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The War on Higher Education

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ABSTRACT

Higher education is under assault in the United States. Tracking authoritarian movements across the globe, domestic attacks on individual professors and academic institutions buttress a broader campaign to undermine multiracial democracy and the institutions that sustain and safeguard it. Reflecting on the past academic year, this essay charts the increasingly brazen right-wing efforts in the U.S. Congress and the States to erode academic freedom and university independence—two pillars of our democratic republic. We also identify a bi-partisan source of higher education’s present precarity: the neoliberal policies that precipitated the privatization and corporatization of universities across the country.

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TABLE OF CONTENTS

INTRODUCTION.....	4
I. ACADEMIC FREEDOM & ITS ANTAGONISTS.....	6
A. Academic Freedom Basics.....	6
B. Academic Freedom's Antagonists.....	14
1. North Carolina's GOP Assault on Higher Education.....	15
2. Florida's GOP Assault on Higher Education	16
II. A COORDINATED ASSAULT ON ACADEMIC FREEDOM SWEEPS THE UNITED STATES	18
III. PRIVATIZING PUBLIC EDUCATION AND DEFUNDING HIGHER ED.	27
A. Privatizing K-12 Education	28
B. Privatizing (and Corporatizing) Higher Education	29
CONCLUSION.....	36

INTRODUCTION

Academic freedom is under assault in the United States.¹ Like the authoritarian populism rising across the globe, domestic attacks on individual professors and academic institutions buttress a broader and multifaceted campaign to undermine multiracial democracy and the institutions that sustain and safeguard it.² The individuals and entities driving this antidemocratic movement have also targeted the electoral process; public education; the right to bodily autonomy; the civil rights and liberties of minoritized and marginalized communities; and freedom of speech and expression (increasingly marshaled against pro-Palestinian advocacy).³ Their openly stated goal is to delegitimize, defund, and “lay siege to”⁴ the institutions that anchor American democracy and civil society, including the institutions that comprise higher education.⁵

This backdrop shapes our analysis and speaks to the urgency of this moment. It also may explain why the United Nations Special Rapporteur on the right to

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1. See Darrell M. West, *Why Academic Freedom Challenges Are Dangerous for Democracy*, BROOKINGS INST. (Sept. 8, 2022), <https://www.brookings.edu/articles/why-academic-freedom-challenges-are-dangerous-for-democracy> [<https://perma.cc/2YW9-L47P>].
 2. See *id.*
 3. See Athena D. Mutua, *Reflections on Critical Race Theory in a Time of Backlash*, 100 DENV. L. REV. 553, 595 (2023); see also Statement by the Special Rapporteur on the Right to Education, Ms. Farida Shaheed on Her Visit to the United States of America, 29 April–10 May 2024 (May 10, 2024), <https://www.ohchr.org/sites/default/files/documents/issues/education/statements/20240510-stm-eom-sr-education-usa.pdf> [<https://perma.cc/9J5D-ZB7T>] (“The most appalling factor [in the widespread repression of student protest] is the unequal treatment of protesters depending on their political position. Pro-Palestinian protesters are disproportionately affected by the harsh response, allegedly for their antisemitic views, paradoxically, even if they self-identify as belonging to the Jewish community or represent Jewish student associations.”).
 4. See Christopher Rufo, *Laying Siege to the Institutions*, IMPRIMIS (April 5, 2022), <https://imprimis.hillsdale.edu/laying-siege-to-the-institutions> [<https://perma.cc/AD4J-BC3Y>] (“Why do I say that we need to lay siege to our institutions? Because of what has happened to our institutions since the 1960s . . . You have to fight on terms that you define. In responding to opponents of the Florida bill, for instance, don’t argue against ‘teaching diversity and inclusion,’ but against sexualizing young children . . . Conservatives have for too long been resistant to attacking the credibility of our institutions.”); see also Jonathan Feingold & Joshua Weishart, *Discriminatory Censorship Laws*, TUL. L. REV. (forthcoming 2024).
 5. See ISAAC KAMOLA, AM. ASS’N OF UNIV. PROFESSORS, *MANUFACTURING BACKLASH: RIGHT-WING THINK TANKS AND LEGISLATIVE ATTACKS ON HIGHER EDUCATION, 2021–2023* 3 (2024), https://www.aaup.org/sites/default/files/Manufacturing_Backlash_final.pdf [<https://perma.cc/GN57-9DDD>] (“Today higher education is under attack. Since 2021 we have witnessed what one scholar correctly called an ‘unusually brazen series of challenges to academic freedom,’ unleashed by conservative activists and a ‘national-level political machine’ closely aligned with the Republican Party.”).

education (SRE) conducted an official country visit to the United States in spring 2024.⁶ The SRE is an independent human rights expert that the United Nations Human Rights Council (UNHRC) appointed in 1998 to “examine the crucial issue of the right of all persons to access quality education without discrimination, and to provide recommendations to Governments and other stakeholders.”⁷

To fulfill her mandate, the SRE produces and presents periodic reports to the UNHRC.⁸ Earlier this year, the SRE announced a forthcoming report on “academic freedom and freedom of expression in educational institutions.”⁹ The Report “[will] build[] on previous work achieved by other United Nations human rights mechanisms on the topic” and “take stock of setbacks and progress both under international human rights law and in domestic legislation and practice with respect to defining academic freedom, ensuring its enjoyment by all relevant actors and protecting it from attacks and interferences.”¹⁰

As is practice, the SRE invited input from entities ranging from nation-states and UN agencies to human rights organizations and individual academics.¹¹ The Critical (Legal) Collective (CLC)¹² answered this call with a submission that

6. See *Call for Contributions: Country Visit to the United States of America (29 April–10 May 2024)* U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/calls-for-input/2024/call-contributions-country-visit-united-states-america-29-april-10-may-2024> [<https://perma.cc/JH2Z-69SM>].

7. See *Special Rapporteur on the Right to Education*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/special-procedures/sr-education> [<https://perma.cc/54GR-6ES6>]; see also *The Practical Guide to Humanitarian Law*, MEDECINS SANS FRONTIERES, <https://guide-humanitarian-law.org/content/article/3/special-rapporteurs> [<https://perma.cc/TQ7E-WZKH>].

8. See *Special Rapporteur on the Right to Education*, *supra* note 7.

9. See *Call for Contributions: Academic Freedom and Freedom of Expression in Educational Institutions*, U.N. HUM. RTS. SPECIAL PROC. (Feb. 2, 2024), <https://www.ohchr.org/sites/default/files/documents/issues/education/cfis/cfi-expression/2023-academic-freedom-questionnaire-en.pdf> [<https://perma.cc/R8Y4-RQQD>] (“The report . . . will also analyze, from a human rights perspective, direct and indirect attacks on and interferences with respect to academic freedom of staff and students, including through commercialization, online surveillance, funding, conditions of work and studies and other pertinent issues.”); see also Farida Shaheed (Special Rapporteur on the Right to Education), *Academic Freedom: Rep. of the Special Rapporteur on the Right to Education*, Farida Shaheed, U.N. Doc. A/HRC/56/58 (Apr. 25, 2024).

10. See *Call for Contributions: Academic Freedom and Freedom of Expression in Educational Institutions*, *supra* note 9.

11. *Id.*

12. The Critical (Legal) Collective describes itself as follows:

The Critical (Legal) Collective is a group of legal scholars representing some of the many intellectual formations affiliated with critical legal theory—including, Critical Race Theory, Asian American Legal Scholarship, ClassCrits, Critical Legal Studies, Feminist Legal Theory, eCRT, Indigenous Law and Policy, Jurisprudence of Distribution, LatCrit, Law & Political Economy, Third World Approaches to International Law, and more. We promote a more inclusive, democratic, and just

outlined the escalating assault on academic freedom, university independence and freedom of expression in the United States.¹³

This Essay expands upon that submission and proceeds as follows. Part I outlines academic freedom’s core features and spotlights GOP-led attacks on academic freedom in North Carolina and Florida. In Part II, we situate the two preceding case studies within a nationwide right-wing assault on academic freedom and university independence. Part III links academic freedom’s present precarity to often-bipartisan neoliberal reforms that privatized and corporatized much of higher education.

I. ACADEMIC FREEDOM & ITS ANTAGONISTS

A. Academic Freedom Basics

The first formal defense of academic freedom came in 1915 when the American Association of University Professors (AAUP) formed to counter rising threats to university autonomy and faculty independence.¹⁴ The AAUP aimed to limit private industry’s influence over university governance and research and safeguard each professor’s ability to research and teach without the threat of external interference.¹⁵ As Galileo Galilei discovered centuries earlier, the pursuit

society through scholarship, teaching, and advocacy that reckons honestly with past and present structural oppression.

CLC Statement to University Administrators: *Academic Freedom and Palestine*, CRITICAL LEGAL COLLECTIVE (Nov. 15, 2023), <https://www.criticallegalcollective.org> [<https://perma.cc/8723-V9E9>].

13. The CLC’s submission is available on the SRE’s website. See *Call for Contributions: Academic Freedom and Freedom of Expression in Educational Institutions*, *supra* note 9 (expand the “Inputs Received” menu and select the “CLC_Critical Legal Collective (United States)” link under the “CSO” heading) (last visited July 23, 2024). For the CLC’s actual submission, please see Contribution from *Critical (Legal) Collective to the Special Rapporteur on the Right to Educ.*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (Feb. 4, 2024), <https://www.ohchr.org/sites/default/files/documents/issues/education/cfis-cfi-expression/subm-academic-freedom-cso-clc-criti-united-states-ates.docx> [<https://perma.cc/ZEN6-HLUR>].
14. See *Timeline of the First 100 Years*, AM. ASS’N OF UNIV. PROFESSORS, <https://www.aaup.org/about/history/timeline-first-100-years> [<https://perma.cc/TZ78-DXX3>].
15. See *id.* (“In March 1915, seventeen faculty members at the University of Utah resign in protest after the appointments of four of their colleagues are abruptly terminated by the president and board of trustees. A month later, the AAUP . . . launches an investigation into violations of principles of academic freedom and tenure at Utah—the first of five investigations that the new Association will undertake in its first year as it puts its principles into practice.”); see also *About the AAUP*, AM. ASS’N OF UNIV. PROFESSORS, <https://www.aaup.org/about-aaup> [<https://perma.cc/B7FG-VKEV>] (“Since our founding in 1915, the AAUP has helped to shape American higher education by developing the standards and procedures that maintain quality in education and academic freedom in this country’s colleges and universities.”).

of knowledge and truth can be controversial and – at times – can expose individual researchers to targeted backlash.¹⁶

The AAUP issued its initial Declaration of Principles on Academic Freedom and Academic Tenure (the Declaration) in 1915.¹⁷ As a unifying principle, the Declaration counsels that without academic freedom, the university cannot achieve its core mission “to promote inquiry and advance the sum of human knowledge.”¹⁸ To this end, the Declaration explains that academic freedom is “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.”¹⁹ Professor Brian Soucek has accordingly explained “that constraints on academic freedom [must therefore] come from professional norms and disciplinary standards, not from administrators, trustees, or public opinion.”²⁰ At bottom, academic freedom embodies the “principle that scholars, researchers, and educators can engage in teaching and scholarship without the fear of censorship or retribution.”²¹

Against this backdrop, the Declaration articulates three core functions of academic institutions:

- to promote inquiry and advance the sum of human knowledge;

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16. See Jessica Wolf, *The Truth About Galileo and His Conflict with the Catholic Church*, UCLA NEWSROOM (Dec. 22, 2016), <https://newsroom.ucla.edu/releases/the-truth-about-galileo-and-his-conflict-with-the-catholic-church> [<https://perma.cc/JRG6-434A>] (discussing an article by Professor Henry Kelly examining the conflict between the Catholic Church and Galileo and his adherence to the idea and research suggesting that the earth revolved around the sun).
 17. See EDWIN R.A. SELIGMAN ET AL., AM. ASS’N OF UNIV. PROFESSORS, APPENDIX I: 1915 DECLARATION OF PRINCIPLES ON AMERICAN FREEDOM AND ACADEMIC TENURE 295 (1915), [https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915 Declaration.pdf](https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915%20Declaration.pdf) [<https://perma.cc/S3HC-LDNS>]. Over the ensuing century, AAUP members have revised and issued dozens of policy documents and reports on academic freedom. Standout publications include the 1940 Statement of Principles on Academic Freedom. See AM. ASS’N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> [<https://perma.cc/A96X-RXTH>]; see also AM. ASS’N OF UNIV. PROFESSORS, STATEMENT ON GOVERNMENT OF COLLEGES AND UNIVERSITIES (1966), <https://www.aaup.org/report/statement-government-colleges-and-universities> [<https://perma.cc/54QA-99EW>].
 18. See SELIGMAN ET AL., *supra* note 17, at 295.
 19. See *id.* at 300 (“It is obvious that here again the scholar must be absolutely free 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.”) *Id.* at 296.
 20. Brian Soucek, *Diversity Statements*, 55 U.C. DAVIS L. REV. 1989, 2035 (2022).
 21. Melissa De Witte, *Academic Freedom’s Origin Story*, STANFORD REP. (May 1, 2023) <https://news.stanford.edu/report/2023/05/01/origin-story-academic-freedom> [<https://perma.cc/BU65-R7V6>].

- to provide general instruction to students; and
- to develop experts for various branches of the public service.²²

The Declaration further articulates three related principles of academic freedom:

- freedom of inquiry and research;
- freedom of teaching within the university or college; and
- freedom of extramural utterance and action.²³

As a doctrinal matter, academic freedom is grounded in the First Amendment of the U.S. Constitution,²⁴ which provides in relevant part: “Congress shall make no law . . . abridging the freedom of speech, or of the press.”²⁵ The U.S. Supreme Court has declared that the First Amendment’s core purpose is to allow for free debate on public issues.²⁶

Academic freedom is not defined in the U.S. Constitution. Nor has the Supreme Court identified academic freedom as a standalone constitutional right.²⁷ Nonetheless, the Supreme Court has held that academic freedom advances unique First Amendment and democratic interests given the special role of speech and thought in public colleges and universities.²⁸

The Supreme Court identified academic freedom’s doctrinal and normative significance in *Keyishian v. Board of Regents*.²⁹ This foundational 1967 decision involved professors at a New York public university who refused to sign a loyalty oath saying they were not communists.³⁰ In a ruling that struck down the governing regulations, the Supreme Court held that laws that infringe on freedom

22. SELIGMAN ET AL., *supra* note 17, at 295.

23. *Id.* at 292.

24. See Rachel Levinson, *Academic Freedom and the First Amendment: Presentation to the AAUP Summer Institute*, AM. ASS’N OF UNIV. PROFESSORS (July 2007), <https://www.aaup.org/our-work/protecting-academic-freedom/academic-freedom-and-first-amendment-2007> [https://perma.cc/VTH9-SN62].

25. U.S. CONST. amend. I.

26. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

27. See *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 602–03 (1967); *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1236–37 (N.D. Fla. 2022) (noting that while the U.S. Supreme Court has never proclaimed academic freedom to be a stand-alone right protected by the First Amendment, and the Eleventh Circuit has rejected the view that academic freedom is an independent constitutional right, the Circuit “still recognized that academic freedom remains an important interest to consider when analyzing university professors’ First Amendment claims”).

28. See *Keyishian*, 385 U.S. at 602–03; see also *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (involving a petition to compel disclosure of a classroom lecture in order to determine if it was “subversive”).

29. 385 U.S. 589 (1967).

30. *Id.* at 592.

of speech in the classroom must be narrow and specific.³¹ The majority explicitly moored academic freedom to the First Amendment:

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. [Academic] freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.³²

Beyond offering academic freedom a precedential anchor, the *Keyishian* majority tethered the concept to democracy itself³³:

No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.³⁴

Even though academic freedom and the First Amendment are linked, the two entail distinct considerations.³⁵ Whereas free speech analysis often makes no judgement about the quality of an opinion or idea, academic freedom often does.³⁶ Academic freedom's concern for quality stems from the university's role within democratic societies as an engine of truth and knowledge production for the common good.³⁷ Leading experts have explained that this basic mission "requires

31. *Id.* at 604.

32. *Id.* at 603.

33. With respect to academic freedom, the *Keyishian* Court explained that the "essentiality of freedom in the community of American universities is almost self-evident." *Id.* at 603 (quoting *Sweezy*, 354 U.S. at 250).

34. *Keyishian*, 385 U.S. at 603 (quoting *Sweezy*, 354 U.S. at 250).

35. See Soucek, *supra* note 20, at 2035–36 ("‘Academic freedom’ is sometimes just used to refer to the free speech rights of academics But academic freedom is also a distinctive and even defining feature of modern American universities.").

36. See MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 34–39 (2009) ("The core principle of American academic freedom . . . [recognizes] that faculty are professional experts in the production of knowledge . . . universities can advance the sum of human knowledge only if they employ persons who are experts in their disciplines and only if universities liberate these experts to apply freely the disciplinary methods established by their training."); see also Bill Moyers, *In the Age of Trump, a Chilling Atmosphere*, BILL MOYERS (Oct. 18, 2017), <https://billmoyers.com/story/academic-freedom-age-trump> [https://perma.cc/NT99-5APL].

37. See David Kaye (Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression), *Rep. of the Special Rapporteur on the Promotion and Protection of*

precisely that ideas be treated unequally, that they be assessed and weighed, accepted and rejected.”³⁸

The university must therefore be a place that separates the good idea from the bad—that distinguishes between what is true and what is false.³⁹ One would expect academic institutions and faculty to reject academically discredited ideas—like the notion that the earth is 10,000 years old, that the Holocaust did not occur, or that biological differences explain racial inequality. The processes for evaluating an idea’s quality, in turn, must be free from external interference and influence; requiring systems of review by peers with relevant disciplinary competence.⁴⁰

It is now widely recognized that tenured professors and higher education institutions enjoy academic freedom.⁴¹ Functionally, this means that principles of academic freedom can extend to administrative staff speaking on the university’s behalf.⁴²

Primary and secondary level (K-12) teachers do not enjoy the same academic freedom protections as their higher education counterparts.⁴³ One reason is that states generally enjoy police power over teaching and learning, which constrains K-12 teachers to preapproved state curricula.⁴⁴ Teachers can face adverse

the Right to Freedom of Opinion and Expression, ¶ 10, U.N. Doc. A/75/261 (July 28, 2020) [hereinafter *UN 2020 Report on Academic Freedom*]; R. SELIGMAN ET AL., *supra* note 17, at 295 (the core mission of academic institutions is “to promote inquiry and advance the sum of human knowledge”).

38. See FINKIN & POST, *supra* note 36, at 43.

39. See Steven G. Calabresi, *Freedom of Expression and the Golden Mean*, 79 BROOK. L. REV. 1005, 1010 (2014) (“I would add that public colleges, universities, and secondary schools could not even function if they did not choose to praise some viewpoints and criticize others. The praising of some things and the disapproving of others is basically at the core of what education itself is all about.”).

40. See Moyers, *supra* note 36 (noting effort by rightwing groups to eliminate peer review).

41. See *Parate v. Isibor*, 868 F. 2d 821, 826 (6th Cir. 1989) (quoting Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) (alterations in original)) (“Academic freedom thrives not only on the robust and uninhibited exchange of ideas between the individual professor and his students, but also on the ‘autonomous decisionmaking [of] . . . the academy itself.’”).

42. See Brian Soucek, *Academic Freedom and Departmental Speech*, AAUP BLOG (Spring 2022), <https://www.aaup.org/article/academic-freedom-and-departmental-speech> [<https://perma.cc/K6F4-KN7G>].

43. See *The Perilous State of Academic Freedom and Free Expression in Education*, PEN AM. (Feb. 5, 2024), <https://pen.org/the-perilous-state-of-academic-freedom-and-free-expression-in-education> [<https://perma.cc/X4PX-YGTH>] (“While academic freedom is an institutional precedent in higher education, it is not customarily applied at the primary and secondary school level in the same manner.”).

44. See, e.g., *Evans-Marshall v. Bd. of Educ. of Tipp City. Exempted Vill. Sch. Dist.*, 624 F. 3d 332, 344 (6th Cir. 2010) (“Even to the extent academic freedom, as a constitutional rule, could somehow apply to primary and secondary schools, that does not insulate a teacher’s curricular and pedagogical choices from the school board’s oversight, as opposed to the teacher’s right to speak and write publicly about academic issues outside of the classroom.”).

employment action for deviating from those standards.⁴⁵ This does not mean that K-12 teachers enjoy no speech rights. As one example, the federal judge who enjoined Florida’s “Stop W.O.K.E. Act” observed that “the Eleventh Circuit and its predecessor have recognized that the First Amendment protects classroom discussions at [both] the secondary and university levels.”⁴⁶

Academic freedom is not without limits. Even for tenured faculty, academic freedom does not insulate individual professors from institutional regulations or administrative oversight.⁴⁷ Academic freedom does not, for example, preclude a university from disciplining a faculty member who violates university policy or ethical obligations—such as violating “regulations on human subject research.”⁴⁸ Nor does academic freedom pre-empt constitutional or statutory obligations that govern individual faculty and academic institutions—such as state and federal antidiscrimination laws that prohibit race- and gender-based harassment.⁴⁹

It is worth also noting that recent conservative Supreme Court majorities have exhibited a waning commitment to academic freedom and employee speech rights generally. In *Garcetti v. Ceballos*, for example, the Supreme Court confronted “whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee’s official duties.”⁵⁰ In a 5-4 ruling, the Supreme Court held that when government workers “make statements pursuant to their official duties, [they] are not speaking as citizens,” and therefore, the First Amendment does not apply.⁵¹

This ruling narrowed the speech rights for government employees—a category that includes professors at public universities. The question, therefore, is

45. *Id.*

46. *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1242 (N.D. Fla. 2022).

47. *See, e.g., Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989) (“The administration of the university rests not with the courts, but with the administrators of the institution. A nontenured professor does not escape reasonable supervision in the manner in which she conducts her classes or assigns her grades.”).

48. *FAQs on Academic Freedom*, AM. ASS’N OF UNIV. PROFESSORS, <https://www.aaup.org/programs/academic-freedom/faqs-academic-freedom> [<https://perma.cc/7WD4-H5W4>].

49. *See* Cara McClellan, *Discrimination as Disruption: Addressing Hostile Environments Without Violating the Constitution*, 34 *YALE L. & POL’Y REV. INTER ALIA* 1, 6–7 (2015) (quoting *Healy v. James*, 408 U.S. 169, 189 (1972)) (arguing that universities may constitutionally regulate speech that constitutes racial discrimination under Title VI of the Civil Rights Act of 1964 because such speech—and failure to address it—can offend “reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education”).

50. 547 U.S. 410, 413 (2006).

51. *Id.* at 421.

whether *Garcetti* reaches public university faculty and undercuts the academic freedom they would otherwise enjoy.⁵² Recognizing this concern, the *Garcetti* majority explicitly declined to extend its holding to cases involving scholarship or teaching-related speech.⁵³ One can read this as an attempt to square *Garcetti* with precedent like *Keyishian* that grounded academic freedom in the First Amendment and broader democratic norms.

Uncertainty about *Garcetti*'s scope nonetheless lingers.⁵⁴ In recent years, champions of discriminatory censorship,⁵⁵ who increasingly dominate the Republican Party (GOP),⁵⁶ have invoked *Garcetti* to challenge the speech rights of professors at public universities. In one 2022 decision enjoining part of Florida's Stop W.O.K.E. Act,⁵⁷ a federal judge rejected this argument and held that *Garcetti* does not apply to a university professor's in-class speech.⁵⁸ The lawsuit alleges that

52. See *Protecting an Independent Faculty Voice: Academic Freedom After Garcetti v. Ceballos*, AM. ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/report/protecting-independent-faculty-voice-academic-freedom-after-garcetti-v-ceballos> [<https://perma.cc/7R6P-EABB>] (“[A]cademic freedom of professors continues to face serious threats. In the immediate aftermath of *Garcetti*, the principal threat appeared to be judicial hostility or indifference to academic freedom, which seemed to lead some lower federal courts to adopt overly restrictive interpretations of faculty free speech rights that *Garcetti* did not compel.”).
53. See *Garcetti*, 547 U.S. at 425 (“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.”).
54. See Soucek, *supra* note 20, at 2023 (noting “[t]here is a circuit split . . . about whether *Garcetti*’s holding *does* apply to teachers, especially university professors”).
55. We borrow the term “discriminatory censorship” from Jonathan Feingold & Joshua Weishart. See JONATHAN FEINGOLD & JOSHUA WEISHART, NAT’L EDUC. POL’Y CTR., HOW DISCRIMINATORY CENSORSHIP LAWS IMPERIL PUBLIC EDUCATION 18–21 (2023), <https://nepc.colorado.edu/publication/censorship> [<https://perma.cc/J5UC-GP72>] (applying the term “discriminatory censorship” to laws designed to (1) chill classroom conversations about racism, gender identity, and other targeted topics and (2) demean inclusionary values and stigmatize historically subordinated groups).
56. See *Mutua*, *supra* note 3.
57. In August of 2022, Florida Governor Ron DeSantis signed into law Florida House Bill 7, more commonly referred to as the Stop W.O.K.E. Act, or the redubbed Individual Freedom Act. See H.R. 7, 124th Leg. Reg. Sess. (Fla. 2022).
58. See *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1241 (N.D. Fla. 2022) (“All this is to say that Defendants have identified no case, nor has this Court identified any authority—binding or persuasive—holding that *Garcetti* applies to university professors’ in-class speech such that it amounts to government speech outside the First Amendment’s protection. To the extent Defendants urge this Court to determine that university professors’ in-class speech is always pure government speech, the weight of binding authority requires this Court to decline the invitation.”); see also Soucek, *supra* note 20, at 2023–24 (footnotes omitted) (“*Garcetti* is premised on the idea that a manager should be able to direct an employee’s work without triggering a free speech lawsuit. Since no managers direct faculty

the Stop W.O.K.E. Act “severely restricts Florida educators and students from engaging in scholarship about issues related to race and gender” in higher education classrooms, including concepts related to slavery, affirmative action, white privilege, and antiracism.⁵⁹ The challenged law exposes Florida professors to severe penalties for expressing views regarding these topics, and it grants Florida’s Republican officials substantial discretion to target individuals who express viewpoints and perspectives they dislike.⁶⁰ Siding with the plaintiffs, the district court recognized academic freedom’s doctrinal and practical significance.⁶¹ With notably stark language, the court concluded that the Florida law imposed an impermissible viewpoint-based restriction on educators’ classroom speech.⁶² In March 2023, the Eleventh Circuit denied the state’s request to stay the injunction.⁶³ The case is ongoing.

To summarize: the Supreme Court has long viewed academic freedom as a “special concern of the First Amendment” that enables higher education to serve

members’ teaching and research in that way, at least at any university that respects academic freedom, the premise does not apply.”).

59. See Press Release, ACLU of Fla., *Florida’s “Stop W.O.K.E.” Censorship Bill Continues to Be Blocked After Eleventh Circuit Decision*, ACLU (Mar. 16, 2023, 2:30 PM), <https://www.aclu.org/press-releases/floridas-stop-w-o-k-e-censorship-bill-continues-to-be-blocked-after-eleventh-circuit-decision> [<https://perma.cc/45P8-3ZE4>].
60. See *Pernell*, 641 F. Supp. 3d at 1231–32 (providing its interpretation of the Act); see also Katheryn Russell-Brown, “*The Stop Woke Act*: HB 7, Race, and Florida’s 21st Century Anti-Literacy Campaign,” 47 N.Y.U. REV. L. & SOC. CHANGE 338, 365–66 (2023) (footnotes omitted) (“The law allows for a private cause of action that could entitle a successful complainant to injunctive relief, back pay, and compensatory damages up to \$100,000. This amount covers loss of dignity, mental anguish, and punitive damages. Further, the Attorney General may initiate a civil action for injunctive relief, damages, or civil penalties of up to \$10,000 per violation when they have reasonable cause to believe that an individual or a group has engaged in or been subjected to discrimination under HB 7. Where a state employee is found to have violated the law, they may be discharged from their position.”).
61. *Pernell*, 641 F. Supp. 3d, at 1271.
62. *Id.* at 1230 (footnotes omitted) (“The law officially bans professors from expressing disfavored viewpoints in university classrooms while permitting unfettered expression of the opposite viewpoints. Defendants argue that, under this Act, professors enjoy ‘academic freedom’ so long as they express only those viewpoints of which the State approves. This is positively dystopian. It should go without saying that ‘[i]f liberty means anything at all it means the right to tell people what they do not want to hear.’”).
63. *Pernell v. Fla. Bd. of Governors of State Univ.*, No. 22-13992-J, 2023 WL 2543659 (11th Cir. 2023). In a separate recent decision, a federal judge in New Hampshire struck down a discriminatory censorship law on the basis that it was unconstitutionally vague. See Local 8027, AFT-N.H., AFL-CIO, et al. v. Edelblut, No. 21-cv-1077-PB, 2024 WL 2722254, slip op. at 49 (D. N.H. May 28, 2024) (“The Amendments are viewpoint-based restrictions on speech that do not provide either fair warning to educators of what they prohibit or sufficient standards for law enforcement to prevent arbitrary and discriminatory enforcement. Thus, the Amendments violate the Fourteenth Amendment to the U.S. Constitution.”).

its core democratic function. Against this backdrop, we now highlight two state-level efforts to undermine academic freedom and university independence.⁶⁴

B. Academic Freedom's Antagonists

One of AAUP's most significant achievements comprises the development "of robust professional norms of democratic university governance" which include a democratic labor regime of shared governance structured to safeguard academic freedom.⁶⁵ These norms and practices include faculty independence, the job security of tenure, due process prior to discipline or dismissal, and shared governance.⁶⁶ Under shared governance (which distributes governance authority across the faculty and the administration), the faculty have the "primary responsibility, through their governing bodies, over academic matters such as curriculum [including approving new academic programs and courses], teaching, research, and faculty appointments and promotions."⁶⁷ For many university faculty, concrete privileges and protections are secured by contract (and negotiated through unions at a number of public institutions).⁶⁸

64. Albeit beyond the scope of this Essay, students also possess certain First Amendment rights animated by academic freedom interests. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (explaining that high school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sept. 19, 2022), <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools> [<https://perma.cc/CX5J-ARWY>].

65. Risa L. Lieberwitz, *Corporatization of Higher Education: A Crisis of Labor and Democracy*, in THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY 318, 318–21 (Angela B. Cornell & Mark Barenberg eds., 2022). This has manifested as the internalization and adoption of the "extra-legal" rights of academic freedom by most colleges and universities, both public and private. See *id.* at 321. While the AAUP has provided a strong framework for academic freedom, and other organizations now exist to protect it, the framework has identifiable flaws. These include its rather singular focus on teachers in higher education, and its failure to sufficiently address the rights of students. See De Witte, *supra* note 21. The AAUP has, at times, issued statements concerning students' rights and freedoms that relate to academic freedom. See, e.g., *Joint Statement on Right and Freedoms of Students*, AM. ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/report/joint-statement-rights-and-freedoms-students> [<https://perma.cc/82V7-JTY5>] ("Freedom to teach and freedom to learn are inseparable facets of academic freedom."). Further, despite the widespread practice of peer review of research and teaching, white women and people of color remain underrepresented in the tenure ranks of many disciplines—due in part to institutions' and disciplines' ongoing failure to remedy histories of formal and informal exclusion. See Lieberwitz, *supra* note 65, at 323.

66. See Lieberwitz, *supra* note 65, at 320.

67. *Id.* at 321.

68. See *id.* at 321, 323.

Even under shared governance, the administration or external governing boards often enjoy final decisionmaking authority over many areas of institutional governance.⁶⁹ As we now detail, GOP officials in North Carolina and Florida have weaponized external boards to buttress a broader effort to undermine academic freedom and cripple university and faculty independence.⁷⁰

1. North Carolina GOP's Assault on Higher Education

The University of North Carolina (UNC) system is “overseen by a board of governors” (BOG) that enjoys immense power over “the planning, development, and overall governance of the system.”⁷¹ In 2010, Republicans held the Governor’s post and gained control of both chambers of North Carolina’s legislature.⁷² Party leaders “saw the UNC board of governors, with its broad agenda-setting powers, as the key to transforming the university system” to one of their liking.⁷³

Over the next several years, GOP leadership spearheaded procedural and substantive changes that cemented the party’s “partisan political control” over higher education in the state.⁷⁴ In 2016, for example, the “outgoing Republican governor signed legislation stripping his Democratic successor of the power to make appointments to campus-level boards of trustees.”⁷⁵ In a state with roughly equal numbers of registered Democrats and Republicans,⁷⁶ state-level gerrymandering has enabled Republicans to maintain legislative majorities. As a result, the 2016 transfer of appointment power granted the GOP “near-total control over appointments to campus-level boards of trustees.”⁷⁷

69. *Id.* at 321.

70. See KAMOLA, *supra* note 5; NICHOLAS FLEISHER ET AL., AM. ASS’N OF UNIV. PROFESSORS, REPORT OF A SPECIAL COMMITTEE: GOVERNANCE, ACADEMIC FREEDOM, AND INSTITUTIONAL RACISM IN THE UNIVERSITY OF NORTH CAROLINA SYSTEM 15 (2022), <https://www.aaup.org/report/governance-academic-freedom-and-institutional-racism-university-north-carolina-system> [<https://perma.cc/ZK9N-DKSG>]; AFSHAN JAFAR ET AL., AM. ASS’N OF UNIV. PROFESSORS, REPORT OF A SPECIAL COMMITTEE: POLITICAL INTERFERENCE AND ACADEMIC FREEDOM IN FLORIDA’S PUBLIC HIGHER EDUCATION SYSTEM (2023), https://www.aaup.org/file/AAUP_Florida_final.pdf [<https://perma.cc/P42V-44R8>].

71. See FLEISHER ET AL., *supra* note 70, at 3.

72. See *id.*

73. See *id.*

74. See *id.* at 4.

75. See *id.*

76. Justyn Melrose, *Does North Carolina Have More Democrats, Republicans, or Unaffiliated Voters?*, MYFOX8 (Feb. 20, 2024), <https://myfox8.com/news/politics/your-local-election-hq/does-north-carolina-have-more-democrats-republicans-or-unaffiliated-voters> [<https://perma.cc/3WGH-M74W>].

77. See FLEISHER ET AL., *supra* note 70, at 4.

The AAUP report recounts how these changes, which coincided with GOP leadership appointing “political ideologues” to the boards, undermined academic freedom and university independence across the UNC system.

One example entails the BOG’s decision to close three university-based policy centers in 2015.⁷⁸ This included UNC-Chapel Hill’s privately-funded Center for Poverty, Work, and Opportunity—an entity created to “examine innovative and practical ideas for moving more Americans out of poverty and into the middle class.”⁷⁹ The Report notes that “[p]rominent North Carolina conservatives had opposed the poverty center from its inception [in 2005].”⁸⁰ That opposition escalated when the poverty center’s director “joined the state’s Moral Mondays civil disobedience movement and became an outspoken critic of [the North Carolina] state government.”⁸¹ In 2014, a BOG working group called for eliminating the poverty center along with thirteen other public-minded centers (out of 237 centers reviewed).⁸² The BOG obliged and closed the center—withstanding widespread support for the center from faculty, students, administrative leaders, and local civil rights groups.⁸³

2. Florida GOP’s Assault on Higher Education

A separate AAUP Report identified similar conduct by the Florida GOP.⁸⁴ The Report opens by detailing Governor DeSantis’ takeover of New College. Prior to the takeover, “New College was known as a leading alternative liberal arts college . . . known for its tolerance of diversity and its ‘quirky’ and iconoclastic students.”⁸⁵

In January 2023, following the governor’s re-election, DeSantis and the state board of governors appointed seven new members to New College’s board of trustees.⁸⁶ Five of the new members are “well-known conservative academics or activists who appear to live outside of Florida.” Among them is Christopher Rufo,

78. See *id.* at 15.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* “Six of the seven working group members were Republicans. Of the 237 centers reviewed by the group, the only three recommended for closure involved scholarly interests in poverty, the environment, or social justice. Among the thirteen other research centers for which the panel recommended changes but not elimination were programs that focused on diversity, the environment, women’s issues, aging, and teaching and learning.” *Id.*

83. *Id.* at 15–16.

84. See generally JAFAR ET AL., *supra* note 70.

85. *Id.* at 3.

86. See *id.* (noting that the state board of governors also appointed one new member).

who gained notoriety for “fueling a conservative backlash against DEI efforts and CRT.” Two other appointments were part of President Trump’s 1776 commission; a third is president of a DC-based conservative think tank. In a January 6 tweet, Rufo communicated his vision for the board: “We are now over the walls and ready to transform higher education from within . . . [O]ur all-star board will demonstrate that the public universities, which have been corrupted by woke nihilism, can be recaptured, restructured, and reformed.”⁸⁷

Over the subsequent months, the new trustees replaced the New College President with Richard Corcoran (the former commissioner of DeSantis’ Board of Education), eliminated the Office of Outreach and Inclusive Excellence, altered the faculty handbook, terminated the college’s gender studies program, and denied tenure to five faculty members.⁸⁸ Corcoran also recommended that the board deny tenure to a separate set of faculty members due, in part, to “a renewed focus on ensuring the College is moving towards a more traditional liberal arts institution.”⁸⁹ This “renewed focus” reflects the trustees’ desire to “adopt a new ‘classical’ liberal arts curriculum modeled after that of conservative Hillsdale College.”⁹⁰ As Kathryn Joyce outlined in a series of articles, “Hillsdale’s ‘classical education’ model—extolling Western civilization, American exceptionalism and the idea that America was founded on ‘Judeo-Christian’ principles—has become the chief model of what conservatives want to see in education.”⁹¹

The AAUP report explains that Corcoran’s plan to “gauge applications by their alignment with the purported new mission and vision for New College”—rather than the substantive content and merit of each tenure file—violates AAUP-supported standards of academic freedom and tenure and violates New College’s collective bargaining agreement.⁹²

This concern played out in May 2023 when Corcoran ignored the faculty’s recommendation and declined to renew the contract of Erik Wallenberg, a visiting

87. *Id.*

88. *Id.*

89. *Id.* at 5.

90. *Id.* at 8.

91. Kathryn Joyce, *Tennessee Showdown: Governor’s Big Plan for Right-Wing Charter Schools Sparks Fierce Backlash*, SALON (Aug. 22, 2022, 6:30 AM), <https://www.salon.com/2022/08/22/tennessee-showdown-governors-big-plan-for-right-wing-charter-schools-sparks-fierce-backlash> [<https://perma.cc/G7ZZ-WRH4>]; see also Kathryn Joyce, *Salon Investigates: The War on Public Schools Is Being Fought From Hillsdale College*, SALON (Mar. 16, 2022, 6:35 AM), <https://www.salon.com/2022/03/16/salon-investigates-the-on-public-schools-is-being-fought-from-hillsdale-college> [<https://perma.cc/GE4F-LTXM>].

92. See JAFAR ET AL., *supra* note 70, at 5.

professor and New College’s “sole historian of the United States.”⁹³ Two months’ prior, Wallenberg had co-authored an opinion piece that criticized the board’s takeover and described “comments made to a student by trustee Rufo [as] ‘demeaning and rude.’”⁹⁴ In an extraordinary act, Rufo responded by attacking Wallenberg on Twitter and then celebrated the professor’s nonrenewal: “New College will no longer be a jobs program for middling left-wing intellectuals.”⁹⁵ Multiple organizations condemned Rufo’s tweets and the board’s open interference and abuse of power. Jeremy Young, who leads PEN America’s Freedom to Learn initiative, described the nonrenewal as “an appalling act of political retaliation and an affront to the principle of academic freedom.”⁹⁶

Albeit a single example, the New College takeover illustrates how DeSantis weaponized state power to undermine academic freedom, erode faculty rights and impose a right-wing ideological agenda on Florida’s leading public liberal arts institution. We encourage readers to review the full AAUP report, which details a broader campaign to undermine higher education in Florida. The report’s authors summarize their findings as follows:

‘[A]cademic freedom, tenure, and shared governance in Florida’s public colleges and universities currently face a politically and ideologically driven assault unparalleled in [U.S.] history,’ which, ‘if sustained, threatens the very survival of meaningful higher education in the state, with the direst implications for the entire country.’⁹⁷

North Carolina and Florida are not anomalous. In the next Part, we situate these two examples within a nationwide right-wing campaign to erode academic freedom and undermine university independence.⁹⁸

II. A COORDINATED ASSAULT ON ACADEMIC FREEDOM SWEEPS THE UNITED STATES

The assault on academic freedom is part of a multifaceted campaign to undermine democracy and democratic institutions.⁹⁹ This antidemocratic project

93. *Id.* at 7.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 2.

98. See Letter from Concerned Law Professors Re: House Committee Investigation, to Congresswoman Virginia Foxx (Apr. 17, 2024), <https://docs.google.com/document/d/1YkrKYwkae7uR3XasQkZhLRmJf8xTyOC5ILRc4EkXVi8/edit> [<https://perma.cc/RH66-DLUV>].

99. See West, *supra* note 1.

is supported by a well-resourced network of right-wing officials, think tanks, foundations, and media.¹⁰⁰ Through coordinated legal, political, and discursive strategies, this network has already begun to undermine our collective right to research, learn about and address the structural forces that drive racism, sexism, and class inequality in the United States.¹⁰¹

As a strategic matter, we should not be surprised that antidemocratic forces view financially stable and independent universities as a threat. A well-informed citizenry, autonomous university, and independent faculty are all antithetical to authoritarian causes.¹⁰² Johns Hopkins University President Ronald J. Daniels outlined this dynamic in an insightful 2021 Washington Post op-ed, “Why Authoritarian Regimes Attack Universities.”¹⁰³ Alongside examples including the Taliban, Benito Mussolini, and Viktor Orbán, President Daniels clarified what many of us intuitively understand: “Independent universities unnerve authoritarians because everything that these institutions strive to achieve is inimical to the autocrat’s devotion to the accumulation and arbitrary exercise of coercive public power.”¹⁰⁴

One can divide today’s assault on academic freedom and critical thought into three general phases.

Phase 1: Beginning in earnest in early 2021,¹⁰⁵ right-wing think tanks developed and deployed model legislation and talking points to stigmatize and stifle the nation’s nascent turn toward racial justice.¹⁰⁶ Central to this strategy was a messaging campaign that transformed the term “critical race theory” into a slur

100. See KAMOLA, *supra* note 5.

101. See Mutua, *supra* note 3.

102. See Ronald J. Daniels, Opinion, *Why Authoritarian Regimes Attack Independent Universities*, WASH. POST (Sept. 28, 2021, 12:46 PM), <https://www.washingtonpost.com/opinions/2021/09/28/why-authoritarian-regimes-attack-independent-universities> [https://perma.cc/6JTP-XHWW].

103. *Id.* We borrow this reference to President Daniel’s op-ed from the Letter from Concerned Law Professors, which astutely connected Daniels’s insights vis-à-vis foreign authoritarians to the GOP officials in the United States. See Letter from Concerned Law Professors, *supra* note 98. This link is more than conceptual. Earlier this year, Hungary’s authoritarian leader Viktor Orbán visited the United States and held meetings with former president Trump and the Heritage Foundation. See Casey Michel, *How Viktor Orbán Conquered the Heritage Foundation*, NEW REPUBLIC (Mar. 15, 2024), <https://newrepublic.com/article/179776/heritage-foundation-viktor-orban-trump> [https://perma.cc/N2BE-ER2K].

104. Daniels, *supra* note 102.

105. One could mark the beginning of this phase in September 2020, when then-President Trump issued an Executive Order widely understood to target antiracist efforts within the federal government. See Jonathan Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723 (2022).

106. See KAMOLA, *supra* note 5.

that could discredit efforts to combat racism generally (antiracism), and anti-Black racism in particular.¹⁰⁷ This discursive front created the pretext for GOP officials across the nation to propose hundreds of “discriminatory censorship laws”¹⁰⁸—a term scholars have employed to describe laws designed to demean inclusionary projects and chill classroom conversations about racism, gender identity, and American history, among other targeted topics. Many discriminatory censorship laws repurposed language from Executive Order 13,950 (now rescinded), which President Trump signed in September 2020 (the Trump EO).¹⁰⁹ The Trump EO banned federal entities and contractors from promoting so-called “divisive concepts” in a publicly understood effort to wield the power of the presidency against antiracism and CRT.¹¹⁰

Over the ensuing three years, GOP officials at the state, local and federal levels have proposed over 800 discriminatory censorship laws.¹¹¹ Over the same period, the United States has witnessed almost 6,000 instances of book banning across forty-one states and 247 public school districts.¹¹²

A report by the National Education Policy Center (NEPC Report) details that as of November 2023, state and local officials had enacted over 240 discriminatory censorship laws regulating K-12 classrooms.¹¹³ Most of these laws were adopted at

107. See Kimberlé Williams Crenshaw, *This Is Not a Drill: The War Against Antiracist Teaching in America*, 68 UCLA L. REV. 1702, 1715 n.25 (2022) (“Much of the well-funded disinformation campaign animating the depiction of C[ritical] R[ace] T[h]eory as an intellectual boogeyman began after Christopher Rufo self-declared a ‘one-man war against [C]ritical [R]ace [T]heory.’”).

108. See Feingold & Weishart, *Discriminatory Censorship Laws*, *supra* note 4 (manuscript at 6) (“[W]e believe the term captures two discrete goals these laws further: (1) to discredit inclusionary principles and practices and (2) to deny students access to critical knowledge about racism, sexism, gender identity, and other targeted topics.”).

109. Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 22, 2020) (revoked by Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021)); see Memorandum from Russell T. Vought, Dir., Off. Mgmt. & Budget, to the Heads of Exec. Dep’t & Agencies regarding Ending Employee Trainings that Use Divisive Propaganda to Undermine the Principle of Fair and Equal Treatment for All 2 (Sept. 28, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-37.pdf> [<https://perma.cc/QKS6-W88D>].

110. See Feingold and Weishart, *Discriminatory Censorship Laws*, *supra* note 4 (manuscript at 13).

111. See CRT Forward, UCLA SCH. OF L., <https://crtforward.law.ucla.edu> [<https://perma.cc/5LKY-FHN9>] (identifying “807 anti-Critical Race Theory bills, resolutions, executive orders, opinion letters, statements, and other measures” since September 2020); see also TAIFHA ALEXANDER, LA TOYA BALDWIN CLARK, KYLE REINHARD & NOAH ZATZ, UCLA SCH. OF L. CRITICAL RACE STUD., CRT FORWARD: TRACKING THE ATTACK ON CRITICAL RACE THEORY (2023), https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law-CRT-Report_Final.pdf [<https://perma.cc/6TYS-UW5L>].

112. See Sabrina Baëta & Kasey Meehan, *Spineless Shelves: Two Years of Book Banning*, PEN AM., <https://pen.org/spineless-shelves> [<https://perma.cc/4ZAA-L59Y>] (reporting 5894 instances).

113. See generally FEINGOLD & WEISHART, *supra* note 55.

the local level by school districts or school boards rather than by state officials.¹¹⁴ But state laws have the largest impact because they govern all covered schools in the state. Discriminatory censorship laws now regulate over 1.3 million educators and nearly half of the approximately 50 million U.S. public school students.

The NEPC Report documents how discriminatory censorship laws produce two related but distinct harms.¹¹⁵ First, discriminatory censorship laws produce regimes of miseducation—in which students lose access to critical curricular materials. For example, in some “censored” states, political leaders have replaced a comprehensive curriculum with content produced by right-wing entities like PragerU and Hillsdale College.¹¹⁶ Second, these laws expose students and teachers from targeted groups to a heightened risk of race- and sex-based harassment.¹¹⁷

Phase II: By 2022, GOP officials across the country began to direct rhetorical and legislative attacks at the LGBTQ+ community and women’s roles in society.¹¹⁸ Considered a more successful target than even antiracist efforts, attacks on LGBTQ+ people and related issues such as gender-affirming health care,¹¹⁹ this period saw right-wing activists employ the “whip of parental rights” to galvanize a mostly conservative, white base to limit discussions on gender and gender

114. *Id.* at 9–10.

115. *See id.* at 19–20.

116. Feingold & Weishart, *Discriminatory Censorship Laws*, *supra* note 4 (manuscript at 5) (detailing “PragerU’s self-described right-wing ‘indoctrination’ videos . . .”).

117. *See id.*

118. *See* Jeffrey Sachs & Jonathan Friedman, *Educational Gag Orders Target Speech About LGBTQ+ Identities with New Prohibitions and Punishments*, PEN AM. (Feb. 15, 2022), <https://pen.org/educational-gag-orders-target-speech-about-lgbtq-identities-with-new-prohibitions-and-punishments> [<https://perma.cc/C2TH-DPAA>]. Many of these bills built on Florida’s HB 1557, colloquially known as the “Don’t Say Gay” bill that Florida’s GOP legislature passed in 2022. Katie Blankenship, James Tager & Ryan Howzell, *The Florida Effect: How the Sunshine State Is Driving the Conservative Agenda on Free Expression*, PEN AM., <https://pen.org/report/the-florida-effect> [<https://perma.cc/8WE2-G3EM>].

119. Jeremy C. Young, Jonathan Friedman & Kasey Meehan, *America’s Censored Classrooms 2023*, PEN AM. (Nov. 9, 2023), <https://pen.org/report/americas-censored-classrooms-2023> [<https://perma.cc/5P3F-H2XD>].

expression.¹²⁰ The move also reflected the alignment between political conservatives and Christian nationalists.¹²¹

Further, whereas the discriminatory censorship laws that proliferated in Phase I principally targeted K-12 institutions, Phase II saw escalating attacks on higher education.¹²² This included GOP efforts to expand governmental control over curricular content in public colleges and universities; to restrict tenure and other faculty protections; to limit the role of accreditation agencies; and, most recently, to exert “direct ideological control over how universities operate” through bans on Diversity, Equity, and Inclusion (DEI) programs.¹²³ Each of these targets embodies a pillar of academic freedom and, by extension, democratic governance. According to the free speech advocacy organization PEN America, the underlying goal is to: “silence ideas and identities that some find uncomfortable; control narratives about the past; and ensure that only one set of values, viewpoints, and ideologies makes it past the schoolhouse gate.”¹²⁴

Although Florida has led this effort, GOP legislatures in several states—such as North Carolina, North Dakota, Ohio, and Texas—have proposed and adopted legislation designed to usurp institutional independence.¹²⁵ Consistent with the foregoing, the University of Kentucky Board of Trustees is poised to vote “on a controversial proposal . . . to dissolve its University Senate, which is more than 100 years old.”¹²⁶ The proposal would substantially circumscribe the faculty’s longstanding authority over core issues of university governance—including the power to “approve or reject new academic programs and courses.”¹²⁷

120. See LaToya Baldwin Clark, *The Critical Racialization of Parents’ Rights*, 132 YALE L.J. 3000, 3042–43 (2023) (explaining that parents were given “parents’ rights anti-CRT guidebooks” and were expected to become “teaching and curriculum watchdogs” entitled to “inspect curricula on demand, investigate an individual teacher’s lessons plans without that teacher’s permission, and opt students out of lessons parents disagree with.”); see also Athena D. Mutua, Angela P. Harris & Francisco Valdes, *Organizing for Democracy and Liberation: The Right to Learn, the Right to Teach & the Right to Thrive: CLC’s Inaugural Convening*, BALDY CTR. BLOG, <https://www.criticallegalcollective.org/blog/organizing-for-democracy-and-liberation-the-right-to-learn-the-right-to-teach-amp-the-right-to-thrive> [https://perma.cc/WX7U-RXE3] (referring to the “whip of ‘parental rights’” and the alignment of political conservatives and the Christian Nationalists in the attack on LGBTQ+ people and related issues).

121. See Mutua et al., *supra* note 120.

122. See generally Young et al., *supra* note 119.

123. *Id.*

124. *Id.*

125. See *id.*

126. Ryan Quinn, *Faculty Power on the Line in Kentucky*, INSIDE HIGHER EDUC. (June 5, 2024), <https://www.insidehighered.com/news/faculty-issues/shared-governance/2024/06/05/faculty-power-under-threat-university-kentucky> [https://perma.cc/UFJ3-SYB5].

127. *Id.*

Phase III: Hamas's October 7, 2023, attack on Israel and Israel's subsequent military campaign against Gaza created an opening for proponents of discriminatory censorship to recruit new allies and revive attacks on higher education and inclusive practices like DEI initiatives.¹²⁸ Right-wing officials—at times with bipartisan support—have weaponized legitimate concerns about antisemitism by deeming any criticism levied against the Israeli government's policies and practices antisemitic.¹²⁹ Individuals and entities aligned with both major American political parties continue to invoke this conflation to silence and stigmatize pro-Palestinian advocacy.¹³⁰ At times driven by faculty or alumni pressure, efforts to discredit and censor pro-Palestinian scholarship has penetrated law schools and the journals that produce legal scholarship.¹³¹

On the legislative front, multiple state legislatures have introduced bills that would codify the widely criticized International Holocaust Remembrance Alliance (IHRA) definition of antisemitism.¹³² This builds on efforts by approximately thirty states to redefine antisemitism¹³³—many of which replicated

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128. See Ryan D. Doerfler et al., *A Call for Institutional Fairness on Palestine*, LAW & POL. ECON. BLOG (Nov. 21, 2023), <https://lpeproject.org/blog/a-call-for-institutional-fairness-on-palestine> [<https://perma.cc/WFW3-GWBL>].
 129. #RaceClass, *The Anti-Zionism = Anti-Semitism Power Play*, SOUNDCLOUD (Dec. 6, 2023), <https://soundcloud.com/user-808872105/ep-24-the-anti-zionism-anti-semitism-power-play> (press play to listen to the podcast) (last visited July 23, 2024).
 130. See, e.g., Letter from the ACLU et al., to Co-Sponsors of Proposed American Bar Association Resolution 514 on Antisemitism 2 (Jan. 18, 2023), <https://www.aclu.org/documents/letter-co-sponsors-proposed-american-bar-association-resolution-514-antisemitism> [<https://perma.cc/6RDS-6KQD>] (arguing that “[o]ngoing efforts to codify the I[n]ternational H[olocaust] R[emembrance] A[llyance] definition into law and policy, including at the A[merican] B[ar] A[ssociation], are invariably framed as efforts to fight antisemitism. Yet, the clear objective behind the promotion of the IHRA definition is the suppression of non-violent protest, activism, and criticism of Israel and/or Zionism . . .”).
 131. See Jake Offenhartz, *Columbia Law Review's Website Is Shut Down After Publishing Article Critical of Israel*, PBS NEWS (June 4, 2024, 8:49 PM), <https://www.pbs.org/newshour/education/columbia-law-reviews-website-is-shut-down-after-publishing-an-article-critical-of-israel> [<https://perma.cc/N263-YLXT>].
 132. See Geoff Mulvihill, *Lawmakers in Several U.S. States Push for Laws Defining Antisemitism*, PBS NEWS HOUR (Jan. 29, 2024, 9:21 AM), <https://www.pbs.org/newshour/politics/lawmakers-in-several-u-s-states-push-for-laws-to-define-antisemitism> [<https://perma.cc/6SJA-ZLRD>]; see also *Working Definition of Antisemitism*, INT'L HOLOCAUST REMEMBRANCE ALL., <https://holocaustremembrance.com/resources/working-definition-antisemitism> [<https://perma.cc/32W7-LWBE>]. For a discussion of various definitions of antisemitism and background of advocacy around them, see Masha Gessen, *In the Shadow of the Holocaust: How the Politics of Memory in Europe Obscures What We See in Israel and Gaza Today*, NEW YORKER (Dec. 9, 2023), <https://www.newyorker.com/news/the-weekend-essay/in-the-shadow-of-the-holocaust> [<https://perma.cc/XU3E-FA29>].
 133. Geoff Mulvihill, *There's a Wave of New Bills to Define Antisemitism. In These 3 States, They Could Become Law*, ASSOCIATED PRESS (Jan. 30, 2024, 8:12 AM), <https://apnews>.

former President Trump's 2019 Executive Order 13899 that adopted the IHRA definition.¹³⁴

At the federal level, the U.S. House passed a bill that would amend the U.S. tax code to “terminate the tax-exempt status of ‘terrorist supporting organizations.’”¹³⁵ Professor Maryam Jamshidi explains that the bill is “[i]ntended to respond to pro-Palestine student organizing” and “gives the Secretary of the Treasury unilateral authority to suspend the 501(c)(3) status of any U.S. organization they determine has provided ‘material support’ to certain kinds of groups in the preceding three years.”¹³⁶ Jamshidi notes with concern that federal officials could weaponize the law by “pushing the baseless narrative that [Students for Justice in Palestine] chapters are fronts for Hamas”—a claim that pro-Israel politicians and groups had made even before October 7, 2023.¹³⁷

At the state level, Florida Bill H.B. 465 requires state colleges and universities “to assess the out-of-state fee for [post-secondary] students who promote [what they define as] a foreign terrorist organization.”¹³⁸ The bill renders such students ineligible for financial aid.¹³⁹ In October 2023, Florida's Board of Governors Chancellor invoked this legislation in a directive to Florida university presidents to disband chapters of Students for Justice in Palestine (SJP), a student group that advocates for Palestinian rights.¹⁴⁰ It is unclear whether any presidents have taken steps to deactivate the SJP chapters.¹⁴¹ Even in states without discriminatory censorship laws, universities have suspended or otherwise sanctioned student groups that openly support Palestinian causes.¹⁴²

com/article/antisemitism-definition-states-law-zionism-indiana-georgia-871571f3b392455b1479827bdf1f5ea7 [https://perma.cc/7CLQ-BXJQ].

134. See Postsecondary Education Students, H.B. 465, 2024 Reg. Sess. (Fla. 2024).

135. Maryam Jamshidi, *Securitizing the University*, LAW & POL. ECON. BLOG (June 3, 2024), <https://lpeproject.org/blog/universities-secritization-palestine/> [https://perma.cc/JMV5-RPNC].

136. *Id.*

137. See also Maryam Jamshidi, *Students for Justice in Palestine, Governors for Authoritarianism in Florida*, LAW & POL. ECON. BLOG (Nov. 9, 2023), <https://lpeproject.org/blog/students-for-justice-in-palestine-and-governors-for-authoritarianism-in-florida> [https://perma.cc/L275-VMGH].

138. Fla. H.B. 465.

139. *Id.*

140. *Students for Just. in Palestine at Univ. of Fla. v. Rodrigues*, No. 1:23CV275-MW/MJF, 2024 WL 37454, (N.D. Fla. Jan. 31, 2024). For more information about the case, see *Students for Justice in Palestine at the University of Florida v. Raymond Rodrigues*, ACLU (Nov. 16, 2023), <https://www.aclu.org/cases/students-for-justice-in-palestine-at-the-university-of-florida-v-raymond-rodrigues> [https://perma.cc/RZ2L-2PB5].

141. *Id.* at 13 (finding in part that “that no actions have been taken in pursuit of deactivation under the Chancellor’s memorandum.”).

142. See, e.g., Press Release, ACLU, NYCLU and Palestine Legal Sue Columbia University Over Student Group Suspension (Mar. 12, 2024), <https://www.nyclu.org/press-release/>

This targeting of pro-Palestinian advocacy tracks broader trends in which politicians and university leaders wield state power to repress criticism of Israel's military campaign against Gaza.¹⁴³ This past spring, university presidents in deep Red and Blue states deployed armed police forces to arrest and harass their own students and faculty for engaging in peaceful protest.¹⁴⁴ The SRE commented on this disturbing trend following her recent country visit to the United States:

Riot units reportedly used tear gas and rubber bullets in clashes with demonstrators, there are reports of violent arrests leading to injuries, including concussions and broken bones requiring hospital treatment, as well as harassment of the protesters In addition, universities have reportedly taken disciplinary measures against those who participated or plan to participate in the protests All these measures have inevitably created a chilling effect on the whole academic community and a climate of intimidation.¹⁴⁵

As we write, House GOP leadership—among other elected officials—marshal cynical antisemitism talking points to smear individual academics and discredit higher education writ large.¹⁴⁶ On April 17, 2024, Columbia University President Minouche Shafik appeared before the Republican-led U.S. House of Representatives Committee on Education and the Workforce.¹⁴⁷ Modelled after a December 2023 hearing that triggered the ousting of two university presidents, the April 17 hearing bore the title “Columbia in Crisis: Columbia

nyclu-and-palestine-legal-sue-columbia-university-over-student-group-suspension [https://perma.cc/9ZMA-D4BU] (noting “lawsuit against Columbia University for the unlawful suspension of its chapters of Students for Justice in Palestine (SJP) and Jewish Voice for Peace (JVP) for engaging in peaceful protest”).

143. See, e.g., Paul Butler, *Opinion, Columbia's President Is Committed to One Principle: Keeping Her Job*, WASH. POST (Apr. 23, 2024, 5:43 PM), <https://www.washingtonpost.com/opinions/2024/04/23/columbia-university-president-committed-job> [https://perma.cc/U7QW-TELV].

144. See, e.g., Dan Rosenzweig-Ziff, Jennifer Hassan, Richard Morgan, Karin Brulliard & Kelly Kasulis Cho, *More Arrests and a Canceled Commencement as College Antiwar Rallies Spread*, WASH. POST (Apr. 26, 2024, 10:26 AM), <https://www.washingtonpost.com/nation/2024/04/25/university-protests-gaza-arrests-emerson-usc> [https://perma.cc/E6UL-BXNA].

145. Statement from Special Rapporteur, *supra* note 3, at 2.

146. See generally Katherine Knott, *Colleges in Republicans' Crosshairs Enroll Only a Sliver of U.S. College Students*, INSIDE HIGHER EDUC. (June 10, 2024), <https://www.insidehighered.com/news/government/politics-elections/2024/06/10/congress-targets-unrepresentative-sliver-higher-ed> [https://perma.cc/BQ9E-C56T].

147. Noah Bernstein, Sarah Huddleston, Shea Vance & Esha Karam, *Live Updates: Shafik Testifies Before Congress on Columbia's Handling of Antisemitism on Campus*, COLUMBIA SPECTATOR (Apr. 17, 2024), <https://www.columbiaspectator.com/news/2024/04/17/live-updates-shafik-testifies-before-congress-on-columbias-handling-of-antisemitism-on-campus> [https://perma.cc/63NX-ZCAQ].

University's Response to Antisemitism."¹⁴⁸ During the hearing, President Shafik promised that a visiting professor "will never work at Columbia again" and "pledge[d] to crack down on . . . tenured faculty that the [U.S. House] committee targeted as antisemitic and demanded disciplinary action be taken against."¹⁴⁹ AAUP National President Irene Mulvey remarked that "[w]e are witnessing a new era of McCarthyism where a House committee is using college presidents and professors for political theater."¹⁵⁰

The day following the hearing, Shafik requested that the New York Police Department (NYPD) remove protesting Columbia students from the university campus. The NYPD responded by arresting over a hundred students.¹⁵¹ The AAUP issued a concise statement denouncing Columbia's treatment of student protestors:

We condemn in the strongest possible terms the Administration's suspension of students engaged in peaceful protest and their arrest by the New York City Police Department. These acts violate the letter and the spirit of the University Statutes, shared governance, students' rights, and the University's absolute obligation to defend students' freedom of speech and to ensure their safety.¹⁵²

148. *Id.*

149. Alan Blinder, *Columbia Leaders Grilled at Antisemitism Hearing Over Faculty Comments*, N.Y. TIMES (May 7, 2024, 1:52 PM), <https://www.nytimes.com/live/2024/04/17/nyregion/columbia-antisemitism-hearing?searchResultPosition=2> [https://perma.cc/57XK-R8FV].

150. Stephanie Saul, *Who Are the Columbia Professors Mentioned in the House Hearing?*, N.Y. TIMES (Apr. 17, 2024), <https://www.nytimes.com/2024/04/17/nyregion/jospeh-massad-katherine-franke-mohamed-abdou-columbia-university.html> [https://perma.cc/JMP2-FRKX]. Mulvey added that "President Shafik's public naming of professors under investigation to placate a hostile committee sets a dangerous precedent for academic freedom and has echoes of the cowardice often displayed during the McCarthy era." *Id.* Elements of today's coordinated assault on academic freedom also have more recent echoes. See Juan Cole, *The New McCarthyism*, SALON (Apr. 22, 2005, 7:49 PM), https://www.salon.com/2005/04/22/mccarthy_5 [https://perma.cc/D99B-TZDE] (drawing parallels between the McCarthy era and a 2005 controversy in which a Columbia University professor was targeted for their speech critical of the Israeli government's policies).

151. Judd Legum, *Columbia University Protests and the Lessons of "Gym Crow"*, POPULAR INFO. (Apr. 22, 2024), <https://popular.info/p/columbia-university-protests-and> [https://perma.cc/A93G-6KVZ].

152. Laura Spitalniak, *Pro-Palestinian Legal Group Files Civil Rights Complaint Against Columbia University*, HIGHER ED DIVE (Apr. 26, 2024), <https://www.highereddive.com/news/pro-palestinian-legal-group-civil-rights-complaint-columbia-university-gaza> [https://perma.cc/CQ9R-VSCQ].

III. PRIVATIZING PUBLIC EDUCATION AND DEFUNDING HIGHER EDUC.

A distinct source of academic freedom's present precarity flows from neoliberal policy and the empowerment of private interests, issues to which we now turn. Decades of neoliberal ideology and reforms—a hallmark of Democratic and Republican administrations—have eroded university autonomy and faculty independence.¹⁵³ Neoliberal policies have fueled the corporatization of the academy and enhanced control of it by corporations and the wealthy.¹⁵⁴

Neoliberalism theorizes that “governmental power is inherently prone to corruption, and that private markets freed from burdensome regulations are the best way to build wealth . . . and distribute the goods and services necessary for human flourishing.”¹⁵⁵ In practice, “neoliberal policy has dramatically increased economic precarity [in the United States] and concentrated wealth in fewer and fewer hands.”¹⁵⁶

At the K-12 level, “neoliberal initiatives such as voucher programs, charter schools, state funding for parochial schools, and attacks on teachers and teacher unions seek to undermine public education and create opportunities for private profiteering.”¹⁵⁷ For higher education, neoliberal policy has resulted in “dramatic reductions in state funding which have rendered colleges and universities increasingly dependent on” private sources and student tuition, with students in turn increasingly dependent on loans.¹⁵⁸ It has also stimulated “the gradual replacement of tenure-track faculty with poorly paid adjuncts denied security of employment,” and therefore, security for expression, “and the closing of humanities departments and programs that teach students to think critically.”¹⁵⁹

The 1980s push to privatize and decrease public services led to the privatization of a host of public functions.¹⁶⁰ In the process, interest groups, including right-wing donors and politicians, have systematically eroded key pillars of our public K-12 schools and higher education by privatizing both domains. Increased privatization has, in turn, stripped resources from our public education

153. See Christine Morley, *The Systemic Neoliberal Colonization of Higher Education: A Critical Analysis of the Obliteration of Academic Practice*, 51 AUSTL. EDUC. RESEARCHER 571, 571 (2024).

154. See Jason Del Gandio, *Neoliberalism and the Academic-Industrial Complex*, TRUTHOUT (Aug. 12, 2010), <https://truthout.org/articles/neoliberalism-and-the-academicindustrial-complex> [<https://perma.cc/V4CJ-2L8A>].

155. Mutua et al., *supra* note 120.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. See Lieberwitz, *supra* note 65, at 324–25.

systems and centralized power within individuals and entities often hostile to public education and multiracial democracy itself.

A. Privatizing K-12 Education

The move to privatize public K-12 education has had bipartisan support, influencing the policies of the G.W. Bush, Obama, and Trump administrations.¹⁶¹ Recent reporting reveals that the K-12 privatization agenda is funded and led “by a very small group of American billionaires.”¹⁶² In addition to dark money sources, proponents range from the Walton family (Walmart) and Charles Koch (Koch Industries), to Bill Gates (Bill & Melinda Gates Foundation) and Mark Zuckerberg (Facebook).¹⁶³

Diane Ravitch, a leading education historian and a former member of the conservative school reform movement, explains that the reform-cum-privatization movement “is not meant to reform public education but is a deliberate effort to replace public education,” a system which educates nearly 90 percent of American children,¹⁶⁴ “with a privately managed, free-market system of schooling.”¹⁶⁵ Ravitch argues that contrary to the view of education privatizers, many challenges—particularly in urban schools—derive from poverty and segregation.¹⁶⁶ Commonly proposed reforms—e.g., private management and control, increased standardize testing, competition among schools and accountability (which often entails closing “failing” schools)—fail to remedy these core issues.¹⁶⁷ Ravitch further argues that privatization has failed to deliver on its promises of improved educational quality and racial equity as measured by its own key criteria: it has failed to raise test scores, and charter schools are more segregated than public schools.¹⁶⁸

161. See generally DIANE RAVITCH, *SLAYING GOLIATH: THE PASSIONATE RESISTANCE TO PRIVATIZATION AND THE FIGHT TO SAVE AMERICA’S PUBLIC SCHOOLS* loc. 2679 (2020) (ebook) (discussing the educational policies of all three administrations and noting that from “Ronald Reagan to Donald Trump, six successive administrations in Washington, D.C., actively encouraged and funded Corporate Disruption,” which they claimed was reform but Ravitch argues was actually meant to disrupt, redesign, and privatize American public education).

162. JIM FREEMAN, *RICH THANKS TO RACISM: HOW THE ULTRA-WEALTHY PROFIT FROM RACIAL INJUSTICE* 53 (2021).

163. *Id.* at 53–55.

164. DIANE RAVITCH, *REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA’S PUBLIC SCHOOLS* 320 (2013).

165. *Id.* at 4.

166. *Id.*

167. *Id.*

168. *Id.* at 4, 293; see also RAVITCH, *supra* note 161, loc. 117, 2602.

Jim Freeman, a civil rights attorney, notes that the privatization movement has operated heavily in communities of color.¹⁶⁹ The reforms, he suggests, are often imposed without community consultation, or despite opposition, and have led to an epidemic of school closings that destabilize these communities.¹⁷⁰ Among other examples, Freeman notes that Chicago, IL, Detroit, MI, and Saint Louis, MO public school districts (each with over 88 percent students of color) have shuttered at least 126, 200, and 44 public schools, respectively, in the relevant time period.¹⁷¹

While Ravitch distinguishes among the various types of educational privatizer advocates, both she and Freeman observe that school privatization functions as a “money grab.”¹⁷² In concrete terms, fully privatizing public education would entail a transfer of a half trillion dollars of “public funds to private management and the creation of thousands of deregulated, unsupervised, and unaccountable schools [that open] the public coffers to profiteering, fraud, and exploitation by large and small entrepreneurs.”¹⁷³

B. Privatizing (and Corporatizing) Higher Education

In the domain of higher education, privatization has resulted in the steep decline of public funding for higher education from the federal government (which “mainly provides financial assistance to individual students and specific research projects”) and the states (which “primarily pay for the general operations of public institutions.”¹⁷⁴) This decline in funding has had more deleterious effects on public (relative to private) universities.¹⁷⁵ Professor Risa Lieberwitz has detailed how privatizing higher education has yielded multiple negative consequences: higher tuition fees, increased commodification of education, and staggering student debt, with universities forced to search for additional funds in the private market or cut programs, driving declines in liberal arts studies.¹⁷⁶

Corporatization is pervasive throughout the American university. The increased influence of private actors has shifted the university’s societal role from

169. See FREEMAN, *supra* note 162, at 41–45, 53, 77.

170. *Id.* at 45–46, 78–79.

171. *Id.* at 43.

172. *Id.* at 41.

173. RAVITCH, *supra* note 164, at 4.

174. *Two Decades of Change in Federal and State Higher Education Funding*, PEW CHARITABLE TRS. (Oct. 15, 2019), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/10/two-decades-of-change-in-federal-and-state-higher-education-funding> [https://perma.cc/U9PP-J9H5].

175. Lieberwitz, *supra* note 65, at 318–33.

176. *See id.*

serving a democratic public mission to catering to private economic interests—specifically, the economic interests of for-profit corporations.¹⁷⁷ Further, the corporate business model of managing universities as a business “strengthen[s] the top-down [decisionmaking] power of the administration,”¹⁷⁸ encourages university-industry ties, and “creates a strong incentive to commercialize academic research.”¹⁷⁹ This dynamic “undermine[s] [universities’] institutional independence, faculty impartiality in choosing and carrying out a research agenda, and the norms of the academic profession.”¹⁸⁰

In terms of academic research, American colleges and universities have institutionalized academic peer review of sponsored research, though administrators often manage these offices. Federal government agencies such as the National Endowment for the Humanities (NEH), the National Science Foundation, and the National Institutes of Health (NIH)—agencies which primarily fund intellectual research—often employ peer review processes.¹⁸¹ Although government funding “shapes research agendas through its descriptions of research interests and award of grants, the public-interest ethos of some agencies and the peer review process place constraints on the use of agency power or personal financial interests to skew research grants in an unchecked capitalist, anti-democratic direction.”¹⁸²

Over time, federal government funding of academic research has steadily declined. During the post-World War II expansion of public funding for academic research, the federal government provided 60 to 70 percent of university research support. After the Reagan administration launched an era of neoliberal policies in the 1980s, this support began to decline—a trend that endures. Between 2000 to 2017, federal funding for academic research decreased from 57 percent to 51 percent.¹⁸³

177. *See id.*

178. *Id.* at 325.

179. *Id.*

180. *Id.* at 326.

181. For a list of U.S. federal grant-making agencies, see *Grant-Making Agencies*, <https://www.grants.gov/learn-grants/grant-making-agencies.html> [<https://perma.cc/SEE9-RVQ5>]. *See e.g., Peer Review for Sponsored Research*, HARVARD MED. SCH., <https://ari.hms.harvard.edu/research-influence/peer-review-confidentiality/peer-review-sponsored-research#:~:text=Peer%20Review%20for%20sponsored%20research%20funding%20is%20a%20process%20adopted,strength%20of%20proposed%20research%20plans> [<https://perma.cc/W7MN-KTMX>] (describing National Institutes of Health peer review for sponsored research).

182. Lieberwitz, *supra* note 65, at 324.

183. *Id.*

This was accompanied by the promulgation of laws like the 1980 Bayh-Dole Act,¹⁸⁴ which alongside the corporatization of the university, incentivized the commercialization of academic research.¹⁸⁵ The Act “permits and encourages universities and other federal fund recipients to patent and license research resulting from the use of federal funds, including exclusive licenses to for-profit corporations.”¹⁸⁶ Previously, the government held many of the patents to research and resulting inventions. This meant that the research and inventions remained in the public domain for possible public use. The shift relocated certain kinds of academic research from the public domain into private, often for-profit hands. As Lieberwitz observed, “before the Bayh-Dole Act, [U.S.] universities obtained 264 patents Between 1988 and 2003, [U.S.] patents awarded to academic institutions [jumped] from about 800 to more than [3200] per year . . . and by 2016 had more than doubled [from that total to over 6600].”¹⁸⁷ This practice continues “[d]espite the fact that patents and licenses have not been lucrative for most universities.”¹⁸⁸

On another front, corporatization and limited funding have led to a steady decline in the number of tenured faculty. Nationally, the “percentage of tenure-track [and] tenured faculty positions has plummeted from 78 percent in 1969 to . . . 30 percent” today.¹⁸⁹ In their place, universities have hired contingent faculty. Growth in contingent faculty—a status in which people of color and women are overrepresented—stratifies the faculty and delinks academic freedom from tenure. This status, unprotected by tenure processes, limits contingent faculty’s ability to freely express themselves and participate in shared governance. At the same time, higher education has witnessed an increase in administrative staff. Between 1976 and 2015, for example, “the number of full-time university executives and managers grew by 140 percent.”¹⁹⁰ Faculty grew at a smaller rate over the same period.¹⁹¹

These trends have not only increased the power of administrators but also increased the power and influence of corporate funders and donors over academics and universities. This influence empowers private entities to shape

184. *Id.* at 325.

185. *Id.*

186. *Id.*

187. *Id.* (citing Jon Marcus, *Think Universities Are Making Lots of Money From Inventions? Think Again*, THE HECHINGER REP. (Jan. 17, 2020), <https://hechingerreport.org/think-universities-are-making-lots-of-money-from-inventions-think-again> [https://perma.cc/CS9R-QWKS]).

188. Lieberwitz, *supra* note 65, at 325.

189. *Id.* at 327.

190. *Id.*

191. *Id.*

institutions and research to meet their own narrow pecuniary needs and ideological perspectives, which overall tend to be more conservative than those of the American public.¹⁹² Multiple recent scandals implicating law school independence reveal how donors have driven institutional governance in ways that favor right-wing economic and political interests.¹⁹³

One such episode involved the donor-driven reshaping of George Mason Law School through secret gift agreements, some of which “revealed egregious violations of academic freedom and [university] independence that had been carried out for years.”¹⁹⁴ George Mason University (GMU) was founded in 1972 as a public institution with a small endowment.¹⁹⁵ In the 1980s, Charles Koch—the highly influential libertarian activist—identified GMU as a potential “stronghold of libertarian economics.”¹⁹⁶

To realize that goal, Koch and his foundation contributed nearly \$100 million to the university between 2005 and 2015, directing most of those funds to the economics department and the law school’s libertarian Law and Economics Center, “which provides corporate-backed ‘free-market’ educational workshops for federal and state judges and attorneys general.”¹⁹⁷ Presumably, these institutions provide the intellectual scaffolding—including the increasingly discredited theory of trickle-down economics—that support the free-market, antitax, anti-government and anti-public education policies associated with and beneficial to the Koch-affiliated network.¹⁹⁸ Then in 2016, “the Koch Foundation and an anonymous donor gave \$30 million to the GMU law school.”¹⁹⁹ The gift

192. See Timothy K. Kuhner, *The Third Coming of American Plutocracy: What Campaign Finance Reformers Are Up Against*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 19, 36 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018) (footnotes omitted) (“[T]his elite class of donors and spenders is highly unrepresentative of the general public. Beyond being overwhelmingly white and wealthy, and mostly male, the donor class does not want the same things from government as average citizens do. Indeed, studies suggest that conservative economic views are what most distinguish campaign donors from the rest of the population and even from other wealthy citizens. Donors’ conservative views on economic matters coincide with the legal and policy environment driving economic inequality.”).

193. See Shawn Musgrave, *Leonard Leo Built the Conservative Court. Now He’s Funneling Dark Money into Law Schools.*, THE INTERCEPT (May 29, 2024, 6:00 AM), <https://theintercept.com/2024/05/29/leonard-leo-donor-law-schools> [<https://perma.cc/QX2Y-VABX>].

194. Bethany L. Letiecq, *George Mason University’s Donor Problem and the Fight for Transparency*, AM. ASS’N OF UNIV. PROFESSORS, <https://www.aaup.org/article/george-mason-university%E2%80%99s-donor-problem-and-fight-transparency> [<https://perma.cc/92XL-T5KS>].

195. *Id.*

196. *Id.*

197. See *id.*

198. *Id.*; see also Lieberwitz, *supra* note 65, at 326.

199. Letiecq, *supra* note 194.

stipulated funding for new faculty hires, which “raised questions about a donor’s ability to influence the makeup of faculty in a school and whether such provisions essentially subsidize the donor’s intent.”²⁰⁰

Concerned stakeholders, including students and faculty, criticized the gift agreement for “providing donors with too much influence [and] also violating principles of academic freedom.”²⁰¹ However, while the faculty and students in Virginia continue to work to ensure transparency of donor gift agreements, GOP politicians, often funded by the same donor networks, have stepped into the breach. Elsewhere, in Wisconsin, the GOP-led state legislature withheld funding for the state university system of Wisconsin until it agreed to freeze hiring in DEI, eliminate a program for hiring a diverse cohort of faculty members and raise funds for a new position that would focus on “conservative political thought, classical economic theory, or classical liberalism.”²⁰²

In a separate incident, UNC’s journalism school failed to secure the appointment of Nikole Hannah-Jones (the recipient of a MacArthur Fellowship and a Pulitzer Prize), despite an ultimate offer.²⁰³ In 2020, after the dean of UNC’s journalism school “raised the possibility of appointing [Hannah-Jones] to an endowed chair,” Hannah-Jones began the “rigorous tenure process” necessary to secure the appointment.²⁰⁴ Reflecting her impressive credentials, Hannah-Jones received widespread faculty and administrative support—including the dean’s review that Hannah-Jones had “the best” tenure file she had ever seen.²⁰⁵ The Board of Trustees, who possessed final authority on the appointment, nonetheless delayed review of Hannah-Jones’s file.²⁰⁶ Reporting revealed that the delay was precipitated by concerns from influential donors and political appointees who disliked the substance of Hannah-Jones’s scholarship.²⁰⁷

200. *Id.*

201. *Id.*

202. Erin Gretzinger, ‘We Were Under So Much Pressure’: Inside Wisconsin’s Tumultuous Budget Deal, *THE CHRON OF HIGHER EDUC.* (Mar. 22, 2024), <https://www.chronicle.com/article/we-were-under-so-much-pressure-inside-wisconsins-tumultuous-budget-deal> [<https://perma.cc/J63M-XH9Q>].

203. See Katie Robertson, *Nikole Hannah-Jones Denied Tenure at University of North Carolina*, *N.Y. TIMES* (July 15, 2022), <https://www.nytimes.com/2021/05/19/business/media/nikole-hannah-jones-unc.html> [<https://perma.cc/UK64-QK3Y>].

204. FLEISHER ET AL., *supra* note 70, at 26.

205. *Id.*

206. See Joe Killian, *Deadline Set for Lawsuit in Nikole Hannah-Jones Tenure Controversy*, *N.C. NEWSLINE* (May 29, 2021, 10:42 AM) <https://pulse.ncpolicywatch.org/2021/05/29/pw-exclusive-deadline-set-for-lawsuit-in-nikole-hannah-jones-tenure-controversy> [<https://perma.cc/64J9-7ZJR>].

207. See FLEISHER ET AL., *supra* note 70, at 26.

One such opponent was Walter Hussman, Jr., who had donated \$25 million to UNC's journalism school (renamed in his honor) and lobbied against Hannah-Jones's appointment. He raised concerns in multiple correspondences to UNC leadership about her support of reparations for Black Americans.²⁰⁸ Two North Carolina congresspeople—including Representative Virginia Foxx, who now chairs the same House Committee targeting academics who engage in pro-Palestinian speech—also attempted to block Hannah-Jones's appointment.²⁰⁹ In a letter to UNC's Chancellor, Representative Foxx suggested that “[Hannah-Jones's] portrayals of ‘White America’ are purposely divisive, a characteristic that objectively questions her ability to lead a program at UNC.”²¹⁰

And as referenced above, since October 7, 2023, Representative Foxx has weaponized claims of antisemitism and the power of her congressional office to harass academics and smear higher education itself.²¹¹ In one of her first publicity stunts,²¹² Representative Foxx leveraged her federal subpoena power to hold public hearings with university leaders from Harvard University, the University of Pennsylvania, the Massachusetts Institute of Technology (MIT), and Columbia University.²¹³ Within a month after the hearing, Harvard University's president, Dr. Claudine Gay,²¹⁴ and the University of Pennsylvania's president, Dr. Liz Magill, resigned from their respective roles.

208. *Id.* at 27.

209. *See id.*

210. Matt Shuham, *GOP Reps Objected to Nikole Hannah-Jones's Hiring in Letter to UNC Chancellor*, TALKING POINTS MEMO (Aug. 3, 2021, 6:18 PM), <https://talkingpointsmemo.com/news/gop-reps-objected-to-nikole-hannah-jones-hiring-in-letter-to-unc-chancellor> [https://perma.cc/HQ2S-KTZS].

211. *See* Letter from Concerned Law Professors, *supra* note 98.

212. *See* Press Release, Comm. on Educ. & the Workforce, *Foxx Calls on Columbia President, Trustees to Restore Order on Campus* (Apr. 21, 2024), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=410478> [https://perma.cc/4TBH-N59D].

213. Katie Lobosco, *Harvard, Penn and MIT Presidents Face Grilling by Congress Over Antisemitism*, CNN (Dec. 5, 2023, 3:36 PM), <https://www.cnn.com/2023/12/05/politics/harvard-penn-mit-antisemitism-congress/index.html> [https://perma.cc/4AQY-LYCU]; Annie Ma & Collin Binkley, *Columbia's President Rebuts Claims She Has Allowed the University to Become a Hotbed of Antisemitism*, ASSOCIATED PRESS (Apr. 17, 2024, 5:36 PM), <https://apnews.com/article/columbia-president-congress-israel-hamas-antisemitism-3255357b4443c1fb4bae8b8ea5774ee5> [https://perma.cc/YWB3-JE25].

214. Alvin Tillery, *Putting the Racist Crusade Against Harvard's Dr. Claudine Gay in Context*, MEDIUM (Jan. 5, 2024), <https://medium.com/@atillery2/putting-the-racist-crusade-against-harvards-dr-claudine-gay-in-context-26535c307f96> [https://perma.cc/98Y2-G94U]; Richard Luscombe, *University of Pennsylvania President Resigns After Furor Over Free Speech and Antisemitism*, THE GUARDIAN (Dec. 9, 2023, 5:17 PM), <https://www.theguardian.com/us-news/2023/dec/09/university-of-pennsylvania-president-free-speech-antisemitism> [https://perma.cc/8TLZ-8J65].

While House Republicans played a role in these departures, wealthy donors also fueled intense pressure campaigns against Gay and Magill.²¹⁵ One of those donors, Marc Rowan, had criticized President Magill prior to Oct. 7 for allowing UPenn to stage a Palestinian literary festival, on the claim that the festival was antisemitic.²¹⁶ Later, apparently in his role as chair of the board of advisors of UPenn's Wharton School, he sent a letter to UPenn's trustees suggesting that "hard choices" would need to be made, potentially including issues related to closing departments, examining faculty hires, and clarifying student free speech rules. The email generated a harsh response signed by 900 UPenn faculty members, among others, explaining that these types of decisions were not within the purview of trustees but rather the product of shared governance practices among those with academic expertise.²¹⁷

For her part, Harvard President Gay became the target of a coordinated right-wing and racially-fueled smear campaign.²¹⁸ Many who cheered on this

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215. See Robert Reich, *Powerful Donors Managed to Push out Harvard's Claudine Gay. But at What Cost?*, THE GUARDIAN (Jan. 3, 2024, 7:20 AM), <https://www.theguardian.com/commentisfree/2024/jan/03/powerful-donors-managed-to-push-out-harvards-claudine-gay-but-at-what-cost?ref=biztoc.com> [https://perma.cc/R5VH-NU2S] (outlining abuse of power by wealthy donors like Kenneth Griffin "who earned billions on Wall Street" [Citadel LLC and Citadel Securities], Bill Ackman, "who heads the giant hedge fund Pershing Square Capital Management," Marc Rowan, "chief executive of Apollo Global Management and the chair of the board of Penn's Wharton School, and Jay Clayton, "chairman of Apollo's board, among others). Ross Stevens is the "founder and chief executive officer of Stone Ridge Holdings Group, a financial-services firm, [and he] informed Penn in a letter that he would cancel \$100 million of Stone Ridge shares held by the university if it didn't replace President Liz Magill." Melissa Korn & Joseph De Avila, *Penn Donor Threatens to Rescind \$100 Million Gift Unless President Is Ousted*, WALL ST. J. (Dec. 17, 2023, 11:26 PM), <https://wsj.com/us-news/education/university-of-pennsylvania-president-liz-magill-congressional-testimony-antisemitism-backlash-97376d49> [https://perma.cc/SZ2Y-NUUD].
 216. Ramishah Maruf, *UPenn Donors Were Furious About the Palestine Writes Literature Festival. What About It Made Them Pull Their Funds?*, CNN (Oct. 25, 2023, 8:11 AM), <https://www.cnn.com/2023/10/25/business/palestine-writes-literature-festival-what-happened/index.html#:~:text=The%20root%20of%20their%20anger,characterization%20or ganizers%20and%20attendees%20reject.> [https://perma.cc/AP6K-3ARB]; Maureen Tkacik, *The Moral Authority of Marc Rowan*, THE AM. PROSPECT (Oct. 21, 2023), <https://prospect.org/power/2023-10-21-moral-authority-of-marc-rowan> [https://perma.cc/E5VJ-EGHY].
 217. Ethan Young, *Over 900 Penn Faculty Warn of 'Hostile Takeover' by Trustees, Donors in Response to Marc Rowan Letter*, DAILY PENNSYLVANIAN (Dec. 17, 2023, 3:08 PM), <https://www.thedp.com/article/2023/12/penn-faculty-concern-marc-rowan-letter> [https://perma.cc/W246-NF2V].
 218. See Braktkton Booker, *Was Claudine Gay's Ouster From Harvard Racially Motivated*, POLITICO (Jan. 3, 2024, 2:18 PM), <https://www.politico.com/newsletters/the-recast/2024/01/03/claudine-gay-harvard-ouster-00133649> [https://perma.cc/9GD8-FH4Q] ("[Gay's] critics trumpeted victory once her resignation became public Tuesday, after a very meticulous and overt campaign to smear Gay, Harvard's first Black woman president.").

campaign openly situated it within a broader effort to discredit and dismantle DEI.²¹⁹

These episodes illustrate the increasing power of external forces—themselves hostile to higher education’s basic mission—to influence and shape institutional governance. Not only does external interference hinder every college and university’s truth-seeking function, but it also cripples universities’ ability to serve as a check on authoritarian impulses. This dynamic should not surprise us. As we have noted from the outset, rising attacks on academic freedom across the globe serve antidemocratic ends.

CONCLUSION

At its best, the autonomous and independent university functions as a democratic check against authoritarianism. Taking a playbook from dictators across the globe, antidemocratic forces in the United States now aim to erode the safeguards that buffer universities against interference from political ideologues and corporate interests. It behooves all institutional stakeholders, and all champions of freedom of expression, to counter these attacks. Little more than the future of American democracy depends on it.

219. *See id.* (quoting Josh Hammer for Tweeting: “Claudine Gay’s is a huge scalp. No doubt about that. Especially when combined with Liz Magill’s a few weeks ago. But we can’t rest on our laurels. This is a fight for civilizational sanity against civilizational arson. We can’t stop until the DEI cancer is fully eliminated.”)