Trusteeship

Preserving Academic Freedom in Turbulent Times

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People usually cite academic freedom as a bedrock tenet of higher education. But what does academic freedom mean? And how does it influence the governance of universities today and the decisions board members will have to make going forward?

The answers to those questions are rooted in the history of academic freedom in the United States. Long before the U.S. Supreme Court recognized it as a First Amendment right, the 1915 Declaration of Principles on Academic Freedom and Academic Tenure, the founding document of the American Association of University Professors (AAUP), established it as a professional norm. Today, more than a century later, that 1915 Declaration remains the most thorough American analysis of academic freedom. Its principles provide the intellectual basis for institutional regulations governing academic freedom in many American universities today.

For its part, the Supreme Court first identified academic freedom as a First Amendment right in 1957. Initially applied to professors, in the 1970s the Supreme Court extended the First Amendment right of academic freedom to universities as institutions.

Both the professional and the constitutional understandings of academic freedom address the role of university trustees. The current growing challenges to academic freedom underline the importance of board familiarity with these understandings.

The 1915 Declaration

The 1915 Declaration began by recognizing that trustees are "the ultimate repositories of power" in universities and, therefore, can determine the extent of academic freedom within them. It stressed that the "ordinary" university, whether funded by the state or through private endowments, is a "public trust" and that its trustees "are trustees for the public."[1] The ordinary university appeals to the public for support as "a nonpartisan institution of learning." It violates the public trust if it places "restrictions upon the intellectual freedom of its professors."

The 1915 Declaration differentiated the ordinary university from a "proprietary" institution, which is "designed for the propagation of specific doctrines prescribed by those who have furnished its endowment." Whereas the ordinary university is a public trust, a proprietary institution is a "private trust" whose trustees are obligated to support those specific doctrines. In contrast to ordinary universities, proprietary institutions, at least with respect to one subject, do not accept principles of free inquiry and are not committed "to advance knowledge by the unrestricted research and unfettered discussion of impartial investigators." Rather, they prescribe "inculcation of a particular opinion upon a controverted question."

As examples of proprietary institutions, the 1915 Declaration cited universities established by religious denominations to profess certain religious views, a university established by a wealthy manufacturer to promote the advantages of a protective tariff, and a university endowed to promote socialism. While expressing no opinion on the desirability of proprietary institutions, it stressed that they "should not be permitted to sail under false colors" by presenting themselves as ordinary universities. And it observed that proprietary institutions were becoming increasingly rare, pointing out that many religious universities had abandoned their previous commitments to spread specific religious doctrines.

Many trustees, the 1915 Declaration asserted, understand the distinction between proprietary and ordinary universities. But it regretted that this distinction "is not yet so universally accepted as it should be" and that the trustees at some universities still conceive their relationship with professors as analogous to the one between a private employer and his employees. This "conception of a university as an ordinary business venture," in which employers have almost unlimited authority to fire employees, manifests "a radical failure to apprehend the nature of the social function discharged by the professional scholar."

That function, the 1915 Declaration stressed, is the production and dissemination of knowledge based on expertise gained through lengthy study. Professors cannot perform this societally valuable function if people without academic expertise are able to punish them for expressing their scholarly views. "To the degree that professional scholars, in the formation and promulgation of their opinions are, or by the character of their tenure appear to be, subject to any motive other than their own scientific conscience and a desire for the respect of their fellow-experts, to that degree the university teaching profession is corrupted; its proper influence upon public opinion is diminished and vitiated; and society at large fails to get from its scholars, in an unadulterated form, the peculiar and necessary service which it is the office of the professional scholar to furnish."

Observing that infringements of academic freedom had varied over time, the 1915 Declaration reported that during the early development of American universities, the main threat came from ecclesiastical pressure on the disciplines of philosophy and the natural sciences. Calling recent infringements less frequent but still significant, it maintained that the subjects of the threats had shifted. Though ecclesiastical pressure remained, most recent threats attacked the political and social sciences.

Perhaps bending over backwards to be ideologically neutral, the Declaration identified threats from both the right and the left. The document observes that from the right—and particularly in private universities—trustees, donors, and parents often belong to the more "prosperous" and, therefore, "conservative classes." They object to academic views they deem "ultra-radical." In state universities, by contrast, "the danger may be the reverse" because the state legislatures that fund them may be dominated by progressives who object to academic views they deem "ultra-conservative." Whatever the source of pressure, the university should be "an intellectual experiment station" free from the "tyranny of public opinion." They should serve as a place where "new ideas may germinate" yet also as "the conservator of all genuine elements of value in the past thought and life of mankind which are not in the fashion of the moment." To assure public confidence in universities, the 1915 Declaration reiterated, universities must be organized in ways that preclude "any exercise of pressure upon professorial opinions and utterances by governing boards of laymen."

After stressing the importance of academic freedom in protecting the societally valuable function of professors in universities, the 1915 Declaration cautioned that academic freedom entails "correlative obligations." Those obligations include following scholarly methods and standards, setting forth the "divergent opinions" of other scholars, and refraining from indoctrinating students. Consistent with its justification of academic freedom, the Declaration insisted that professors should take the lead in evaluating any alleged departures from these obligations. Not only are professors distinctively competent to make this determination, but also involvement by others who lack competence inevitably raises suspicion that improper motivations played a significant role.

The 1915 Declaration conceded that lay boards of trustees are competent to resolve disputes about neglect of duties and "grave moral delinquency." But with respect to academic speech, intervention by the board destroys "the essential nature of a university," a place dedicated to the expression of expert academic views by trained scholars. In making these points, the 1915 Declaration emphasized that it was not asserting "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."

Academic Freedom as a First Amendment Right

Whereas the relationship between trustees and professors was at the core of the analysis of academic freedom in the 1915 Declaration, the Supreme Court focused on the relationship between the *state* and professors in its early decisions identifying academic freedom as a First Amendment right. Paul Sweezy, a Marxist economist who had delivered an invited guest lecture in a class at the University of New Hampshire, was the plaintiff in *Sweezy v. New Hampshire*, the 1957 decision in which the Supreme Court initially associated academic freedom with the First Amendment. The New Hampshire attorney general, as part of his investigation during the Cold War of possible violations of a state law prohibiting government employment of subversive persons, asked Sweezy if he advocated Marxism and the theory of dialectical materialism in his lecture. Relying on the First Amendment, Sweezy refused to answer. State courts in New Hampshire rejected his First Amendment claim and held him in contempt.[2]

Writing for a plurality of four of the nine justices, Chief Justice Earl Warren declared that Sweezy's conviction for contempt "unquestionably was an invasion" of his First Amendment right to academic freedom. He emphasized that professors play a vital role in a democracy by guiding and training students. "To impose any straight jacket upon the intellectual leaders in our colleges and universities," he asserted, "would imperil the future of our Nation."[3]

In the paragraph of his opinion that addressed academic freedom, Warren added: "No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die."[4]

Justice Felix Frankfurter, who had been a professor at Harvard Law School before his appointment to the Supreme Court, wrote a concurring opinion reiterating "the dependence of a free society on free universities." Joined by Justice John Marshall Harlan II, this concurrence, combined with the four justices who signed the plurality opinion, provided a majority of six justices who treated

academic freedom as a First Amendment right. Frankfurter emphasized "the grave harm resulting from government intrusion into the intellectual life of a university" while objecting to the attorney general's attempted compulsion of Sweezy "to discuss the content of his lecture."[5]

To support his views, Frankfurter quoted from a recent South African statement on academic freedom, which identified "the four essential freedoms of a university: to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[6] The *Sweezy* case involved the academic freedom of a lecturer; the University of New Hampshire was not a party. But in the 1970s, when the Supreme Court extended the First Amendment right of academic freedom from professors to the educational decisions of universities, judges at all levels of the judiciary often quoted or cited this sentence as the core meaning of institutional academic freedom.

In *Keyishian v. Board of Regents*, decided a decade after Sweezy, the Supreme Court majority again invoked the First Amendment right of academic freedom while invalidating a New York law designed to prevent the employment of subversive people by state educational institutions. The majority called academic freedom "a special concern of the First Amendment."[7] Frustratingly, the many subsequent judicial decisions that quoted this phrase approvingly have not elaborated *how* academic is "special" or its relationship to general First Amendment rights of free speech. Yet the substantial case law on the First Amendment right of academic freedom does reveal the broad consensus, consistent with the analysis of the 1915 Declaration, that it protects the *content* of expert speech by professors in teaching and scholarship so long as it meets academic standards.

Justice Lewis F. Powell Jr.'s opinion in the famous 1978 affirmative action case, *University of California v. Bakke*, was the first time that a Supreme Court justice explicitly extended the First Amendment right of academic freedom to a university. Quoting Frankfurter's concurring opinion in *Sweezy*, Powell relied on the fourth of the freedoms identified in the South African statement, "who may be admitted to study," to assert that the "freedom of a university to make its own judgments as to education includes the selection of its student body."[8]

In *Bakke*, Powell wrote only for himself, but 25 years later the Supreme Court majority endorsed his analysis. And even when the Supreme Court majority in 2023 invalidated the affirmative action programs at Harvard and the University of North Carolina while reinterpreting the constitutional meaning of racial discrimination, it continued to identify institutional academic freedom as a First Amendment right.

Legal cases have applied the First Amendment right of institutional academic freedom in numerous contexts. In most of those cases, the administration acted on behalf of the university. But in some cases, a faculty body did. In an important unanimous decision in 1985, for example, the Supreme Court treated the decision of a faculty committee to dismiss a student on academic grounds as a legitimate exercise of the university's academic freedom. "When judges are asked to review the substance of a genuinely academic decision," the opinion observed, "they should show great respect for the faculty's judgment."[9]

Decisions about institutional academic freedom, like decisions about the academic freedom of professors, have not resolved many important issues about its scope. But just as the cases about the academic freedom of professors have reached a consensus that it protects the *content* of expert speech that meets academic standards, the cases about institutional academic freedom

have reached a consensus that it protects the *educational* decisions of universities so long as they do not violate other laws, such as the prohibition against racial discrimination.

Recent Legislation and Demands from the Trump Administration

Recent legislation in some states and demands on universities from the Trump administration in 2025 have challenged the judicial interpretation that has prevailed since the Supreme Court initially recognized academic freedom as a First Amendment right in the 1957 *Sweezy* case. Such legislation prohibits teaching "divisive concepts," often related to issues of race and sex. Demands from the Trump administration condition federal funding of academic research on requirements that universities place academic departments in receivership; create new programs; hire new faculty with viewpoints acceptable to the government; base the admission of students on purely "objective criteria"; restrict the percentage of foreign students; and close diversity, equity, and inclusion programs.

These restrictions involve substantially *more government intrusion* into the intellectual life of universities than the Supreme Court *invalidated* in *Sweezy*. The court concluded that even *asking* Sweezy about the content of his visiting lecture violated his First Amendment right to academic freedom. By restricting the scholarly content of classroom expression, these recent intrusions go much further. They also interfere with all four of the essential academic freedoms of a university identified in the South African statement quoted in Frankfurter's concurrence: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[10]

Some universities have acquiesced to these restrictions. But litigation at four universities has challenged them on First Amendment grounds. Three of the four legal decisions, consistent with the overwhelming consensus of existing law, found that the government violated the First Amendment. The fourth decision rejected the First Amendment challenge to an Alabama law while recognizing that precedents in most jurisdictions did not support this result.

The boards of trustees at these four universities had very different positions in the litigation. The President and Fellows of Harvard College sued the Trump administration. By contrast, the Board of Governors of the State University of Florida System and the University of Alabama Board of Trustees were defendants in lawsuits challenging state legislation with which they complied. The University of California was not a party in the case challenging the Trump administration's intervention at UCLA, which was brought by the AAUP and various labor unions representing UCLA employees.

As additional litigation unfolds, it will be interesting to see if courts continue to follow the consensus of existing law about the First Amendment right of academic freedom. It will also be interesting to see what positions university trustees at various institutions might take in future litigation. Knowing how courts have interpreted and applied this right will help them make much more informed decisions.

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Editor's Note: Many quotes in this article are from the 1915 Declaration of Principles on Academic Freedom and Academic Tenure*, the founding document of the American Association of University Professors. There is an initial citation for the first instance in which the document is mentioned but other short mentions from it are not listed as endnotes to provide better readability.*

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1. American Association of University Professors, *Declaration of Principles on Academic Freedom and Academic Tenure*, 1915.
2. David M. Rabban, *Academic Freedom: From Professional Norm to First Amendment Right* (Harvard University Press, 2024), 62–63.
3. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
4. Id.
5. Sweezy v. New Hampshire, 354 U.S. at 261–63 (Frankfurter, J., concurring).
6. Id. at 263.
7. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).
8. Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978).
9. Regents of the University of Michigan v. Ewing, 474 U.S. 214, 225 (1985).
10. Sweezy v. New Hampshire, 354 U.S. 234, 263 (Frankfurter, J., concurring).