On the Impossibility of Free Inquiry within the American Academy

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I. AS FLORIDA GOES...

"What is happening in Florida?," asked *The Chronicle of Higher Education* toward the beginning of 2023. At first blush, this question may appear easy to answer, and the *Chronicle*'s reporters seem to have had little difficulty doing so: "Since the New Year," they declared, "Gov. Ron DeSantis and his Republican allies have ramped up efforts to eradicate 'woke' ideology from public colleges."[1] This reply, which reads events in Florida as one skirmish within the so-called culture wars, is not wrong per se but it is far too superficial. To say only this is to fail to appreciate the underlying logic as well as the larger project that informs the state's mandates regarding what can and cannot be said in university classrooms;[2] the vitiation of tenure protections;[3] the closure of diversity, equity, and inclusion offices;[4] the enfeeblement of teacher unions;[5] the disablement of accreditation reviews;[6] the empowerment of governing boards and presidents in faculty

1. Francie Diep and Emma Pettit, *What is happening in Florida?,* THE CHRONICLE OF HIGHER EDUCATION (Jan. 30, 2023), https://www.chronicle.com/article/what-is-happening-in-florida [https://perma.cc/85A3-Z9JJ].

2. For a discussion regarding the banning of specific arguments within higher education classrooms, *see* Matt Papaycik and Forrest Saunders, *Florida's governor signs controversial bill banning critical race theory in schools*, WPTV (April 22, 2022), https://www.wptv.com/news/education/floridas-governor-to-sign-critical-race-theory-education-bill-into-law [https://perma.cc/MQ4M-E2UG]. And for a discussion about the imposition of substantive curricular mandates, *see* Divya Kuman, *Florida's new higher education law faces legal challenges,* TAMPA BAY TIMES (August 15, 2023), https://www.tampabay.com/news/education/2023/08/15/floridas-new-higher-education-law-faces-legal-challenges/ [https://perma.cc/RAV3-DWFP]. Finally, for a critical analysis of these mandates, *see* Timothy V. Kaufman-Osborn, *Who rules the curriculum at Florida's universities?*, ACADEME BLOG (December 5, 2022), https://academeblog.org/2022/12/05/who-rules-the-curriculum-at-floridas-universities/ [https://perma.cc/5UBB-3KKV].

3. Divya Kumar, *DeSantis signs bill limiting tenure at Florida's public universities,* TAMPA BAY TIMES (April 19, 2022), https://www.tampabay.com/news/education/2022/04/19/desantis-signs-bill-limiting-tenure-at-florida-public-universities [https://perma.cc/YN2Y-85JC].

4. Brenno Carillo, *DeSantis signs SB 266: How does the new law restrict DEI programs at public universities?,* DAYTONA BEACH NEWS-JOURNAL (May 16, 2023), https://www.news-journalonline.com/story/news/state/2023/05/16/desantis-signs-bill-banning-dei-programs-in-public-universities/70223248007/ [https://perma.cc/ZU7Y-YUJL].

5. Jim Saunders, *DeSantis signs bill restricting teacher, public sector unions,* TAMPA BAY TIMES (May 9, 2023), https://www.tampabay.com/news/florida-politics/2023/05/09/desantis-signs-teacher-public-employee-union-bill-law/ [https://perma.cc/4BWQ-D3CN].

6. Josh Moody, *Florida's accreditation shuffle begins,* INSIDE HIGHER ED (August 30, 2023), https://www.insidehighered.com/news/governance/accreditation/2023/08/30/flas-accreditation-shuffle-begins-one-college-gets-us [https://perma.cc/WC4L-PWCV].

appointments and dismissals;[7] the installation of political cronies to key leadership positions;[8] and the threat of substantial financial repercussions for those who refuse to succumb to these intrusions into the affairs of Florida's public institutions of higher education.[9]

What is happening in Florida is better understood as a comprehensive assault on the autonomy that is an indispensable condition of the university's status as a home to free inquiry.[10] There are two principal prongs to this onslaught. The first is essentially political, and it is illustrated well by the state's takeover of Florida's New College. The Governor accomplished that not by shuttering the college, as might occur within an undisguised authoritarian regime, but via an exercise of his statutory authority to appoint like-minded ideologues to six vacant seats on its governing board. That board in turn exercised its lawful right to fire the president of New College and install in her place a Republican former Florida House speaker who has vowed to remake the college's curriculum on Christian foundations.[11] The conquest of New College thus offers a prime example of what Kim Scheppele calls "autocratic legalism,"[12] which aims to consolidate state power not by abolishing established institutions but by colonizing and then perverting them in the service of, in this instance, an antieducational agenda.[13]

If the first prong in this pincer movement involves the consolidation of power in the hands of those external to the university, whether that be the state government or, one step removed, those it appoints to governing boards, the second

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7. Thomas B. Edsall, '*The death knell for higher education in Florida*,' THE NEW YORK TIMES (March 8, 2023), https://www.nytimes.com/2023/03/08/opinion/desantis-florida-history-colleges.html [https://perma.cc/EEU6-TVDA].

8. For but one example of this phenomenon, *see* Josh Moody, *DeSantis appoints DEI critics to Florida University's board,* INSIDE HIGHER ED (October 27, 2023), https://www.insidehighered.com/news/governance/trustees-regents/2023/10/27/desantis-chooses-dei-critics-florida-polytechnic-board [https://perma.cc/68AJ-8EJ7].

9. On the threat of financial consequences for those who disobey, *see* Gerson Harrell, *UF's choice: Change teachings on racism or risk $100M in funding due to DeSantis' 'Stop Woke' Act*, THE GAINESVILLE SUN (May 9, 2022), https://www.gainesville.com/story/news/2022/05/05/desantis-stop-woke-act-could-cost-university-florida-100-million-funding-racism-teaching/9629890002/ [https://perma.cc/XJ44-RAED].

10. For a detailed account of the assault on public higher education in Florida, *see* REPORT OF A SPECIAL COMMITTEE: POLITICAL INTERFERENCE AND ACADEMIC FREEDOM IN FLORIDA'S PUBLIC HIGHER EDUCATION SYSTEM, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (December 2023), https://www.aaup.org/file/AAUP_Special_Committee_Report_on_Florida_final.pdf [https://perma.cc/NK3E-T23L].

11. Zac Anderson, *New College board fires president, installs former GOP House speaker, DeSantis ally*, SARASOTA HERALD-TRIBUNE (Jan. 31, 2023), https://www.heraldtribune.com/story/news/local/sarasota/2023/01/31/richard-corcoran-becomes-interim-president-of-sarasotas-new-college/69858928007/ [https://perma.cc/6ZYA-TY7H]. For the new president's plans for New College, *see* Stephanie Saul, Patricia Mazzel, and Trip Gabriel, *DeSantis takes on the education establishment, and builds his brand,* THE NEW YORK TIMES (January 31, 2023), https://www.nytimes.com/2023/01/31/us/governor-desantis-higher-education-chris-rufo.html [https://perma.cc/QWL3-WWMT].

12. Kim Lane Scheppele, *Autocratic Legalism,* 85 UNIV. OF CHICAGO L. REV. 545 (2018).

13. For one example of how imposition of this political agenda contradicts the purposes of education, *see* Cheyanne M. Daniels, *Black leaders condemn Florida's new education guidelines,* THE HILL (July 21, 2023), https://thehill.com/homenews/race-politics/4110599-black-leaders-condemn-floridas-new-education-guidelines/ [https://perma.cc/H2UG-ZJJM].

involves the disempowerment of those who might otherwise impede the academy's deautonomization. This latter strategy is economic in the sense that it involves a transformation in the employment status of Florida's faculty, and it is illustrated well by the response offered by the state's attorneys to a suit seeking a preliminary injunction to halt enforcement of the so-called Stop WOKE Act.[14] Because Florida's public colleges and universities are subordinate organs of the state, DeSantis's accomplices explained, their instructors are but clerks: "State-employed teachers may not espouse in the classroom the concepts prohibited by the Act, while they are on the State clock, in exchange for a State paycheck . . . The in-class instruction offered by state-employed educators is also pure government speech, not the speech of the educators themselves."[15] On this construction, just like employees in Florida's Department of Highway Safety and Motor Vehicles, professors are underlings who must never say what their employer disallows.

Perfection of the faculty's heteronomy and evisceration of the academy's autonomy are two sides of the same coin. Pressed to its dystopian conclusion, that coin anticipates the conversion of Florida's public institutions of higher education into mere administrative agencies of the state and their faculty into functionaries. Should that project someday succeed, the university will become a puppet of purposes dictated by others and instruction will become indistinguishable from indoctrination. On that day, we may still call these institutions universities and their employees educators, but these terms will no longer signify accomplishment of ends that are uniquely their own.

II. BACK TO BASICS

Because other red states are busily taking their cues from the Sunshine State, what is happening in Florida is now happening across the nation.[16] Today, when we express our indignation at these violations of the university's independence,

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14. For a helpful summary of the Stop Wrong to our Kids and Employees Act as well as the injunction preventing its enforcement, *see* John R. Vile, STOP W.O.K.E ACT (FLORIDA) (2022) (last updated on September 19, 2023), FREE SPEECH CENTER, MIDDLE TENNESSEE STATE UNIVERSITY, https://firstamendment.mtsu.edu/article/stop-w-o-k-e-act-florida-2022/ [https://perma.cc/B6FD-W2Y9].

15. Defendants' Response in Opposition to Petitioner's Motion for a Preliminary Injunction, 2, 11, *Pernell v. Florida Board of Governors of the State University System*, No. 4:22-cv-304-MW-MAF (N.D. Fla., Sept. 22, 2022), https://storage.courtlistener.com/recap/gov.uscourts.flnd.442797/gov.uscourts.flnd.442797.52.0.pdf [https://perma.cc/LZ4T-MEKN].

16. For a helpful database that tracks state legislation concerning public higher education, *see* DEFENSIVE HIGHER ED LEGISLATION 2023, AMERICAN FEDERATION OF TEACHERS, https://www.quorum.us/spreadsheet/external/lZclMXAwRZWtEQpnAPCf/ [https://perma.cc/CQ59-JJAB]. For an overview of this legislation, *see* THE RIGHT-WING ATTACKS ON HIGHER EDUCATION: AN ANALYSIS OF THE STATE LEGISLATIVE LANDSCAPE, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (April 2023), https://www.aaup.org/sites/default/files/Higher-Ed-Legislative-Landscape.pdf [https://perma.cc/3C8K-3PJ3]. Lastly, for an account of how this movement fits within the radical right's broader plan to consolidate its power even at the cost of destroying American democracy, *see* Timothy V. Kaufman-Osborn, *Not just a war on 'woke',* INSIDE HIGHER ED (May 22, 2023), https://www.insidehighered.com/opinion/views/2023/05/22/not-just-war-woke [https://perma.cc/Q26Y-ZLXE].

we often do so in the name of academic freedom. In some instances, as in Stop WOKE's ban on introducing critical race theory into the classroom, we deploy this category to defend the right of faculty members to determine the curriculum they think best suited to the ends of education. In other cases, as in the cancellation of diversity, equity, and inclusion programs, we appeal to this category to defend the right of universities to determine how best to allocate the resources available to them. These appeals will prove adequate to the task at hand, however, only if the American university as it is now configured does not preclude academic freedom's viability and hence realization of the purposes we ask it to secure.

A. What is the Academy For?

What defines the academy's end is what distinguishes it from other associational forms such as churches, governments, armies, and businesses. On my account, the academy's singular purpose was intimated by Socrates when he urged his interlocutors in *The Republic* to "follow the argument wherever, like a wind, it may lead us."[17] In *What Are Universities For?*, Stefan Collini reworks Socrates' point as follows:

> Intellectual enquiry is in itself ungovernable: there is no predicting where thought and analysis may lead when allowed to play freely over almost any topic, as the history of science abundantly demonstrates. It is sometimes said that in universities knowledge is pursued 'for its own sake', but that may misdescribe the variety of purposes for which different kinds of understanding may be sought. A better way to characterize the intellectual life of the university may be to say that the drive towards understanding can never accept an arbitrary stopping-point, and critique may always in principle reveal that any currently accepted stopping point *is* ultimately arbitrary.[18]

To paraphrase, the conduct of free inquiry cannot remain true to itself if any epistemic conclusions, no matter how well substantiated at present, come to be considered as beyond reformulation, criticism, or even rejection and hence as something other than provisional. To forget this is to allow commonsense, orthodoxy, or ideology to displace the inherently tentative fruits of inquiry, and, when that happens, the university becomes something other than an academy. To say this is not to deny that free inquiry can distinguish between what we take to be

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17. PLATO AND G.M.A GRUBE, BK. III, 394D, THE REPUBLIC (1974).

18. STEFAN COLLINI, WHAT ARE UNIVERSITIES FOR? 55 (2012). For a specific policy that nicely captures Collini's point, *see* Columbia University's *Rules of University Conduct*, https://universitypolicies.columbia.edu/content/rules-university-conduct [https://perma.cc/T79T-AHHF]: "The University, as a forum for the pursuit and attainment of knowledge in every field of human endeavor, has a special role in fostering free inquiry. A principal reason why universities have endured and flourished over centuries is that they provide a place for ideas to be tested, for values to be questioned, and for minds to be changed with as few constraints as possible. Like society at large, but even more so, the University has a vital interest in fostering a climate in which nothing is immune from scrutiny."

true as opposed to what we find false, but it is to say that these assessments can never be considered indisputable or final. Stop WOKE is to be condemned, therefore, because it forecloses issues that must stay open if the academy's inquiry is to remain free.

It is empirically true of course that the contemporary American university has adopted many other purposes, for example, augmenting the project of capital accumulation via workforce training. But, to stick with this example, such training does not differentiate the academy from other entities that are equally if not better equipped to accomplish this task (think, for example, of Apple University, McDonald's Hamburger University, and Disney University). The conduct of specifically academic inquiry and instruction may be distinguished from workforce training because it must always consider contingent the knowledge the latter seeks only to transmit. To say this is not to deny the value of such training; but it is to say that when the logic of occupational apprenticeship subsumes that peculiar to the academy, we should no longer consider that enterprise an association of scholars and students.

The regulative ideal of free inquiry never exists in ahistorical abstraction from the specific historical incarnations that simultaneously enable but also constrain its possibility. Free inquiry's realization within Europe's medieval universities was checked, for example, by adherence to certain essential articles of Catholic faith whose interrogation was deemed heretical. So, too, the denominational colleges that defined most American higher education well into the nineteenth century sought not chiefly to champion free inquiry but to train their charges, mostly young white men, in received truths mastered via drills, recitations and other forms of rote learning.

What we now think of as free inquiry in the U.S. is largely an accomplishment of the late nineteenth and early twentieth centuries when the German conception of *lehrfreiheit* (the freedom to teach without interference) was imported into the U.S. by a newly professionalizing professoriate housed within a growing number of research universities, public as well as private. To historicize the category of free inquiry in this way is to acknowledge its contingency (and hence fragility), but also to invite the question this essay explores: Does the American university, as it is now structured, compromise realization of the project of free inquiry, as we understand it today, and, if so, is it possible to imagine a rival formation that might enable that project's more complete realization?[19] To ask these questions is not to posit the possibility of inquiry that is altogether without constraint. After all, although they are themselves contestable, the normative conventions of

19. For reasons that will become clear below, the argument I advance in this essay places me at odds with Stanley Fish who, in *Shared Governance: Democracy Is Not an Educational Idea*, 39 CHANGE 8, 12, 11 (2007), argues that how the academy is institutionalized—and more specifically—how it is governed are irrelevant to the possibility of free inquiry. Rejecting calls to reform the university on egalitarian principles, Fish contends that "questions of governance are logically independent of questions of mission" and hence, whether the academic constitution be organized democratically or autocratically, "good scholarship and good pedagogy . . . can flourish or fail to flourish in either."

contemporary scholarship set the authoritative terms by which we distinguish between epistemic claims that merit our attention as opposed to those that should be dismissed as bunk. To pose these questions is, however, to ask whether the institutional confines within which these disciplinary conventions do their work may subvert the ideal that the mission statements of American colleges and universities incessantly recite.

B. What is Academic Freedom?

Let us construe academic freedom as a term that directs our attention to the conditions of the possibility of free inquiry. What, then, are the conditions without which that inquiry cannot flourish or may do so only in attenuated form? For a preliminary and partial answer, consider the account offered by one of the founders of the American Association of University Professors (AAUP), Arthur Lovejoy, in 1930:

> Academic freedom is the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.[20]

Read carefully, Lovejoy's account suggests that academic freedom is an internally complex category that encompasses two related but distinct forms of liberty. To borrow terminology introduced by Isaiah Berlin,[21] the first is the negative liberty that takes shape as the absence of "interference" with inquiry's conduct by any source external to it, whether enacted in the classroom, the lab, or the library. This form is insufficient, Lovejoy recognizes, unless joined to the affirmative liberty that takes shape as the capacity of the "qualified" to develop, apply, and refashion the disciplinary standards that enable but also regulate the practice of free inquiry.

The possibility of free inquiry, in other words, requires the academy's autonomy from outside intervention but also the self-governance exemplified, for example, by the practice of peer review as exercised by those who qualify as colleagues. Or, as Judith Areen suggested nearly a century after Lovejoy, "academic freedom should protect not only a professor's speech, but also her power, as a member of a governing faculty, to be the architect of a place of study and learning that can facilitate the core university tasks of producing and disseminating new

20. Arthur O. Lovejoy, *Academic Freedom*, *in* 1 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 384, 384 (Edwin A. Seligman ed., 1930).

21. Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118–72 (1969).

knowledge."[22] The task of those who would defend academic freedom, accordingly, is to articulate an account that is sufficiently robust to enable scholars to repel those who do not belong among the "qualified" but also to ensure that those who do are able to fashion and regulate the "place" that sustains the conduct of free inquiry.

As Areen rightly notes, the governance dimension of academic freedom has received scant attention in the scholarly literature, and that neglect is apparent in the two accounts of academic freedom that, according to Walter Metzger, emerged in the United States over the course of the twentieth century and continue to define our discussions today. The first is what he labeled the "professional," and its roots can be traced to the founding of the AAUP in the early decades of the twentieth century and, specifically, to its canonical 1915 Declaration on Academic Freedom and Tenure. The second is what Metzger called the "constitutional," and its roots can be traced to the post-World War II Red Scare and, specifically, to a handful of Supreme Court cases that sought to ground academic freedom in the First Amendment. These two accounts, contends Metzger, "run the gamut of all definitions that have really mattered, if not all that anyone in the past ever dreamed of or that someone in the future might invent."[23]

Neither of these representations of academic freedom, I argue below, is informed by an adequate account of what I will call the American academy's constitution. With this term, unlike Metzger, I refer not to academic freedom's status within constitutional law, but to how power is marshaled, distributed, and exercised within U.S. colleges and universities. For my purposes, of primary concern are two features of that constitution that are now so well etched into our conventional understanding of what the university is that they tend to disappear from view and so remain largely immunized from criticism. The first concerns the legal organization of the academy as an autocracy; and the second concerns the status of faculty members as employees subject to rule by their employers. Working in tandem, these are the primary prerequisites of the hostile takeover of public higher education now afoot in Florida and elsewhere; and that takeover is itself well understood as a systematic dismantling of the conditions necessary to the form of inquiry that differentiates the academy from other institutional types.

The purpose of this essay's next Part (III), accordingly, is to explicate the contemporary American university's constitution and, more specifically, to show how these two features reproduce relations of domination and subordination that mock the self-governance that is an indispensable condition of inquiry that deserves to be called free. The impossible task of those who have defended what Metzger calls the "professional" and "constitutional" conceptions of academic freedom, I then explain in Parts IV and V, has been to show how such inquiry can

22. Judith C. Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L. J. 945, 949 (2009).

23. Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEXAS L. REV. 1265, 1266 (1988).

be secured without challenging in any fundamental way these mutually disempowering dimensions of the American university's basic constitutional structure.

Following my account of the failure of these two conceptions, in Part VI, more suggestively than conclusively, I seek to do what Metzger says cannot be done but Areen says we must: imagine a third way of thinking about the academic freedom that is essential to free inquiry's possibility. That way, which requires teasing loose our conception of academic freedom from that advanced by the AAUP, takes shape as an argument in favor of a reconstitution of the university, one that rejects its autocratic architecture of rule as well as its organization of the relationship between ruler and ruled by means of the employment contracts characteristic of a capitalist economy. Instead, I argue for the university's reformation as an incorporated body politic that is built on the model of an autonomous republic and whose faculty are not employees but members akin to (but not identical with) democratic citizens. Within this university, the "professional" and "constitutional" conceptions of academic freedom are not entirely jettisoned; but they are significantly rearticulated via their relocation within a radically different institutionalized configuration of power. If the university so constituted is superior to its current incarnation, as I believe it is, that is because it better secures the conditions necessary to the free inquiry that is the academy's end.

III. THE CONSTITUTION OF THE AMERICAN UNIVERSITY

Throughout their history, U.S. colleges and universities have often been the targets of power exercised by those external to them, as illustrated by Ron DeSantis's consolidation of control over Florida's public university system. But colleges and universities are also sites of power internally insofar as the work of those within is shaped by certain durable structures that differentially distribute the capacity to determine the conditions of their collective work. Some of these structures are not officially recognized but are no less powerful for that reason; think, for example, of the overrepresentation of older white men among tenured faculty as well as women of color among those contingently employed. Other structures of domination and subordination, however, are formally built into the university's constitution and, here, I examine two that systematically undercut the possibility of free inquiry within the American academy.

A. An Instructive Anecdote

To introduce these vectors of power and show how they intertwine, consider the following tale: "We can terminate everybody, even down to the janitor, if it's the will of the board."[24] So declared Wesley G. Terrell moments before the governing body of Texas Southern, a public university, amended its bylaws and so gave this fiat official form: The Board of Regents shall "remove any professor,

24. Lindsay Ellis, *This university's board now has the power to fire anyone—'even down to the janitor,'* THE CHRONICLE OF HIGHER EDUCATION (February 3, 2020), https://www.chronicle.com/article/This-University-s-Board-Now/247957 [https://perma.cc/85A3-Z9JJ].

instructor, tutor, or other officer or employee connected with the institution when, in its judgment, the best interests and proper operation of the institution requires it."[25]

Those troubled by this amendment raised doubts about the capacity of a nine-member board to pass informed judgment on each of the university's fourteen hundred faculty and staff members. The regents' authority to make this change, however, was not challenged, and it is not clear on what grounds one might do so. The university's enabling statute declares that the "government of the university is vested in a board of nine regents appointed by the governor with the advice and consent of the Senate."[26] The board, moreover, enjoys "wide discretion in exercising the power and authority granted by the State Legislature, including discretion in what action it takes directly and in what authority it delegates to other bodies within the University."[27] While the board may, for example, cede to senior administrators the authority to fire rank-and-file staff members, it "retains the unilateral right to temporarily or permanently repeal, rescind, suspend or waive" this or any other delegated authority, again whenever this body determines "that such action is in the best interest of the institution."[28]

Texas Southern's board of regents, in sum, is empowered to establish the rules that govern the university, to modify those rules as it sees fit, and to contravene them at will. Its monopoly over the power to rule encompasses all of the university's affairs but is most nakedly apparent in the board's authority to dismiss anyone and, indeed, everyone who is classified as an employee. Those subject to the board's authority may complain all they want about this or that action but, in the final analysis, they are without any formally guaranteed title to do more than gripe.

B. The Academy as Autocracy

As this tale illustrates, the American university is legally constituted as an autocracy.[29] With this term I mean to point to an attribute that has distinguished American higher education from its European and especially its English

25. Bylaws 1.2, Board of Regents, TEXAS SOUTHERN UNIVERSITY, adopted Oct. 25, 2019, http://www.tsu.edu/about/board-of-regents/bor_bylaws06212013.pdf [https://perma.cc/2F4A-X7RT].

26. Texas Education Code § 106.11 (2023), https://statutes.capitol.texas.gov/Docs/ED/htm/ED.106.htm#A [https://perma.cc/N7NP-PFKZ].

27. Bylaws 1.1, Board of Regents, TEXAS SOUTHERN UNIVERSITY, adopted Oct. 25, 2019, http://www.tsu.edu/about/board-of-regents/bor_bylaws06212013.pdf [https://perma.cc/2F4A-X7RT].

28. Bylaws 1.3, Board of Regents, TEXAS SOUTHERN UNIVERSITY, adopted Oct. 25, 2019, http://www.tsu.edu/about/board-of-regents/bor_bylaws06212013.pdf [https://perma.cc/2F4A-X7RT].

29. To label the American academy autocratic may appear hyperbolic to those of us who, in virtue of our privileged institutional status, are less likely to grasp this harsh reality than are those who are perpetually vulnerable in virtue of their contingent appointments. Even tenured senior faculty members, however, find themselves situated within a constitution of consolidated power that renders them subjects of rule they cannot hold to account. Although we who are members of this diminishing elite may not recognize ourselves in this characterization, that does not render it false. More probably, it indicates that we have a stake in not acknowledging a truth that, if conceded, would call into question our professional stature as well as the privileges and perquisites that accompany it.

counterparts since the earliest colleges were founded in the colonial era. Unlike Oxford and Cambridge, where established faculty bodies exercised significant control over their operation, in the colonies there were no comparable bodies that could claim governance prerogatives in the face of provincial elites, especially political and clerical, who had a vested interest in maintaining control over these fledgling institutions. That control was secured via these colleges' constitution as corporations ruled by boards whose members were drawn chiefly from those same elites, and it is this accident of history that accounts for what Richard Hofstadter and Walter Metzger once labeled "the great anomaly of American higher education:"[30] concentration of the university's powers of governance within what have come to be known as external lay governing boards.

To call these boards external is to say that their members are not employees of the colleges and universities they govern. To call them lay is to indicate that their members are neither required nor even expected, as a condition of appointment, to display any expertise in the field of higher education. To call them autocratic, as I do, is to belabor what is too often unremembered: The American university is a hierarchically organized entity that locates its apex in an identifiable head granted unidirectional authority, whether by charter, enabling statute, or state constitutional provision, to establish the basic rules and policies by which its internal affairs are governed.

As such, the exercise of antidemocratic authority within the American university is not an incidental feature that can be explained by pointing to power-hungry trustees and/or their executive appointees. No matter how satisfying this may be, it will not suffice to ferret out specific villains who can then be held responsible for the latest violations of academic freedom. The condition of the possibility of these violations is the American university's constitution as the type of corporation in which the authority to rule is exclusively vested in their boards and wielded over those who, again in virtue of this specific corporate form, are excluded from any formally recognized title to take part in its exercise.

To label the American academy autocratic is not to deny that colleges and universities can be more or less so depending on differences in their legal constitution. As a rule, for example, private colleges are more perfectly autocratic than are their public counterparts. That is so because, almost without exception, they are ruled by self-replicating boards whose new members are selected by those already in office. Less perfectly autocratic, perhaps, are public universities governed by boards whose members are appointed by politicians or, in a few states, by popular election. These latter methods of selection render rule by these boards not democratic but rather imperial insofar as, like colonial governors, they owe their positions to powers beyond themselves. Like their kin in the private sector, however, they are neither selected nor removeable by the employees they rule

30. RICHARD HOFSTADTER AND WALTER METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES, 416 (1955).

and, for that reason, power's unaccountability to the governed is structurally guaranteed.

True, in untroubled times, the exercise of this authority may be tempered by adherence to tenure policies, respect for the norms of shared governance, and/or observance of collective bargaining agreements. It is during crises, however, whether real or manufactured, that the formal becomes the actual as the university's rulers assert the plenary authority they never relinquish. This was amply demonstrated during the COVID-19 pandemic when, according to a 2021 report issued by the AAUP, governing boards and/or their chief executive agents terminated tenured as well as nontenured appointments, suspended faculty handbooks, eliminated entire academic programs, abolished established bodies of governance, invoked force-majeure clauses to nullify collective bargaining agreements, and more.[31] The possibility of rule by what the AAUP castigates as unilateral "fiat," in short, always lurks behind governance in accordance with the established policies and procedures that, in less contentious times, veil this truth.

To illustrate the American academy's antidemocratic form, let's return once more to Florida. To accomplish his conquest of New College, Ron DeSantis did not find it necessary to issue authoritarian edicts, and that is so because the college's constitution is already autocratic. To set in motion its conversion from a bastion of left-wing "woke" ideology to a citadel dedicated to the eternal pieties of Western civilization, the governor exercised his lawful power of appointment to secure control over New College's board; and that board then exercised its statutory authority to consummate the college's hostile takeover by aliens who, hitherto without, are now within.

Like all other public universities in Florida, New College is legally constituted as a "body corporate" whose sole members are those who sit on its board. That board "is vested with a broad range of authority and responsibilities for governing and managing New College," including "responsibility for making cost-effective policy decisions, authority to adopt rules, authority to acquire and to dispose of real and personal property and for controlling college-owned property, responsibility to establish degree programs, *and generally, authority and responsibility to do all things needed to administer New College*."[32] This sweeping grant of authority more than sufficed to enable the newly-constituted board, after ousting the college's incumbent president, to dismantle its gender studies program,[33]

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31. SPECIAL REPORT: COVID-19 AND ACADEMIC GOVERNANCE, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, (2021), https://www.aaup.org/file/Special-Report_COVID-19-and-Academic-Governance.pdf [https://perma.cc/3C8K-3PJ3].

32. REGULATIONS MANUAL, POLICIES & PROCEDURES, Office of the General Counsel, New College, https://www.ncf.edu/departments/office-of-the-general-counsel/regulations-policies-procedures/ [https://perma.cc/SPT5-V8WV] (emphasis added).

33. Laura Spitalniak, *New College trustees take steps to dismantle gender studies program,* HIGHER ED DIVE (August 11, 2023), https://www.highereddive.com/news/new-college-trustees-move-dismantle-gender-studies/690696/ [https://perma.cc/Q8SN-7GLH].

abolish its diversity office,[34] and deny tenure to five professors who had been endorsed by their peers.[35]

While New College's board must ultimately answer to Florida's statewide board of governors, internally, power exercised by anyone other than its trustees is not original but delegated. For example, the president is tasked with diverse responsibilities by the board, including the establishment and implementation of "policies and procedures to recruit, appoint, transfer, promote, compensate, evaluate, reward, demote, discipline, and remove personnel."[36]As is true of Texas Southern, however, the board may "amend or withdraw"[37] this power as well as any other delegated responsibilities whenever it sees fit. To do so, the board need only amend its bylaws, which expressly state that "nothing" in its enumeration of delegated powers "should be construed as limiting or divesting the Board of Trustees' right to exercise any authority or responsibility as deemed appropriate."[38] The powers delegated to the president include the authority to assign to other subordinates certain of the powers allocated to this office, but, again, with the proviso that "the chief executive officer of the corporation" may "condition, limit, or revoke any delegated authorities at any time."[39] This downward chain of contingently ceded and hence forever revocable authority is what furnishes New College its shape as the hierarchically ordered pyramid of power we see depicted in standard organization charts.

The authority of New College's board, as outlined in its Regulations Manual, extends to basic academic matters, including the establishment and discontinuation of degree programs, the awarding of credit, and even the designation of specific course offerings. Tellingly, the college's faculty are not mentioned in this regard and, in the board's bylaws, make only a cameo appearance in their capacity as employees governed by a personnel program devised by the president in accordance with rules approved by the board. That program regulates not just the "conditions of employment" for all who do New College's compensated work but also the "academic freedom and responsibility"[40] that is specific to its faculty. Articulation of free inquiry's indispensable condition is thereby removed

34. Zac Anderson, *New College of Florida board abolishes diversity office after emotional debate,* SARASOTA HERALD-TRIBUNE (February 28, 2023), https://www.heraldtribune.com/story/news/local/sarasota/2023/02/28/new-college-has-first-board-meeting-with-president-richard-corcoran-sarasota-desantis-diversity/69954368007/ [https://perma.cc/6ZYA-TY7H].

35. Josh Moody, *New College board denies tenure for 5 professors,* INSIDE HIGHER ED (April 27, 2023), https://www.insidehighered.com/news/governance/trustees-regents/2023/04/27/new-college-board-denies-tenure-5-professors [https://perma.cc/Q8HB-ZJAQ].

36. REGULATIONS MANUAL, POLICIES & PROCEDURES, Office of the General Counsel, NEW COLLEGE, https://www.ncf.edu/departments/office-of-the-general-counsel/regulations-policies-procedures/ [https://perma.cc/9FKM-UKU5].

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

from the purview of those who engage in that inquiry and ascribed to a body whose members do not.

Generalizing from the examples of Texas Southern and New College, we see that the power of rule within American colleges and universities is concentrated within external bodies whose members are neither selected by nor accountable to those over whom they rule, and that is what ultimately warrants their characterization as autocratic. This constitution is inherently illiberal because the exercise of rule is not grounded in consent of the governed, and it is essentially antidemocratic because those who rule do not belong to the body whose members are their subjects. If, as Areen contends, the viability of academic freedom requires that faculty members serve as the collective "architect" of the home within which the academy's distinctive purpose is accomplished, its current residence is a place of perpetual exile.

C. The Academy as Employer

The second feature of the American academy's constitution I highlight comes into view when we focus not on its rulers but, instead, the ruled. These are the academy's employees; and what is common to all—whether president, instructor, or staff member—is the organization of work in the form of a relationship between those who hire and those who may be fired. To say this is not to deny that senior administrators are differently situated within the university than are, say, its maintenance workers. But it is to say that, in the last analysis, all are employees of governing boards, and that is true even when the authority to hire and fire has been delegated to a specific class of employees who in turn are authorized to dismiss those to whom this privilege has not been ceded.[41]

The employment relationship assumes a specific form within America's capitalist economy, and this form is common to for-profit as well as nonprofit organizations. Here, the capacity to labor assumes the form of a commodity that is exchanged on the open market in return for monetary renumeration. According to classical political economy, such employment is the fruit of an agreement between two parties who are free in the sense that neither has the right to compel the other to enter this pact and, moreover, are equal in the sense that either can exit this agreement at any time. Just as employees can quit whenever they please without incurring any post-employment obligations, so too can employers fire those they hire without any legal liability other than to pay for work already completed.

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41. In other words, there is no perfect correspondence between the academy's rulers and its employers insofar as some employees exercise considerable power over others. For example, when I signed letters of faculty appointment in my capacity as provost, I did so as an officer of the college to whom such authority had been delegated and who was therefore authorized to discipline those who violated its policies. But I remained an employee of the college and answered to the Board of Trustees through their appointed employee, the president. While this lack of perfect correspondence may complicate my representation of the American academy's constitution, it does not require a rejection of my characterization of it as an autocracy predicated on capitalist employment relations.

This is the crux of what we call at-will employment, and it is this form that is presupposed by American common law unless the parties to any given agreement expressly provide otherwise. At-will employment, in other words, is capitalism's default mode; and, unlike slavery or serfdom, this relationship is deemed legitimate because it is predicated on the freedom and equality of both parties. Any departure from this default is therefore prima facie suspect, which is why state regulation is castigated by capitalism's economists as interference with the self-regulating laws of the labor market, but also as an infringement on the rights of employers as well as employees.

This representation of the employment relationship is a fiction if only because it forgets that employers as a rule are better able to absorb the costs of leaving these agreements than are employees, especially if the latter have little or no wealth to fall back on while jobless. More important for my purposes, the construction of employment as a relationship between two free and equal parties hides the presence of domination and subordination within all labor contracts. When employees agree to sell their capacity to work in return for a wage, they simultaneously consent to their employers' authority. The Internal Revenue Service minces no words when it reminds employers that "under common-law rules, anyone who performs services for you is your employee *if you can control what will be done and how it will be done*. This is so even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed."[42] To accept a job offer, therefore, is to agree to do the work stipulated in an employment agreement, but it is also to assent to the status of a subject who relinquishes the prerogatives reserved to employers.

This agreement to become a subordinate is not itself a negotiated product of the mutual bargaining that culminates in an employment contract, whether unwritten or formally codified. Rather, this asymmetrical power distribution is presupposed by the employment relationship per se and so exists anterior to specification of its terms in any individual case. That this is so testifies to the persistence of certain residues of the master/servant relationship that antedated capitalism's emergence and that, in one form or another, structured most labor within a feudal economy. Feudal organizations of work, for example, affirmed the master's ownership of the services provided by servants as a form of property. Because common law typically presupposed that ownership of this property extended for a specified period (for example, the duration of a harvest season), masters were authorized to pursue penalties against servants should they quit their work before its term and/or tasks were completed, including forfeiture of any restitution for tasks already performed.

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42. EMPLOYEE (COMMON-LAW EMPLOYEE), INTERNAL REVENUE SERVICE (2023), https://www.irs.gov/businesses/small-businesses-self-employed/employee-common-law-employee [https://perma.cc/4ANU-4NP7] (emphasis in original).

The development of specifically capitalist employment law severed the construction of labor as a form of property owned by another and thereby "freed" workers to exchange their capacity to labor in return for a wage. What capitalist law did not do was eliminate the authority of feudal masters now in the guise of modernity's employers to command their subordinates and, correlatively, the duty of those servants now constituted as wage-earners to render obedience once they have agreed to the terms of their exchange. This explains why U.S. courts have held that employment contracts entail an implicit but generalized obligation on the part of employees to obey their employers unless an order is patently illegal or unethical. Except for those expressly mandated by law (for example, to provide a workplace free from recognized safety hazards), employers have no corresponding duties to those they hire.

This structural inequality also appears in what economists call the doctrine of contractual incompleteness. This doctrine effectively acknowledges that no job description ever specifies in full detail the responsibilities an employee has agreed to or may rightly be asked to perform. These duties need not be spelled out because, once again, they are inherent within the background terms of corporate, property, and employment law that establish the juridical framework presupposed by any individual contract. To recall that the right to modify these obligations is granted to the employer but never the employee, to remember that employees must obey or face termination, is to see how labor contracts embed domination within a relationship between those who, in the unseeing eyes of the law, are equals.

To dispel this optical illusion, Elizabeth Anderson recommends that we understand employment contracts not "as an exchange of commodities on the market, but as the way workers get incorporated under the governance of productive enterprises."[43] This is a relationship of control not free market exchange; and this mode of governance, Anderson concludes, is inherently rather than incidentally autocratic. Granted, the authoritarianism internal to the employer/employer relationship may be tempered within the industrial work site via concessions extracted by unions (for example, seniority rules that stipulate who gets axed first) or within government agencies via civil service regulations that require performance reviews as a preface to termination. But these are exceptions that do no more than prove the rule that is at-will employment, and it is this rule that Ron DeSantis tacitly invokes when he disparages tenure as a lifetime sinecure that denies universities their right to dismiss the incompetent.[44]

To highlight the inegalitarian distribution of power within these sites, Anderson offers the seemingly oxymoronic category of "private government." Too well

43. Elizabeth Anderson, *Equality and Freedom in the Workplace: Recovering Republican Insights*, 31 SOCIAL PHILOSOPHY AND POLICY 48, 50 (2015).

44. Joseph Contreras, *DeSantis ramps up 'war on woke' with new attacks on Florida higher education,* THE GUARDIAN (February 5, 2023), https://www.theguardian.com/us-news/2023/feb/05/ron-desantis-war-on-woke-florida-higher-education-new-college [https://perma.cc/GF6X-9ZRT].

schooled in classical liberalism, she argues, we typically equate government with state power and so miss its presence in other arenas, especially the sites of employment we consider private because they are located within the economic realm. To rectify this oversight, Anderson contends that government "exists wherever some have the authority to issue orders to others, backed by sanctions, in one or more domains of life." These sites, she concludes, are constituted as places of unfreedom when this authority's exercise is joined to a denial to its subjects of any "standing to demand that their interests be taken into account" as well as "no voice other than what their employers care to give them (which is often none at all)."[45]

When we extrapolate Anderson's argument to the American university, we see that it too is a locus of unfreedom in which the form of domination inherent within the employment relationship is folded within an autocratic form of political rule; and it is the mutually reinforcing conjunction of these two sorts of institutionalized inequality that I call the university's constitution. Here, the law's formal exclusion of subordinates from any enforceable title to participate in governing the university is wedded to its right to exercise the prerogatives inherent within capitalism's construction of work. The board's jurisdictional authority to govern a university's employees, in other words, is mediated by contractual relationships that occlude but also amplify the antidemocratic nature of that rule.

Because the conduct of free inquiry within America's colleges and universities is so situated, academic freedom must bear a heavy burden, indeed. To accomplish the end required of it, that freedom must secure the negative liberty that enables faculty to do their work absent external encroachment, including that initiated by those legally authorized to do just that. But it must also guarantee the affirmative liberty, the capacity for self-governance, that allows faculty members to develop from within their own collective practice the disciplinary methods, standards, and norms that entitle free inquiry to represent its conclusions, although always provisional, as something other than so much opinion. Why our received conceptions of academic freedom have not and, indeed, cannot guarantee either form of liberty, and hence the free inquiry they are alleged to enable, is the subject of this essay's next two parts.

IV. THE "PROFESSIONAL" CONCEPTION OF ACADEMIC FREEDOM

The American conception of academic freedom is a creature of the peculiar circumstances of its birth and, more specifically, the constitution of the academy outlined in Part III. If the two conceptions of academic freedom identified by Metzger are deficient, that is because neither has asked whether the cause of free inquiry can be realized within a university legally organized as an autocracy predicated on capitalist employment relations. If the answer to this question is no, as I maintain in this section and the next, then a reconsideration of the American

45. ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT), 42, 55 (2017).

university's constitution is a necessary condition of articulating a conception of academic freedom that is adequate to the university's end.

A. The Project of the Professional Professoriate

The canonical articulation of what Metzger calls the "professional" construction of academic freedom is the American Association of University Professors' 1915 Declaration of Principles on Academic Freedom and Academic Tenure (hereafter the 1915 Declaration). Read one way, the 1915 Declaration is an audacious document, for what it declares is the independence of the scholarly profession from subjection to the authority of nineteenth-century American college presidents as well as the governing boards that appointed them. Read another way, the 1915 Declaration represents a fundamental failure of nerve, for its radicalism is sapped by its refusal to mount a frontal assault on the American university's basic constitutional form. The net result is an untenable compromise whose long-term implications are now unfolding in Florida and elsewhere.

For the most part, the presidents of American colleges in the nineteenth century were granted considerable discretionary authority by the governing boards that formally supervised their rule. However benevolent these potentates might be, their rule was exercised over those who, absent the protections provided by codified tenure policies or any enforceable legal recourse, were essentially ill-paid subordinates serving at the pleasure of their governors. Within public and private institutions alike, the relationship between ruler and ruled was governed by the common law of master and servant, as outlined earlier.

If the scope and exercise of this authority were sometimes checked, that was accomplished by customary norms that were often cast aside when tutors proved insubordinate.[46] The capacity of these norms to constrain the exercise of arbitrary power eroded considerably during the later decades of the nineteenth century as industrial capitalism displaced a mostly agrarian and merchant economy, and, in consequence, the rule of at-will employment was codified. That doctrine's arrival within the academy was effectively announced in 1915 when the University of Pennsylvania justified its dismissal of the socialist economist, Scott Nearing, on the ground that "the relation of a University professor to the trustees" is "the same as that of a day laborer to his employers" and, anticipating Texas Southern's governors, that its board may terminate faculty members "whenever the interests of the college required."[47] Although "masters" were thereby freed from any ongoing obligations to their "servants," the terms of capitalist employment still demanded that employees demonstrate obeisance to their employers; and that explains why

46. For an excellent account of the precarious status of faculty members at all but the most elite colleges prior to the turn of the twentieth century, *see* William Metzger, *Academic Tenure in America: A Historical Essay*, *in* COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE; A REPORT AND RECOMMENDATIONS, 93, 111–135 (John W. Macy and W.R. Keast, eds., 1973).

47. LIGHTNER WITMER, THE NEARING CASE 29, 25 (2012).

A.A. Knowlton was dismissed from the University of Utah, also in 1915, for private utterances found "disrespectful" of its governing board chair.[48]

It is against this backdrop that the AAUP advanced its 1915 Declaration. That document was predicated on the Association's representation of the professoriate as a distinctively modern profession akin to those already ascendant among doctors, who founded the American Medical Association in 1847, and lawyers, who established the American Bar Association in 1878. To engage in specifically professional work, the 1915 Declaration proclaims, is to participate in a form of disciplined conduct that is distinguishable from that of wage labor, whether manual or technical, but also the business of capitalists who employ that labor. Equally important, this work is unlike that performed by the nineteenth century's instructors, especially at the nation's denominational colleges, whose primary task was to train young and mostly white men in the arts of moral and mental discipline, as grounded in a classical and Christian architectonic of the sort New College's president now seeks to resuscitate.

Unlike these less noble forms of work, to serve as a member of a profession is to subordinate self-interest to the imperatives of a vocation—indeed, a calling—that is no less demanding than its Calvinist equivalent. Performance of the duties specific to the professionalized professoriate involves the disinterested conduct of free inquiry, and this is the universal good that distinguishes the academy from enterprises that aim to maximize profit but also churches that subordinate the search for truth to sectarian dogma.[49] What renders "the academic calling" perhaps the most precious of all modern professions is its unique commitment to secure the "progress in scientific knowledge" that is "essential to civilization."[50] On this proto-positivist and Enlightenment construction, the academy provides a home for inquiry that presses beyond the boundaries of received wisdom, which enables everyone to overcome the fetters that otherwise block humanity's liberation from a retrograde past now congealed as the present.

If they are to accomplish this noble end, the 1915 Declaration proceeds, faculty members must possess the independence without which they cannot "perform honestly and according to their own consciences the distinctive and important function which the nature of the profession lays upon them."[51] That function turns on something akin to the Socratic conception of free inquiry introduced in Part II of this essay (although now Socrates appears not as a philosopher who strikes up conversations in the agora but as an expert who holds a paid position within the academy institutionalized as a university): "the scholar must be absolutely free

48. Walter P. Metzger, *The First Investigation*, 47 AAUP BULLETIN 206, 209 (1961).

49. For a more complete elaboration of this characterization of specifically professional work, *see* TIMOTHY V. KAUFMAN-OSBORN, THE AUTOCRATIC ACADEMY: REENVISIONING RULE WITHIN AMERICA'S UNIVERSITIES 168–170 (2023).

50. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *1915 Declaration of Principles on Academic Freedom and Academic Tenure* (1915), *reprinted in* POLICY DOCUMENTS AND REPORTS 3, 6 (11th ed. 2015).

51. *Id.*

not only to pursue his investigations but to declare the results of his researches, no matter where they may lead him or to what extent they may come into conflict with accepted opinion."[52]

The professoriate, accordingly, must be exempt from interference by laypersons who, when it comes to matters academic, literally do not know what they are talking about. Those who fall into this category are those who have not undergone the rigorous training required to secure an advanced degree in an established academic discipline, thereby rendering them uncertified amateurs. Accordingly, protection of the scholar's work from encroachments initiated by the inexpert, and most proximately, the university's external lay governing boards, is the cornerstone of the specifically professional doctrine of academic freedom.

B. The AAUP's Challenge to at-will Employment

The AAUP's endorsement of codified tenure policies, which is the primary institutional reform advanced within the 1915 Declaration, is justified on the ground that they protect academic freedom, and they do that by ensuring qualified immunity from the terms of at-will employment. This shield is secured not by challenging capitalism's construction of work as the contractually mediated sale of labor in return for a wage but rather by tweaking its terms. Specifically, the AAUP argues that termination of an instructor by an employer should be preceded by a hearing before one's peers and predicated on a demonstrated inability or failure to fulfill the responsibilities incumbent on professionals. Whereas the adequate cause provision tempers the arbitrariness inherent in at-will employment, fulfillment of the claims of due process requires that colleagues rather than employers determine whether their peers have, in fact, violated professional standards. Tenure, so construed, is an indispensable element of the autonomy that is essential to the capacity of the modern professoriate to sift truth from falsehood, the known from the hypothetical, the verified from the speculative.

To defend these departures from capitalism's default mode of employment, the AAUP insists that professorial work must not be regarded as "a purely private employment, resting on a contract between the employing authority and the teacher."[53] To explain why this representation is misguided, the AAUP likens professors to judges who are appointed by politicians but who hold office "during good behavior" and who should be "no more subject to the control of the trustees, than are judges subject to the control of the president, with respect to their decisions."[54] On this account, professors are akin to commissioned officers of associations dedicated to universal goods whose accomplishment cannot be exhaustively specified within the four corners of a letter of appointment. Indeed, unlike

52. *Id*. at 7.

53. Edwin Seligman, *Preliminary Report of the Joint Committee*, 9 AM. POL. SCI. REV. 374, 380 (1915). This report, which provided the foundation for the 1915 Declaration, was adopted by the Joint Committee on Academic Freedom and Tenure and prepared on behalf of the American Economic Association, the American Sociological Association, and the American Political Science Association.

54. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *supra* note 50.

workers who are legally obligated to do whatever employers command so long as those orders are not illegal, professors qua professionals cannot and must not be expected to do as they are told. To be a professional is, by definition, to be afforded the discretionary leeway to determine how best to achieve the ends constitutive of the academic vocation, much as doctors must be afforded considerable autonomy in determining how best to treat patients.

From this it follows that the obligations of professors extend far beyond the colleges and universities that pay their wages:

> For, once appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene. The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession; and while, with respect to certain external conditions of his vocation, he accepts a responsibility to the authorities of the institution in which he serves, in the essentials of his professional activity his duty is to the wider public to which the institution itself is morally amenable.[55]

The duties of professors, in other words, are owed to ends that transcend the walls of specific universities, and so their fulfillment must not be circumscribed by anyone within their perimeter. Because these obligations bind all who are members of the professoriate, moreover, it matters not whether any given faculty member is employed by a private as opposed to a public institution. As members of a common profession, all are engaged in a search for truth whose regulation by any external ruler will quite literally disqualify any so-called university from affirming its identity as a bona fide academic enterprise: "Lay governing boards," the 1915 Declaration insists, "cannot intervene without destroying, to the extent of their intervention, the essential nature of a university—without converting it from a place dedicated to openness of mind, in which the conclusions expressed are the tested conclusions of trained scholars, into a place barred against the access of new light, and precommitted to the opinions or prejudices of men who have not been set apart or expressly trained for the scholar's duties."[56]

Because the professoriate's discretionary authority and hence autonomy are necessary conditions of its work, the AAUP would appear to be pressed by the logic of its own argument to proclaim the faculty's status as a self-governing community of colleagues. Only when so organized, after all, can its members collectively determine what counts as competent practice and enforce those standards via, for example, the conduct of peer review. Accomplishment of that possibility, it would also seem to follow, demands a repudiation of the university's constitution as an employer vested with unfettered legal power over its employees. This is what Lovejoy seemed to grasp when, in 1938, he wrote: "The

55. *Id*. at 6.
56. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *supra* note 50, at 11.

distinctive social function of the scholar's trade cannot be fulfilled if those who pay the piper are permitted to call the tune."[57] The AAUP, however, does not challenge the piper's authority to name that tune and so does not conclude that a university ruled by its faculty is a necessary condition of one that is free.

C. The AAUP's Capitulation to Autocratic Rule

That the AAUP does not make this argument is all the more noteworthy given that medieval Europe offered examples of universities built as incorporated bodies politic on the model of "little republics" in which its professorial "citizens" exercised plenary authority over their assets as well as their affairs; that the governance disputes within the earliest colonial colleges, drawing inspiration from Cambridge and Oxford, were often informed by this same republican model; and, perhaps most important, that for several decades prior to the AAUP's founding, contributors to what came to be known as the "professors' literature of protest" argued that America's newly minted research universities should be reconstituted as self-governing corporations within which faculty enjoy not just the quasi-judicial protections afforded by tenure but also the legislative authority to make the laws by which they are collectively governed and to hold accountable those they select to administer these statutes.[58]

Rather than go down this path, the 1915 Declaration quietly surrenders to the brute fact that governing boards are "the ultimate repositories of power"[59] within the American academy. So empowered, those at the apex of this autocracy retain the legal authority not merely to define the contractual terms that govern employment but also to dismiss any employee with or without cause (as the example of Texas Southern illustrates). True, governing boards may find it prudent to respect the due process niceties that constitute tenure and, in individual cases, the terminated may seek redress if they believe that a breach of contract has occurred. But nothing prevents governing boards from foreclosing future appeals to the courts by eliminating the possibility of tenure for all subsequent hires or, should the academy's autocrats deem this exigent, by stripping tenure from those who currently hold it.

Indeed, in a self-defeating concession that anticipates the personnel policy of New College, the AAUP acknowledges that governing boards retain the unequivocal right "to determine the measure of academic freedom which is to be realized"[60] within any given college or university. Should this freedom be attenuated or even abolished, thereby rendering accomplishment of the

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57. Arthur Lovejoy, *Professional Association or Trade Union?*, 24 AM. ASS'N OF UNIV. PROFESSORS BULL. 409, 414 (1938).

58. For an account of the seventeenth and eighteenth-century conflicts at Harvard and William & Mary between those who endorsed the principles of academic self-governance and those who defended rule by external lay boards, *see* KAUFMAN-OSBORN, *supra* note 49 at 66-104; and, for an account of the "professors' literature of protest," *see* 143-160.

59. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *supra* note 50, at 4.

60. *Id.*

academy's mission impossible, it is not clear what recourse is available since faculty members possess none of the authority that would position them as anything other than so many subjects in the guise of employees. The essential condition of the academy's possibility—the exercise of a scholar's freedom—is thereby rendered perpetually precarious because it is conditional on the willingness of those who rule to allow its existence and, if allowed, to define its limits.

To explain why the American university's rule by external lay governing boards should be considered anything other than an anachronistic relic invented by colonial elites to ensure control over America's earliest colleges, the 1915 Declaration says nothing. Instead, the AAUP's principled argument on behalf of faculty autonomy collapses beneath the accumulated weight of what John Dewey, the AAUP's first president, once called "the crust of convention." The 1915 Declaration thereby abandons the professional professoriate's duty to challenge received wisdom regarding all matters, no matter how set in stone that commonsense may now appear. Doing so, the AAUP surrenders to something akin to capitalism's reconfiguration of feudalism's master-servant relationship in at-will form, as buttressed by something not unlike monarchical absolutism.

Lacking any legal foundation for its claim that governing boards should not treat faculty members as mere employees, the AAUP resorts to pious exhortation (or, as Metzger puts it, "in academic freedom matters, the AAUP would ask not as much for faculty control as for greater trustee courtesy"[61]). Complementing its representation of faculty members as professionals rather than subordinates, the 1915 Declaration invites governing board members to reconsider what it is to be a trustee. If it is true that trustees have "no moral right to bind the reason or the conscience of any professor,"[62] that is because, properly understood, they are not merely employers but also guardians of the collective good that is education. Just as appointment as a professor should "be regarded as a quasi-public official employment," so too those who assume office as board members should "act not as private employers or from private motives but as public trustees."[63] In their capacity as fiduciaries obligated to uphold goods that transcend parochial interests, governing board members should therefore refrain from exercising the autocratic powers they never relinquish.

However, the AAUP gives us little reason to anticipate that trustees will in fact exercise such self-restraint and plenty of reason to think they will not. The 1915 Declaration demands that colleges and universities be organized "in such a way as to make impossible any exercise of pressure upon professorial opinions and utterances by governing boards of laymen."[64] Yet it also acknowledges that the practice of scholarly inquiry will frequently engender views that "point toward

61. Metzger, *supra* note 46, at 93, 149-150.
62. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *supra* note 50, at 5.
63. Seligman, *supra* note 53, at 380.
64. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *supra* note 50, at 9.

extensive social innovations, or call in question the moral legitimacy or social expediency of economic conditions or commercial practices in which large vested interests are involved."[65] The work of the scholar, therefore, is sure to provoke attempts to rein in or discharge those who displease the powers that be.

Within private colleges, attempts to do so will most often emerge from "benefactors, as well as most of the parents who send their children to privately endowed institutions" and who "belong to the more prosperous and therefore usually to the more conservative classes."[66] These demands are likely to find a receptive audience among governing boards because they too are usually "made up of men who through their standing and ability are personally interested in great private enterprises."[67] Moreover, because appointments to vacant seats on the boards of these institutions are made by those already installed, there is every reason to believe that academic freedom's restriction and hence free inquiry's negation will prove a problem without end.

Within public institutions, the "menace to academic freedom" is even more pronounced because scholarly inquiry will often give rise to conclusions that "differ from the views entertained by the authorities" on whom "the university is dependent for funds."[68] This peril is compounded in specifically democratic orders because the work of government officers and especially elected representatives demands responsiveness to the shifting tides of public opinion. "The tendency of modern democracy," the AAUP concedes, "is for men to think alike, to feel alike, and to speak alike," and so "any departure from the conventional standards is apt to be regarded with suspicion."[69] The "tyranny of public opinion," a form of despotism that draws strength from the doctrine of popular sovereignty, does not bode well for an institution whose purpose, among others, is "to help make public opinion more self-critical and more circumspect, to check the more hasty and unconsidered impulses of popular feeling."[70]

In short, in public as well as private institutions, "the points of possible conflict" between governing boards and a professionalized professoriate are "numberless," and the academy's ability to stand as an "inviolable refuge" for free inquiry must prove fragile at best.[71] To secure the professoriate's independence, the AAUP must persuade not merely governing boards and presidents but also the public generally to guarantee to the professoriate certain occupational privileges that, within a capitalist economy, are alien to most employers and denied to employees in all other sectors of that economy. Indeed, the 1915 Declaration insists, those who are not academics must consent not merely to refrain from treading where they do not belong but also to defer to the specialized expertise of

65. *Id.* at 8.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 8, 9.
71. *Id.*

those who challenge their most cherished beliefs as well as the order from which the powerful now derive great profit. This is a tall order, and the AAUP gives us every reason to suspect that an appeal to the professional ideal of vocational expertise, no matter how eloquently defended in the 1915 Declaration, is not up to the task.

The academy envisioned within the 1915 Declaration is structurally incoherent. The specifically modern profession that is the professoriate, on the AAUP's own account, must be a self-governing entity predicated on horizontal relations of authority that are egalitarian in the sense that every member of this body is invited to challenge the epistemic claims advanced by all others, and, in this sense, no one is granted an anterior title to rule over others. This collective entity, however, is situated within the master-servant framework that provides the historical foundation for capitalist employment law as it is exercised within universities constituted as autocratic corporations. What is surprising about this house divided is not who ultimately prevails when this institutionalized self-contradiction engenders controversies but, rather, our expressions of righteous indignation each time that proves so.

V. THE "CONSTITUTIONALIZATION" OF ACADEMIC FREEDOM

The 1915 Declaration seeks to temper the authoritarian and precarious elements inherent within at-will employment and thereby safeguard academic freedom by "judicializing" the work of the professional professoriate, and it does so in two ways. First, the 1915 Declaration's brief on behalf of tenure is an argument in favor of certain due process protections, most notably a hearing conducted by peers, as a preface to the possible termination of faculty members. Second, by analogizing tenured faculty appointments to judicial offices whose incumbents are obligated to uphold the law rather than do the bidding of those who appoint them, the 1915 Declaration affirms that the professorial vocation entails the fulfillment of duties that cannot be reduced to obeying whatever orders are issued by its superiors.

The 1915 Declaration, however, does not argue that academic freedom is itself rooted in the Constitution and, more particularly, the First Amendment. That argument, as Metzger correctly notes, first appears in conjunction with the Red Scare whipped up by Joseph McCarthy and his confederates in the wake of World War II. The AAUP was slow to respond to this anti-Communist hysteria; indeed, it was not until 1958 that the Association filed its first amicus brief on behalf of a teaching fellow at the University of Michigan who had refused to answer questions put to him by the House Un-American Activities Committee.[72] At best, the AAUP's refusal to engage the judiciary before that time can be considered a strategic choice made on the ground, to quote Robert Carr, "that what the

72. For an account of that brief as well as those filed by the AAUP in subsequent cases, *see* Robert M. O'Neil, *The AAUP in the Courts*, 101 ACADEME 6 (2015).

courts give, they may take away."[73] At worst, as Ellen Schrecker has argued,[74] this tardy response should be read as an abdication of the principles articulated in the 1915 Declaration. Either way, by the end of the 1950s, the Association had endorsed the constitutional rearticulation of arguments once grounded exclusively in the vocational imperatives of professionalism.[75] Indeed, as the disenchanting rationality of secularism has rendered the ideal of a vocational calling ever less credible, the professional account has ceded its primacy to the judicial as academic freedom's foremost line of defense; and that is why its "constitutionalization" merits the extended analysis provided below.

The AAUP's turn to the courts has proven problematic because, among other reasons outlined in this section, the judiciary has never developed a coherent account of academic freedom's status as a constitutional right grounded in the First Amendment. After reviewing a half-century of jurisprudence about this issue, Lawrence White concludes: "While referring in fits and starts to academic freedom, the Supreme Court has declined invitation after invitation to clarify the meaning and reach of the term, leaving the law in what can only be described as a confused state."[76] The causes of this muddle, according to Karen Petroski, are several:

> The perplexities surrounding the federal constitutional concept of academic freedom derive from two sources: confusion over the precedential authority of statements on the subject by various Supreme Court Justices and confusion over the doctrinal substance of, and relationships among, those statements. Few of the leading Supreme Court opinions on the issue have been majority opinions. And to the extent that the opinions addressing the issue identify academic freedom as some kind of constitutionally protected right, they usually do so in language that can plausibly be construed as dicta. Finally, while these statements "ground" academic freedom in the First Amendment, they never fully clarify the nature of its relationship to other First Amendment rights.[77]

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73. Robert K. Carr, *Academic Freedom, the American Association of University Professors, and the United States Supreme Court*, 45 AAUP BULL. 5, 20 (1959).

74. Ellen Schrecker, *Political Repression and the AAUP from 1915 to the Present,* 109 ACADEME 36, 40 (2023).

75. For the AAUP's formal codification of its embrace of academic freedom's constitutional construction, *see* the first "interpretive comment" appended in 1970 to the Association's *1940 Statement of Principles on Academic Freedom and Tenure*, *reprinted in* POLICY DOCUMENTS AND REPORTS 13, 14 (11th ed. 2015).

76. Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J. OF COLL. AND UNIV. L. 791, 794 (2010).

77. Karen Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability,* 32 J. OF COLL. AND UNIV. L. 149, 153 (2005).

The cumulative result, argues Nathan Adams, "is a constitutional doctrine in shambles"[78] or what Neal Hutchens and his co-authors label "a constitutional morass."[79]

Insofar as these dispirited assessments are correct, academic freedom cannot help but prove vulnerable to those who, today, aim to constrict its exercise or, as in Florida, disallow it altogether. More specifically, the "constitutionalization" of academic freedom has rendered the practice of free inquiry precarious in at least three ways; and, in the remainder of this part, although doing justice to none, I examine several cases that illustrate each. The first (A), which concerns the Cold War loyalty tests, indicates why academic freedom's construction as an individual right protected by the First Amendment cannot acknowledge, let alone secure, the faculty's collective authority to establish the conditions of its own disciplinary practice. The second (B), which concerns the equation of academic freedom with institutional autonomy, explains how this conflation has ratified the university's autocratic rule. The third (C), which concerns the so-called public employee speech doctrine, shows how the judiciary has failed to reconcile the legal obligation of employees to obey their employers with the professional duty of academics to engage in inquiry that, if it is to remain free, cannot be so constrained.

To review these three jurisprudential strands is to see why the AAUP in the 1950s had good reason to worry that academic freedom's "constitutionalization," to quote Carr again, may leave it "in a weaker position than it was before it became a concern of the law."[80] Whereas the 1915 Declaration left the ultimate fate of academic freedom in the hands of external lay boards, its "constitutionalization" has placed its future in the hands of courts that are ill-equipped and often disinclined to articulate the arguments that might defend it against those boards and, equally if not more so, against the likes of Ron DeSantis.

A. Finding Academic Freedom in the First Amendment

Those who affirm the grounding of academic freedom in the U.S. Constitution, including the AAUP, typically begin their accounts by citing three key Cold War cases. On this narrative, the status of academic freedom as a First Amendment concern was first identified by Justice Douglas in his 1952 dissenting opinion in *Adler v. Board of Education;* that discovery secured the Court's affirmation five years later in *Sweezy v. New Hampshire*, most notably in Justice Frankfurter's concurring opinion; and, finally, academic freedom received its full-throated endorsement in 1967 when the Court, in *Keyishian v. Board of Regents*, effectively

78. Nathan A. Adams IV, *Resolving Enmity Between Academic Freedom and Institutional Autonomy*, 46 J. OF COLL. AND UNIV. L. 1, 3 (2021).

79. Neal H. Hutchens et al., *Faculty, the Courts, and the First Amendment*, 120 DICK. L. REV. 1027, 1027–28 (2016).

80. Robert K. Carr, *Academic Freedom, the American Association of University Professors, and the United States Supreme Court*, 45 AAUP BULLETIN 5, 20 (1959).

declared that Douglas had been right all along.[81] What these cases actually demonstrate, however, is that appeals to the First Amendment's Free Speech Clause, which is designed to protect all persons against state encroachment on their right to espouse whatever idiosyncratic opinions they happen to hold, is ill-suited to appreciate, let alone protect, the inherently collective freedom that enables members of one specific profession, the professoriate, to advance claims that qualify not as opinion but as knowledge.

Decided at the height of McCarthyism, *Adler* concerned a group of New York City high school teachers who were suspended and later terminated after running afoul of a New York statute aimed at preventing members of "subversive" organizations, particularly the Communist Party, from teaching in public schools. The question before the Court was whether New York could condition employment on a faculty member's declaration of political loyalty or, more accurately, a refusal to disavow disloyalty.

In response, the Court upheld the constitutionality of the Feinberg Law and hence the state's termination of Adler and his cohorts. Writing for a six-member majority, Justice Minton explained that public teachers "have the right under our law to assemble, speak, think and believe as they will," but "they have no right to work for the State in the school system on their own terms. . .If they choose not to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."[82] On this account, Adler and his cohorts are figured as so many hired hands whose employment is a privilege to which their masters can attach any terms and which may be withdrawn at any time should their servants fail to abide by those conditions.[83] So framed, to be an employee is to be without rights and, consequently, any claim to judicial redress. Within a capitalist economy, however, the freedom of those terminated is not thereby abridged, however, for an employee's liberty to quit remains as complete as does an employer's liberty to hire and fire.

Joined by Justice Black, William O. Douglas dissented because he rejected the view that "a citizen who enters the public service can be forced to sacrifice his civil rights."[84] Taking exception to the majority's construction of employment as a revocable privilege, Douglas declares that nowhere in the U.S. Constitution can he find an affirmation of "the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression."[85] This claim about the rights of government employees generally

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81. For a narrative that adheres to this script, see *Protecting an Independent Faculty Voice: Academic Freedom after* Garcetti v. Ceballos, AM. ASS'N OF UNIV. PROFESSORS (2009).

82. *Adler v. Board of Edu.,* 342 U.S. 485, 492 (1952).

83. Here, the Court draws on Justice Holmes's opinion for the Supreme Court of Massachusetts in *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220 (1892): "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

84. *Adler,* 342 U.S. at 508 (Douglas, J., dissenting).

85. *Id.* (Douglas, J., dissenting).

assumes a specifically academic twist when Douglas then declares that "[t]he Constitution guarantees freedom of thought and expression to everyone in our society," but "none needs it more than the teacher" because "[t]he public school is in most respects the cradle of our democracy."[86]

On this metaphorical foundation, Douglas predicates his argument on behalf of what he labels "academic freedom." When "[t]eachers are under constant surveillance," when "their pasts are combed for signs of disloyalty," when "their utterances are watched for clues to dangerous thoughts," a "pall is cast over the classroom."[87] Under this shadow, which now looms over Florida's public universities, the distinctive ends of education cannot be achieved, for the teacher subject to unremitting scrutiny cannot be anything but "a pipeline for safe and sound information. A deadening dogma takes the place of free inquiry."[88]

Should such "censorship" be allowed, Douglas declares, the school will become an accomplice to a "police state" committed to an orthodoxy that is as authoritarian as is the antidemocratic Communist "party line" the Feinberg Law seeks to crush.[89] Therefore, this law should be found unconstitutional because it violates the First Amendment rights of teachers in their capacity as citizens who cede none of their constitutionally guaranteed liberties when they become state employees. So long as a teacher meets appropriate "professional standards," Douglas concludes, "her private life, her political philosophy, her social creed should not be the cause of reprisals against her."[90]

No matter how gratifying we may find Douglas's celebration of faculty freedom from state control, the fact remains that he provides none of the analysis that would convince skeptics that this unenumerated freedom is implicit within the First Amendment, or that this amendment's authors intended to embed it there, or that it is "deeply rooted in this Nation's history and tradition,"[91] or that it is somehow inherent within the structure of a document that makes no reference to education whatsoever. Nor does Douglas explain why the government, in its specific capacity as an employer, should be denied the authority to regulate the conduct of employees in the same way that all nongovernmental employers are. Nor does he make clear whether all government employees are entitled to the same free speech protections as Adler, as he initially appears to imply, or, alternatively, that only teachers are so shielded, as he later seems to suggest.

The category of academic freedom makes its first appearance in a plurality opinion in *Sweezy v. New Hampshire*, which concerned a free-lance journalist who, in 1954, delivered a guest lecture on Marxism in a course offered at the University of New Hampshire. Not long after, Sweezy was summoned to appear before New Hampshire's attorney general who had been granted a broad

86. *Id.* (Douglas, J., dissenting).
87. *Id.* at 510 (Douglas, J., dissenting).
88. *Id.* (Douglas, J., dissenting).
89. *Id.* (Douglas, J., dissenting).
90. *Id.* at 511 (Douglas, J., dissenting).
91. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

delegation of power to investigate "subversive persons" and "subversive organizations" operating within the Granite State. Sweezy replied to most of the questions put to him, but, citing the First Amendment, refused to answer when asked about the content of his lecture as well as his knowledge of the left-leaning Progressive Party. He was then slapped with a citation for contempt, and, three years later, his case was reviewed by the Supreme Court.

In a 6-2 ruling, the Court decided in favor of Sweezy. However, the justices in the majority could not agree on the constitutional basis for this opinion. Writing for four, Chief Justice Warren echoed Douglas's contention that free inquiry's conduct within the university is essential to the cause of democracy and, echoing the 1915 Declaration, the very possibility of progress and thus civilization itself:

> 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.[92]

Here, Warren builds on Douglas's representation of the academy as democracy's cradle but resolves none of the questions his dissent in *Adler* left unanswered. Still more problematic for those who cite *Sweezy* as a precedent that affirms the First Amendment's commitment to academic freedom, Warren in fact sidesteps that issue: "We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields. But we do not need to reach such fundamental questions of state power to decide this case."[93] Instead, the Court based its ruling on narrower grounds, concluding that the Due Process Clause of the Fourteenth Amendment does not permit the state to abridge Sweezy's constitutional liberties absent a clear indication of the relationship between the purpose of the investigation mandated by New Hampshire's legislature and the specific questions posed by its attorney general.

No doubt because this ruling is so circumscribed, it is Justice Frankfurter's concurring opinion that future celebrants of academic freedom routinely cite. This case, he argues, requires the application of a balancing test that weighs "the right of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection."[94] By adopting this calculus,

92. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
93. *Id.* at 251.
94. *Id.* at 266–67 (Frankfurter, J., concurring).

Frankfurter qualifies Douglas's categorical insistence that "a citizen who enters the public service can[not] be forced to sacrifice his civil rights," for it now appears that the state can do so if its interests outweigh those rights.

To explain why the state fails to pass this test in this instance, Frankfurter argues that the university advances an end that merits special constitutional protection and, for that reason, "political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."[95] To describe this activity's unique character, Frankfurter quotes two South African university chancellors:

> In a university, knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates – to follow the argument where it leads. This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university.[96]

Here, like Douglas, Frankfurter leaves uncertain why we should conclude that the university's special prerogatives, however valuable they may be, are in fact rooted in the Constitution. Moreover, like the *Adler* majority but unlike Douglas, Frankfurter grounds his argument in the due process guarantees of the Fourteenth Amendment and so furnishes no help to those who would find academic freedom in the First Amendment's Free Speech Clause. Indeed, Frankfurter grounds his argument in favor of Sweezy's refusal to answer certain questions in the latter's right to political privacy, and that right is one that belongs to all citizens rather than only academics. In sum, if one were to excise Frankfurter's paean to free inquiry, which is so much dicta, we might well conclude that *Sweezy* says little if anything that is peculiar to the university, let alone any privileged freedoms that might be claimed for it.

The confusions left in the wake of *Adler* and *Sweezy* remained unresolved when, in 1967, Douglas was effectively vindicated in *Keyishian v. Board of Regents of University of State of N.Y.* There, the Court revisited the Feinberg Law and, in a 5-4 vote, rejected its decision in *Adler* (although, technically, the Court stated that the decision in that earlier case was not dispositive of the constitutional issues raised in *Keyishian*). In his opinion for the Court's majority, Justice Brennan offers one of the most often quoted hymns in praise of academic freedom and elevates democracy's cradle to the realm of the sublime:

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95. *Id.* at 261 (Frankfurter, J., concurring).
96. *Id.* at 262–63 (Frankfurter, J., concurring).

> 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.[97]

Here, for the first time in a majority opinion, the Supreme Court expressly grounded academic freedom in the First Amendment. However, the constitutional status of this freedom remains uncertain insofar as it is represented not as a fundamental right akin to that of free speech but, instead, as a "special concern." This characterization may perhaps be read as a ringing endorsement of academic freedom, as the AAUP does, but it may also be read as a sign of that freedom's potential exposure to encroachment, whether by governments, employers, or, as we will see below, governmental bodies in their role as employers.

Equally important, as in *Sweezy*, the ruling in *Keyishian* was predicated not on an independent analysis of this "special concern" in relation to the university's unique imperatives but, instead, on the ground that the statute's references to sedition and treason were vague as well as overbroad and so likely to chill the exercise of First Amendment freedoms. This due process argument, notes Scott Bauries, was a straightforward application of "the then-emerging jurisprudence under the First Amendment in general. The Court did not derive any particular or 'special' rule for academic contexts, nor did it purport to do so:"[98] These early academic freedom cases, he continues, "do not present any binding judicial holdings recognizing speech rights that inhere in academics and not in non-academics:"

> Looking past the lofty rhetoric of these cases, they appear to establish the contrary–that speech rights are as protected from extramural government interference within educational institutions as they are outside such institutions, surely an encouraging proposition, but one that contradicts any conception of academic freedom as its own unique set of rights. So, during this period, the Court was doing nothing more than establishing a jurisprudence of the First Amendment mostly through cases brought by speakers uniquely vulnerable to extramural suppression, while refraining from holding that these uniquely *vulnerable* speakers were in any way uniquely *protected*.[99]

On Bauries's account, in other words, the cases arising out of McCarthyism do not offer a substantive argument on behalf of a right to academic freedom that is specific to faculty and that secures them immunities from state coercion that are not extended to others. However, what these cases did accomplish, surmised

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97. Keyishian v. Board of Regents of University of State of N.Y., 385 U.S. 589, 603 (1967) (citation omitted).

98. Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISSISSIPPI L. J. 677, 701–02 (2014).

99. *Id*. at 702–03.

Peter Byrne in 1989, was the "virtual extinction of *overt* efforts by non-academic government officials to prescribe political orthodoxy in university teaching and research. Today, few politicians seek political capital by attacking academics for their political opinions, and those who do only provide their victims with lawsuits that usually fortify their academic positions against more subtle or justifiable assault."[100]

If Bauries is correct, the "constitutionalization" of academic freedom has done far less than we conventionally think to ensure this "special concern" against shifting views within the judiciary, changing tides within state legislatures, or a decline in the public's regard for higher education. It is this failure, moreover, that explains why Byrne was wrong to conclude that the cases decided during the Cold War spelled the end of undisguised efforts on the part of government officials to impose their political views on the professoriate and punish those who dare to deviate. Indeed, given what is happening in Florida, one might speculate that, today, academic freedom hangs from a thread that may soon be snipped by a Court that is less prone to defer to the authority of the university in the governance of its internal affairs, more friendly to the rights of employers than employees, and disinclined to acknowledge any rights other than those expressly enumerated in the Constitution or effectively acknowledged by its framers.

Perhaps, therefore, Stop WOKE is not an aberration that is sure to be repudiated by the courts on the ground that it contravenes academic freedom's status as a "special concern" of the First Amendment but, instead, a pivotal step toward rendering that concern unexceptional and so unworthy of judicial protection. True, given the rulings in *Sweezy* and *Keyishian*, future abridgments of academic freedom may not assume the form of compulsory loyalty oaths. But that crude device hardly exhausts the state's means of securing its orthodoxy by, for example, banning instruction about the "divisive concepts" identified in Stop WOKE on the ground that America's classrooms must no longer be torn asunder by "identity politics" based in lies about gender, race, and sexuality.[101]

The liability of academic freedom to such challenges is inherent within any effort to locate it within or justify its exercise through an appeal to the First Amendment. The 1915 Declaration's brief on behalf of academic freedom, recall, opted to ground immunization of the professoriate's work from external interference in the collective prerogatives of modern professionalism. Academic freedom's "constitutionalization," by way of contrast, appeals to the First Amendment's guarantee of free speech rights possessed by individuals against state infringement. However, as Arthur Lovejoy understood and Judith Areen reminds us, the claim of individual professors to academic freedom is advanced not in their

100. J. Peter Byrne, *Academic Freedom: A 'Special' Concern of the First Amendment,* 99 YALE L. J. 251, 298 (1989).

101. Nicole Narea and Li Zhou, *A guide to Ron DeSantis's most extreme policies in Florida*, VOX (May 25, 2023), https://www.vox.com/politics/2023/5/25/23736141/ron-desantis-2024-florida-legislature-policies [https://perma.cc/G9FF-9DYM].

capacity as monads but, rather, as *members* of a body that is essentially rather than adventitiously collaborative. What those members affirm is not their private right to advance whatever opinions they may happen to entertain, as if the academy were a mere "marketplace of ideas" whose freedom demands that the state adhere to the principle of viewpoint neutrality. Rather, what they champion is the affirmative authority of diverse disciplinary communities to articulate and uphold the standards of scholarly inquiry that enable them to amend, criticize, and, when appropriate, reject candidates for epistemic status that do not pass muster.

"It is," the AAUP stated in 1915," not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession, that is asserted by this declaration of principles."[102] Here, the AAUP gets matters exactly right: Academic freedom is grounded in the conjoint practice of the professoriate, and it is out of this reservoir of pooled practice that the rules governing its work arise. To confuse academic freedom with the liberty of "the individual scholar" is to abstract that scholar's work from the accumulated disciplinary storehouses out of which it originates and to which it must return if it is to secure designation as something other than opinion.

This is not to deny the susceptibility of received academic standards to criticism or even eventual rejection; but it is to say that the recomposition of disciplines, and even the invention of new ones, are not well-understood according to the conceits of methodological individualism or the constitutional equivalent that is the First Amendment's Free Speech Clause. To represent inquiry's freedom on the model of a private citizen asserting the right to be exempt from state coercion is to confuse the negative liberty affirmed by classical liberal political theory with the affirmative freedom that makes knowledge possible. The capacity to participate in what Charles Peirce called the academy's "communities of the competent" surely presupposes the absence of alien dictation by the state, by lay boards, and, indeed, by anyone who does not qualify as a member. However, to equate academic freedom with that absence, which, at best, is what the First Amendment can accomplish, is to fail to capture elements essential to the university's constitution.

Perhaps counterintuitively, to participate in the academy's project of free inquiry is to agree to be constrained by the practices that enable this project. To do so is to consent to be a member of a self-regulating community of scholars whose conclusions, although forever provisional and hence perpetually revisable, command the authority to trump the opinions that the U.S. Constitution must guarantee. Thomas Haskell, therefore, is quite right to conclude that "no justification for academic freedom can succeed unless it provides ample resources for justifying the autonomy and self-governance of the [academic] community," and he is

102. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *supra* note 50, at 11.

equally correct to declare that "[f]or this task, the First Amendment is ill-suited."[103]

B. Academic Freedom as Institutional Prerogative

The cause of free inquiry does not fare better when we turn to the second of my three intersecting strands of academic freedom's "constitutionalization." This thread concerns the judiciary's construction of academic freedom as a right enjoyed by colleges and universities qua institutions. "In the last decade," wrote Byrne in 1989, "the Supreme Court's decisions concerning academic freedom have protected principally and expressly a First Amendment right of the university itself—understood in its corporate capacity—largely to be free from governmental interference in the performance of core educational functions."[104] To locate academic freedom in the university constituted as a corporation, however, is to ratify its autocratic constitution and hence, to reaffirm the law's disenfranchisement of those denied any justiciable claim to rule.[105]

Justification of the university's institutional autonomy in the name of academic freedom first appears in Justice Frankfurter's concurring opinion in *Sweezy*. Echoing the plurality opinion, Frankfurter begins by asking whether Sweezy's due process rights have been violated by New Hampshire but then quickly pivots to a much broader inquiry into "the grave harm resulting from governmental intrusion into the intellectual life of a university."[106] That harm, Frankfurter explains, endangers "the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[107] Here, in effect, Frankfurter represents the university as the injured party in *Sweezy* and then invokes its freedom as the basis for defending Sweezy's right to refuse to answer certain of the questions put to him by New Hampshire's attorney general.

Perhaps the most robust post-*Sweezy* manifestation of academic freedom's construction as an institutional prerogative is found in the Supreme Court's affirmative action cases. In *Regents of the University of California v. Bakke*, decided in 1978, the Court ordered that Allan Bakke be admitted to the medical school of the University of California at Davis because the school's use of a quota

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103. Thomas L. Haskell, *Justifying the Rights of Academic Freedom in the Era of 'Power/Knowledge,' in* THE FUTURE OF ACADEMIC FREEDOM 43, 54 (Louis Menand, ed. 1996): "Historically speaking, the heart and soul of academic freedom lie not in free speech but in professional autonomy and collegial self-governance. Academic freedom came into being as a defense of the disciplinary community (or, more exactly, the university conceived as an ensemble of such communities), and if it is to do the work we expect of it, it must continue to be at bottom a denial that anyone outside the community is fully competent to pass judgment on matters falling within the community's domain."

104. Byrne, *supra* note 99, at 311.

105. For the Supreme Court's affirmation that faculty have no legally guaranteed right to participate in institutional governance, see Minnesota Board for Community Colleges v. Knight, 465 U.S. 271, 287 (1984).

106. Sweezy v. New Hampshire, 354 U.S. 234, 261 (1957) (Frankfurter, J., concurring).

107. *Id*. at 263.

system in making admissions decisions offends the Equal Protection Clause. That, however, does not preclude Davis from considering race as a factor in future admissions decisions insofar as that practice furthers the legitimate academic goal of promoting diversity and, thereby, a robust exchange of ideas within the classroom.

In an opinion joined by others but only in part, Justice Powell justified this looser form of affirmative action by citing a "countervailing constitutional interest, that of the First Amendment."[108] Specifically, the university's interest in crafting its own admissions policy is one of the "four essential freedoms" identified by Frankfurter in *Sweezy*: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body."[109] This conclusion in turn provided the basis for subsequent affirmative actions cases, most notably *Grutter v. Bollinger* and *Fisher v. University of Texas*, each of which maintained that the judiciary should grant substantial deference to a university's judgment about how best to accomplish its specifically academic ends, including determination of its admissions policies.

That rationale was upended this past summer when the Court ruled that affirmative action programs do in fact violate the Fourteenth Amendment, thereby reminding us that the AAUP was altogether correct to worry that "what the courts give, they may take away." Writing for the Court in *Students for Fair Admissions v. Harvard,* Chief Justice Roberts declared that no longer will it allow smug appeals to "professional" expertise to justify the academy's claim to remain free of judicial scrutiny.[110] Whether this portends a more sweeping end to judicial deference and thus the academy's autonomy is as yet unclear. What is more important for my purposes is a more specific issue that is elided when academic freedom is conflated with institutional autonomy: Within the university, who is to be granted the authority to decide such matters and hence in the name of academic freedom to enjoy this deference?

In *Regents of the University of Michigan v. Ewing*, decided in 1985, Justice Stevens argued that the judiciary should not intervene in Ewing's dismissal from the university because that decision was made by those most qualified to do so, i.e., its faculty:

> The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an

108. Regents of Univ. of California v. Bakke, 438 U.S. 265, 313 (1978).

109. *Id.* at 312.

110. Students for Fair Admissions v. Harvard, 143 S. Ct. 2141 (2023). "The universities' main response to these criticisms," writes Roberts, "is 'trust us.' They assert that universities are owed deference when using race to benefit some applicants but not others. While this Court has recognized a 'tradition of giving a degree of deference to a university's academic decisions,' it has made clear that deference must exist 'within constitutionally prescribed limits.'" *Id.* at 2152.

> evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[111]

Were Stevens's argument in this case to be generalized, we might conclude that the university is entitled to independence from judicial intervention when authority over its academic matters, broadly construed, is vested in the hands of the faculty rather than those who do not possess the "professional judgment" requisite to this task. Were this conclusion to be endorsed by the Court, which it has not, that would go some distance toward making good on Areen's insistence that academic freedom will not be complete until faculty are not merely free from external constraint but also free in their capacity as "architects" of the universities they collectively govern.

This line of reasoning will be nipped in the bud, however, if the faculty's claim to academic freedom is categorically denied on the ground that this prerogative is exclusively vested in those legally entitled to rule the university. Consider, for example, *Urofsky v. Gilmore*, which was decided in 2000 by the Fourth Circuit and later rejected for review by the Supreme Court. *Urofsky* concerned the constitutionality of a Virginia law that restricted the access of state employees, including faculty members, to sexually explicit materials on computers purchased using taxpayer funds. Six university instructors sued on First Amendment grounds, arguing that this prohibition was unconstitutional as it applies to all state employees and, even if found valid for others, nonetheless violated the petitioners' right to academic freedom by circumscribing inquiry into, among other matters, human sexuality, obscenity statutes, and the racy verse of certain Victorian poets.

Responding to the suit's claims about government employees in general, Judge Wilkins declared that "the regulation of state employees' access to sexually explicit material, in their capacity as employees, on computers owned or leased by the state is consistent with the First Amendment."[112] To explain why that is so, Wilkins argues that the state must be granted considerable latitude in regulating the conduct of those whose salaries it pays and whose work it enables by furnishing its instrumentalities, in this case, computers. Citing the state's interest in efficient delivery of the services it provides, Wilkins concludes that the statutory restriction in question raises no First Amendment concerns because it is a rightful exercise of the state's authority to tell its employees what they can and cannot do while on the job.

Turning to the petitioners' appeal to academic freedom specifically, Wilkins denies that members of the professoriate possess a constitutional right to determine without interference the subjects and methods of their teaching and scholarship. Why is that so? "[T]o the extent the Constitution recognizes any right of

111. Univ. of Michigan v. Ewing, 474 U.S. 214, 225 (1985).
112. Urofsky v. Gilmore, 216 F.3d 401, 404 (4th Cir. 2000).

'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors."[113] Although the Supreme Court has identified academic freedom as a "special concern" of the First Amendment, explains Wilkins, it has never found unconstitutional a state regulation on the ground that it violates a right peculiar to faculty. What the Court has recognized instead, as exemplified by Frankfurter's concurring opinion in *Sweezy*, is "an institutional right of self-governance in academic affairs."[114] This is not to say that faculty members can never raise claims about deprivation of their rights under the First Amendment, but it is to say that they may only do so in their capacity as private citizens alleging unconstitutional infringements by state actors. The speech of faculty members, concludes Justice Luttig, "is subject to the limitations of the First Amendment certainly no more, but just as certainly no less, than is the custodian's."[115]

The ruling in *Urofsky* is possible only because, as noted earlier, the judiciary has yet to articulate a coherent account of academic freedom as well as its constitutional status. *Urofksy* contradicts *Sweezy* and *Keyishian*, both of which represent academic freedom as a right that can be claimed by individual faculty members in denying the state's unconstitutional mandates. Wilkins merely inverts this construction, however, when he concludes that academic freedom, if not vested in individuals, must therefore be located in the institutions that employ them. Neither argument adequately understands that academic freedom is not a right that inheres in individuals or institutions, but, instead, is the constellation of conditions that enable faculty members to do their collaborative (but not for that reason necessarily harmonious or even amicable) work in their capacity as members of a self-governing profession.

Urofsky, though, is far more pernicious than are *Sweezy* and *Keyishian*. The argument in favor of institutional academic freedom, Mathew Finkin explains, provides far too much constitutional cover for trespasses on the autonomy of faculty work by those who monopolize the power of rule within:

> [T]he interests insulated are not necessarily those of teachers and researchers but of the administration and governing board; the effect is to insulate managerial decision making from close scrutiny, even in cases where the rights or interests of the faculty might be adverse to the institution's administration. Consequently, the theory of "institutional" academic freedom would provide institutional authority with more than a prudential claim to judicial deference; it provides a constitutional shield against interventions that would not ordinarily seem inappropriate, for example, judicial intervention on behalf of a faculty whose civil or academic rights had been infringed by the institution.[116]

113. *Id*. at 410.
114. *Id*. at 412.
115. *Id*. at 425 (Luttig, J., concurring).
116. Matthew W. Finkin, *On 'Institutional' Academic Freedom*, 61 TEX. L. REV. 817, 851 (1983).

To paraphrase: When institutional autonomy is justified in the name of academic freedom, and when that freedom is itself considered a "special concern of the First Amendment," and when respect for that freedom is presented as a rationale for judicial deference, the effect is to immunize from challenge those who hold the legally-mandated authority to rule the university. To do that is to confirm the faculty's status as so many heteronomous subjects, which in turn renders fulfillment of the academy's unique purpose unattainable. Ironically, affirmation of academic freedom in its institutional guise, when cited in defense of the power of boards and/or its executive officers to rule as they will, is the condition of free inquiry's impossibility.

True, affirmations of so-called institutional academic freedom may sometimes shield colleges and universities from state interference, as they did for a time with respect to affirmative action policies. But this same claim can be invoked not to protect faculty members from intrusions upon free inquiry's conduct but, instead, to offer a constitutional justification for their subjection to employer discipline.[117] To afford First Amendment protection to that rule is to add yet another layer of obfuscation to capitalism's ideological characterization of the employee/employee relationship. The constitutionalization of executive prerogative affords what Elizabeth Anderson calls private government a patina of legitimacy and so bolsters the academy's autocratic constitution. Yes, this antieducational reality may sometimes be tempered by adherence to the norms of shared governance and/or the due process protections of tenure. But these are easily jettisoned without much fuss, as a rash of red state legislatures are now demonstrating; and, when that occurs, the harsh dictates of at-will employment soon reassert themselves, as any member of America's army of surplus instructors will be quick to remind us.

C. Folding Academic Freedom Within Capitalist Employment Law

I turn now to one last strand of constitutional jurisprudence that implicates academic freedom within specifically public universities: the so-called government employee speech doctrine. This strand was anticipated in *Urofsky*'s representation of faculty whose freedom may be restricted by the state in virtue of their status as government employees, and it finds its most recent articulation in the contention that Florida's public university faculty have no greater freedom on the job than do the clerks in the Department of Highway Safety and Motor Vehicles. On these accounts, the unfreedom of faculty in their capacity as employees is implicit within the contracts they sign as a condition of their appointment. The common law presumptions built into those agreements, as outlined in Part III, serve as one of the principal vehicles through which the autocratic academy,

117. Nearly four decades after Finkin expressed his concerns about academic freedom's conflation with institutional autonomy, Nathan Adams offered this disheartening update: "A majority of courts now insist that, if an independent liberty, academic freedom is institutional, notwithstanding that it was conceptualized originally as protecting faculty from interference by university trustees . . . When the two kinds of academic freedom cross swords, institutional freedom generally prevails." Adams, *supra* note 78, at 3.

especially when shielded from judicial scrutiny by academic freedom's conflation with institutional autonomy, organizes and wields its power.

At first blush, the government employee speech doctrine may appear to operate as a constraint on that power whereas, in its current form, it does the opposite. The purpose of that doctrine is to indicate when a governmental agency's authority to discipline its employees must give way to the First Amendment's right of free expression. This limitation, Metzger explains, operates against the backdrop furnished by the judiciary's long-standing practice of granting to employers much greater latitude in commanding their employers than it cedes to the state in coercing its citizens:

> In the lineup of potential wrongdoers, the state appears either as a governing power seated in the federal, state, or local lawmaking and law-enforcing institutions of the country, or as an employing authority resident in such bodies as public school boards, academic governing boards, and municipal service departments. In first amendment cases affecting teachers, the Supreme Court has tended to look with particular suspicion on the state as *government*—the state empowered to compel the testimony of witnesses and punish those who balk, to prescribe loyalty oaths and proscribe subversive activities, to issue commands to public agencies and induce or force private ones to obey its will. Far less has the Court been inclined to mistrust the state as employer—the state that may wrong individuals on its payroll, but cannot issue subpoenas, pass sweeping, repressive legislation, or send anyone to jail.[118]

Within a liberal capitalist order, Metzger might have also said, employment relationships are located within the private sphere where they are said to be governed by contracts freely entered by parties presumed to be equal. This is so even when an employer happens to be a public agency, and hence courts have generally agreed that these actors may rule their employees as they see fit except when there are compelling constitutional reasons to do otherwise.

The basic parameters of the doctrine that outlines the grounds for exceptions to this rule were first set forth in *Pickering v. Board of Education*, decided in 1968. In that case, a public school teacher had published a letter to the editor of a local newspaper in which he criticized the school board, principally on the ground that it was spending too much money on athletic programs and not enough on academic matters. In response, the school board dismissed Pickering who then sued the board, alleging a violation of his First Amendment rights.

In its ruling, the Supreme Court rejected the nineteenth century representation of employment as a privilege that, as is true of any servant in relation to a master, can be withdrawn at any time with or without cause. Echoing Douglas and citing *Keyishian*, the Court held instead that teachers may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to

118. Metzger, *supra* note 23, at 1292.

comment on matters of public interest in connection with the operation of the public schools in which they work."[119] The Court conceded, however, that "the State has interests as an employer in regulating the speech of employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry."[120] Specifically, the state has an interest "in promoting the efficiency of the public services it performs through its employees"[121] who, in this role, are conceptualized as subordinate instruments of government policy.

The state's interest must, therefore, be weighed against the free speech rights Pickering retains as a citizen, and, in this instance, the Court could find no interest that outweighed Pickering's right to speak his mind on a matter of public concern. Indeed, the Court concluded, within a democracy, everyone has an interest in hearing from those "members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent," and, precisely because they are experts in such matters, teachers must "be able to speak out freely on such questions without fear of retaliatory dismissal."[122] *Pickering* thereby vindicates the First Amendment rights of employees in their capacity *as citizens* so long as their speech addresses issues of public concern, in which case the burden rests with the authorities to show that their expressive conduct significantly disrupts the provision of governmental services. True, the adoption of a balancing test invites employers to expand their representation of what qualifies as disruption; but the fact remains that *Pickering* goes some distance toward immunizing from retaliation what the 1915 Declaration called "extramural utterances," i.e., utterances made outside the confines of their employment by those who work within.

The more significant post-*Pickering* rulings have emerged from employment sectors quite unlike the school, and their rulings have proven ill-equipped and indeed indisposed to acknowledge the unique considerations that distinguish academic freedom cases from generic workplace disputes.[123] That is so because at-will employment remains the default within these nonacademic workplaces and because, as explained earlier, the judiciary has yet to develop an independent

119. Pickering v. Board of Education, 391 U.S. 563, 568 (1968).
120. *Id.*
121. *Id.*
122. *Id.* at 572.
123. On this point, *see* Neal Hutchens and his co-authors:

> In current constitutional academic freedom debates, some commentators contend public college and university faculty possess no First Amendment speech rights beyond those afforded to any other public employees, while others advocate that specific constitutional protections exist for at least some forms of professorial speech and expression. A cause and symptom of this legal uncertainty stem from a failure by courts to articulate a set of legal standards based on a constitutional conception of academic freedom to adjudicate faculty speech claims. Instead, legal standards governing the speech rights of public employees in general have provided the dominant legal framework when public higher education faculty assert First Amendment speech and academic freedom claims against their institutions.

Hutchens et al., *supra* note 79, at1033.

doctrinal basis for the form of freedom that is essential to the academy's distinctive work. The question that hangs in the balance today, therefore, is whether the *Pickering* test, as trimmed by these later cases, will govern the public university and, if so, whether that will have the effect of foreclosing the free inquiry that is the academy's end.

A quarter century after *Pickering*, the Court decided *Connick v. Myers*. Upon learning that she was to be transferred against her wishes to a different department, Sheila Myers, an assistant district attorney in Louisiana, circulated to her co-workers a questionnaire that implicitly questioned the judgment of their supervisors, including the district attorney, Harry Connick, Sr. In response, Connick charged Myers with insubordination and fired her. Myers then sued, claiming that she had been discharged wrongfully because her actions were protected by the First Amendment's Free Speech Clause.

Ruling against Myers, the Court found that the purpose of her questionnaire was chiefly to air a private grievance and, as we would anticipate given liberalism's categorical separation of the economic from the political sphere, that federal courts are not the appropriate forum for adjudicating complaints brought by disgruntled employees. True, one of the questions posed by Myers arguably raised an issue of public concern, for it asked whether her fellow employees had ever felt pressured to engage in political campaigns. Even if this point were to be conceded, the Court stated, Connick's managerial prerogatives would still outweigh the public's interest in this issue, and that is so because Connick was not seeking to suppress Myers's right to participate in public affairs but, instead, to ensure discipline within the workplace. Furthermore, the Court concluded, the district as well as the appeals court, each of which had ruled in Myers's favor, imposed an unduly onerous burden on the state when it required the district attorney to demonstrate that her speech had in fact "substantially interfered" with its efficient operation.

Although *Connick*, citing *Pickering,* formally rejects the characterization of employment as a rightless privilege, the majority opinion goes out of its way to emphasize this construction's reconfiguration in at-will form; and that, in turn, has the effect of shifting the Court's orientation away from the rights of the employee and toward the prerogatives of the employer. Writing for the Court, for example, Justice White contends: "The limited First Amendment interest involved here did not require petitioner to tolerate action that he reasonably believed would disrupt the office, undermine his authority, and destroy the close working relationship within the office."[124] After all, Myers served "at the pleasure of"[125] Connick and, for that reason, he possesses the prima facie authority to fire her whenever he sees fit. That termination "may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the

124. Connick v. Myers, 461 U.S. 138, 154 (1983).
125. *Id.* at 140.

dismissal are alleged to be mistaken or unreasonable."[126] Here, the discretionary authority of employers is wedded to the employee's lack of any right to receive a reasoned account of its exercise, and the judiciary's deference does no more than grant this fiat a sheen of legality. The upshot of *Connick*, in sum, is to depreciate *Pickering's* balancing test in favor of an instrumental calculation that affords pride of place to the government's interest in workplace discipline and workforce obedience.

It is against the backdrop furnished by *Pickering*, as reworked by *Connick*, that we should read *Garcetti v. Ceballos*. As much as any other recent case, *Garcetti* has vexed the AAUP because it clearly indicates why the cause of constitutionalized academic freedom is now so uncertain and, arguably, was ill-advised from its inception. Decided in 2006, *Garcetti* arises from a complaint made by a deputy district attorney, Richard Ceballos, who contended that he had been subject to retaliatory action after challenging the accuracy of an affidavit used by Los Angeles County police officers to obtain a search warrant. Although Ceballos communicated his concerns in a written memo and recommended dismissal of the case, his supervisor, Gil Garcetti, elected to proceed with its prosecution and, according to Ceballos, then reassigned him to another position, transferred him to a different courthouse, and denied him a promotion. In response, Ceballos filed a 42 U.S.C. § 1983 suit, alleging that Garcetti had deprived him of his rights in violation of the First and Fourteenth Amendments.

By a 5-4 vote, in *Garcetti*, the Supreme Court departed from what, after some additional refinement, had come to be known as the *Pickering-Connick* test. This sequential test, according to Nathan Adams's formulation, asks:

> (1) whether the employee's speech is fairly characterized as constituting speech as a citizen on a matter of public concern, (2) whether the employee's interest in speaking outweighs the government's legitimate interest in efficient public service, (3) whether the speech played a substantial part in the government's challenged employment decision, and (4) whether the government has shown by a preponderance of the evidence that it would have made the same employment decision even in the absence of the protected conduct.[127]

Garcetti flattens this nuanced test by holding that whenever public employees make statements or take action "pursuant to their official duties," by definition, they are ineligible for First Amendment protection and so are not shielded from employer discipline. The Court thereby shifts its focus away from what an employee says as well as whether that content is a matter of public concern and focuses instead on the occupational role and corresponding duties of that employee. In this instance, the memo Ceballos composed had been written in his official capacity as a paid employee and, for that reason, he could not seek

126. *Id*. at 146.
127. Adams IV, *supra* note 78, at 25.

judicial remedy on the ground that his free speech rights had been violated when he was punished by his supervisor.

"When a citizen enters government service," explained Justice Kennedy for the Court's majority, "the citizen by necessity must accept certain limitation on his or her freedom."[128] The scope of those restrictions is considerable because, as Metzger noted, the government in its capacity as an employer "has far broader powers than does the government as sovereign."[129] Accordingly, and at odds with Justice Douglas in *Adler*, public employers may regulate and discipline their employees in ways that would not survive First Amendment scrutiny if applied to citizens generally. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created,"[130] and that power must be substantially complete if the state is to furnish its services effectively. As an employer, the state may therefore rightly impose sanctions up to and including termination of any employee whose conduct does or harbors the potential to disrupt the workplace by, for example, questioning the authority of superiors, impairing the morale of other workers, undermining client confidence, or acting as anything other than a subordinate.[131]

Within the world according to *Garcetti*, the first question a court must ask is not about the importance of speech to the public, as was the case in *Pickering*, but whether that speech falls within an employee's job description, in which case the First Amendment and hence appeal to the *Pickering-Connick* test is precluded. So long as an employee's speech can be located within that description–which, recall, can never be exhaustively specified given the common law doctrine of contractual incompleteness–that conduct will of course be enacted by the employee but in fact is that of the government; and because the First Amendment does not prohibit the government from determining the content of what it says, those officials who are structurally positioned to do so are entitled to punish any personnel who deviate from that content. *Garcetti,* in sum, represents a marked expansion of the state's managerial prerogative as well as a significant constriction of the power of those who, according to its representation, are so many compliant mouthpieces.

Not surprisingly, outside the university, *Garcetti* has had the effect of amplifying the relations of domination and subordination inherent within capitalist employment practices, especially but hardly exclusively as they apply to those who call attention to misconduct within government agencies:

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128. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

129. Metzger, *supra* note 23 at 1293.

130. Garcetti, 547 U.S. at 422.

131. For an account of the factors that have been found to impede a government agency's efficient operation and so warrant disciplinary action, see McVey v. Stacy, 157 F3d 271, 278 (1998).

> Although public entities frequently hire workers specifically to flag dangerous or illegal conditions, *Garcetti* now empowers the government to punish them for doing just that. The many examples include police officers terminated after reporting public officials' illegal or improper behavior, health care workers disciplined after conveying concerns about patient care, primary and secondary school educators punished after describing concerns about student treatment, financial managers fired after reporting fiscal improprieties, and a wide variety of public employees discharged after detailing health and safety violations.[132]

As Helen Norton explains, *Garcetti* thereby "frustrate[s] a meaningful commitment to republican government by allowing government officials to punish, and thus deter, whistleblowing and other valuable work-related speech that would otherwise facilitate the government's accountability for its performance."[133] Or, we might say, *Garcetti* amplifies the autocratic character of employment within state agencies but perversely justifies that rule by invoking the authority of the people whose will these agencies are said to serve.

Whether *Garcetti* applies to the public university figured as a state employer is a question the Court leaves unanswered, and that lacuna is easily read as a tacit acknowledgement that the work performed by higher education faculty does not fit neatly within its confines. *Garcetti* deems persons either employees who speak about matters that are not of public concern or, alternatively, as citizens who comment on matters that are of such concern. But the work of faculty members, in their capacity as scholars and educators, fulfills a public concern in the very act of discharging their contractual obligations as state employees. As such, their work appears to fall simultaneously within the domain available for protection by the First Amendment as well as that which does not. Sensing this problem, in his dissenting opinion, Justice Souter expressed his "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.'"[134] Justice Kennedy acknowledges this concern, but does little to alleviate Souter's anxiety: "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."[135] Demonstrating once again its failure to articulate an adequate jurisprudential theory of academic freedom, the Court effectively defers this question to another day and so leaves open the

132. HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 62 (2019).
133. *Id*. at 63.
134. Garcetti, 547 U.S. at 438 (Souter, J., dissenting).
135. *Id*. at 425.

possibility that on that day it may decide that the ruling in *Garcetti* applies to faculty members as fully as it does to Richard Ceballos.

Should that day come, free inquiry will become impossible and the university will qualify as a university in name alone. If the academy's inquiry is to remain free, the state and its agencies must be categorically *denied* the authority to exercise the control that, according to *Garcetti*, they rightly exercise over all other public employees. Recall that the overarching duty of the professoriate, according to the 1915 Declaration, is to challenge received wisdom because that is the necessary condition of advancing knowledge. Essential to fulfillment of this professional obligation is the autonomy, whether in the conduct of scholarship or teaching, to do as professors think best in light of currently accepted canons of discipline-based practice. That, the 1915 Declaration contends, is the "office" of a professor, which cannot be collapsed into a faculty member's "official" duties, as stipulated within an employment contract. To hold otherwise, as *Garcetti* does, is to negate a condition that free inquiry cannot do without.

To deny faculty members the discretionary authority that is indispensable to their identity as professionals is to render them unable to do their jobs; and, if they cannot do their jobs, the 1915 Declaration tells us, they cannot deliver the epistemic goods that may discomfit some today but will redound to the benefit of all tomorrow. Should, for example, the state of Florida forbid its public university faculty from teaching about the reality of structural racism, as it has effectively done via Stop WOKE, those employees will be unable to perform the duties that, according to the AAUP, are protected by academic freedom. Should they nonetheless dare to teach what is now forbidden, according to *Garcetti*, they will violate their "official duties" as prescribed by their state employers and hence be subject to discipline up to and including termination. The possibility of contesting that discipline by appealing to the First Amendment will be shut down unless faculty members can persuade a court that they are speaking not as public employees but as private citizens about public matters that fall outside the scope of their "official duties." The absurd implication is this: Unlike Pickering whose contribution to public discourse was commended because of his expertise in matters educational, post-*Garcetti* faculty can most plausibly claim First Amendment protection for their speech when they address matters about which they know next to nothing and only when there is no chance they will be considered professionals worth listening to.

Today, the AAUP finds itself between a rock and a hard place. In the amicus brief it filed in conjunction with the challenge to Stop WOKE, the AAUP argued that this case "is best analyzed under the *Pickering-Connick-Garcetti* line of cases."[136] Having conceded that point, which it cannot help but do given its endorsement of academic freedom's "constitutionalization," the AAUP must now fight its battles on turf that misrepresents the classroom as a site whose

136. Brief for the American Association of University Professors as Amicus Curiae Supporting Plaintiffs-Appellees at 23, Pernell v. Lamb, Nos. 22-13992 & 22-13994 (11th Cir. June 23, 2023).

purpose is to ensure the "efficient delivery" of government services. To offset the pernicious implications of this characterization, the AAUP must argue for a professorial exception to the ruling in *Garcetti* based primarily on an expression of hope included in a dissenting opinion; and to make that claim the AAUP must declare that when professors speak pursuant to their official duties, unlike all other government employees, they alone are afforded shelter by the First Amendment.

Doing exactly that, in its Stop WOKE brief, the AAUP cites several federal cases that have concluded that *Garcetti* does not in fact apply to academic speech when it assumes the form of teaching and scholarship.[137] However, no matter how often the AAUP cites these cases as well as the odes to academic freedom found in *Sweezy* and *Keyishian*, there is little reason to think that the Supreme Court as currently constituted will consider itself bound to respect these precedents; and that is especially so given the Court's recent disdain for universities that seek judicial deference on the ground that they are exclusively qualified to decide their internal affairs. Moreover, should courts do what the AAUP commends, i.e., revert to the *Pickering*/*Connick* test once they conclude that *Garcetti* does not apply, the judiciary will thereby locate academic freedom cases on a terrain defined by capitalist employment law that is conceptually incapable of imagining a self-governing community whose achievement of order does not require a boss. True, the actions of that boss may then be subject to *Pickering's* balancing test, but that test's application can never be truly fair within an economy whose employment law presupposes the authority of one party to command and another's obligation to obey.

Even if the courts continue to hold that the conduct of teaching and scholarship does indeed merit an exception to *Garcetti's* general rule, that will not necessarily secure any immunity from discipline for faculty members who participate in university governance. If that speech, which the AAUP labels "intramural," is deemed part of a faculty member's "official duties," it is entitled to no constitutional protection; and that would appear to encompass hiring, tenure, and promotion decisions; determination of the curriculum as well as the academic program more broadly; and indeed all forms of institutional policy-making, including formulation of the bylaws that stipulate how and by whom power is to be exercised within the university. To fail to safeguard these activities from institutional reprisal, which the *Garcetti* ruling cannot countenance, is to ratify the legally ratified incapacity of faculty to rule the enterprises for which they are so many docile spokespersons.

To illustrate, consider the recent case of Stephen Porter.[138] Trained in survey research methods, this tenured faculty member challenged a proposal to add to the student evaluations used by North Carolina State University a question

137. The cases cited by the AAUP include Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021); Demers v. Austin, 746 F.3d 402 (9th Cir. 2014); and Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011).

138. Porter v. Bd. of Trs. of N.C. State Univ., 72 F.4th 573 (4th Cir. 2023). In January 2024, the U.S. Supreme Court declined to review this case.

concerning its instructors' maintenance of inclusive classroom environments. Charged with a deficit of collegiality, Porter was then removed from a graduate program in higher education; and, in response, he brought suit against the university's board of trustees on First Amendment grounds.

Citing *Garcetti*, the Fourth Circuit Court of Appeals concluded that Porter's criticisms did not qualify as teaching or scholarship but were nonetheless made "pursuant to his official duties" and so were entitled to no constitutional protection. To avoid that conclusion, Souter or someone of like mind would have to plead for yet another exception to *Garcetti's* "official duties" doctrine, in this case, one that extends academic freedom to participation in the conduct of collective self-governance. That, however, would require the judiciary to reject the binary distinction between supervisors and the supervised, managers and the managed, bosses and the bossed, which it clearly considers an indispensable condition of order within governmental and indeed all workplaces; and that, we can predict with some confidence, is a conclusion that the Supreme Court as currently composed is unlikely to tease out of the Constitution any time soon.

In this Part's first section, I suggested that the First Amendment is unable to acknowledge let alone protect the specifically collective dimensions of the form of freedom that is integral to scholarly work. In the second, I suggested that the conflation of academic freedom with institutional autonomy encourages judicial deference to the powers that be within America's autocratically organized universities. In this last section, I have suggested that the government employee speech doctrine is unable to secure the free inquiry of those who are hired *by* the state but are not paid to speak *for* the state. To believe that these problems can be remedied absent a fundamental overhaul of the American university's constitution, as the AAUP apparently does, is to indulge in a pipe dream.

VI. A THIRD WAY: THE "CORPORATE" CONCEPTION OF ACADEMIC FREEDOM

In Part II of this essay, I asked about the purpose of the university and answered by pointing to the project of free inquiry. I then urged that we think of academic freedom as the constellation of conditions that enable this project to flourish. Furthermore, I suggested that these conditions must include the academy's capacity to fend off those who would encroach on this project's autonomy but also the capacity of the scholarly community to develop from within its own disciplinary practice the rules and standards that govern free inquiry's conduct. These are correlative sides of the same coin; and, together, they comprise what I call the academy's constitution.

For reasons elaborated in Parts IV and V, neither the AAUP's appeal to professionalization nor its later turn to the First Amendment have sufficed to secure academic freedom and so safeguard free inquiry. That is so because both formulations were articulated in opposition to and for that reason are irreducibly shaped by the American university's organization as an autocracy, as supplemented by work's organization in accordance with capitalist labor law. The professional account was conceptualized first and foremost as a strategy for mitigating the

threat posed to free inquiry by external lay governing boards; and the 1915 Declaration's argument on behalf of tenure is essentially a compromise devised to constrain those boards' penchant for ruling by fiat but without denying their lawful authority to do exactly that. So, too, the First Amendment account was chiefly developed to temper the arbitrary authority of government employers to hire and fire as they will but without categorically rejecting the authoritarianism inherent within capitalism's default mode of employment.

If nothing else, the radical right's recent interventions within U.S. higher education have demonstrated why these strategies will not do. These ill-fated strategies have proven palliative at best and so, I would suggest, now is the time to address the underlying ailments that incapacitate free inquiry rather than seeking to meliorate their symptoms. That in turn calls us to rethink the university's constitution, by which, once again, I mean how the academy marshals, distributes, and exercises power and, of particular concern in this Part, how it organizes the power of rule.

This is not the sole enabling condition of free inquiry since, clearly, the academy also requires, for example, control over sufficient material resources to sustain this distinctive form of work. The question of power, however, is especially pressing since neither of the accounts of academic freedom that emerged in the twentieth century afforded it the attention it merits. Whereas the 1915 Declaration was disabled from doing so by its Enlightenment conviction that knowledge's authority requires its categorical separation from power's intrigues, the account grounded in the First Amendment has placed far too much faith in the capacity of judicial affirmations of abstract right to offset power's machinations, political as well as economic. My contrary contention is that the project of free inquiry presupposes and demands a durable infrastructure of power and, furthermore, that this infrastructure is not an external means to this end but, rather, an immanent condition of its realization. Should this architecture, to recall Areen's term, be destroyed, this project will be no more and, for that reason, the academy's reconstitution of power is its necessary condition as well.

Here, I cannot provide a comprehensive account of the American university's possible reconstitution, but I can offer a partial delineation of certain of its key predicates. Specifically, in Section A, contrary to those who bemoan the contemporary university's "corporatization," I suggest that the academy's constitution as a corporation, properly understood, is a crucial condition of the autonomy that enables the university to govern its own affairs and so safeguard its distinctive work. In Section B, I argue that if the academy's constitution as a corporation is to provide the legal foundation for a third conception of academic freedom, its powers must be organized not autocratically, as is now the case, but democratically. In Section C, using tenure to illustrate my point, I indicate how this reconstitution entails a shift in the status of faculty members from that of subordinate employees to that of colleagues within a self-governing body politic. Finally, in Section D, to ward off a possible misconstruction of my argument, I explain how the conduct of free inquiry is analogous in certain ways to the practice of

democratic politics but is not for that reason to be conflated with it. If the university's constitution in the form of an incorporated democratic republic is worth considering, I conclude, that is not because this way of regulating its specifically political affairs is identical to the conduct of free inquiry but, rather, because it provides a more congenial home for that inquiry.

A. The Corporate University

The professoriate, as envisaged by the 1915 Declaration, is a corporate entity in the sense that it is an association of colleagues engaged in discipline-based inquiry whose defining feature is the perpetually provisional and hence endlessly revisable character of its epistemic claims, no matter how well established they may be at any given moment in time. Most American colleges and universities are corporate bodies in a second sense as well, for they are legally structured as corporations by means of the charters, state constitutions, or enabling acts that afford them the status of juridical persons (or, in some cases, as quasi-corporations invested by law with the powers typically afforded to corporations but absent the status of independent juridical personhood[139]). Within the specifically American academy, these juridical persons are governed by a head that is severed from and unaccountable to the body it rules; and it is for this reason that they are appropriately characterized as autocratic.

For reasons explained in parts IV and V, the two senses in which the American university is a corporate enterprise conflict and so render it structurally incoherent. The reconstitution I propose here seeks to resolve this discordance. That does not require a rejection of the academy's constitution in the legal form that is a corporation, but it does require a rethinking of our familiar understanding of what a corporation is.

Today, when we hear the term "corporation," we most often think of its contemporary for-profit manifestations; and, if we are asked to identify specific examples, most likely we will point to behemoths like Facebook, Exxon Mobil, Walmart, and the like. Our citation of these examples suggests that we now think of the corporation as a creature of private actors engaged in the pursuit of self-interested gain within a free-market economy predicated on private property and contractual agreements. This, we have come to believe, is what a corporation is.

To think this, however, is to forget that the corporation has assumed diverse forms since something akin to it was first imagined in ancient Roman

139. *See*, for example, Article X of Montana's constitution, which does not afford this state's public university system corporate legal status but nonetheless grants to its board of regents many of the powers that define juridical persons, including the power to govern its internal affairs: "The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law." MONT. CONST. art. X, §9. For an account of the antidemocratic character of rule within Montana's public universities, see Timothy V. Kaufman-Osborn, *Lawyers, Guns and Autonomy,* INSIDE HIGHER ED (September 11, 2022), https://www.insidehighered.com/views/2022/09/12/montana-campuses-can-ban-guns-what-cost-opinion [https://perma.cc/H5RA-NZW4].

jurisprudence and then perfected in medieval Europe as an essential ingredient in the Catholic Church's struggle to secure autonomy from the state. In America, moreover, from the colonial era until the mid-nineteenth century, corporations were understood not as private entities but as quasi-public agencies granted certain powers by the state but only on condition that those powers be employed to accomplish a purpose that it could not accomplish on its own (for example, canal and turnpike construction). Furthermore, most municipalities in the U.S. are incorporated entities, as are many but not all non-profit organizations. As these examples suggest, the contemporary neoliberal variant predicated on the principle of shareholder primary and fixated on profit maximization is a historically contingent artifact that should not be allowed to monopolize our understanding of what a corporation is or must be.

At bottom, when abstracted from its diverse incarnations, a corporation is a specific way of aggregating, organizing, and amplifying the power of human and nonhuman assets. Unlike other durable formations that do the same, such as the voluntary associations of civil society, the existence of a corporation requires its express creation by law, and what that creation summons into being is a juridical person composed of but irreducible to the natural persons implicated in its constitution. Only because a corporation exists apart from the natural persons that comprise it at any given moment in time does it possess the capacity to endure long after its merely mortal members have expired. Moreover, and unlike an ordinary business partnership, this juridical person is defined by the socialization of its assets in the sense that these goods are owned not by any natural persons, including its shareholders, but instead by this sempiternal entity.[140] Juridical personhood, in sum, is that which identifies an entity as a corporation and thereby renders it a unique way of consolidating diverse kinds of power.

The state's creation of a corporation entails conferring on this artificial person certain powers it would not otherwise possess. For my purposes, the most salient power assigned to corporations is not the power to enter into contracts, to borrow money, to buy and sell property, and so forth, but to engage in self-governance. Unlike unincorporated associations, corporations are granted considerable authority to govern their own affairs, specifically by enacting and enforcing rules applicable to those subject to their jurisdiction. Unlike a voluntary association (think, for example, of an online canasta club), which lacks the authority to adopt rules that bind its members, corporations of all stripes can do so, and that is yet another reason why Anderson is right to call them "private governments." Their status as quasi-governments is reflected in their common statutory representation as "bodies politic," and that in turn explains why the eighteenth-century English

140. The corporation's socialization of property is what we acknowledge when we state that its assets are locked in and hence unavailable for private appropriation by, for example, shareholders who now labor under the neoliberal but mistaken impression that they are the real owners of publicly traded corporations.

jurist William Blackstone also spoke truly when he referred to corporate bylaws as "a sort of political reason to govern" these bodies.[141]

To note that corporations are instruments of governance is not to consider them identical to the state whose creatures they are and whose laws they must obey. However, it does mean that these juridical persons are granted power, within certain parameters defined by law, to rule their internal affairs as they see fit. Corporations, in other words, are not mere administrative arms of the state. The state's delegation of certain powers to corporations does not establish a principal-agent relationship, that is, one that renders the latter nothing but an instrument for accomplishing the purposes or enacting the will of the former. (That, recall, is the premise of those who, making the most of *Garcetti*, now characterize Florida's public university faculty as ministerial employees whose foremost duty is to convey whatever message the state tells them to communicate.) Rather, the powers exercised by corporations are delegated by the state; but, once conferred, these juridical persons enjoy considerable operational independence from their creator.

That independence is apparent, for example, in the customary deference of U.S. courts toward the internal decisions made by universities so long as they can demonstrate fidelity to the policies and procedures adopted to regulate their own affairs. Like any other incorporated body, the university is granted considerable discretionary authority to determine how best to accomplish the educational purpose with which it is entrusted, and that authority *is* its autonomy. The university is thereby positioned not wholly apart from, but in an oblique relationship to the state that grants it the status of a juridical person. Via that concession, the state thereby furnishes to this semi-sovereign entity the means to stand apart from and sometimes frustrate or thwart its maker.

True, the incorporated university remains ultimately answerable to the people in their capacity as the source of the enactment, whether constitutional or statutory, that first called it into being; and, as recent events in Florida illustrate, many legislatures are now seeking to exploit this dependence by transforming public universities into something akin to mere state agencies. What that signifies is not that DeSantis's attorneys are right to advance this representation but, instead, that the corporate powers of public universities are now becoming a significant issue in the fight over the future of American higher education.[142] If this is so, rather

141. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, VOLUME I at 476 (1893).

142. For an example of this emerging fight, consider a 2022 case in which Montana's supreme court upheld the authority of the board of regents to reject the state legislature's effort to overturn the university system's campus firearms policy. Bd. of Regents of Higher Educ. of the State of Mont. v. The State of Mont., DA 21-0605, 2022 MT 128 (June 29, 2022) https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=395212 [https://perma.cc/U232-83YG]. To see how this issue is unfolding elsewhere, see Jessica Blake, *Who's the Boss of Virginia's Public University Boards?*, INSIDE HIGHER ED (November 30, 2023), https://www.insidehighered.com/news/government/state-policy/2023/11/30/virginia-ags-opinion-higher-ed-raises-questions [https://perma.cc/9GRY-AWAP]. For a critique of the answer to this question offered by Virginia's attorney general, see Timothy V. Kaufman-Osborn,

than condemning the academy's "corporatization," perhaps we should seek to reaffirm and consolidate its status as a corporation whose powers of self-governance enable it to resist reduction to a mere political plaything.[143] To forestall that collapse, the university must prove able to stand as a countervailing power, and the corporation's history demonstrates that achievement of this status, although it cannot guarantee this accomplishment, is certainly one of the more effective means of consolidating the power necessary to it.

In sum, the university's constitution as a corporation is a sign not of its corruption by capital, as so many on the left would contend, but of its capacity to govern its own affairs. This of course is the distorted kernel of truth buried in *Urofsky's* affirmation of institutional autonomy in the name of academic freedom. That, though, cannot be the end of the matter since, as we have seen, this conclusion furnishes the premise that justifies freedom's denial to those scholars who are consigned by this ruling to the status of subordinate state employees. To remedy that problem requires not just a reinvigoration of the university's powers to resist external encroachment but also a fundamental reconfiguration of its powers within.

B. Reconstituting the University's Subjects as Citizens

Precisely because a corporation is a legal fiction, it cannot itself exercise the powers of self-governance that accompany this status. A juridical person has no will of its own, and so the natural persons who govern any given corporation are authorized by law to exercise these powers in its name. Those persons in turn are conventionally organized in the form of governing boards, whether of directors, trustees, regents, or whatever title a state's incorporation law specifies. To believe that the existence of these boards necessarily entails the corporation's or the incorporated university's organization in autocratic form is to mistake the familiar with the inexorable.

Within the American university, these boards conduct their internal business democratically insofar as they elect their own officers, adopt as well as amend their own bylaws, and resolve issues by means of debate followed by voting that

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Who Rules Virginia's Public Universities?, ACADEME BLOG (December 21, 2023), https://academeblog.org/2023/12/20/who-rules-virginias-public-universities/ [https://perma.cc/GP44-TH2Z].

143. Less vulnerable to legislative and executive encroachment are those states whose constitutions afford their public universities something akin to the status of a separate branch of government. *See, e.g.*, CAL. CONST. art. IX, § 9: "The University of California shall constitute a public trust, to be administered by the existing corporation known as The Regents of the University of California, with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services." For a proposal to amend Florida's constitution by locating public higher education under a separate article of the state constitution, thereby granting it something akin to the status of an independent branch of government and hence immunizing it from legislative encroachments that usurp its capacity for self-governance, see Joseph Beckham, *Constitutionally Autonomous Higher Education Governance: A Proposed Amendment to the Florida Constitution*, 30 FLORIDA L. REV. 543 (1978).

adheres to the principle of one member/one vote. These boards rule the university autocratically, however, insofar they hold exclusive title to the powers that accompany incorporation and are unaccountable to those who, because they are subjects in the guise of employees, are unfree.

In late medieval and early modern Europe, Metzger notes, the quest to establish this community's freedom assumed the form of a struggle to secure the university's legal recognition as a categorically different sort of corporation: "The key to the autonomy they sought was to gain through the device of incorporation (variously termed *communitas, collegium societas, consortium*) the right to elect their own officers and representatives, to sue and be sued as a single juristic person, and—above all else—to enact the rules and regulations to which they and those who dealt with them had to conform."[144] The achievement of the university's autonomy on this account is a matter of providing for its constitution as a corporation that is a self-governing body politic ruled not by external powers, whether that be the state or the boards whose members it selects, but by those who engage in the free inquiry that renders this entity a university rather than some other kind of enterprise.

To call for the American academy's reconstitution as this type of corporation is no anachronism, for state statutory codes now provide for the creation of what are often called member corporations.[145] Within corporations of this sort, the status of membership is not confined to exclusive governing boards but, instead, is extended to all who engage in the work necessary to accomplish the purposes for which these entities are granted juridical personhood. The members of these corporations establish rules for their self-governance by means of debate followed by voting; governance is exercised either immediately by those members or by representatives elected by majority rule; and these officers remain accountable to and removeable by their members should they fail to fulfill the fiduciary responsibilities with which they have been entrusted.[146]

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144. Metzger, *supra* note 46, at 96.

145. To cite but one example, California's statutory code provides for the constitution of what it calls "member-governed corporations," and it defines as a member:

> any person who, pursuant to a specific provision of a corporation's articles or bylaws, has the right to vote for the election of a director or directors or on a disposition of all or substantially all of the assets of a corporation . . . 'Member' also means any person who is designated in the articles or bylaws as member and, pursuant to a specific provision of a corporation's articles or bylaws, has the right to vote on changes to the articles or bylaws.

CAL. CIV. CODE § 5056 (Nonprofit Corporation Law).

146. We see vestigial traces of this democratic construction of academic corporations within faculty senates. However, given how the American university is now constituted, the work of these bodies can never generate anything but recommendations advanced to those who hold the ultimate power to decide (just as a vote of no confidence in presidents and/or boards is but an expression of collective indignation). To render these bodies truly legislative rather than merely advisory requires their emancipation from an autocratic constitution that, one would like to think, should appear suspect to the citizens of a democratic republic. If it does not so appear, that testifies not to the rightness of the university's autocratic form but to its appearance as something irrevocably given in the very nature of the American academy.

These are the corporations that Blackstone characterized as "little republics;" and what this label indicates is that the officers selected to govern their quotidian affairs are not separate from but remain incorporated members of the bodies politic to which they belong. Any authority delegated to their governors, therefore, is delegated not from the top down, as is the case within American universities, but from the bottom up. The pyramid of power depicted in conventional university organization charts is thereby inverted as those who now occupy its apex become officers who, as the university's public servants, are accountable to the members they represent.

Within the academy so constituted, the incorporated members of this body politic are not employed *by* that academy or work *for* it, but, instead, *are* that university. In this capacity, these members bear ultimate responsibility for fashioning the bylaws that specify how the power of rule is to be exercised, how disputes are to be adjudicated, and how conflicting interests are to be reconciled. Here, the fiduciary duty to secure the conditions necessary for education's end is no longer exclusively vested within an external elite composed of laypersons ill-equipped to grasp that purpose. Instead, this duty is distributed among all who share in the powers of collective self-governance. No rule may be adopted, accordingly, that would have the effect of rendering any member or members subject to unaccountable domination. To do that would be to deprive these persons of their status as members, thereby releasing them from their obligation to safeguard the academy's purpose by ensuring the necessary conditions of free inquiry.

On this account, to participate in the university's collective self-governance *is* an instantiation of its academic freedom; and to say that is to cast a very different light, for example, on what the AAUP calls "intramural utterances." From within the confines of capitalist employment law, this speech will always be problematic because, given the status of employees as subjects, it is not clear why they should be permitted to challenge their employers. The AAUP seeks to circumvent this institutionalized structure of domination by affirming the exceptional character of the work performed by academics; but that will always remain a problematic move within a democracy predicated on egalitarian principles that regard elites of any sort as inherently suspect as well as politically convenient targets of resentment. Moreover, when faculty seek protection for so-called intramural utterances from the courts, as did Stephen Porter, they effectively embrace their own heteronomy by turning to an institution outside the academy to secure their freedom. Within the academy constituted as a member corporation, however, intramural utterances are figured not as so many irksome challenges to those who rule from above, but, instead, as vital affirmations of self-governance, collective autonomy, and shared freedom. On this account, the absence rather than the presence of such challenges is the mark of a university that has lost its way.

To ensure free inquiry's practice, self-governance within the university formed as a democratically organized member corporation must be tempered by certain principles of republicanism. That order must affirm, for example, the rule of law, fidelity to the norms of due process, and the right to dissent. None of this

corporation's members, moreover, may be excluded from full participation in scholarly inquiry in virtue of any elements of their identity that are irrelevant to the assessment of knowledge claims by those who are colleagues and hence peers. Free inquiry, in short, must be predicated on egalitarian principles that cannot be realized within an order in which the power to establish its constitutional conditions, including those that provide for academic freedom, is monopolized by those not subject to its provisions.

The transformation of the university imagined here will not cause power to disappear within some idyllic home of happy harmony. But it does mean that conflict will no longer be structurally organized by the contractually mediated form of domination that is the commodification of academic labor and whose paradigmatic expression, as we saw at Texas Southern, is the power to hire and fire. Nor will the resolution of disputes be structurally organized in accordance with the hierarchical chain of command that the AAUP accepted in 1915 as an incontestable given and that is now being perfected in Florida. Today, in virtue of the finality of their legal authority, those who sit astride the American university can bring any given dispute to an end by means of unilateral fiat and/or by discharging the dissident. The termination of conflict by these means, however, is no longer possible when power remains constitutionally embedded within the academic corporation's members.[147]

C. Reconstituting the University's Employees as Scholars

Within the university constituted as a member corporation, strictly speaking, there are no employers and hence no employees. To become an employee, for reasons explained in Part III, is to become a subordinate who in the final analysis must accept the conditions of employment specified by those structurally positioned to exercise the power to define what they are. When the power of corporate self-governance is organized democratically, those who are now the university's subjects become equal members entitled to take part in exercising powers of rule that each holds with all others. The category of membership grounded in shared scholarly status thus becomes the common denominator as well as the source of collective identity that supplants the binary and mutually exclusive relationship between governing boards and their subjects qua employees.

To see what this reconfiguration of employment might entail, consider its implications for how we might think about tenure. To construe scholarly work as a form of capitalist employment is to render it structurally precarious. That is so because any departure from at-will employment, including tenure, will always

147. If nothing else, this reconfiguration of the American university would enable us to escape the dreary spectacle that unfolds when governing boards and/or their chief executive officers issue unpopular mandates that cause faculty members to respond with expressions of wounded outrage, usually framed in the terminology of shared governance. This ineffectual form of unpolitical engagement, which often generates nothing but entrenchment on the part of the academy's rulers and resentment on the part of the ruled, follows a script that is oddly consoling, chiefly because we know how these incidents will end as soon as they begin.

appear a questionable aberration that violates the free market in labor as well as the formal equality it (falsely) ascribes to employer and employee. As such, tenure is an easy target for those in Florida and elsewhere who call either for its outright abolition or, if that proves not yet possible, for weakening whatever policies now impede summary termination.[148]

To be awarded tenure within a university constituted as a member corporation is to become a citizen within an academic body politic from which one can no more be arbitrarily dismissed than can a citizen be capriciously deprived of this civil status by the state. To secure tenure on this account is not to earn a change in the contractual terms of employment but, rather, to be admitted to a corporate body on the basis of certain qualifications and accomplishments specific to the work of scholars. On this construction, to say that tenured status is of indefinite duration is to remove its holder from the domain within which employment remains the sale of an exchangeable commodity, labor, in return for wages paid for performance of whatever duties are specified (or are unspecified but nonetheless obligatory) within a letter of appointment. Instead, within a member corporation, compensation is more akin to a stipend that enables one to perform well the duties of an office to which one has been elected by one's colleagues. Tenure and peer review are thereby complemented by a form of remuneration that regards scholars as contributors to the academy's purpose rather than as economically rational agents whose interests, according to free market ideologues, are necessarily antagonistic to employers who themselves seek the biggest bang for the smallest buck.

Because one of the defining powers of a member corporation is the authority to determine who shall and shall not be a member, removal of tenured status can only be accomplished by those who are themselves members. Should someone outside that company deprive a professor of this status, whether that be an external lay board, a chief executive officer, or a legislature, that will violate this university's juridical identity as a member corporation. To do so is to injure the dismissed party but also that body politic as a whole by thwarting its members' capacity to govern themselves; and that in turn is to compromise their ability to achieve the purpose for which this university is afforded the rights, immunities, and privileges that accompany incorporation.

To say this is not to render faculty members immune to discharge. But it is to say that they can only be removed for cause, that is, on the ground that they have failed to fulfill the obligations of the office they hold; and it is to say that they cannot be ousted absent a hearing that adheres to the norms of due process and that is conducted by peers. These of course are the same conditions for removal specified by the AAUP in its 1915 Declaration. Within a member corporation,

148. For a review of recent legislative efforts to weaken or eliminate tenure within institutions of higher education including but not limited to Florida, see Jeremy Bauer-Wolf, *Anti-tenure bills stall in state legislatures,* HIGHER ED DIVE (June 2, 2023), https://www.highereddive.com/news/anti-tenure-bills-state-legislatures/651859/ [https://perma.cc/WN9W-XN9Q].

however, these conditions assume a very different character: Should these conditions be contravened by someone external to this body politic, its members may rightly represent this action as a violation of academic freedom but also as an arbitrary exercise of force akin to that in which despots specialize. True, the AAUP may also condemn this action; but, in virtue of its capitulation to the legal form that is the autocratic corporation, it can do no more than wag its finger at those who in the final analysis have done no more than what the law allows.

In the 1915 Declaration, the AAUP insisted that the vitality of the academic enterprise requires the form of freedom that enables unflinching criticism of the disciplinary truths we now consider verified but also all received opinions, conventional practices, and established powers, whether within or without the academy. If that freedom is to thrive, we must dismantle the vertical relations of unaccountable power that, today, serve chiefly to demoralize those who neither possess nor exercise the prerogatives of genuine membership within a duly-constituted academic body politic. Absent that reconstruction, to call these subjects faculty *members*, as we often do today, is to mythologize their situation within an institutionalized configuration of power that mocks this characterization. What we should say instead is that these subjects may one day become members, but only when the university is reconstituted as a corporation predicated on the principles of democratic republicanism.[149]

D. How the Academy is (and is not) a Democracy

To conclude Part VI, let me briefly anticipate and respond to a possible misconstruction of my argument in favor of the American university's reconstitution as a member corporation. Although they are structurally analogous in certain ways, I do not mean to conflate the conduct of free inquiry with the conduct of democratic politics. Rather, my contention is that a university organized on the principles of democratic republicanism will provide a better residence for free inquiry than does its current home.

Like democratic politics, the conduct of free inquiry is predicated on the ideal of a self-governing community composed of those who are equal in their capacity as members of that community. Elizabeth Anderson explains:

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149. I recognize that my preliminary and partial account of the academy organized as a member corporation poses as many questions as it answers. Perhaps most notably, my account does not address the status of those who do work for the university but are not among the faculty. To deny those now designated as "staff" any role in the governance of the university constituted as a member corporation would be to reinstate the logic of autocracy *within* that corporation (as opposed to the current situation which categorizes faculty and staff alike as employees and hence as subjects ruled by those *without*). This is not an insuperable problem insofar as member corporations often identify diverse classes of members and assign different governance responsibilities to each. What the university qua membership corporation cannot do is to render voiceless any group of persons who perform work necessary to accomplishment of its purpose. To hold that only faculty do so is an elitist presumption that renders invisible the labor of those without whom faculty could not conduct their own. That labor is an immanent part of the academic endeavor rather than an extrinsic means to completion of the academy's "real" work and, as such, those who do this work must not be excluded from this corporation's constitution of rule.

> In political democracies, equality of citizenship means that all citizens are equals in respect of their rights, and entitled to demand a justification of public policies which are open to their scrutiny. In epistemic democracies, equality means that all communicatively competent persons are acknowledged as having the status of inquirers: they must be regarded as reason-givers and reason-takers, and their speech interpreted accordingly. All inquirers have a status that entitles them to call upon others to explain and justify their beliefs, and to offer reasons for them to change their beliefs, which means that others are obliged to listen and respond in kind. No one is assigned a second-class form of cognitive authority, or deprived of cognitive authority altogether, on account of his or her race, gender, class, ethnicity, or other ascribed social status.[150]

Anderson's analogy, however, only works up to a point. That is so, first, because the methods by which we arrive at what we now take to be true within scholarly communities differ from the processes by which we arrive at collective decisions within democratic polities; and, second, because the collaborative fruits of the former are properly called knowledge whereas democratic deliberation engenders collectively held and, ideally, well-informed opinion.

In collective decision-making about, for example, how best to employ the capital assets vested in the juridical person that is a corporation, those who belong to the academy organized as a democratic republic are equals in the sense that no one, absent selection by their fellow members, is structurally entitled to exercise greater authority than is any other. That equality is achieved by crafting a constitutional form that does away with the external lay boards that now monopolize the power to rule and, in addition, repudiates work's organization as an inegalitarian relationship between those who command and those who are commanded.

In specifically scholarly affairs, however, this community is not composed of so many equal citizens whose differences of opinion are resolved by counting votes. Instead, to confer the title of knowledge on any given candidate for this status is to affirm that it has been critically validated by what Anderson calls the "communicatively competent." In this sense, scholarly inquiry is inherently antidemocratic insofar as it presupposes disciplinary communities of colleagues defined by their specialized expertise, and by definition expertise is not something possessed by everyone. Indeed, should the principle of majority rule based on the precept of one-member, one-vote come to govern scholarly inquiry, the university will no longer be an academy.[151]

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150. Elizabeth S. Anderson, *The Democratic University: The Role of Justice in the Production of Knowledge*, 12 SOCIAL PHILOSOPHY AND POLICY 186, 205 (1995).

151. This essential characteristic of free inquiry is misrepresented whenever the Supreme Court, as it sometimes has, justifies academic freedom by citing Justice Holmes's 1919 contention "that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919). As I noted earlier, to say this is to suggest that the identification of what we now regard as true is to be decided by the popularity of an opinion, as that is determined by those figured as consumers in the marketplace of ideas, rather than by its certification via a process of peer review conducted by those qualified to engage in that review.

The conduct of knowledge-making takes shape as a unique form of collective practice that entertains claims based in appeals to reason and evidence in light of established but never immutable disciplinary conventions, and in this sense scholarly inquiry is necessarily and always constrained. This practice is not the sort guaranteed by the U.S. Constitution, and that is so because the First Amendment protects the opinions of the ignorant as fully as it does the informed. Within the realm secured by the Free Speech Clause, one may deny the Holocaust's occurrence whereas, within the community of scholars, that claim is rightly rejected by those who know better and who, because they know better, may rightfully exclude those who do not. To say that the university in the conduct of its specifically academic affairs must furnish a place for both, or that it must provide a "balance" of opinions, or, more fashionably, to say that it must entertain the broadest possible diversity of viewpoints, is to forget that the university's end is to subject all opinions to critical scrutiny and thereby determine which do and which do not deserve to be considered credible.

Within the academy organized as a democratic member corporation, binding institutional decisions about its collective affairs are made by the citizens of this body politic. Those decisions, however, are not subject to any specifically scholarly processes of validation such as peer review or experimental replication. Instead, they are the product of deliberations that, ideally, involve the provision of reasons and evidence but do not, for that reason, become anything other than so many shared opinions generated via debate among equals within a self-governing community. These decisions, therefore, cannot present themselves as true in the sense enabled by the processes of free inquiry conducted among colleagues and, accordingly, cannot claim protection by the academic freedom that is essential to the possibility of this inquiry.

The opinions that are the stuff of those decisions may, however, claim protection in accordance with the right to dissent that must be incorporated within the constitution of any member corporation committed to unfettered debate about how best to manage its political as opposed to its epistemic affairs. That right must be guaranteed not because every opinion is of equal merit, but because the university must be an egalitarian public sphere within which everyone may speak their mind; and that presupposes that no one possesses the power, whether enacted by trustee decree or administrative fiat, to silence or dismiss those with whom they disagree.

VII. "WHAT IS HAPPENING IN FLORIDA?"

What is happening in Florida today is the delayed detonation of two ticking bombs, both of which were hidden in plain sight within the 1915 Declaration: first, its failure to offer a thorough critique of the academy's constitution as an autocratic corporation and, second, its failure to contest the faculty's status as employees subject to that corporation's rulers qua employers.

True, the AAUP did recognize that threats to the professional professoriate will invariably emerge from the academy's internal governing boards, from

external state legislatures, and/or from public opinion. What the AAUP did not foresee is what we now witness in the Sunshine State: a governor who aims to reduce its public universities to the status of compliant administrative agencies; a legislature that seeks to micromanage the university's affairs on behalf of those threatened by inquiry into entrenched racial, gendered, and class injustices; and, finally, their joint propagation of a cynical ideology that justifies this antidemocratic concentration of power on the grounds that only this will enable "the people" to regain their rightful control over universities now in the grip of radical leftists committed to a "woke" agenda. No example better illustrates what Scheppele labels "autocratic legalism;" and there is no more perfect mouthpiece for this project than New College's most bombastic trustee: "Despite recent shibboleths about 'academic freedom,' state legislators and boards of trustees have the right—the duty—to redirect, curtail, or close down academic programs in public universities that do not align with the mandate of the taxpayers who generously support them."[152] Evisceration of the academy's autonomy in the service of established elites but justified as an expression of popular will is a nightmare the AAUP never envisaged.

Nor did the AAUP anticipate that whatever progress was made in securing the institution of tenure following issuance of the 1915 Declaration might one day be reversed as the professional professoriate is dismantled. The consolidation of a neoliberal political economy, beginning in the 1970s, has been marked by what some have labeled the academic workforce's "deprofessionalization."[153] That decomposition's most salient indicator is the dramatic decline in the percentage of tenure-track and tenured appointments as well as the correlative increase in the number held on a contingent and more often than not a part-time basis.[154]

What we witness here of course is a capitalist economy's inveterate tendency to revert to its default form of at-will employment, thereby amplifying the subordination that accompanies perpetual vulnerability. A faculty stripped of any protection against the arbitrary will of their employers is one for which academic freedom is a meaningless category and hence one that cannot participate meaningfully in institutional governance, let alone the project of free inquiry. Consummation of that disempowerment is of course precisely what DeSantis' attorneys intend when they represent the faculty of Florida's public universities as government employees whose acceptance of paychecks signifies their agreement to do as they are told by the state legislature.

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152. Christopher F. Rufo, *The arc of reform: New College of Florida votes to abolish its gender studies program* (Aug. 10, 2023), https://christopherrufo.com/p/the-arc-of-reform [https://perma.cc/5V6H-7EKT].

153. See, for example, LARRY G. GERBER, THE RISE & DECLINE OF FACULTY GOVERNANCE: PROFESSIONALIZATION AND THE MODERN AMERICAN UNIVERSITY (2014). For my critique of Gerber's analysis of the academy's contemporary plight, see KAUFMAN-OSBORN, *supra* note 49, at 66–104.

154. Glenn Colby, *Data snapshot: Tenure and contingency in US higher education,* 109 ACADEME (2023), https://www.aaup.org/article/data-snapshot-tenure-and-contingency-us-higher-education [https://perma.cc/5HE2-SZEE].

Today, the private government that obtains within the American university is taking on an ever more authoritarian cast as its rulers govern subjects ever less able to exercise any powers, formal or informal, that might render those rulers accountable to those who do the work that justifies its existence. That, recall, is the fear expressed by the AAUP when, in the midst of the COVID-19 pandemic, it worried that rule by "unilateral" fiat may soon become a "permanent" element of institutional governance and so "acquire an unfortunate veneer of legitimacy."[155] Denied the prerogatives the AAUP once claimed for modern professionals, this rule's subjects are ill-positioned to sustain the academy envisioned by the 1915 Declaration as "an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world."[156]

In our efforts to reimagine the American academy more than a century later, it is tempting—and almost irresistibly so in the United States—to trumpet the service provided by the university to democracy's vitality. However, unlike the AAUP and unlike the Supreme Court, I do not contend that the academy's value should be measured by the instrumental contribution it makes to that cause. To do so is to invite Florida's governor and his cronies to respond by declaring that the university as currently constituted does not in fact serve this end because its instructors encourage discussion of the beliefs enjoined by Stop WOKE, thereby fomenting America's fragmentation into so many self-righteous subgroups, each seeking to subjugate the others. On this account, the remedy for what ails American democracy is the suppression of counterhegemonic views within the university, and, however counterintuitively, that censorship is presented as a necessary condition of securing the freedom of all (hence Stop WOKE's official title is the Individual Freedom Act).

I do believe that the academy, when remade as a member corporation, may indirectly advance the democratic ends commended by those who now seek to resist the academy's subsumption within a larger authoritarian agenda. A university reconstituted in the form commended here bears that capacity not because it is democracy's "cradle" but because, there, inquiry's conduct is not organized in accordance with the pricing mechanisms of exploitative capitalist markets, the managerial principles that inform hierarchically organized bureaucracies, or the coercive rule of law based in the state's monopolization of the means of legitimate violence. Grounded instead in the self-rule of its citizens, the university qua member corporation offers a tacit critique of the relations of domination and subordination that prevail wherever forms of collective practice are ordered by these other methods.

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155. SPECIAL REPORT: COVID-19 AND ACADEMIC GOVERNANCE, AM. ASS'N OF UNIV. PROFESSORS, 37 (2021), https://www.aaup.org/file/Special-Report_COVID-19-and-Academic-Governance.pdf [https://perma.cc/4TSX-L3TA].

156. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 50, at 9 (11th ed. 2015).

That said, I would urge us to be circumspect before we endorse the claim that the academy's freedom is justified *because* it serves as an instrumental means to any end that is not its own. To defend the academy's autonomy by affirming its contribution to an extrinsic end, even if that end be democracy, is to deny scholarly work the freedom, like the wind, to follow its arguments wherever they may lead. It is only because scholarly inquiry operates on principles very different from those of democratic majoritarianism that it can criticize not just wannabe autocrats but also public opinion when it, too, seeks to monopolize our definition of what is true. My purpose in this essay, accordingly, has not been to show how the academy should be reconstituted if it is to advance the cause of democracy but, instead, to suggest why the university's democratic reconstitution might better sustain the integrity of free inquiry.