

FIRST DO NO HARM: REVISITING *MERIWETHER V. HARTOP* AND ACADEMIC FREEDOM IN HIGHER EDUCATION

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Although the nature and extent of academic freedom has been subject to analysis for over a century, recent developments underscore the need to reconsider the proper scope of academic freedom. These developments include Meriwether v. Hartop, a 2021 Sixth Circuit decision in which a professor claimed a Constitutional right, based in academic freedom, to refuse to use a student’s pronouns; the growing science of pedagogy and understanding of how students learn; and the changing role of higher education in the United States. We propose updated factors for assessing the scope of academic freedom that balance the interests of the university, individual faculty members, students, and the general public. In doing so, we specifically address and discuss the interest of the state in delivering an “effective education”—a concept that we ground in both the literature of constitutional rights and also the literature of effective pedagogy, linking the interest of the state in delivering effective learning experiences to the science of teaching and learning. We also address the need for the recognition of gender pronouns and the potential for harm when they are not recognized.

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INTRODUCTION

How much freedom should university faculty have over what they say and do in their classrooms? Although the nature and extent of academic freedom have been subject to analysis for over a century, recent developments underscore the need to reconsider the proper scope of academic freedom. These developments include a recent court case in which a professor claimed a constitutional right to refuse to use a student’s pronouns, growing consensus about the ways in which faculty must pivot to teach effectively given students’ omnipresent access to the internet, and the changing role of higher education in the United States in general.¹

1. In this Article we do not use the term “preferred pronouns” as that implies both that one’s gender identity is a choice, and that an alternative may be less preferred but would be acceptable. Moreover, this term is often used to suggest that a “preferred pronoun” is an incorrect or substitute pronoun for the “correct” pronoun that would otherwise be assigned to an individual. For a discussion of why this term is disfavored, please see A.C. Fowlkes, *Why You Should Not Say ‘Preferred Gendered Pronouns’*,

In this Article, we propose updated factors for assessing the scope of academic freedom that balance the interests of the university, individual faculty members, students, and general public interest. In doing so, we specifically address and discuss the interest of the *state* in delivering an “effective education”—a concept that we ground in both the literature of constitutional rights and the literature of effective pedagogy, linking the interest of the state in delivering effective learning experiences to the science of teaching and learning.

The role of higher education has changed dramatically over the course of U.S. history. Academic institutions have shifted focus from serving a small number of wealthy and privileged individuals pursuing a limited number of learned professions (particularly ministry)² to developing and providing access to diverse and numerous programs for the public more broadly.³ Over time, they developed a variety of professional graduate degree programs and regularly re-evaluated the role of liberal studies in the curriculum.⁴ As technology has evolved and information has become more accessible via the internet, the role of the faculty member has changed as well, from “sage on the stage”⁵ to facilitator of learning and curator of content.⁶

The resource environment has changed as well. Public institutions face decreased state budget allocations, leading to increased class sizes.⁷ To facilitate the assessment of student learning, possibly to

FORBES (Feb. 27, 2020), <https://www.forbes.com/sites/ashleefowlkes/2020/02/27/why-you-should-not-say-preferred-gender-pronouns> [<https://perma.cc/RW4F-2AHP>].

2. The majority of students attended the earliest colleges in order to become part of the clergy; others generally turned to law, government service, or (in fewer numbers) teachers or physicians. ROGER L. GEIGER, *THE HISTORY OF AMERICAN HIGHER EDUCATION: LEARNING AND CULTURE FROM THE FOUNDING TO WORLD WAR II* 7, 539 (2015).

3. See Rómulo Pinheiro et al., *The Role of Higher Education in Society and the Changing Institutionalized Features in Higher Education*, in *THE PALGRAVE INT’L HANDBOOK OF HIGHER EDUC. POL’Y AND GOVERNANCE* 225, 225–26 (Jeroen Huisman et al., eds., 2015) (noting that higher education institutions are under increasing global and local pressures to show societal relevance by increasing the variety and diversity of offerings).

4. See GEIGER, *supra* note 2, at 539–48.

5. Alison King, *From Sage on the Stage to Guide on the Side*, 41 *COLL. TEACHING* 30, 30 (1993).

6. *Id.*

7. MICHAEL MITCHELL ET AL., *CTR. ON BUDGET & POL’Y PRIORITIES, STATE HIGHER EDUCATION FUNDING CUTS HAVE PUSHED COSTS TO STUDENTS, WORSENEDED INEQUALITY 1* (2019), <https://www.cbpp.org/sites/default/files/atoms/files/10-24-19sfp.pdf> [<https://perma.cc/4SYE-7LXE>].

justify the expenses by demonstrating student learning and, at times, to comply with program or institution accreditation, colleges and universities have implemented standardized learning objectives for programs and courses.⁸ In addition, community colleges have proliferated and grown larger,⁹ offering a competitive alternative to the first two years of the traditional four-year college and pressuring traditional colleges to create standardized curricula that would allow for greater ease in transferring community college credits to four-year degree programs.¹⁰ As universities create more standardized expectations with regard to pedagogy and teaching methods, some faculty members have pushed back, claiming that academic freedom protects their right to teach as they believe best, refusing, for example, to administer student evaluations¹¹ or adjust their style of pedagogy according to university dictates.¹²

Academic freedom is a concept that dates back hundreds of years. Broadly, it refers to a unique right of universities and their faculty to teach, research, and say what they want, without interference from governing boards or the state.¹³ Universities and professors have exercised this right to protect any number of actions, from cases involving a university's right to admit or dismiss students from its

8. See, e.g., Joanna Allan, *Learning Outcomes in Higher Education*, 21 *STUD. HIGHER EDUC.* 93, 95, 99, 104–05 (1996) (arguing that although assessment remains “at the core” of higher education curricula, a focus on the perspective of the learner, rather than the lecturer, would enhance learning experience quality).

9. Grace Chen, *Enrollment at Community Colleges Starting to Slow but Why?*, *CMTY. COLL. REV.* (Aug. 25, 2020), <https://www.communitycollegereview.com/blog/enrollment-at-community-colleges-starting-to-slow-but-why> [<https://perma.cc/4BMQ-9Z4R>].

10. Gloria Crisp, *Oregon Colleges and Universities Need a Common Course Numbering System*, *STATESMAN J.* (May 1, 2021, 9:44 AM), <https://www.statesmanjournal.com/story/opinion/2021/04/30/guest-opinion-oregon-colleges-universities-common-course-numbering-system/7306080002> [<https://perma.cc/538M-QW2T>].

11. *Wirsing v. Bd. of Regents of Univ. of Colo.*, 739 F. Supp. 551, 552–54 (D. Colo. 1990) (finding faculty member's refusal to administer the student evaluation form was not a protected exercise of academic freedom).

12. *Hetrick v. Martin*, 480 F.2d 705, 706 (6th Cir. 1973) (university administration permitted to fire non-tenured faculty member based on concerns about her pedagogical approach).

13. See *infra* Part I. In some cases, the concept of academic freedom has been applied to elementary and secondary school teachers; however, the right originated in and is far more broadly applied to institutions of higher education. Bruce Maxwell et al., *Academic Freedom in Primary and Secondary School Teaching*, 17 *THEORY & RSCH. EDUC.* 119–21 (2019).

programs,¹⁴ to provide courses on controversial subjects, such as evolution,¹⁵ and a faculty member's right to refuse to answer questions about political activities or the subjects of lectures.¹⁶ Recently, some faculty members have invoked academic freedom to resist university policies that they believe intrude into their political or religious beliefs, such as inclusivity policies.¹⁷

The boundaries of academic freedom are unclear. Some claim it is a right held by the university,¹⁸ while others claim it is held by individual faculty.¹⁹ Some describe it as government employees' traditionally protected free speech,²⁰ while others suggest it is a unique constitutional right.²¹ Notably missing from most discussions of academic freedom are the interests of *students* in obtaining an education based on generally accepted and research-tested principles of science and pedagogy or their interest in learning in a non-discriminatory and inclusive environment.²² We believe it is time to rectify this omission.

14. See *Regents Univ. of Mich. v. Ewing*, 474 U.S. 214, 215, 226 n.12 (1985) (“Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of ‘the four essential freedoms’ of a university.”).

15. Judith C. Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 953 n.33 (2009).

16. *Sweezy v. New Hampshire*, 354 U.S. 234, 243–44, 250 (1957).

17. See *infra* Part III.

18. *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000).

19. *Piarowski v. Ill. Cmty. College*, 759 F.2d 625, 629 (7th Cir. 1985).

20. See *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (2007) (applying *Garcetti v. Ceballos*, 547 U.S. 410 (2006), in case involving elementary school teacher). The state may regulate the content of classroom teachers' speech “in part because the school system does not ‘regulate’ teachers’ speech as much as it *hires* that speech The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials.” *Id.* at 479–80.

21. See *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting) (noting that if academic freedom is not given special considerations, the limitation on speech by government employees doctrine announced in the majority opinion would essentially nullify it).

22. For the rare opinion that briefly mentions the rights of students to learn, see *Bonnell v. Lorenzo*, 241 F.3d 800, 823–24 (6th Cir. 2001) (“While a professor’s rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student’s right to learn in a hostile-free environment.”). Cases involving the speech rights of students, on the other hand, are more common. See, e.g., *Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 221 (2000) (recognizing the First Amendment speech rights of students but upholding an activity fee based on a requirement of viewpoint neutrality); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (upholding student right to wear a black armband to protest the Vietnam War, and

Given the changes in higher education and the lack of clarity in the definition and boundaries of academic freedom, it is essential to revisit the historical purpose, scope, and contours of academic freedom and reconsider this history in light of the new goals and purposes of higher education. We undertake this re-examination using the recent decision in *Meriwether v. Hartop*²³ as an illustrative guide of how prior decisions have largely failed to appropriately balance these interests and demonstrate how our proposed updated balancing test would work.²⁴ In *Meriwether*, a professor sought to use the concept of academic freedom to support his refusal to use a student's pronouns, though the subject of transgender rights or political issues related to pronoun usage were not the subject of discussion in the class.²⁵ Rather, the professor's refusal to recognize the student's pronouns was a personal matter relating to his religious beliefs.

While we review the concept of academic freedom generally, our focus is on the concept of academic freedom in the *classroom teaching* context. We do not in this Article discuss the nuances of academic freedom that may be applied to a faculty member's pursuit of research,²⁶ nor do we consider the thorny issues related to the interactions between faculty, university administration, and governing boards related to tenure.²⁷

noting “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).

23. 992 F.3d 492 (6th Cir. 2021).

24. *Id.* at 498.

25. *Id.* at 498–99, 505, 507.

26. For a discussion of academic freedom and research, see *Urofsky v. Gilmore*, 216 F.3d 401, 404 (4th Cir. 2000), where the Fourth Circuit upheld a state law that restricted the use of state resources to access or review sexually explicit materials, even if that limited certain research topics.

27. This issue saw increasing controversy in 2021. See Colleen Flaherty, *Having Their Say—and Then Some*, INSIDE HIGHER ED (May 17, 2021, 3:00 AM), <https://www.insidehighered.com/news/2021/05/17/trustees-florida-atlantic-want-play-role-faculty-tenure-process> [<https://perma.cc/3A73-E5DL>] (illustrating a disagreement between professors and university board members about who has the ultimate say in determining tenure at Florida Atlantic University); Nick Anderson, *UNC Faculty Upset that Prizewinning 1619 Project Journalist Won't Have Tenure when She Starts Teaching at Chapel Hill*, WASH. POST (May 20, 2021, 6:01 PM), <https://www.washingtonpost.com/education/2021/05/19/unc-nikole-hannah-jones-tenure> [<https://perma.cc/ZMF5-6U7L>] (highlighting the debate over the lack of tenure for a renowned Pulitzer Prize winning Professor, Nikole Hannah-Jones, who joined University of North Carolina faculty in July 2021).

The Article proceeds as follows: Part I outlines changes in the popular understanding of academic freedom, mapping the evolution of the role of higher education and faculty within it. Part II provides an overview of the concept of academic freedom in U.S. courts. Part III specifically looks at the 2021 appellate court case *Meriwether v. Hartop* and analyzes how it illustrates: 1) the inadequacy of the current jurisprudence related to academic freedom and teaching; 2) the court's lack of understanding of the state's interest in providing an effective education; and 3) the need to refine the proper scope of academic freedom to both balance the interests of the faculty, university, student, and broader society and to reconceptualize an "effective education." Part IV sets forth a revised test for assessing academic freedom that is intended to do just that.

I. THE EVOLUTION OF ACADEMIC FREEDOM

The concept of academic freedom has evolved along with the functions of higher educational institutions and their faculty. From the early days, when higher education was meant to ensure leaders were well-versed in the classics, through periods of expansion, increased standardization, and an increased focus on student learning styles, higher education has dramatically changed. With those changes came alterations in the role of faculty and in the understanding of academic freedom.

A. *Early Understandings of the Role of Faculty and Academic Freedom*

Even before the United States declared its independence and won its right to be a sovereign nation, the Massachusetts Bay Colony voted to establish Harvard in 1636.²⁸ The first state-chartered, public institution, the University of Georgia, was incorporated in 1785, before the U.S. Constitution replaced the ill-fated Articles of Confederation.²⁹

28. Andrew Haring, *First University in the United States of America*, INT'L STUDENTS GUIDE (July 26, 2013), <https://internationalstudentsguide.org/first-university-of-united-states-of-america> [<https://perma.cc/M29B-HN7U>]; *About Harvard*, HARV. UNIV., <https://www.harvard.edu/about-harvard> [<https://perma.cc/R5FJ-NCPZ>].

29. See *History of UGA*, UNIV. GA., <https://www.uga.edu/history.php> [<https://perma.cc/988Y-9BRP>]. While the legislature incorporated the institution in 1785, it was not truly established until 1801 when the site was selected. *Id.* The University of North Carolina also claims to be the first public university in the United States, and the only public institution to award degrees in the 18th century, being established by the legislature of North Carolina in 1789 with students arriving in 1795. *History and Traditions*, UNIV. N.C. CHAPEL HILL, <https://www.unc.edu/about/history-and->

Many of these early institutions were colleges rather than universities, as colleges are more limited in scope and perspective.³⁰ Admission was limited to those who could translate classics, were proficient in Latin, and could analyze Greek grammar.³¹ Those who did not meet the admissions requirements could attend classes but only if they paid double tuition.³² Thus, attendance at a college was limited to those who were from wealthy, educated families or those who were simply wealthy.

These early American institutions of higher education were founded on the English model—residential colleges within a university structure focused on educating upper-class, White, “gentlemen scholar[s]” who would become the next generation of leaders.³³ In these early institutions, faculty members lived in dormitories with students and served *in loco parentis*.³⁴ In addition to teaching, faculty mentored, advised, disciplined, counseled, and gave career advice to students.³⁵ Faculty often were authoritarian and paternalistic.³⁶ Students learned through reading the classics and attending faculty recitations.³⁷ Oral examinations were required to prove their knowledge and to earn a degree.³⁸ In its earliest years, American higher education was characterized by small, face-to-face classes, classical religious instruction, and non-specialized faculty.³⁹

Though not expressly intended as a vehicle for religious training, American colleges in the seventeenth and eighteenth centuries required adherence to Protestant beliefs, often expressly, as colleges

traditions [<https://perma.cc/6TBY-PGTU>]. The U.S. Constitution was ratified in 1788. *The Day the Constitution Was Ratified*, NAT’L CONST. CTR. (June 21, 2021), <https://constitutioncenter.org/interactive-constitution/blog/the-day-the-constitution-was-ratified> [<https://perma.cc/VZ8N-T82S>].

30. PAUL WESTMEYER, *AN ANALYTICAL HISTORY OF AMERICAN HIGHER EDUCATION* 8–9 (2d ed. 1997).

31. *Id.* at 9.

32. *Id.*

33. John Thelin, *Historical Overview of American Higher Education*, in *STUDENT SERVICES: A HANDBOOK FOR THE PROFESSION* 3, 5, 7 (Susan R. Komives et al., eds., 3d ed. 1996).

34. Elizabeth Nuss, *The Development of Student Affairs*, in *STUDENT SERVICES: A HANDBOOK FOR THE PROFESSION* 22, 23–24 (Susan R. Komives et al., eds., 3d ed. 1996).

35. *Id.* at 24.

36. *Id.*

37. CLAYTON M. CHRISTENSEN & HENRY J. EYRING, *THE INNOVATIVE UNIVERSITY: CHANGING THE DNA OF HIGHER EDUCATION FROM THE INSIDE OUT* 33–34 (2011).

38. *Id.*

39. *Id.* at 35.

from Harvard to Yale to William and Mary often scrutinized faculty writings for signs of unorthodoxy or required college officers to take religious tests.⁴⁰ Yale's purpose was to "protect the faith of the fathers."⁴¹ At the time, higher education was not intended to create a spirit of unfettered inquiry or foster the development of new ideas. Rather, it was to pass along a "fixed and known body of knowledge,"⁴² including classical languages and literature.

Early notions of academic freedom are consistent with this role of higher education. Similar to medieval European universities that were operated by faculty as independent corporations like a guild of scholars, individual scholars within the universities were bound by strict adherence to internal codes and regulations and drew power in many instances from their uniformity within their ranks.⁴³ As Professors Hofstadter and Metzger note in their treatise on academic freedom, "the accepted Christian ideal of the intellectual enterprise was that of a system of knowledge partly stemming from and entirely consistent with the faith."⁴⁴ Faculty members were not employed to develop learning goals and curriculum but instead were charged with perpetuating current understandings. Thus, academic freedom was a limited concept not used to protect faculty who deviated from approved curriculum. It was not until institutions expanded their purpose that academic freedom became a more important concept.

B. An Expansion from Classic Education to "New Ideas."

In the 1700's, Harvard began to secularize and expand from reading and reciting ancient Greek literature to incorporating "new" ideas.⁴⁵ The source of those new ideas in a particular classroom was the faculty member—this is how faculty became known as the "sage on the

40. JOHN S. BRUBACHER & WILLIS RUDY, *HIGHER EDUCATION IN TRANSITION: A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES* 308–09 (Routledge 4th ed. 2017) (1958).

41. *See id.* at 11 (explaining that prior to admission to Yale, prospective students often prepared for college by completing a residency with a minister for an indefinite period); DEREK BOK, *HIGHER EDUCATION IN AMERICA* 171 (rev. ed. 2013) (noting that prior to the Civil War, most colleges were focused on preparing an "elite group of young men for the learned professions and positions of leadership in society").

42. BRUBACHER & RUDY, *supra* note 40, at 13.

43. RICHARD HOFSTADTER, *ACADEMIC FREEDOM IN THE AGE OF THE COLLEGE* 3, 6 (Transaction Publishers 1996) (1955).

44. *Id.* at 29.

45. CHRISTENSEN & EYRING, *supra* note 37, at 37.

stage.”⁴⁶ This phrase has come to represent the idea that faculty are the source of knowledge, whose job is to be in front of students, presenting them with that knowledge (and presumably the faculty member’s interpretation of the knowledge).⁴⁷ Instruction transitioned from rote recitation of classic readings to pure lecture where the subject-matter expert imparted information for students to absorb.⁴⁸ The role of students remained the same—memorization of information given them by the faculty member.⁴⁹

At Harvard, faculty were grouped together into departments for the first time in the mid-1820s and the various departments took over the development and oversight of curriculum.⁵⁰ Departmentalization allowed for faculty to specialize more deeply in their subject matter and to develop more specific courses rooted in faculty expertise.⁵¹ It also led to more faculty fragmentation, distinct disciplinary silos at the institution, and a need for more university oversight of common requirements, such as liberal studies or general education requirements to ensure well-rounded students.⁵² The departmentalization further supported the notion of the “sage on the stage” as faculty were truly the master of the content in the classroom.

In the mid-1800s enrollments increased, legislation such as the Morrill Act of 1862 created funding for new science and agriculture programs, and institutions for women and persons of color were founded.⁵³ The Cornell Plan included an “all-purpose curriculum,”

46. *See id.* (noting that when Professor Greenwood, Harvard’s “first modern scholar,” returned to Harvard from studies abroad, he began splitting time between teaching and research, signaling the start of professors being more distant from the daily student experience); King, *supra* note 5, at 30 (describing professors that have increased knowledge and simply transmit this knowledge to students are known as “sage[s] on the stage”).

47. CHRISTENSEN & EYRING, *supra* note 37, at 37. The term “sage on the stage” is credited to Professor Alison King, a professor at California State University in San Marcos in her seminal 1993 article. King, *supra* note 5, at 30.

48. CHRISTENSEN & EYRING, *supra* note 37, at 37.

49. King, *supra* note 5, at 30. As is discussed later, the idea of the “sage on the stage” is viewed by many today as an outdated model of learning and education.

50. CHRISTENSEN & EYRING, *supra* note 37, at 40.

51. *Id.*

52. *Id.* at 41, 44.

53. Nuss, *supra* note 34, at 25–26. The Morrill Act of 1862 is found at 7 U.S.C. §§ 301–24. The first Morrill Act created the concept of the land-grant college in which states were allocated certain lands for higher education programs related to agriculture or engineering. These programs could be added to existing institutions or the states could found new institutions. The land could be used directly or could be

“service to society through the study of commerce, government, and human relations,” and an “openness to all classes of students.”⁵⁴ According to education historian Paul Westmeyer, the Cornell Plan was adopted by other institutions almost immediately, with an increased focus on the public service mission of the institution.⁵⁵

The mid-1870s saw the development of the first doctoral programs in the United States, with Yale awarding the first American Ph.D. in 1861.⁵⁶ These graduate programs often developed as a reaction to the increasing complexity in fields like agriculture and American social systems (both business and political systems).⁵⁷ Education had become more of a tool for preparing students for “useful occupation[s].”⁵⁸ According to former Harvard President Derek Bok, this time period was characterized by three movements in higher education: a focus on career preparation, a re-focus on broad liberal education, and a focus on research.⁵⁹ Bok noted that not all institutions pursued all three movements and so a divergence in the purpose of institutions began to grow.⁶⁰

In the late 1800s, universities began to embrace the new study of science and to reimagine the role of faculty as researchers and discoverers of scientific knowledge.⁶¹ At the same time, newly developing notions of religious and civil liberty created the stirrings of rebellion against the orthodoxy of belief and action that was imposed by colleges and communities alike.⁶² Academic freedom became more important as faculty began introducing new theories and discoveries that were

sold with the profits dedicated to the creation of these programs. 7 U.S.C. § 304. The Morrill Act was expanded by the Morrill Act of 1890, 7 U.S.C. §§ 321–29, which required either race-neutral admissions criteria for land-grant institutions or the designation of a separate land-grant institution for people of color.

54. WESTMEYER, *supra* note 30, at 71.

55. *Id.* at 72 (noting that universities were “weighed down by traditions” but that Cornell’s innovative model was seen to encapsulate the “best methods of education” and was copied by Minnesota, Wisconsin, Johns Hopkins, Clark, Catholic, Bryn Mawr, and Chicago).

56. *Id.* at 87.

57. *Id.* at 84.

58. BOK, *supra* note 41, at 29.

59. *Id.*

60. *Id.*

61. Areen, *supra* note 15, at 952.

62. HOFSTADTER, *supra* note 43, at 262–66 (providing the anecdote of Professor Thomas Cooper beginning a “pamphlet war” against his institution in furtherance of breaking down the “coalition against freedom” and creating platforms for “fair and free discussion”).

not wholly aligned with popular opinion or belief.⁶³ Developing notions of intellectual and academic freedom came to a head between faculty and their lay governing boards.⁶⁴ Unlike in Europe, where universities were governed by the faculty, in America, lay boards exercised significant control.⁶⁵ This difference developed for a number of reasons, including the lack of expert and experienced faculty, a lack of funding (leading to a need for private funding), and disconnection from the medieval guilds, where faculty self-governance had developed.⁶⁶

With the growth of student populations and degrees offered, higher education saw the beginning of specialization in university staff and the creation of student affairs professionals to take some of the supervision and discipline from the faculty, allowing faculty to delve further and deeper into their academic disciplines.⁶⁷ In addition to these changes, Charles Eliot, Harvard's President from 1869-1909, introduced and advocated for a broader curriculum, rather than the historic classic curriculum, introducing the elective system to allow students to pursue individual interests.⁶⁸ This also allowed faculty to focus more deeply as subject matter experts, developing specialized courses and further removing themselves from daily administrative chores.⁶⁹

To continue to engage faculty as university citizens, President Eliot championed the concept of faculty governance, where faculty participated in major administrative decisions at the university level.⁷⁰ He supported faculty *self*-governance, especially with regard to curriculum, course development, and pedagogy, allowing for the move from smaller seminar-styled classes where students were engaged in discussions with faculty experts about the discipline to larger lectures where students were exposed to the expertise of the faculty.⁷¹ The focus shift from discussion to lecture further cemented the "sage on

63. Areen, *supra* note 15, at 952-54.

64. *Id.* at 952-53.

65. *Id.* at 999.

66. Hofstadter, *supra* note 43, at 120-24.

67. Nuss, *supra* note 34, at 26.

68. *Id.* at 27 (explaining that President Eliot felt students would be freer to gravitate toward their "natural preferences and interests" in an elective curriculum).

69. *See id.* (noting a detachment of faculty from student affairs in the twentieth century).

70. CHRISTENSEN & EYRING, *supra* note 37, at 60.

71. *Id.* at 44, 70.

the stage” concept where faculty, as the source of knowledge, were not to be questioned or debated by students.

In the late nineteenth and early twentieth centuries, faculty began to clash openly with governing boards over matters both personal and professional.⁷² In Wisconsin, for example, a professor was tried for political activities outside the classroom, while in Tennessee, a professor was fired for teaching evolution.⁷³ In reaction to this growing dispute between faculty and governing boards, in 1915 the American Association of University Professors (AAUP) was formed to articulate and defend the evolving notion of academic freedom and the associated concept of shared governance.⁷⁴ In the 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*, the AAUP articulated three strands of academic freedom drawn from the experience of German universities: “freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action.”⁷⁵ The first of these strands, it suggested, was “everywhere so safeguarded that the dangers of its infringement are slight.”⁷⁶ It was the latter two strands that the 1915 Declaration sought specifically to defend.

In its statement of the need for faculty independence, the 1915 Declaration rejected the notion that the university might be likened to a private business venture, arguing instead that universities held a position of a “public trust,” and that professional scholars (university faculty) must be free from any degree of censorship or coercion.⁷⁷ Otherwise, the 1915 Declaration argued, the universities would lose the essential public trust and respect:

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

72. Areen, *supra* note 15, at 952–53.

73. *Id.* at 953 nn.32–33.

74. *Id.* at 954–56; *History of the AAUP*, AM. ASS’N UNIV. PROFESSORS, <https://www.aaup.org/about/history-aaup> [<https://perma.cc/9B4J-MFM4>].

75. AM. ASS’N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915), *reprinted in* AM. ASS’N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 291, 292 (10th ed. 2006) [hereinafter 1915 DECLARATION].

76. *Id.*

77. *Id.* at 293.

corrupted; its proper influence upon public opinion is diminished and vitiated.⁷⁸

According to the AAUP, the university should be a “refuge” from the “tyranny” of “an overwhelming and concentrated public opinion.”⁷⁹ Importantly, with this right came “corresponding duties”: namely, the duty to exercise a scholarly and scientific process, to act with patience, competence, and sincerity, and to “remember that his business is not to provide his students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently.”⁸⁰ The 1915 Declaration also made clear that it was the responsibility of other scholars at the university to act as arbiters of this responsibility, and to “purge” from their ranks “the incompetent and the unworthy, [and] to prevent . . . the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship.”⁸¹ The AAUP restated these principles and adopted them in the 1940 Statement of Principles on Academic Freedom and Tenure (“1940 Statement”),⁸² and they remain at the core of the current understanding of academic freedom in higher education. Almost three-quarters of universities with tenure systems have adopted academic freedom standards drawn directly from the 1940 Statement, and more than half directly cite to the 1940 Statement as the basis of their policy.⁸³

The 1940 Statement set forth the right of faculty to determine the curriculum and what is taught in their classrooms, but that right was not intended to be limitless. Freedom over classroom curriculum is considered an essential aspect of academic freedom⁸⁴ and was one of

78. *Id.* at 294–95.

79. *Id.* at 297.

80. *Id.* at 298.

81. *Id.*

82. Areen, *supra* note 15, at 962; AM. ASS’N UNIV. OF PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1970) [hereinafter 1940 STATEMENT].

83. Hans-Joerge Tiede, *New Report on Prevalence of AAUP Policies in Higher Ed*, ACADEME MAG.: ACADEME BLOG (July 20, 2020), <https://academeblog.org/2020/07/20/new-report-on-prevalence-of-aaup-policies-in-higher-ed> [<https://perma.cc/K27X-FLNX>].

84. *See, e.g., Academic Freedom Guidelines and Best Practices*, ORG. AM. HISTORIANS, <https://www.oah.org/about/governance/policies/academic-freedom-guidelines-and-best-practices> [<https://perma.cc/W48R-CRX7>] (“Academic freedom includes the individual instructor’s right to select course materials and content, pedagogy, make

the three essential freedoms of the 1940 Statement.⁸⁵ However, based on the AAUP's statements, a chemistry professor could not claim protection if she decided to teach religion, and a religion professor would similarly not be protected if she decided to teach American history.⁸⁶ As the 1940 Statement notes, "[t]eachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject."⁸⁷ Moreover, the faculty member must be careful not to use the classroom to pursue individual or selfish means that do not serve the public good.⁸⁸ If they are to act in their own self-interest and lose the trust of the public, the AAUP warns, they similarly risk losing their right to protection for their intellectual activities.⁸⁹

This principle was explicated by A. Lawrence Lowell, who presided over Harvard during World War I, the first time faculty were actively outspoken about deeply political issues.⁹⁰ At that time, Harvard had a German-born professor who defended the German position in World War I.⁹¹ Amid pressure to fire the faculty member, President Lowell refused, citing broad principles of academic freedom.⁹² President Lowell's perspective on academic freedom was that faculty members should have absolute freedom in the classroom with regard to "subjects within the scope of his chair" but that students should not have to listen to personal opinions or offensive remarks on "subjects of which the instructor is not a master."⁹³ As such, Lowell's definition of academic freedom was that academic freedom was "complete but conditioned on expertise" in the classroom.⁹⁴ In situations outside the classroom, Lowell supported faculty freely expressing opinions and statements so

assignments and assess student performance."); Cary Nelson, *Defining Academic Freedom*, INSIDE HIGHER ED (Dec. 21, 2010), <https://www.insidehighered.com/views/2010/12/21/defining-academic-freedom> [<https://perma.cc/ZL5A-K366>] ("Academic freedom gives faculty members substantial latitude in deciding how to teach the courses for which they are responsible.").

85. 1940 STATEMENT, *supra* note 82, at 14.

86. *Id.*

87. *Id.*

88. *Id.*

89. Amy Gajda, *Academic Duty and Academic Freedom*, 91 IND. L.J. 17, 20–21 (2015).

90. CHRISTENSEN & EYRING, *supra* note 37, at 94.

91. *Id.*

92. *Id.*

93. *Id.* at 94–95.

94. *Id.* at 95.

long as the faculty member was transparent about speaking not as an expert at the institution.⁹⁵

What would happen, then, if a faculty member were to decide to teach a conspiracy theory in his classroom as though it were fact-based or scientifically valid? Given the significant anti-science orientation and growing embrace of conspiracy theories (from QAnon to unfounded fears of vaccines in some populations), universities are likely to have faculty teaching disregarded or unscientific theories in their classrooms—indeed, a handful of high profile cases suggest this is already the case.⁹⁶ Based on the terms of the original understanding of academic freedom as explicated by the AAUP, however, these faculty members should *not* be protected from adverse employment consequences for such speech by the concept of academic freedom. Academic freedom comes with the responsibility to act based on peer reviewed science and genuine expertise,⁹⁷ and subject to oversight by other professional scholars—it is not limitless and not equivalent to the free speech rights of citizens in a public forum:

Academic freedom . . . does not protect the autonomy of professors to pursue their own individual work free from all university restraints. Instead, academic freedom establishes the liberty necessary to advance knowledge, which is the liberty to practice the scholarly profession. This point is fundamental. Although the First Amendment may prohibit the state from penalizing the *New York Times* for misunderstanding the distinction between astronomy and astrology, no astronomy professor can insulate himself or herself from the adverse consequences of such a conflation.⁹⁸

Academic freedom, as traditionally understood, is therefore not unlimited in the classroom, even when it comes to inclusion of theory

95. *Id.*

96. See Steven Hsieh, *Mesa College Fires Professor Who Promoted QAnon Conspiracy Theory*, PHX. NEW TIMES (Sept. 16, 2019), <https://www.phoenixnewtimes.com/news/mesa-college-fired-professor-who-promoted-qanon-conspiracy-theory-11359439> [<https://perma.cc/3CRS-VUJ2>] (reporting on a professor who was fired for promoting a QAnon conspiracy theory); Mark Dery, *The Professor of Paranoia*, CHRON. HIGHER EDUC. (May 12, 2021), <https://www.chronicle.com/article/the-professor-of-paranoia> [<https://perma.cc/RD6E-Z7WF>] (reporting on a professor who spread conspiracy theories about COVID-19 and COVID-19 vaccines).

97. Tonja M. Woods et al., *Academic Freedom Should Be Refined: Point and Counterpoint*, 80 AM. J. PHARM. EDUC., no. 146, Nov. 25, 2016, at 3.

98. MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 39 (2009).

or practice. Likewise, academic choices in the classroom are not without limits.

C. Accreditation Emerges to Shift the Role of Higher Education

Academic freedom evolved further as universities began to evaluate their curricula in more systematic ways. The New England Association of Schools and Colleges was founded in 1885, arguably the first accreditation organization in the United States.⁹⁹ The original intent was to ensure that students were prepared for admission to universities.¹⁰⁰ It was not until many years later that a system of curriculum and program review was implemented.¹⁰¹ It was this development that led to a significant change in the role of faculty and a shift in the discussion of academic freedom.

Between 1950 and 1965, various regional organizations developed what is recognizable as today's accreditation system.¹⁰² That system included a focus on institutional mission, a set of common standards, a schedule of regular review, a self-evaluation of institutional achievements with regard to the standards, a peer-review team to evaluate the institution's compliance with standards, and a committee or commission to review the various reports and studies and to verify continuation of accreditation.¹⁰³

The federal government first became involved with accreditation in 1952 with the Veterans' Readjustment Assistance Act of 1952.¹⁰⁴ In connection with an expanded effort to provide veterans with financial aid for higher education, Congress turned to accreditation as a proxy for quality.¹⁰⁵ The tie to accreditation was intended to reduce or eliminate the number of fraudulent institutions that were founded after the 1944 GI Bill for the primary purpose of collecting federal money.¹⁰⁶

99. Barbara Brittingham, *Accreditation in the United States: How Did We Get Where We Are?*, 145 *NEW DIRECTIONS FOR HIGHER EDUC.*, no. 145, Spring 2009, at 7, 11, 14.

100. *Id.* at 11.

101. *Id.* at 14.

102. *Id.*

103. *Id.* at 14–15.

104. Antoinette Flores, *Hooked on Accreditation*, *Center for American Progress*, *CTR. FOR AM. PROGRESS* (Dec. 14, 2015), <https://www.americanprogress.org/issues/education-postsecondary/reports/2015/12/14/127200/hooked-on-accreditation-a-historical-perspective> [<https://perma.cc/3R29-4UD3>].

105. *Id.*

106. *Id.*

In 1965, the United States Congress passed the first Higher Education Act, which inserted the federal government into the accreditation story through financial aid oversight.¹⁰⁷ The Accreditation Group, part of the U.S. Department of Education, works with accrediting agencies in the process of receiving Department of Education recognition.¹⁰⁸ The Higher Education Act created the recognition process to ensure that accrediting agencies were reliable sources of quality evaluation.¹⁰⁹ The 1992 reauthorization of the Higher Education Act set forth specific items that had to be included in the accreditation criteria to ensure that accredited institutions would be eligible for the federal financial aid programs.¹¹⁰ To be recognized, an agency must have standards that set forth expectations for institutions with regard to student achievement, curricula, faculty, finances, support services, and other operational aspects of the institution.¹¹¹ The Department of Education does not evaluate institutions or grant accreditation, it only recognizes the accreditation agencies as valid and reliable.¹¹² The federal government does, however, link financial aid to accreditation so a school that is not accredited by a recognized accreditation agency, will not be able to participate in the federal student loan programs and its students will be ineligible for federal financial aid.¹¹³

While accreditation generally is intended as a verification of rigor and quality, it has impacted the control faculty have on the curriculum.¹¹⁴ For example, the Higher Learning Commission's criteria for accreditation includes a commitment to "academic freedom and freedom of expression in the pursuit of truth in teaching

107. *History and Context of Accreditation in the United States*, U.S. DEP'T OF EDUC., https://www.ed.gov/admins/finaid/accred/accreditation_pg2.html [https://perma.cc/A824-SNSX].

108. *Id.*

109. 34 C.F.R. § 602.1(a) (2021).

110. Flores, *supra* note 104.

111. 34 C.F.R. § 602.16 (2021).

112. *Overview of Accreditation in the United States*, U.S. DEP'T OF EDUC., <https://www.ed.gov/admins/finaid/accred/accreditation.html> [https://perma.cc/KF89-SN3P].

113. Betsy Mayotte, *What to Know After a School's Accreditor Loses Recognition*, U.S. NEWS (Dec. 14, 2016), <https://www.usnews.com/education/blogs/student-loan-ranger/articles/2016-12-14/what-to-know-after-a-schools-accreditor-loses-recognition>.

114. *Criteria for Accreditation*, HIGHER LEARNING COMM'N: HLC POL'Y, <https://www.hlcommission.org/Policies/criteria-and-core-components.html> [https://perma.cc/QC3R-EXG9].

and learning.”¹¹⁵ At the same time, the criteria includes a requirement that institutions articulate learning goals for academic programs, and offer programs that “engage students in collecting, analyzing and communicating information; in mastering modes of intellectual inquiry or creative work; and in developing skills adaptable to changing environments.”¹¹⁶

Discipline-specific accreditation standards also may impact faculty autonomy in the classroom. For example, the Association to Advance Collegiate Schools of Business (AACSB) evaluates the curriculum of business programs based on several criteria, including criteria number 4.1, which requires curriculum to be “current, relevant, forward-looking, globally-oriented, aligned with program competency goals, and consistent with its mission, strategies, and expected outcomes.”¹¹⁷ The Commission on Collegiate Nursing Education’s Standards for Accreditation of Baccalaureate and Graduate Nursing Programs requires clear statements of expected student outcomes that are related to the career roles of future graduates.¹¹⁸ In addition to curriculum development and quality education, accreditation standards often contain requirements related to institutional effectiveness and resources.¹¹⁹ This includes shared governance, data-driven decision making, and the provision of sufficient resources to fulfill an institution’s mission.¹²⁰

While these may be valid and worthy goals, the impact on the autonomy of the faculty in the classroom is substantial. At a minimum, the accreditation process has altered the authority of faculty and universities and restricted the faculty members’ ability to unilaterally decide on curriculum or teaching techniques. While faculty may continue to have authority to determine curriculum and teaching methodology to a point, it would not be accurate to suggest they have that authority free from oversight or limitation.

115. *Id.*

116. *Id.*

117. ASS’N TO ADVANCE COLLEGIATE SCHS. OF BUS., 2020 STANDARDS FOR BUSINESS ACCREDITATION 37 (2020).

118. COMM’N ON COLLEGIATE NURSING EDUC., STANDARDS FOR ACCREDITATION OF BACCALAUREATE AND GRADUATE NURSING PROGRAMS 13 (2018).

119. HIGHER LEARNING COMM’N, *supra* note 114.

120. *Id.*

D. A “New” Understanding of Learning Again Shifts the Role of Faculty

Moving forward to the 1990s, research in education determined that passive learning was not as effective as active learning, calling into question the notion that students should passively take notes on lectures given by faculty who were the source of knowledge.¹²¹ But even in early articles about this change, faculty still were touted as the subject matter experts with a primary function of delivering content.¹²² The shift from “sage on the stage” to “guide on the side” was not a curricular shift but a pedagogical shift, encouraging faculty to change the delivery of the material to include students as more active learners.¹²³ Thus began a shift in focus from students as receptors of information to participants in learning.

While faculty continue to be experts in their content areas, an entire field of study has developed around the science of teaching and learning, marrying together a variety of disciplines, including development psychology, cognitive science of the brain, and sociology of learners and communities.¹²⁴ Though elementary and secondary educators receive extensive training in this science of pedagogy, with teacher certification requiring a minimum of a four-year education degree, and a Master’s degree in many states,¹²⁵ many higher education faculty members receive *no* training on how to teach or the science behind how to teach most effectively—they are considered qualified based on their training in their subject area.¹²⁶ Thus, while faculty generally consider themselves “experts” in the classroom based on education in their content area, they may have no education or training in the science of teaching—calling into question how expertise should be defined with regard to this essential area of faculty responsibility.¹²⁷ This gap is exacerbated by the introduction of new

121. King, *supra* note 5, at 30–35.

122. *See id.* (urging professors to act as facilitators who guide students through material instead of distantly directing their students through the same).

123. *Id.* at 30.

124. Linda Darling-Hammond et al., *Implications for Educational Practice of the Science of Learning and Development*, 24 APPLIED DEVELOPMENTAL SCI. 97, 97 (2019).

125. *How to Earn Your Teacher Certification*, ALL EDUC. SCHS., <https://www.alleducationschools.com/teacher-certification> [<https://perma.cc/W2RE-BTGM>].

126. Inara Scott, *As In-Person Classes Resume, Colleges Shouldn’t Lose Steam on Faculty Training*, HIGHER ED DRIVE (Apr. 12, 2021), <https://www.highereddrive.com/news/as-in-person-classes-resume-colleges-shouldnt-lose-steam-on-faculty-train> [<https://perma.cc/SK2P-K7CQ>].

127. One may certainly gain expertise in teaching through experience and self-education, but higher education typically requires a graduate degree (minimum of a

academic technology and the need for unique approaches to teaching online-skills that all educators needed in the spring and fall of 2020, when they were forced by the global COVID-19 pandemic to shift to online and remote education.¹²⁸

With the proliferation of information on the internet and the almost ubiquitous access to technology and the web, students today can access more information than they possibly could process. A search for “Romeo and Juliet commentary,” which might be used by a student in an English class, found 1,360,000 results in 0.59 seconds.¹²⁹ A search for “copyright law fair use,” which might be helpful in a business law class, resulted in about 445,000,000 results in 0.81 seconds.¹³⁰ With this sort of access, the role of the faculty no longer is that of “sage on the stage” with the disciplinary expertise to impart to students, or even solely the “guide on the side,” with a goal of helping students actively learn the material provided to them by the faculty. The faculty role necessarily has shifted to include that of curator of reliable material.¹³¹

While some faculty still believe that their primary role is to present material to students, many other higher education experts believe there is a need to teach students to think critically and learn to curate accurate and reliable information for themselves.¹³² For these experts,

master’s degree, but typically a Ph.D.) in a subject to teach in that area. *See, e.g., How to Become a College Professor*, INDEED: CAREER GUIDE (Mar. 9, 2021), <https://www.indeed.com/career-advice/career-development/how-to-become-a-college-professor> [<https://perma.cc/UK7B-Q38N>] (explaining the different levels of education a college professor may have).

128. Caralee Adams, *Teachers Need Lots of Training to Do Online Learning Well. Coronavirus Closures Gave Many Just Days*, HECHINGER REP. (Apr. 17, 2020), <https://hechingerreport.org/teachers-need-lots-of-training-to-do-online-learning-well-coronavirus-closures-gave-many-just-days> [<https://perma.cc/4G4W-977L>]; Chrysi Rapanta et al., *Online University Teaching During and After the Covid-19 Crisis: Refocusing Teacher Presence and Learning Activity*, 2 POSTDIGITAL SCI. & EDUC. 923, 923–24 (2020).

129. “Romeo+Juliet+commentary”, GOOGLE (Apr. 28, 2021) (internet search run by the authors on April 28, 2021 using the Google search engine).

130. “copyright+law+fair+use”, GOOGLE (Apr. 28, 2021) (internet search run by the authors on April 28, 2021 using the Google search engine). While different searches yield different results, most will inundate users with hundreds of thousands of sources almost instantly.

131. *See* Ted Curran, *Teacher as Curator: Capture and Organize Learning Materials with Web 2.0 Tools*, TEDCURRAN.NET (Feb. 11, 2014), <https://tedcurran.net/2014/02/teacher-as-curator-capture-organize-learning-materials-web-2-0-tools> [<https://perma.cc/CR29-DKYP>] (explaining how teachers can best curate their educational content for their students).

132. An assessment of the abundant literature related to the importance of critical thinking to students, and how it has become an essential component of higher

an essential purpose of higher education is to develop the ability of students to think critically and apply the disciplinary knowledge in different contexts, shifting the focus away from recitation of received knowledge and toward the production and use of knowledge in new and creative ways.¹³³

To develop this ability, students must be able to learn in a safe environment where mistakes are corrected appropriately and academically. This has required faculty to move beyond appearing in class and imparting information to having to manage interactions between the faculty member and students as well as among students. This role change from a potentially aloof presenter with minimal interaction with students to a moderator and guide has shifted the discussion about academic freedom from strictly content-based to including classroom management. And this shift has further blurred the boundaries and definitions of the concept of academic freedom, both as a legal right and an educational theory.

E. Academic Freedom and Faculty Expertise

The purpose of institutions of higher education today is as complex as ever. Changes in society have shifted the focus from inculcating students with historic information to assessing what students need to learn in order to succeed in a professional career.¹³⁴ In several states, community colleges, with a traditional focus on career preparation and open access, have been given permission to grant four-year

education is beyond the scope of this paper. *See, e.g.*, Dawit T. Tiruneh et al., *Effectiveness of Critical Thinking Instruction in Higher Education: A Systematic Review of Intervention Studies*, 4 HIGHER EDUC. STUD. 1, 1 (2014) (“Acquisition of [critical thinking] skills is considered vital for students to face a multitude of challenges of adult life and function effectively in today’s increasingly complex world.”); R.T. Pithers & Rebecca Soden, *Critical Thinking in Education: A Review*, 42 EDUC. RESEARCH 237, 237 (2000) (“While the contemporary education curriculum is a highly contested arena, there seems to be consensus that it should help students to think well and to think for themselves.”); Nancy Bowers, *Instructional Support for the Teaching of Critical Thinking: Looking Beyond the Red Brick Walls*, 1 INSIGHT 10, 10 (2006) (“[T]he teaching of critical thinking should be integrated into all courses and in all classroom areas”); John Schlueter, *Can Colleges Truly Teach Critical-Thinking Skills*, INSIDE HIGHER ED (June 7, 2016, 3:00 AM), <https://www.insidehighered.com/views/2016/06/07/can-colleges-truly-teach-critical-thinking-skills-essay> [<https://perma.cc/DPK5-LZG4>] (noting that “critical thinking has become synonymous with higher education”).

133. *See, e.g.*, Bowers, *supra* note 132, at 20 (describing creative ways to encourage critical thinking).

134. BOK, *supra* note 41, at 29.

baccalaureate degrees.¹³⁵ A focus on rankings and a need to supplement any state funding with private donations have caused university leaders to grow programs that stretch the mission or purpose of the institution.¹³⁶ Academics have asserted that institutions of higher education need to refocus, redefine their goals, refine their purposes, and restructure for efficiency and efficacy.¹³⁷ The emphasis on accreditation at an institutional and programmatic level has further advanced changes in higher education. All of these changes point to a new emphasis on pedagogy and the science of teaching and learning in higher education.

How, though, should an emphasis on expertise in *pedagogy* be reflected in an updated understanding of academic freedom? One way to conceive of this change may be to look to the related notion of shared governance. Shared governance refers to the balance of authority that is shared between the faculty of an institution of higher education and its administration.¹³⁸ In her discussion of shared governance, Nancy Rapoport sums up the complicated shared power structure between faculty and administration at a university as being grounded in expertise: “The idea is simple: those people with the most knowledge of an area should have the most input.”¹³⁹ Thus, administrators that deal with budgets and have the greater understanding of the university’s finances have oversight of budgets, while the faculty has oversight of curriculum.¹⁴⁰ Or, as Dean Rosovsky puts it, “In a university, those with knowledge are entitled to a greater say.”¹⁴¹ This principle would argue that faculty, with relatively little

135. E.g., Sara Weissman, *Arizona Allows Community Colleges to Offer Bachelor’s Degrees*, INSIDE HIGHER ED (May 7, 2021, 3:00 AM), <https://www.insidehighered.com/news/2021/05/07/arizona-allows-community-colleges-offer-bachelors-degrees> [https://perma.cc/YN38-BZ6Z].

136. See BOK, *supra* note 41, at 34–42 (detailing the financial, institutional, and social forces that drive universities and colleges to climb the rankings, often to the detriment of their core mission of education).

137. *Id.* at 34–43. See generally CHRISTENSEN & EYRING, *supra* note 37 (focusing on the need to have institutions that differ from the traditional university).

138. Nancy B. Rapoport, *On Shared Governance, Missed Opportunities, and Student Protests*, 17 NEV. L.J. 1, 4 (2016).

139. *Id.* at 4.

140. *Id.* at 4; see also *Statement on Government of Colleges and Universities*, AM. ASS’N OF UNIV. PROFESSORS, <https://www.aaup.org/report/statement-government-colleges-and-universities> [https://perma.cc/J54E-5MUY] (advocating that budgeting responsibilities should be understood by all).

141. HENRY ROSOVSKY, *THE UNIVERSITY: AN OWNER’S MANUAL* 269 (1990).

training in the science of teaching and learning, should have less input on *how* they teach, and more input on *what* they teach. Put another way, if an expert in pedagogy suggests it inhibits and undermines learning for a faculty member to stand at a podium and lecture for two hours without providing any opportunity for students to engage actively in their education, a faculty member should not have limitless authority to choose that teaching strategy.

While this reasoning appears persuasive, based on the AAUP principles and the tradition of academic freedom, it must be acknowledged that the precedential value of the 1940 Declaration is debatable. The 1940 Declaration remains widely adopted as a professional norm, and certainly may be legally applicable in a contractual dispute between a faculty member and university if the university has formally adopted the AAUP principles or incorporated them into bargaining agreements.¹⁴² Moreover, the AAUP statements have been relied upon by a variety of federal and state courts in resolving cases involving academic freedom.¹⁴³ Still, as a matter of constitutional law, they lack formal legal significance. In the next Part, we look at how the U.S. courts have addressed the issue of academic freedom.

II. ACADEMIC FREEDOM IN THE COURTS

The notion of academic freedom began to appear in constitutional law cases in the 1940s, spurred on by pressures on faculty to disavow “subversive” groups or activities perceived as threatening to the United States. The first mention of academic freedom came in a dissent in *Adler v. Board of Education*,¹⁴⁴ where Justice Douglas warned that if teachers could be limited in their political activities, there could be “no real academic freedom.”¹⁴⁵ In *Sweezy v. New Hampshire*,¹⁴⁶ the Supreme

142. *But see* Frederick P. Schaffer, *A Guide to Academic Freedom*, J. COLLECTIVE BARGAINING ACAD., Apr. 2014, at 42 n.22 (2014) (“[The AAUP] does not constitute any kind of legal precedent or authority and should be considered only to the extent it is persuasive.”).

143. *See* *Vega v. Miller*, 273 F.3d 460, 476 (2d Cir. 2001) (“The AAUP’s 1940 Statement of Principles on Academic Freedom and Tenure has been relied upon as persuasive authority by courts to shed light on, and to resolve, a wide range of cases related to academic freedom and tenure.”).

144. 342 U.S. 485, 508 (1952) (Douglas, J., dissenting) (upholding law authorizing state to fire or refused to hire members of “subversive” groups).

145. *Id.* at 510.

146. 354 U.S. 234 (1957).

Court protected the right of a university guest lecturer to refuse to answer questions about what he had said to students in a class related to Communism and the Community Party.¹⁴⁷ In a concurring opinion, Justice Frankfurter identified the “four essential freedoms” of the university, including “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”¹⁴⁸

In 1967, the Court made its broadest statement yet about academic freedom. In *Keyishian v. Board of Regents*,¹⁴⁹ the Court broadly identified the need for constitutional protection for academic freedom, finding this freedom to be of “transcendent value to all of us,” and “therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”¹⁵⁰

Despite this broad language, after *Keyishian*, protections for academic freedom have been called into question, based on other decisions limiting the free speech rights of public employees. In *Pickering v. Board of Education*,¹⁵¹ the Court considered the whether a high school teacher could be fired for writing a letter to a local newspaper critical of the Board of Education and district superintendent.¹⁵² While extending free speech rights to public employees, including teachers, the Court created a balancing test to be employed in these cases, weighing the interest of the employee in being able to speak as a citizen, and the interest of the government/employer in “promoting the efficiency of the public services it performs.”¹⁵³ This balancing test was refined in *Connick v. Myers*,¹⁵⁴ where the Court created an additional hurdle for public employees in which speech must be on a matter of “public concern” to be protected.¹⁵⁵

Finally, in *Garcetti v. Ceballos*,¹⁵⁶ the Court considered the case of a deputy district attorney who believed that he had been subjected to retaliation for his testimony in a case involving a search warrant issued

147. *Id.* at 250.

148. *Id.* at 263 (Frankfurter, J., concurring).

149. 385 U.S. 589 (1967).

150. *Id.* at 603.

151. 391 U.S. 563 (1968).

152. *Id.* at 564.

153. *Id.* at 568.

154. 461 U.S. 138 (1983).

155. *Id.* at 147.

156. 547 U.S. 410 (2006).

by his department.¹⁵⁷ The Court applied the *Connick* public concern test and the *Pickering* balancing test, but ultimately concluded that because Garcetti had testified in the course of his official duties, his speech was not protected.¹⁵⁸ This case raised clear implications for teachers and professors: if speech made in the course of official duties was *not* protected, what would become of academic freedom?

Since *Garcetti*, courts have divided over whether a claim for academic freedom based on speech made in the course of a faculty member's official duties can stand. In *Renken v. Gregory*,¹⁵⁹ the Seventh Circuit applied *Garcetti* to a case involving a professor who had complained about his employer-university's conduct related to a grant.¹⁶⁰ Finding the speech to be "pursuant to his official duties as a University professor," the court held "his speech was not protected by the First Amendment."¹⁶¹ In *Adams v. Trustees of the University of North Carolina-Wilmington*,¹⁶² the Fourth Circuit found that *Garcetti* did not apply, but only based on the narrow facts of the case, in which a conservative professor argued that he did not receive a promotion based on writings and activities he undertook that were outside the scope of his faculty position.¹⁶³ The court explicitly left open the possibility that *Garcetti* could be applied in the future, stating:

There may be instances in which a public university faculty member's assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching. In that circumstance, *Garcetti* may apply However, that is clearly not the circumstance in the case at bar [T]he scholarship and teaching in this case . . . was intended for and directed at a national or international audience on issues of public importance unrelated to any of Adams' assigned teaching duties at [the University] or any other terms of his employment found in the record.¹⁶⁴

157. *Id.* at 413–15.

158. *Id.* at 417, 423–24.

159. 541 F.3d 769 (7th Cir. 2008).

160. *Id.* at 770, 773.

161. *Id.* at 775.

162. 640 F.3d 550 (4th Cir. 2011).

163. *Id.* at 552, 561.

164. *Id.* at 563–64.

The Fifth Circuit, on the other hand, after acknowledging that academic freedom is a “special concern” of the Constitution, simply ignored *Garcetti* and applied the *Pickering-Connick* framework.¹⁶⁵

Another area of confusion is the question of *who* may exercise the right of academic freedom.¹⁶⁶ In *Urofsky v. Gilmore*,¹⁶⁷ the Fourth Circuit pointed out that the minimal Supreme Court precedent related to academic freedom suggested that the right was held by the university, not individual faculty members.¹⁶⁸ However, in *Regents of the University of Michigan v. Ewing*,¹⁶⁹ the Supreme Court rejected a student’s appeal of his dismissal from a medical program, based on what it identified as a policy supporting extreme deference toward *faculty* making complex academic decisions.¹⁷⁰ The Seventh Circuit has gone further, recognizing that the term has been used to mean “both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy.”¹⁷¹

The confusion over these issues illustrates the challenge of distinguishing the legal meaning of academic freedom. As J. Peter Byrne noted in his seminal article on the subject, “Lacking definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles.”¹⁷² Perhaps the most important unsettled question is whether the right of academic freedom is a new and unique constitutional right, or if it is merely a manifestation of First Amendment speech rights applied to a particular group of state employees. If it is the latter, then case law such as *Garcetti*

165. *Buchanan v. Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

166. See Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Legal Status of Constitutional Protections for Individual Academic Freedom*, 36 J. COLL. & U.L. 145, 146 (2009) (suggesting that “constitutional academic freedom should only apply to institutions and not to individual faculty members”); David M. Rabban, *A Functional Analysis of ‘Individual’ and ‘Institutional’ Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 230 (1990) (discussing academic freedom in institutional and individual terms).

167. 216 F.3d 401 (4th Cir. 2000).

168. *Id.* at 412.

169. 474 U.S. 214 (1985).

170. *Id.* at 215, 226.

171. *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985).

172. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 YALE L.J. 251, 253 (1989).

may be directly applicable. If it is the former, then the contours of that unique constitutional right have yet to be articulated.

Courts considering the scope of faculty authority within the classroom have consistently upheld limits on the rights of faculty in both choosing the content of the course and the way in which that content is administered.¹⁷³ For example, in *Johnson-Kurek v. Abu-Absi*,¹⁷⁴ the court upheld the university's right to require the faculty member to clearly communicate with students with regard to certain grading policies.¹⁷⁵ Similarly, in *Hetrick v. Martin*,¹⁷⁶ the court found an untenured faculty member could be dismissed based on the failure of her "teaching philosophy" to comport with university standards.¹⁷⁷ Consistent with the AAUP, however, if the subject of a faculty member's speech is germane to the content of the course, it has been found to be protected.¹⁷⁸ Perhaps the most dramatic example of this

173. See, e.g., *Wozniak v. Conry*, 236 F.3d 888, 891 (7th Cir. 2001) (tenured faculty member could be required to use university grading scale); *Wirsing v. Bd. of Regents of the Univ. of Colo.*, 739 F. Supp. 551, 554 (D. Colo. 1990) (adverse action against faculty member for refusing to administer university student evaluation form was permitted), *aff'd*, 945 F.2d 412 (10th Cir. 1991) (unpublished table decision).

174. 423 F.3d 590 (6th Cir. 2005).

175. *Id.* at 594–95 ("While the First Amendment may protect [plaintiff's] right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas."); see also *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 492 (3d Cir. 1998) (finding professor had no "constitutional right to choose curriculum materials in contravention of the University's dictates."); *Lovlace v. Se. Mass. Univ.*, 793 F.2d 419, 421 (1st Cir. 1986) (*per curiam*) (upholding non-renewal of faculty member for refusing to adhere to university grading standards).

176. 480 F.2d 705 (6th Cir. 1973).

177. *Id.* at 709. "Thus, we are squarely presented with the question whether the administration of a public school may, consistent with the First Amendment, fail to renew a nontenured teacher because of displeasure with her 'pedagogical attitudes.' We conclude, as did the district court, that it may." *Id.* at 708; see also *Millikan v. Bd. of Dirs. of Everett Sch. Dist. No. 2*, 611 P.2d 414, 416 (Wash. 1980) (*en banc*) ("[A]pplicable cases take the position that a school district has authority to prescribe both course content and teaching methods."); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1190–91 (6th Cir. 1995) (holding that a coach could be terminated for use of the "n word" in an attempt to motivate players); *cf. Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) (distinguishing *Dambrot* and finding use of the "n word" should not have been grounds for non-renewal where it was "germane to the subject matter of his lecture on the power and effect of language").

178. See *Sweezy v. New Hampshire*, 354 U.S. 234, 249–50 (1957) (plurality opinion) (noting the state court's admission that the faculty member had a "right to lecture" and that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation"); *Hardy*, 260 F.3d at 679 (finding

can be found in *Cohen v. San Bernadino Valley College*,¹⁷⁹ where the court examined a case involving a tenured professor who used a variety of sexually explicit and offensive materials in his introductory-level English class and was subjected to discipline as a result.¹⁸⁰ The Ninth Circuit, in a minimal opinion that did not address academic freedom or the *Pickering-Connick* test, found in favor of the professor, holding that the university could not apply its policy against sexual harassment to the case in question.¹⁸¹

With this background on the scope and history of the concept of academic freedom, we turn now to *Meriwether v. Hartop*,¹⁸² which provides an important illustration of how a court can misapply the concept, through both misapplication of the law and misunderstanding of the interest of the state in offering access to an effective and non-discriminatory education.

III. MERIWETHER V. HARTOP

The recent decision of *Meriwether v. Hartop* underscores the need for new guidance with regard to academic freedom. This Part analyzes how the case demonstrates: (1) the inadequacy of the current jurisprudence; (2) the court's lack of understanding of the interest of the state in providing an effective education; and (3) the need for a new approach to assess academic freedom that appropriately balances the interest of the faculty, the university, the student, and the broader society. Part IV sets forth a new approach to academic freedom that is intended to do just that.

A. *Meriwether's Refusal to Use Doe's Pronouns and Its Consequences*

Nicholas Meriwether teaches philosophy at Shawnee State, which is a small and relatively new public college in Ohio.¹⁸³ In 2016, Shawnee State instituted a policy that required faculty to respect students' pronouns.¹⁸⁴ Meriwether expressed his concerns about this policy to the chair of his department, Jennifer Pauley, apparently in an

use of the "n word" should not have been grounds for termination where it was germane to classroom content).

179. 92 F.3d 968 (9th Cir. 1996).

180. *Id.* at 969–70.

181. *Id.* at 971–72.

182. 992 F.3d 492 (6th Cir. 2021).

183. *Id.* at 498.

184. *Id.*

unsuccessful bid to seek a religious exemption from the policy.¹⁸⁵ It appears that Meriwether did not follow the policy at first, since nothing in the court's decision suggests that he did so between the time it was instituted and the time of the incident that gave rise to this case in January 2018.¹⁸⁶

On the first day of his Political Philosophy class that month, Meriwether called on a student referred to in the proceedings as Doe.¹⁸⁷ Meriwether's teaching style involves the use of the Socratic method and addressing students as Mr. or Ms.¹⁸⁸ Meriwether, believing that Doe presented as male, called Doe "sir."¹⁸⁹ Doe approached Meriwether after class to explain that she used feminine pronouns and to ask that Meriwether use female honorifics and pronouns for her.¹⁹⁰ She also showed Meriwether her driver's license, stating that she is female, and explained that Ohio legally recognizes her as female.¹⁹¹ Meriwether refused to use her pronouns, despite Shawnee's policy requiring him to do so.¹⁹² Both Meriwether and Doe reported the exchange to university officials, including the school's Title IX office and the Acting Dean, Roberta Milliken.¹⁹³

Initially, Dean Milliken told Meriwether that he could refer to Doe only by her last name, rather than using pronouns for her.¹⁹⁴ It is unclear whether Meriwether did this or not, but Doe complained to the university again two weeks later.¹⁹⁵ Dean Milliken then told Meriwether that he had to respect Doe's pronouns in compliance with Shawnee's gender identity policy.¹⁹⁶ In spite of this discussion, Meriwether "accidentally" continued to refer to Doe using the title "Mr."¹⁹⁷

185. *Id.* at 499.

186. *Id.*

187. *Id.*

188. *Id.* There is no reference to his using a comparable non-binary address such as Mx.

189. *Id.*

190. *Id.*

191. *Meriwether v. Trs. of Shawnee State Univ.*, No. 18-cv-753, 2019 U.S. Dist. LEXIS 78771, at *23 (S.D. Ohio, May 9, 2019), *aff'd in part, vacated in part, rev'd in part sub nom. Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

192. *Id.* at *9, *23.

193. *Meriwether*, 992 F.3d at 499.

194. *Id.*

195. *Id.* at 499–500.

196. *Id.* at 500.

197. *Id.*

At this point, Doe threatened to retain counsel if Shawnee did not take action to protect her rights.¹⁹⁸ Doe “dreaded participating in [Meriwether’s] class but felt compelled to do so because [Meriwether] graded students on participation.”¹⁹⁹ Meriwether’s refusal to use her pronouns also affected how others in the class referred to Doe, since her classmates sometimes “mistakenly” used male honorifics when referring to her in class.²⁰⁰ Doe “suffered significant psychological strain and distress, including an exacerbation of her gender dysphoria” as a result of Meriwether’s differential treatment.²⁰¹

When Dean Milliken had her third conversation with Meriwether about his noncompliance, Meriwether asked if he could just put a disclaimer about his refusal to follow Shawnee’s policy in this regard in his syllabus.²⁰² Dean Milliken explained that such a disclaimer itself would violate the school’s policy.²⁰³ After this meeting, she sent him a letter reiterating the requirement that Meriwether treat Doe as he would any other student who identified as female.²⁰⁴ Doe complained again, prompting Dean Milliken to begin a formal investigation and refer the matter to Shawnee State’s Title IX office.²⁰⁵ The Title IX staff interviewed two other transgender students, presumably in Meriwether’s class, as well as Meriwether and Doe.²⁰⁶ The office concluded that Meriwether’s “disparate treatment” of Doe had “created a hostile environment” in violation of school policies prohibiting gender identity discrimination.²⁰⁷ Dean Milliken then issued her own report, noting that Meriwether had “effectively created a hostile environment” for Doe and recommended putting a formal warning in his file.²⁰⁸

At this point, Provost Jeffrey Bauer stepped in to review Dean Milliken’s recommendation.²⁰⁹ Meriwether protested that he treated

198. *Id.*

199. *Meriwether v. Trs. of Shawnee State Univ.*, No. 18-cv-753, 2019 U.S. Dist. LEXIS 78771, at *23–24 (S.D. Ohio, May 9, 2019), *aff’d in part, vacated in part, rev’d in part sub nom.* *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

200. *Id.* at *24.

201. *Id.*

202. *Meriwether*, 992 F.3d at 500.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 500–01.

208. *Id.* at 501.

209. *Id.*

Doe “exactly the same as he treated all male students.”²¹⁰ He then asked Provost Bauer to allow “‘reasonable minds . . . to differ’ on this ‘newly emerging cultural issue.’”²¹¹ The Provost refused.²¹² Shawnee State gave Meriwether a written reprimand and warned him that if he did not treat transgender students with more respect, he would be subject to further corrective actions.²¹³

Although the faculty union filed a grievance on Meriwether’s behalf, the Provost denied the grievance.²¹⁴ A union representative attempted to explain Meriwether’s religious objections but apparently failed to complete his presentation because Provost Bauer laughed “[a]t one point.”²¹⁵ Subsequent appeals to higher level school officials also failed.²¹⁶ These officials, Shawnee State’s General Counsel and Labor Relations Director, found that Meriwether had engaged in unlawful “differential treatment” of Doe, rather than creating a hostile environment.²¹⁷ They rejected Meriwether’s religious accommodation request by comparing it to racism or sexism, neither of which the university would tolerate even if it were religiously motivated.²¹⁸ Meriwether then “steer[ed] class discussions away from gender-identity issues and has refused to address the subject when students have raised it in class.”²¹⁹ He gave Doe a good grade, however, because of her excellent classwork and participation.²²⁰

B. The District Court Refuses Meriwether’s Motion to Dismiss

On November 5, 2018, Meriwether filed his complaint against several trustees and administrators at Shawnee State, in their official capacities.²²¹ He was represented by a team of attorneys from Alliance

210. *Id.*

211. *Id.* (omission in original).

212. *Id.*

213. *Id.*

214. *Id.* at 501–02.

215. *Id.* at 502.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 500.

221. The complaint alleges nine specific causes of action: violations of Plaintiff’s (1) First Amendment right to freedom of speech retaliation, (2) First Amendment right to freedom of content and viewpoint discrimination, (3) First Amendment right to freedom of compelled speech, (4) First Amendment right to free exercise of religion, (5) right to be free from unconstitutional conditions, (6) Fourteenth Amendment

Defending Freedom (ADF) including David A. Cortman, ADF's senior counsel and vice president of U.S. litigation.²²²

The district court referred the case to a magistrate judge.²²³ Doe and Sexuality and Gender Acceptance (SAGA) successfully moved to intervene.²²⁴ The defendants Doe and SAGA filed separate motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The magistrate recommended dismissing all of Meriwether's federal claims and the district court adopted that recommendation over Meriwether's objections.²²⁵

The district court focused, in part, on whether Meriwether's use of pronouns touched on a matter of public concern, a prerequisite for First Amendment protection against retaliation.²²⁶ Although gender identity was a profoundly important issue, the district court reasoned, Meriwether's speech "did not implicate the broader social concerns surrounding the issue."²²⁷ Because the speech was limited to addressing one student, it was not a matter of public concern given its "content, context and form."²²⁸ The district court also found that the university had not compelled Meriwether's speech in violation of the First Amendment because it gave him the choice to address all students by either their first or last names.²²⁹ Because Meriwether failed to show that his speech was protected, the district court dismissed his claim that the university's anti-discrimination policies, as applied, were unconstitutionally overbroad.²³⁰

Meriwether's free exercise claims met the same fate at this level. Because the university's gender identity anti-discrimination policies

right to due process of law, (7) Fourteenth Amendment right to equal protection of the law, (8) rights of conscience and free exercise of religion, and (9) breach of contract. Plaintiff's Verified Complaint (Redacted) at 35–44, *Meriwether v. Trs. of Shawnee State Univ.*, No. 18-cv-753, 2019 U.S. Dist. LEXIS 78771 (S.D. Ohio, May 9, 2019).

222. *David A. Cortman*, ALL. DEFENDING FREEDOM, <https://adflegal.org/biography/david-cortman> [<https://perma.cc/574Y-5VP2>].

223. *Meriwether*, 2019 U.S. Dist. LEXIS 78771, at *2.

224. *Id.* at *48.

225. *Meriwether*, 2019 U.S. Dist. LEXIS 151494, at *96–97.

226. *Id.* at *39–45; *see Connick v. Myers*, 461 U.S. 138, 146 (1983) (holding that if a government official's speech is not a matter of public concern, the judiciary should not intrude in the name of the First Amendment).

227. *Meriwether*, 2019 U.S. Dist. LEXIS 151494, at *44.

228. *Id.* at *46.

229. *Id.* at *53–54.

230. *Id.* at *63–64.

were neutral and generally applicable on their face, Meriwether would have had to allege that the policies targeted particular religious beliefs in practice.²³¹ Although Meriwether alleged that some university officials were hostile toward his religion, he did not “allege[] facts to show defendants generated or enforced Shawnee State’s nondiscrimination policies based on hostility to his religious beliefs.”²³² The district court also took issue with Meriwether’s evidence of Bauer’s hostility, noting that the evidence suggested that Bauer laughed at one point in a meeting that covered several topics, including but not limited to Meriwether’s beliefs.²³³ In sum, the district court granted the university and intervenor-defendants’ motions to dismiss.²³⁴

C. *The Sixth Circuit Reverses and Remands*

On March 26, 2021, the United States Court of Appeals for the Sixth Circuit reversed the district court’s rulings on the motions to dismiss.²³⁵ The decision was written on behalf of the three-judge panel by Judge Amul Thapar.²³⁶ Thapar had been nominated to the Sixth Circuit by President Trump four years earlier and is a contributor to the Federalist Society.²³⁷

In describing Meriwether, the court noted that the professor was a “fixture” at the school, having taught “countless students” over the twenty-five years he had been at Shawnee State, which itself is only thirty years old.²³⁸ It called attention to his “spotless disciplinary record” and noted that he is a “devout Christian.”²³⁹

The court’s recitation of the facts showed a comparative lack of respect both for Doe and for the rights of students to determine their own pronouns in general. For example, in describing the facts underlying Meriwether’s claim, the court observed that Shawnee State

231. *Id.* at *71–72 (citing *Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 179 (6th Cir. 1993)).

232. *Id.* at *73.

233. *Id.* at *76.

234. *Id.* at *97.

235. *Meriwether v. Hartop*, 992 F.3d 492, 498 (6th Cir. 2021).

236. *Id.* at 497–98.

237. *Hon. Amul F. Thapar*, FEDERALIST SOC’Y, <https://fedsoc.org/contributors/amul-thapar> [<https://perma.cc/RZ4F-RULB>].

238. *Meriwether*, 992 F.3d at 498.

239. *Id.*

had not informed Meriwether of Doe’s “sex or gender identity,”²⁴⁰ eliding the difference between sex and gender identity that is critical to this case. It did not address whether Doe had provided that information herself, or whether Meriwether’s attention to pedagogical effectiveness included asking the students themselves about their pronouns. The court omitted Doe’s statements about the harmful impact that Meriwether’s disrespect had on her, including the exacerbation of her gender dysphoria, and the fear she suffered knowing that she had to speak up often in class because of the significance Meriwether attached to participation in his grading schema.²⁴¹

1. *The free speech claims*

The court began by reversing the district court’s dismissal of Meriwether’s free speech claims. As a threshold question, it examined the Supreme Court’s ruling in *Garcetti v. Ceballos* that ordinarily, “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”²⁴² The court held that *Garcetti* did not bar Meriwether’s free speech claim because it did not specifically apply to academic speech.²⁴³ Other precedents, it noted, suggested an expansive view of the free speech rights of professors.²⁴⁴ These cases included *Keyishian v. Bd. of Regents*,²⁴⁵ in which the Supreme Court referred to the classroom as “peculiarly the ‘marketplace of ideas’” and stated that the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom.”²⁴⁶

Importantly, the *Meriwether* court characterized respect for gender autonomy as a “matter of public import” on which a professor

240. *Id.* at 499.

241. *See Meriwether v. Trs. of Shawnee State Univ.*, No. 18-cv-753, 2019 U.S. Dist. LEXIS 78771, at *23–24 (S.D. Ohio, May 9, 2019), *aff’d in part, vacated in part, rev’d in part sub nom. Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

242. 547 U.S. 410, 421 (2006).

243. *Meriwether*, 992 F.3d at 504 (citing *Garcetti*, 547 U.S. at 425).

244. *Id.* at 504–05 (citing *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (holding that *Sweezy* and *Keyishian* together establish “that the First Amendment protects the free-speech rights of professors when they are teaching”); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

245. 385 U.S. 589 (1967).

246. *Id.* at 603.

legitimately might have a different viewpoint, noting that “when the state stifles a professor’s viewpoint on a matter of public import, much more than the professor’s rights are at stake.”²⁴⁷ It cited to Sixth Circuit precedent, underscoring the importance of “academic freedom,” which led to the conclusion that “professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.”²⁴⁸ The *Meriwether* court did not, however, recognize any of the responsibilities faculty have that justify academic freedom, and that formed the basis for the AAUP’s 1915 Declaration. Through this omission, the court implicitly endorsed a concept of academic freedom that focused only on the rights of the faculty without any of the responsibilities recognized by the AAUP.

In concluding its analysis of *Meriwether*’s free speech claim, the court called attention to what it saw as the potential danger of academic totalitarianism:

If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity. A university president could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of [G-d], or a Soviet émigré to address his students as ‘comrades.’ That cannot be.²⁴⁹

In response to the counter-argument that *Meriwether*’s disrespect for Doe’s pronouns was not part of the substance of class discussion, the court rejected the distinction between “choices about how to lead classroom discussion” and the substance of the classroom instruction.²⁵⁰ “Any teacher will tell you that choices about how to lead classroom discussion shape the *content* of the instruction enormously,” wrote Judge Thapar.²⁵¹ In conflating the curriculum of the class with decisions about how to address students, the court ignored the AAUP’s distinctions between curricular freedom and extra-curricular restrictions. In particular, the court contravened the principles set out in the 1915 Declaration and endorsed by Harvard’s President Lowell, that the faculty’s freedom extended only to subjects within the professor’s academic expertise. Instead, the court expressed

247. *Meriwether*, 992 F.3d at 505.

248. *Id.*

249. *Id.* at 506. The court’s comparison in this passage of respect for gender identity with communism is noteworthy.

250. *Id.*

251. *Id.*

appreciation for the potential benefits of Meriwether’s “views on gender identity,” suggesting that the university’s refusal to allow Meriwether to express his hostility to school policy in his syllabus “silenced a viewpoint that could have catalyzed a robust and insightful in-class discussion.”²⁵² It noted that under Sixth Circuit precedent and *Pickering*, the state may only restrict a professor’s expression of ideas “when its interest in restricting a professor’s in-class speech outweighs his interest in speaking.”²⁵³ The court assumed here that there is no relevant distinction here between the subject of the course, as determined by the university, and any extraneous matter that the professor chooses to add.

The court did not appear convinced that respecting gender identity is desirable, let alone required by any title of the Civil Rights Act of 1964. The court described Shawnee State’s requirement that Meriwether adhere to this university policy as an obligation to “toe the university’s line on gender identity.”²⁵⁴

In order to evaluate whether Meriwether’s free-speech claim was protected by the First Amendment, the court applied the *Pickering-Connick* test. This test required the answers to two questions. First, had Meriwether spoken on “a matter of public concern”?²⁵⁵ If so, did his interest in doing so outweigh Shawnee State’s interest in “promoting the efficiency of the public services it performs through” him?²⁵⁶

In answering the first question, the court characterized Meriwether’s refusal to honor Doe’s pronouns as a message in itself, intended to convey his point of view that “one’s sex cannot be changed.”²⁵⁷ Indeed, the court noted, “his mode of address *was* the message.”²⁵⁸ The court went on to equate “this controversy” with “a passionate political and social debate” over “the use of gender-specific titles and pronouns.”²⁵⁹ It reasoned that the university must also view “this pronoun debate” as a “hot issue,” because it could not conceive of another reason for the university to bar Meriwether from expressing his beliefs about gender identity in his syllabus.²⁶⁰ Consequently, the court concluded that the

252. *Id.*

253. *Id.*

254. *Id.* at 502.

255. *Connick v. Myers*, 461 U.S. 138, 146 (1983); *Meriwether*, 992 F.3d at 508.

256. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Meriwether*, 992 F.3d at 508.

257. *Meriwether*, 992 F.3d at 508.

258. *Id.*

259. *Id.*

260. *Id.* at 509.

answer to the first *Pickering-Connick* test question was yes: this was a matter of public concern.²⁶¹ By adopting Meriwether's apparent equation of "sex" with "gender," the court's opinion not only reflected but implicitly endorsed a misunderstanding of the difference between the two and what they represent. It sidestepped that difference by referring repeatedly to "the pronoun debate."²⁶²

The second question called for a balancing of the professor's interests in commenting with the university's interests, which the court framed as the interests of "the State, as an employer, in promoting the efficiency of the public services it performs through its employees."²⁶³ The tradition of academic freedom, coupled with the fact that Meriwether's beliefs were motivated by his religion, strengthened Meriwether's First Amendment interests.²⁶⁴ The university, on the other hand, should have had an interest in exposing students to both sides of this matter of public concern.²⁶⁵

In emphasizing the "efficiency" of the state's provision of "public services," the court adopted a view of the role of education that is very different from that of the AAUP's 1915 and 1940 statements.²⁶⁶ The court implied that the state's goal should be to act efficiently in providing an education without consideration for the ways in which a university education differs from any other service.²⁶⁷ But higher education is not comparable to offering reliable transportation infrastructure, collecting taxes, keeping parks clean or any other rote public service. Education, whether offered by a public or private university, should not be evaluated with primary concern for its "efficiency." In this decision, the court did not elucidate the standards by which a public university education should be measured with regard to either efficiency or effectiveness and did not differentiate education from any other public service in this regard.

In response to its claim of a compelling interest in protecting transgender students from discrimination, the court expressed skepticism. Its decision in *EEOC v. R.G. & G.R. Harris Funeral Homes*,

261. *Id.*

262. *Id.*

263. *Id.* (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

264. *Id.*

265. *Id.* at 510.

266. *Id.* at 509 (quoting *Pickering*, 391 U.S. at 568).

267. *See id.* (noting that the State's interest in the case is that of an employer seeking to promote "the efficiency of the public services it performs through its employees" (quoting *Pickering*, 391 U.S. at 568)).

Inc.,²⁶⁸ upholding Title VII protections for a transgender employee, did not mean that “the government always has a compelling interest in regulating employees’ speech on matters of public concern.”²⁶⁹

The university’s interests seemed “comparatively weak” to the court, which could not see why Meriwether’s offer to simply not use Doe’s pronouns was unacceptable.²⁷⁰ After all, it reasoned, “when Meriwether employed this accommodation throughout the semester, Doe was an active participant in class and ultimately received a high grade.”²⁷¹ In other words, Doe’s success in class was, in the court’s eyes, evidence that Meriwether’s refusal to use her pronouns caused no harm.²⁷² This logic is flawed. A student’s ability to excel in classes where she experiences prejudice or discrimination does not obviate the prejudice or discrimination. It simply attests to the fortitude of the student under challenging circumstances, and in this case, under conditions that the university itself deemed unacceptable. Finding “no suggestion that Meriwether’s speech inhibited his duties in the classroom . . . or denied Doe any educational benefits,” the court determined that Meriwether’s interests outweighed those of Shawnee State.²⁷³

Doe’s success in Meriwether’s class also weakened the university’s Title IX claims, in the court’s eyes. Since there was no evidence that Meriwether’s speech “inhibited Doe’s education or ability to succeed in the classroom,” there was no hostile environment as required for a Title IX claim.²⁷⁴ The fact that the Provost had conceded that there was no hostile environment earlier in the proceedings did not help the university’s case.²⁷⁵ The court did not assess the extent of the state’s interest in restricting Meriwether from using gender pronouns inconsistent with Doe’s identity or refusing to acknowledge her gender at all. In sum, the court held, Shawnee State violated Meriwether’s rights of free speech.²⁷⁶ Because the district court’s free speech rulings

268. 884 F.3d 560, 566 (6th Cir. 2018), *aff’d sub nom.* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

269. *Meriwether*, 992 F.3d at 510.

270. *Id.* at 510–11.

271. *Id.* at 511.

272. Interestingly, the Court itself also refuses to use Doe’s feminine pronouns. The student is never referred to as “she” or “her” in the decision.

273. *Meriwether*, 992 F.3d at 511.

274. *Id.* at 511.

275. *See id.* at 511, 514 (noting university officials’ concessions that Meriwether’s misgendering “was not so severe and pervasive” to rise to the level of a hostile environment).

276. *Id.* at 511–12.

were predicated on the belief that his speech was not protected, the court vacated all of them as well.²⁷⁷

2. *The free exercise claims*

The court also ruled that there was a plausible allegation that Shawnee State violated Meriwether's rights under the First Amendment's Free Exercise Clause.²⁷⁸ The first basis for its ruling was that the university was hostile rather than neutral towards Meriwether's religious beliefs because, Meriwether alleged, neither Pauley nor Bauer were respectful of his beliefs.²⁷⁹ Because the court was ruling on a motion to dismiss, it accepted his allegations as true over the university's objections that Pauley was not even involved in the action against Meriwether.²⁸⁰ It stated that the Supreme Court's observation in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*²⁸¹ that "religion has [historically] been used to justify all kinds of discrimination" was itself discriminatory, or at least hostile towards religion.²⁸² Shawnee State's invocation of racism, in response to Meriwether's "good-faith convictions," gave rise to an "inference of religious hostility."²⁸³

The court also held that the university's procedures suggested non-neutrality.²⁸⁴ While both the university's Title IX report and its counsel at oral argument claimed that Meriwether had created a hostile environment, other university officials had characterized his actions as "disparate treatment" instead.²⁸⁵ These changes amounted to a "moving target" and implied to the court that the university was "using an evolving policy as a pretext for targeting Meriwether's beliefs" rather than applying their policy in a neutral manner.²⁸⁶ The district court, however, had acknowledged that Shawnee State's Director of

277. *Id.* at 512 n.5.

278. *Id.* at 514.

279. *Id.* at 513.

280. *Id.* at 513.

281. 138 S. Ct. 1719 (2018).

282. *Meriwether*, 992 F.3d at 513 (citing *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018)).

283. *Id.* at 514.

284. *Id.* at 515.

285. *Id.* at 514. In the factual summary portion of the decision, however, the Court quoted these officials as calling it a "differential treatment" case, not a "disparate treatment" case. *Id.* at 502. The phrase "differential treatment" is not as widely recognized as a legal theory in employment law cases as "disparate treatment."

286. *Id.* at 515.

Human Resources and Dean Milliken had separately concluded that Meriwether's "disparate treatment" of Doe had created a "hostile environment,"²⁸⁷ so the target may not have been moving all that much.

The court rejected the university's counter-arguments based on *Harris*, in which a Sixth Circuit panel had held that a funeral home owner could not fire a person for being transgender because the owner's religion did not endorse gender mutability without violating Title VII.²⁸⁸ The court distinguished *Harris* because it viewed the university's policy, and its rejection of Meriwether's proposed compromise regarding syllabus language, as requiring an actual endorsement of gender identity that ran contrary to Meriwether's faith.²⁸⁹ "Depending on the circumstances," wrote the court, "the application of a nondiscrimination policy could force a person to endorse views incompatible with his religious convictions."²⁹⁰ That compelled endorsement, according to the court, violates the Free Exercise Clause.²⁹¹

The university's alleged hostility to Meriwether's religious beliefs at the initial stages of its investigation doomed its argument that the actual warning was issued by Milliken, who had not exhibited any of the anti-religious sentiment Meriwether complained about. Hostility toward religion at any point in the process, according to the court,

287. *Meriwether v. Trs. of Shawnee State Univ.*, No. 18-cv-753, 2019 U.S. Dist. LEXIS 151494, at *18–19 (S.D. Ohio Sept. 5, 2019), *aff'd in part, rev'd in part, vacated in part sub nom.* *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

288. *Meriwether*, 992 F.3d at 516; *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–75 (6th Cir. 2018), *aff'd sub nom.* *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

289. *Meriwether*, 992 F.3d at 516.

290. *Id.*

291. *Id.* at 512, 517. But the funeral home in *Harris* made very similar arguments, unsuccessfully, to the one that the court upheld for Meriwether made in this case. In both cases, a religious cisgender person argued that he should not be forced to respect the gender identity of a transgender person (in *Harris*, an employee; in *Meriwether*, a student). The *Harris* court ruled that keeping a transgender person employed did not amount to "endorsing" contrary religious views. *Harris*, 884 F.3d at 589. In *Meriwether*, the court ruled that the university's nondiscrimination policy, as applied, required Meriwether to "endorse a view on gender identity contrary to his faith." *Meriwether*, 992 F.3d at 516. The court found the university's refusal to allow Meriwether to include a disclaimer about his beliefs on gender identity in his syllabus significant in this context. *Id.* It is hard to see what difference there is, in principle, between the actions that the *Harris* court deemed violations of Title VII and the actions that the *Meriwether* court upheld over the university's Title IX claims.

makes the entire proceedings hostile.²⁹² “A disciplinary proceeding that is fair at the beginning still violates the Free Exercise Clause if it is influenced by religious hostility later.”²⁹³ The court also rejected the university’s counter-arguments that Meriwether could have avoided using pronouns, which the court found impractical.²⁹⁴ As a final matter, the court rejected Meriwether’s claims that the university’s anti-discrimination policies regarding gender identity were unconstitutionally vague, thus depriving him of due process. Because he was on notice that the policies applied to him, his challenge failed.²⁹⁵

D. *The Legal Errors in the Sixth Circuit’s Opinion*

The Sixth Circuit’s *Meriwether* opinion suffers from several critical errors. As an initial matter, the court assumed that Meriwether’s refusal to use Doe’s pronouns was speech rather than conduct. By refusing to honor Doe’s gender, the court glossed over the very real question of whether Meriwether was expressing his views on the subject of gender identity and whether transgender people should be humanized in the classroom, or whether he was simply acting on a personal religious belief that he did not perceive Doe to be “female.” He did express the fact that his views were personal and religious to his Chair and Provost, as well as subsequently in the media,²⁹⁶ but he does not allege that he was punished for that speech. The court also assumed, without evidence, that Meriwether’s refusal to use Doe’s pronouns was part of “how” he taught. It assumed that *any* conduct of Meriwether’s constituted a pedagogical choice, rather than a personal expression.

Next, the court improperly assumed that Meriwether’s refusal to use Doe’s pronouns was part of the *content* of the course, an area in which the professor could claim professional expertise. Meriwether’s feelings about transgender students like Doe and their pronouns were grounded in his personal religious beliefs. He made no professional claim to expertise in that area, nor is there anything in the court’s decision to suggest that the use of pronouns was what Meriwether was

292. *Id.* at 516–17.

293. *Id.* at 516.

294. *Id.* at 517.

295. *Id.* at 518.

296. Nicholas Meriwether, *The Truth About My Stand Against a University’s Enforced Orthodoxy*, HILL (Sept. 28, 2020, 4:30 PM) [hereinafter Meriwether, *The Truth*], <https://thehill.com/opinion/civil-rights/518531-the-truth-about-my-stand-against-a-universitys-enforced-orthodoxy> [<https://perma.cc/NPR4-7SZA>].

hired to teach in this particular course. The record does not show any discussion in class of the subject of transgender rights or the use of pronouns in society—the so called “hot issue” identified by the court.²⁹⁷

By conflating the way in which the class was conducted with the subject matter of the course, the court obviated the important distinction between method and content as well as the distinction between personal and professional. The court avoided the issue of whether a debate over pronouns was relevant to this particular course, which the Fifth Circuit has deemed relevant.²⁹⁸ Even if the court were correct in assuming that the way in which a professor addresses his students affects what the students learn in a course, the fact that a relationship exists between two things does not make those two things one and the same. The court’s ignorance of these distinctions is significant. It is also inconsistent with *Connick*, in that a professor’s personal religious convictions may likely be a private matter and not one of “public concern.”²⁹⁹

Another legal weakness of this decision is the elevation of a professor’s religious beliefs over his student’s self-expression. It is not clear that the First Amendment prioritizes one right over another as a matter of principle. As Professor Steve Sanders has observed:

Meriwether claims a privilege for his own freedom of conscience on a deeply personal matter (his religious beliefs). Yet he demands the right to use those beliefs to override *someone else’s* freedom of conscience on the deeply personal matter of their own gender identity. What gives him the right to do that? Can that really be [what] the First Amendment requires?³⁰⁰

The court’s refusal to consider the impact of Meriwether’s religious freedom claim on Doe’s expression of gender identity may be due, in part, to the fact that Doe stated no First Amendment claims. However, the failure to consider any limitations of religious freedom in what amounts to a territorial battle over identity rights (Meriwether’s

297. *Meriwether*, 992 F.3d at 509.

298. See *Martin v. Parrish*, 805 F.2d 583, 586 (5th Cir. 1995) (finding plaintiff professor’s use of profanity not protected because the profanity lacked an “academic purpose” and served merely to attack students).

299. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

300. Steve Sanders, *Pronouns, “Academic Freedom,” and Conservative Judicial Activism*, AM. CONST. SOC’Y: EXPERT F. (Apr. 12, 2021), <https://www.acslaw.org/expertforum/pronouns-academic-freedom-and-conservative-judicial-activism> [https://perma.cc/Y3E8-AXDH].

religious identity vs. Doe's gender identity) is shortsighted at best. At worst, it may be discriminatory in violation of Title IX. There is a critical distinction to be made between protected speech in the classroom and identity discrimination, but the court has not drawn that line clearly here. The court repeatedly expresses outrage over the notion that Meriwether's refusal to honor Doe's identity might be comparable to racism or sexism, as if the idea is so preposterous as to be unworthy of analysis. But as others have noted, religion has been used to justify racist behavior in the past.³⁰¹ If Meriwether had refused to address Black male students by the honorific "Mr." but accorded that honor to White students, on the basis of a religious belief about the superiority of White people, it is hard to imagine the court justifying that differential treatment in the same way it has justified Meriwether's behavior here.³⁰² Yet there is no acknowledgement in the court's decision that identity discrimination is as harmful, or as potentially unlawful, as religious discrimination.

IV. BALANCING INTERESTS IN ACADEMIC FREEDOM

In this Part, we offer a fresh perspective on how academic freedom should be applied to the challenging and rapidly evolving characteristics of today's higher education environment, and the pressing needs of our changing society. In our view, what a case like *Meriwether* demonstrates is not that the law or principles of academic freedom need to change—indeed, we believe the principles of academic freedom described in Part II are deeply resilient and applicable today. Rather, we find *Meriwether* demonstrates a lack of

301. Tisa Wenger, *Discriminating in the Name of Religion? Segregationists and Slaveholders Did It, Too*, WASH. POST (Dec. 5, 2017) <https://www.washingtonpost.com/news/made-by-history/wp/2017/12/05/discriminating-in-the-name-of-religion-segregationists-and-slaveholders-did-it-too> [<https://perma.cc/ZET3-ZC6J>]; cf. Vikram David Amar & Alan E. Brownstein, *Analyzing the Recent Sixth Circuit's Extension of "Academic Freedom" Protection to a College Teacher Who Refused to Respect Student Gender-Pronoun Preferences*, JUSTIA: VERDICT (Apr. 16, 2021), <https://verdict.justia.com/2021/04/16/analyzing-the-recent-sixth-circuits-extension-of-academic-freedom-protection-to-a-college-teacher-who-refused-to-respect-student-gender-pronoun-preferences> [<https://perma.cc/5U3P-8NBE>] (arguing that the *Meriwether* court arrived at "the wrong outcome on the facts" of the case and set "questionable" First Amendment precedent).

302. See *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1190–91 (6th Cir. 1995) (coach's use of the "n word" not protected: "An instructor's choice of teaching methods does not rise to the level of protected expression. . . . The [u]niversity has the right to disapprove of the use of the ["n word"] as a motivational tool . . .").

understanding of the core of those principles, as well as a lack of understanding of the changing nature of higher education and the science of pedagogy.

A. *Academic Freedom and the Pickering-Connick Framework*

In our re-examination of academic freedom, we start with the assumption that academic faculty have unique constitutional free speech rights in the classroom, and they do not surrender those rights because they are government employees acting in an official capacity. Like the Fourth, Fifth, Sixth, and Ninth Circuits,³⁰³ we reject the application of *Garcetti* to faculty acting in the areas of teaching and scholarship. To believe otherwise would require a wholesale dissolution of the notion of academic freedom, overturning decades of jurisprudence at the state and federal level, including fundamental Supreme Court opinions in *Sweezy*, *Tinker v. Des Moines Independent Community School District*,³⁰⁴ *Ewing*, and *Pickering*, not to mention the reservation expressed in *Garcetti* itself in the dissent by Justice Souter.³⁰⁵

From this starting place, we believe the appropriate test for the application of academic freedom to these cases is the *Pickering-Connick* test, but with particular caveats that are drawn from the history and original policy behind academic freedom. In a case such as *Meriwether*, which involves purported claims of academic freedom related to classroom speech, we therefore must ask first, based on the standard identified in *Connick*, is this a matter of public concern?³⁰⁶

303. *Adams v. Tr. of Univ. N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011) (finding *Garcetti* rule does not apply “in the academic context of a public university”); *Buchanan v. Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019) (applying a *Pickering-Connick* framework rather than *Garcetti*); *Meriwether v. Hartop*, 992 F.3d 492, 504 (6th Cir. 2021) (finding *Garcetti* does not limit free speech rights of faculty in the classroom); *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014) (“[I]f applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.”).

304. 393 U.S. 503, 506 (1969) (seminal decision finding secondary student had the right to political speech in the educational setting and noting that students and faculty do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).

305. *Garcetti v. Ceballos*, 547 U.S. 410, 428 (2006) (Souter, J., dissenting).

306. *Meriwether*, 992 F.3d 492, 508 (6th Cir. 2021) (noting that the first step of the *Pickering-Connick* framework required the court to ask whether *Meriwether* was speaking on “a matter of public concern” (quoting *Connick v. Myers*, 461 U.S. 138, 146–48 (1983))).

This, of course, is no simple matter to determine.³⁰⁷ In *Connick*, the Court held, “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.”³⁰⁸ Generally, speech must be related to “any matter of political, social, or other concern to the community.”³⁰⁹ While this is broadly worded and fact-specific, courts have looked to the intent of the speaker to determine if the speech was intended to address a public concern or if it was purely a personal issue.³¹⁰ To guide courts in the resolution of this issue, we note that academic freedom, per the 1940 Declaration, is based on a notion of public trust.³¹¹ Public trust in higher education is premised on professional scholars pursuing a *non-partisan* agenda based on *scientific principles* that are rigorously *peer-reviewed* and *germane* to the faculty member’s teaching or area of scholarship. Thus, a matter of public concern may not solely reflect a personal agenda or personal religious or moral conviction. This is a key distinction between matters of academic freedom and individual free speech: unlike other areas in which a matter of public concern may be driven by personal desires, to justify a claim of academic freedom, speech must instead be intended to further a larger, public goal.

This boundary is essential for several reasons. First, as an expression of public trust, the public must be assured that faculty speech is based on expertise; this expertise can be assumed in the subject matter of the class for which they have been hired to teach. This expertise cannot be assumed on other matters. Second, academic freedom must be grounded in current notions of the goals and purposes of higher education. Faculty today are not hired to expound on random topics; assessment and accreditation and the need for transferability of

307. See, e.g., *Bonnell v. Lorenzo*, 241 F.3d 800, 811–21 (6th Cir. 2001) (deliberating at length as to whether professor’s speech was a matter of public concern); *Dambrot*, 55 F.3d at 1186–87 (noting that the Sixth Circuit had applied the *Connick* public concern test in a number of areas, but none with facts similar to the instant case, requiring a fact-specific inquiry).

308. *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

309. *Id.* at 146.

310. See *Dambrot*, 55 F.3d at 1187 (finding coach’s use of the “n word,” while intended to motivate students, “imparted no socially or politically relevant message The *point* of his speech was not related to his use of the [“n word”] but to his desire to have his players play harder”); *Martin v. Parrish*, 805 F.2d 583, 585 (5th Cir. 1986) (finding use of profanity in the classroom was not a matter of public concern, even though it was generally intended to motivate students to work harder).

311. 1940 Statement, *supra* note 82, at 14.

learning outcomes suggests that, with regard to classroom speech specifically, it should be within the authority of the university to restrict the topics that are discussed in a class to those germane to the class and on which the professor has recognized expertise.

Based on this first prong, we would dismiss the speech at issue in the *Meriwether* case as not being protected under the principles of academic freedom. The professor was not speaking on a matter of public concern—he did not refuse to use Doe’s pronouns in the context of a discussion of transgender student rights or a general religious or philosophical dispute over the recognition of transgender people. Rather, he was expressing a personal religious conviction. Meriwether openly stated the fact that he was using this lawsuit as a means of promoting his opposition to “the juggernaut of political correctness.”³¹² Based on existing precedent, the concept of academic freedom should not be a tool that can be used to further a personal political agenda and to promote an individual faculty member’s religious views of gender.³¹³

Assuming the speech in question was a matter of public concern, the next step of the *Pickering-Connick* framework would be to balance the interest of the state and the speaker. This stage requires us to identify what the interest of the state is, a task which has not previously been undertaken with rigor in existing case law. We suggest the state’s interest is in delivering an *effective educational experience* to students. This effective educational experience includes the acquisition by students of substantive, content-based knowledge, and the acquisition of critical thinking skills. In short, an effective education includes student mastery of learning outcomes, as established by both the individual faculty member and the institution.

The state’s interest cannot be broadly understood simply to be the creation of a classroom and the placement of a faculty member at the head of it—it must be understood to mean a classroom in which

312. Meriwether, *The Truth*, *supra* note 296.

313. Our analysis here is limited to academic freedom at public universities. Whether private universities, especially religious universities, may have other interests as well is a matter for discussion beyond the scope of this paper. We can conceive, for example, that Yeshiva University and Brigham Young University may have legitimate interests beyond the general provision of effective education. HBCUs may also have unique interests to be considered. It may be the case that future court decisions take the specific purposes of such universities into account when balancing the interests of university, faculty and student, even if there is no First Amendment-based protection of academic speech at issue.

learning occurs. Just as we would not expect the college or university to allow faculty members to stand in front of a class and read aloud a textbook, or to beat students who failed to grasp certain concepts, common sense suggests the university has an interest in creating environments in which basic and accepted principles of effective teaching and learning are administered. Though classroom techniques vary widely, the science of pedagogy does offer insight into effective teaching techniques. Importantly, the science of teaching and learning tells us that students learn best when they are engaged and feel like they are part of a supportive learning community.³¹⁴ An effective education also includes the creation of a non-discriminatory and non-hostile learning environment.³¹⁵

This scientific understanding of what creates an effective learning environment should have been considered in *Meriwether*. Generally,

314. See generally Aryn M. Dotterer & Katie Lowe, *Classroom Context, School Engagement, and Academic Achievement in Early Adolescence*, 40 J. YOUTH & ADOLESCENCE 1649 (2011) (finding that school engagement leads to positive academic achievements for students); Jennifer A. Fredricks et al., *School Engagement: Potential of the Concept, State of the Evidence*, 74 REV. EDUC. RSCH. 59 (2004) (noting that there is a positive correlation found between higher levels of engagement and academic achievements for students); Shu-Hui Lin & Yun-Chen Huang, *Assessing College Student Engagement: Development and Validation of the Student Course Engagement Scale*, 36 J. PSYCHOEDUCATIONAL ASSESSMENT 694 (2018) (stating that it is important to measure student's level of effective engagement as it correlates with more successful learning outcomes for students); Mitchell M. Handelsman et al., *A Measure of College Student Course Engagement*, 98 J. EDUC. RSCH. 184–91 (2005) (finding that engaged students and effective teaching leads are positively correlated); Soren Svanum & Silvia M. Bigatti, *Academic Course Engagement During One Semester Forecasts College Success: Engaged Students Are More Likely to Earn a Degree, Do It Faster, and Do It Better*, 50 J. COLL. STUD. DEVELOP. 120 (2009) (detailing findings that college students who are more actively engaged in college life generally perform better academically and finish their degrees quicker than those who are not engaged); Maria R. Reyes et al., *Classroom Emotional Climate, Student Engagement, and Academic Achievement*, 104 J. EDUC. PSYCH. 700 (2012) (noting that “[s]tudent engagement is vital to academic achievement” and leads to higher motivation to learn).

315. See generally Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES 126 (Mitchell J. Chang et al. eds., 2003); Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. HIGHER EDUC. 430 (2006); Lauren Cyr, *Literature Review: Interdisciplinary Findings on Diversity and Inclusion*, in DIVERSITY AND INCLUSION IN HIGHER EDUCATION AND SOCIETAL CONTEXTS 17 (SunHee Kim Gertz et al. eds., 2018); Seth Gershenson et al., *Who Believes in Me? The Effect of Student—Teacher Demographic Match on Teacher Expectations*, 52 ECONOMICS EDUC. REV. 209 (2016); Nel Noddings, *An Ethic of Caring and Its Implications for Instructional Arrangements*, 96 AM. J. EDUC. 215 (1988).

case law has supported the university's right to create policies and enforce pedagogical methods.³¹⁶ This follows from the expectation that academic freedom is grounded in expertise and subject to review by peers who are also experts, a concept identified in the original 1915 Declaration and discussed above.³¹⁷ Similarly, this expertise and interest in effective education supports the administration's right to impose standards that are consistent with accreditation (i.e., nursing, engineering). However, the court clearly did not consider whether the university might have had a significant pedagogical reason for its policies and showed no deference to the university's expertise or interest in creating reasonable pedagogical expectations for faculty.

An example of the court's failure to consider the educational impact of Meriwether's conduct lies in the court's rejection of Shawnee State's effort to build a compromise which would have balanced Meriwether's religious principles with Doe's gender identity. Shawnee State had suggested that Meriwether address all students by their surnames without the gender-specific honorifics of Mr. or Ms., an accommodation that would not have required him to act inconsistently with his religious beliefs.³¹⁸ The court dismissed this as unworkable because the court assumed that a professor could not conduct a class without using gendered pronouns.³¹⁹ We do not believe this to be true, nor do other commentators who are professors like us.³²⁰ The court never considered if Meriwether's pedagogical method was educationally sound, as it should have. To accord faculty unfettered rights to abuse their students on a pedagogical whim does a disservice to the students, the university, and the public interest.

While courts have not considered the interests of the students as a primary factor in most academic freedom cases, we would argue that it has become necessary to do so. Students clearly have an interest in receiving an effective education. This is an interest they share with universities, so to this extent, their interests are aligned. But students

316. See *supra* notes 156–62 and accompanying text.

317. 1915 DECLARATION, *supra* note 75, at 3, 8 (describing the “prolonged and specialized technical training” that describes “professional scholars” and emphasizing the importance of fellow faculty being willing to “purge [the] ranks” of those who are incompetent, or else “it is certain that the task will be performed by others”).

318. *Meriwether v. Hartop*, 992 F.3d 492, 517 (6th Cir. 2021).

319. *Id.*

320. Andrew Koppelman, *Abuse as a Constitutional Right: The Meriwether Case*, HILL (Apr. 5, 2021, 2:30 PM), <https://thehill.com/opinion/judiciary/546444-abuse-as-a-constitutional-right-the-meriwether-case> [<https://perma.cc/A95Z-7KDT>].

also have interests in self-expression, including but not limited to their gender identity. Some universities, including Shawnee State, have adopted policies aimed to promote those interests, such as requiring faculty to honor students' pronouns. But decisions like *Meriwether* may cause universities to reconsider those policies. In a political environment in which some faculty members (including Meriwether) and conservative members of the public are asking universities to abandon diversity, equity, and inclusion measures, students can no longer assume that universities will give due consideration to the full range of their identities and interests.

The impact of Meriwether's conduct may be far more damaging to students than the Sixth Circuit acknowledges, and therefore also damaging to the university's interest in delivering an effective education. Students who identify with a gender other than the one they were assigned at birth suffer from markedly higher rates of suicide and self-harming.³²¹ Research shows that affirming transgender students' gender identities can significantly reduce these risks, while denial and misgendering can exacerbate them.³²² By ignoring the harm caused by misgendering students, as Meriwether did in his classroom and as the court did in its opinion, the court set a precedent that further endangers these at-risk students.

The court's succinct refusal to concede harm to Doe is also dangerous as a matter of public policy. The fact that Doe earned a good grade in Meriwether's class is not a reliable indicator that she was not traumatized by the experience. Indeed, her decision to remain engaged with this litigation, successfully moving to intervene, further suggests that she has been deeply affected by Meriwether's actions. The fact that a student earns an A, does not complain, or continues to participate in class does not show that the state's interest in effective education was *not* compromised. Trauma may not be expressed publicly, particularly trauma related to being misgendered. Moreover, there were other students in the class who witnessed Meriwether's conduct and were potentially traumatized as well. The university may not be able to predict with certainty what will traumatize an individual

321. See Maureen D. Connolly et al., *The Mental Health of Transgender Youth: Advances in Understanding*, 59 J. ADOLESCENT HEALTH 489 (2016).

322. Deborah Temkin & Claudia Vega, *Research Shows the Risk of Misgendering Transgender Youth*, CHILD TRENDS (Oct. 23, 2018), <https://www.childtrends.org/blog/research-shows-the-risk-of-misgendering-transgender-youth> [<https://perma.cc/3KK7-JT9C>].

student, but neither can a professor. For this reason, we should allow the university to set general policies that are intended to protect students and generally create effective educational environments. Requiring faculty to use students' identified pronouns is one such rule.

We propose that the primary interests of the faculty are to have broad freedom to teach the subjects in which they have professional expertise and in which the university has authorized them to teach in any given class. Faculty may be deeply engaged in the content of their area of discipline, but that does not necessarily mean that they are experts on *how* to teach. It is salient that a majority of faculty at universities today are untenured instructors, typically without research duties.³²³ Rather than being hired to opine on general subjects in the classroom or conduct research, today's faculty often are exclusively teaching faculty responsible for large classes with limited freedom to modify the curriculum.³²⁴ Based on this practical consideration in particular, we support previous courts that have concluded that the university's interest in developing and administering an effective education will generally outweigh faculty interests when it comes to teaching methodology.

What, then, of the hypothetical offered in *Meriwether*, which asked—could the state require faculty to misgender students, be authoritarian, deny history, or act in racist ways? Simply, no. We do not propose to eliminate the protections of academic freedom in the classroom. Rather, we intend to prioritize the state's reasonable interest in administering an effective education, and its expertise in determining effective pedagogy, over an unlimited right for an individual faculty member to apply any pedagogical technique they see fit. By grounding our examination of the state's interest in the administration of an effective education, a court can and should consider if the policies at issue would run contrary to that interest. While not substituting its

323. See Colleen Flaherty, *About Three-Quarters of All Faculty Positions Are off the Tenure Track, According to a New AAUP Analysis*, INSIDE HIGHER ED (Oct. 12, 2018), <https://www.insidehighered.com/news/2018/10/12/about-three-quarters-all-faculty-positions-are-tenure-track-according-new-aaup> [<https://perma.cc/8XQM-SZEY>] (noting that around seventy three percent of university faculty are “off the tenure track”).

324. *Id.*; see also Johann Neem, *Three Subtle Forces Weakening Academic Freedom*, INSIDE HIGHER ED (Apr. 16, 2019), <https://www.insidehighered.com/views/2019/04/16/three-subtle-forces-weakening-academic-freedom-opinion> [<https://perma.cc/R7S6-MN8A>] (describing the rise of non-tenure track faculty, outsourcing of curriculum, and increase in the number of college classes taught by high school faculty).

judgment for that of the university, the court could inquire whether administration of a policy such as the ones offered by the *Meriwether* court actually further the state's interest. The creation of a hostile or discriminatory learning environment, or the furtherance of misinformation, would not serve that interest.

CONCLUSION

The basis and nature of academic freedom has not changed since the early 1900s and the 1915 Declaration. Faculty have a right to exercise free speech in the classroom, and the freedom to speak freely on matters of public concern. However, that right may be limited when their speech interferes with the creation of an effective learning environment or contradicts reasonable pedagogical policies established by the university. Moreover, that speech must be germane to the content of the class that the faculty member was hired to teach.

Faculty do not have free speech rights to use higher education classrooms as podiums from which to expound on unrelated topics, particularly when their speech is intended to express simply their own personal religious or moral convictions, rather than to lead students in an exploration of controversial or challenging topics.

In *Meriwether*, the court rejected these principles, creating an unworkable precedent that: 1) ignores the harm that may occur when faculty misgender students; 2) prioritizes a faculty member's personal expression over the state's interest in creating an effective learning environment; and 3) fails to recognize changes in higher education and the science of teaching and learning. In this Article, we have offered a critical analysis of how academic freedom precedent should have been applied, and we have offered a new understanding of academic freedom built on existing policy and precedent that recognizes and balances the real interest of faculty, universities, students, and the public at large.