

## **The Federal Government & Academic Freedom in Higher Education**

**July 11, 2024, at 9:00 a.m. ET  
Rayburn House Office Building Room 2075**

### *Relationship between Academic Freedom and Free Speech*

- There have been contrasting positions about this relationship since the concept of academic freedom was first developed in the US in the early 20th century. A key example of differing positions can be found among the framers of the 1915 Declaration of Principles of the newly founded American Association of University Professors (AAUP).
- The 1915 Declaration, while justifying academic freedom as essential to protecting the professor's distinctive role in the production and dissemination of expert knowledge, extended the definition of academic freedom to include the professor's off-campus political expression unrelated to academic expertise.
- Some framers of the declaration objected to this extension; others supported it. Pragmatic concerns that neither existing First Amendment law nor contract law protected political expression by professors may have influenced those who supported the extension.
- Another approach differentiated academic freedom based on expertise from general political expression while maintaining that universities should leave the issue of general political expression to the state.
- Judicial review of the relationship between academic freedom and the First Amendment arose during the 1950s and 1960s in response to government investigations and legislation directed at Communist and other "subversive" activities. Some of these cases differentiated academic freedom from political expression and identified the former as "a special concern of the First Amendment."
- While many subsequent decisions have clearly identified academic freedom as a First Amendment right of both professors and universities, they have not clarified its meaning or its relationship to the First Amendment generally. Decisions generated by federal legislation and regulations reveal this continuing lack of clarity.

- The societal value of the expert academic speech of professors, the basic justification of academic freedom in the AAUP's 1915 Declaration, provides the primary basis for a distinctive First Amendment right of academic freedom, different from but related to the general First Amendment right of free speech that applies equally to all citizens.

### *What Is Really Happening in the Academy?*

- When the modern concept of academic freedom took shape, a crucial part of it involved a distinction between “academics” and “politics.” Academic freedom would apply to the former, but not the latter—this is one of the things that has historically distinguished academic freedom from freedom of speech. At the time, the distinction seemed obvious, and, to many people today, it still does. Thus the frequent calls today in Washington to “depoliticize higher education.”
- In fact, the distinction is not so obvious. Some of the most important research over the past few decades has shown how supposedly neutral and objective academic work can in fact reflect political assumptions—for instance, about the superiority of certain cultures to others—and has in the past served to justify political projects.
- Many scholars do see their research as furthering political causes. Some believe that academic work in their fields—especially fields born out of the liberation movements of the 1960s including African American studies and gender and sexuality studies—should be grounded in a commitment to the fundamental principles of those movements, such as the idea of equal rights for women.
- But does this mean that scholars in the humanities and nonquantitative social sciences no longer believe in any distinction between academics and politics? A few scholars have said things that might seem to confirm this charge. But for the overwhelming majority, the charge is not true. Very few scholars believe that academic work should be judged on the basis of its political content. Nearly all believe that academic work should be judged by independent standards of merit and expertise.
- Scholars also believe that classrooms and academic departments should be places of free and open discussion, in which people with diverse opinions can participate. In short, while they acknowledge the difficulty of separating academics from politics, they also recognize the importance of the distinction as an ideal to strive for.
- But the belief that scholars (at least in the humanities and nonquantitative social sciences) have abandoned the distinction altogether has encouraged certain politicians to charge that the academy is heavily and corruptly “politicized.” On this basis, some politicians have pursued legal means to ensure “diversity of viewpoint” in academic hiring. Others have tried to put direct

pressure on academic leaders to dismiss or discipline scholars for alleged political advocacy, especially when they see this advocacy as a form of hate speech against members of minority groups.

- And for some politicians, the belief that the distinction between academia and politics has vanished has encouraged them to abandon the distinction themselves and to push for the imposition of their own political views on the academy.
- In sum: a mistaken belief about prevailing academic ideas as to the distinction between academics and politics is driving a severe overreaction and a belief that political action is necessary to thwart these ideas. But this political action itself constitutes a threat to academic freedom.

### *Academic Freedom, the Unsafe/Uncomfortable Distinction, and the Role of the Federal Government*

- In current conversations about academic freedom, the duality of “unsafe versus uncomfortable” is often invoked in determining the bounds of what falls within the purview of acceptable speech on campus, especially by faculty in the classroom. If a student is made to feel “unsafe,” an edifice of institutional and legal mechanisms exists to protect them. Feeling “uncomfortable,” by contrast, is considered not only less serious, but positive—a sign one is being intellectually challenged.
- Since the outbreak of conflict in the Middle East on October 7, 2023, many college campuses have been sites of unrest, and even violence, that disrupted instruction and arguably compromised the safety of students, faculty, and staff. Issues of academic freedom have been at the forefront of these conflicts, as the concept has been used to defend all matter of political expression in the classroom and on campus more generally.
- Adjudicating these cases often falls to campus conduct offices. But they rise to the federal level in the case of potential violations of Title VI of the 1964 Civil Rights Act, when campus speech can be reasonably understood to constitute discrimination on the basis of race, color, or national origin—categories salient to the Jews, Israelis, Palestinians, and Muslims at the center of these cases. Such cases suggest there should be parameters to such expression, and the federal government has a responsibility to assert them.
- The broader relevant context here is the growth and diversification of the student bodies at American colleges and the expansion of the federal government’s role in this process and their affairs. Since World War II, American universities have become more inclusive by almost every identity category, including age, race, gender, and socioeconomic class. Since the 1960s, much federal policy has focused on increasing access to universities to historically marginalized

groups, through antidiscrimination policies that encompass admissions, financial assistance, and some programmatic offerings.

- Beginning in the 1990s and still accelerating, this policy focus on access and antidiscrimination has been intertwined with an emphasis on the emotional state educational environments foster among its community members. Influenced by a broader therapeutic turn, this approach borrows heavily from psychological language: e.g., an expanded definition of “harm” to include the effect not only violence or deliberate aggression, but unintentional verbal slights, classrooms as “safe spaces,” “trigger warnings” prefacing disturbing content, “wellness” centers, and “trauma-informed pedagogy” as a default teaching method. While the federal government has been less involved in this development, the question that animates today’s inquiry into the appropriate boundaries for academic freedom and the reason it is difficult to answer—*are students unsafe or just uncomfortable*—is inextricable from this therapeutic turn.
- On campuses where students, faculty, and staff have been instructed that “impact, not intent” matters in terms of assessing injury, how can a faculty member discuss the difficult issues that are both urgent to address with college students and the riskiest, due to this murky line between “unsafe” and “uncomfortable”? Does “academic freedom” extend to all topics, or is it delimited by a scholar’s professional discipline? Especially when the social sciences and humanities, the disciplines in which many of these cases are concentrated, are defined by decreasing job security, who makes and enforces these decisions?
- What *should* the federal role be? For 80 years, the federal government has been crucial to making higher education more inclusive, and it should continue such active involvement both to protect academic freedom and prevent behavior that discriminates against community members and disrupts the provision of education. Interestingly, the expansion of the federal role in education has largely been a project of Democrats, while Republicans have been less interventionist. Today, Republicans spearhead federal efforts to intervene on campuses while Democrats resist, suggesting an opportunity for collaboration, for it is crucial that any federal intervention be bipartisan and earnestly endeavor to ensure the provision of education for all, free of political bias.

### Participant Biographies

**David A. Bell** is the Sidney and Ruth Lapidus Professor in the Department of History at Princeton University. A specialist in European history, he is the author of seven books, most recently *Men on Horseback: The Power of Charisma in the Age of Revolution*. An elected member of the American Academy of Arts and Science, he writes regularly on issues of history and education for magazines including the *New York Review of Books* and the *Chronicle of Higher Education*. Recent articles have touched on the congressional hearings on campus unrest, whether academic departments should issue statements on political issues, and the politics of elite universities.

**Natalia Mehlman Petrzela** is associate professor of history at the New School in New York City. In 2024–25, she is on leave as a fellow of the Carnegie Corporation, working on a book about the history of the culture wars in American education. She is the author of two books, *Classroom Wars: Language, Sex, and the Making of Modern Political Culture* and *Fit Nation: The Gains and Pains of America's Exercise Obsession*. Currently, she serves as the lead scholar on the New York City Department of Education's Jewish American Hidden Voices Curriculum, which will be freely available in June 2025. A passionate "history communicator" beyond the academy, she has produced and hosted several podcasts and is a columnist at MSNBC. Her writing and commentary appear often in publications including the *New York Times*, the *New Republic*, the *Washington Post*, and the *Chronicle of Higher Education*.

**David M. Rabban** is Dahr Jamail, Randall Hage Jamail, and Robert Lee Jamail Regents Chair in Law and Distinguished Teaching Professor at the University of Texas School of Law, where he has taught since 1983. His book, *Free Speech in its Forgotten Years, 1870–1920*, was co-winner of the 1998 Morris D. Forkosch Prize. His forthcoming book, *Academic Freedom: From Professional Norm to First Amendment Right*, will be published by Harvard University Press in August 2024. He was staff counsel to the American Association of University Professors (AAUP) before becoming a law professor and has since served as its general counsel (1998–2006) and chair of its committee on academic freedom and tenure (2006–12).

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