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Cover Page Footnote

Mr. Thro thanks Linda Speakman for her editorial assistance.

FOLLOW THE TRUTH WHEREVER IT MAY LEAD: THE SUPREME COURT'S TRUTHS AND MYTHS OF ACADEMIC FREEDOM

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[W]e are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.[1]

INTRODUCTION

Jefferson's words, describing his newly founded University of Virginia, aspire to an educational utopia.[2] In his ideal "academical village," no individual is punished for what he believes; required to violate his conscience by affirming something he does not believe; or forced to fund a cause he opposes.[3] Rather, he may advocate any belief or pursue any course of inquiry as long as he is open to the arguments of others that he might be wrong.[4] Disputes over "the truth" are resolved by facts, not feelings; by science, not superstition; by debate, not dogma; by discussion, not denunciation; by heterodoxy, not orthodoxy.[5]

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[1] Letter from Thomas Jefferson to William Roscoe (Dec. 27, 1820).

[2] As one scholar observed:

> T[homas] J[efferson's] [version] of a great university founded on educational principles never before applied on this continent became a reality when the University of Virginia opened its doors in 1825. . . .
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> The University of Virginia quickly became the most admired institution of higher education in the southern states, and so remained throughout the nineteenth century. Innovations included a faculty composed mainly of professors brought over from Europe, complete rejection of any organized religion or theological dogma, a curriculum divided into separate schools and offering courses in mathematics, sciences, and modern languages, and a novel elective system.

VIRGINIUS DABNEY, MR. JEFFERSON'S UNIVERSITY 1–2 (1981).

[3] Jefferson coined the phrase "academical village" to describe the "classical group of buildings that has evoked the admiration of the world." *Id.* at 1. Indeed, the "Lawn" and surrounding buildings are a world heritage site. *See id.*; World Heritage List, *Monticello and the University of Virginia in Charlottesville*, UNESCO WORLD HERITAGE CENTRE, https://whc.unesco.org/en/list/442/ (last visited Feb. 9, 2020); *Jefferson's Masterpiece*, UNIV. OF VA., https://www.virginia.edu/visit/grounds (last visited Feb. 17, 2020). "As academic freedom developed, originally in Europe and then later the United States, it had two branches: faculty academic freedom and student academic freedom." 1 WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 717 (5th ed. 2013). *See also* RICHARD HOFSTADER & WALTER METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 386–91 (1955) (discussing German influence on the development of academic freedom).

[4] James Carpenter, *Thomas Jefferson and the Ideology of Democratic Schooling*, 21 DEMOCRACY & EDUC. J. 1, 4 (2013).

[5] GREG LUKIANOFF & JOHNATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE 33–51 (2018) (discussing the "untruth" of emotional reasoning—basing decisions on emotions rather than facts); *see generally* HEATHER MACDONALD, THE DIVERSITY DELUSION: HOW RACE AND GENDER PANDERING CORRUPT THE UNIVERSITY AND UNDERMINE OUR CULTURE (2018). For a discussion of MacDonald's work, see Jillian Kay Melchior, *The Scourge of Diversity: A Onetime liberal, Heath MacDonald Now Believes Identity Politics Threatens Higher Education and Civilization Itself*, WALL ST. J. (Oct. 13, 2018); *see generally* John D. Inazu, A CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016). As John Inazu recently explained:

> A central purpose, if not *the* central purpose, of the university is to be a place of facilitating disagreement across differences, what the philosopher Alasdair MacIntyre has termed a "place of constrained disagreement, of imposed participation in conflict." The paradigmatic university pursuing this purpose embodies [at] least three core characteristics: it is dialogical; it is democratic; and it is residential.

"Universities have historically been fierce guardians of intellectual debate and free speech, providing an environment where students can voice ideas and opinions without fear of repercussion."[6] Quite simply, "knowledge cannot be advanced unless existing claims to knowledge can with freedom be criticized and analyzed."[7] As the best contemporary statement of academic freedom explains, "the ideas of different members of the University community will often and quite naturally conflict," but an institution should not "attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive."[8] Indeed, "concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some" individuals.[9]

The First Amendment provides broad protection for academic freedom, but every institution "has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it."[10] "[F]ree speech is bred into the bones of a modern university" but "[u]nless the campus zest for

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John Inazu, *The Purpose (and Limits) of the University*, 2018 UTAH L. REV. 943, 947 (2018) (emphasis added).

[6] Speech First, Inc. v. Schlissel, 939 F.3d 756, 761 (6th Cir. 2019).

[7] ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 64 (2012).

[8] THE UNIVERSITY OF CHICAGO, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION (2015) [hereinafter "CHICAGO STATEMENT"]. Numerous other institutions have adopted the Chicago Statement, and the Foundation for Individual Rights in Education is urging its adoption nationwide. *See Hard to Say: A Statement at the Heart of the Debate Over Academic Freedom*, ECONOMIST (Jan. 30, 2016), http://www.economist.com/news/united-states/21689603-statement-heart-debate-over-academic-freedom-hard-say. For a list of institutions adopting the Chicago Statement, *see Chicago Statement: University and Faculty Body Support*, THE FIRE (Nov. 6, 2019), https://www.thefire.org/chicago-statement-university-and-faculty-body-support/.

[9] CHICAGO STATEMENT, *supra* note 8.

[10] As the Supreme Court explained:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) (citations omitted). Similarly, ten years earlier, the Court observed:

> 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. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. 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.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); CHICAGO STATEMENT, *supra* note 8.

censorship is combatted now, what we have always regarded as a precious inheritance could be eroded beyond recognition and a soft totalitarianism could become the new American norm."[11]

Of course, defining academic freedom raises other questions about whether academic freedom is universal, or grants greater protections for faculty, or allows the university to defy the government.[12] First, the *Chicago Statement* emphasizes "*all* members of the University community [have] the broadest possible latitude to speak, write, listen, challenge, and learn" and "to discuss any problem that presents itself."[13] Academic freedom is not limited to the faculty, but extends to the students, non-faculty scientists and researchers, and even administrators.[14] If you are part of the university community, you enjoy academic freedom.[15] Second, the American Association of University Professors, while not necessarily denying academic freedom to non-faculty, envisions enhanced academic freedom for faculty members.[16] With enhanced academic freedom, "a university professor possesses a constitutional right to determine for himself, without the input of the university (and perhaps even contrary to the university's desires), the subjects of his research, writing, and teaching."[17] Third, late twentieth

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[11] KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 29 (2018); MACDONALD, *supra* note 5, at 18.

[12] Unfortunately, "'[a]cademic freedom' is a term that is often used, but little explained, by federal courts." Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) (en banc).

[13] CHICAGO STATEMENT, *supra* note 8.

[14] Such individuals frequently make significant scholarly contributions. For example, law students—through student written law review notes and case comments—shape the law. At major research institutions, staff researchers often author more papers than their faculty counterparts. Administrators, many of whom had significant scholarly and policy accomplishments before assuming their current roles, continue to publish extensively.

[15] The German notion of academic freedom includes both Lehrfreiheit (freedom to teach) and Lernfreiheit (freedom to learn). *Urofsky*, 216 F.3d at 410. The Chicago Statement's affirmation of academic freedom for all members of the University Community would seem to embody both concepts.

[16] As the Fourth Circuit explained:

> In 1915, a committee of the American Association of University Professors (AAUP) issued a report on academic freedom that adapted the concept of *Lehrfreiheit* to the American university. In large part, the AAUP was concerned with obtaining for professors a measure of professional autonomy from lay administrators and trustees. The AAUP defined academic freedom as "a right claimed by the accredited educator, as teacher and investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation, or penalization because the conclusions are unacceptable to some constituted authority within or beyond the institution." Significantly, the AAUP conceived academic freedom as a professional norm, not a legal one: The AAUP justified academic freedom on the basis of its social utility as a means of advancing the search for truth, rather than its status as a manifestation of First Amendment rights. The principles adopted in the 1915 report were later codified in a 1940 Statement of Principles on Academic Freedom and Tenure promulgated by the AAUP and the Association of American Colleges. The 1940 Statement since "has been endorsed by every major higher education organization in the nation," "through its adoption into bylaws, faculty contracts, and collective bargaining agreements . . . ."

Urofsky, 216 F.3d at 410–11 (footnotes omitted) (citations omitted). *See* AM. ASS'N OF UNIV. PROFESSORS, STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940); AM. ASS'N OF UNIV. PROFESSORS, DECLARATION OF PRINCIPLES (1915).

[17] *Urofsky*, 216 F.3d at 409–10.

century court decisions suggested there was an "institutional academic freedom." Although public universities are completely free from control by the Church, Synagogue, Mosque, or private corporation, state institutions may have rights against the creating state or the national government.[18] Just as a private university, like any private entity, can resist the government, public universities may be able to resist state or federal government officials.[19]

Yet, the Constitution takes a different approach to the questions of whether academic freedom is universal, or grants greater protections for faculty, or allows the university to defy the government.[20] As recent decisions of the Supreme Court of the United States illustrate, academic freedom is both a constitutional truth and a constitutional myth.[21] First, the *Chicago Statement*'s notion of academic freedom for all is a constitutional truth for public universities.[22] Regardless of whether you are a student, a staff researcher, a faculty member, or a senior administrator, institutional officials may not punish you for expression, force you to conform, or require you to subsidize causes you oppose.[23] In a sense, liberty has never been greater on a public campus. Second, enhanced academic freedom for faculty members is a constitutional myth. In terms of constitutional rights, faculty members at state universities are no different than ordinary public employees.[24] Third,

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[18] *See* KAPLIN & LEE, *supra* note 3, at 719 (citations omitted) (internal quotation marks omitted). The University of Virginia was the first institution to be completely free of sectarian or corporate control but was still subject to control by a board appointed by the Governor of Virginia. *See generally* DUMAS MALONE, JEFFERSON: THE SAGE OF MONTICELLO 271–82 (1981) (describing efforts to convince the Virginia General Assembly to fund the University). *See also* DABNEY, *supra* note 2, at 2–3; Paul Horwitz, *Constitutional "Niches": The Role of Institutional Context in Constitutional Law: Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1526 (2007); KAPLIN & LEE, *supra* note 3, at 719–21 (discussing institutional academic freedom).

[19] *See* United States v. Morrison, 529 U.S. 598, 621 (2000) (Constitution restricts only state actors). To be sure, while a private institution can defy the government, it may not be able to defy the religious denomination that controls it or a for-profit corporation that controls it.

[20] As Professor Rabban observed:

> Fitting academic freedom within the rubric of the first amendment is in many respects an extremely difficult challenge. The term "academic freedom," in obvious contrast to "freedom of the press," is nowhere mentioned in the text of the first amendment. It is inconceivable that those who debated and ratified the first amendment thought about academic freedom.

David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 237 (1990).

[21] *See infra* Part I, Part II.

[22] Victor Yang, *The Chicago Principles Arrive at Other Universities*, THE CHICAGO MAROON (May 23, 2019), https://www.chicagomaroon.com/article/2019/5/24/chicago-principles-arrive-universities/.

[23] *See* discussion *infra* Part I, Part II.

[24] Although faculty members have the same constitutional rights as their non-faculty colleagues, a faculty member's speech is limited by the restraints of the academic discipline. As Professor Calhoun observed:

> [F]aculty in our universities also live their professional lives within disciplinary constraints and norms. Physicists have one methodological approach to studying automobile accidents; professors of journalism and law will each have their own approved disciplinary perspective on the important questions to ask about such events, as will social scientists. Any given professor's academic research and teaching are constrained by disciplinary limitations on content, viewpoint, and subject matter; research and teaching are expected to be pursued in accordance with accepted disciplinary methods and behaviors. The discipline links faculty

with respect to a state university and its creating state, institutional academic freedom is a constitutional myth. Yet, as to the relationship between a state university and national government, institutional academic freedom is a constitutional truth.

The purpose of this Article is to demonstrate how the Supreme Court has recognized the constitutional truths and destroyed the constitutional myths of academic freedom. This purpose is accomplished in three parts. Part I explores how the recent Supreme Court decisions in a variety of First Amendment contexts guarantee academic freedom for the entire university community. In particular, it focuses on how decisions concerning offensive speech, coercive expression, compelled subsidies, student organizations, and public employee free speech effectively set up academic freedom for the entire public university community. Part II explains why the idea of enhanced academic freedom for faculty is a constitutional myth. Faculty members have the same rights as other public employees—no more and no less. At the same time, the Supreme Court's decision in *Garcetti v. Ceballos* may diminish constitutional protections for faculty speech in the employment capacity.[25] Part III examines why institutional academic freedom is a constitutional myth at the state level, but a constitutional truth at the federal level.

I. ACADEMIC FREEDOM FOR THE ENTIRE UNIVERSITY COMMUNITY IS A CONSTITUTIONAL TRUTH

A. Public Universities May Not Punish Offensive Expression

Within academe, there is no longer a consensus for "freedom for the thought that we hate."[26] Instead, large segments of the university community insist "discrimination based on those characteristics has been the driving force in Western Civilization," and our Nation "remains a profoundly bigoted place, where heterosexual white males continue to deny opportunity to everyone else."[27] Many "equate non-conforming ideas with 'hate speech,' and 'hate speech' with life-threatening conduct that should be punished, censored, and repelled with force if necessary."[28] They "vilify Americans who are unwilling to assent to the new orthodoxy" and call for "*vindictive protectiveness*"—the

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physically located at different sites throughout the world and is arguably more important to faculty than any specific university home.

Emily M. Calhoun, *Academic Freedom: Disciplinary Lessons from Hogwarts*, 77 COLO. L. REV. 843, 844 (2006). In other words, an institution can give individual faculty members a large degree of autonomy and assume that the exercise of that autonomy will be limited, either by peer disapproval or through the structural constraints of the professor's field. Of course, as several high-profile incidents demonstrate, there will be exceptions. Yet, these exceptions prove the rule, the overwhelming majority of faculty exercise their autonomy in a responsible manner that brings credit to them, their professions, their academic discipline, and to the state university that employs them.

[25] *See generally* 547 U.S. 410 (2006).

[26] United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

[27] MACDONALD, *supra* note 5, at 45.

[28] *Id.* at 62.

silencing and shaming of those who dare to dissent.[29]

These new attitudes represent a fundamental threat to academic freedom, but the Court has responded decisively. First, because "the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys," "hate speech" is not outside the Freedom of Speech.[30] In *Snyder v. Phelps*, the Court held a state could not impose civil liability for intentional infliction of emotional distress resulting from provocative and inflammatory comments made at a military funeral.[31] In *Matal v. Tam*, the Court unanimously found Congress violated the Constitution when it enacted a statute prohibiting the registration of trademarks that may "disparage . . . or bring . . . into contempt[] or disrepute" any "persons, living or dead."[32] Such a restriction "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[33] In *Iancu v. Brunetti*, the Court again found Congress violated the Constitution when it prohibited the registration of "immoral" or "scandalous" trademarks.[34]

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[29] Obergefell v. Hodges, 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting). *See also* Tish Harrison Warren, *The Wrong Kind of Christian*, CHRISTIANITY TODAY (Sept. 2014) (describing Vanderbilt University's treatment of religious groups that espouse orthodox doctrine); LUKIANOFF & HAIDT, *supra* note 5, at 10.

[30] Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., joined by Ginsburg, Sotomayor, & Kagan, JJ., concurring).

[31] *See generally* 562 U.S. 443 (2011); *id.* at 458–59. Despite the incendiary nature of the comments and the sensitive context, the Court found the speech addressed "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy," touched on a matter of public concern. *Id.* at 454, 455. Because the speech was on a matter of public concern, it receives "special protection [and] cannot be restricted simply because it is upsetting or arouses contempt." *Id.* at 458.

[32] *See generally* 137 S. Ct. 1744; 15 U.S.C. § 1052(a) (2019).

[33] *Matal*, 137 S. Ct. at 1751. Consequently, the government must allow a musical group to trademark "Slants" even though that term is a racial slur toward Asians. *Id.*

[34] *See generally* 139 S. Ct. 2294 (2019). Applying the reasoning of *Matal*, the Court elaborated:

> The government may not discriminate against speech based on the ideas or opinions it conveys. In Justice Kennedy's explanation, the disparagement bar allowed a trademark owner to register a mark if it was "positive" about a person, but not if it was "derogatory." That was the "essence of viewpoint discrimination," he continued, because "[t]he law thus reflects the Government's disapproval of a subset of messages it finds offensive." Justice Alito emphasized that the statute "denie[d] registration to any mark" whose disparaging message was "offensive to a substantial percentage of the members of any group." The bar thus violated the "bedrock First Amendment principle" that the government cannot discriminate against "ideas that offend." Slightly different explanations, then, but a shared conclusion: Viewpoint discrimination doomed the disparagement bar.
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> If the "immoral or scandalous" bar similarly discriminates on the basis of viewpoint, it must also collide with our First Amendment doctrine. The Government does not argue otherwise. In briefs and oral argument, the Government offers a theory for upholding the bar if it is viewpoint-neutral (essentially, that the bar would then be a reasonable condition on a government benefit). But the Government agrees that under *Tam* it may not "deny registration based on the views expressed" by a mark. "As the Court's *Tam* decision establishes," the Government says, "the criteria for federal trademark registration" must be "viewpoint-neutral to survive Free Speech Clause review." So the key question becomes: Is the "immoral or scandalous" criterion in the Lanham Act viewpoint-neutral or viewpoint-based? It is viewpoint-based. . . . So the Lanham Act allows registration of marks when their messages

Second, while there are "few categories of speech that the government can regulate or punish," "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."[35] Indeed, the Court has refused to recognize categorical exclusions for depictions of animal cruelty and depictions of violence to children.[36]

Third, the Court has rejected expansive definitions for existing categorical exclusions. "Incitement" is limited to advocacy "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[37] "True threat" requires an intent to actually make the threat or the knowledge that the communication will be viewed as a threat.[38] "Defamation" involves a common law definition over centuries of Anglo-American jurisprudence with a significant narrowing for public figures.[39] In

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> accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter. "Love rules"? "Always be good"? Registration follows. "Hate rules"? "Always be cruel"? Not according to the Lanham Act's "immoral or scandalous" bar. The facial viewpoint bias in the law results in viewpoint-discriminatory application.

Id. at 2299–2300 (citations omitted).

[35] *Matal*, 137 S. Ct. at 1765 (Kennedy, J., joined by Ginsburg, Sotomayor, & Kagan, JJ., concurring). As the Court explained:

> "From 1791 to the present," however, the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." These "historic and traditional categories long familiar to the bar," including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."

United States v. Stevens, 559 U.S. 460, 468–69 (2010) (citations omitted); Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 791 (2011).

[36] As the Court observed:

> The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure."

Stevens, 559 U.S. at 470 (citations omitted). *See also id.* at 472; *Brown*, 564 U.S. at 799.

[37] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[38] "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343, 359 (2003); Elonis v. United States, 135 S. Ct. 2001, 2012 (2015).

[39] Beauharnais v. Illinois, 343 U.S. 250, 254–55 (1952). As Justice Thomas explained:

> The constitutional libel rules adopted by this Court in *New York Times* and its progeny broke sharply from the common law of libel, and there are sound reasons

the educational context, "harassment" is limited to expression or conduct that is so "severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." "Fighting words" seem limited to a single case.[40]

> to question whether the First and Fourteenth Amendments displaced this body of common law.
>
> The common law of libel at the time the First and Fourteenth Amendments were ratified did not require public figures to satisfy any kind of heightened liability standard as a condition of recovering damages. Typically, a defamed individual needed only to prove "a false written publication that subjected him to hatred, contempt, or ridicule." Malice was presumed in the absence of an applicable privilege, right, or duty. General injury to reputation was also presumed, special damages could be recovered, and punitive damages were available if actual malice was established. Truth was a defense to a civil libel claim. But where the publication was false, even if the defendant could show that no reputational injury occurred, the prevailing rule was that at least nominal damages were to be awarded. Libel was also a "common-law crime, and thus criminal in the colonies." The same principles generally applied, except that truth traditionally was not a defense to libel prosecutions—the crime was intended to punish provocations to a breach of the peace, not the falsity of the statement. Laws authorizing the criminal prosecution of libel were both widespread and well established at the time of the founding. And they remained so when the Fourteenth Amendment was adopted, although many States by then allowed truth or good motives to serve as a defense to a libel prosecution.
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> Far from increasing a public figure's burden in a defamation action, the common law deemed libels against public figures to be, if anything, *more* serious and injurious than ordinary libels. Libel of a public official was deemed an offense "most dangerous to the people, and deserv[ing of] punishment, because the people may be deceived and reject the best citizens to their great injury, and it may be to the loss of their liberties."
>
> The common law did afford defendants a privilege to comment on public questions and matters of public interest. This privilege extended to the "public conduct of a public man," which was a "matter of public interest" that could "be discussed with the fullest freedom" and "made the subject of hostile criticism." Under this privilege, "criticism may reasonably be applied to a public man in a public capacity which might not be applied to a private individual." And the privilege extended to the man's character "so far as it may respect his fitness and qualifications for the office," which was in the interest of the people to know.
>
> But the purposes underlying this privilege also defined its limits. Thus, the privilege applied only when the facts stated were true. And the privilege did not afford the publisher an opportunity to defame the officer's private character. "One may in good faith publish the truth concerning a public officer, but if he states that which is false and aspersive, he is liable therefor however good his motives may be; and the same is true whether the party defamed be an officer or a candidate for an office, elective or appointive."

McKee v. Cosby, 139 S. Ct. 675, 678–79, (2019) (Thomas, J., concurring in the denial of certiorari) (citations omitted); New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964).

[40] Although it is likely that the Court would find a public employer liable for expression that constitutes harassment under Title VII, the Court has never addressed whether expression that constitutes harassment under Title VII is protected by the First Amendment. Although the Supreme Court has never said that harassment does not fall within the freedom of speech, it has held that public school districts incur monetary liability for responding with deliberate indifference to one student's harassment of another student. Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 650 (1999). Thus, by inference, expression that amounts to harassment is not within the freedom of speech. *Id.* at 650.
To the extent that institutions impose a broader definition of harassment, institutions may well violate the First Amendment. The Court defined "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Cohen v. California, 91 S. Ct. 1780, 1785 (1971). Although the Court has never repudiated *Chaplinsky*, and although the Court continues to regularly cite it, the Court has never invalidated another statute or ordinance based on the "fighting words" exclusion. *See, e.g.*, *id.*

In sum, by refusing to recognize a "hate speech" exception, refusing to create new categorical exceptions, and narrowly defining the few existing categorical exceptions, the Court has ensured that the government—including public institutions—may not punish offensive expression. While many "believe they are at existential threat from circumambient bias" and thus demand that offensive speech be punished, the Court requires public university officials to reject those demands.[41]

B. Public University Employees Have Broad Free Speech Rights

Public university faculty, administrators, and staff "do not surrender their First Amendment rights by accepting public employment."[42] There is no constitutional protection when employees "make statements pursuant to their official duties," but "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."[43] "Speech involves matters of public concern 'when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."'"[44] Thus, if a public university employee is speaking as a citizen and if the speech is on a matter of public concern, courts must strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."[45]

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[41] MACDONALD, *supra* note 5, at 62. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (explaining that because the law is clearly established, university officials will have personal liability). While the qualified immunity doctrine protects government actors "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*; District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (asserting the doctrine does not apply when "the constitutionality of the [state] officer's conduct [is] 'beyond debate'").

[42] Lane v. Franks, 573 U.S. 228, 231 (2014).

[43] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006); *id.* at 417.

[44] *Lane*, 573 U.S. at 241.

[45] United States v. Nat'l Treasury Emples. Union, 513 U.S. 454, 465–66 (1995) (quoting Pickering v. Bd. of Educ. Twp. High Sch. Dist. 205, 391 U.S. 563, 586 (1968)). After *Garcetti*, many aspects of faculty speech are considered speech pursuant to official duties and, thus, are not constitutionally protected. *See infra* notes 86–91 and accompanying text. While public concern is broadly defined, it does not include speech regarding employment conflicts with an employer. Connick v. Myers, 461 U.S. 138, 147–48 (1983) (holding an employee's speech regarding office transfer policy, the need for an employee grievance policy, and the level of confidence in supervisors did not address a matter of public concern). Simply put, the First Amendment "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State." *Id.* at 147.

In other words, an employee cannot manufacture a First Amendment retaliation claim simply by shouting his or her employment-related grievances from the rooftops or talking to the media. The Supreme Court explicitly recognized this principle in *Connick*. *Id.* at 147–48; *see also* Van Compernolle v. City of Zeeland, 241 F. App'x 244, 250 (6th Cir. 2007) (stating employee discipline is generally not a matter of public concern); Cockrel v. Shelby Cty. Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001) (finding that employee grievances or other private disputes are generally not matters of public concern). An issue does not become a matter of public concern merely because it is discussed among employees of a single entity, such as university faculty.

C. Public Institutions May Not Require Individuals to Violate Their Convictions

Public institutions not only punish offensive speech, but also require conformity. "Many professors require their students to adopt certain assumptions, mandate students lobby for certain left-wing causes, are intolerant of students who disagree with their views, evaluate students' 'dispositions,' and punish student writing that makes them uncomfortable."[46] Indeed, in some instances, students who aspire to be professionals are punished for failing to conform to professional norms.[47]

More specifically, certain professional groups, such as psychological counselors or social workers, impose ethical requirements on those who are part of the profession.[48] As part of training students to enter the profession, public university faculty may insist students conform to the profession's ethics and ignore their personal conscience or faith convictions.[49]

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[46] *Id.* at 186–98; William E. Thro, *Betraying Freedom: A Review of Lukianoff's* Unlearning Liberty *and Powers'* The Silencing, 42 J. OF COLL. AND UNIV. L. 523, 532 (2017) (footnotes omitted).

[47] Keefe v. Adams, 840 F.3d 523, 533 (8th Cir. 2016); *see also* Zach Greenberg, *Eighth Circuit Decision Opens the Door for Violations of Student Speech Rights*, FIRE NEWSDESK (Nov. 1, 2016), https://www.thefire.org/eighth-circuit-decision-opens-door-for-violations-of-students-speech-rights/.

[48] *See, e.g.*, *Ethical Principles of Psychologists and Code of Conduct*, AM. PSYCHOL. ASS'N, https://www.apa.org/ethics/code/code-1992 (last revised 2016). As DeMitchell, Hebert, and Phan explained:

> What do professionals do that separates them from individuals in other occupations? William J. Goode, in his study of professions, asserts that there are two generating qualities that define professions. They are "(1) a basic body of abstract knowledge, and (2) the ideal of service." He asserts that professionals fashion solutions based on the needs of the client, "not necessarily [on] the best material interest or needs of the professional himself." Professional actions taken in pursuit of the best interest of clients involves "a high degree of self-control of behavior through codes of ethics." Members of a profession are required to adhere to the code of ethics of their profession as a condition of membership. For example, the *American Counseling Association* (ACA) *Code of Ethics* serves five goals. Goal Three states that the *Code* "establishes the principles that define the ethical behavior and best practices" of its members. Goal Four states the purpose for the ethical behavior. It reads: "The *Code* serves as an ethical guide designed to assist members in constructing a professional course of action that best serves those utilizing counseling services and best promotes the values of the counseling profession." Therefore, professionals must act in the best interests of their client, patient, or student. The *ACA Code of Ethics* further states that counselors, when faced with difficult-to-resolve ethical dilemmas, should base their decisions on that which "help[s] to expand the capacity of people to grow and develop." The emphasis is placed on the interests of the client, not on the interests of the professional counselor. As demonstrated by the *ACA* Code, ethical behavior and best practices are designed to help the client. The predicate of a profession is the best interests of the client, not the needs, interests, or desires of the professional.

Todd A. DeMitchell et al., *The University Curriculum and the Constitution: Personal Beliefs and Professional Ethics in Graduate School Counseling Programs*, 39 J.C. & U.L. 303, 304–05 (2013) (footnotes omitted) (citations omitted).

[49] As DeMitchell, Herbert, and Phan framed the issue:

> But what happens when there is a conflict between the established code of ethics of a profession (being taught in graduate programs of school counseling) and the deeply held beliefs of an aspiring practitioner? What must give way? Can aspirants compel the profession through the preparation program, to make room for their deeply held position, or can the profession compel the aspirant to demonstrate

In *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), the Court held California's legislature violated the Constitution by requiring professionals "to inform women how they can obtain state-subsidized abortions."[50] The constitutional challenge involved a group of professionals who were opposed to abortion and who actively tried to persuade women from pursuing abortion.[51] By compelling the professionals to speak a particular message, the government was "alter[ing] the content" of the professionals' speech.[52] Most significantly, the Court rejected the notion, embraced by some of the courts of appeal, that strict scrutiny does not apply to content-based regulation of "professional speech."[53] This aspect of the holding broadens the freedom of speech for professionals and aspiring professionals speaking in their professional context.[54]

> acceptance of and willingness to follow the complete *Code of Ethics* regardless of their convictions?

DeMitchell et al., *supra* note 48, at 305. *See* Keeton v. Anderson-Wiley, 664 F.3d 865, 874 (11th Cir. 2011). When confronted with the issue before 2018, the lower federal appellate courts agreed that religious students must conform to the profession's ethics, and insisted that students with religious objections be treated the same as secular students. *Id.*; Ward v. Polite, 667 F.3d 727, 735, 737–38 (6th Cir. 2012). As Laycock explained:

> [T]he opponents of religious liberty also insist that every individual application of their interests is compelling. They say there is a compelling interest in avoiding any inconvenience or affront; no potential customer should ever be referred elsewhere. They say that they are entitled to have personal services available even when the services are entirely unwanted. No same-sex couple in its right mind would want to be counseled by a counselor who believes that the couple's relationship is fundamentally wrong. But supporters of gay rights insist that every counselor be available to same-sex couples. The purpose of such arguments is not to obtain counseling, but to drive conservative believers out of the profession.
>
> The same logic is applied to every other occupation or profession in any way connected to one of these disputes. If you don't want to do abortions, do not work in obstetrics and gynecology. You should not be permitted to deliver babies unless you are also willing to kill babies on request. If you don't want to do same-sex weddings, don't be a wedding planner or a caterer or the owner of a bridal shop, however small. And even: if religious nonprofits don't want to provide contraception, they don't have to run "a hospital, school, or charity." Never mind that churches for centuries have treated education, and care of the sick and the destitute, as part of their missions.

Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 872–73 (2014) (footnotes omitted).

[50] 138 S. Ct. 2361, 2371, 2378 (2018).

[51] *Id.* at 2370.

[52] *Id.* at 2371 (citations omitted).

[53] *Id.* at 2371–75; *see* King v. Governor of N.J., 767 F.3d 216, 232 (3rd Cir. 2014); Pickup v. Brown, 740 F.3d 1208, 1229 (9th Cir. 2014); Moore–King v. Cty. of Chesterfield, 708 F.3d 560, 568–70 (4th Cir. 2013). As the Supreme Court explained:

> These courts define "professionals" as individuals who provide personalized services to clients and who are subject to "a generally applicable licensing and regulatory regime." "Professional speech" is then defined as any speech by these individuals that is based on "[their] expert knowledge and judgment," or that is "within the confines of [the] professional relationship." So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny.

NIFLA, 138 S. Ct. at 2371 (citations omitted).

[54] Casey Mattox, *Three New Supreme Court Decisions Protect Speech on Campus*, NAT'L REV. ONLINE (Aug. 14, 2018), https://www.nationalreview.com/2018/08/supreme-court-decisions-clarify-campus-free-speech-protections/amp.

Although faculty and administrators may look to compel an affirmation of certain views, *NIFLA* reaffirms the state "must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief."[55] Similarly, to the extent that public university administrators seek to punish speech of aspiring professionals for failing to adhere to professional norms, *NIFLA*'s rejection of lesser scrutiny for "professional speech" precludes such actions.[56] In sum, all members of the university community are free from compulsion. Just as speech from professionals will be the same as speech from ordinary citizens for constitutional purposes, speech from students who aspire to a particular profession must be treated the same as speech from ordinary students.

D. Public Institutions May Not Force the University Community to Subsidize Speech

The Constitution protects the right "to refrain from speaking at all" and the right to eschew association for expressive purposes, but many public institutions force members of the university community to subsidize speech that they find objectionable.[57] Most obviously, many public university staff members and/or faculty members are unionized, and all employees are required to pay "agency fees."[58] Less obviously but more commonly, all students are required to pay a student activity fee (a tax) and then proceeds of these fees are distributed to recognized student groups.[59]

Although such direct payments from the general government to political parties, religious organizations, or advocacy groups would be constitutionally questionable, the Court historically has approved public employee's forced subsidy of labor unions and public university student's forced subsidy of private student organizations.[60]

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[55] *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring).

[56] *See* Mattox, *supra* note 54.

[57] Wooley v. Maynard, 430 U.S. 705, 714 (1977); Janus v. Am. Fed'n of State, Cty., & Mun. Emp., Council 31, 138 S. Ct. 2448, 2463 (2018) (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)). "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623; *see, e.g.*, *Janus*, 138 S. Ct. at 2460.

[58] *Janus*, 131 S. Ct. at 2460.

[59] Thus, a Democrat subsidizes the College Republicans, an atheist subsidizes the Christian groups, a Muslim subsidizes the Jewish students, and a LGBTQ student subsidizes traditional marriage advocacy groups.

[60] As the Supreme Court explained:

> Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.

Yet, in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, the Court ended "the oddity of privileging compelled union support over compelled party support and [brought] a measure of greater coherence to our First Amendment law."[61] "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning" and "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns."[62] "Compelling individuals to mouth support for views they find objectionable violates that

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> Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

Id. at 2463–64. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241–42 (1977); Bd. of Regents of the Univ. of Wis. v. Southworth, 529 U.S. 217 (2000). As the Court explained:

> The University must provide some protection to its students' First Amendment interests, however. The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support. Viewpoint neutrality was the obligation to which we gave substance in *Rosenberger v. Rector and Visitors of the Univ. of Va.* There the University of Virginia feared that any association with a student newspaper advancing religious viewpoints would violate the Establishment Clause. We rejected the argument, holding that the school's adherence to a rule of viewpoint neutrality in administering its student fee program would prevent "any mistaken impression that the student newspapers speak for the University." While *Rosenberger* was concerned with the rights a student has to use an extracurricular speech program already in place, today's case considers the antecedent question, acknowledged but unresolved in *Rosenberger*: whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech in the first instance. When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. There is symmetry then in our holding here and in *Rosenberger*: Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.

Southworth, 529 U.S. at 233–34 (citations omitted). Of course, this begs the question of what constitutes viewpoint neutrality. In subsequent proceedings in *Southworth*, the Seventh Circuit focused on the amount of discretion given to the student government association to allocate fees. *See* Southworth v. Bd. of Regents of the Univ. of Wis. Sys., 307 F.3d 566, 582 (7th Cir. 2002). If the student government association had unbridled discretion (a term that was developed in the Supreme Court's jurisprudence involving the denial of licenses and permits), then the requirement of viewpoint neutrality was violated. *Id.*

Assuming the Seventh Circuit's analysis is correct, then viewpoint neutrality requires a mechanical approach. Some general observations can be made. First, if funding decisions are made using a mathematical formula, then viewpoint neutrality is achieved. For example, if funding requests are twice the amount of the available funds and the university gives each student organization one-half of the amount requested, then the funding allocation is viewpoint neutral. Second, since the Supreme Court has recognized that scarce resources, such as access to money or the ability to participate in a political debate, can be denied to those who do not demonstrate a certain level of support, the student organizations with large memberships could receive more money than student organizations with small memberships. *See* Ark. Educ. Tv Comm'n v. Forbes, 523 U.S. 666, 682–83 (1998). For example, an organization with 300 members could be given more money than an organization with ten. Third, because the Court has suggested that viewpoint neutrality is lost when the decisions are based on politics, the practice of student politicians meeting and negotiating an acceptable allocation of student fees is not acceptable. Viewpoint neutrality means that an organization should not have to worry about its influence in the student government.

[61] *Janus*, 138 S. Ct. at 2484.

[62] *Id.* at 2464.

cardinal constitutional command, and in most contexts, any such effort would be universally condemned."[63] Therefore, any forced subsidy "violates the First Amendment and cannot continue" unless the individual "affirmatively consents to pay."[64]

Janus ends the practice of the public university employees being forced to subsidize union activities, but *Southworth* remains binding precedent until overruled.[65] Nevertheless, *Janus* appears to contradict *Southworth*.[66] If an employee cannot be forced to financially support the activities of a labor union with which he disagrees, then it is difficult to see how a student can be forced to financially support the activities of a student organization with which he disagrees.

E. Student Groups Have the Right of Association, Recognition, and Funding

Under existing Supreme Court precedent involving student organizations, there is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."[67] If a public institution chooses to recognize and fund student groups, it may not favor some groups and disadvantage others.[68] Similarly, the Court has ruled that disagreement with a student organization's views does not justify denial of access or funding.[69] Quite simply, the "avowed purpose" for recognizing student groups is "to provide a forum in which students can exchange ideas."[70] Thus, a group that holds racist, sexist, homophobic, anti-Semitic, or anti-Christian views is entitled to recognition, access to facilities, and funding.[71]

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[63] *Id.* at 2463.

[64] *Id.* at 2486.

[65] *Id.*; *see* Agostini v. Felton, 521 U.S. 203, 237 (1997).

[66] Mattox, *supra* note 54.

[67] Widmar v. Vincent, 454 U.S. 263, 269 (1981).

[68] There is no obligation for a university to recognize or fund student groups, but if a university chooses to do so, then it must treat all student groups the same. *See* 1 WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 1050 (4th ed. 2007); Healy v. James, 408 U.S. 169, 187–88 (1972). Nearly fifty years ago, the Court declared:

> The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of "destruction" thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.

[69] *Widmar*, 454 U.S. at 269; *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995). Indeed, the practice of requiring students to pay mandatory fees that are then distributed to student groups is permissible only if the institution does not favor particular viewpoints. Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217, 233–34 (2000).

[70] *Widmar*, 454 U.S. at 272 n.10; *see also Southworth*, 529 U.S. at 229 (student activity fee was designed to facilitate "the free and open exchange of ideas by, and among, its students"); *Rosenberger*, 515 U.S. at 834 (university funded student organizations to "encourage a diversity of views from private speakers").

[71] To be sure, this mandate of viewpoint neutrality toward student organizations does not mean that the university must compromise its own viewpoints. *See* Rumsfeld v. Forum for Acad. & Inst'l Rights,

The public institution must remain viewpoint neutral.[72]

Of course, in *Christian Legal Society v. Martinez*, the Court upheld—as a matter of federal constitutional law—policies at public institutions requiring student groups to admit "all comers," including those who disagree with their deeply held religious beliefs and values.[73] While this decision remains binding precedent until overruled, two subsequent decisions, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, and *Agency for International Development v. Alliance for Open Society*

Inc., 547 U.S. 47, 69–70 (2006). While the institution must accommodate the viewpoints of all student groups, "[s]tudents and faculty are free to associate to voice their disapproval of the [student organization's] message." *See id.* If one finds a particular viewpoint disagreeable, the solution is to promote an alternative viewpoint, not to suppress the disagreeable viewpoint. If college and university officials are going to express disapproval in the name of the university, they should make certain that they are authorized to speak for the institution. There likely will be situations—particularly at public institutions—where the governing board has a very different attitude toward the student organization.

[72] However, the institution may require the organization to (1) obey the campus rules; (2) refrain from disrupting classes; and (3) obey all applicable federal, state, and local laws. KAPLIN & LEE, *supra* note 68, at 1052 (interpreting *Healy*). As a practical matter, this means that the institution can impose some neutral criteria for recognition, such as having a faculty advisor, having a constitution, and having a certain number of members. However, the institution cannot deny recognition simply because the institution or a significant part of the campus community dislikes the organization. *See Healy*, 408 U.S. at 187–88. Moreover, *Healy* also states that the institution may not deny recognition because members of the organization at other campuses or in the outside community have engaged in certain conduct. *Id.* at 185–86.

[73] 561 U.S. 661, 668 (2010). In effect, the government, through university officials, could force faith-based groups to choose between compromising their religious values and receiving benefits that other student groups receive as a matter of constitutional right. While one can hope that governmental officials "surely could not demand that all Christian groups admit members who believe that Jesus was merely human, [they] may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints." *Id.* at 731 (Alito, J., joined by Roberts, C.J., Scalia & Thomas, J.J., dissenting). For commentary on Christian Legal Society, see Charles J. Russo, Mergens v. Westside Community Schools at Twenty-Five *and* Christian Legal Society v. Martinez*: From Live and Let Live to My Way or the Highway?*, 2015 BRIGHAM YOUNG U. EDUC. L.J. 453 (2015); Charles J. Russo & William E. Thro, *Another Nail in the Coffin of Religious Freedom?* Christian Legal Society v. Martinez, 12 EDUC. L. J. 20 (2011); William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of* Christian Legal Society v. Martinez, 261 EDUC. L. REP. 473 (2010).

Moreover, at some institutions, secular student groups may exclude those who disagree with their views, religious organizations are required to refrain from what they described as religious discrimination as they sought to preserve their faith-based identities. *See* Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (9th Cir. 2011) (upholding a policy allowing secular groups to exclude students who disagreed with their objectives, but expressly prohibiting religious groups from doing the same on the basis that this constituted discrimination). For example, the Young Democrats may have excluded Republicans, but Evangelical Christian Clubs could not have denied membership to atheists. In describing one state university's policy, the Ninth Circuit observed:

> Indeed, San Diego State stipulates that some officially recognized student groups at the university restrict membership to those who believe in the group's purpose, or "agree with the particular ideology, belief, or philosophy the group seeks to promote." For example, the Immigrant Rights Coalition requires members to "hold the same values regarding immigrant rights as the organization." The San Diego Socialists at San Diego State require students to be in "agreement with our purpose." The Hispanic Business Student Association opens membership to those "who support the goals and objectives" of the organization. Plaintiffs argue that San Diego State is discriminating against their viewpoint by allowing these secular groups to discriminate on the basis of belief, while prohibiting Plaintiffs from doing so on the basis of their religious beliefs.

Id. at 800–01.

International, Inc., cast serious doubt on its continued viability.[74] Even if the holding remains viable, in some states, state law may protect the rights of student religious groups.[75]

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[74] Agostini v. Felton, 521 U.S. 203, 237–38 (1997). For a commentary on this case, see Allan G. Osborne & Charles J. Russo, *Agostini v. Felton and the Delivery of Title I Services in Nonpublic Schools*, 119 EDUC. L. REP. 781 (1998); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189 (2012); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 570 U.S. 205 (2013). While all groups enjoy these constitutional rights to exclude those who disagree with the groups' objectives, the Court recognized that the First Amendment "gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own [leaders]." *Hosanna-Tabor*, 565 U.S. at 189. "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Id.* at 188. "According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.* at 188–89.

Hosanna-Tabor establishes that religious groups have a right of absolute discretion to determine who their leaders will be. *Id.* at 196. Logically, if an organization can restrict its leadership to those who adhere to the faith and basic principles, then the organization ought to be able to impose a similar requirement on membership. Consequently, the necessary inference of *Hosanna-Tabor* is that student religious organizations, through the Religion Clauses, have greater associational freedoms than their secular counterparts.

After *Alliance for Open Society*, the constitutionality of a condition of receiving a subsidy turns on whether the condition defines the program or reaches outside of the program. 570 U.S. at 205; William E. Thro, *Embracing Constitutionalism: The Court and the Future of Higher Education Law*, 44 DAYTON L. REV. 147, 171 (2019). As the Supreme Court observed, state university officials recognize and fund student organizations so that "students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217, 233 (2000). While state university administrators may be tempted to adopt a different and broader rationale for recognizing and funding student organizations, public institutions "cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 547 (2001).

If the purpose of recognizing and funding student organizations on campuses is to foster dynamic discussions among students, then public university administrators may impose conditions that facilitate those purposes. For example, it likely is appropriate to require student organizations to follow university accounting procedures, have a faculty advisor, reserve meeting space in advance, and open some of its educational events to the entire campus. Similarly, state university officials likely can require that most of the members and all of the officers in a student group actually be enrolled. These conditions are fully consistent with the reasons why state universities recognize and fund student groups. *See* William E. Thro, *Embracing Constitutionalism: The Court and the Future of Higher Education Law*, 44 DAYTON L. REV. 147, 171–75 (2019); William E. Thro, *The Limits of Christian Legal Society*, 2014 CARDOZO L. REV. DE NOVO 124, 127–28 (2014); William E. Thro, *Undermining Christian Legal Society v. Martinez*, 295 EDUC. L. REP. 867, 877–82 (2013).

[75] Because state constitutions often are more protective of individual liberty, a student group may have a state constitutional right to exclude those who disagree with the group's views. *See generally* A.E. Dick Howard, *The Renaissance of State Constitutional Law*, 63 U. VA. INST. GOV'T NEWS LETTER 1, at 1 (Sept. 1986). Although the issue apparently is one of national first impression, it would not be surprising if a state court determined that its state constitution prohibited the government from indirectly forcing an organization to admit members who disagreed with the organization's objectives. Moreover, for a religious organization, state Religious Freedom Restoration Acts prohibit government from imposing a substantial burden on the free exercise of religion unless there is a compelling governmental interest pursued through the least restrictive means. *See* Christopher C. Lund, *Religious Liberty after Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 497 (2010); James W. Wright, Jr., *Making State Religious Freedom Restoration Amendments Effective*, 61 ALA. L. REV. 425, 426 (2010). To the extent that a student group's position is the result of religious belief, these state laws prohibit government from indirectly forcing the inclusion of dissenters. Furthermore, in some states, there are specific state statutes guaranteeing the right of religious groups to exclude those who do not embrace the faith. *See* KY. REV. STAT. § 164.348(4) (Baldwin 2002 & Supp. 2017); VA. CODE ANN. § 23.1-400 (West 2002).

II. ENHANCED ACADEMIC FREEDOM FOR INDIVIDUAL FACULTY MEMBERS IS A CONSTITUTIONAL MYTH

Although there is serious debate concerning the rationale for individual academic freedom, public university faculty assume individual faculty have "a constitutional right to determine for [themselves], without the input of the university (and perhaps even contrary to the university's desires), the subjects of [their] research, writing, and teaching."[76] Certainly, public university faculty have the same rights as other public employees, but to the extent the faculty are claiming rights above and beyond those available to all members of the University Community, this claim is a constitutional myth.[77] This is so for three reasons.

First, despite the Court's rhetorical support for "academic freedom," it has "never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so."[78] Indeed, recognizing enhanced academic freedom for faculty would be to privilege faculty over non-faculty and to privilege academic speech over non-academic speech.[79]

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[76] *See e.g.*, STANLEY FISH, VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION (2014); Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677, 678 (2014). *See also* Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1324 (1988) (stating that individual academic freedom is a conventional wisdom); Urofsky v. Gilmore, 216 F.3d 401, 409–410 (4th Cir. 2000) (en banc).

[77] *See supra* Part I.B. As Fourth Circuit Judge Michael Luttig observed:

> In reality . . . the true academic is in no need of defense. The court holds today, as has been uniformly recognized by the Supreme Court through the years, only that *there is no constitutional right of free inquiry unique to professors or to any other public employee, that the First Amendment protects the rights of all public employees equally.* Neither the value nor the contributions of academic inquiry to society are denigrated by such a holding. And to believe otherwise is to subscribe to the fashionable belief that all that is treasured must be in the Constitution and that if it is not in the Constitution then it is not treasured. But precisely because it is a constitution that we interpret, not all that we treasure is in the Constitution. Academic freedom is paradigmatic of this truism. Academic freedom, however, is also paradigmatic of the truism that not all that we treasure is in need of constitutionalization. *No university worthy of the name would ever attempt to suppress true academic freedom—constrained or unconstrained by a constitution. And, if it did, not only would it find itself without its faculty; it would find itself without the public support necessary for its very existence. The Supreme Court has recognized as much—be it through wisdom, prescience, or simple duty to the Constitution—for over two hundred years now.* It has recognized that, in the end, the academic can be no less accountable to the people than any other public servant. His speech is subject to the limitations of the First Amendment certainly no more, but just as certainly no less, than is the custodian's. That we should all be accountable to the people, and accountable equally, should cause none of us to bridle.

Urofsky, 216 F.3d at 425 (Luttig, J., concurring) (emphasis added). As Judge Luttig noted, there is nothing in the Constitution's text, structure, or history that suggests that academia is entitled to special constitutional protection. *Id.* at 419 (Luttig, J., concurring).

[78] *Id.* at 414.

[79] As Professor Bauries explained:

> An individual First Amendment right to academic freedom violates the neutrality principle in two ways. First, it asks the courts to treat publicly employed academics differently from all other classes of public employees. Second, because of this

Such a result is antithetical to current constitutional doctrine.[80]

Second, in *Urofsky v. Gilmore*, the one federal appellate decision where the court confronted a claim that faculty members have greater rights than other public employees, the Fourth Circuit, sitting *en banc*, emphatically rejected the notion of enhanced academic freedom for individual faculty members.[81] *Urofsky* involved a constitutional challenge by a group of professors to a Virginia state law that prohibited state employees from using state-owned computers to access pornography.[82] In addition to a general First Amendment argument asserting all state employees have the right to access pornography using publicly owned equipment, the faculty claimed "that a university professor possesses a constitutional right to determine for himself, without the input of the university (and perhaps even contrary to the university's desires), the subjects of his research, writing, and teaching."[83] The Fourth Circuit undertook a comprehensive review of the history of academic freedom and those Supreme Court's decisions purporting to establish academic freedom as a constitutional value.[84] Ultimately, the Court concluded that faculty members have the same rights as other public employees—no more and no less.[85]

Third, because the Court, in *Garcetti v. Ceballos*, declared that a public employee's speech pursuant to their official duties is not constitutionally protected, it is unclear "whether the First Amendment

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> difference in the treatment of speakers, individual academic freedom inherently also requires the courts to designate scholarly and classroom speech as uniquely valuable, as compared with the job-required speech of non-academic public employees, and even the non-academic speech of academic public employees.

Bauries, *supra* note 76, at 731.

[80] As Professor Bauries elaborated:

> First Amendment jurisprudence has for many years coalesced around a principle that places primary importance on the prevention of content and viewpoint discrimination, as well as discrimination against particular speakers. . . . The neutrality principle is the bedrock of all First Amendment protection. Governmental discrimination against speakers with *particular viewpoints* on favored topics, or against all speakers on *disfavored topics*, or against *particular speakers* or classes of speakers regardless of topic, all presumptively violate the First Amendment.

Id. at 729–30.

[81] 216 F.3d 401, 415 (4th Cir. 2000) (en banc).

[82] *Id.* at 403.

[83] *Id.* at 409–10.

[84] *Id.* at 409–15.

[85] As the Court observed:

> [T]he best that can be said for Appellees' claim that the Constitution protects the academic freedom of an individual professor is that teachers were the first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights. Nothing in Supreme Court jurisprudence suggests that the "right" claimed by Appellees extends any further. Rather, since declaring that public employees, including teachers, do not forfeit First Amendment rights upon accepting public employment, the Court has focused its discussions of academic freedom solely on issues of institutional autonomy. We therefore conclude that because the Act does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors.

Id. at 415.

protects faculty from reprisals by their institutions for speech within the duties of their job."[86] *Garcetti* "may not have directly imperiled speech rights, but it may have done something worse—left academics and school teachers in a troubling state of uncertainty about their rights."[87] Justice Souter, in dissent, expressed "hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties,'" but the Court explicitly reserved the issue for another day.[88] This reservation can be viewed as an implicit endorsement of the view that academic speech remains a "special concern" of the First Amendment or a suggestion that Garcetti applies to classroom and research speech.[89] Not surprisingly, the lower courts are divided on whether *Garcetti* applies to a faculty member's expression in the classroom or in research context.[90] While

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[86] 547 U.S. 410, 421 (2006); J. Peter Byrne, *Neo-Orthodoxy in Academic Freedom*, 88 TEX. L. REV. 143, 163–64 (2009) (reviewing MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM (2009) & STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME (2008)).

[87] Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines:* Garcetti v. Ceballos *in the Federal Appellate Courts*, 262 ED. L. REP. 357, 388 (2011).

[88] *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting). The Court observed:

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Id. at 425.

[89] Bauries & Schach, *supra* note 87, at 388–89.

[90] *Compare* Demers v. Austin, 746 F.3d 402 (9th Cir. 2014), *with* Adams v. Tr. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011). In *Adams*, the Fourth Circuit declined to apply *Garcetti* to the speech of an associate professor at a state university. 640 F.3d at 564. The Fourth Circuit went on to hold that the Defendants were not entitled to qualified immunity because "the underlying right Adams assert[ed] the Defendants violated . . . is clearly established and something a reasonable person in the Defendants' position should have known was protected." *Id.* at 565–66. In *Demers*, the Ninth Circuit likewise refused to apply the *Garcetti* test to speech related to scholarship or teaching. 746 F.3d at 412. However, while the Ninth Circuit held that the speech at issue in that case was protected speech, the Court held that the defendants were entitled to qualified immunity because there was no Ninth Circuit case law on point to inform the defendants about whether or how *Garcetti* might apply in the context of academic speech. *Id.* at 417. As a federal trial court recently observed:

> Plaintiff contends that the "public employee" test established in *Garcetti* does not apply to his speech and it is therefore immaterial whether he was speaking pursuant to his "official duties." Plaintiff argues that the Supreme Court in *Garcetti* refused to extend the "official duties" test to "faculty speech related to scholarship or teaching," and that the Supreme Court "exempted 'speech related to . . . teaching'" from the test applicable to other public employees so as "to protect the teaching of a public university professor." Plaintiff argues that because his "remarks in class to his students are by definition 'related to ... teaching' and 'classroom instruction,'" *Garcetti's* "official duties" test does not apply.
>
> Plaintiff has not accurately characterized the Supreme Court's holding in *Garcetti*. The Supreme Court did not exempt speech related to teaching from the public employee test. The majority acknowledged a concern raised by the dissent about applying *Garcetti's* holding to teachers at public colleges and universities. But the Supreme Court majority in *Garcetti* expressly declined to decide this issue, stating:
>
> > There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this

there are important policy reasons for extending such protections, this is an area of constitutional uncertainty.[91]

III. INSTITUTIONAL ACADEMIC FREEDOM IS A CONSTITUTIONAL MYTH AT THE STATE LEVEL, BUT A CONSTITUTIONAL TRUTH AT THE NATIONAL LEVEL

Institutional academic freedom involves the "autonomous decisionmaking by the academy itself."[92] As described by Justice Frankfurter in a concurring opinion, it allows the institution to determine, without interference from outside the academy, who may teach, what may be taught, how it will be taught, and who may study.[93] Yet, despite its support in Supreme Court dicta, "the Court has never invalidated a statute, regulation,

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> Court's customary employee-speech jurisprudence. *We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.*
>
> (emphasis added). Thus, contrary to plaintiff's representation, the Supreme Court in *Garcetti* did not carve out an exception to its holding for "faculty speech" that is "related to teaching" or to "scholarship."
>
> Plaintiff also contends that other federal appellate courts have declined to apply *Garcetti's* "official duties" test to faculty speech related to teaching and scholarship. This Court, though, is bound by the holdings of the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit. Neither Court has decided that *Garcetti* does not apply, or that it applies in a different manner, to teachers at public colleges and universities.

Meriwether v. Trs. of Shawnee St. Univ., No. 1:18-cv-753, 2019 U.S. Dist. LEXIS 151494, at *33–35(S.D. Ohio Sept. 5, 2019) (citations omitted).

[91] As a practical matter, the realities of the academic employment market effectively force institutions to give some degree of individual academic freedom. Most institutions, through contract or policy, extend a large degree of individual academic freedom. *Urofsky*, 216 F.3d at 411. If professors feel that an institution is overly regulating their activities, the professors will simply leave. *Id.* at 425 (Luttig, J., concurring). Similarly, if an institution does not enforce a statement of academic freedom that closely parallels that articulated by the AAUP, prospective faculty will simply refuse job offers and go to other institutions that do offer such protections. *See* Becky M. Barger, Faculty Experiences and Satisfaction with Academic Freedom (Aug. 2010) (Ph.D. dissertation, University of Toledo) (available at https://etd.ohiolink.edu/!etd.send_file?accession=toledo1279123430&disposition=inline). Indeed, institutions endeavor to avoid being censured by the AAUP because of its impact on the ability to attract job candidates. Abolishing individual academic freedom is institutional suicide. *Id.* As Fourth Circuit Judge Wilkinson, who served as a public university law professor prior to being elevated to the bench, observed:

> I had always supposed that democracy and speech, including academic speech, assisted one another and that democracy functioned best when the channels of discourse were unfettered. It would be folly to forget this fundamental First Amendment premise in complex times when change of every sort confronts us. Those who have worked to acquire expertise within their given fields can aid popular representatives in reaching decisions and in shaping an informed response to rapid change. Democratic representatives may often choose to reject academic proposals, but rejection, not suppression, is the constitutionally tested course.

Id. at 434–35 (Wilkinson, J., concurring).

[92] Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985). However, the distinction between individual academic freedom and institutional academic freedom "does not entail a separation of the institution's interests from those of its faculty members, nor does it suggest that that institutional interests must prevail over faculty interests if the two are in conflict." KAPLIN & LEE, *supra* note 3, at 718; *see also* Richard Hiers, *Institutional Academic Freedom v. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J. COLL. & UNIV. L. 35, 56–57, 81–82 (2002).

[93] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

or policy because it violates institutional academic freedom."[94] Nevertheless, a careful review of the cases indicates institutional academic freedom is a constitutional myth at the state level, but a constitutional truth at the national level.[95]

First, with respect to the creating state, a state university has no institutional academic freedom.[96] State governments routinely determine the mission of an institution, what degree programs are offered, whether admissions will be highly competitive, competitive, or open, and the portion of students from the creating state. In *Schuette v. Coalition to Defend Affirmative Action*, the Supreme Court held that the people of a state could amend their state constitution to remove the ability of a state university to consider race in the admissions process.[97] Although the issue of institutional academic freedom was not raised explicitly, the net effect of the Court's decision seems to foreclose the notion that a public institution has a federal

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[94] As Kaplin and Lee observe, in addition to *Ewing* and *Sweezy*, similar notions of institutional academic freedom were advanced in *Grutter v. Bollinger*, 539 U.S. 306, 324, 329 (2003), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.). KAPLIN & LEE, *supra* note 3, at 718; JJ Hermes, *A Glance at the December Issue of the Journal of Personnel Evaluation in Education: Why Academic Freedom Is a 'Constitutional Myth,'* CHRON. HIGHER EDUC. (Nov. 12, 2007), https://www.chronicle.com/article/A-Glance-at-the-December-Issue/121926.

[95] Regardless of whether institutional academic freedom is a constitutional truth or myth, the sheer complexity of the academic task demands a degree of institutional and individual autonomy. It is one thing for the legislature or some centralized state agency to broadly define a university's mission, establish a program in a particular discipline, or mandate that an institution be selective in its admissions. It is quite another for the state government to hire particular professors, determine the best approach to teaching a specific subject, or sort through the literally thousands of applications that some institutions receive. Educating undergraduate and graduate students or pursuing academic inquiry in a variety of fields is fundamentally different from most governmental functions. It requires a greater degree of flexibility and independent discretion.

[96] Indeed, in those instances where the state seeks to regulate a public institution, judicial recognition of a federal constitutional right to institutional academic freedom likely undermines the principles of democratic accountability. Although some states have *state* constitutional provisions granting a degree of autonomy to public institutions, many, if not most, states have state law provisions mandating that the public institutions are subject to control by the governor and/or the state legislature. Most obviously, the governing board for the institution, sometimes called visitors, regents, trustees, or governors, is appointed by the governor with the advice and consent of at least one legislative chamber. These provisions reinforce a basic point: A public institution belongs to the people of a state, not to the university administration, faculty, alumni, or students. If the people, through their elected representatives, want to define admissions criteria, the admissions process, the curriculum, or the tuition level, then the people have that right. The strongest proponents of institutional academic freedom claim that the Federal Constitution insulates such decisions from legislative and executive control. *See* J. Peter Byrne, *Constitutional Academic Freedom After* Grutter*: Getting Real About the "Four Freedoms" of a University*, 77 COLO. L. REV. 929, 934–46 (2006).

[97] 572 U.S. 291, 314 (2014). As Justice Kennedy, joined by the Chief Justice and Justice Alito, observed:

> This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters. Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.

Id. at 314 (citations omitted).

constitutional right against the state that creates the institution.[98] Indeed, as Justice Scalia, joined by Justice Thomas, noted, the states have almost unlimited discretion to define the role of political subdivisions, state agencies, and state universities.[99] This sovereign discretion includes the ability to remove decision-making authority from the institution and transfer to the people or another branch of government.[100]

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[98] Scott Greytak, Comments to *How Diversity Stole the Show at Oral Argument in* Schuette v. Coalition to Defend Affirmative Action, EDUC. L. PROF BLOG (Nov. 18, 2013, 5:49 AM), http://lawprofessors.typepad.com/education_law/2013/11/how-diversity-stole-the-show-at-oral-argument-in-schuette-v-coalition-to-defend-affirmative-action-b.html. As Professor Schneider observed:

> These commenters suggested and discussed such an argument. Bauries stated that "[i]f there were ever a test case for an institutional "right" to academic freedom, this is it. The university, in its professional academic discretion, seeks to do something that it thinks is in the best academic interest of the entire institution, while state law says that it cannot do that thing. If the First Amendment provides universities with institutional First Amendment rights, then these rights trump even state constitutional law." Greytak noted in his Comment response to Bauries that such an argument was made by Justice O'Connor in *Grutter* where her "third justification for the deference granted in Grutter was the Court's 'tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.'" Greytak praised Bauries' "excellent observation that the institutional conception of academic freedom/the First Amendment would override any attempts from the state to legislate in this space, but" noted that "unfortunately the issue was never pursued—not even in passing—at oral argument." Gretak then suggested looking at "two amicus briefs from Fisher: AAUP's brief to the 5th Circuit (http://www.aaup.org/brief/fisher-v-university-texas-570-us-133-s-ct-2411-2013), and ACE's [American Council on Education's] brief to the Supreme Court (which AAUP joined) (http://www.acenet.edu/news-room/Pages/Amicus-Brief-Supreme-Court-Fisher-v-UT.aspx)" and stating that "[w]hile another blog (http://jaypinho.com/2013/10/14/schuette-v-coalition-to-defend-affirmative-action-death-by-a-thousand-cuts-for-race-based-affirmative-action/) raised the issue last month, I'm yet to hear much discussion on the issue, perhaps due to the jurisprudential guardrails placed on the Court by the political restructuring doctrine."

RONNA GREFF SCHNEIDER, EDUCATION LAW § 5.14 (2017 Update).

[99] Justice Scalia, joined by Justice Thomas, observed:

> [W]e have emphasized the near-limitless sovereignty of each State to design its governing structure as it sees fit. Generally, "a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power" and may create "political subdivisions such as cities and counties . . . 'as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them.'" Accordingly, States have "absolute discretion" to determine the "number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised." So it would seem to go without saying that a State may give certain powers to cities, later assign the same powers to counties, and even reclaim them for itself.

Schuette, 572 U.S. at 327–28.

[100] As Justice Breyer, concurring in the judgement, stated:

> This case, in contrast, does not involve a reordering of the *political* process; it does not in fact involve the movement of decisionmaking from one political level to another. Rather, here, Michigan law delegated broad policymaking authority to elected university boards . . . but those boards delegated admissions-related decisionmaking authority to unelected university faculty members and administrators . . . Although the boards unquestionably retained the *power* to set policy regarding race-conscious admissions . . . in *fact* faculty members and administrators set the race-conscious admissions policies in question. (It is often true that elected bodies—including, for example, school boards, city councils, and state legislatures—have the power to enact policies, but in fact delegate that power to administrators.) Although at limited times the university boards were advised of the content of their race-conscious admissions policies, . . . to my knowledge no

Second, as to the national government, a state university has a large degree of institutional academic freedom. In most instances, a state university is considered the state for purposes of dual sovereignty.[101] "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[102] Thus, in order to preserve the power of the national government, the Court has prevented the states from imposing limits on members of Congress, instructing members of Congress as to how to vote on certain issues, discouraging welfare recipients from migrating to California, undermining the nation's foreign policy, and exempting themselves from generally applicable regulations of interstate commerce.[103] Conversely, in order to preserve the power of the states, the Court has prevented the national government from requiring the states to pass particular legislation, commandeering state and local officials to enforce federal law, and regulating local matters under the guise of interstate commerce, and, perhaps most significantly, from diminishing the sovereign immunity of the states.[104] While Congress can require state universities to do certain things as a condition of receiving federal funds, the Spending Clause power is limited by state sovereignty.[105]

> board voted to accept or reject any of those policies. Thus, unelected faculty members and administrators, not voters or their elected representatives, adopted the race-conscious admissions programs affected by Michigan's constitutional amendment. The amendment took decisionmaking authority away from these unelected actors and placed it in the hands of the voters.

Id. at 335–36.

[101] KAPLIN & LEE, *supra* note 3, at 265–71.

[102] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[103] U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995); Cook v. Gralike, 531 U.S. 510, 526 (2001); Saenz v. Roe, 526 U.S. 489, 510–11 (1999); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000); Reno v. Condon, 528 U.S. 141, 148–49 (2000).

[104] *See* New York v. United States, 505 U.S. 144, 188 (1992); Printz v. United States, 521 U.S. 898, 935 (1997); United States v. Morrison, 529 US. 598, 627 (2000); United States v. Lopez, 514 U.S. 549, 567–68 (1995); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (no abrogation of sovereign immunity for ADA Title I claims); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (no abrogation of sovereign immunity for ADEA claims); Alden v. Maine, 527 U.S. 706, 712 (1999) (implicitly holding no abrogation for FLSA claims); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (no waiver of sovereign immunity for Lanham Act claims); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank 527 U.S. 627, 630 (1999) (no abrogation for intellectual property claims); Seminole Tribe v. Fla., 517 U.S. 44, 47 (1996) (no abrogation of sovereign immunity for Indian Gaming Act claims).

[105] For example, in *Rumsfeld v. Forum for Acad. & Inst. Rights*, the Supreme Court upheld the Solomon Amendment, a statute that required institutions to provide equal access to military recruiters as a condition of receiving federal funds. 547 U.S. 47, 69–70 (2006). In doing so, the Court found that if Congress could impose a requirement directly using its general Article I powers, then it certainly could do so using its Spending Clause power. *Id.* at 59–60. Thus, the validity of the statute turned on whether it violated the First Amendment. *Id.* at 60–61. With respect to the First Amendment, the Court rejected the notions that: (1) the statute's requirements amounted to compelled speech, (2) the statute required institutions to facilitate the military's speech, (3) no restriction of speech opposing the military, and (4) no interference with the freedom of association. *Id.* at 62, 63–64, 65, 68–70. For a contemporary discussion of the case, see generally William E. Thro, *The Spending Clause Implications of Rumsfeld v. Forum for Academic and*

CONCLUSION

Two hundred years after Jefferson envisioned a public institution where the entire university community would "follow truth wherever it may lead," and "tolerate any error so long as reason is left free to combat it," academic freedom is both a constitutional truth and a constitutional myth for public institutions.[106] First, consistent with the *Chicago Statement*, recent decisions declare a constitutional truth of academic freedom for the entire university community.[107] The Court recognizes that the goals of a university are best achieved "through a confident pluralism that conduces to civil peace and advances democratic consensus-building, not by abridging [constitutional] rights."[108] Second, enhanced academic freedom, the idea that faculty have rights above and beyond those of non-faculty employees is a constitutional myth. Indeed, after *Garcetti*, "under the Court's First Amendment jurisprudence, the academic speech of public university professors is among the *least protected forms of speech*."[109] Third, institutional academic freedom, the idea that the public institution has rights against the state or national government, is both a constitutional myth and a

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Individual Rights, 7 ENGAGE: THE J. OF THE FEDERALIST SOC'Y'S PRAC. GROUPS 69 (Oct. 2006); William E. Thro, *The Constitutionality and Current Status of the Solomon Amendment*, 4 NACUA NOTES 4 (2006). As the Supreme Court explained, "Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer." Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012).

[106] Jefferson, *supra* note 1.

[107] In a non-higher education case, Justice Kennedy, joined by three other Justices observed:

> But it is not forward thinking to force individuals to "be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable." It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.

See Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2379 (2018) (citations omitted). While Justice Kennedy wrote those words in a context other than higher education, they are equally applicable to a state university.

[108] Christian Legal Soc'y. v. Martinez, 561 U.S. 661, 733–34 (2010) (Alito, J., joined by Roberts, C.J, Scalia, & Thomas, JJ., dissenting) (emphasis added) (citations omitted). Building upon the phrase and the work of other scholars, Professor Inazu has developed a comprehensive theory for discourse within society. *See generally* John D. Inazu, *supra* note 5; *see also* John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587, 591 (2015). Inazu's theory is particularly relevant for higher education. To fulfill its mission, higher education must encourage the individual values of tolerance, humility, and patience, but must also act at an institutional level. Inazu's prescription for government—respect associational freedom, ensure access to public forums, and provide funding—must become institutional policy.

[109] Bauries, *supra* note 76, at 715 (emphasis original). Professor Bauries elaborates:

> In fact, it stands on the same footing as obscenity, fighting words, incitement speech, and child pornography, which are all categorically unprotected under the First Amendment due to their "low-value." So, academic speech is indisputably high-value speech, but in the public university workplace, it qualifies for the same protection as indisputably low-value speech[—]no protection.

Id.

constitutional truth.[110] If the people of the state are to remain sovereign, then the leadership of a state university cannot defy the wishes of the people of the state or the people's agents (the legislature).[111] Conversely, because We The People "split the atom of sovereignty" between the states and the national government, the national government may not breach the sovereignty of a state university.[112]

Yet, regardless of whether it is a constitutional truth or a constitutional myth, public institutions must embrace academic freedom for the entire university community and, to the extent permitted by state law, the institution itself.[113] "There is no vaccination against ignorance, but there *is* us. There is *this* [public] university. [Public institutions] still have heavy doors to open, unmet obligations to the land and its people[, but must lead] this nation, and our world towards fulfilling its potential, towards meeting its lofty promises."[114] Because "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected," a state university "has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation,

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[110] As the leading treatise on higher education observed:

> The U.S. Supreme Court's statements on academic freedom . . . do not themselves provide strong support for the claim that public institutions have First Amendment rights. . . . Nor has there been any clear indication by other courts that they are ready to set aside the classical view of constitutional rights or the public-private dichotomy in higher education to the extent necessary to accommodate the claim that public colleges and universities have their own First Amendment rights to academic freedom.

Kaplin & Lee, *supra* note 3, at 720 (citations omitted).

[111] As the Sixth Circuit explained:

> The Universities mistake *interests* grounded in the First Amendment—including their interests in selecting student bodies[—]with First Amendment rights. It is not clear, for example, how the Universities, as subordinate organs of the State, have First Amendment rights against the State or its voters. One does not generally think of the First Amendment as protecting the State from the people but the other way around[—]of the Amendment protecting individuals from the State.

Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237, 247 (6th Cir. 2006) (emphasis added) (citations omitted).

[112] U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). By dividing sovereignty, the Constitution "protects us from our own best intentions" by preventing the concentration of "power in one location as an expedient solution to the crisis of the day." New York v. United States, 505 U.S. 144, 187 (1992). The state sovereignty of a public institution is no greater and no less than that of another state agency. Being an academic institution does not confer any special privileges or rights.

[113] CHICAGO STATEMENT, *supra* note 8. The People of a State may amend their State Constitution to grant a large degree of autonomy to the State's public institutions. However, any grant of autonomy must recognize that state university administrators are no more or less virtuous than other constitutional actors. *See generally* William E. Thro, *No Angels in Academe: Ending the Constitutional Deference to Public Higher Education*, 5 BELMONT L. REV. 27 (2018); William E. Thro, *Academic Freedom: Constitutional Myths and Practical Realities*, 19 J. PERS. EVALUATION IN EDUC. 135 (2007) (rejecting the enhanced academic freedom for faculty and institutional academic freedom as a constitutional matter, but insisting institutions must respect individual academic freedom as a matter of policy).

[114] Frank X. Walker, *Seedtime in the Commonwealth: On the Occasion of the University of Kentucky's Sesquicentennial* (Feb. 23, 2015) (emphasis original), https://ufi.ca.uky.edu/treeactivity/seedtime. Walker's words, which are incorporated into the University of Kentucky's strategic plan, influence and inform the University's ongoing efforts to keep its promise to Kentucky.

but also to protect that freedom when others attempt to restrict it."[115]

[115] Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). As Justice Brandeis explained:

> [F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). *See also* CHICAGO STATEMENT, *supra* note 8.