* note 357.

Administrative Hearings, [359] which conducts proceedings for many Kansas state agencies.[360]

On September 1, 2022, Emporia State University proposed to the Board of Regents a framework reflecting the requirements of the workforce management rules.[361] The president of Emporia State said the university needed to readjust campus resources "to address the university's structural deficits that have been ongoing for several years."[362] The Board of Regents approved the policy on September 14, 2022,[363] and the next day, Emporia State terminated thirty-three faculty members,[364] twenty-three of whom were tenured.[365]

Eleven of the tenured professors who had been terminated sued Emporia State in federal court under 42 U.S.C. § 1983 for violations of procedural and substantive due process under the Fifth and Fourteenth Amendments, liberty interests under the Fourteenth Amendment ("their reputations and careers as tenured public employees"),[366] equal protection rights under the Fourteenth Amendment, and freedom-of-association rights under the First Amendment.[367] Before filing their case, the eleven faculty members appealed their termination to the Office of Administrative Hearings, which affirmed four of the terminations but reversed seven of the others.[368] Emporia State filed a case in state court to challenge the seven reversals. Before the appeals could be decided, the eleven faculty members filed their federal complaint.[369]

On December 5, 2024, the district court dismissed some claims against members of the Board of Regents, including the liberty-interest claim,[370] but it denied most of the motions to dismiss, including a motion based on the defendants' invocation

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359 *Id*.

360 Kan. Office Admin. Hearings, About (2025), https://oah.ks.gov/Home/About.

361 Tim Carpenter, *Emporia State University Seeks Authority to Begin Campus Workforce Restructuring*, Kan. Reflector (Sept. 7, 2022), https://kansasreflector.com/2022/09/07/emporia-state-university-seeks-authority-to-begin-campus-workforce-restructuring/.

362 *Id*.

363 Emma Pettit, *Emporia State University Is Told It Can Fire Employees, Including Tenured Professors*, Chron. Higher Educ. (Sept.15, 2022), https://www.chronicle.com/article/emporia-state-university-is-told-it-can-fire-employees-including-tenured-professors.

364 Anne Marie Tamburro, *Emporia State Guts Tenure Protections, Fires 33 Professors Including One Who Publicly Criticized New Policy*, Found. for Individual Rts. and Expression (Nov. 2, 2022), https://www.thefire.org/news/emporia-state-guts-tenure-protections-fires-33-professors-including-one-who-publicly.

365 Ryan Quinn, *A General Counsel Seeks to Eviscerate Tenure After Being Sued for Ignoring It*, Inside HigherEd. (Feb. 25, 2025), https://www.insidehighered.com/news/faculty-issues/tenure/2025/02/25/top-lawyer-targets-tenure-after-being-sued-ignoring-it.

366 Miracle v. Hush, No. 23-4056-JAR-GEB, 2024 U.S. Dist. LEXIS 220331, at *24 (D. Kan. Dec. 5, 2024).

367 *Id*. at *14–15. The plaintiffs also made several conspiracy claims. *Id*.

368 *Id*. at *14.

369 *Id*.

370 *Id*. at *31.

of qualified immunity because the plaintiffs failed to demonstrate "the violation of a clearly established property right."[371] The court found that the plaintiffs "sufficiently allege that they were entitled to continued employment as defined by Kansas law,"[372] writing:

> The entire premise of Plaintiffs' case is that under longstanding KBOR [Kansas Board of Regents] policy, as tenured faculty, they were terminable only for cause. They allege that this was the policy in place when they were hired and obtained tenure, and there is no dispute that this was ESU's [Emporia State University's] policy before the WMP [Workforce Management Plan] and ESU Framework changed the policy. Thus, Plaintiffs do identify a state-law source of their property interest in continued employment. … Plaintiffs sufficiently allege that they held property rights in their continued employment.[373]

The defendants filed a subsequent motion to reconsider, claiming in part that the court misapplied Tenth Circuit precedent regarding the property-interest claims.[374] In its review of the motion to reconsider, the court cited the U.S. Supreme Court case on which the Tenth Circuit's decisions were based, *Board of Regents v. Roth*, and quoted several passages from it, including "the Court has held that a public college professor dismissed from an office held under tenure provisions, and college professors and staff members dismissed during the terms of their contracts, have interests in continued employment that are safeguarded by due process."[375] The court denied the motion to reconsider except to correct the court's mistaken reference to "leave without pay and benefits" while characterizing the status of the seven plaintiffs reinstated after their appeal to the Office of Administrative Hearings (they were placed on administrative leave with pay and benefits).[376]

While the terminated faculty members' case continued in court, the Kansas legislature considered a bill that specified that tenure does not create a property right. House Bill No. 2348 stated:

> a. An award of tenure may confer certain benefits, processes or preferences, but tenure shall be discretionary and conditional and shall not, nor shall it be interpreted to, create any entitlement, right or property interest in a faculty member's current, ongoing or future employment by an institution.
>
> b. The board of regents and any institution shall not define, award or otherwise recognize tenure as an entitlement, right or property interest in a faculty member's current, ongoing or future employment by an institution.
>
> c. No award of tenure by the board of regents or any institution in existence on the effective date of this act shall be considered or deemed an entitlement,

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371 *Id*. at *34.

372 *Id*. at *37–38.

373 *Id*. at *38.

374 Miracle v. Hush, No. 23-4056-JAR-GEB, 2025 U.S. Dist. LEXIS 24401, at *4 (D. Kan. Feb. 11, 2025).

375 *Id*. at *6 (citing *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972).

376 *Id*. at *15–16, *14.

> right or property interest in a faculty member's current, ongoing, or future employment by an institution.
>
> d. Any special benefits, processes or preferences conferred on a faculty member by an institution's award of tenure can be at any time revoked, limited, altered or otherwise modified by the awarding institution or by the state board of regents.[377]

Kansas Representative Steven Howe introduced the bill at the request of Emporia State University General Counsel Steven Lovett, a defendant in the faculty members' case but who insisted he asked for the bill as a private citizen.[378] Testifying in favor of the bill during a hearing of the House Committee on Judiciary on February 11, 2025, Lovett said, "While I am in favor of tenure, and this bill does not abolish tenure, I am not in favor of it being a property right because it obligates Kansans to a long-term, unfunded fiscal liability."[379] Several public higher education leaders testified against the bill, including the president of the Kansas Board of Regents, the chancellor of the University of Kansas, and the president of Kansas State University.[380]

The bill did not pass. House Republicans tried to procedurally move the bill to another committee "before returning it to House [J]udiciary."[381] Kansas Governor Laura Kelly believed the bill "lacked traction" in the legislature and predicted it would not pass in the 2025 session, saying, "I'd be very surprised if it gets to my desk."[382]

2. Texas

On February 14, 2022, the Faculty Council of the University of Texas at Austin approved a resolution that rejected "any attempts by bodies external to the faculty to restrict or dictate the content of university curriculum on any matter, including matters related to racial and social justice."[383] The council resolved to "stand firm against any and all encroachment" on faculty authority, including by the legislature.[384] Texas Lieutenant Governor Dan Patrick condemned the resolution, writing on Twitter, "I will not stand by and let looney Marxist UT professors poison

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377 H.B. 2348, 2025 Sess. (Kan. 2025).

378 Sophia Best & Ainsley Smyth, *A Kansas House Bill Would Transform Tenure*. [Wichita St. Univ.] Sunflower (Feb. 12, 2025), https://thesunflower.com/92935/news/a-kansas-house-bill-would-transform-tenure-many-in-higher-education-worry-about-potential-implications/.

379 Maya Stahl, *A University's Top Lawyer Is Behind a Bill to Weaken Tenure. The University Had No Idea*. Chron. Higher Educ. (Feb. 11, 2025), https://www.chronicle.com/article/a-universitys-top-lawyer-is-behind-a-bill-to-weaken-tenure-the-university-had-no-idea.

380 *Id*.

381 Tim Carpenter, *Gov. Laura Kelly Skeptical Kansas House's Anti-Tenure Legislation Will Reach Her Desk*, Kan. Reflector (Feb. 24, 2025), https://kansasreflector.com/2025/02/24/gov-laura-kelly-skeptical-kansas-houses-anti-tenure-legislation-will-reach-her-desk/.

382 *Id*.

383 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.

384 *Id*.

the minds of young students with Critical Race Theory. We banned it in publicly funded K-12 and we will ban it in publicly funded higher ed."[385] Three days after his tweet, on February 18, 2022, Patrick issued a statement saying, "Universities across Texas are being taken over by tenured, leftist professors, and it is high time that more oversight is provided," and that one of his legislative priorities was "eliminating tenure at all public universities in Texas," along with changing tenure reviews from every six years to annually for "already-tenured professors" and defining "teaching Critical Race Theory in statute as a cause for a tenured professor to be dismissed."[386]

Senate Bill 18 of 2023, as introduced on March 10, 2023, would have accomplished Patrick's major goal. It proposed to eliminate tenure for faculty hired by public colleges and universities after September 1, 2023.[387]

The Texas House Committee on Higher Education amended the bill via a substitute on May 22, 2023 that restored tenure but diminished its benefit. The substitute omitted the provision prohibiting a public institution of higher education from granting tenure to an institution employee.[388] The substitute, however, added a provision stating: "The granting of tenure may not be construed to create a property interest in any attribute of a faculty position beyond a faculty members continuing employment, including his or her regular annual salary and any privileges incident to his or her status as a tenured professor."[389] The substitute incorporated the language regarding property rights into a new definition of tenure: "'Tenure' means the entitlement of a faculty member of an institution of higher education to continue in the faculty member's academic position unless dismissed by the institution for good cause in accordance with the policies and procedures adopted by the institution" under a separate section in the legislation.[390] The Senate concurred with the House amendments, and Governor Greg Abbott signed the bill on June 17, 2023, with an effective date of September 1, 2023.[391]

A bill introduced in 2025 aimed to enact Lieutenant Patrick's original idea of eliminating tenure. House Bill 1830, assigned to the House Committee on Higher Education on March 14, 2025, would prohibit public institutions of higher education from granting "an employee of the institution tenure or any type of permanent employment status," with an exception for employees and faculty employed by

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385 Dan Patrick (@DanPatrick), TWITTER (Feb. 15, 2022, 4:09 PM), https://x.com/DanPatrick/status/1493694009600053250.

386 Press Release, Lt. Gov. of Tex. Dan Patrick, Statement on Plans for Higher Education and Tenure (Feb. 18, 2022), https://www.ltgov.texas.gov/2022/02/18/lt-gov-dan-patrick-statement-on-plans-for-higher-education-and-tenure/.

387 S.B. 18, 88th Leg., Reg. Sess. (Tex. 2023).

388 Comm. Substitute S.B. 18, 88th Leg., Reg. Sess. (Tex. 2023).

389 *Id*.

390 *Id*.

391 Drew Shaw, *Gov. Greg Abbott Signs Senate Bills 17 and 18*, THE [UNIV. OF TEX. AT ARLINGTON] SHORTHORN, June 14, 2023, https://www.theshorthorn.com/news/gov-greg-abbott-signs-senate-bills-17-and-18/article_5b1ce70c-0af9-11ee-879c-3fe6c0fc698e.html.

the institution "on September 1, 2025, and who was awarded tenure or any type of permanent employment status by the institution before September 1, 2025."[392]

E. Proposed Dilutions of Tenure Rights that Morphed into Post-Tenure Reviews

1. South Carolina

Between 2022 and 2024, South Carolina considered legislation to end tenure, then studied the effects of a ban, and then considered a post-tenure review system. Under the initial legislation, public colleges and universities would have phased out their tenure systems until "there are no faculty members covered by the system who remain employed by the institution," and they could "not award tenure to, or enter into an employment contract for a period longer than five years with, a person hired by the institution after December 31, 2022."[393] Opposition from South Carolina's higher education commission, public colleges and universities, the AAUP, and legislators from both sides of the aisle "killed the bill's chances to move forward."[394] The sponsor of the bill said he "agreed to 'slow the bill down' after it raised a 'great amount of ruckus among universities and professors,'" and the legislature ordered an independent economic study of the bill's potential consequences.[395]

In 2024, a bill in the South Carolina Senate would have required public institutions of higher education to establish "a tenure review process for every tenured faculty member."[396] The review would occur at least once every six years after a faculty member had gained tenure. The tenure review process was required to "ensure that the faculty member has continued to meet the high standards for tenure that are outlined in the institution's faculty guidelines."[397] The Senate passed the bill unanimously, but the House did not hear the bill.[398]

2. North Dakota

North Dakota, in consecutive legislative sessions between 2023 and 2025, considered significant curtailments to tenure at a small set of institutions but then deliberated—and finally adopted—post-tenure reviews for a wider set of colleges and universities. In 2023, House Bill 1446—as introduced—would have created a four-year pilot program at Bismarck State College and Dickinson State University requiring tenured faculty members to meet the following criteria:

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392 H.B. 1830, 89th Leg., Reg. Sess. (Tex. 2025).

393 H.R. 4522, 124th Gen. Assemb., Reg. Sess. (S.C. 2021–22).

394 Jeremy Bauer-Wolf, *South Carolina Bill to End Tenure at Public Colleges Won't Advance This Year*, Higher Ed Dive (Feb. 24, 2022), https://www.highereddive.com/news/south-carolina-bill-to-end-tenure-at-public-colleges-wont-advance-this-yea/619330/.

395 David Montgomery, *GOP Targets Tenure to Curb Classroom Discussions of Race, Gender*, Stateline (Mar. 14, 2022), https://stateline.org/2022/03/14/gop-targets-tenure-to-curb-classroom-discussions-of-race-gender/.

396 S. 538, 125th Gen. Assemb., Reg. Sess. (S.C. 2023–24).

397 *Id*.

398 *Id*; https://www.scstatehouse.gov/sess125_2023-2024/bills/538.htm.

> 1. Generate more tuition or grant revenue than the combined total of the salary, fringe benefits, compensation, and other expenses of the tenured faculty member plus all other costs of employing the faculty member, including employment taxes. …
>
> 2. Comply with the policies, procedures, and directives of the institution, the institution's president and other administrators, the state board of higher education, and the North Dakota university system.
>
> 3. Effectively teach and advise a number of students approximately equal to the average campus faculty teaching and advising load.
>
> 4. Engage in measurable and effective activities to:
>
> a. Help recruit and retain students for the institution.
>
> b. Help students achieve academic success.
>
> c. Further the best interests of the institution including providing advice and shared governance to campus leaders, and exercising mature judgment to avoid inadvertently harming the institution, especially in avoiding the use of social media or third-party internet platforms to disparage campus personnel or the institution.
>
> 5. Perform all other duties outlined in any applicable contract and position description.[399]

In addition, the bill authorized the presidents at Bismarck State College and Dickinson State University to review the performance of tenured faculty members "at any time the president deems a review is in the institution's best interest."[400] If a president determined that a tenured faculty member failed to comply "with a duty or responsibility of tenure," the president "may not renew the contract of the tenured faculty member, unless the president specifically articulates why it is in the interest of the institution to continue to employ the faculty member despite the faculty member's failure to comply with the duties and responsibilities of tenure."[401]

The bill failed to pass the legislature but pitted institutional leaders against each other. The North Dakota House of Representatives, after slightly amending the bill,[402] overwhelmingly passed it by a vote of 66–27 on February 20, 2023.[403]

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399 H.B. 1446, 68th Legis. Assemb. (N.D. 2023).

400 *Id*.

401 *Id*.

402 H.B. 1446 First Engrossed, 68th Legis. Assemb. (N.D. 2023). Among other changes, the amendments removed the requirement that tenured faculty generate more revenue than their combined expenses.

403 Ryan Quinn, *N.D. Senate Narrowly Rejects Bill on Firing Tenured Faculty*, Inside Higher Ed(Apr.3, 2023), https://www.insidehighered.com/quicktakes/2023/04/03/nd-senate-narrowly-rejects-bill-firing-tenured-faculty.

The North Dakota Senate narrowly defeated the bill, 23–21, on March 31, 2023.[404] The president of Dickinson State actually drafted a version of the bill for House Majority Leader Mike Lefor, the prime sponsor of the bill, while the chancellor of the North Dakota University System testified against the bill before the North Dakota Senate, saying, "The [State] [B]oard [of Higher Education] feels strongly that the award of academic tenure" should stay under the board's "constitutional authority."[405]

In the wake of the legislative defeat, the North Dakota State Board of Higher Education Board discussed tenure policies at several meetings in 2024. It amended one policy to say that tenured faculty have an "expectation to continuous academic year employment in an academic unit or program area" instead of a "right" to employment.[406] It rejected a proposal to require reviews of tenured faculty every three years instead of the already-required five years.[407]

Legislation introduced in 2025 would have banned tenure for any faculty member hired after July 1, 2026, at North Dakota's two-year institutions.[408] The bill's primary sponsor, Rep. Mike Motschenbacher, explained, "I don't see any advantage to the students to have somebody who can basically hide behind a protection where they could almost never be let go."[409]

The House Government and Veterans Affairs Committee amended the bill on February 14, 2025 by replacing the tenure ban with provisions requiring two- and four-year public institutions to adopt post-tenure review policies for tenured faculty by July 1, 2026.[410] For "newly tenured faculty members," the first evaluation "must happen within the first three years of being awarded tenure," and "[s]ubsequent evaluations must occur every five years or more frequently."[411] The policy must also define "the outcome of an unsatisfactory review of post-tenured faculty, which may be removal from the position," a decision that "must be made by the employing institution and the state board of higher education."[412]

The amended version of the bill passed both chambers of the North Dakota legislature, after a surprise vote in the Senate. The House passed the bill by a vote

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404 *Id*.

405 Ryan Quinn, *Tenure Under Fire—Again—in North Dakota*, Inside Higher Ed (May 30, 2024), https://www.insidehighered.com/news/faculty-issues/tenure/2024/05/30/tenure-under-fire-again-north-dakota.

406 N.D. St. Bd. of Higher Educ. Policy Manual, Policy 605.1§ 6.b; Jeff Beach, *Higher Education Board Wades into Details of Tenure Policy*, N.D. Monitor (Dec. 11, 2024), https://northdakotamonitor.com/2024/12/11/higher-education-board-wades-into-details-of-tenure-policy/.

407 Beach, *supra* note 406.

408 H.B. 1437, 69th Legis. Assemb. (N.D. 2025). The bill identified the two-year institutions as Bismarck State College, Dakota College at Bottineau, Lake Region State College, North Dakota State College of Science, and Williston State College.

409 Quinn, *supra* note 273.

410 H.B. 1437 first engrossed, 69th Legis. Assemb. (N.D. 2025).

411 *Id*.

412 *Id*.

of 84-5, with the North Dakota University System's vice chancellor satisfied that the bill "mostly reiterates work already done by the State Board of Higher Education."[413] The Senate Education Committee made minor amendments to the bill, changing the language as follows: "The first post-tenure evaluation must be completed within three years. Subsequent post-tenure evaluations must be completed at least every five years or more frequently."[414] After the Senate initially defeated the bill by six votes on March 25, 2025, a motion to reconsider put the bill up for a second vote the next day, when it passed 28–19.[415] The chair of the Senate Education Committee explained that the bill "aligns with a recent policy that was put in place in higher ed. So higher ed did agree that the parameters in here did match what they recently put into place."[416] The governor signed the bill on April 18, 2025.[417]

F. Post-Tenure Reviews in Other States

1. Florida

Post-tenure review laws enacted in Florida in 2022 and 2023, and the institutional policies they authorized, led to at least three lawsuits. The 2022 law allowed, but did not require, the Board of Governors—which oversees the twelve four-year institutions within the State University System of Florida—to "adopt a regulation requiring each tenured state university faculty member to undergo a comprehensive post-tenure review every 5 years."[418] The legislation stipulated that the regulations must include the following criteria: "1. Accomplishments and productivity; 2. Assigned duties in research, teaching, and service; 3. Performance metrics, evaluations, and ratings; and 4. Recognition and compensation considerations, as well as improvement plans and consequences for underperformance."[419]

Legislation in 2023 mandated that the Board of Governors adopt such post-tenure review regulations.[420] In addition, the bill limited the ability to appeal tenure and termination decisions, eliminating the option of arbitration. The legislation stated that:

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413 Jeff Beach, *Amended Tenure Policy Bill Advances to North Dakota Senate*. N.D. Monitor (Feb. 19, 2025), https://northdakotamonitor.com/briefs/amended-tenure-policy-bill-advances-to-north-dakota-senate/.

414 H.B. 1437 first engrossment with Sen. amends., 69th Legis. Assemb. (N.D. 2025).

415 Dave Thompson, *State Senate Reverses Itself, Passes 'Tenure' Bill*, Prairie Public Broad. (Mar. 27, 2025), https://news.prairiepublic.org/local-news/2025-03-27/state-senate-reverses-itself-passes-tenure-bill.

416 *Id*.

417 N.D. Legis., 69th Legislative Assembly (2025–27), HB 1437, https://ndlegis.gov/assembly/69-2025/regular/bill-actions/ba1437.html?bill_year=2025&bill_number=1437.

418 2022 Fla. Laws, 486.

419 *Id*. at 487.

420 2023 Fla. Laws 82, 1015. Under earlier versions of the legislation, tenured professors would have faced post-tenure review at any time or for any cause, but that language was removed by the bill's sponsor. Eva Surovell, *'Diversity, Equity, and Inclusion' Is Stripped Out of Florida's Higher-Ed Reform Bill*, Chron. Higher Educ. (Apr. 13, 2023), https://www.chronicle.com/article/diversity-equity-and-inclusion-is-stripped-out-of-floridas-higher-ed-reform-bill.

> personnel actions or decisions regarding faculty, including in the areas of evaluations, promotions, tenure, discipline, or termination, may not be appealed beyond the level of a university president or designee. Such actions or decisions must have as their terminal step a final agency disposition, which must be issued in writing to the faculty member, and are not subject to arbitration. The filing of a grievance does not toll the action or decision of the university, including the termination of pay and benefits of a suspended or terminated faculty member.[421]

The Board of Governors adopted post-tenure review regulations in 2023. The review criteria included

> 1. The level of accomplishment and productivity relative to the faculty member's assigned duties in research, teaching, and service, including extension, clinical, and administrative assignments. The university shall specify the guiding documents. Such documents shall include quantifiable university, college, and department criteria for tenure, promotion, and merit as appropriate.
>
> 2. The faculty member's history of professional conduct and performance of academic responsibilities to the university and its students.
>
> 3. The faculty member's non-compliance with state law, Board of Governors' regulations, and university regulations and policies.
>
> 4. Unapproved absences from teaching assigned courses.
>
> 5. Substantiated student complaints.
>
> 6. Other relevant measures of faculty conduct as appropriate.[422]

The regulations established four performance ratings. They include "[e]xceeds expectations," "[m]eets expectations," "[d]oes not meet expectations," and "[u] nsatisfactory."[423] A faculty member who receives a final performance rating of "unsatisfactory" "shall receive a notice of termination from the chief academic officer."[424]

The first reviews under the new regulations, conducted in the spring of 2024, resulted in several dismissals at the state's flagship institution. At the University of Florida, 17% of the 226 faculty members who underwent reviews were rated in the two lowest categories: five were rated as "unsatisfactory" and received a notice of termination, while thirty-four were rated as "does not meet expectations" and were placed on a one-year performance-improvement plan.[425] The University of

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421 2023 Fla. Laws 1015, 1020.

422 Fla. Bd. of Governors Regul. ch. 10.003 (2025).

423 *Id*. at ch. 10.003 §§ (4)(f), (4)(i).

424 *Id*. at ch. 10.003 § (5)(d).

425 Megan Zahneis, *Why U. of Florida Professors Decry 'Chaotic' Post-Tenure Review that Failed Nearly a Fifth of Those Evaluated*, Chron. Higher Educ. (Aug. 19, 2024), https://www.chronicle.com/

Central Florida had the next-highest proportion of professors in the bottom-two ratings—11.1%—while all professors reviewed at Florida State University either met or exceeded expectations.[426]

Three tenured professors filed a lawsuit in state court to challenge the constitutionality of the post-tenure review laws.[427] The Florida Constitution established the "Statewide Board of Governors" and gave it the authority to "operate, regulate, control, and be fully responsible for the management of the whole university system. These responsibilities shall include, but not be limited to, defining the distinctive mission of each constituent university and its articulation with free public schools and community colleges, ensuring the well-planned coordination and operation of the system, and avoiding wasteful duplication of facilities or programs."[428] The plaintiffs argued that the tenure law limited "the Board of Governors' authority to make policies and decisions with respect to tenure," while also imposing "direct requirements on the Board with respect to tenure."[429] Therefore, every provision of the tenure law "that usurps, encroaches on, modifies or controls the Board of Governor's constitutional powers and duties prescribed in Article IX § 7(d) [of the] Florida Constitution is unconstitutional."[430]

The plaintiffs claimed that the tenure law caused them injuries in two ways. First, they argued that the law constructively ended tenure in Florida, causing them "immediate harm … as the termination of tenure affects their career opportunities."[431] They argued, "Because traditional tenure has been abolished in Florida, Plaintiffs can no longer represent to the public and to their peers that they are fully-tenured professors," making it difficult for them "to advance in their field," especially outside of Florida, and "secure government grants."[432] The plaintiffs characterized the law as:

> [t]echnically … abolish[ing] only lifetime or indefinite tenure in favor of a five-year review process. But that means that Plaintiffs can no longer truthfully represent that they have life-time tenure. At most, they can represent that they have a five-year contract which may or may not be renewed.[433]

The plaintiffs also argued that the tenure law infringed on "the substantive and procedural protections of tenured professors."[434] They asked the court to find

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article/why-u-of-florida-professors-decry-chaotic-post-tenure-review-that-failed-nearly-a-fifth-of-those-evaluated.

426 *Id*.

427 Complaint at 2–3, Hernandez v. Bd. of Governors of the St. Univ. of Fla., 2024 CA 001238 (Fla. Cir. Ct. July 30, 2024).

428 Fla. Const. art. IX, § 7.

429 Complaint, *supra* note 427, at 10–11.

430 *Id*. at 15.

431 *Id*. at 16.

432 *Id*. at 17.

433 *Id*. at 16 n. 5.

434 *Id*. at 19.

the law unconstitutional and to impose an injunction against its enforcement.[435]

Faculty members and faculty unions pursued cases in state and federal courts to challenge the tenure law's elimination of arbitration. Hugo Viera-Vargas, a faculty member at New College, was denied tenure in April 2023 and subsequently denied the right to appeal through arbitration because of the tenure law's provision against it.[436] Viera-Vargas teamed with the United Faculty of Florida in court to assert that the tenure law violated collective-bargaining rights and unconstitutionally impaired a union contract. A collective bargaining agreement between New College and United Faculty of Florida in effect between 2021 and 2024 included a provision governing grievance procedures and arbitration.[437] Noting this provision, the complaint stated, "The arbitration ban cannot survive any level of constitutional scrutiny. There is no remotely sufficient governmental interest in this prohibition. Nor do the state's means bear an adequate connection to any purported interest. Instead, the prohibition serves only to undermine plaintiffs' constitutionally protected collective bargaining and contractual rights."[438] The college's motion to dismiss was denied, with the judge writing, "Here, plaintiffs alleged the arbitration provisions in the collective bargaining agreement were bargained-for. This claim is more than plausible given that the collective bargaining agreement's arbitration provisions go well beyond the requirements (of part of state law) by setting out the scope and procedures of any arbitration in detail."[439]

United Faculty of Florida also brought a suit in federal court to protect arbitration rights. The complaint cited the 100-year-old Federal Arbitration Act (FAA),[440] which "reflects a long-standing federal policy favoring arbitration and preempts state laws that ban arbitration of particular types of claims or treat agreements to arbitrate differently from any other type of contract."[441] Relying on the Supremacy Clause of the U.S. Constitution,[442] the plaintiffs' first count argued, "The Arbitration Ban directly conflicts with the FAA because the Arbitration Ban purports to invalidate terms providing for arbitration of adverse personnel

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435 *Id*. at 18, 20.

436 Jim Saunders, *New College of Florida Professor, Unions Sue State Over Arbitration*, Fla. News Serv. (Aug. 7, 2023), https://www.newsserviceflorida.com/latest/headlines/unions-new-college-prof-challenge-state-law/article_125dd81a-32df-11ee-9c48-d3752b3dfb22.html.

437 New Coll. of Fla. Bd. of Trs. and New Coll. United Faculty of Fla. (2021), *Collective Bargaining Agreement 2021–2024*, art. 20, https://www.ncf.edu/wp-content/uploads/2024/05/NCUFF-Collective-Bargaining-Agreement-2021-2024-BOT-Approved-08.10.23-1.pdf.

438 Saunders, *supra* note 436.

439 Josh Moody, *Tenure Denial Lawsuit Against New College Moves Forward*, Inside Higher Ed (July 19, 2024), https://www.insidehighered.com/news/quick-takes/2024/07/19/tenure-denial-lawsuit-against-new-college-moves-forward.

440 9 U.S.C. § 1-16.

441 Complaint at 6, United Faculty of Fla. v. Lamb, 1:24-cv-136 (N.D. Fla. Aug. 7, 2024). The FAA guarantees that "[a] written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

442 U.S. Const. art. VI, cl. 2.

decisions for higher education faculty in Florida and stands as an obstacle to Congress's objectives and purpose of promoting arbitration and enforcing arbitration agreements as written."[443]

United Faculty of Florida sought declaratory judgment that the arbitration ban is invalid regarding all collective bargaining agreements covered by the Federal Arbitration Act.[444] It also requested a permanent injunction enjoining the Florida Board of Governors from enforcing the arbitration ban, including any action to impair "contractual right to arbitrate grievances before a neutral arbitrator under the operative CBAs."[445]

2. Georgia

In 2021, the Georgia Board of Regents adopted a revised post-tenure review policy that the president of the Georgia Conference of the AAUP described as "the death of tenure and due process in Georgia."[446] In effect, the policy separated the post-tenure review process from the due-process protections under the system's faculty dismissal policy.[447] The process to remove tenured professors includes a peer review with other faculty,[448] but under the 2021 revisions, faculty at public universities could be removed after failing two consecutive annual reviews without a final faculty review.[449] Additional revisions in 2023 addressed due process, but left the final decision in the hands of institutional presidents.[450]

The post-tenure review policy requires each tenure-granting institution in the University System of Georgia to establish criteria and a process to evaluate the performance of each tenured faculty member.[451] Each institution was required to develop its policies "in consultation with the institution's faculty and … include appropriate due-process mechanisms."[452] The criteria must include "evaluation of instruction, student success activities, research/scholarship, and service as is appropriate to the faculty member's institution, school or college, and department."[453]

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443 Complaint, *supra* note 441, at 28.

444 *Id*. at 30.

445 *Id*.

446 Dave Williams, *University System of Georgia Faculty Fighting Changes to Tenure System*, Athens Banner-Herald (Oct. 12, 2021), https://www.onlineathens.com/story/news/2021/10/12/university-system-georgia-set-adopt-tenure-changes-opposed-faculty/8428426002/.

447 Colleen Flaherty, *Tenure Changes Ahead*, Inside Higher Ed (Oct. 12, 2021), https://www.insidehighered.com/news/2021/10/13/georgia-board-set-vote-controversial-tenure-changes.

448 See *infra* text accompanying note 460.

449 Giulia Heyward, *Board's Move Allows Firing of Professors with Tenure*, N.Y. Times, Oct. 14, 2021, at A19.

450 See *infra* text accompanying notes 458–60.

451 Univ.Sys.ofGa.,*Bd.forRegentsPolicyManual*,§8.3.5.4(2025),https://www.usg.edu/policymanual/assets/policymanual/documents/bor_policy_manual.pdf.

452 *Id*.

453 *Id*. These criteria largely mirror the criteria already considered for pre-tenure reviews and decisions regarding retention, promotion, and tenure. *Id*. at 8.3.5.1.

Each tenured faculty member must "participate in a post-tenure review within five years following the award of tenure and again at least once every five years thereafter."[454] If the results of the post-tenure review are unfavorable, then the appropriate department chair and dean, in consultation with the faculty member, create "a performance improvement plan."[455] If the faculty member successfully completes the performance improvement plan, their next post-tenure review will take place on the regular five-year schedule. If the faculty member fails to make sufficient progress in performance as outlined in the performance improvement plan (or refuses to engage reasonably in the process) as determined by the department chair and dean after considering feedback from the committee of faculty colleagues, then the institution "shall take appropriate remedial action corresponding to the seriousness and nature of the faculty member's deficiencies," with options including but not limited to "suspension of pay, salary reduction, revocation of tenure, and separation from employment."[456] The president makes the final determination of the remedial action, which is "not governed by or subject to the Board Policy on Grounds for Removal or Procedures for Dismissal."[457]

Procedural due process was the major difference between the method to impose remedial action after a post-tenure review—including separation from employment—and the procedures to remove or dismiss a faculty member. The policy on Grounds for Removal lists nine reasons to dismiss a tenured or non-tenured faculty member "before the end of his or her contract term … provided that the institution has complied with procedural due process requirements."[458] The policy on Procedures for Dismissal establish "the minimum standards of due process" that an institution must follow, including four "preliminary procedures" that include a "letter to the faculty member forewarning that he or she is about to be terminated for cause and informing him or her that a statement of charges will be forwarded to him or her upon request," and a "statement of charges, if requested by the faculty member" along with advisement of "the names of the witnesses to be used against him or her together with the nature of their expected testimony." [459] The faculty member also has "the right to be heard by a faculty hearing committee," and hearings must comply with fourteen specific procedures, including "[s]ervice of notice of the hearing with specific reasons or charges against the faculty member together with the names of the members of the hearing committee," the right of both sides to have counsel, the keeping of a tape recording or transcript of the proceedings, and the right of both sides "to confront and cross-examine all witnesses."[460]

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454 *Id*. at § 8.3.5.4.

455 *Id*.

456 *Id*.

457 *Id.* at § 8.3.5.4.

458 *Id*. at § 8.3.9.1.

459 *Id*. at § 8.3.9.2.

460 *Id*.

In 2023, the Board of Regents added language to try to address due process concerns over terminations resulting from post-tenure reviews by providing a final faculty hearing. After consulting with the University System of Georgia Faculty Council, the board recommended "an expeditious faculty hearing to evaluate due process, and one that is not binding on the President, at the final stage of the post-tenure review process," thereby making the post-tenure review policy "self-sufficent [sic] for separation of employment cases that are based on a post-tenure review."[461] The additional language stated,

> [I]f the remedial action is separation from employment, the faculty member has the right to request a final faculty hearing for the purpose of confirming that due process was followed in reaching the decision of separation of employment. The outcome of the faculty hearing shall not be binding, but only advisory to the President who shall make the final decision.[462]

Press reports noted that the final faculty hearing " would be to 'evaluate due process'—not the ostensible reason for dismissal."[463] The AAUP, in a report critical of the 2021 revisions, concluded that the University System of Georgia administration and the Board of Regents had "effectively abolished tenure in Georgia's public colleges and universities," explaining, "Under the new policy, a system institution can dismiss a tenured professor for failing to remediate deficiencies identified through post-tenure evaluation without having afforded that professor an adjudicative hearing before an elected faculty body in which the administration demonstrates adequate cause for dismissal," and by "thus denying academic due process to tenured faculty members dismissed through post-tenure review," the policy was a "flagrant violation of the joint 1940 *Statement of Principles on Academic Freedom and Tenure*."[464]

3. Kentucky

A law enacted in Kentucky in 2025 through a veto override requires presidents and faculty at the state universities,[465] the Kentucky Community and Technical

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461 Univ. Sys. of Ga., *Board of Regents Agenda*, Apr. 18–19, 2023 at 78, https://www.usg.edu/regents/assets/regents/documents/board_meetings/BoR_Agenda_April_18th_19th_2023_%28Public%29_with_cover_page_4-13-23pm.pdf. The board questioned the need for this language, stating in the abstract to the proposed rules: "While a final faculty hearing seems redundant for post-tenure review outcomes given the extensive steps already incorporated into the post-tenure review process, adding such a hearing would better align a separation of employment based on post-tenure review with a separation of employment based on other reasons." *Id*.

462 *Id*. at 82; *see also* Univ. Sys. of Ga., *supra* note 451, at § 8.3.5.4.

463 Ryann Quinn, *Georgia System Board OKs Post-Tenure Review Change*, Inside Higher Ed (Apr. 20, 2023), https://www.insidehighered.com/news/quick-takes/2023/04/20/georgia-system-board-oks-posttenure-review-change.

464 Am. Ass'n Univ. Professors, *Academic Freedom and Tenure: University System of Georgia* 12 (2021), https://www.aaup.org/file/Bulletin2022Final-2-USG_0.pdf. In March 2022, the AAUP voted to censure the University System of Georgia "for the unilateral action of its administration and governing board to remove the protections of tenure and academic freedom from the system's post-tenure review policy." Am Ass'n Univ. Professors, *AAUP Censures University System of Georgia* (Mar. 5, 2022), https://www.aaup.org/news/aaup-censures-university-system-georgia.

465 Eastern Kentucky University, Morehead State University, Murray State University, Western

College System, the University of Kentucky, and the University of Louisville to undergo an evaluation of their "performance and productivity" every four years.[466] Each institution's board must establish an evaluation process by 2026. "Failure to meet performance and productivity requirements may result in removal" of a president or faculty member.[467]

During the vote on the legislation in the Kentucky Senate, a senator who is an assistant professor at the University of Louisville warned about the bill's effect on academic freedom. Noting that universities already have evaluation systems and that the governing boards are "inherently political organizations that are appointed by the governor and confirmed by" the Senate, "there are no guard rails in this legislation that require that the policies or procedures that they set actually be tied to an employee's employment contract or to their work obligations," he said.[468]

Governor Andy Beshear, in his veto message, shared concerns about the legislation's encroachment on academic freedom.[469] The veto message stated, "In a time of increased federal encroachment into the public education, this bill will limit employment protections of our postsecondary institution teachers," and "limit Kentucky's ability to hire the best people and threatens academic freedom."[470] Two days later, the Republican-majority legislature overrode the Democratic governor's veto by a vote of 80–20 in the House and 29–9 in the Senate.[471]

G. Governance over Tenure in Mississippi: Transfer of Decision-Making, and New "Communications" and "Collegiality" Criteria

In 2022, the Institutions of Higher Learning Board of Trustees in Mississippi, which governs the eight public universities in the state,[472] amended three of its eight tenure policies: minimum standards for tenured employment, promotions in rank, and post-tenure review.[473] In a governance change, the authority to grant

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Kentucky University, Northern Kentucky University, and Kentucky State University. Ky. Rev. Stat. Ann. § 164.290 (2025).

466 H.B. 424 veto override, 2025 Gen. Assemb., Reg. Sess. (Ky. 2025).

467 *Id*.

468 Monica Kast, *'No Guard Rails': KY University Performance Evaluation Bill Passes Despite Tenure Concerns*, Lexington Herald-Leader (Mar. 14, 2025), https://www.kentucky.com/news/local/education/article302062789.html.

469 Veto Message from the Governor of the Commonwealth of Kentucky Regarding House Bill 424 of the 2025 Regular Session, Mar. 25, 2025.

470 *Id*.

471 Quinn, *supra* note 299; McKenna Horsley, *Bills Become Law Ending DEI in Public Colleges, Stirring Uncertainty About Tenure's Future in KY*, KY. LANTERN (Mar. 27, 2025), https://kentuckylantern.com/2025/03/27/ky-bills-ending-dei-in-public-colleges-creating-uncertainty-about-tenures-future-become-law/.

472 Alcorn State University, Delta State University, Jackson State University, Mississippi State University, Mississippi University for Women, Mississippi Valley State University, the University of Mississippi, and the University of Southern Mississippi. Miss. Institutions of Higher Learning, *Institutions of Higher Learning*, http://www.mississippi.edu/about/ (last visited July 10, 2025).

473 Molly Minta, *College Presidents Now Have Final Say on Tenure After IHL Quietly Revises Policy*, Miss.

tenure was transferred from the board to the institutional presidents.[474] The policy to grant tenure was amended to add eight criteria to be considered:

- Professional training and experience;
- Effectiveness of teaching;
- Effectiveness, accuracy and integrity in communications; The Board endorses the American Association of University Professors' (AAUP) Statement of Principles on Academic Freedom and Tenure, which states in part: "When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence, they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution."
- Effectiveness in interpersonal relationships, including collegiality, professional ethics, cooperativeness, resourcefulness, and responsibility;
- The absence of malfeasance, inefficiency and contumacious conduct in the faculty member's performance of his/her faculty position at the university;
- Professional growth, such as research, publications, and creative activities;
- Service and other non-teaching activities, which reflect favorably upon the institution; and
- Any other criteria for granting tenure set out in the applicable institution's tenure policies, which are not inconsistent with this policy.[475]

Several of those criteria were already part of the consideration for promotions in rank, but the amendments added the elements regarding "effectiveness, accuracy and integrity in communications," the "absence of malfeasance, inefficiency and contumacious conduct," and additional criteria from institutional policies.[476] For post-tenure review, all the tenure-related criteria except "professional training and experience" were added as criteria to be considered, along with the phrase "and/or research" added after "[e]ffectiveness of teaching."[477]

Today (Apr. 21, 2022), https://mississippitoday.org/2022/04/21/tenure-ihl-revises-policy/.

474 Miss. Bd. Trs. of State Insts. Higher Learning, *Board Book* 82 Apr. 21, 2022), https://web.archive.org/web/20220421201149/http://www.mississippi.edu/board/downloads/boardbooks/2204.pdf; *see also* Miss. Bd. Trs. State Insts. Higher Learning, *Policies and Bylaws*, § 403.0101 (2024).

475 Miss. Bd. Trs. State Insts. Higher Learning, *Board Book*, *supra* note 474, at 82–83; Miss. Bd. Trs. State Insts. Higher Learning, *Policies and Bylaws*, *supra* note 474.

476 Miss. Bd. Trs. State Insts. Higher Learning, *Board Book*, *supra* note 474, at 81; Miss. Bd. Trs. State Insts. Higher Learning, *Policies and Bylaws*, *supra* note 474, at § 402.03.

477 Miss. Bd. Trs. State Insts. Higher Learning, *Board Book*, *supra* note 474, at 84; Miss. Bd. Trs. State

The ambiguity of words like "collegiality" can be problematic. Neal Hutchens, a professor of higher education who specializes in higher education law,[478] said, "I worry these new terms would be used to try and chill faculty speech and participation in shared governance."[479] Hutchens also said, "The problem is that such terms can be so vague as to really be more about whether faculty are subservient to institutional leaders and be a ground to dismiss faculty for unwarranted reasons or to deny tenure."[480]

The AAUP opposes the use of "collegiality" as a criterion to evaluate faculty. In a statement with origins dating back to 1999, the AAUP asserts that "collegiality is not a distinct capacity to be assessed independently of the traditional triumvirate of teaching, scholarship, and service. Evaluation in these three areas will encompass the contributions that the virtue of collegiality may pertinently add to a faculty member's career."[481] The statement explains how the "invocation of 'collegiality'" can "threaten academic freedom":

> In the heat of important decisions regarding promotion or tenure, as well as other matters involving such traditional areas of faculty responsibility as curriculum or academic hiring, collegiality may be confused with the expectation that a faculty member display "enthusiasm" or "dedication," evince "a constructive attitude" that will "foster harmony," or display an excessive deference to administrative or faculty decisions where these may require reasoned discussion. Such expectations are flatly contrary to elementary principles of academic freedom, which protect a faculty member's right to dissent from the judgments of colleagues and administrators.[482]

Moreover, a specific criterion of collegiality "also holds the potential of chilling faculty debate and discussion. Criticism and opposition do not necessarily conflict with collegiality."[483]

H. Task Force that Did Not Meet, Bill that Did Not Pass, But Issue Persisted: Louisiana

A task force established by the Louisiana legislature in 2022 to scrutinize tenure was never convened, and legislation the following year that would have required annual faculty reviews did not proceed. Still, tenure remained a hot-button issue in Louisiana in 2025.

Insts. of Higher Learning, *Policies and Bylaws*, *supra* note 474, at § 403.0103.

478 *See* Kaplin et al., *supra* note 20. Hutchens was at the University of Mississippi from 2016 to 2022 and is now at the University of Kentucky. *Id*. at xxxi.

479 Minta, *supra* note 473.

480 *Id*.

481 Am. Ass'n Univ. Professors, *On Collegiality as a Criterion for Faculty Evaluation* 1 (2016), https://www.aaup.org/file/AAUP%20Collegiality%20report.pdf.

482 *Id*. at 1–2.

483 *Id*. at 2.

Louisiana Senate Concurrent Resolution 6, sponsored by Senator Stewart Cathey, created the Task Force on Tenure in Postsecondary Education in 2022.[484] Signaling the sponsor's skepticism of tenure, the resolution stated that "tenure policies may provide competent faculty the freedom to perform scholarly research, impart their knowledge, and debate controversial or emerging issues without any political influence or fear of reprisal," and that

> postsecondary education students should be confident that they are being exposed to the spectrum of viewpoints, including those that are dissenting; that they are graded solely on the basis of their reasoned answers and appropriate knowledge; and that faculty members are not using their courses for the purposes of political, ideological, religious, or antireligious indoctrination.[485]

The Task Force on Tenure in Public Postsecondary Education established by the resolution was required "to perform an in-depth review of the merits of and need for tenure, to study public postsecondary tenure policies, and to propose any recommendations regarding tenure policies."[486]

The composition of the nineteen-member task force led to its demise, with the majority of its members supporting tenure. The task force was "dominated by academics and politicians skeptical of the panel's stated mission."[487] Only two members, Senator Cathey and fellow Republican Senator Kirk Talbert, had publicly criticized tenure. Four House members appointed by the House Speaker had voted against the resolution.[488] University administrators—including the president of the University of Louisiana System and the president-chancellor of the Southern University System—and several faculty members filled a total of nine seats. The four remaining seats belonged to legislators who had not shared a position on tenure.[489]

Given the perception that the task force was "stacked with academics and pro-tenure legislators," Senator Cathey, as the chair of the task force, decided not to convene it.[490] Instead, he sponsored legislation that would require annual evaluations of all faculty members at public colleges and universities.[491]

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484 Sen. Con. Res. No. 6, 2022 Reg. Sess. (La. 2022).

485 *Id*.

486 *Id*.

487 Piper Hutchinson, *Louisiana Task Force to Scrutinize University Tenure Is Made Up of People Who Support Tenure*, La. Illuminator (Aug. 3, 2022), https://lailluminator.com/2022/08/03/louisiana-task-force-to-scrutinize-university-tenure-is-made-up-of-people-who-support-tenure/.

488 *Id*.

489 *Id*.

490 Piper Hutchinson, *Higher Ed Tenure Task Force Will Not Meet; Sponsor Plans Legislation*, La. Illuminator (Jan. 31, 2023), https://lailluminator.com/2023/01/31/higher-ed-tenure-task-force-will-not-meet-sponsor-plans-legislation/.

491 S.B. 174, 2023 Reg. Sess. (La. 2023).

The bill would have required criteria that assigned "a weight to each of the areas of teaching, professional activity, and service."[492] Department heads needed to develop a written job description for each faculty position that included "detailed job duties in the three areas of teaching, professional activity, and service," and upon employment, each faculty member would receive the job description, the evaluation criteria, and the weight assigned to each of the three areas, along with "a list of performance goals."[493]

Department heads would annually evaluate each full-time and part-time faculty member, and the evaluation would be used to determine promotion, reappointment, and merit raises.[494] Evaluations would determine whether a faculty member's performance was "adequate or not."[495] Under the bill, a faculty member needed to meet at least 75% of the performance goals in an area to be determined "adequate or higher."[496]

Failure to be evaluated as adequate over two consecutive years triggered a "mandatory plan of remediation," and if a faculty member refused to concur with the plan as approved by the provost, their tenure would be rescinded.[497] A tenured faculty member under a mandatory plan of remediation who failed "to achieve significant progress as outlined in the remediation plan within the designated timetable shall forfeit tenure and may become subject to academic dismissal."[498]

The faculty-evaluation bill did not proceed beyond the committee stage in the Louisiana Senate,[499] but tenure remained a controversial topic in the state. During a lecture on January 14, 2025, a tenured criminal law professor at Louisiana State University, Ken Levy, "dropped f-bombs against then-president-elect Donald Trump and Louisiana governor Jeff Landry, and told students who like Trump that they need his 'political commentary,'" and LSU quickly removed him from

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492 *Id*. The legislation specified areas of emphasis in each of the three areas. For example, evaluations of teaching needed to "emphasize activities which engage students in learning, encourage"; evaluations of professional activity needed to "emphasize activities requiring professional or academic expertise that support and advance a discipline pertinent to the faculty member's position and the professional development of students through publications, performances, and exhibitions"; and evaluations of service needed to "emphasize professional contributions made to the institution, to students, and to the larger community meaningful academic and career guidance." *Id*.

493 *Id*.

494 *Id*.

495 *Id*.

496 *Id*.

497 S.B. 174, *supra* note 491.

498 *Id*.

499 La. St. Legis., Bill Search for the 2023 Regular Session, SB174, https://legis.la.gov/legis/BillInfo.aspx?s=23RS&b=SB174&sbi=y.

his teaching duties.[500] Levy sued to be reinstated.[501] While Levy's case progressed, Governor Landry posted on X an alleged criminal law exam given by Levy that included a section on sex crimes,[502] and Landry commented, "Disgusting and inexcusable behavior from Ken Levy. Deranged behavior like this has no place in our classrooms! If tenure protects a professor from this type of conduct, then maybe it's time to abolish tenure."[503] After the governor's post, it was anticipated that Senator Cathey was likely to file legislation similar to his previous tenure-related bill.[504]

IV. TRUMP'S EFFECTS ON TENURE THROUGH FEDERAL ACTION IN HIS SECOND TERM: "EXISTENTIAL TERROR," DEI, DOGE, AND TITLES VI AND IX AS TRUNCHEONS

Rather than attacking tenure and academic freedom directly, the second Trump administration used cuts in federal funding; prohibitions on DEI programs; calls for greater efficiency; and allegations of violations of Titles VI and IX as leverage to force colleges to comply with its vision of higher education, which in effect weakened tenure rights. Trump used bullying announcements, executive orders, and investigations as the means toward his ends.[505]

Early in his second term, Trump decided that withholding funds from "elite academic institutions" was "the fastest way to force policy changes … that the new administration believes it has a mandate to pursue."[506] An architect of this plan was Christopher Rufo, a senior fellow at the Manhattan Institute, a conservative think tank, who had earlier worked with Florida Governor Ron Desantis to defund DEI

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500 Ryan Quinn, *This Law Professor's Job Has Become a Legal Drama*, Inside Higher Ed (Feb. 20, 2025), https://www.insidehighered.com/news/faculty-issues/academic-freedom/2025/02/20/lsu-law-professors-job-has-become-legal-drama.

501 "Levy received notice on January 17 that LSU was relieving him of his teaching duties, 'effective immediately, pending an investigation into student complaints of inappropriate statements made in your class during the first week of the Spring Semester 2025.' Levy's status has since oscillated between being allowed to teach and being removed from the classroom. On Feb. 20, after weeks of back and forth concerning Levy's status in the classroom, Louisiana's First Circuit Court of Appeal vacated the part of the lower court's order that ordered LSU to reinstate Levy after a two-day evidentiary hearing. Levy just appealed that decision to the Louisiana Supreme Court." Letter from Graham Piro, Foundation for Individual Rights and Expression to William F. Tate, President, Louisiana State University (Mar. 12, 2025), https://www.thefire.org/research-learn/fire-letter-louisiana-state-university-march-12-2025.

502 For the text of the exam questions, see Quinn, *supra* note 500.

503 Governor Jeff Landry (@LAGovJeffLandry), X (Feb. 12, 2025, 6:06 PM), https://x.com/LAGovJeffLandry/status/1889813322222149888.

504 Piper Hutchinson, *Political Anxiety on Display at LSU Board Meeting*, La. Illuminator (Feb. 21, 2025), https://lailluminator.com/2025/02/21/political-anxiety-on-display-at-lsu-board-meeting/.

505 As mentioned earlier, this article, with its focus on tenure, does not attempt to catalog all the actions taken by the Trump administration against higher education in general and against specific institutions. *See supra* text accompanying note 200. *See also* Chronicle Staff, *Tracking Trump's Higher-Ed Agenda*, Chron. Higher Educ. (June 26, 2025), https://www.chronicle.com/article/tracking-trumps-higher-ed-agenda.

506 Annie Linskey, *President Ramps Up His Bid to Settle Scores*, Wall St. J., Mar. 22, 2025, at A4.

initiatives at public colleges and universities.[507] Rufo described the defunding plan as a way to put "the universities into contraction, into a recession, into declining budgets" in the following way:

> adjust the formula of finances from the federal government to the universities in a way that puts them in an existential terror and have them say, *Unless we change what we're doing, we're not going to be able to meet our budget for the year*. We're going to have to wind certain things down and then make the universities make those hard decisions.[508]

In 2025, the Trump administration imposed this "existential terror" through attacks on DEI programs, investigations into institutions' responses to antisemitism and compliance with Title IX, and faux calls for government efficiency.

A. Funding Threats over DEI Initiatives

On March 14, 2025, following up on Trump's executive order calling for civil rights enforcement against DEI programs and the Department of Education's Dear Colleague letter warning institutions that failure to comply with this civil rights interpretation could result in the loss of federal funding,[509] the Department of Education announced investigations into more than fifty universities.[510] Forty-five institutions were investigated over their relationship with the PhD Project, a nonprofit organization that helps underrepresented students get business degrees and diversify the business world.[511] The department said that the PhD Project bases eligibility on race and that its partner institutions are "engaging in race-exclusionary practices in their graduate programs."[512] The department was investigating six other institutions for awarding "impermissible race-based scholarships."[513]

B. Antisemitism Investigations

A major conduit to create "existential terror" was the Federal Task Force to Combat Anti-Semitism, which was established under the authority of an executive order to combat antisemitism,[514] and given a charge to "eradicate antisemitic harassment in schools and on college campuses."[515] On February 28, 2025, the task

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507 Josh Moody, *The New Conservative Playbook on DEI*, Inside Higher Ed (Feb. 6, 2023), https://www.insidehighered.com/news/2023/02/07/desantis-debuts-new-conservative-playbook-ending-dei.

508 Ross Douthat, *The Anti-D.E.I. Crusader Taking Aim at Education*, N.Y Times, Mar. 7, 2025, at SR5.

509 *See supra* text accompanying notes 173–76.

510 Collin Binkley, *More Than 50 Universities Face Federal Investigations as Part of Trump's Anti-DEI Campaign*, AP News (Mar. 14, 2025), https://apnews.com/article/trump-dei-universities-investigated-f89dc9ec2a98897577ed0a6c446fae7b.

511 *Id*.

512 *Id*.

513 *Id*.

514 Exec. Order No. 14,188, 90 Fed Reg. 8,847 (Feb. 3, 2025).

515 Press Release, U.S. Dep't of Justice, Federal Task Force to Combat Antisemitism Announces

force announced that it would investigate ten institutions that "may have failed to protect Jewish students and faculty members from unlawful discrimination" during protests over the war in Gaza between Israel and Hamas in 2024.[516] Under another initiative, the Department of Education announced on March 10, 2025, that it had sent letters to sixty universities already under investigation for Title VI violations relating to antisemitic harassment and discrimination, warning them of potential enforcement actions if they did not "protect Jewish students on campus, including uninterrupted access to campus facilities and educational opportunities."[517]

1. Columbia University

At the top of the Federal Task Force to Combat Anti-Semitism's list, and not just alphabetically, sat Columbia, which quickly became an example of the extent of the Trump administration's reach to control academics. On March 7, 2025, the administration announced it was canceling $400 million in federal grants and contracts to the university "due to the school's continued inaction in the face of persistent harassment of Jewish students."[518] In a letter to Columbia's president and board co-chairs on March 13, 2025, the administration outlined "immediate next steps that we regard as a precondition for formal negotiations regarding Columbia University's continued financial relationship with the United States government," including starting "the process of placing the Middle Eastern, South Asian, and African Studies department under academic receivership for a minimum of five years."[519] Academic receivership—a concept "largely absent from the professional

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Visits to 10 College Campuses that Experienced Incidents of Antisemitism (Feb. 28, 2025), https://www.justice.gov/opa/pr/federal-task-force-combat-antisemitism-announces-visits-10-college-campuses-experienced.

516 *Id*.

517 Press Release, U.S. Dep't of Educ., U.S. Department of Education's Office for Civil Rights Sends Letters to 60 Universities Under Investigation for Antisemitic Discrimination and Harassment (Mar. 10, 2025), https://www.ed.gov/about/news/press-release/us-department-of-educations-office-civil-rights-sends-letters-60-universities-under-investigation-antisemitic-discrimination-and-harassment.

518 Press Release, U.S. Dep't of Ed., DOJ, HHS, ED, and GSA Announce Initial Cancelation of Grants and Contracts to Columbia University Worth $400 Million (Mar. 7, 2025), https://www.ed.gov/about/news/press-release/doj-hhs-ed-and-gsa-announce-initial-cancelation-of-grants-and-contracts-columbia-university-worth-400-million. In April 2024, students supporting the Palestinian liberation movement pitched about fifty tents in the center of Columbia's campus to protest the war in Gaza. Chants, posters, and literature at the encampment expressed support for the October 7, 2023, attack by Hamas against Israel, and many Jewish students feared for their safety, especially after protesters targeted some Jewish students with antisemitic verbal abuse, leading the university to call for classes to be taught online. Luis Ferré-Sadurní et al., *Some Jewish Students Report Being Targeted as Protests at Columbia Press On*, N.Y. Times, Apr. 23, 2024, at A14. Other pro-Palestinian incidents included a student takeover of Hamilton Hall, a protest against a class taught by former Secretary of State Hillary Clinton, and the disruption of an Israeli history class. Liam Stack & Katherine Rosman, *A Chill at Columbia: 'Nobody Can Protect You'*, N.Y. Times, Mar. 13, 2025, at A1.

519 N.Y. Times, *Read the Letter to Columbia University*, Mar. 14, 2025, https://www.nytimes.com/interactive/2025/03/14/nyregion/columbia-letter.html. The department "has long been in a pitched battle over its scholarship and the employment of professors who describe themselves as anti-Zionist." Troy Closson, *Ceding to Trump, Columbia Agrees to Alter Policies*, N.Y. Times, Mar. 22,

literature"—"is a situation in which the department is judged incapable of governing itself[,] and an outside chair is imposed upon the department by the dean, provost, or college/university president."[520]

Reflecting on the federal government's funding freeze and subsequent demands against Columbia University, Lee C. Bollinger, the former president of Columbia, said, "Never has the government brought such leverage against an institution of higher education." [521] He added, "The university is in an incredibly unprecedented and dangerous situation. It is an existential threat."[522]

On March 21, 2025, Columbia—which receives about 20% of its operating revenues from the federal government[523]—largely acceded to the Trump administration's preconditions. Among them, the university agreed to appoint a new senior vice provost to oversee regional studies programs, starting with programs on the Middle East, including the department of Middle East, South Asian, and African Studies.[524] Among the new official's responsibilities, the senior vice provost will "review the educational programs to ensure the educational offerings are comprehensive and balanced," "create a standard review process for the hiring of non-tenured faculty," and "review the processes for approving curricular changes."[525] Columbia did not describe the change in authority over the Middle Eastern studies department as receivership, "but several faculty members said that it appeared to resemble that measure."[526]

Despite Columbia's meeting the Trump administration's initial demands, the government did not immediately restore Columbia's funding. Instead, the Trump administration said Columbia's policy changes were "early steps" and a "positive sign."[527] Through mid-April 2025, no agreement had been reached between Columbia and the federal antisemitism task force, and the university president vowed to "reject heavy-handed orchestration from the government that could potentially damage our institution," including any agreement that "dictates what

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2025, at A1.

520 Tammy Stone, *Departments in Academic Receivership: Possible Causes and Solutions*, 33 INNOV. HIGHER EDUC. 229, 230 (2009).

521 Katherine Rosman, *Trump Tactics on Columbia May Be Illegal, Experts Say*, N.Y. TIMES, Mar. 18, 2025, at A17.

522 *Id*.

523 Alan Blinder et al., *Columbia's Interim President Departs*, N.Y. TIMES, Mar. 30, 2025, at A29.

524 COLUM. UNIV. PRESIDENT, ADVANCING OUR WORK TO COMBAT DISCRIMINATION, HARASSMENT, AND ANTISEMITISM AT COLUMBIA 3 (Mar. 21, 2025), https://president.columbia.edu/sites/default/files/content/03.21.2025%20Columbia%20-%20FINAL.pdf.

525 *Id*.

526 Closson, *supra* note 519. Ilya Somin, a law professor at George Mason University, questioned the legality of imposing receivership on an academic department. "'There is no question but that this goes far beyond of the scope of the law.' … The internal workings of an academic institution are 'not something that should be within the government's control.'" Rosman, *supra* note 521.

527 Alyce McFadden, *Trump's Cuts Were 'Gun to the Head,' Faculty Lawsuit Says*, N.Y. TIMES, Mar. 26, 2025, at A19.

we teach, research, or who we hire," or that "would require us to relinquish our independence and autonomy as an educational institution."[528]

Trump officials reportedly considered pursuing a consent decree to ratify an eventual agreement with Columbia.[529] A consent decree would give a federal judge responsibility to ensure Columbia adheres to the terms of the agreement, including finding the university in contempt of court if it is not in compliance. A step above the usual voluntary agreements that resolve education-related civil rights issues, a consent decree "is unprecedented in its expansiveness," said John Thelin, a historian of higher education and professor emeritus at the University of Kentucky.[530]

2. Harvard University

Harvard became the most prominent target on the antisemitism task force's list of ten institutions. On March 31, 2025, the Trump administration announced it was reviewing approximately $9 billion in federal grants and contracts awarded to Harvard, comprising $256 million in contracts and $8.7 billion in "multiyear grant commitments," which included funding for hospitals affiliated with Harvard's medical school.[531] Harvard President Alan Garber indicated that the university would work with the federal government "to ensure that they have a full account of the work we have done and the actions we will take going forward to combat antisemitism."[532]

The federal government, on April 3, 2025, made nine demands, one of which reached into faculty instruction. In a letter co-signed by officials at the three agencies composing the task force, the Trump administration listed nine "immediate next steps … regard[ed] as necessary for Harvard University's continued financial relationship with the United States government."[533] Under the heading "Oversight and accountability for biased programs that fuel antisemitism," the first demand stated: "Programs and departments that fuel antisemitic harassment must be reviewed and necessary changes made to address bias, improve viewpoint diversity, and end ideological capture."[534]

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528 Troy Closson, *Columbia Takes Tougher Approach to White House Threats*, N.Y. Times, Apr. 16. 2025, at A15.

529 Liz Essley Whyte & Douglas Belkin, *Trump Seeks Consent Decree on Columbia*, Wall St. J., Apr. 11, 2025, at A2.

530 *Id*.

531 Alan Blinder et al., *Trump Administration Will Review Billions in Funding for Harvard*, N.Y. Times, Mar. 31, 2025, https://www.nytimes.com/2025/03/31/us/trump-administration-harvard-funding.html.

532 *Id*. An internal report on antisemitism at Harvard revealed "a campus climate in which some Jewish students were told by peers and, in some cases, faculty members, 'that they were associated with something offensive, and, in some cases, that their very presence was an offense,'" "'partisan and one-sided pedagogy' that failed to represent Jewish and Israeli perspectives," and Israeli Jewish students "feeling unwelcome and 'shunned' on campus." Kate Hidalgo Bellows et al., *Harvard Reports on Antisemitism and Islamophobia Offer Stark Findings, Divergent Solutions*, Chron. Higher Educ. (Apr. 29, 2025), https://www.chronicle.com/article/harvard-releases-reports-on-campus-climate.

533 Dhruv T. Patel & Grace E. Yoon, *Trump Administration Conditions Harvard's Funding on Eliminating DEI, Restricting Protests*, Harv. Crimson (Apr. 3, 2025), https://www.thecrimson.com/article/2025/4/4/harvard-federal-funding-demands/.

534 *Id*. A few days before receiving the letter, Harvard dismissed the director and associate director

In a letter on April 11, 2025, that stated it "incorporates and supersedes the terms of the federal government's prior letter," the Trump administration demanded more intrusive control over Harvard, spanning governance, hiring, admissions, and student discipline.[535] The letter demanded "reducing the power held by faculty (whether tenured or untenured) and administrators more committed to activism than scholarship," and an external audit of "the student body, faculty, staff, and leadership for viewpoint diversity, such that each department, field, or teaching unit must be individually viewpoint diverse."[536] After the audit, departments and fields "found to lack viewpoint diversity must be reformed by hiring a critical mass of new faculty within that department or field who will provide viewpoint diversity; every teaching unit found to lack viewpoint diversity must be reformed by admitting a critical mass of students who will provide viewpoint diversity."[537]

The April 11 letter also demanded a similar external audit of "those programs and departments that most fuel antisemitic harassment or reflect ideological capture," singling out the Divinity School, Graduate School of Education, School of Public Health, Medical School, Religion and Public Life Program, FXB Center for Health & Human Rights, Center for Middle Eastern Studies, Carr Center for Human Rights in the Kennedy School of Government, Department of Near Eastern Languages and Cultures, and the International Human Rights Clinic at Harvard Law School.[538] The audit would, chillingly, identify "individual faculty members who discriminated against Jewish or Israeli students or incited students to violate Harvard's rules following October 7," with the university and the federal government cooperating "to determine appropriate sanctions for those faculty members within the bounds of academic freedom and the First Amendment."[539]

Harvard refused. The university's lawyers, in a letter to the three signatories to the April 11 letter, wrote that the government's demands violated the First Amendment and denied Harvard its statutory rights to have accusation against it to be proven "through mandatory processes established by Congress and required by law."[540] The letter also stated, "The university will not surrender its independence or relinquish its constitutional rights. Neither Harvard nor any other private university can allow itself to be taken over by the federal government."[541] Harvard President

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of the Center for Middle Eastern Studies, which had been criticized for failing to represent Israeli perspective and for programming considered by some to be antisemitic. William C. Mao & Veronica H. Paulus, *Harvard Dismisses Leaders of Center for Middle Eastern Studies*, Harv. Crimson (Mar. 29, 2025), https://www.thecrimson.com/article/2025/3/29/harvard-cmes-director-departure.

535 Letter from Josh Gruenbaum, Thomas E. Wheeler, & Sean R. Keveney to Alan M. Garber & Penny Pritzker (Apr. 11, 2025), https://static01.nyt.com/newsgraphics/documenttools/092f8701fdf305fd/4d7d152d-full.pdf.

536 *Id*. at 2.

537 *Id*. at 3.

538 *Id*.

539 *Id*.

540 Letter from William A. Burck & Robert K. Hur to Josh Gruenbaum, Thomas E. Wheeler, & Sean R. Keveney (Apr. 14, 2025), https://static01.nyt.com/newsgraphics/documenttools/bd81d9a77d5dfaa2/b051520f-full.pdf.

541 *Id*. at 2.

Alan Garber, in a statement to the university, said, "No government—regardless of which party is in power—should dictate what private universities can teach, whom they can admit and hire, and which areas of study and inquiry they can pursue."[542] In response to Harvard's defiance, the Trump administration froze $2.2 billion in multiyear grants and a $60 million contract.[543]

Harvard then sued the federal government to undo the freeze order. On April 21, Harvard filed a complaint in federal court,[544] stating plainly, "Defendants' actions are unlawful."[545] The complaint focused on the First Amendment, due process requirements—such as notice, a hearing, and an express finding—under Title VI, and the arbitrary and capricious nature of the funding freeze. In violation of the First Amendment, by requiring Harvard "to modify its hiring and admissions practices to achieve a particular balance of viewpoints in every department,' 'field,' and 'teaching unit,'" the government "wielded the threat of withholding federal funds in an attempt to coerce Harvard to conform with the Government's preferred mix of viewpoints and ideologies."[546] Moreover, "The Government's demands on Harvard cut at the core of Harvard's constitutionally protected academic freedom because they seek to assert governmental control over Harvard's research, academic programs, community, and governance."[547] Under Title VI, Congress specified that the government "must follow the delineated statutory procedures *first* and freeze research funding *after* (and then only as a last resort)," while in this case, members of the Trump administration "have done the precise opposite: they issued a Freeze Order on research funding first (with no process or opportunity for voluntary compliance) and used that freeze as leverage to negotiate. Such action is flatly unlawful and contrary to statutory authority."[548] Finally, Harvard alleged that the funding freeze was arbitrary and capricious: "The Government has not—and cannot—identify any rational connection between antisemitism concerns and the medical, scientific, technological, and other research it has frozen that aims to save American lives, foster American success, preserve American security, and maintain America's position as a global leader in innovation."[549]

With the court case underway, the Trump administration continued cutting federal funds to Harvard. On May 13, the Task Force to Combat Anti-Semitism announced that eight federal agencies terminated approximately $450 million in grants to Harvard. Explaining the cuts, the task force stated, "Harvard University

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542 Vimal Patel, *Harvard Says It Won't Obey U.S.*, N.Y. Times, Apr. 15, at A1.

543 *Id*. It is unclear how the Trump administration calculated the $2.2 billion. It was speculated that it equaled all of "the roughly $650 million the federal government provides the university's researchers annually and the life span of any multiyear contracts." Alan Blinder et al., *Harvard Decided Fight Was Worth the Risk*, N.Y. Times, Apr. 17, 2025, at A13.

544 Stephanie Saul, *Harvard Sues Over Threats to Block Funding*, N.Y. Times, Apr. 22, 2025, at A22.

545 Amended complaint at 5, Harvard Coll. v. U.S. Dep't of Health and Human Servs., No. 1:25-cv-11048 (D. Mass. May 13, 2025).

546 *Id*. at 35.

547 *Id*. at 37.

548 *Id*. at 44–45.

549 *Id*. at 6.

has repeatedly failed to confront the pervasive race discrimination and anti-Semitic harassment plaguing its campus," and as a result, "institutional leaders have forfeited the school's claim to taxpayer support."[550]

3. Princeton University

Not appearing on the federal task force's top-ten list provided no protection from federal funding cuts. On April 1, 2025, Princeton University received notices that agencies including the departments of Energy and Defense, as well as NASA, were ending "several dozen" research grants.[551] The grants reportedly totaled $210 million, representing almost half of amount of federal grants and contracts that Princeton receives from the federal government.[552]

While Princeton University President Christopher Eisgruber said in an email to the campus community that "[t]he full rationale for this action is not yet clear," a White House official said the notices were "a proactive pause in funding pending an investigation into alleged antisemitism."[553] It has been speculated that an opinion piece written by Eisgruber in *The Atlantic* following the situation at Columbia University brought retribution from the Trump administration. On March 19, 2025, Eisgruber wrote, "The Trump administration's recent attack on Columbia University" presented "the greatest threat to American universities since the Red Scare of the 1950s. Every American should be concerned."[554] He went on to say, "The attack on Columbia is a radical threat to scholarly excellence and to America's leadership in research. Universities and their leaders should speak up and litigate forcefully to protect their rights." Jon Fansmith, senior vice president for government relations at the American Council on Education, noted that the Trump administration froze Princeton's federal grants soon after Eisgruber's piece appeared in *The Atlantic*.[555]

4. Brown University

In April 2025, the Trump administration announced it would block $510 million in federal contracts and grants for Brown University.[556] The Brown Corporation was

550 Michael C. Bender & Alan Blinder, *Additional $450 Million In Federal Grants Is Cut in Battle with Harvard*, N.Y. Times, May 14, 2025, at A14. Beyond cutting federal research funds, the Trump administration targeted Harvard in many ways, including prohibiting it from enrolling international students (Harvard won an injunction in court); investigating disclosures of foreign gifts; and threating to revoke its tax-exempt status. Michael C. Bender, *All the Actions the Trump Administration Has Taken Against Harvard*, N.Y. Times (June 5, 2025), at https://www.nytimes.com/2025/05/22/us/politics/harvard-university-trump.html.

551 Joseph Pisani, *White House Targets Princeton*, Wall St. J., Apr. 2, 2025, at A3.

552 Megan Zahneis, *Nearly Half of Princeton U.'s Federal Funding Has Reportedly Been Frozen by the Trump Administration*, Chron. Higher Educ. (Apr. 1, 2025), https://www.chronicle.com/article/nearly-half-of-princeton-u-s-federal-funding-has-reportedly-been-frozen-by-the-trump-administration. In the 2024 fiscal year, Princeton received $455 million in federal research funds. *Id*.

553 Pisani, *supra* note 551.

554 Christopher L. Eisgruber, *The Cost of the Government's Attack on Columbia*, The Atlantic (Mar. 19, 2025), https://www.theatlantic.com/ideas/archive/2025/03/columbia-academic-freedom/682088/.

555 Ryan Quinn, *As Universities Yield to Trump, Higher Ed Unions Are Fighting*, Inside Higher Ed (Apr. 4, 2025), https://www.insidehighered.com/news/faculty-issues/labor-unionization/2025/04/04/universities-yield-trump-higher-ed-unions-fight.

556 Anemona Hartocollis et al., *White House Plans to Halt $510 Million For Brown*, N.Y. Times, Apr. 5,

among the few governing boards at U.S. universities that agreed to the demand of pro-Palestinian protesters to vote on divesting from Israel.[557] Brown voted against divestment, saying it held no direct investments in companies identified by the protesters with ties to Israel.[558]

C. Elon Musk and the So-Called "Department of Government Efficiency"

Another agent of existential terror was Elon Musk, the head of the Trump administration's so-called Department of Government Efficiency (DOGE). Established by an executive order and given a mandate to "implement the President's DOGE Agenda, by modernizing Federal technology and software to maximize governmental efficiency and productivity,"[559] the initiative was led by Musk, with a special focus on dismantling the U.S. Agency for International Development (USAID).[560]

Johns Hopkins University suffered a funding loss twice are large as Columbia's when the federal government terminated $800 million in grants related to the university's work with USAID on March 11, 2025.[561] Under USAID, Johns Hopkins helped run a transgender health clinic in India, which Musk criticized on X, the social media outlet he owns.[562] In response to a tweet from World of Statistics on February 28, 2025, reporting that "India's first transgender clinic, Mitr Clinic in Hyderabad, shuts down due to USAID fund freeze," Musk responded, "That's what American tax dollars were funding."[563] After the cuts were announced, Johns Hopkins President Ronald Daniels, in a letter to the campus community, noted that nearly half of the institution's revenue in 2023–24 came from research done on behalf of the federal government and wrote, "The breadth and depth of this historic relationship means that cuts to federal research will affect research faculty, students, and staff and will ripple through our university."[564]

D. Title IX and Transgender Student Athletes

1. University of Pennsylvania and Transgender Athletes

Researchers across seven schools at the University of Pennsylvania received

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2025, at A16.

557 Josh Moody, *Students' Demands for Divestment from Israel Have Mostly Failed*, Inside Higher Ed (Sept. 5, 2024), https://www.insidehighered.com/news/governance/trustees-regents/2024/09/05/student-divestment-demands-have-mostly-failed.

558 Hartocollis et al., *supra* note 556.

559 Exec. Order No. 14,210, 90 Fed. Reg. 9669 (Feb. 14, 2025).

560 Bobby Allyn & Shannon Bond, *Elon Musk Is Barreling into Government with DOGE, Raising Unusual Legal Questions*, NPR (Feb. 2, 2025), https://www.npr.org/2025/02/03/nx-s1-5285539/doge-musk-usaid-trump.

561 Liz Essley Whyte & Nidhi Subbaraman, *Johns Hopkins Braces for Cutbacks*, Wall St. J., Mar. 12, 2025, at A3.

562 *Id*.

563 Elon Musk (@elonmusk), X (Feb. 28, 2025, 4:13 AM), https://x.com/elonmusk/status/1895402040400212271.

564 Whyte & Subbaraman, *supra* note 561.

stop work orders for $175 million in federally funded research on March 19, 2025, because the university allowed a transgender athlete to compete on its women's swim team in 2022,[565] which retroactively violated Trump's 2025 executive order that, in its words, intended to keep "men out of women's sports."[566] Unlike the funding freezes that were connected at least superficially to investigations into antisemitism, the funding freeze at Penn was "[an] immediate proactive action to review discretionary funding streams to … universities," according to a statement from a White House official.[567] The official also noted that the funds were frozen because Penn "infamously permitted a male to compete on its women's swimming team."[568] The statement referred to Lia Thomas, who initially competed on the men's swimming team at Penn, transitioned, and then swam for the women's team during the 2021–22 season, going on to win the NCAA five-hundred-yard freestyle championship.[569]

While the funding freeze was purportedly a "proactive" measure, the Department of Education had started an investigation on February 5, 2025, to examine whether Penn had violated Title IX by allowing Thomas to compete on the women's swim team.[570] On April 28, 2025, the department announced that Penn had violated Title IX "by denying women equal opportunities by permitting males to compete in women's intercollegiate athletics and to occupy women-only intimate facilities."[571] The government presented Penn with three demands to resolve the investigation:

> i. Issue a statement to the University community stating that the University will comply with Title IX in all of its athletic programs;
>
> ii. Restore to all female athletes all individual athletic records, titles, honors, awards or similar recognition for Division I swimming competitions misappropriated by male athletes competing in female categories; and
>
> iii. Send a letter to each female athlete whose individual recognition is restored expressing an apology on behalf of the University for allowing her educational experience in athletics to be marred by sex discrimination.[572]

On July 1, 2025, the University of Pennsylvania acceded to the Trump administration's demands. Under a resolution reached with the Department of

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565 Valeri Guevarra & Alex Dash, *Trump Administration Freezes $175 Million in Federal Funding to Penn*, Daily Pennsylvanian (Mar. 19, 2025), https://www.thedp.com/article/2025/03/penn-trump-freezes-federal-funding-transgender-participation-sports.

566 Exec. Order No. 14,201, 90 Fed. Reg. 9,279 (Feb. 11, 2025).

567 Guevarra & Dash, *supra* note 565.

568 *Id*.

569 Alan Blinder & Michael C. Bender, *Penn Targeted with Defunding for Trans Policy*, N.Y. Times, Mar. 19, 2025, at A1.

570 *Id*.

571 Katherine Knott, *Education Dept. Gives Penn 3 Demands After Finding Title IX Violation*, Inside Higher Ed (Apr. 29, 2025), https://www.insidehighered.com/news/quick-takes/2025/04/29/education-dept-says-penn-violated-title-ix.

572 *Id*.

Education, the university agreed to revoke Lia Thomas's records for the women's swim team, issue apologies to affected female swimmers, adopt "biology-based definitions" for the words "male" and "female," and issue public statements to the university community stating that it will comply with Title IX, specifying that the university will not allow males to compete in female athletic programs.[573]

2. Title IX Special Investigations Team

Experts saw "a more aggressive use of Title IX to further President Donald Trump's anti-trans agenda," based on the quick investigation against Penn, the "unusual demands," and the fact that Penn was in compliance with Title IX when Thomas swam for the women's team.[574] In fact, on April 4, the Department of Education and the Department of Justice announced a joint Title IX Special Investigations Team spanning the two departments to "streamline Title IX investigations."[575] With the stated goal of protecting female athletes "from the pernicious effects of gender ideology in school programs and activities," U.S. Secretary of Education Linda McMahon warned, "To all the entities that continue to allow men to compete in women's sports and use women's intimate facilities: there's a new sheriff in town. We will not allow you to get away with denying women's civil rights any longer."[576]

E. Freeze Funds First, Ask (Legal) Questions Later: No Due Process

Starting with the termination of $400 million from Columbia and the Trump administration's list of compliance requirements, it was clear to legal experts that "the administration doesn't have the legal or constitutional authority to impose [such] demands. Columbia is still a private university that possesses its own constitutional rights."[577] Eighteen legal scholars, in a co-written article, stated, "any sanctions imposed on universities for Title VI violations must follow that statute's well-established procedural rules." [578] The initial "cancellation of $400 million in federal funding to Columbia University did not adhere to such procedural safeguards," and neither did the subsequent "ultimatum stipulating that Columbia

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573 Sarah Randazzo, *Penn to Revoke Records of Transgender Swimmer*, Wall St. J., July 2, 2025, at A3. Thomas holds three all-time school records in freestyle events and one relay record. *Id*. On July 2, 2025, the Department of Education reported that the university would receive the $175 million that had been frozen. Katherine Knott, *Trump Admin. Reportedly Restores Federal Funding to Penn*, Inside Higher Ed (July 3, 2025), https://www.insidehighered.com/news/quick-takes/2025/07/03/penn-gets-funding-back-after-agreeing-trumps-demands.

574 Johanna Alonso, *Trump Is Using Title IX as a 'Battering Ram,' Experts Say*, Inside Higher Ed (May 8, 2025), https://www.insidehighered.com/news/diversity/sex-gender/2025/05/08/education-depts-penn-demands-show-shift-title-ix.

575 Press Release, U.S. Dep'ts of Education & Justice, U.S Department of Education and U.S. Department of Justice Announce Title IX Special Investigations Team (Apr. 4, 2025), https://www.ed.gov/about/news/press-release/us-department-of-education-and-us-department-of-justice-announce-title-ix-special-investigations-team.

576 *Id*.

577 David French, *It Won't Stop with Mahmoud Khalil*, N.Y. Times, Mar. 16, 2025, at SR7,

578 Eugene Volokh et al., *A Statement from Constitutional Law Scholars on Columbia*, N.Y. Rev. Books (Mar. 20, 2025), https://www.nybooks.com/online/2025/03/20/a-statement-from-constitutional-law-scholars-on-columbia/.

make numerous changes to its academic policies … as 'a precondition for formal negotiations regarding Columbia University's continued financial relationship with the United States government.'"[579]

Title VI—like other civil rights laws, including Title IX—has an administrative enforcement provision.[580] Such provisions "generally authorize agencies to enforce their rules implementing the nondiscrimination mandates through enforcement proceedings that can suspend or terminate assistance" but only after "they have alerted the recipient of their noncompliance and determined that compliance cannot be reached voluntarily."[581] The enforcement provisions of the Department of Justice's regulations implementing Title VI for the programs it funds "provide a helpful model for how the civil rights spending statutes may be enforced."[582]

Under its regulations, the Department of Justice conducts periodic compliance reviews and conducts an investigation when it is appropriate.[583] If an investigation reveals that a funding recipient is in noncompliance, the department seek to resolve the issue informally.[584] If a funding recipient fails or refuses to comply with Title VI, the department may suspend or terminate the funding assistance.[585] Before doing so, however, the department must notify the recipient of the failure to comply and determine that compliance cannot be attained voluntarily.[586] Moreover, the department can suspend or terminate funding only after an opportunity for a hearing and a finding on the record of noncompliance.[587] As additional steps, the attorney general must approve decisions to terminate or suspend assistance,[588] and termination may only occur after thirty days' notice to Congress.[589] Requirements like these "aim to ensure that any withdrawal of funds is based on genuine misbehavior," namely, "illegal toleration of discriminatory conduct, not just on allowance of First Amendment-protected expression."[590]

From the Trump administration's perspective, "there is a logical bridge between antisemitism, anti-Western ideologies and what they contend is an intolerant progressive orthodoxy on campus."[591] For example, "theories on 'settler colonialism'

579 *Id*.

580 42 U.S.C. § 2000d-1 (Title VI); 20 U.S.C. § 1682 (Title IX).

581 Christine J. Back & Jared P. Cole, *Federal Financial Assistance and Civil Rights Requirements*, Cong. Res. Serv. 15–16 (May 18, 2022).

582 *Id*. at 16.

583 28 C.F.R. § 42.107(a), (c) (2025).

584 *Id*. at § 42.107(d)(1).

585 *Id*. at § 42.108 (2025).

586 *Id*.

587 *Id*. at § 42.108(c)(1), (2).

588 *Id*. at §§ 42.108(c)(3), 42.110(e) (2025).

589 28 C.F.R. § 42.10(c)(4) (2025).

590 Volokh, *supra* note 578.

591 Liz Essley Whyte et al., *Little-Known Group Tears Through Universities*, Wall St. J., Apr. 16, 2025, at A1.

hold that Israel is a white supremacist state created by the theft of land from Palestinians. Demonizing Zionism has fueled antisemitism on college campuses."[592]

F. Is Trump Playing by the Authoritarian Playbook?

"History, which for a time seemed to be running from west to east, now seems to be moving from east to west," [593] so it is useful to turn to Eastern Europe to assess its influence on politics and higher education policy in the United States. Hungary's "illiberal democracy" under Viktor Orbán—described by former U.S. Secretary of State Madeleine Albright as "democratic because it respects the will of the majority; illiberal because it disregards the concerns of the minorities"[594]—has been cited as a model by influential members of the conservative wing of the Republican Party. J.D. Vance, as a U.S. senator in 2024, said:

> You know, the closest that conservatives have ever gotten to successfully dealing with left-wing domination of universities is Viktor Orbán's approach in Hungary. I think his way has to be the model for us: not to eliminate universities, but to give the[m] a choice between survival or taking a much less biased approach to teaching.[595]

Despite Vance's description, Orbán and his government did not present much of a choice to the universities in Hungary. First, the government cut university funding by about 40%, which "really completely changed the academic landscape in Hungary" since "this is Europe where almost all the universities are public universities," said Princeton University legal scholar Kim Lane Scheppele.[596] Second, in 2017, the Hungarian Parliament amended its National Higher Education Act ostensibly to change the way foreign universities operate in Hungary but in effect aimed to force Central European University (CEU)—founded by Hungarian American billionaire George Soros and accredited in the United States—out of the country.[597] Established in 1991, CEU "symbolized liberal academic values in

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592 *Id*.

593 Timothy Snyder, On Tyranny: Twenty Lesson from the Twentieth Century 68 (2017) (ebook).

594 Madeleine Albright, Fascism: A Warning 172 (2018) (ebook).

595 Rod Dreher, *"I Would Like to See European Elites Actually Listen to Their People for a Change": An Interview with J.D. Vance*, Eur. Conservative (Feb. 22, 2024), https://europeanconservative.com/articles/dreher/i-would-like-to-see-european-elites-actually-listen-to-their-people-for-a-change-an-interview-with-j-d-vance/.

596 Joshua Coe, *How Hungary's Higher Education Overhaul Became a Model for US Conservatives*, The World, (May 28, 2025), https://theworld.org/stories/2025/05/28/how-hungarys-higher-education-overhaul-became-a-model-for-us-conservatives.

597 Petra Bárd, *The Open Society and Its Enemies: An Attack Against CEU, Academic Freedom and the Rule of Law*, 2017/14 CEPS Pol'y Insights 1 (Apr. 2017). Among three requirements for a foreign university to be able to function in Hungary, the most onerous was "an intergovernmental agreement between Hungary and the respective country in which the program is accredited," with the additional burden for institutions based in "federal countries" like the United States to enter a treaty with the Hungarian government (institutions accredited in the European Union/European Economic Area were exempt from the new requirements). *Id*. In 2020, the European Court of Justice ruled that "Lex CEU," as the law was nicknamed (Coe, *supra* note 596), violated E.U. law. "But by then it was too late. C.E.U.'s academic operations had been transferred to

postcommunist Hungary,"[598] and Orbán "refashioned Soros as his archenemy, the personification of everything real Hungarians should reject: decadent globalism, open borders, 'gender ideology,' a rootless cosmopolitan élite."[599] Third, in 2021, Orbán's government transferred control of eleven state universities—"along with billions of euros in related state assets" that included real estate and shares in Hungarian companies—to quasi-public foundations whose initial members were appointed by the Orbán government, suggesting that "the autonomy of teaching and research staff is not ensured," according to a former Hungarian minister of education.[600] A former member of Hungary's parliament, Gábor Scheiring, said the law "creates these institutions that seem to be independent, but they are not. They are run by people who were directly appointed by Viktor Orbán … ex-Fidesz politicians … and the owners and CEOs of the biggest corporations in the country"[601] who are now able "to exert more influence over the country's next generation of leaders."[602]

In his actions toward higher education, Trump seems to be following Orban's footsteps. "Orbán's main weapon of attack against all independent institutions, including the universities, was always financial," said Kim Lane Scheppele. "That's exactly what we're seeing here" in the United States.[603] Trump and Orbán also made an example of the most prestigious university in their respective country. CEU was the highest-ranked university in Hungary,[604] and Harvard is "the oldest and richest school in the United States."[605] Orbán put most of Hungary's public universities under the control of private foundations led by his loyalists, and Trump demanded control over specific academic departments at Columbia and Harvard, reforms to faculty hiring at Harvard in the name of "viewpoint diversity," and audits of specific schools and programs at Harvard that could lead to sanctions against faculty found to have discriminated against Jewish or Israeli students.[606]

Vienna, leaving a large number of students in limbo, and causing many of Hungary's top scholars to leave the country." Andrew Marantz, *Is It Happening Here?*, New Yorker, 26, at 29, June 5, 2025.

598 Coe, *supra* note 596.

599 Marantz, *supra* note 597, at 28. Soros is also a target of vehement antisemitism. "It appears remarkable that so much of the contemporary visible, high-profile, international antisemitism has focussed on one man, George Soros. A Hungarian born Jew, Holocaust survivor, Soros acquired considerable wealth in the United States as a hedge fund manager, wealth that he has spent the last 40 years investing in liberal and progressive causes around the world. … The unifying thread of many … anti-Soros conspiracies is the charge that he is interfering to cause national disturbance and disorder." Jelena Subotic, *Antisemitism in the Global Populist International*, 24(3) Brit. J. Pol. & Int'l Rel. 458, 466 (2021).

600 Benjamin Novak, *Orban's Allies Given Control of Universities*, N.Y. Times, Apr. 27, 2021, at A12.

601 *Id*.

602 Marantz, *supra* note 597, at 29.

603 Coe, *supra* note 596.

604 Bárd, *supra* note 597, at 1.

605 Alan Blinder, *Reasons for Singling Out Universities for Defunding Run Deep*, N.Y. Times, Apr. 10, 2025, at A17.

606 *See supra* text accompanying notes 519, 524–25, 535–39.

Despite the similarities between Orbán's and Trump's respective attempts to control higher education, close observers note that the "exact steps from the Hungarian playbook cannot be replicated here" in the United States.[607] They started with Orbán's party winning a legislative super-majority, which it used to rewrite the Hungarian constitution. In our sclerotic two-party system, it's become nearly impossible for either party to sustain a long-standing majority; and, even if Trumpists held super-majorities in both houses of Congress, this wouldn't be enough to amend the Constitution. … All talk of playbooks aside, an autocratic breakthrough is not something that any leader can order up at will, by following the same ten easy steps.[608]

Ultimately, "Taking over the US is much more complicated," Princeton professor Kim Lane Scheppele said. "The checks and balances of the US system are far stronger than what Viktor Orbán faced."[609]

V. CONCLUSION

In a foundational decision protecting tenure rights during the McCarthy era, Chief Justice Earl Warren wrote that "the areas of academic freedom and political expression" are "areas in which government should be extremely reticent to tread."[610] During the era of Donald Trump, government stomped all over those areas.

There is a "systematic attack being conducted on the professoriate, and it is manifesting through the attacks at the federal level with defunding research through federal agencies, the attacks on academic freedom of faculty and what they can teach through anti-DEI efforts, and then the tenure attacks at the state level," said Adrianna Kezar, director of the Pullias Center of Higher Education at the University of Southern California. [611] "So it is all tied to a larger and broad-scale attack on faculty."[612]

The consequences of state actions aimed at faculty are immediate and long-lasting. In Ohio, in response to Senate Bill 1's requirement to cut academic programs that graduate five or fewer students annually over a three-year span, the University of Toledo announced it would stop offering nine undergraduate majors, including Africana Studies, Disability Studies, and Philosophy.[613] In 2023, surveys of 4250 faculty in Florida, Georgia, North Carolina, and Texas found that two-thirds of respondents indicated they would not recommend their state as "a desirable place for academic work," and one-third said they planned to interview for positions in

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607 Marantz, *supra note* 597, at 34.

608 *Id*.

609 Coe, *supra* note 596.

610 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

611 Stahl, *supra* note 7.

612 *Id*.

613 Amy Morona, *University of Toledo Axing Nine Majors in Response to Controversial Ohio Higher Ed Law*, Signal Clev. (Apr. 22, 20250, https://signalcleveland.org/university-of-toledo-axing-nine-majors-response-ohio-sb1/.

other states in the coming year.[614] While salary was the major reason for faculty dissatisfaction, "more than half the respondents cited political climate and academic freedom" as the reason.[615]

The chilling effect of the Trump administration's investigations on faculty can be profound. The "specter of investigations on campuses—this list of 60 campuses [being investigated for alleged antisemitism], this idea that if you're on a campus that's potentially going to be under investigation—might impact what you say in class, outside of class, how you teach, everything that's fundamental to the academy," said Michelle Deutchman, executive director of the University of California National Center for Free Speech and Civic Engagement.[616]

Even at institutions not under investigation, faculty have concerns "that executive actions targeting diversity, equity, and inclusion efforts would force them to change what they were teaching or how they were supporting students."[617] Faculty at Delta College, a community college in Michigan, were "on edge" over the vague and far-reaching words of Trump's executive orders and directives,[618] such as the phrase "all other aspects of student, academic, and campus life" in the Dear Colleague letter that declared, "Federal law … prohibits covered entities from using race in decisions pertaining to admissions, hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life."[619]

As the second Trump administration entered its second hundred days, the investigations continued to mount, and under different and expanded means. On May 19, 2025, the Department of Justice launched the Civil Rights Fraud Initiative, under which the department will enforce the "False Claims Act against those who defraud the United States by taking its money while knowingly violating civil rights laws."[620] In an internal memo describing the initiative, the department stated that "a university that accepts federal funds could violate the False Claims Act when it encourages antisemitism, refuses to protect Jewish students … or requires women to compete against men in athletic competitions. Colleges and universities

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614 Matt Krupnick, *Attacks on Tenure Leave College Professors Eyeing the Exits*, Center for Pub. Integrity (Dec. 19, 2023), https://publicintegrity.org/education/academic-freedom/attacks-tenure-college-professors-exits/.

615 *Id*.

616 Johanna Alonso, *5 Questions on Open Expression in the Era of Trump*, Inside Higher Ed (May 21, 2025), https://www.insidehighered.com/news/students/free-speech/2025/05/21/free-speech-expert-discusses-open-expression-and-trump.

617 Eric Kelderman, *Most Colleges Aren't a Target of Trump (Yet). Here's How Their Presidents Are Leading*. Chron. Higher Educ. (May 20, 2025), https://www.chronicle.com/article/most-colleges-arent-a-target-of-trump-yet-heres-how-their-presidents-are-leading.

618 *Id*.

619 U.S. Dep't of Educ., Dear Colleague Letter, *supra* note 176.

620 Katherine Knott, *DOJ Starts Fraud Team to Investigate Civil Rights Violations*, Inside Higher Ed (May 21, 2025), https://www.insidehighered.com/news/quick-takes/2025/05/21/doj-starts-fraud-team-investigate-civil-rights-violations. *See also* False Claims Act, 31 U.S.C. § 3729.

cannot accept federal funds while discriminating against their students."[621] The memo also said, "The False Claims Act is also implicated whenever federal-funding recipients or contractors certify compliance with civil rights laws while knowingly engaging in racist preferences, mandates, policies, programs, and activities, including through diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, ethnicity, or national origin."[622] Even before the announcement of the new initiative, the department had already opened an investigation against Harvard under the False Claims Act.[623]

In the end, some of the anti-tenure policies of the states that copied the Trump administration's initiatives, and some of the Trump directives themselves, may be found unconstitutional and contrary to federal and state laws. Florida's "gag order" law,[624] which parrots Trump's list of "divisive issues,"[625] has been enjoined by a federal court because it violates both the First Amendment (it discriminates on the basis of viewpoint) and the Fourteenth Amendment (its provisions are impermissibly vague).[626] In Indiana, faculty members filed similar charges based on the First Amendment and Fourteenth Amendment against that state's post-tenure review law's criterion that requires them "to foster a culture of free inquiry, free expression, and intellectual diversity."[627] In Kansas, faculty members who were tenured but terminated under Emporia State University's post-tenure review framework, which was authorized by system rules, claimed they were denied procedural and substantive due process under the Fifth and Fourteenth Amendments, and liberty interests under the Fourteenth Amendment, over their property interest in tenure.[628] Faculty in Florida have challenged the state's post-tenure law for violating higher-education governance provisions in the Florida Constitution.[629]

The Trump administration itself, in the first one hundred days of its second term, faced "at least 220 lawsuits … challenging more than two dozen executive orders, the firing of twenty high-ranking government officials, and dozens of other executive actions."[630] As of June 22, 2025, at least 197 rulings "have at least

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621 Memorandum from the Deputy Att'y Gen. to Off. of the Assoc. Att'y Gen., Civ. Div., Civ. Rts. Div., Crim. Rts. Div., Exec. Off. for U.S. Att'ys, All U.S. Att'ys (May 19, 2025).

622 *Id*.

623 Michael C. Bender & Michael S. Schmidt, *New Justice Dept. Investigation Escalates Trump's Feud with Harvard*, N.Y. Times, May 16, 2025, at A17.

624 2023 Fla. Laws 1015. *See supra* text accompanying notes 205–20.

625 Exec. Order No. 13,950, *supra* note 8; *see also supra* text accompanying notes 146–47.

626 Pernell v. Fla. Bd. of Governors, 641 F. Supp. 3d 1218, 1287 (N.D. Fla. 2022).

627 McDonald v. Trs. of Ind. Univ., 1:24-cv-01575 (S.D. Ind. Sept. 13, 2024); *see supra* text accompanying notes 247–58.

628 Miracle v. Hush, No. 23-4056-JAR-GEB, 2024 U.S. Dist. LEXIS 220331 (D. Kan. Dec. 5, 2024); *see supra* text accompanying notes 357–77.

629 Hernandez v. Bd. of Governors of the St. Univ. of Fla., 2024 CA 001238 (Fla. Cir. Ct. July 30, 2024); *see supra* text accompanying notes 427–33.

630 Peter Charalambous, *220 Lawsuits in 100 Days: Trump Administration Faces Unprecedented Legal Blitz*, ABC News (Apr. 29, 2025), https://abcnews.go.com/US/220-lawsuits-100-days-trump-administration-faces-unprecedented/story?id=121252266.

temporarily paused some of the administration's initiatives."[631] Harvard could add to that number. In its federal case to unfreeze the federal grants withheld by the Trump administration over alleged violations of Title VI involving antisemitism on campus, Harvard based its complaint on the First Amendment, the arbitrary and capricious nature of the freeze, and due process requirements—such as notice, a hearing, and an express finding—under Title VI.[632]

By June 20, 2025, however, negotiations between Harvard and the Trump administration resumed after Harvard's leaders were "increasingly convinced in recent weeks that the school has little choice but to try to strike a deal with the White House,"[633] signaling a larger concern about the state of American democracy. Harvard officials "believe that if the university remains at odds with the administration that it is likely to become far smaller and less ambitious as Mr. Trump tries to keep pummeling it with funding cuts, federal investigations and limits on visas for international students."[634] Trump's tactics against Harvard mirror the strategies used by "elected autocrats … to subvert democratic institutions."[635]

> This is how elected autocrats subvert democracy—packing and "weaponizing" the courts and other neutral agencies, buying off the media and the private sector (or bullying them into silence), and rewriting the rules of politics to tilt the playing field against opponents. The tragic paradox of the electoral route to authoritarianism is that democracy's assassins use the very institutions of democracy—gradually, subtly, and even legally—to kill it.[636]

State government, too—especially those Republican-led state governments that have mimicked Trump's treatment of higher education—can subvert democracy. During Trump's first term in office, scholars noted, "American states, which were once praised by the great jurist Louis Brandeis as 'laboratories of democracy,' are in danger of becoming laboratories of authoritarianism as those in power rewrite electoral rules, redraw constituencies, and even rescind voting rights to ensure that they do not lose."[637]

Three scholars of democracy—Steven Levitsky, Lucan Way, and Daniel Ziblatt—asked in May 2025, "How, then, can we tell whether America has crossed the line

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631 Alex Lemonides et al., *Tracking the Lawsuits Against Trump's Agenda*, N.Y. Times (June 22, 2025), https://www.nytimes.com/interactive/2025/us/trump-administration-lawsuits.html.

632 Harvard Coll. v. U.S. Dep't of Health and Human Servs., No. 1:25-cv-11048 (D. Mass. May 13, 2025). *See supra* text accompanying notes 544–49. *See also supra* text accompanying notes 577–92.

633 Michael S. Schmidt & Alan Blinder, *Harvard and Trump Administration Restart Talks to End Their Bitter Dispute*, N.Y. Times, June 22, 2025, at A23.

634 *Id*.

635 Steven Levitsky & Daniel Ziblatt, How Democracies Die 14 (2018) (ebook).

636 *Id*. at 15.

637 *Id*. at 10. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

into authoritarianism?"[638] They proposed "a simple metric: the cost of opposing the government,"[639] and they concluded, "When citizens must think twice about criticizing or opposing the government because they could credibly face government retribution, they no longer live in a full democracy. By that measure, America has crossed the line into competitive authoritarianism."[640] Trump's actions against universities alone provided ample evidence:

> Mr. Trump has … followed other autocrats in assaulting universities. The Department of Education opened investigations into at least 52 universities for their participation in diversity, equity and inclusion programs, and it has placed some 60 universities under investigation for antisemitism, threatening them with severe penalties. The administration illegally suspended hundreds of millions of dollars in approved funding to leading schools such as Brown, Columbia, Princeton and the University of Pennsylvania. It has frozen $2.2 billion in government grants to Harvard, asked the I.R.S. to revoke the university's tax-exempt status and threatened to revoke its eligibility to host foreign students.[641]

"Americans are living under a new regime. The question now is whether we will allow it to take root," Levitsky, Way, and Ziblatt stated.[642] It is important to remember that the United States is not alone: Timothy Snyder, a prominent professor of history formerly at Yale and now at the University of Toronto, wrote, "The present difficulties in the United States are an element of a larger trend."[643] Government interference into public and private higher education is part of that trend. Academic freedom and institutional autonomy "have been increasingly questioned, challenged, and even dismantled, as geopolitical tensions, nationalist policies, and ideological shifts toward populism, illiberal democracy, and autocracy reshape the landscape of global higher education."[644] The Academic Freedom Index—which "assesses de facto levels of academic freedom across the world based on five indicators: freedom to research and teach; freedom of academic exchange and dissemination; institutional autonomy; campus integrity; and freedom of academic and cultural expression"[645]—indicated that "in the last decade, academic freedom has declined in 22 countries representing more than half of the global population, including major democracies like Brazil, India, the United Kingdom, and the United States."[646]

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638 Steven Levitsky et al., *No One Has Ever Defeated Autocracy from the Sidelines*, N.Y. Times, May 11, 2025, at SR4.

639 *Id*.

640 *Id*.

641 *Id*.

642 *Id*.

643 Snyder, *supra* note 593, at 67. *See also* Matina Stevis-Gridneff, *Some Professors Leave U.S., Seeing Canada as More Congenial*, June 29, 2025, N.Y. Times, at A6.

644 Daniela Craciun, *Academic Freedom at a Crossroads*, 123 Int'l Higher Educ. 11, 11 (2025).

645 Academic Freedom Index, https://academic-freedom-index.net/.

646 Craciun, *supra* note 644, at 11.

It may seem ironic for an article of this length to call for more research into the role of government intrusion into tenure and academic freedom, but "[u]nderstanding the new threats and broader impacts of academic freedom erosions is crucial for effective policy action."[647] Ultimately, "a comprehensive comparative examination across regions and disciplines is needed to identify commonalities and differences in how academic freedom is shaped, contested, and defended in varying sociopolitical and institutional landscapes,"[648] including the United States.

647 *Id*. at 12.

648 *Id*.

NON-DISCIPLINARY PROFESSORIAL SPEECH:

The First Amendment and the Decay of Professional Norms

*MATTHEW FINKIN**

Abstract

A spate of recent postings on social media have gotten the posting professors into hot water. These expressions are not rooted in their academic disciplines, but address public and institutional controversies: condemning Israel as a "social cancer"; condemning a faculty advisor as "racist" for the campus organization he advised. May they be sanctioned?

In public institutions shelter might be sought in the first amendment. In all institutions shelter might be sought in institutional academic freedom policies rooted in national professional norms. On closer examination, however, the first amendment appears a rather weak reed to lean on; and protective policy appears enervated, the national norms in decay. This article explains how the robust, uninhibited, unfettered campus debate on public and institutional issues is now beclouded, and explores what this trend portends.

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* Research Professor of Law, Swanlund Endowed Chair Emeritus and Center for Advanced Study Professor of Law Emeritus, the University of Illinois Champaign-Urbana. What follows are remarks prepared for the Colloquium, *Campus Speech and Academic Freedom*, organized by Professors Heidi Hurd and Michael Moore of the University of Illinois College of Law held in Champaign, IL (Jan. 24, 2025). Thanks are due Joseph Park and Bobby Mannis, class of 2025, for a quick dive into the law of disruptive speech; and for comments from the speakers Erwin Chemerinsky and Robert Post, and the attendees. The author served as an expert witness on the norms and usage of academic freedom and tenure in some of the cases treated herein.

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INTRODUCTION

A century ago, the emerging academic profession, acting through the newly created American Associations of University Professors (AAUP), sought institutional acceptance of academic freedom—primarily the liberty of instructors to teach, to research, and publish the fruits of their research according to their best professional judgment constrained only by the norms of teaching and research ethics. Over time, the wider academic community arrived at a consensus, the 1940 *Statement of Principles on Academic Freedom and Tenure* (or 1940 *Statement*), which included the AAUP's role in the generation of policies and investigative reports that gave an added texture of meaning to academic freedom; this by private action, "soft law," but acknowledged in institutional practice and, at times, by the courts.

A recent article in this *Journal*[1] details the quest for a firm constitutional grounding for faculty freedom in and of institutional autonomy for public institutions of higher education. Their work is stimulated by the radical actions by several state legislatures—they study Florida in detail, but Indiana should now be added—placing an ideological impress on teaching in their state universities. These laws challenge the fundamental idea of what university is on which the profession's claim of liberty depends.

They focus on the disciplinary grounding of academic freedom, of speech that is the product of the teacher's area of professional expertise. But, the academic community's 1940 consensus also addressed speech unconnected to the instructor's scholarship: speech addressing an issue of public moment—"extramural utterance"—or directed to a policy or action of the instructor's institution—"intramural utterance." The 1940 *Statement* treated speech of that nature as a matter of academic freedom as well.

What follows addresses the current state of that aspect of academic freedom in institutional actions and in the courts: how the reception of the liberty of non-disciplinary speech, once robust, is now eroding institutionally and judicially. It concludes with a rumination on the future, of what repression of non-disciplinary discourse holds for the future of the profession, the university, and the nation.

I. NON-DISCIPLINARY SPEECH: TWO ARCHETYPICAL CASES

Let us start with two recent cases. In the first a nontenured instructor in philosophy at a public university posted his thoughts on social media about "human racial equality," in particular to claim it lacked "a genetic basis":

> That Africans have an average IQ of around 75 whereas whites have an average IQ around 100, and Africans who have mixed with whites (for example in North America or South Africa) have an average IQ of around

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1 Jeffrey Sun and Heather Turner, *Vice Gripping Academic Freedom: Controlling the Learning Movement That Supports Minoritized Voices*, 49 J. C. & U. L. 177 (2024),

> 85 has to do not with education or social conditioning, but with different genetic inheritances from extinct Hominid species.[2]

Straightaway, eighteen members of the university's Department of Biological Sciences condemned the posting for creating an intimidating educational environment which condemnation was echoed by numerous faculty members and faculty bodies there and elsewhere accusing the writer of legitimizing "discredited race-based ideas about intelligence" thereby creating a "hostile learning environment" and calling for his termination. The university acceded to the demand. This episode resonates with others where public address to a hot button issue—the Gaza War, Black Lives Matter, the transgendered—has gotten the speaker into hot water, the academy not excluded.[3]

In the second, a tenured professor of chemistry at a public university, long critical of her Department Chairman's administration of the Department (she had written to the President asking for an external review of the Department) learned that an adjunct professor of chemistry a friend whose work has been closely tied to hers, was given an unanticipated notice of nonreappointment. Shortly thereafter she encountered the chairman in a parking lot and proceeded to berate him for making the decision without any prior notice to or consultation with her. She termed the decision "an outrage," "unfair to [the named instructor]," and further illustrative of "the reason the department is failing," because he was "a screw up." The Chairman complained against her, and after investigation the chief academic officer issued notice of suspension for violating the University's policy on *Bullying in the Workplace*, which charge was sustained by a faculty grievance committee. The professor pursued an appeal to the President. The President did not sustain that particular ground of discipline, but termed her speech "unprofessional" and in light of that sustained discipline for her filing a complaint in response to the Chairman's complaint against her, as an act of wrongful retaliation.[4] This case also

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2 The case is *Jorjani v. N.J. Institute of Technology*, 2024 WL 359440 (D.N.J., July 29, 2024) (appeal pending).

3 For example, *Tannous v. Cabrini University*, 697 F. Supp. 3d 350 (E.D. Pa. 2023), where a nontenured assistant professor of business in a private university posted the following on his social media:

> Zio[Zionist] controlled USGOV politicians promise to cancel 2T$ in student debt so that #donkeydemocrats would elect them yet sent that 2T$ to Ukraine, NATO, and Israel to rm NAZIs.… Israel and Ukraine are societal cancers and must be eradicated.

After substantial pressure from the Jewish community, he was terminated. See also, for example, the complaint in *Neel v. New York University*, N.Y. Sup. Ct., N.Y. County No. 655743/2023 (Feb. 1, 2024), wherein it is alleged that a distinguished tenured professor of medicine was sanctioned for reposting social media postings critical of Hamas and those who have supported it, for example, his posting of

> A tweet from Noah Blum who had reposted a tweet from Sharif Kouddous, which read: "The health ministry in Gaza just published a 200+ page report with all the names, ID numbers, and ages of 7,028 Palestinians killed in Gaza from Oct. 7 until Oct. 26, 3pm. I wonder if news outlets will drop the 'if verified' caveat now whenever citing Palestinian casualties." Kouddous' tweet also contained a list of names. In reporting Kouddous' tweet, Blum included the caption: "Hamas wrote names on a piece of paper so it's definitely accurate."

Id. at ¶ 25(b).

4 The professor sued, and the matter was settled to her satisfaction. Schelble v. Bd. of Trs.of

resonates with other recent episodes of employees disciplined or discharged for public criticism of the actions or policies of their employers, again, the academy not excluded.[5]

These are archetypical instances of non-disciplinary discourse, of professorial speech not grounded in the speaker's field of study. In the profession's taxonomy, the first case is one of "extramural utterance"—of address to an issue of public interest. The second is an instance of "intramural utterance"—speech concerning a policy of or action taken by the speaker's institution.[6]

What follows will sketch how the First Amendment relates to these forms of speech; of how, today, the constitution protects, or not, professors housed in public universities when they engage in non-disciplinary speech. Though the focus of this colloquium is on extramural utterance, inclusion of intramural utterance is useful for the contrast in approach and important for what is will say later to the temper of the time. The treatment of the First Amendment will be contrasted with

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Metropolitan State Univ. of Denver, Colo. Dist. Ct. Denver, No. 2023-cv-32299 (May 8, 2023). The institution's *Bullying in the Workplace* policy defines "bullying" as

> Unwanted, repeated, aggressive behavior that manifests as verbal abuse, conduct that is threatening, humiliating, intimidating, or acts of sabotage that interfere with work, consequently creating a hostile, offensive and toxic workplace.

5 For example, *Phillips v. Collin Community College District*, 701 F. Supp. 3d 525 (E.D. Tex. 2023), where a professor of history was nonreappointed for postings critical of the college's state-mandated COVID-19 policy that was hostile to masking and social distancing, for example. that (1) "… your employer is basically saying the loss of your life is an acceptable calculated risk"; (2) "… it looks like we're opening in the fall. Masks will be recommended but not required. There has been no discussion of capping class sizes to allow any degree of social distancing …"; and (3) "With my employer apparently willing to put my life at risk this fall. …" *Id*. at 533. The Provost "found the posts concerning because she thought they lacked dignity and respect and Plaintiff had not raised the concerns to his leadership." *Id*.

See also *DePiero v. Pennsylvania State University*, 711 F. Supp. 3d 410 (E.D. Pa. 2024), in which a nontenured professor of writing at a public university who had published an op-ed criticizing the "race-based curriculum" objected to the content of mandatory anti-racism workshops one of which,

> included a required reading titled "The Myth of the Colorblind Writing Classroom: White Instructors Confront White Privilege in Their Classrooms." After the training "accused white faculty of 'unwittingly reproduce[ing] racist discourses and practices in our classrooms,'" DePiero [the plaintiff] … asked for specific examples of what it meant to "reproduce[e] racist discourses."

Id. at 417. The Chair of the English Department, who directed the training, complained of feeling bullied by his asking questions that challenged the race-based curriculum. He resigned, but sued on several grounds including the First Amendment. Inasmuch as the training was mandated across the curriculum, it was not geared to any academic specialty. The criticism was grounded in an objection to the instructional policy at large though applied to instruction in writing. See also *Reges v. Cauce*, 733 F. Supp. 3d 1025 (W.D. Wash. 2024) reviewing how the balance is to be struck when an investigation was ordered into a faculty member's posting of a satirical response to the administration's suggestion that "Indigenous Land Acknowledgement Statements" be attached to course syllabi. Interestingly, the court was singularly concerned with the fact that the syllabus' posting was considered as more significant than had the instructor merely posted the satire on social media.

6 The two are disaggregated in Matthew Finkin & Robert Post, For the Common Good: Principles of American Academic Freedom chs. 5 & 6 (2009).

the academic profession's understanding of academic freedom, which has come to subsume these forms of speech into a conception historically grounded in research and teaching in one's discipline; that is, an understanding that applies to private as well as public institutions and, if incorporated into institutional policy, as a great many have, would have legal effect as a matter of contract independent of the First Amendment. The comparison sets the stage for a deeper dive into how our two archetypical cases speak to the temper of the time in which the profession's norms are under attack and to the implications of normative decay for the enterprise of higher learning.

II. PUBLIC EMPLOYEE SPEECH UNDER THE FIRST AMENDMENT

A. Constitutional Doctrine

For most of our history public employees labored under a constitutional law that saw public employment to be in no way different from employment by a private entity. In a sort of "reverse state action" manner of reasoning, the public employer was no more "hampered" by the Fourteenth Amendment than its private-sector counterpart.[7] When a policeman in Boston was dismissed for circulating a political petition he had no free speech claim to make: He had a "constitutional right to talk politics," opined Holmes, J., then sitting on the Massachusetts Supreme Court, "but he has no constitutional right to be a policeman."[8] This applies as much for a university professor as for a cop on the beat. Employees, public or private, could be discharged for speech on political or social issues save only when some statute or their employment contracts restrained that power.[9] Employees, public or private, were held to the same obligations of respectful obedience arising out of a master–servant relationship no matter how well educated or well paid the employee was.[10]

It was in this legal environment that the architects of the American conception of academic freedom set about to craft the 1915 *General Declaration of Principles on Academic Freedom and Tenure*,[11] a document that will engage us presently.

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7 *See, e.g.*, Scopes v. State, 289 S.W. 363, 365 (Tenn. 1927) ("In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of … the Fourteenth Amendment of the Constitution of the United States.").

8 McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 518 (Mass. 1882).

9 Annot., *Discharge from Private Employment on Grounds of Political Views or Conduct*, 51 A.L.R.2d 742 (1957).

10 A comprehensive treatise of 1913 treated instances of public and private employment interchangeably. The common law rule was that, "Every servant implicitly stipulates that … his words … in regard to his master … .shall be respectful and free of insolence." 1 C.B. Labatt, Commentaries on the law of Master and Servant § 299, at 930 (1913). This implied obligation applied to the uttering of "insulting, disrespectful, or abusive" language to any superior.

11 *Reprinted in* 2 American Higher Education: A Documentary History 860 (Richard Hofstadter & Wilson Smith eds., 1961). The historical background of the 1915 *Declaration* is explored by Richard Hofstadter & Walter Metzger, The Development of Academic Freedom in the United States (1955); Hans-Joerge Tiede, University Reform: The Founding of the American Association of University Professors (2015).

It is important to stress that the First amendment makes no appearance in that document, not out of negligence or indifference, but for the simple reason that, at the time, the First Amendment had no bite.

With the advent of state loyalty–security measures in the 1930s imposing restrictions on teaching and associational liberty, the profession engaged in a decades-long struggle to persuade the U.S. Supreme Court to assimilate the freedom of teaching and research into the First Amendment. Eventually, the effort proved successful.[12] In an early landmark case, *Sweezy* v. *New Hampshire*,[13] the academic freedom concern, which the Court saw as spoken to by the First Amendment, was not what Paul Sweezy had actually said in his lectures—in fact, we cannot know what he said as the dispute concerned the constitutionality of the state's demand for disclosure of the contents of his lecture[14]—but his right to lecture free of state surveillance. It would make no difference whether his lecture was on a topic of immediate public moment or of only esoteric academic interest. Either would be vehicles to instill in students a critical habit of mind, a desideratum of a higher education. As the Court put it, "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[15]

In other words, the Court's academic freedom jurisprudence was specific to disciplinary discourse in higher education; the right–privilege distinction was otherwise undisturbed. That changed in 1968 when Marvin Pickering, a high school teacher in Illinois, was discharged for publishing a letter to the editor in the local newspaper critical of his school board and opposing a bond issue the board was seeking. The Court made a clear doctrinal break: Schoolteachers, and so most other public employees, do not relinquish their First Amendment rights at the workplace door.[16] However, what would seem at first blush to extend the right of robust, unfettered, uninhibited speech to public employees was immediately circumscribed in two consequential regards that were to take on a thick texture in the unfolding jurisprudence.

As the proscription of speech was not that of the citizenry at large, but of those in an employment relationship with the public employer, the Court described the task before it: to strike a balance between the employee's interest in "commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[17] The first prong of the balance was not simply a passing descriptive. The First Amendment

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12 What that extension entailed was taken up by William 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 79 (William Van Alstyne ed., 1993) and more recently by David Rabban, Academic Freedom: From Professional Norm to First Amendment Right (2024).

13 354 U.S. 234 (1957).

14 Wyman v. Sweezy, 121 A.2d 783, 789 (N.H. 1956) ("The questions concerning the subject matter of the defendant's lecture…directed and ascertaining what, if anything, the defendant said … ").

15 *Sweezy*354 U.S. at 250.

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

17 *Id*. at 568.

applies to speech on matters of "public concern"—economic, political, social—to matters of moment in a democracy, not to matters of merely parochial concern.

The Court refined what that meant in 1983 when a disgruntled assistant district attorney in New Orleans was fired for circulating a questionnaire to her coworkers of their thoughts about the office—speech tending to foment what one manager termed a "mini-insurrection."[18] The Court held that most of what the questionnaire treated and the reasons for circulating it arose out of and were in pursuit of Ms. Myers personal grievance. The Court was not prepared to hold that expression of that nature was entitled to absolutely no protection whatsoever but that on an apparently sliding scale of speech protection, the value was close to negligible. However, one of her questions could be read to implicate a wider public interest, in the quality of management, at which point the second prong of the balancing test—the threat of disruption to or disharmony within the public service—had to be taken into account.

On that, the second prong of the balance, the Court has laid weight on the employer's judgment of the prospect of disruption, disharmony, or inefficiency when "those working relationships are essential to fulfilling public responsibilities."[19] It noted that that actual disruption was not required; in the absence of the passage of time sufficient to ascertain whether and what disruption has ensued, a reasonable expectation of such a threat at the time of utterance would suffice.[20]

The constitutional conundrum of unacceptable "viewpoint discrimination"—of the government allowing speech on one side of an issue while sanctioning speech on the other—has been avoided by maintaining that the speaker is not being sanctioned because the government is offended by the speaker's words—indeed is altogether agnostic about it—but because others are, and are so deeply as the reverberations to pose a threat to government efficiency. So, too, the criticism that the exemption for disruption condones a "heckler's veto" has been distinguished when those repulsed by the speech, to whose objections the employer is reacting, are persons in the relationship of stakeholders of or in the employing entity whose sentiments stand on a different footing from those with no connection to it.[21] The logic is questionable insofar as these combine to privilege the sensibilities of some who take offense over others depending on the strategic situation of the person or groups whose sensitivities are aroused. These distinctions do not rest on logic; they rest on experience.

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18 Connick v. Myers, 461 U.S. 138, 151 (1983). The denigration of insurrectionary speech resonates sympathetically with the common law of master and servant. In *Lucy* v. *Osbaldson*, 8 C&P 83, 173 ER 408 (1837), when the acting manager of Covent Garden asked a performer singing in the opera *Zampa* how she "can perform in such rubbish," it was held to be a question for the jury whether he had wrongfully excited "discontent" in the workplace.

19 *Connick*, 461 U.S. at 151.

20 *Id*. "[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action," later echoed by the plurality in *Waters v. Churchill*, 511 U.S. 661 (1994).

21 In which *Melzer v. Board of Education*, 336 F.3d 185 (2d Cir. 2003) (parental outrage resulting from a teacher's associational affiliation justified the teacher's termination) has been influential.

B. Applied

Let us return to our illustrative cases taking intramural utterance first: the professor of chemistry's criticism of her department chair. The public may have some interest in how well a chemistry department in one of its state universities is being administered, but it would seem to be the case that that element would be eclipsed by the fact that the speech was a spontaneous face-to-face outburst stemming from a decision personally deeply felt; it would be most unlikely to cross the threshold for constitutional protection.[22] Even if a balance were to be struck, the words used to characterize her chairman—that he was a "screw up"—could be understood to pose the threat of disqualifying disruption and disharmony in the setting of a supervisory relationship.

Were the chemist's accusation more widely disseminated—on social media, for example—it might have greater call on the public interest[23] but yet pose a greater claim of potential disruptive impact. In *Gruber* v. *Bruce*,[24] for example, a campus chapter of Turning Point USA "(TPUSA) was established with a named professor as faculty advisor. TPUSA is a right-wing advocacy group most well known for maintaining the "Professor Watchlist," which its website explains is fashioned "to expose and document" named professors. Two faculty members circulated a flyer on campus declaring TPUSA to be a "racist" organization and condemning the faculty advisor, whose face was shown on the flyer. They were sanctioned and sought relief under the First Amendment. The administration was granted summary judgment under the second prong of *Pickering*. The Sixth Circuit affirmed:

> The dissemination of "disrespectful, demeaning, insulting, and rude" messages targeting a colleague and students—*regardless of whether some accusations may have had basis in fact*—to the entire university community

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22 The fact that the criticism was not widely published would detract from its bearing on the public interest. Clermont v. Sound Mental Health, 632 F.2d 1091, 1104 (9th Cir. 20110 (reviewing authority); Anderson v. Burke County Ga., 239 F.3d 1216, 221 (11th Cir. 2020) (reviewing authority). More importantly, the fact that the jibe—calling the chairman a "screw up"—could be viewed as a personal gripe would sound a death knell to constitutional protection. In *De Pietro v. Pennsylvania State University*, 711 F. Supp. 3d 410 (E.D. Pa. 2024), the professor's protest over antiracism training was in a matter of public interest, but as his objections were of a purely nature, his speech amounted to a personal grievance and so lacked constitutional protection; *cf*. Monroe v. Central Bucks School District, 805 F.2d 454 (3d Cir. 2015). A series of vents on social media by a school teacher complaining about her students were personal grievances or expressions of her visceral reactions to her daily experiences, which, only for the sake of argument, the court was willing to assume could satisfy the public concern requirement.

23 Whistleblowing, "speech that seeks to expose improper operations of the government or questions the integrity of government officials clearly concerns vital public interests" weighs heavily in *Pickering's* balance. McFall v. Bedar, 407 F.3d 1081, 1089 (10th Cir. 2005) (reference omitted); *see also* Salge v. Edna Indep. Sch. Dist., 411 F.3d 178 (5th Cir. 2005); Lindsey v. City of Orrick, 491 F.3d 892 (8th Cir. 2007); Clairmont v. Sound Mental Health, 632 F.3d 1091 (9th Cir. 2011); Mosholder v. Barnhardt, 679 F.3d 443 (6th Cir. 2012).

24 643 F. Supp. 3d 824 (M.D. Tenn. 2022).

> undoubtably threatened to disrupt TTU's learning environment and academic mission.[25]

Now to extramural utterance, to the to the philosophy instructor. That his speech addressed an issue of public interest is patent, evidenced in the very intensity of the widespread outrage over what he said. However, that very hostility, widely expressed within the university, could be and was taken by the court to allow the administration to terminate his appointment for the prospect of disruption his speech threatened.[26] The court acknowledged that higher education has been recognized as a "special environment" in which institutions function as "marketplaces for ideas"[27]; but, the court found nevertheless that his expressions on eugenics and on human rights presented a "level of hostility" likely to "disrupt [the university's] mission of fostering a collegial pedagogical environment."[28]

* * *

Such is the state of the freedom of non-disciplinary expression under the First Amendment. Assume instead that these instructors were housed in universities, private or public, whose academic freedom policies incorporated by reference or reiterated verbatim the 1940 *Statement of Principles on Academic Freedom and Tenure*, widely accepted as the norm in the academic community, or simply assured the faculty of "academic freedom," no more being said, which commitment would draw sustenance from the national norm governing the understanding of it. Assume further that the jurisdiction is one in which the institution's policies are given legal effect, commonly stating a term assimilated into the contract of employment.[29] How would these speakers fare if legal reliance was placed on the institution's provision for academic freedom, not the First Amendment?

III. PROFESSORIAL NORMS: THE 1940 *STATEMENT*

A. Text and Exegesis

The 1940 *Statement* is a pact, the product of years of negotiation between the AAUP and the Association of American Colleges (AAC), at the time the leading organization of four year liberal arts colleges, predominantly private, many with denominational affiliation. It set out three provisions governing academic freedom. The first and second deal with disciplinary utterance, with freedom of research

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25 Gruber v. Tenn. Tech. Bd., 2024 WL 3051196 (6th Cir., May 16, 2024) (italics added) (opinion not officially reported).

26 Jorjani v. N.J. Inst. of Tech., 2024 WL 359440 (D.N.J., July 29, 2024), slip op. at 10.

27 *Id*. (reviewing authority).

28 *Id*.

29 Leading cases: AAUP v. Bloomfield Coll., 322 A.2d 846 (N.J. Ch. Div. 1974) *aff'd as modIfied*, 346 A.2d 846 (N.J. App. Div. 1975); Browzin v. Catholic Univ., 527 F.3d 843 (D.C. Cir. 1975); Drans v. Providence Coll., 383 A.2d 1053 (R.I. 1978) *judgment vacated and remanded*, 410 A.2d 972 (R.I. 1980); Krotkoff v. Goucher Coll., 585 F.2d 675 (4th Cir. 1978); Saxe v. Bd. of Trs. of Metro St. Coll., 179 P.3d 67 (Colo. App. 2007), *on remand* 29 IER Cases 1996 (Colo. Dist. Ct. 2009); McAdams v. Marquette Univ,, 914 N.W.2d 708 (Wis. 2018); Crenshaw v. Erskine Coll,, 850 S.E.2d 1 (S.C. 2020); Wortis v. Trs. of Tufts Coll., 228 N.E.3d 116 (Mass. 2024).

and publication, and freedom of teaching. So long as the instructor has adhered to the profession's standards of disciplinary care and ethics in research and teaching, what the teacher says cannot be subject to sanction; no other limiting condition is recognized. The third addresses non-disciplinary speech:

> College and university teachers are citizens, members of a learned profession and officers of an educational institution. When they speak or write a citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others and should make every effort to indicate that they are not speaking for the institution.

Note that the provision starts with a tripartite division of the teacher's role—as a member of a learned profession, an officer of the institution, and a citizen. It then focuses on the latter, according speech as a citizen freedom from "institutional censorship," subject to what is either an admonition ("should remember") or a binding stricture ("imposes"); nor is it clear that what must be observed applies equally to speech in the capacity of an "officer" of the institution as well as a "citizen" at large, that is, whether it conflates the standard of care applicable to extramural utterance—whatever that standard might be—with standards applicable to intramural utterance, to speech as an "officer" of the institution. The waters are further muddied by an official "Interpretation" appended to this provision by the drafting parties at the time of adoption that calls the provision an "admonition" but then contemplates that institutions may proceed on a deviation from it as a basis for discipline when the utterance raises "grave doubts concerning the teacher's fitness for his or her position," the determination of which is made subject to a hearing before a faculty body.[30]

The current status of the "speech as a citizen" clause will be taken up below, but the history of the provision, explored by Walter Metzger, should be noted.[31] He starts with the profession's foundational document, the 1915 *Declaration of Principles*. The *Declaration* included the "freedom of extramural utterance and action" as having "an importance of its own,"[32] that is, as something apart from

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30 AAUP, 1940 *Statement of Principles on Academic Freedom and Tenure*, AAUP Policy Documents and Reports 3, 6 (10th ed. 2006), 1970 Interpretation No. 4:

> If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph 3 of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges under paragraph 4 of the section on Academic Tenure. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

31 Walter Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, *in* Freedom and Tenure in the University 3 (William Van Alstyne ed., 1993).

32 1915 *Declaration*, *reprinted in* 2 American Higher Education, *supra* n. 11, at 861.

disciplinary speech that ought to be protected. Scholars should not be "deterred from giving expression of their judgments on controversial questions … outside the university," nor should they "be limited to questions falling within their own specialties."[33] But then the *Declaration* adumbrated the tension to later follow. It acknowledged, as "obvious," that academics "are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression."[34] These it termed "restraints," but "such restraints as are necessary should in the main … be self-imposed, or enforced by the public opinion of the profession":[35] "[i]n the main," but, apparently, not exclusively. Anticipating the 1940 *Interpretation*, the *Declaration* allowed for the "occasional," "aberrational" case to require disciplinary action, which it cabined by requiring faculty, not administrative disposition.

The tension in the 1940 *Statement* between the liberty of non-disciplinary discourse and the question of its subjection to a standard of care was not the product of conflict between a presidential delegation that sought to secure institutional accountability—for fear of reputational (and financial) repercussions in influential quarters as a result of offense taken to what a professor said—and a professorial delegation that sought to deny the institution that power. In fact, a cohort of cosmopolitan presidents would have abjured any institutional power, and some in the AAUP's leadership were favorably disposed toward the presence of it. As Metzger put it, "They [the drafting parties] faced the problem of reconciling two opposed ambitions—to hold the academic professional to high standards of public conduct and to secure for the academic professional the *ordinary right to free speech*."[36]

The tension came to a head in 1963 when a professor at the University of Illinois was terminated for having published a letter in the student press endorsing premarital sexual intercourse. The AAUP's ad hoc committee of investigation, chaired by Professor Thomas Emerson of the Yale Law School, a distinguished scholar of the First Amendment, rejected the admonition as being capable of sanction: A rule to observe "appropriate restraint" did not state an intelligible governing principle.[37] Some on the parent committee agreed, but a majority did not. The upshot was the issuance of a *Statement on Extramural Utterances* the following year, which the joint drafting parties appended as an Interpretive Comment to the 1940 *Statement* six years later, that the "speech as a citizen" clause should be interpreted "in keeping" with the "controlling principle"

> that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position. Extramural utterances rarely bear upon the faculty member's fitness for the position …

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33 *Id*. at 874.

34 *Id*.

35 *Id*. at 875.

36 Metzger *supra* note 30, at 51 (emphasis added).

37 *Academic Freedom and Tenure: The University of Illinois*, 49 AAUP Bull. 25 (1963).

There the text rests. The AAUP has never undertaken to give content to what unfitness manifested in speech does or might entail. In all the many cases of extramural utterance it has entertained in the ensuing half century that question has never been addressed, this residual—or vestigial—constraint has tacitly been excised.[38] The practical result today is what several of the presidential and faculty negotiators sought the policy to express in 1940: that the scholar is not to be held accountable to the institution for her non-disciplinary public utterances, though what is said, if knowingly false or uttered in willful neglect of fact, might open a door to whether the speaker's scholarly work manifests a lack of disciplinary care. When, for example, Ward Churchill, a professor of American Indian Studies at the University of Colorado, publicly applauded the terrorist attack on the World Trade Center, terming the victims "little Eichmanns"—a morally squalid pronouncement if ever there were—he was not to be nor was he sought by the university to be sanctioned for having said it; but he was investigated for complaints of analogous professional lassitude in his publications, was found guilty of it by a faculty hearing committee, and was dismissed.[39] Thus, it is the case today that under the 1940 *Statement* the liberty of academic expression on matters of public moment not grounded in the speaker's discipline is not only not held to a disciplinary standard of care, it is not held to any short of ethical breach or that which could subject the speaker to criminal or civil legal sanction.

In contrast, the liberty of intramural utterance lacks any texture in the negotiations leading to the 1940 *Statement* analogous to its extramural counterpart, any discussion of what, if any, standard of care attaches to speech in that guise. Nevertheless, intramural protest has been a rich source of campus contention and AAUP investigation, which, over time, has resulted in the assimilation of that speech into the 1940 *Statement*: The profession has come to see academic freedom as including a right to criticize or to protest admission standards,[40] athletics,[41] library policy,[42] the award of a degree,[43] the quality (and probity) of administrative leadership,[44] salary policies,[45] and appeal to a college's governing board against a president's decision to non-reappoint a colleague and over the president's

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38 It was agreed at the time of adoption that the AAUP would retain its case investigation process to apply the 1940 *Statement*, but that the AAC would perform a consultative role for those matters that require a "fuller examination." Robert Lincoln Kelly, The American College and the Social Order 124 (1940). (The author was the AAC's Executive Director, 1917–1937.) That consultative process was never pursued. The AAUP assumed the role of sole arbiter of the 1940 *Statement*'s meaning.

39 The episode is analyzed in Matthew Finkin, *Academic Freedom and Professional Standards: A Case Study, in* Academic Freedom in Conflict ch. 3 (James Turk ed., 2014).

40 *Academic Freedom and Tenure: The University of Nevada*, 42 AAUP Bull. 530, 554–55 (1956).

41 *Report of the Committee on the Dismissal of Professor Wells from Washington and Jefferson College*, 8 AAUP Bull. 53, 69 (1922).

42 *Academic Freedom and Tenure: Montana State University*, 24 AAUP Bull. 321, 337–41 (1938).

43 *Academic Freedom and Tenure: Eastern Washington College of Education*, 43 AAUP Bull. 225, 235 (1957).

44 *See, e.g., Academic Freedom and Tenure: Report of the Sub-Committee of Inquiry for William Jewell College*, 16 AAUP Bull. 226, 228 (1930).

45 *Academic Freedom and Tenure: Montana State University*, 24 AAUP Bull. 321, 337–41 (1938).

prohibition against an appeal being lodged.[46] In none of these has any serious question been raised of the presence of some "special obligation" that would constrain the speech.

One of the rare if terse dilations on point appears in connection with the dismissal of Professor Ekow O. Hayford by the President of Stillman College in 2008. Professor Hayford publicly held the president of the college responsible for declining student enrollment, for a crisis in cash flow, and for low faculty morale; he called on the president to resign.[47] The president invoked the College's Policy prohibiting *Malicious Gossip or Public Verbal Abuse*:

> Malicious gossip is rumor or innuendo based on incomplete facts or downright fiction intended to cause harm or discredit individuals or the institution.
>
> It may also be rumor based upon assumptions about what the future holds or what is going on currently. Gossip of this nature can have serious repercussion on the morale and productivity of the institution. Verbal abuse is the use of malicious or hostile language by a supervisor or colleague that is intended to harm or embarrass another individual. Individuals who repeatedly engage in these types of behavior may be terminated for cause.[48]

The ad hoc committee of investigation took note of the right of faculty members to speak on matters of institutional policy and action without fear of reprisal. It then viewed the Policy on "rumor or innuendo" to be "so broad as to allow infringement of academic freedom." Even so, it found that the president had not presented any evidence of "knowing falsehood or irresponsible recklessness" in Professor Hayford's charges. The latter is instructive insofar as it implies that in intramural speech, uttering a false statement knowing it to be false or uttering it in reckless disregard of its falsity—that is, with reason to believe it to be false—would fall afoul of the 1940 *Statement*, aligning the profession's standard of care in intramural utterance with First Amendment law governing the defamation of a public figure.[49]

However, under the First Amendment the speaker has no duty to investigate the matter before speaking to it. In *extramural* utterance the professor stands no differently; a professor of textile art, just as a university groundskeeper, may condemn climate change as "false science" without knowing or seeking to know a whit about it. Unaddressed so far is whether in *intramural* utterance, the professor should be required to have made an effort to confirm the facts before speaking.[50]

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46 *Academic Freedom and Tenure: Winthrop College*, 28 AAUP Bull. 173 (1942).

47 *Academic Freedom and Tenure; Stillman College (Alabama)*, 95 Academe 94 (2009).

48 *Id*. at 96.

49 New York Times v. Sullivan, 376 U.S. 254 (1964).

50 The reader will recall that in the case of the flyer labelling TPUSA and its faculty advisor "racists," the Sixth Circuit said it was of no moment whether the accusation was true. Gruber v. Bruce, 643 F. Supp. 3d 824 (M.D. Tenn. 2022).However, the trial court noted Tennessee Tech's Policy 007 "Free Speech on Campus":

B. Applied

Let us return to our illustrative cases. First, of extramural utterance, the espousal of eugenics caused controversy. Fifty years ago, the academic world was roiled by the strident advocacy of eugenics by William Shockley. He was a professor of electrical engineering at Stanford and holder of the Nobel Prize in Physics for his discovery (with two others) of the transistor effect. Although he was not a population geneticist, or even a biologist, he came to embrace eugenics full-throatedly including advocacy of the view that, genetically, black people were intellectually inferior to white people. His classes were disrupted; there were calls for his dismissal,[51] and when invited to speak in other venues, the invitations were protested,[52] his attempts to speak disrupted. In the event, Stanford did not dismiss him. His right to speak was affirmed. Shockley's experience at Yale resulted in the appointment of a Committee on Freedom of Expression chaired by the historian C. Vann Woodward whose Report affirmed the right of an invited speaker to be heard.[53] The AAUP's Committee A on Academic Freedom and Tenure issued a statement criticizing those in the academic community who would "suppress unpopular opinions." It reasserted

> the paramount virtue of the open forum for the dissemination of ideas through publication, exposition, and debate. No less importantly we commend open channels of expression as the basic source of counter-positions and correctives, where critics of distasteful views can express themselves without restraint.[54]

Were the policies of the New Jersey Institute of Technology to have afforded its faculty academic freedom, embracing the profession's norm as it has been understood for a half a century, and were that policy to be legally binding, it should be the case that the speaker could not be terminated for having spoken as he did.[55]

Tennessee Tech is committed to maintaining a campus as a marketplace of ideas for all Students and Faculty in which the free exchange of ideas is not to be suppressed because the ideas put forth are thought by some or even most members of Tennessee Tech's community to be offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrong-headed.

Gruber supra at 833. The trial court distinguished the policy's application to the flyer thusly: "[N] amelessly identifying a group as promoting hate *without substantiating the allegation* cuts against the promotion of the "free exchange of ideas" contemplated by Policy 007." *Id*. at 840 (italics added). The Sixth Circuit cut through that knot. It was irrelevant whether or not the accusation had been investigated; even if accurate the flyer would be a ground of sanction based on threat of disruption it created.

51 Doyle McManus, *William Shockley and His Opponents*, STANFORD DAILY (Jan. 14, 1974).

52 Tom Bailey et al., *Shockley and Free Speech*, HARVARD CRIMSON (Nov. 6, 1973). The authors, identified as members of Students for a Democratic Society (SDS), defended disinvitation to a racist.

53 *Report of the Committee on Freedom of Expression at Yale. Yale College, yale.edu* (Dec. 23, 1974). *See also* Anthony Lewis, *A Report on the Dangers to the Right of Free Speech*, N.Y. TIMES (Jan. 26, 1975).

54 *On Issues of Academic Freedom in Studies Linking Intelligence and Race*, 60 AAUP BULL. 148, 153 (1974). The statement was more concerned with the freedom of research and publication in the subject.

55 The nontenured professor terminated at a private university for his anti-Zionist social media

Now to intramural utterance, to the case of the angry chemist. As the brief snapshot of only a handful of AAUP reports evidences, the profession has long understood criticism of institutional policies, actions, and actors to be encompassed by academic freedom. This includes the right to rise to the defense of a colleague the speaker believes to have been wronged[56]; this not only goes back to episodes in the 20s, 30s, and 40s, but in the AAUP's very first investigation in 1915. The inquiry was instigated by the resignation of seventeen members of the faculty at the University of Utah in protest over the dismissal of two colleagues, one, A.A. Knowlton, a physicist, for having "spoken very disrespectfully" of the Chairman of the University's governing board. Knowlton had said in private conversations, "'Isn't it too bad that we have a man like that as Chairman of the Board of Regents' or words to that effect."[57] To this, the AAUP's Committee of Inquiry responded brusquely, "The law of *lèse-majesté* cannot with advantage … be applied to university faculty in America."[58]

Our angry chemist accused the Chairman of "outrageous" treatment of a colleague, of failing the department in leadership, and, generally, of "screwing up." The latter was a frank assessment phrased in common parlance—calling a spade a spade. It had no element of profanity, harsh abuse, intimidation or threat; it could not constitute wrongful "bullying" within the institution's exemption of speech of that nature from the accepted zone of intramural criticism.[59] Were that

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post sued for breach of contract, for his termination during a contractual term of service. He claimed the contract to have incorporated the university policies set out in its Faculty Handbook, which included the 1940 *Statement*. Tannous v. Cabrini Univ., 697 F. Supp. 3d 350 (E.D. Pa. 2023). The University defended its action as consistent with the "appropriate restraint" clause. As the Handbook was not authenticated, was not made part of the record, the court declined to reach the issue. The University's argument disregarded the restriction of that clause to professional unfitness. Were incorporation to have been found, that would be the question to be decided.

56 In the case the speaker was a tenured professor protesting the way an adjunct, nontenured instructor had been treated. One of the arguments for academic tenure essayed by the Princeton economist, Fritz Machlup, was that it provided protection to exercise that right:

> [W]e need and want teachers and scholars who would unhesitatingly come to the defense of the "odd ball," the heretic, the dissenter, the troublemaker, whose freedom to speak and to write is under some threat from colleagues, administrators, governing board, government, or pressure groups. The impulse to take up the cudgels for the "odd ball" is all too easily suppressed if unpleasant consequences must be feared by those who defend him.

Fritz Machlup, *In Defense of Tenure*, 50 AAUP BULL. 112 (1964).

57 *Report of the Committee of Inquiry on Conditions at the University of Utah*, 1 AAUP BULL. 3 (1915). The Report did not address what prompted Knowlton to speak as he had. In private communication to the author, a student of this episode explained that Professor Knowlton had appeared before the Board on some matter during which the Chairman asked him what he professed. "Physics," he replied. To which the Chairman observed that as he suffered from dyspepsia he wondered what "physic" Knowlton would advise.

58 *Id*. at 15. The Committee, chaired by E.R.A. Seligman, included John Dewey, Arthur Lovejoy, and Roscoe Pound.

59 The *Faculty Employment Handbook* of Metropolitan State University of Denver (July 1, 2022) "adopts the principles of academic freedom as defined by … the 1940 *Statement*," and goes on to add (references omitted):

> Academic freedom also encompasses the right to address, question, and criticize institutional policy or action—both as an individual and in one's role as part of an institutional body engaged

not so, were our chemist to have said, "Isn't it too bad we have a man like that as chair of our department," and then, on inquiry, explained that he had "screwed up," she would be discharged for the explanation Here, too, even as the speech would not be in exercise of a constitutional civil liberty, it would be in exercise of an academic liberty assured in any institution that had adopted on that abides by the 1940 *Statement*.

To return to the faculty members disciplined for calling TPUSA and its supporters including the named faculty advisor "racist,"[60] recall that the speech was held constitutionally unprotected. But when a graduate student instructor stood beside a TPUSA recruitment table at another institution with a sign labelling it "fascist," and was terminated, the administration, when pressed by an AAUP investigative committee, disclaimed that her termination was for that speech; instead, it maintained that she was terminated for her allegedly blocking access to the recruitment table.[61] For academic, not First Amendment purposes the specter of disruption or disharmony consequent to her speech was not mentioned by the administration; its invocation would have been inconsistent with the profession's understanding of the freedom of intramural utterance and the university's professed adherence to it.

IV. THE ACADEMIC FREEDOM OF NON-DISCIPLINARY DISCOURSE FURTHER EXPLORED

As the AAUP's incorporation of non-disciplinary speech into the concept of academic freedom has not passed without criticism, some further note should be made.

A. Extramural Utterance

The most cogent critique of extending academic freedom to extramural utterance was voiced by William Van Alstyne in 1972, in *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*.[62] His critique has recently been seconded by David Rabban.[63]

Van Alstyne mounts two major arguments. The first is to equality: that insofar as political speech is protected not as a matter of general civil liberty enjoyed by all, but as a claim special to the professoriate, it would elevate the professoriate above the citizenry without any warrant in disciplinary expertise—an ordinary citizen who expresses unpopular opinions may have to suffer economic or social

in institutional governance. The University recognizes the inextricable link between academic freedom and shared governance.

60 Gruber v. Tenn. Tech. Bd., 2024 WL 3051196 (6th Cir., May 16, 2024).

61 *Academic Freedom and Tenure: The University of Nebraska-Lincoln*, 103 Academe 1 (May, 2018).

62 William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, 404 Annals Am. Acad. Pol. & Soc. Sci. 140 (1972) [hereinafter *Specific Theory*].

63 Rabban, *supra* note 12, at 155–61.

repercussions for it[64]; there is no reason to insulate an academic elite when voicing the same unpopular opinions ungrounded in academic expertise.[65]

The second is the obverse of the first: that inasmuch the exercise of disciplinarily grounded academic freedom is held to a standard of professional care, subsuming political speech into it bears the risk of non-disciplinary speech being sanctionable for failure to observe professional standards. In this way, the professorial speaker would be less free under the 1940 *Statement* than her non-professorial counterparts. This was Van Alstyne's deeper concern.[66]

The latter should be addressed first. Van Alstyne wrote in 1972. He viewed *Pickering*, the ink of which was scarcely dry, as more protective of that robust, unfettered, and unhindered debate speakers in the public sphere should enjoy than the 1940 *Statement* would appear to allow even under less restrictive joint disposition made in 1970. He could not have anticipated how the restriction to unfitness for office as a constraint on extramural utterance acknowledged in 1970 would atrophy so totally; nor could he know how large the limiting constraint on civil liberty, worked by the threat of disruption or disharmony, would loom. Accordingly, it is not obvious, insofar as it was more the practical consequence than the doctrinal dissonance than was Van Alstyne's deeper concern, that he would hold to that critique today. However, as we will see, others have turned to the 1970 *Interpretive Comment* to give it the very effect Van Alstyne feared.

So, to the former ground, of inequality, the courts have laid considerable emphasis on how job specific *Pickering's* limiting condition is: that the extent of speech protection varies from job to job. There are, for example, numerous cases of police officers, firefighters, and corrections officers whose negative comments on race, a matter of intense public interest, have been held to provide grounds for discipline, including discharge, resulting from the anticipated lack of confidence by members of the community in the speakers' ability to serve it free of any suspicion of animus or discrimination. These, as "paramilitary organizations," have a "need to secure discipline, mutual respect, trust, and particular efficiency among

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64 And they do. Matthew W. Finkin, *Social Media, Social Sensibilities, and the Employment Relationship*, __ J. Contemp. Legal Probs. __ (in press).

65 David Rabban particularizes the disparity even more:

> [I]f the university is the institutional embodiment of a general societal commitment to free inquiry and free expression, the entire university community, not just professors, should enjoy those freedoms. … General principles of free speech under the First Amendment accomplish these goals. Principles of academic freedom do not because they give professors rights that others cannot claim.

Rabban, *supra* note 12, at 157.

66 Van Alstyne, *supra* note 62, at 155:

> [T]he trade-off the AAUP appeared to have accepted with the Association of American Colleges in 1940—namely, to cultivate public confidence in the profession by laying down a professionally taxing standard of institutional accountability for all utterances of a public character made by a member of the profession—is substantially more inhibiting of a faculty member's civil freedom of speech than any standard that government is constitutionally privileged to impose in respect to the personal political or social utterances of other kinds of public employees.

the ranks" that differentiate these employments from others.[67] If paramilitary organizations function in an environment special to them such that more restrictive speech constraints are allowed than could be allowed in other employments—say, a public library[68]—it should be the case that a university's commitment to the free exposition of ideas and robust intramural debate creates an environment special to it in which greater freedom attuned to that specific institutional attribute should be recognized.[69]

When a high school football coach was fired for praying quietly but publicly, midfield after a game, and the Court held his expression protected as in free exercise of religion, it confronted as well the application of *Pickering*.[70] The expression was of public moment, but countervailing disruption played no role: The coach had done so for years without objection from students or parents; indeed, protest was generated only when the school ordered him to desist.[71] This prompts the question, what if the coach was not a devout Christian in a fervent Christian community, but a devout Muslim in the same community whose religious display triggered vociferous and vehement objection by parents and families? Were that disruption to be an allowable basis for discharge, one religion would be favored over another. That cannot be acceptable, but the result could be avoided by holding that all religious expression conducted in that way is protected, any disruption notwithstanding. However, that ground would elevate religious expression over, say, political expression where even the potential for disruption has negated speech in some settings.

The setting may be key. The Court has said that a public school should teach students "how to live in a pluralistic society, a society which insists upon open

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67 *E.g.,* Anderson v. Burke Cnty. Ga., 239 F.3d 1216, 2122 (11th Cir. 2001) (reference omitted) (fire department) (reviewing authority); Hicks v. Ill. Dept. of Corr., 109 F.4th 895 (7th Cir. 2024) (corrections officer); Hussey v. City of Cambridge, 720 F. Supp. 3d 41 (D. Mass. 2024) (police officer); Johnson v. City of Kissimmee, Fla., 2024 U.S. Dist. LEXIS 199964 (M.D. Fla.) (Nov. 4, 2024) (police officer) (reviewing authority); Grutzmacher v. Howard Cnty., 851 F.3d 332 (4th Cir. 2017) (paramedic); *Compare* Bonifacio v. Sewell, 212 N.Y.S.3d 307 (App. Div. 2024) (police officer) (posting a racist meme grounds for dismissal as conduct "prejudicial to the good order, efficiency, or discipline" of the department) *with* Moser v. Las Vegas Metro Police Dept., 984 F.3d 900 (9th Cir. 2021) (police officer posting presents fact question of disruptive effect) (Berzon, J. dissenting in favor of trial court's grant of summary judgment for the Police Department).

68 *See, e.g,.* Noble v. Cincinnati & Hamilton Cnty. Pub. Lib., 112 F.4th 373 (6th Cir. 2024) (offensive social media posting by a security guard working for a public library was protected; Sutton, C.J. dissenting); *but see* McCullars v. Maloy, 369 F. Supp. 3d 1230 (M.D. Fla. 2019) (offensive social media by an employer of the Office of the Clerk of the Court was not protected in view of the need for public confidence in the court); and *cf*. Festa v. Westchester Med. Center, 380 F. Supp. 3d 308 (S.D.N.Y. 2019) (termination of a health network's "compliance coordinator" who posted on Facebook in response to the sighting of a tornado over a Hasidic community that it was "too bad it didn't suck them all the way" addressed a matter of public concern and stated a fact question under *Pickering's* balancing that could not be resolved on a motion to dismiss, but with strong dicta explaining why it would not be protected).

69 To which the *Jorjani* court gave lip service. See text accompanying *supra* note 26.

70 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2408 (2022).

71 *Id*. at 2416, 2426.

discourse toward the end of a tolerant citizenry,"[72] including their exposure to speech when consistent with the maturity of the students and the fact of compulsory school attendance. If so, tolerance for speech in order to instill a critical habit of mind in more mature students voluntarily in attendance should be the sturdy sounding board against which the claim of disruption for *Pickering's* purposes resonates.

A high school guidance counselor may be discharged consistent with the First Amendment for publishing a book of "relationship advice," *It's Her Fault*, advising women to use sex appeal in power relationships and approving a certain level of promiscuity before marriage, for the "potential disruption" the book could cause predicated on a prediction that the book "would 'create an intimidating educational environment'," particularly in how the author's "female students would respond upon reading or hearing about the hypersexualized content" of it.[73] The profession maintained sixty years earlier that a professor of English cannot be fired for publishing a novel, *Brood of Fury*, which the college was advised was "the filthiest book" some had ever read, on the ground that he had occasioned "a severe censure of the college" from its "constituency."[74] The AAUP's ad hoc committee of investigation rejected that as a permissible ground of action: "[I]t is the duty of a college or university to withstand and to defend itself against 'censure' by its 'constituency' when the cause of the criticism is the responsible exercise of academic freedom by members of its faculty."[75]

B. Intramural Utterance

The same two limbs of Van Alstyne's critique of subsuming extramural utterance under academic freedom has been voiced about intramural utterance as well: that it bears no relationship to any grounding in disciplinary expertise; and it offends the principle of speech equality as the professoriate would have a higher right to express intramural grievances than is accorded nonprofessorial workers. As the focus of this colloquium is on extramural utterance, especially that which offends or outrages institutional constituents, the texture of debate on intramural utterance need not be rehearsed.[76] It is enough to say that the profession's claim

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72 Lee v. Weismann, 505 U.S. 577, 590 (1992).

73 Craig v. Rich Twp. High Sch. Dist. 227, 736 F.3d 1110, 1119 (7th Cir. 2023). A school teacher's anti-Islamic social media postings have been held to allow her termination as antithetical to the school's mission to provide a "safe and nondiscriminatory school environment." Durstein v. Alexander, 629 F. Supp. 3d 408 (S.D. W. Va. 2023), *app. dism*issed, Aug. 23, 2023.

74 *Academic Freedom and Tenure: Mercy College*, 48 AAUP Bull. 245, 246 (1963).

75 *Id*. at 250, "responsible" apparently meaning consistent with professional standards of care and ethics. The committee did not discuss the academic freedom issue any further. It did not, for example, discuss whether in writing a novel a professor of English is subject to a disciplinary standard or, if he were, what that would be. Suffice it to say, no standard would appear to be violated in the writing of a novel whose treatment of sex is considered by some readers to be "immoral."

76 The debate is captured in the following: Matthew Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 Tex. L. Rev. 1323 (1988); Mark Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finkin*, 66 Tex. L. Rev. 1351 (1988) and Matthew Finkin, *"A Higher Order of Liberty in the Workplace": Academic Freedom and Tenure in the Vortex of Employment*

to a freedom of intramural utterance rests on an understanding of the role of the faculty in the institution, as akin to being not employees but citizens of it free to speak to all that the institution does. This, too, is an environment specific to institutions of higher learning.[77] The *Connick* Court allowed that a speaker could be sanctioned when the speech disrupts "those working relationship [that] are essential to fulfilling public responsibilities."[78] But the relationship of a professor to a high officer of administration—a president, a provost, a dean—bears no such essentiality.[79] Disagreements between colleagues, including colleagues who serve as department chairs,[80] over matters of policy or action are part and parcel of daily institutional life in which acrimony may be no stranger, which the courts have acknowledged if sometimes only in the breach.[81] It should be enough to

Practices of the Law, in FREEDOM AND TENURE IN THE ACADEMY 357, 373–77 (William Van Alstyne ed., 1993) (replying to Yudof); Stanley Fish, VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION ch. 5 (2014); RABBAN, *supra* note 12, at 153–58.

77 Val Alstyne, *supra* note 62, at 156 (emphasis added):

> It may be conceded that circumstances will sometimes arise where the personal conduct of a faculty ember may *so immediately involve the regular operation of the institution itself* or otherwise provide firm ground for an internal grievance that internal recourse, consistent with academic due process, is offensive neither to the general protection of civil liberty nor to the standards of this Association. Decision such as that in the *Pickering* case are instructive, however, that this exception is not nearly so broad as the presumption of custom has supposed.
>
> The emphasized passage puts the nub of that which the freedom of intramural speech would not protect. A faculty member who makes meritless, endless motions to correct the minutes of previous department faculty meetings in order to obstruct the faculty from doing its needful work can, for example, be excluded from attendance.

78 Connick v. Myers, 461 U.S. 138, 151 (1983).

79 J. McKeen Cattell, a founding figure in American psychology, had a long running feud with President Nicholas Murray Butler of Columbia University. Cattell gave a speech in which he said he had incited his little daughter to name her doll "Mr. President" on "the esoteric ground that he will lie in any position in which he was placed." J. McKeen Cattell, *Academic Slavery*, 6 SCH. & SOC'Y 421, 426 (1917). Butler eventually did engineer Cattell's dismissal, not for his criticism but on a trumped-up charge of treason during the first world war. HOFSTADTER & METZGER, *supra* note 11, at 499–502.

80 HENRY L. MASON, COLLEGE AND UNIVERSITY GOVERNMENT: A HANDBOOK OF PRINCIPLE AND PRACTICE 79–81 (1972), on the situation of the departmental chair. Little has changed on that.

81 Some courts have expressed appreciation for this fact in applying the *Pickering* balance. *E.g.*, Higbee v. E. Mich. Univ., 399 F. Supp. 3d 694, 704 (E.D. Mich. 2019): "in the academic setting 'dissent is expected'," citing Smith v. Coll. of the Mainland, 63 F. Supp. 3d 712, 718–19 (S.D. Tex. 2014). But it has been ignored or paid lip-service, for example, Tennessee Tech's commitment to the "free exchange of ideas," even when "offensive" or "indecent" was ignored when a flyer accused an organization and its faculty advisor of being racist. Gruber v. Bruce, 643 F. Supp. 3d 824 (M.D. Tenn. 2022).. *See also* Phillips v. Collins Cmty. Coll. Dist., 701 F. Supp. 3d 525 and DePiero v. Pa State Univ., 711 F. Supp. 3d 410 (E.D. Pa. 2024),.

> A professor of computer science at Alabama A&M University was terminated for sending email messages to his Dean and colleagues that compared his Dean to named dictators accusing him "of being a 'dictatorial leader' who went against 'democracy.' Shi v. Montgomery, 679 Fed. App'x. 838, 835 (11th Cir. 2017). His, said the court, was "an embarrassing, vulgar, vituperative, ad hominem attack that was perceived in the workplace as disrespectful, demeaning, insulting, and rude," *id.*, that lost any color of free speech protection. The fact is that authoritarian, even dictatorial presidents have not been unknown in higher education. *See* UPTON SINCLAIR, GOOSE STEP (1922). In 1978, Peter O. Steiner, a distinguished professor of economics at the University

note the many occasions where entire faculties have voted "no confidence" in their institutions' administrative officers, have fomented actual "insurrections" in exercise of the freedom of intramural utterance.[82]

V. THE MODERN TEMPER: MARKET FAILURE OR "FAILURE OF NERVE"[83]

A half century ago, the profession's answer to offensive, to some, repulsive extramural speech—eugenics was and is a superb example—was to call for more speech: to treat what was said as an invitation to an extracurricular exercise in learning. This in extension of the purpose of a higher education: to instill in students a critical habit of mind; to have them learn to seek out and dispassionately dissect the facts, to analyze the facts through the lens of applicable epistemological categories and to weigh the arguments, especially when a proposition fires the strongest passions, is most likely to have reason blurred by emotion. The call rested on faith in the institution's capacity to do that, in the willingness of students and faculty to accept the responsibility that that entailed. As Derek Bok put it in 1980, echoing the AAUP's statement on eugenics six years before, members of a university community have the right to resist unpalatable ideas not by expelling the speaker, but by opposing her with reasoned arguments. This he put in probing rhetorical questions:

> Do we have so little confidence in the ability of our students to judge for themselves what opinions to accept within the open marketplace of ideas? And should our fears on this score justify the use of standards that would endanger academic freedom and invite interference from all manner of groups holding strong views concerning the proper moral environment for our students?[84]

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of Michigan, then President of the AAUP and later Dean of the College of Liberal Arts and Sciences at Michigan, a scholar not much given to hyperbole, called attention to the rise of what he termed "the plantation campus." Peter O. Steiner, *The Current Crisis of the Association*, 68 AAUP Bull. 135, 137 (1978). Were Steiner to have professed at Alabama A&M, to have reached the same conclusion as Professor Shi and to have uttered those words, according to the Eleventh Circuit he could be fired for saying it, as a matter of constitutional law. As a matter of academic freedom, he could not.

It may be instructive for those critical of the liberty of intramural utterances as according professors more voice than, say, blue collar workers, and for the Eleventh Circuit's indignation that an administrator could be called a "dictator," that our labor law allows employees to call their employer a "Dictator," San Juan Hotel, 289 N.L.R.B. 1453, 1454 (1988), or to accuse the employer of running a "plantation." Polynesian Cultural Ctr., 222 N.L.R.B. 1192, 1205 (1976).

82 *See, e.g.*, *Special Committee on Hurricane Katrina and New Orleans Universities: Loyola University New Orleans*, 92 Academe 88–99 (2007) (on a faculty's calibrated use of votes of no confidence).

83 On the latter to borrow from Gilbert Murray, Five Stages of Greek Religion ch. 4 (1925).

84 Derek Bok, *Reflections on Academic Freedom: An Open Letter to the Harvard Community*, Harv. Gazette Supp. at 4(Apr. 11, 1980). Of those faculty members today who call for the abolition of the State of Israel, who claim its relationship to its Palestinian citizens to be one of colonialism, its treatment of them a form of Apartheid, instead of opponents crying "*Antisemite!*" and calling for their dismissal, the approach in the previous century would invite the speaker to explain just who the colonial power is, to detail those features of Israeli law that echo prior South African law, and to submit these explanations to critical assessment. That approach is based on the premise that the speaker has the freedom to utter all manner of ignorant foolishness but has no right not to be exposed as an ignorant fool for having uttered it.

Faith in the power of education is being tested today—sorely and this time even more from within. The faculty members of the New Jersey Institute of Technology outraged by the profession of eugenics pointed in passing to the lack of scientific foundation, but with much greater vehemence they called not for engagement on that basis but for the dismissal of their colleague because of his creation of a "hostile learning environment." The court concurred disregarding the "marketplace of ideas" in favor of "fostering a collegial pedagogical environment."[85] So, too, in the TPUSA protest, the Sixth Circuit disregarded the institution express disclaimer that, as a matter of policy, it would ever sanction the expression of offensive ideas.[86]

The protection of students from a "hostile learning environment" is premised on a conception of the student as one who must be shielded not from individually directed verbal assault, but from exposure to ideas that might offend rather than being educated to engage critically with them. (This closely parallels the development of an institutional culture that casts a questioning of the evidence for a contested policy or decision as a sanctionable aggression.[87]) The result is to infantilize students and to render the faculty complicit in it: the former by telling them that if there are ideas they do not wish to hear they will be insulated from hearing them; the latter by telling them there are ideas they may not express for fear of giving offense.

All this was made clear in the Shockley controversy a half century ago. What calls for inquiry is why the question of offensive speech has recrudesced so powerfully today and to quite an opposite effect; and of what the contemporary institutional response contrary to the academy's response a half century ago holds for the future. The first has been explained in the conflation of two developments—one societal, the other specific to the university. Of the societal, it has been argued that the past fifty years has witnessed a lessening of expressive self-restraint abetted by an expanded capacity broadly to disseminate what one says via dense networks of social media no less in the academy than in society at large.[88] The sorts of speech freely bandied about in social media today simply did not figure on the scene fifty years ago when the AAUP began to retreat from the exercise of "appropriate restraint" in extramural utterance.

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85 *See* text accompanying *supra* note 24.

86 *See* text accompanying *supra* notes 26 and 50.

87 Not our chemist alone. *See also e.g.,* Porter v. Bd. of Trs. of NC State Univ., 72 F.4th 573, 578 (4th Cir. 2023) (faculty member's questioning of the professional basis for a question in a student course survey, on "diversity," was held by the university's Office of Institutional Equity and Diversity to be "bullying"); and *DePiero v. Pennsylvania State University*, 711 F. Supp. 3d 410 (E.D. Pa. 2024), where a professor's asking the instructor in a training program mandated for the faculty for the evidence supporting her claim of "white privilege in writing" was said to be "bullying." The court granted summary judgment for the university on De Piero's claim of a hostile workplace environment under Title VII. He was not "bullied" within the meaning of that doctrine. Be that as it may, the criticism of what was used and said in mandatory training which triggered the institution's investigation, discussed in considerable detail in *DePiero v. Pennsylvania State University*, 2025 U.S. Dist. Lexis 20097 (E.D. Pa., Mar. 6, 2025), was in exercise of the freedom of intramural utterance.

88 Matthew Finkin, *supra* note 64.

The institutional circumstance centers on sentiments that have taken root within segments of the professoriate, sometimes in tandem. One is the sense that the model of a marketplace of ideas—or myth, as some would have it—has been refuted. Those so minded point to the widespread acceptance of conspiracy theories, bogus facts, and pseudo-science, not only in the population at large, but at the highest political circles as definitive evidence of market failure. Some have called for the vitalization of the concept of "unfitness" as a restraint on extramural utterance, to sanction speakers for voicing thoughts an "appropriately selected" faculty body finds unacceptable due to the want of factual grounding or moral odiousness.[89]

The other sentiment Edward Shils characterized a generation ago as "antinomianism," the adherents to which would have the university pursue values they embrace in pursuit of which academic freedom "counts for nothing."[90] A salient example is provided today by the efforts of the boycott, divestment, and sanctions (BDS) movement on campus, including members of the professoriate, to have the university boycott Israeli universities. Were their effort to succeed the freedom of colleagues to research and teach in Israel would be abridged[91]—a result that counts for nothing to these faculty members.

The contemporary combination of these ingredients confronts a university historically ill-equipped to deal with it. The draftsmen in 1915 considered repression stemming from conservative elites, especially donors, and from democratic majorities outside the university, especially legislatures, but they failed to consider even the possibility of suppression emanating from within, from students and colleagues. Not long thereafter Max Weber did:

> Where Toqueville feared that mass democracy would be the grounds on which the "tyranny" of public opinion grew, Weber saw the same threat to freedom coming not from outside the campus but from within its own institutions, run by the spineless leading the complacent.[92]

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89 Michael Bérubé & Jennifer Ruth, It's Not Free Speech: Race, Democracy, and the Future of Academic Freedom (2022). How what is proposed would actually function is explored in Matthew Finkin, *An Account of the Deliberations of the Faculty Committee on Academic Freedom and Unacceptable Speech*, 51 Hofstra L. Rev. 477 (2023).

90 Edward Shils, *Do We Still Need Academic Freedom?*, 62 Am. Scholar 187, 209 (1993). Antinomianism is a complicated religious doctrine with an equally complicated history. *See* Tim Cooper, *Antinomianism, in* Cambridge Dictionary of Christian Theology 734 (Ian MacFarland et. al., eds., 7th ed. 2011); Dov Schwartz, *Antinomianism, in* 2 Encyclopedia Judaica 199 (Dov Schwartz et al., eds., 2d ed. 2007). Alexandre Papas, *Antinomianism, in* Encyclopedia of Islam (Kate Fleet et. al., eds., 3d ed. 2013) (online. But for purposes here it can be simplified as a belief that some individuals or groups who have attained a certain state of knowledge, or salvation, are no longer bound by the moral constraints applicable to others.

91 The position taken by the AAUP a generation ago. *On Academic Boycotts*, 92 Academe 39 (2006). The AAUP's backtracking is described in the references *infra* note 93.

92 John Patrick Diggins, Max Weber: Politics and the Spirit of Tragedy 142 (1996). In 1920, Weber was shouted down by fascist students while attempting to give a public lecture at the University of Munich. A student witness recalled that the whistles and cat-calls went on for an hour. When the university's Rector threatened to turn off the lights hoping to restore silence a student shouted, "So much the better, then we can beat up the Jews in darkness." The witness recalled "The lights

Ralph Fuchs, a steadfast opponent of loyalty oaths at a time when a not insignificant cohort of the professoriate was supportive of or indifferent to it, acknowledged the conundrum. The "core of the matter" of academic freedom, he wrote, is the freedom of the faculty member "against control of thoughts or utterance from *either within* or without the employing institution."[93]

VI. NORMATIVE DECAY AND THE FUTURE UNIVERSITY

When the foregoing has posited "professional norms" in contrast to constitutional law, these have been found primarily in the policy documents and investigative reports of the AAUP. The 1940 *Statement* has surely exceeded the expectations of the bargaining partners to become the national norm—now near universally accepted by reference or in text, if sometimes observed only in the breach—with a single agency that sits to interpret it, enforced primarily by the weight of opinion within the profession as buttressed from time to time by judicial decision.[94] The result is a commonly accepted uniform standard, truly a remarkable achievement.

Why this came about might be explicable in economic terms. It would be awkward, to say the least, were each faculty member to have to bargain over the degree of expressive freedom he or she would have; a general policy governing the faculty as a whole is a practical necessity. But a common norm transcends that need: It assures applicants and incumbents a known playing field among the universe institutions that might attract them; reciprocally, institutional acceptance signals applicants and incumbents that they need have no reservations on that account.

Unfortunately, this system of private ordering is on the cusp of collapse. The AAUP has now cast its lot in with antinomianism; not that academic freedom "counts for nothing," but that it is to be discounted where other ideological or organizational ends are to be served, bolstering the boycott of Israeli universities as a means of advancing human rights; insisting that faculty manifest fidelity to diversity, equity, and inclusion (DEI) as a condition of appointment in order to respond to the "needs of a diverse global public"[95]; and, after a half century's meticulous care to wall the norm setting and applying functions off from the membership's activist agenda,[96] now to put the former into service for the latter. The AAUP has merged into the American Federation of Teachers, a step it had

went off, the hall cleared out. The organized terror of Hatreds had won." *Id*. at 139–40.

93 Ralph Fuchs, *Academic Freedom—Its Basic Philosophy, Function and History, in* ACADEMIC FREEDOM: THE SCHOLARS PLACE IN MODERN SOCIETY 1, 3 (Hans Baade & Robinson Everett eds., 1964) (emphasis added).

94 The more notable of which are set out *supra* note 29.

95 Matthew Finkin, *The Collapse of AAUP Credibility and Why It Matters*, https://insights.telosinstitute.net/p/the-collapse-of-aaup-credibility; Tom Ginsburg, *Can Academic Freedom Survive the AAUP?*, CHRON. F HIGHER EDUC., Feb. 18, 202) and Garrett Shanley, *A Firestorm Against the AAUP: What's the Best Way to Defend Academic Freedom?*, CHRON. HIGHER EDUC., Dec. 6, 2024.

96 *From* Sanford Kadish et al., *The Manifest Unwisdom of the AAUP as a Collective Bargaining Agency: A Dissenting View*, 58 AAUP BULL. 57 (1978) to *Report of Committee A 1983–84*, 70 ACADEME 21a (1984).

resisted since its founding[97]; and the current President has been clear about the course the refashioned AAUP will chart, that it

> cannot exist primarily to write reports and statements and conduct research on higher ed … These are important, *but they must be used as tools toward the goal of aggressively organizing academic workers of all types across the country*.[98]

The AAUP's credibility, the confidence it earned by a consistent adherence to principle and by scrupulous care in working it out, was the glue that held the system of private ordering together. The collapse of credibility frees institutions of that normative constraint, soft law, to be sure, but, historically, surprisingly effective. It gives them free play in policy and action subject only to judicial intervention. This portends a Balkanization of the meaning of academic freedom in practice as well as in university policy, leaving only the First Amendment in play, for public institutions, absent judicial reliance on professional norms as a matter of contract. On that some recent cases may be instructive.

A case of extramural utterance—*Lee v. Yale University*.[99] Bandy Lee was a volunteer assistant clinical professor of psychiatry at the Yale School of Medicine; she also taught in the Law School. The facts are laid out by the district court. Alan Dershowitz, a professor of law at Harvard, known for his representation of defendants in cases much in the public eye, including advising Donald Trump, referred to his, Dershowitz's, "perfect sex life" echoing a turn of phrase Trump had used. Lee was asked on social media for her thoughts about what he had said and she replied,

> "Alan Dershowitz's employing the odd use of 'perfect' … might be dismissed as ordinary influence in most contexts." She added that "given the severity and spread of 'shared psychosis' among just about all of Trump's followers, a different scenario is more likely," and that scenario was "that he has wholly taken on Trump's symptoms by contagion."[100]

Dershowitz protested to the School of Medicine claiming Lee's message to be in violation of psychiatric ethics. Dr. Lee was discharged. She sued for a violation of academic freedom, of extramural political utterances in breach of contract by virtue of a statement of policy acknowledged in Yale's Faculty Handbook:

> Yale University is committed to the free expression of ideas by members of the University community, including expression of political views; and to the freedom of students and faculty to engage in scholarship related to political life and discourse. The Woodward Report … reinforces these

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97 Tiede, *supra* note 11 at 188–90.

98 Rotua Lumbantobing et al., *Do Much More to Meet This Moment: An Interview with United Faculty for the Common Good*, https://www.nplusonemag.com/online-only/online-only/do-much-more-to-meet-this-moment/ (remarks of Todd Wolfson) (italics added). *See also* Ryan Quinn, *The AAUP's New President is Not Staying Neutral*, https://www.insidehighered.com/news/faculty-issues/academic-freedom/024/10/30/aaups-new-president-not-staying-neutral.

99 2023 WL 4072948 (2d Cir., June 20, 2023) (not reported in F.4th).

100 Lee v. Yale Univ., 624 F. Supp. 3d 120, 127 (D. Conn. 2022).

> commitments, and reminds us that within the diversity of the Yale community there coexist many points of view.[101]

The trial court dismissed the complaint because the policy relied on was only a "general statement of principles" "insufficiently definite to create the contract."[102] The Second Circuit affirmed: The policies relied on "reduce merely to generalized support for academic freedom"; they are insufficiently "definite" to manifest an intention to be contractually binding.[103]

The court proceeded either indifferent to or in willful ignorance of the body of contract law the courts have built on institutional adoption of policies that do no more than recite a commitment to academic freedom: Rarely does an academic freedom policy proclaim itself expressly to hold contractual status.[104] It has long been enough to simply assure the institution's observance of academic freedom without more.[105] Yet the body of judicial authority to that effort was ignored.[106] Nor did the court acknowledge the historically deep weight of law that holds a party contracting with respect to a trade or profession to be bound by the generally recognized customs and usages of the trade or profession without a word more being said.[107] The decision leaves the Yale faculty and others similarly situated

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101 *Id*. at 131. The Woodward Report was widely circulated and relied on by the Yale administration and faculty. Of Yale, it said,

> We value freedom of expression precisely because it provides a forum for the new, the provocative, the disturbing, and the unorthodox. Free speech is a barrier to the tyranny of authoritarian or even majority opinion as to the rightness or wrongness of particular doctrines or thoughts.

Id.

102 *Lee*, *supra* note 100, at 131.

103 *Lee*, *supra* note 101 (slip. op. at 35).

104 New York University had adopted the 1940 *Statement* verbatim as its academic freedom and tenure policy, but expressly disclaimed it to be a contract. Bradley v. NYU, 124 N.Y.S.2d 238 (Sup. Ct. 1953) *aff'd.* 127 N.Y.S.2d 845 (App. Div. 1953), mem. 120 N.E.2d 828 (N.Y. 1954). After NYU was censured by the AAUP, a condition for removal of censure was the excision of the disclaimer which the University did. *Report of Committee A, 1959–1960*, 46 AAUP Bull. 222, 27 (1960). It was never suggested that a positive declaration of contractual obligation was required.

105 A tour of the horizon four decades ago concluded that

> The better judicial decisions recognize that by employment an institution undertakes certain commitments to the faculty member that transcend the four corners of a terse letter of appointment or notice of tenure. In essence, by appointment the institution commits itself not only to observe the stated duration of the appointment, but to abide by the institution's rules *and customary practice*.

Matthew Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 Iowa L. Rev. 1119, 1146 (1980) (references omitted) (italics added).

106 *See* the references compiled *supra* note 29.

107 J.H. Balfour Browne, The Law of Usages and Customs § 39, at 51 (1st Am. ed. 1881) (references omitted):

> The known and received usage of a particular trade or profession, and the established course of every mercantile or professional dealing, are considered to be tacitly annexed to the terms of every mercantile or professional contract, if there be no words therein expressly controlling or excluding the ordinary operation of the usage, and parol evidence thereof may consequently be brought in aid of the written instrument.

with no contractual protection for extramural utterance.[108]

In a case of intramural utterance—*Shaughnessy v. Duke University*[109]—Michael Shaughnessy was a clinical assistant professor of anesthesiology of five years' standing in the Duke University Medical School when a resident in the department committed suicide. Some in the department were disturbed by the chairman's handling of the matter and urged a more sympathetic, supportive role, but their pleas were ignored. Dr. Shaughnessy protested to the chairman for what he saw as hostility to those with depression. The chairman terminated Dr. Shaughnessy's appointment. Shaughnessy sued for a violation of academic freedom as a contractual obligation, for his exercise of intramural speech.

Duke's Faculty Handbook provided that Duke "makes specific processes for academic freedom" as set out in a policy appended to the Handbook. The appended policy tracks the three-part assurances of the 1940 *Statement* as well as a modified appropriate restraint clause on the espousal of "an unpopular cause." However, under North Carolina law, "A university's policies "cannot be the basis of a breach of contract claim unless the … policy provision is a specific, enforceable promise that is incorporated into the terms of a contract" between the university and its employee."[110] The court held that under state law the presence of an academic freedom policy in the Faculty Handbook, even when referenced in the letter of appointment, failed to rise to a contractual commitment because the policy itself evidenced no contractual intent. The court declined to take notice of the headnote to the academic freedom policy:

> This document embodies an agreement between the president and the faculty as to policies and procedures with respect to academic freedom, academic tenure, and certain matters of due process.

If this decision proves persuasive, absent extraordinary regulatory exactitude, there is no contractual protection for intramural utterance in North Carolina.

In a glance at tenure—*Monaco v. New York University*[111]—New York University adopted the text of the 1940 *Statement* verbatim as its policy on academic freedom and tenure.[112] The 1940 *Statement* precedes its provisions for "academic freedom" and "tenure" with a separate rationale for each headed, "The Case For." The case for tenure rested on the need to protect academic freedom and to assure "a sufficient degree of economic security to make the profession of teaching attractive to men and women of ability."[113]

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108 The Yale Medical School viewed Dr. Lee's posting as disciplinary speech in violation of the "Goldwater Rule" prohibiting psychiatrists from diagnosing of public figures. Dr. Lee maintained hers to be political comment, not psychiatric diagnosis. Because of the court's disposition that issue was not reached.

109 2020 WL 4227545 (D.N.C.., July 23, 2020) (not reported in F. Supp. 3d).

110 *Id*. slip op. at 5 (references omitted).

111 164 N.Y.S.3d 87 (App. Div. 2022).

112 *See supra* note 104.

113 AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP Policy Documents and

After several years of faculty opposition, the administration of NYU's Medical School adopted a policy that capped the salaries of basic science faculty members below their existing levels and required them to make up the difference out of research grants on pain of reduction in pay. Some affected faculty sued for breach of contract, as an abridgement of tenure. The New York courts agreed that the policy's operative text on tenure—that just cause is required to dismiss—was contractual but not the rationale on which it rests, which the court termed a mere "preamble."[114] As a result, it held that tenure had no contractual component of "economic security." The court was aware that, by this logic, the salaries of the tenured faculty of NYU, not only the medical faculty, could be reduced to zero.[115] If the rationale for tenure is of no value in deciding what tenure is, neither would the rationale for academic freedom in deciding what that is. In the event, the contractual protection of the profession's understanding of the economic security afforded by tenure has been eviscerated in New York.

* * *

These decisions, if expressive of the modern temper, take a radical historical turn. A hundred years ago, whether academic freedom should be institutionally embraced was hotly debated.[116] Fifty years ago the dust had settled: Professional norms were well established; institutions embraced them by adoption in policy; the courts acknowledged legal enforcement by the fact of adoption alone. Today, at least to these courts, if an institution wishes to be bound to observe academic freedom it must make its acceptance extraordinarily emphatic.

Even so, the deeper significance of these cases may lie less in what they held—the reasoning being so patently threadbare[117]—than in what they say to the willingness of the administrations of otherwise reputable universities to advance arguments so blatantly antithetical to the common understanding of academic freedom—and of tenure as well—in an effort to free themselves of those obligations.[118]

Reports 3 (2008).

114 The court quotes the following from a case concerning a retirement plan: a "recital paragraph in a document is not determinative of the rights and obligations of the parties." Anderson v. Weinroth, 840 N.Y.S.2d 210, 219 (App. Div. 2007). The court omits the clause immediately following: "nor does it prevent the introduction of parol evidence to explain the parties' intent." *Id*.

115 The point was made in a brief *amicus curiae* to the court set out in. Matthew Finkin, *Tenure in New York*, 70 Buffalo L. Rev. 1891, 1910 (2022) and confirmed in deposition testimony by the university's president. *Id*. at 1910.

116 Academic Freedom, III The Reference Shelf No. 6 (Julia Johnsen ed., 1925). The Reference Shelf series published materials needed for "good debate" in matters of public policy.

117 Writing for a unanimous Supreme Court of Massachusetts, Judge Scott Kafker handily dispatched the NYU decision when the Tufts Medical School's identical policy was challenged as an abridgement of tenure. Wortis v. Trs. of Tufts Coll., 228 N.E.3d 1163 (Mass. 2024). Even so, the Association of American Universities, the organization representing the most well respected research universities in the nation, filed an *amicus* endorsing the New York decision.

118 In *Kilborn v. Amiridis*, __ F.4th ___, 7th Cir. No. 23-3196, Mar. 12, 2025, the Court of Appeals held a professor of law in the University of Illinois at Chicago had a First Amendment right to select the terms in which he phrased an examination question that offended some students and for which he was sanctioned without regard to pedagogical purpose or value; the matter was remanded for trial on the issue of disruption. The University of Illinois was reported to have spent over

The aspiration animating the effort and the consequences extend beyond legal accountability alone.

For the present, it seems doubtful, but by no means certain that universities will suppress freedom of teaching and research when objected to as offensive; but non-disciplinary speech has been more contested terrain. The loss of protection there leaves the faculties of private institutions naked and of public institutions covered only by the fig leaf *Pickering* supplies, that is, to the extent the law allows disharmony, disruption, or loss of efficiency as a ground of sanction, the instructor in the public university confronts an unascertainable, near capricious restraint on extramural (and intramural) speech. A professor of geology, housed in an urban university with liberal students and alumni, who resolutely condemns same sex marriage could be at risk.[119] A professor of geology, housed in a rural university with a fundamentalist Christian student body and a similarly minded alumni base, who resolutely advocates for same sex marriage would be at equal risk.[120] The result is to leave the profession twisting in the shifting winds of political and social excitements.[121]

In making the case for academic freedom, the 1940 *Statement* echoes the stress the 1915 *Declaration* placed on the conditions needed to attract persons of ability to the academic life: persons not only of promise in their disciplines, but those who in addition to disciplinary achievement might also be drawn to address issues of public moment not excluding those most in contention, those that might arouse the strongest passions. This is scarcely an unusual combination of traits among academics. In order to attract persons of that character the university should afford conditions conducive to the exercise of both disciplinary and non-disciplinary speech subject only to applicable standards of care and ethics. Were *Pickering* to replace those norms in non-disciplinary speech one has to contemplate what sort of person would be attracted to academic life; what the lesson is that students will have learned in that environment; and, what the implications are for the society those students will inhabit.

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a million dollars in defense of its right to suppress freedom of teaching. Lauren Berg, *7th Cir. Reviews Suit by Law Professor Disciplined over Exam*, Law 360 (Mar. 12, 2025).

119 *Cf*. MacRae v. Mattos, 106 F.4th 122, 139 (1st Cir. 2024) (where a high school teacher's stridently negative "social media posts directed at the LGBTQ population had made staff and students very upset," the element of the prospect of disruption was sufficient to deny constitutional protection was satisfied).

120 Amy Harmon, *Idaho Lawmakers Seek Reversal on Same-Sex Marriage*, N.Y. Times, Jan. 27, 2025, at A13 ("In 2006, Idaho voters passed an amendment to the State Constitution limiting marriage to between men and women.")

121 On the transitory nature of controversy, see Edward Thorndike, The Teaching of Controversial Subjects 1–2 (1937). When one reads the letter on premarital sex that resulted in Professor Koch's discharge at the University of Illinois sixty years ago, one could have little doubt that it could raise no eyebrows today.

Review of Hon. David S. Tatel's

VISION: A MEMOIR OF BLINDNESS AND JUSTICE

*ELIZABETH MEERS**

The National Association of College and University Attorneys presented Judge David Tatel with its Distinguished Service Award in 1993. His book *Vision: A Memoir of Blindness and Justice* demonstrates many reasons for that abundantly deserved honor. The book describes his important role in the history of the civil rights movement, including in higher education; his experience moving from private practice for educational institutions into the role of a federal appeals court judge; and most poignantly, his gradual coming to terms with his loss of his eyesight. Along the way he offers gems of advice, especially for younger lawyers. He also gives loving tribute to his parents; his wife, Edie; and their children and their families. NACUA members will find valuable all of these aspects of this readable memoir.

1. Civil Rights and Education

After growing up in a Washington, D.C., suburb, Judge Tatel earned his undergraduate degree at the University of Michigan, where President John F. Kennedy, Rev. Martin Luther King Jr., and the curriculum sparked his interest in political science, constitutional law, and government service. Judge Tatel reflects on "the important values that emerged in the sixties: equal justice under law, fairness, and the importance of challenging authority."[1] Attending the University of Chicago Law School, Judge Tatel began his service to higher education with a part-time job in the university's legal office. After graduation he explored teaching at the University of Michigan law school and then entered private practice at Sidley, Austin, Burgess & Smith (now Sidley Austin LLP), where he had been a summer associate.

Sidley initiated Judge Tatel's career in civil rights and education law by inviting him to help write an *amicus curiae* brief in a major school desegregation case in the Illinois Supreme Court.[2] Sidley subsequently seconded Judge Tatel to the Chicago Riot Study Committee, a panel examining causes of urban unrest. Those experiences, coupled with Edie's experience teaching in the Chicago public schools, "opened

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* Senior Counsel Emerita, Hogan Lovells US LLP. I had the privilege of working with Judge Tatel for a decade when he was in private practice at Hogan & Hartson (now Hogan Lovells). Out of due respect, I refer to him as "Judge Tatel" even during his prejudicial years.

1 D. Tatel, *Vision: A Memoir of Blindness and Justice* 37 (Little Brown 2024).

2 Tometz v. Bd. of Educ. of Waukegan City Sch. Dist., 39 Ill. 2d 593, 237 N.E.2d 498 (Ill. 1968).

my eyes to the real struggles, and real stakes, of the fight for equal educational opportunity. … I now knew for sure that I wanted to practice civil rights law full-time. … I wanted to devote all my energy to people who needed lawyers but couldn't afford them."[3]

Judge Tatel's conviction became reality through his appointment as the founding director of the Chicago Lawyers' Committee for Civil Rights Under Law, which he describes as not "just [getting] a job," but receiving "a mission."[4] Hankering to work on the national stage, Judge Tatel returned to Washington via Sidley's D.C. office. Two years later he became director of the National Lawyers' Committee. In 1974 Hogan & Hartson (now Hogan Lovells), "the first major firm to establish a separate practice group devoted exclusively to pro bono work,"[5] asked Judge Tatel to join its pro bono practice. With support from his Hogan colleagues, he concurrently served as General Counsel to the Legal Services Corporation, a private nonprofit corporation funded by the federal government to provide legal services for low-income individuals.

After President Jimmy Carter's inauguration in 1977, Judge Tatel became Director of the Office for Civil Rights (OCR) at the-then U.S. Department of Health, Education, and Welfare.[6] Focusing on desegregating educational institutions, OCR took on the legacy of legal segregation of North Carolina's university system. Unlike integrating public elementary and secondary schools, "[t]he only way to desegregate state higher education systems was to strengthen the Black schools to make them more attractive to white students, give financial incentives to white students to attend Black schools (and vice versa), and eliminate unnecessarily duplicated courses."[7] OCR was unable to reach an acceptable settlement with the university system, but President Ronald Reagan, who took office in 1981, "immediately agreed to a settlement far worse than what we in the Carter Administration had repeatedly rejected. … The federal government failed the students of North Carolina. …"[8] From that experience Judge Tatel learned the limitations of the power of the so-called nuclear option—termination of federal funding—that OCR wields.

Judge Tatel reinvigorated OCR's enforcement of disability and sex discrimination laws. He finalized the first set of regulations under section 504 of the Rehabilitation Act of 1973, prohibiting discrimination on the basis of handicap by recipients of federal financial assistance. Even while "downplay[ing his] own disability," Judge Tatel realized that "[t]his fight … was my own."[9] Then as now, issues relating to sex discrimination in athletics under Title IX of the Education Amendments of 1972

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3 Tatel, *supra* note 1, at 56.

4 *Id.* at 59.

5 *Id.* at 74.

6 Congress subsequently divided the agency into the U.S. Department of Education and the U.S. Department of Health and Human Services.

7 Tatel, *supra* note 1, at 139.

8 *Id.* at 141.

9 *Id.* at 145.

were especially challenging. Title IX and the regulatory guidance promulgated during Judge Tatel's tenure at OCR "have dramatically altered the landscape of school sports" to improve opportunities for girls and women.[10]

After his service at OCR Judge Tatel returned to Hogan & Hartson to start its education practice. He had "found at OCR that many school districts wanted to desegregate their school systems but lacked the legal and technical know-how to make it happen. The expertise of a big D.C. law firm could definitely help. … And we could help them with their other day-to-day legal problems, too. Based on my OCR experience, I thought we could also do the same for colleges and universities. … It worked. The education group thrived" under Judge Tatel's leadership over the next fifteen years.[11]

2. Judicial Career

In 1993 President Clinton appointed Judge Tatel to the U.S. Court of Appeals for the District of Columbia Circuit, where Judge Tatel serve for thirty years. He emphasizes that he "was not a blind judge. … [He] was a judge who happened to be blind."[12]

Judge Tatel offers extensive reflections on his judicial philosophy and experience as a judge. From the beginning of his service he had "a strong conviction … that the most important job of the judge is to protect individual rights from … 'the Leviathan of government.'"[13] At the same time he sought "a set of principles to guide my decision-making and to help separate my judicial obligation to faithfully apply the law from my personal views about right and wrong."[14] He found those models in Judge Learned Hand and Justice Lewis Powell, who "played it straight[;] … strove to identify, and then ignore, their own predispositions[; and] believed in judicial restraint."[15] Judge Tatel describes himself as "a textualist long before the word became the clarion call of so-called legal conservatives."[16]

Writing before the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo,*[17] Judge Tatel defends the traditional standards of judicial review of decisions of federal administrative agencies. He explains that "'arbitrary and capricious review' and *Chevron* deference are important principles of judicial restraint that keep unelected judges from second-guessing agency decision-making."[18] He criticizes the "nondelegation doctrine," which "[i]n theory … is about preserving Congress's

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10 *Id.* at 148.

11 *Id.* at 153–54.

12 *Id.* at 11.

13 *Id.* at 214 (quoting constitutional law professor Philip Kurland).

14 *Id.*

15 *Id.* at 216.

16 *Id.* at 91.

17 603 U.S. 369 (2024).

18 Tatel, *supra* note 1, at 255; *see* Administrative Procedure Act, 5 U.S.C. § 706(2)(A); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

power to legislate—and making sure executive branch agencies don't take that power for themselves" but "[i]n practice … is all about the Supreme Court's own power, because by invoking the doctrine, the Court disregards Congress's legislative choices in favor of its own."[19] He observes that "if Congress can't delegate the regulatory details to expert agencies, it won't be able to regulate in those spaces at all."[20] For similar reasons he objects to the recent "major questions" doctrine,[21] pointing out that the nondelegation and major questions doctrines both "purport to prioritize Congress's authority while ultimately empowering the courts, which can use the two doctrines to override any congressional delegations they don't like."[22]

Judge Tatel observes that "[j]udges all wear the same black robes because it shouldn't make any difference which judge hears your case."[23] Yet the Supreme Court's decisions in these administrative law cases, as well as other cases such as *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,[24] have reluctantly led Judge Tatel to support term limits for Supreme Court Justices, while recognizing that such a change could face constitutional challenge.

Perhaps to illustrate differences between judging and legislating, Judge Tatel describes in detail the operation of the court and his chambers, including the hiring of law clerks (his were dubbed "Tatel Tots").[25] He found oral argument to be "the pinnacle of the appellate process"[26] and offers advice for appellate advocates:

> Good lawyers know their case at least as well as the judges do. They know that when a judge asks a question, they should stop talking, think about the question, and answer it, preferably by starting with a simple yes or no. Good lawyers answer hypothetical questions rather than fight them. Above all, good lawyers understand that although their professional obligation is to represent their clients zealously, they are also officers of the court obligated to present their arguments accurately and honestly.[27]

Judge Tatel retired from the bench in 2024, during the term of President Joe Biden. Judge Tatel loved the job, "honestly say[ing] that I found something interesting in nearly every one of the thousands of cases I heard in my thirty years on the court."[28] But he felt disappointed in the direction of American politics and the Supreme Court, and missed judicial colleagues who had retired or passed away. Harkening back to the origins of his own legal career, he calls on lawyers to

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19 Tatel, *supra* note 1, at 258; *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

20 Tatel, *supra* note 1, at 260.

21 *See* West Virginia v. Env'l Prot. Agency, 597 U.S. 697 (2022).

22 Tatel, *supra* note 1, at 269.

23 *Id.* at 188.

24 600 U.S. 181 (2023).

25 Tatel, *supra* note 1, at 203.

26 *Id.* at 192.

27 *Id*. at 193.

28 *Id.* at 231.

"remember President Kennedy's message so many years ago that lawyers have a special obligation to use their legal skills on behalf of those whose constitutional rights are threatened."[29]

3. Blindness

Judge Tatel was born with sight, but began to lose his vision at the age of eight or nine. When he was fifteen, a doctor at the National Institutes of Health diagnosed the cause as retinitus pigmentosa, a rare, genetic eye disease. Judge Tatel movingly chronicles this "more private journey, from shame about my deteriorating vision, to denial about the effects of my blindness, and ultimately to acceptance and equanimity."[30]

Judge Tatel met Edie—ironically, on a blind date—when he was a student at the University of Chicago Law School and she was studying for her master's degree in education at Northwestern University. He soon anxiously confided his affliction to her, neither of them anticipating that eventually he would become legally blind. They married four months after their first date.

Gradually the reality of his loss of eyesight confronted Judge Tatel. He was, for example, exempted from the military draft because of legal blindness and could no longer drive. Nevertheless, for many years Judge Tatel attempted to "pass" as "normal." At his initial interview at Hogan & Hartson in 1974, he admitted to a prospective employer for the first time that he might become totally blind. The partner asked simply, "What help will you need?" Judge Tatel recounts, "Those five simple words changed everything."[31]

Despite this admission, Judge Tatel's apparent normalcy—his ability to navigate the world without vision—amazed colleagues like me who are sighted. He traveled extensively for work and pleasure, and engaged in sports such as hiking, running three marathons, and skiing. One of the most touching moments in the book is the question from his son and ski guide, "What's better than a father's one hundred percent trust in his son?"[32]

Judge Tatel also compensated for his blindness in astounding ways. Perhaps because he was once sighted, he still "thinks visually."[33] His memory developed so that he "could retain whole statutes and judicial opinions in my mind."[34] He recounts, "Because I can't see the words on the page, I often parse complex text by creating diagrams [of the sentences] in my head."[35] Many of us sighted people would yearn for such mental capacity.

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29 *Id.* at 300.

30 *Id.* at 8–9.

31 *Id.* at 118.

32 At times Judge Tatel's apparent normalcy led me and perhaps others temporarily to forget his blindness. Once, when we were preparing to file a brief, I asked him what color paper we should use. He diplomatically responded, "Elizabeth, you choose."

33 *Id.* at 210.

34 *Id.* at 112.

35 *Id.* at 150.

A lover of science and technology, Judge Tatel also gives a tour of the various assistive devices that he used over the years, characterizing "[e]ach technological advance" as a combination of "the rigor of science with the magic of possibility."[36] In addition to human readers, he has used a range of reading machines to absorb daily doses of legal authorities and news. After returning to Washington, he learned Braille and began to use a Braille computer to write.

Yet Judge Tatel deferred for years customary supports for the blind. It was not until age forty that he began to use a white mobility cane, at last "announc[ing] to the world that I was blind."[37] And only at age seventy-six did he gain his beloved German shepherd guide dog, Vixen, giving both Judge Tatel and Edie more independence than was previously possible and an unexpected best friend to boot.

As his blindness became more obvious and public, Judge Tatel experienced not only the kindness of strangers, but also discrimination. He recounts an incident when a rideshare driver refused to accept him and Vixen as passengers. The experience was insulting and humiliating. As when Allegheny Airlines bumped consumer advocate Ralph Nader, the rideshare driver did not realize whom he had evicted. Judge Tatel filed a complaint with the ridesharing service and called the *Washington Post*, which soon ran a story headlined, "A Federal Judge Was Refused a Lyft Ride with His Guide Dog. He's Not Alone." For the moral of the story, Judge Tatel quotes the Old Testament: "Before the blind: thou shalt not place a stumbling block."[38]

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Judge Tatel attributes his success to several fortunate circumstances: his parents' support; his gradual loss of sight, culminating only after he was an adult with an established profession; his attraction to technology; and his family's love and encouragement. Shirley Hufstedler, a former federal judge and Secretary of Education, added an insight into Judge Tatel's character: "Because he can't see people, he can see through them."[39] Whatever the contributions to his success, Judge Tatel's "yearn[ing] to be a civil rights lawyer and to use [his] legal skills to make the world a better place" is an inspiration for all lawyers. And his ultimate acceptance of his disability, coupled with his expansive curiosity and perseverance in pursuing his goals, make his life one to emulate, personally as well as professionally, for the blind and sighted alike.

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36 *Id.* at 324.

37 *Id.* at 168.

38 *Id.* at 128 (quoting Leviticus 19:14).

39 *Id.* at 112.

Review of David Rabban's

ACADEMIC FREEDOM: FROM PROFESSIONAL NORM TO FIRST AMENDMENT RIGHT

NEAL H. HUTCHENS AND BRANDON WILLIAMS***

While writings on academic freedoms are expansive, David M. Rabban's *Academic Freedom: From Professional Norm to First Amendment*[1] makes a noteworthy contribution to the academic freedom literature. Rabban, a faculty member at the University of Texas at Austin's School of Law, is well-positioned to write a consequential book on academic freedom. He previously served as the general counsel and chair of the committee for academic freedom for the American Association of University Professors (AAUP). In the work, Rabban argues for distinctive First Amendment academic freedom protections that apply to individual faculty members, institutions, and students, with the author making a specific argument for each one.

Rabban's book is excellent, but it is perhaps not the gateway work for a reader newly delving into the topic of academic freedom and the First Amendment, especially if they are not a lawyer. For someone seeking an introductory overview of academic freedom, other works, for example, ones by Henry Reichman[2] or Matthew Finkin and Robert Post,[3] might be a good starting place before taking on Rabban's book. Individuals with a solid understanding of issues connected to academic freedom and the First Amendment or with legal expertise will find Rabban's book informative and thought-provoking.

In chapters one and two, Rabban reviews academic freedom as developed under the AAUP, with special attention to its 1915 Declaration of Principles on Academic Freedom and Tenure, and the constitutional role in regulating the "relationship between the university and the state" through the Contract Clause earlier in the

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1 David Rabban, Academic Freedom: From Professional Norm to First Amendment Right (2024).

2 Henry Reichman, Understanding Academic Freedom (2d ed. 2025).

3 Matthew Finkin & Robert Post, For the Common Good: Principles of American Academic Freedom (2011).

nation's history and, in the twentieth century, the First Amendment.[4] Providing a major focus of the book, chapters three through six focus on academic freedom as an individual First Amendment right for professors. Chapters seven and eight take up the issue of a First Amendment right for institutional academic freedom. In chapter nine, Rabban considers balancing potential conflicts between institutional and individual speech rights. Similarly, the author contemplates in chapter ten the role of the courts in sorting out competing academic freedom claims by professors and their higher education institutions. The issue of student academic freedom is covered in chapter eleven. The bibliographic essay also adds important context to and elaboration of Rabban's arguments for distinctive academic freedom rights for individual professors, institutions, and students.

A noteworthy contribution of the book is to scrutinize not only the opinions from formative legal decisions involving academic freedom, such as *Sweezy v. New Hampshire*,[5] but also to provide important backstories and context for these cases. For instance, with the *Sweezy* decision, along with examining the well-known concurring opinion of Justice Felix Frankfurter, Rabban chronicles exchanges between Chief Justice Earl Warren and Frankfurter that resulted in Warren adding references to academic freedom in what would become the Court's plurality opinion in the case.[6]

Another example of how Rabban goes beyond solely assessing legal opinions is the treatment of the AAUP's involvement with academic freedom and the First Amendment. With *Sweezy*, for example, Rabban recounts how the AAUP was not at the forefront of efforts to establish First Amendment standards to safeguard academic freedom. Rabban chronicles how the AAUP considered filing an amicus brief in the *Sweezy* case but decided not to, even though the organization had previously decided in 1956 to approve such legal advocacy.[7] The AAUP feared that recognition of academic freedom as a constitutional right could undermine the conceptions of academic freedom as a professional standard previously developed by the organization. While acknowledging these concerns, Rabban describes the AAUP's decision not to file an amicus brief in the case as an important missed chance "to influence judicial interpretation of the relationship between academic freedom and the First Amendment at its inception."[8] This type of analysis, where Rabban goes beyond only providing an explication of legal decisions, results in one of the richest contributions of the work, allowing the reader to more fully reflect on the sociohistorical development of academic freedom as a constitutional concern.

Along with analysis that goes beyond legal opinions for source material, Rabban also provides an in-depth examination of pivotal academic freedom legal

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4 Rabban, *supra* note 1, at 35.

5 354 U.S. 234 (1957). With the plurality opinion in *Sweezy* and the concurrence by Frankfurter in the case, Rabban states that "[f]or the first time, in *Sweezy*, a majority of Supreme Court justices indicated that academic freedom is a distinctive First Amendment right." Rabban, *supra* note 1, at 68.

6 Rabban, *supra* note 1, at 65–65.

7 *Id.* at 63.

8 *Id.* at 64.

decisions, including majority, plurality, concurring, and dissenting opinions. This review is complemented by consideration of materials that include parties' briefs, amici briefs, correspondence between justices, and contextual historical information about the decision. The result is a detailed accounting of how the Supreme Court crafted an initial conception of academic freedom along its constitutional dimensions in a series of opinions in the 1950s and 1960s. The careful coverage of this period may prompt a reader to engage in further reading about the surrounding historical context and developments of academic freedom during this period such as Hans-Joerg Tiede's history of the AAUP[9] or Ellen Schrecker's account of higher education during the McCarthy era.[10]

For foundational legal decisions, Rabban gives considerable attention to *Keyishian v. Board of Regents of the University of State of New York*,[11] a case that, in many respects, represents the apex of the Supreme Court's identification of academic freedom as a distinctive First Amendment right. In *Keyishian*, the Supreme Court overturned its prior approval of a New York law in *Adler v. Board of Education of the City of New York*[12] that allowed the dismissal of educators found to be affiliated with organizations deemed subversive. In *Keyishian*, support for academic freedom was included in a Supreme Court majority opinion, with Rabban scrutinizing an often-quoted paragraph of the opinion describing academic freedom as a "special concern of the First Amendment."[13]

While Rabban describes *Keyishian* as a "major step in incorporating academic freedom within the First Amendment," he also considers how the decision left much unanswered about academic freedom and the First Amendment.[14] He states how the "brief paragraph" from the opinion highlighting academic freedom "gave very little guidance about the meaning of academic freedom and gave contradictory signals about its relationship to the First Amendment generally."[15] For instance, he notes how the passage highlights academic freedom as "peculiarly the 'marketplace of ideas.'"[16] In characterizing academic freedom in this way, Rabban states how the majority opinion in *Keyishian* highlighted the distinctive aspects of academic freedom while at the same time, and rather contradictorily, placing the concept under the marketplace of ideas umbrella, a rationale used for the general protection of free speech under the First Amendment.[17] For Rabban, this analytical ambiguity matters. His argument for recognition of academic freedom as a distinctive First Amendment right rests on a different premise than the general

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9 Hans-Joerg Tiede, University Reform: The Founding of the American Association of University Professors (2015).

10 Ellen Schrecker, No Ivory Tower: McCarthyism and the Universities (1986).

11 385 U.S. 589 (1967).

12 342 U.S. 485 (1952).

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

14 Rabban, *supra* note 1, at 79.

15 *Id.*

16 *Id.* (quoting from *Keyishian*, 385 U.S. at 603).

17 Rabban, *supra* note 1, at 79.

marketplace of ideas metaphor where speech protected by the First Amendment is not subject to quality control standards like the peer review systems used in higher education.

One of Rabban's defining goals for the book is to chart a distinctive niche for academic freedom as a constitutional right, and he is critical of how many courts have turned to general First Amendment standards to decide cases involving faculty members, even when "clear issues of academic freedom were raised."[18] After surveying a muddled judicial landscape for constitutional academic freedom protections, Rabban argues for the "need for a comprehensive theory that justifies treating academic freedom as a distinctive First Amendment right."[19] He also considers the "realistic issues" that such a right must take into account, such as applications to research, teaching, and intramural campus speech, including participation in shared governance.[20]

Along with examining cases that squarely center on academic freedom, Rabban considers what could be termed academic freedom adjacent cases. For example, Rabban reviews *Rust v. Sullivan*,[21] a case that centered on a prohibition for doctors in federally funded family planning clinics from discussing abortion with their patients. While approving of the prohibition, Chief Justice William Rehnquist's opinion for the majority noted that restraints exist on federal control of speech it funds, with higher education serving as one of the examples to describe limits on federal authority and with Rehnquist citing *Keyishian*.[22] In these academic freedom adjacent cases and with legal decisions with academic freedom issues more explicitly in play, Rabban describes what he views as a series of missed opportunities for the Supreme Court and other courts to define and devise legal standards applicable to First Amendment academic freedom. Like Godot or Waldo, finding academic freedom as a defined First Amendment concept has proven elusive, even while continuing to be identified by the Supreme Court and other courts as a relevant constitutional concern in post-*Keyishian* legal decisions.

In assessing how lower federal courts have responded to claims implicating faculty members' academic freedom, Rabban states, "While overwhelmingly concluding that the First Amendment protects the academic freedom of professors, lower-court rulings have disagreed about its meaning."[23] Rabban acknowledges that some lower courts have rejected First Amendment protection for faculty academic freedom, such as in *Urofsky v. Gilmore*,[24] and with Rabban examining the various opinions of the case in detail. Describing a case like *Urofsky* as an outlier, he states that a number of lower court opinions "have understood Supreme Court decisions as establishing a First Amendment right of academic freedom for

18 *Id.* at 81.

19 *Id*.

20 *Id.* at 81–82.

21 500 U.S. 173 (1991).

22 Rabban, *supra* note 1, at 88.

23 *Id.* at 93.

24 216 F.3d 401 (4th Cir. 2000) (en banc).

professors."[25] Despite concluding that courts have generally recognized academic freedom as constitutionally protected, at least in connection to faculty expertise in teaching and scholarship, Rabban laments the hazy status of First Amendment protection for academic freedom in legal decisions:

> Judges have disagreed about its scope and have reached inconsistent results in many factually similar cases. Even while relying on this right, judges have rarely defined it, which has obscured the relationship of academic freedom to the First Amendment generally.[26]

Rabban is critical of courts looking to general First Amendment principles to settle cases raising academic freedom issues. He also contends that reliance on First Amendment standards applied in employee-speech cases has hindered the development of clear academic freedom rights under the First Amendment.

Before offering the contours of a First Amendment academic freedom right for professors, Rabban offers his justifications for a unique constitutional niche for academic freedom, namely, he points to the "societal value of the contribution to knowledge through the expert academic speech of professors" as "provid[ing] the most convincing justification for treating it as a distinctive category of First Amendment analysis differentiated from the general free speech rights of all citizens… ."[27]

As support for this rationale for constitutional academic freedom, Rabban turns to the AAUP's 1915 Declaration. Specifically, he looks to the document as expressing the need for professors to be able to exercise independence "in producing and disseminating expert knowledge."[28] Additionally, Rabban points to peer review as a fundamental check for ensuring "whether speech by a professor meets the academic standards that justify the protection of academic freedom."[29]

Besides teaching and scholarship, Rabban argues that academic freedom should include faculty speech related to "educational policy," such as in connection to "academic standards, curricular reform, and university governance."[30] However, according to Rabban, such academic freedom protections are not inclusive of all professorial speech related to institutional matters, with the examples he provides of excluded speech including decisions of whether to celebrate a holiday on campus, institutional fundraising efforts, or policies governing athletics.[31] He also makes clear that academic freedom should not extend to speech that is "unprofessional, false, threatening, or harassing."[32]

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25 RABBAN, *supra* note 1, at 99.

26 *Id.* at 111.

27 *Id.* at 136.

28 *Id.* at 137.

29 *Id.*

30 *Id.* at 138.

31 *Id.*

32 *Id.*

A key part of the work focuses on when professors at a public college or university come into legal conflict with their employer institution and questions of academic freedom arise.[33] As to such clashes, Rabban argues that courts are equipped to settle these conflicts through reliance on "traditional techniques of judicial analysis" to evaluate whether actions taken against professors were done so based in "good faith on academic grounds" or, instead, an institution has used academic justifications as pretext.[34]

Much of Rabban's foundation for a First Amendment right for faculty academic freedom is based on peer review. The emphasis on faculty expertise and authority is potentially at odds with efforts and calls in some states to diminish the faculty role in institutional decision-making. A central issue for Rabban's approach to and theory of academic freedom is how courts should respond to academic freedom claims if state legislatures and governing boards have decided to deemphasize the role of faculty authority and expertise, including in responding to allegations of violations of a faculty member's academic freedom. In general, the book leads to questions about the authority of state governments to establish the roles and missions of public higher education institutions and their professors, with the answers to such an inquiry relevant to defining the contours of First Amendment academic freedom rights for faculty members at public colleges and universities in relation to their institutional employers. Rather than a last word, Rabban's work is an important starting point for continuing conversations about the basis for faculty members' First Amendment academic freedom rights when it comes to institutional and state authority to define the intellectual rights of professors in public higher education and to control the basic nature and functions of public colleges and universities in a state.

The chapter devoted to student academic freedom as a distinctive First Amendment right also leaves open ample avenues of future inquiry by scholars and courts. Rabban ties student academic freedom protection to interests in learning. He describes student academic freedom as encompassing "student interests in access to knowledge, in disagreeing with the views of their professors, and in fair evaluation."[35] It is perhaps unfair to ask for more from a book that provides an extensive review of academic freedom. Still, readers may find themselves left wanting even more from Rabban on the issue of student academic freedom, such as more exploration of previous legal decisions, including ones involving elementary and secondary education students that have been imported into higher education cases.

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33 First Amendment academic freedom protections potentially apply to faculty members in public higher education in relation to their institutional employer since they work at colleges or universities that qualify as state actors. In contrast, private colleges and universities would generally not qualify as state actors and, as such, they are not legally beholden to First Amendment standards. For faculty members in private higher education, when it comes to their institutional employer, their academic freedom rights would be protected through sources that include tenure and contract principles or collective bargaining agreements. Rabban's theory of academic freedom would, however, permit a private higher education institution or one of its faculty members to assert First Amendment academic freedom rights against a governmental actor.

34 RABBAN, *supra* note 1, at 254–55.

35 *Id.* at 297.

It is the mark of an engaging book for a reader to be left wanting more, and Rabban's work is an important addition to the scholarship on academic freedom. In a period of sharp uncertainty and challenge for higher education, Rabban's work is a timely and meaningful one. He advances a theory to safeguard academic freedom, but he also places clear limits on when it should apply, especially in the case of faculty members and confining the scope of their academic freedom rights to matters of scholarly expertise subject to standards of peer review or to matters clearly connected to educational policy. Even if a reader does not agree with all of Rabban's conclusions as to distinctive First Amendment academic freedom rights for individual professors, institutions, and students, his work is informative and thought-provoking.