

THE AMERICAN PROPOSITION ON CAMPUS: ACADEMIC FREEDOM AND ACADEMIC RESPONSIBILITY

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Abstract

The authors argue that colleges and universities, particularly public institutions, should embrace and teach the American Proposition, to ameliorate the Nation's deep divisions and to return universities to their mission of the search for truth. The American Proposition, the authors explain, is premised on the idea of a human equality and unalienable rights and a republic with constitutional standards to check governmental authority. The authors argue that teaching and creating a community consistent with the American Proposition can help overcome our national divisions, not only those of a partisan nature but also over the worth of our constitutional republic. They argue that partisans of both the political left and right have rejected the constitutional tools intended to moderate the People and the government—Free Speech, Religious Liberty, Due Process, and legal equality regardless of race, sex, or sexual orientation. These partisan tensions are heightened at our colleges and universities, which the authors contend have abandoned the search for truth to promote the prevailing popular opinion of the day and have failed to promulgate the legally required constitutional practices.

Colleges and universities can and should embrace and teach the American Proposition, the authors argue, which means aligning themselves with the very constitutional principles that created the first public colleges and universities in the Nation. This means two things. First, institutions of higher learning must promote academic freedom for the faculty, and for the entire university community. Second, public universities must discharge their academic responsibility—teaching civic literacy and constitutional principles and promoting what John Inazu calls “confident pluralism.”

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INTRODUCTION

Our Nation is deeply divided, not only in a partisan sense, but over the worth of our constitutional republic. The division has entered a new level of viciousness in the last several years—the assassination attempts on President Donald Trump, the pro-Hamas/pro-Palestinian protests and encampments on college campuses, the January 6 riot, the George Floyd protests, the attempt to force vaccination on an unwilling public, the return of the abortion policy to the States, the ongoing crisis on our southern border, and the descent of our cities into chaos—have only intensified those divisions. The resulting frustrations have led many—on both the left and the right—to reject and abdicate the constitutional tools that are meant to alleviate these tensions—Free Speech, Religious Liberty, Due Process, and legal equality regardless of race, sex, or sexual orientation. Without these protective mechanisms, our (federal, state, local, and community) leaders lack the tools to generate consensus through compromise as demanded by our constitutional system. Instead, they either appease the dominant voice of the moment or seek to score points on social media or cable news.

These tensions are playing out at the Nation's colleges and universities.¹ After the murder of George Floyd, universities rushed to issue statements of solidarity and to embrace programs² promoting an ideology³ that Yascha Mounk calls the "identity

1 Official university actions taken on the left and on the right speak only to their respective constituents and have often sidestepped the art of consensus-building. Their adopted measures have often failed to appreciate the extent and limits of the First Amendment on public college campuses and display a lack of understanding of basic constitutional principles and liberties that mandate Academic Freedom.

More fundamentally, students who often lack basic constitutional knowledge and civic skills are becoming incapable of granting meaningful consent to the U.S. Constitution. All members of the campus community must live together peacefully, even with those with whom they ideologically disagree. The purpose of a constitutional republic, and a university campus as a microcosm of that republic, is to find a way to do this while enabling the flourishing of the individual citizen.

2 Responding to the George Floyd protests, universities created (often executive level) Diversity, Equity, and Inclusion (DEI) Offices and Officers, added or mandated courses in social justice advocacy, and provided additional accommodations for marginalized groups on campus, all to appease their external and internal constituents' desire for swift social justice. See Alexa Wesley Chamberlain et al., *Moving from Words to Action: The Influence of Racial Justice Statements on Campus Equity Efforts*, NASPA REPORT (2021), <https://naspa.org/report/moving-from-words-to-action-the-influence-of-racial-justice-statements-on-campus-equity-efforts>. Universities added mandatory DEI training for faculty, students, and staff, mandated faculty applicants to include "diversity statements," which have been acknowledged as ideological "litmus tests," and required students to take newly developed social justice courses. See Komi Frey, *We Know Diversity Statements and Political Litmus Tests*, CHRON. HIGHER EDUC. (Jan. 4, 2024), <https://www.chronicle.com/article/we-know-diversity-statements-are-political-litmus-tests>.

3 The ideological framework typically employed by these social justice programs—"anti-racism" and "equitable policy"—employs advocacy tactics rather than educational ones like civil discourse or critical thought. They do not merely teach, but rather promote critical race theory and "white privilege" doctrines popularized by Ibram X. Kendi, Robin DiAngelo, the 1619 Project, and the Black Lives Matter movement. A class whose purpose is to create advocates, rather than critically thinking adults, stifles the intellectual maturation of students and explicitly undermines the truth-

synthesis.”⁴ Yet, after the October 7 massacre in Israel, many university presidents remained silent or muted⁵ as their campuses engaged in increasingly threatening activity, including calling for genocide of the Jewish population, bombarding Jewish students in university buildings,⁶ or turning campuses into pro-Palestinian encampments.⁷ Because state universities ultimately belong to the People, state legislators, as the People’s “Agents,”⁸ intervened to address both the embrace of the “identity synthesis”⁹ and the toleration of unlawful activities after October 7.¹⁰

seeking mission of the university. Open inquiry by faculty and students within a culture that respects and protects free speech and expression is prerequisite for the university’s search for truth.

4 YASCHA MOUNK, *THE IDENTITY TRAP* (2023).

5 Adrienne Lu, *The Apolitical University*,” CHRON. HIGHER EDUC. (Dec. 2, 2022), <https://www.chronicle.com/article/the-apolitical-university>); Editorial Board, “*We Expect Too Much of Our University Presidents*,” CAVALIER DAILY, (Jan. 18, 2024), <https://www.cavalierdaily.com/article/2024/01/editorial-we-expect-too-much-of-our-university-presidents>); Laura Schwartz, *Against University Statements*, WASHINGTON MONTHLY (Oct. 27, 2023), <https://washingtonmonthly.com/2023/10/27/against-university-statements/>); Lindsay McKenzie, *Words Matter for College Presidents, but So Will Actions*, INSIDE HIGHER EDUC. (June 7, 2020), <https://www.insidehighered.com/news/2020/06/08/searching-meaningful-response-college-leaders-killing-george-floyd#:~:text=Dozens%20of%20college%20presidents%20published,against%20racism%20and%20police%20brutality>.

6 Luke Tress, *Jewish Students Barricade in Cooper Union Library as Protesters Chant “Free Palestine,” On Day of Protest Across NYC Campuses*, N.Y. JEWISH TIMES (Oct 26, 2023), <https://www.jta.org/2023/10/26/ny/jewish-students-barricade-in-cooper-union-library-as-protesters-chant-free-palestine-on-day-of-protest-across-nyc-campuses>.

7 Joseph Bouchard, *I Visited a Pro-Palestinian Encampment; They’re Not Interested In Peace*, ISRAEL HAYMON (May 27, 2024), <https://www.israelhayom.com/opinions/i-visited-a-pro-palestinian-encampment-theyre-not-interested-in-peace/>.

8 THE FEDERALIST NO. 78 (Alexander Hamilton).

9 First, came the state bans of “divisive concepts,” the goal of which was to prevent indoctrination in critical race theory and other social justice ideologies. See *CRT Forward: Tracking the Attack on Critical Race Theory*,” CRT FORWARD (Dec. 20, 2023), <https://crtforward.law.ucla.edu/>. The intent of such bans was to teach “our children the value of freedom of thought and diversity of ideas” Academic Freedom Alliance, *Academic Freedom Alliance Statement on “Divisive Concepts” Policies*, (January 6, 2023) (available at, <https://academicfreedom.org/wp-content/uploads/2023/01/AFA-Statement-on-Divisive-Concepts-Policies.pdf> and enable them “to think for themselves.”; Academic Freedom Alliance, *Academic Freedom Alliance Statement on “Divisive Concepts” Policies* (Jan. 6, 2023), <https://academicfreedom.org/wp-content/uploads/2023/01/AFA-Statement-on-Divisive-Concepts-Policies.pdf>. See also Commonwealth of Virginia Office of the Governor, *Executive Order No. 1, Jan. 15, 2022, Ending the Use of Inherently Divisive Concepts, Including Critical Race Theory, and Restoring Excellence in K-12 Public Education in the Commonwealth*, <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-1-Ending-the-Use-of-Inherently-Divisive-Concepts.pdf>.

While laudable goals, the laws’ means (i.e., the banning of ideas) undermine the constitutional protections of free speech at public universities and potentially foster a campus culture of fear. Next state legislators, with the same goal of ending indoctrination, notably in Florida, Alabama, and others, began limiting, defunding, or eliminating university DEI offices. See Chronicle Staff, *DEI Legislation Tracker*, CHRON. HIGHER EDUC. (2023), <https://www.chronicle.com/article/here-are-the-states-where-lawmakers-are-seeking-to-ban-colleges-dei-efforts>.

10 Responses (or the lack thereof) led to federal government intervention in the form of congressional hearings, and the resignations of three Ivy League presidents; see Steve LeBlank & Collin Binkley, *Harvard President Claudine Gay Resigns Amid Plagiarism Claims, Backlash from Antisemitism Testimony*, ASSOC. PRESS (Jan. 2, 2024), <https://apnews.com/article/harvard-president-claudine-gay-resigns-841575b89bcd062cdf979e647a2539e>. The widespread lack of clear university leadership protecting and respecting all students’ basic rights impelled the federal Government to intervene. The House

Yet, the responses of university leaders and the resulting legislative backlash are indicative of a larger problem—the failure of many universities to cultivate a campus culture conducive to the pursuit of knowledge and the preservation of our Constitutional Republic.¹¹ Our institutions of higher learning have abandoned the search for truth to promote the prevailing popular opinion of the day and have failed to promulgate the legally required constitutional practices.¹² University leaders often have not modeled civic literacy or constitutional knowledge, and consequently their curricula lack requirements in American history and U.S. Government. Not only are our Nation’s colleges and universities not inculcating basic constitutional and civic knowledge, they also often fail to create a campus community that respects or reflects the requirements of the U.S. Constitution. In other words, the Nation’s colleges and universities increasingly fail to protect academic freedom of individuals by not equipping students, faculty, and staff with the skills to practice what John Inazu calls “confident pluralism.”¹³

These campus battles are really part of a larger war—the war for an idea that we call the American Proposition.¹⁴ As we have developed the concept, the American

of Representatives proposed a resolution condemning antisemitism on college campuses, H.R. Res. 927 — 118th Congress: *Condemning antisemitism on university campuses and the testimony of University Presidents in the House Committee ...*” an act that the Foundation for Individual Rights and Free Expression (FIRE) warns smells of speech codes and censorship. See Greg Gonzales, *FIRE urges Reps to Vote NO on House Resolution Targeting University Presidents*, FOUND. INDIVIDUAL RTS. & FREE EXPRESSION (Dec. 13, 2023), <https://www.thefire.org/news/fire-urges-reps-vote-no-house-resolution-targeting-university-presidents>. The nonpartisan Academic Freedom Alliance warns that “American universities are being tested. It is essential that they pass the test by rededicating themselves to their core scholarly missions and acting consistently and in good faith on the principles that preserve free inquiry and open debate.” See Academic Freedom Alliance, *Statement on Campus Protests Regarding Events in Israel and Gaza* (Nov. 14, 2023), <https://academicfreedom.org/wp-content/uploads/2023/11/Academic-Freedom-Alliance-Statement-on-Campus-Protests-regarding-Events-in-Israel-and-Gaza.pdf>. In other words, colleges and universities must understand and protect academic freedom.

11 Johns Hopkins University President Ronald Daniels has suggested that universities have a broad obligation to a democratic society. Specifically, institutions must (1) promote access, mobility, and fairness; (2) educate students to participate in democracy; (3) create knowledge to check power; and (4) encourage dialogue among people with different perspectives, values, backgrounds, and experiences. RONALD J. DANIELS, *WHAT UNIVERSITIES OWE DEMOCRACIES* (2021). The American Proposition’s obligation to promote Academic Freedom and Academic Responsibility relate to the second and fourth objectives. The first and third objectives are consistent with the broader American Proposition.

12 Instead, some faculty, administrators, and students already assume they know answers to life’s most difficult questions and lack tolerance for those who fail to recognize the “correct” momentary viewpoint.

13 JOHN D. INAZU, *CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* (2016).

14 See Elizabeth Kaufer Busch & William E. Thro, *Aligning Title IX with the American Proposition: The Implications of the Supreme Court’s Limitations on Executive Power*, ___ EDUC. L. REP. ___ (forthcoming 2024); William E. Thro, *Education Finance and the American Proposition*, 48 J. EDUC. FIN. 335 (2023); Elizabeth Kaufer Busch & William E. Thro, *Restoring the Constitutionalist Means: Education Reflections on Major Questions Doctrine*, 407 EDUC. L. REP. 387, 393, 407–08 (2023); Elizabeth Kaufer Busch & William E. Thro, *Restoring Title IX’s Constitutional Integrity*, 33 MARQ. SPORTS L. REV. 507 (2022) Elizabeth Kaufer Busch & William E. Thro, *Reclaiming the Constitutionalist Creed on Campus: Transforming Academe’s Anti-Constitutionalist Culture*, 398 EDUC. L. REP. 565 (2022).

Originally, we used the term “Constitutionalist” to describe the concept that we now call the American Proposition. As we have developed the concept, we have realized that the term Constitutionalist is inadequate to explain the concept and often leads to confusion. Thus, we are using the term

Proposition is simply stated:

Recognizing all are created equal and endowed by their Creator with unalienable rights, an imperfect We the People can consent to a government that secures our equality and rights, but also controls the flawed humans who govern us.

The fight over the American Proposition is the struggle to keep the Constitutional Republic and for the soul of the Nation. It is conflict between the belief that all are created equal and endowed by the Creator with unalienable rights and the belief that people are defined by their race, sex, and sexual orientation. It is the contest between government being established—by consent—to secure equality and unalienable rights and government imposing a utopian ideological or theological vision. It is the fight between elected representatives compromising to reach a consensus and a bevy of experts imposing policies that would never be adopted through the political process.

This is not a battle over policy differences but a struggle between two different visions of the nature of humanity, the purpose of government, and capabilities of human leaders. Those who agree with the American Proposition (“The Proponents”) include both conservatives and progressives.¹⁵ Those who reject the American Proposition (“The Rejectionists”) include both the far left and the far right. There are Proponents and Rejectionists on both sides of any debate about tax rates, free trade, social welfare policy, the role of the United States in international conflict, and the need for limits on abortion.

The way to ameliorate our deep divisions is for our universities, particularly public institutions, to embrace and teach the American Proposition.¹⁶ First, all institutions of higher learning, must promote Academic Freedom for the faculty, and for the entire university community. Second, public universities must discharge their Academic Responsibility—teaching civic literacy, educating constitutional knowledge, and promoting “confident pluralism.”¹⁷ Put another way, public universities must

“American Proposition.”

15 Although we have used the term “Constitutionalists” in some of our previous works, the term “Proponent” is appropriate to describe those who agree to the establishment of a government that secures the equality and unalienable rights endowed by the Creator while also limiting the flawed humans who govern us.

16 The consequences of failing reassert the American Proposition are dire, as indicated by the January 6, 2020, Capitol riot and the two assassination attempts against Former President Donald J. Trump and death of an innocent bystander during his 2024 campaign for President. Yuval Levin eloquently observes that “beyond the bounds of constitutionalism, there is a realm of violence and pain.” Yuval Levin, *The Assassination Attempt and America’s Choice*, FREE PRESS (June 18, 2024), <https://www.aei.org/op-eds/the-assassination-attempt-and-americas-choice/>. Division, violence, and bitterness represent the “only other option” to true constitutionalism, or what we call “the American Proposition.” *Id.* One should not be surprised to see that decades of university neglect of constitutional knowledge and action has led to the increasingly dangerous violence on campuses across the country.

17 In addition to teaching civic and constitutional knowledge in the classroom, all persons on campus should model the behavior conducive to a successful constitutional republic, that is, they must learn how to deal with people who have fundamentally different views from one another. The

align themselves with the very constitutional principles that created the first public colleges and universities in the Nation. Their goal was to create educated citizens prepared to be good stewards of the blessings of liberty protected in a constitutional republic.¹⁸

This article argues that universities must again align themselves with the American Proposition—not only is this a requirement and duty of public colleges and universities, but it is also the first necessary step in restoring the health of our Nation. There are three parts to this argument. Part I presents a more detailed description of the American Proposition. Part II describes why American Proposition mandates Academic Freedom—not only for faculty, but for the *entire* university community and, to some extent, for the institution. Part III explores why the American Proposition imposes Academic Responsibility—an obligation of public institutions to teach civic literacy, educate constitutional knowledge, and to promote Confident Pluralism.

I. DEFINING THE AMERICAN PROPOSITION

As President Biden has observed, “America is an idea—an idea stronger than any army, bigger than any ocean, more powerful than any dictator or tyrant. It is the most powerful idea in the history of the world. . . .”¹⁹ That idea is the American Proposition—Recognizing all are created equal and endowed by their Creator with unalienable rights, an imperfect We the People can consent to a government that secures our equality and rights, but also controls the flawed humans who govern us.²⁰

public university must create a culture that teaches campus citizens how to disagree in a constructive and meaningful way, that is, a campus of Academic Freedom and Academic Responsibility. By promoting Confident Pluralism and ensuring students understand the strengths, requirements, and shortcomings of American constitutionalism, comprise the campus community, colleges and universities can once again model Academic Responsibility.

18 Thomas Jefferson, Bill for Establishing a System of Public Education (1817); James Madison, Memorial and Remonstrance Against Religious Assessments (1785); Benjamin Franklin, Proposals Relating to the Education of Youth in Pennsylvania (1747); Abraham Lincoln, The Perpetuation of Our Political Institutions (Lyceum Address) (1838).

19 President Joseph Biden, Statement to the American People (July 24, 2024). Similarly, Thatcher declared, “No other nation has been created so swiftly and successfully. No other nation has been built upon an idea—the idea of liberty. No other nation has so successfully combined people of different races and nations within a single culture.” Prime Minister Margaret Thatcher, Speech at the Hoover Institution Lunch, Washington, DC (Mar. 8, 1991). In King’s view, this is the “promissory note to which every American was to fall heir.” See Martin Luther King Jr., *I Have a Dream* (1963). Americans “were determined to create a new identity” based not on shared history, but on an idea. Thatcher, *supra*. Thus, in Lincoln’s words, we created “a nation conceived in liberty and dedicated to the proposition that all . . . are created equal.” Abraham Lincoln, Gettysburg Address (1863).

20 The American Proposition is the social and political construct that unites “We the People”—regardless of our faith, race, sex, sexual orientation, disability, class, education, or professional status. It reflects who we were, what we are today, and our dreams of what we can be. It recognizes that “We the People” have profound differences on moral, political, and religious questions, but it seeks “confident pluralism that conduces to civil peace and advances democratic consensus-building.” *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 733–34 (2010) (Alito, J., joined by Roberts, C.J., Scalia, & Thomas, JJ., dissenting).

The American Proposition, which was foreshadowed on the *Mayflower*,²¹ proclaimed at Philadelphia,²² confirmed at Gettysburg,²³ and reiterated from the Birmingham Jail,²⁴ defines our national identity.²⁵

Acceptance of the American Proposition does not require a particular religious faith or adherence to a particular political party.²⁶ Indeed, it is neutral on numerous “difficult questions of American social and economic policy” and leaves those issues “for the people and their elected representatives to resolve through the democratic process in the States or Congress.”²⁷ Rather, it simply requires the acceptance of three fundamental premises:

1. “All are created equal and endowed by their creator with certain unalienable rights.”²⁸
2. Because humans are not angels, it is necessary to establish a government by the consent of the governed.²⁹

21 MAYFLOWER COMPACT (1620).

22 U.S. CONSTITUTION (1787); THE DECLARATION OF INDEPENDENCE (U.S. 1776).

23 Lincoln, *supra* note 19.

24 Martin Luther King Jr., Letter from Birmingham Jail (Apr. 16, 1963).

25 The United States is defined not by race, blood, soil, religion, language, or culture, but by “the belief in the principles of equality and freedom this country stands for.” Antonin Scalia, *What Makes an American*, in SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 15, 17 (Christopher J. Scalia & Edward Whelan eds., 2017).

26 Two documents directly define the American Proposition—the Declaration of Independence and the U.S. Constitution. The Declaration articulates the underlying philosophy, moral justification, and end goals of America’s constitutional republic, while the Constitution provides the roadmap, or necessary means, of attaining the appropriate goals.

27 *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring)

28 THE DECLARATION OF INDEPENDENCE, *supra* note 22. The first feature of the American Proposition is its vision of human beings, made in the Image of God (or Nature), with inherent dignity. The Declaration recognizes the equal possession of unalienable rights by all humans, asserts their permanent foundations in the “Laws of Nature and Nature’s God,” and then sets the protection of these rights as the only legitimate end of government. The Declaration does not create rights; rather the rights have a permanent foundation in the “Laws of Nature and Nature’s God,” the discovery of which precedes the both the Declaration and the U.S. Constitution. The operation of the U.S. Constitution itself is inseparable from these absolute principles of human nature and the equal possession of unalienable rights, which create the need for a government.

29 THE FEDERALIST NO. 51 (James Madison). The fact that government is needed at all acknowledges also that humans are imperfect but capable of doing good, a recognition that certain things must be beyond the reach of political majorities, and an emphasis on process of making policy rather than the policy itself. It seeks to find a way for all persons of varying races, ethnicities, countries of origin, sexes, or genders to build consensus and live together. In acknowledging the absolute authority of Nature and/or God, the Declaration’s principles recognize—and celebrates—our different faiths, perspectives, and life choices. The assertion of human equality and the allusion to the treatment of tyranny requires that we confront those individual differences with tolerance, humility, and patience. The American Proposition requires us to tolerate those who choose to reject it altogether, but the American Proposition’s survival demands each generation be taught to embrace it. Centuries after the founding generation consented to its principles, each American can grant contemporary consent to the American Proposition only if educated in its basic principles.

3. Because our leaders are not angels, it is necessary to devise mechanisms to control the government.³⁰

To fully understand the American Proposition, it is necessary to explore each premise in some detail.³¹

A. “All Are Created Equal and Endowed by Their Creator with Certain Unalienable Rights”

In declaring their independence from the British Crown, the American colonists proclaimed, “all are created equal and endowed by their creator with certain unalienable rights.” Although the Declaration of Independence called this a “self-evident truth,”³² it reflects both the influence of Enlightenment thinkers like Hobbes, Locke, and Montesquieu and “religious sentiments” of rights “derived to them from the God of Nature.”³³ Both lead to the same conclusion—one’s existence as a human being means equality with other human beings and the existence of certain natural rights.³⁴ The American Proposition also recognizes that equality is intimately tied to individual liberty.

1. Individual Equality

Equality acknowledges a basic human dignity. All humans are created in the image of God³⁵ or by Nature, all are full participants in American life,³⁶ and cannot be treated as social outcasts.³⁷ As the “Constitution neither knows nor tolerates classes among citizens. . . . those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake.”³⁸ “We are just

30 *Id.* Our Constitution embraces democracy, but neither pure nor direct democracy. It is skeptical of political majorities, embodies the rule of law, but knows that flawed humans will pass flawed, ineffective, and unjust laws that contradict divine law. It allows different States to have different solutions to problems that confront society, but it insists on national uniformity on certain fundamental issues. It emphasizes equal justice under law but believes it is better for ten guilty persons to go free than for one innocent one to be imprisoned. 2 WILLIAM BLACKSTONE, COMMENTARIES *358 The American Proposition requires a judiciary to enforce the limits on government, but it expects judges to apply the words adopted by Us the People and enshrined in the Constitution, not their own personal policy preferences or public opinion.

31 The first premise—equality and liberty—requires the State to respect Individual Equality and Individual Freedom and Limits the Ends of the Government. The second premise—human (imperfect) nature necessitates the establishment of a government to secure our unalienable rights—requires Consent of the Governed and Tacit Consent through education. The third premise—the need to control the government—places limits on both the means and ends of Government and on the actors within government.

32 THE DECLARATION OF INDEPENDENCE, *supra* note 22.

33 John Adams, Letter to Hezekiah Niles (February 13, 1818), <https://founders.archives.gov/documents/Adams/99-02-02-6854>.

34 JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 4 (1690).

35 *Obergefell v. Hodges*, 576 U.S. 644, 735 (2015) (Thomas, J., joined by Scalia, J., dissenting),

36 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017).

37 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rts. Comm'n*, 138 S. Ct. 1719, 1727 (2018).

38 *Romer v. Evans*, 517 U.S. 620, 623 (1996).

one race here. It is American."³⁹ The same sentiment applies to other immutable characteristics—there is only “We the People.”

This is equality of the individual, not equality of a particular group. Everyone equally possesses the unalienable rights to life, liberty, and the pursuit of happiness. It is an equality of opportunity (to pursue), not an equality of outcomes. No individual is excluded because of their race, sex, or sexual orientation, but not every race, sex, or sexual orientation will be equally represented in a particular occupation, educational institution, or other segment of society.

2. *Individual Freedom*

Yet, equality is not fully realized unless there is respect for the alienable rights of individuals to think, believe, and act as they choose. This requires “a willingness to accept genuine difference, including profound moral disagreement.”⁴⁰ The First Amendment freedoms—no establishment of religion, free exercise of religion, freedom of speech, freedom of press, assembly, and petition—applies universally.⁴¹ As Justice Brandeis observed, the “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; ... that the greatest menace to freedom is an inert people; that public discussion is a political duty.”⁴²

B. Because Humans Are Not Angels, It Is Necessary to Establish a Government by the Consent of the Governed

Although Americans of the founding era were familiar with the political philosophy of Locke, they were more familiar with the Christian theology of John Calvin and saw little conflict between the two.⁴³ Regardless of their faith or lack of faith, they knew Christians believe “all have sinned and fall short of the glory of God”⁴⁴ and, since the Fall,⁴⁵ human nature was corrupt or totally depraved.⁴⁶ Indeed, as Chesterton quipped, the sinful nature of humanity is “the only part of Christian theology which can really be proved.”⁴⁷

Of course, the American Proposition does not require or rely on religious faith, but it does assume that humans, either individually or collectively, are at the very least imperfect and therefore can never be completely trusted.⁴⁸ Unless restrained in

39 Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J. concurring).

40 INAZU, *supra* note 13, at 87.

41 *Id.* at 16.

42 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring).

43 MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 21, 24 (2013).

44 Romans 3:23. The message is reinforced throughout scripture. See 1 Kings 8:46; Psalms 14:3; 1 John 1:8.

45 Genesis 3:1–7.

46 R. C. SPROUL, WHAT IS REFORMED THEOLOGY: UNDERSTANDING THE BASICS 1595 (1997) (Kindle Edition).

47 G. K. Chesterton, ORTHODOXY 5 (1908).

48 Marci Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in

some way, the strongest individual or groups will abuse the weakest. The majority will dominate the minority. Our individual rights can never be secure.⁴⁹ To constrain human nature and, thus, “secure these rights, governments are instituted.”⁵⁰ The Creator (God or Nature), not the government, endows us with unalienable rights, but government exists to secure those rights.

1. *Governments Must Be Formed by Consent*

Government is necessary to secure our individual rights, but government can be formed in many ways. For example, a divine right monarch could impose a government and, thus, secure the rights of the citizens. Yet, imposition of government by a divine right monarch suggests that monarch is somehow superior to ordinary citizens. This notion of superiority for the monarch contradicts the notion the principles that everyone is created equal.⁵¹

If everyone is created equal, then governments cannot be imposed by force but must derive “their just powers from the consent of the governed.”⁵² Our Constitution establishes a government and then limits that government,⁵³ but it is legitimate only because it was by the democratic process.⁵⁴ Specifically, “We the People” selected representatives, and those representatives met in special state conventions to ratify the Constitution.⁵⁵

The American concept of consent of the governed predates Locke, the Declaration of Independence, and the Constitution. Confronting the constitutional equivalent of a state of nature,⁵⁶ the *Mayflower* passengers applied their Reformed Protestant theology to the situation at hand⁵⁷ and formed a “civil body politick.”⁵⁸ By establishing government with the consent of the governed and by defining the community to include “Separatists” and “Strangers,” as well as masters and servants, the signing of the *Mayflower Compact* “was not the actual American founding, but a crucial pre-founding, informing the beginning of the American Republic.”⁵⁹

CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293, 295 (Michael W. McConnell et al. eds., 2001).

49 LOCKE, *supra* note 34, at § 123.

50 THE DECLARATION OF INDEPENDENCE, *supra* note 22, ¶ 2.

51 LOCKE, *supra* note 34, at § 95.

52 THE DECLARATION OF INDEPENDENCE, *supra* note 22, ¶ 2.

53 FEDERALIST NO. 51 (James Madison).

54 Nomination of Judge Antonin Scalia to Be Associate Justice of the Supreme Court of the United States, 99th Cong. 89 (1986) (statement of Antonin Scalia).

55 NEIL GORSUCH, *A REPUBLIC, IF YOU CAN KEEP IT* 119 (2019).

56 NATHANIEL PHILBRICK, *MAYFLOWER: A STORY OF COURAGE, COMMUNITY, AND WAR* 41 (2006).

57 STEPHEN TOMKINS, *THE JOURNEY TO THE MAYFLOWER: GOD’S OUTLAWS AND THE INVENTION OF FREEDOM* 332 (2020).

58 JOHN G. TURNER, *THEY KNEW THEY WERE PILGRIMS: PLYMOUTH COLONY AND THE CONTEST FOR AMERICAN LIBERTY* 60 (2020).

59 PETER WOOD, *1620: A CRITICAL RESPONSE TO THE 1619 PROJECT* 32 (2020).

2. *Contemporary Consent*

However, consent by the Founding Generation in 1788 is different from consent by contemporary Americans. Consent—at least tacitly—must be reestablished with each generation.⁶⁰ As Reagan reminded us, we must pass on the American Proposition to our children.⁶¹

The Framing Generation understood that if the Republic was to survive, the government must ensure the population was educated to fulfill their civic responsibilities.⁶² The Northwest Ordinance, which was enacted before the Constitution was ratified, “forever encouraged” public education as a means of ensuring “good government and the happiness of mankind.”⁶³ The Massachusetts Constitution, written by John Adams, established public schools because it recognizes that “wisdom and knowledge . . . diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties”⁶⁴

The same principles apply today. “America’s public schools are the nurseries of democracy” “and must prepare our youth for their future roles in our Republic.”⁶⁵ “Our representative democracy “only works if we protect the ‘marketplace of ideas.’ This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People’s will.”⁶⁶ To fulfill that purpose, our public education system must teach the American Proposition.

Teaching the American Proposition begins with providing the full story of America’s founding and evolution—both its triumphs and tragedies. It includes the problematic acts of an imperfect People struggling to form a more perfect Union.⁶⁷ While the *Mayflower Compact* established government by consent in an era when Europe’s monarchs ruled by divine right, slavery already existed in North America.⁶⁸ Our Nation took eighty-nine years to move from the Fourth of July to Juneteenth, but Emancipation happened because Union soldiers—of all races—were willing to give “the last full measure of devotion.”⁶⁹ American soldiers defeated the Nazis and Japan, but our leaders also confined Americans of Japanese descent into

60 Thomas Jefferson, Letter to “Henry Tompkinson” (Samuel Kercheval) (July 12, 1816), <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002>.

61 RONALD REAGAN, *A TIME FOR CHOOSING* (1964).

62 Derek W. Black, *America’s Founders Recognizes the Need for Public Education. Democracy Requires Maintaining That Commitment*, *TIME* (Sept. 22, 2020).

63 NORTHWEST ORDINANCE art. 4.

64 MASS. CONST. ch. V, § 2.

65 Mahanoy Area Sch. Dist. v. B. L. by & through Levy, 141 S. Ct. 2038, 2046 (2021).

66 *Id.*

67 U.S. CONST., *supra* note 22, preamble.

68 WOOD, *supra* note 59, AT 32 (2020).

69 Lincoln, *supra* note 19.

campus.⁷⁰ As King reminded us, many Americans are “still languishing in the corners of American society” and find themselves to “be an exile in [their] ‘own land.’”⁷¹ Students should be taught our institutions are both imperfect and inspiring—that they fail and they can improve themselves. Students should learn American society has many virtues but far too many vices. Yet, a curriculum cannot lament our Nation’s darkest times and disregard our Nation’s glory. There should be full truth in history.

C. Because Our Leaders Are Not Angels, It Is Necessary to Devise Mechanisms to Control the Government

Assumptions about the nature of humanity or those who rule are relevant to constitutional design. A polity must decide if human nature is inherently good and virtuous or inherently corrupt and sinful.⁷² Put another way, it must decide if it can unconditionally trust human leaders to always do the right thing.

If a society assumes humanity is inherently good and virtuous, then it will elevate the will of the majority while diminishing “the individual’s right to freedom from the majority.”⁷³ More broadly, if the government can mold individuals to reach their inherent goodness and virtue, then it is possible to achieve a utopian society.⁷⁴ All that is necessary is that government pursue the right policy or philosophy. This belief in the ability of government to perfect humanity is the basis for the French Revolution, Marxism, and Nazism.

Conversely, if a polity assumes humanity is inherently sinful and corrupt, then it will constrain, control, and check the majority and, thus, develop “the conceptual ground for political freedom.”⁷⁵ If the winners of the last election or the followers of the prevailing faith are constrained from silencing their opponents or punishing those of other faiths, then the political losers and minority religions are protected: Their liberties and equality will endure. When a polity assumes that humanity is innately sinful and corrupt, it follows that because human leaders, like the people they rule, cannot be trusted, the state can never perfect humanity.⁷⁶

Given the influence of Calvinism in late eighteenth-century America,⁷⁷ it is not surprising that the Constitution reflects Calvinist ideas.⁷⁸ The Framers knew “Man’s

70 Korematsu v. United States, 323 U.S. 214 (1944).

71 King, *supra* note 19.

72 GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD* 78–86 (2005).

73 STEVEN BREYER, *ACTIVE LIBERTY* 5 (2005). See also William E. Thro, *A Pelagian Vision for Our Augustinian Constitution: A Review of Justice Breyer’s Active Liberty*, 32 J. COLL. & U.L. 491 (2006).

74 James R. Rogers, *Lessons for America from Europe’s Christian Democracy*, LAW & LIBERTY (July 28, 2020), <https://lawliberty.org/lessons-for-america-from-europes-christian-democracy>.

75 *Id.*

76 Abraham Kuyper, *Calvinism: Source and Stronghold of Our Constitutional Liberties*, in ABRAHAM KUYPER: A CENTENNIAL READER 279, 314 (James D. Bratt ed., 1998).

77 HALL, *supra* note 43, at 12–40.

78 James H. Smylie, *Madison and Witherspoon: Theological Roots of American Political Thought*, 73 AM.

will is corrupt by nature but also capable of doing good. In this paradox are mingled dread, hope, and triumph.⁷⁹ Consequently, the American Proposition acknowledges “there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust”⁸⁰ but expects “there are other qualities in human nature, which justify a certain portion of esteem and confidence.”⁸¹ The American Proposition includes both “a principle of distrust of every person who holds power” and “a hope that a well-designed system could deter the inevitable temptations to abuse power.”⁸²

The American Proposition makes the Constitution the ultimate authority.⁸³ In America, it is the Constitution, not a King or Parliament or a Party or a Faith, that is sovereign.⁸⁴ While a republic “derives all its powers directly or indirectly from the great body of the people,”⁸⁵ the People⁸⁶ established the Constitution as superior to ordinary legislation or executive actions.⁸⁷ Although ever shifting political winds result in temporary majorities, the Constitution is “untouchable, fundamental law, to be interpreted not by Congress, still less by the President, but by Justices of the Supreme Court.”⁸⁸ By making the Constitution sovereign, the American Proposition both established and limited the government.⁸⁹

First, the Constitution “withdraws certain subjects from the vicissitudes of political controversy” and “places them beyond the reach of majorities and officials.”⁹⁰ Indeed, there are “certain specified exceptions to the legislative [and executive] authority” within the constitutional text.⁹¹ Similarly, because the People “split the atom of sovereignty” and created “two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it,”⁹² both the National Government and the States are prohibited from pursuing certain ends.⁹³ Because “the federal

PRESBYTERIANS 155 (1995).

79 Marci Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293, 294 (Michael W. McConnell et al. eds., 2001).

80 THE FEDERALIST NO. 55 (James Madison).

81 *Id.*

82 Marci A. Hamilton, *The Framers, Faith, and Tyranny*, 26 ROGER WILLIAMS U. L. REV. 495, 500 (2021).

83 GORDON S. WOOD, CONSTITUTIONALISM IN THE AMERICAN REVOLUTION 46 (2021).

84 DAVID STARKEY, MAGNA CARTA: THE MEDIEVAL ROOTS OF MODERN POLITICS 1308 (2015) (Kindle Edition) (emphasis original).

85 THE FEDERALIST NO. 39 (James Madison).

86 Wood, *supra* note 83, at 18–26, 92–95.

87 *Id.* at 48.

88 STARKEY, *supra* note 84, at 1312.

89 WOOD, *supra* note 83, at 47–52, 92–95.

90 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

91 THE FEDERALIST NO. 78 (Alexander Hamilton).

92 U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

93 Although the People, in the exercise of their sovereignty, granted vast power to the

balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom," the Supreme Court has intervened to support the sovereign prerogatives of both the States and the National Government.⁹⁴

In addition to defining the ends of government, the American Proposition mandates the *means* of pursuing those legitimate ends. The Constitution prevents concentrations of power.⁹⁵ Indeed, the idea that one person or one governmental institution would exercise legislative, executive, and judicial power is the very definition of tyranny.⁹⁶ Ensuring the government utilizes the proper means is "vital to the integrity and maintenance of the system of government ordained by the Constitution."⁹⁷

Yet, mere separation of powers would not provide adequate protections against the abuses of government.⁹⁸ "[T]he next and most difficult task is to provide some practical security for each, against the invasion of the others."⁹⁹ The people themselves are too inconstant to be trusted to keep "the several departments within their constitutional limits"¹⁰⁰ because humans will naturally seek to aggrandize their own power, no matter what kind or how much power they have been delegated. Instead, each branch of government must be provided adequate weapons of defense to prevent encroachment by the members of the other branches. Typically called "checks and balances," each branch will be allocated the necessary tools by which to exercise their own authority and to control the misdeeds of others, that is, each will be provided with a measure of the other branches' authority to prevent any one branch from usurping the others' power.

The American Proposition must be embraced on public university campuses for these institutions to live up to their missions of pursuing Truth and fitting its students for mature citizenship. Reinstating the American Proposition on campus requires several prerequisites. First, personal, constitutional, and institutional forms of academic freedom must be institutionalized, taught, and promulgated. Second, Academic Responsibility must be respected to appreciate the extent and limits of academic freedom. Academic Responsibility is only possible if the public university curriculum respects and perpetuates the American Proposition. This can be achieved by requiring students (and ideally faculty and staff) to learn basic civic knowledge and constitutional principles. Finally, public universities must embrace their educational mission in the search for truth by modeling civil discourse, civic

National Government, the National Government remains one of enumerated, hence limited, powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Indeed, "that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

94 *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by O'Connor, J., concurring).

95 *New York v. United States*, 505 U.S. 144, 187 (1992).

96 THE FEDERALIST NO. 47 (James Madison).

97 *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

98 1 *Maccabees* 8:1, 14–15 (discussing the advantages of separation of powers in the Roman Republic in second century B.C.).

99 THE FEDERALIST NO. 48 (James Madison).

100 THE FEDERALIST NO. 49 (James Madison).

engagement, and Confident Pluralism in all levels of the university. To do this properly requires clear policies of institutional neutrality and robust free speech and expression. These policies require all on campus respect the dignity of all other members and guests of the campus community and learn to tolerate opinions that they find odious or hateful. These skills follow from the constitutional knowledge that all humans are equal and entitled to the same rights and dignity.

II. THE AMERICAN PROPOSITION REQUIRES ACADEMIC FREEDOM

The ultimate purpose of a university is to increase knowledge and search for the Truth,¹⁰¹ even if today it has become controversial to recognize this fact.¹⁰² Moreover, the purpose of a public university is to fit students with the knowledge and skills necessary to become mature adult citizens who contribute to the Nation and preserve and improve our Constitutional Republic.¹⁰³ Truth-seeking is impossible without clearly stated and widely recognized Academic Freedom and Academic Responsibility policies. Of course, these must also be enforced properly by all levels of authority within the university and in all areas of campus life. An education for responsible citizens is impossible without civic and constitutional knowledge.

First, the American Proposition requires all institutions of higher learning to embrace Academic Freedom for faculty and the entire community. If we all are equal in the possession of unalienable rights and if there are proper constitutional and legal controls on those who lead, then, “*all members of the [university] community [have] the broadest possible latitude to speak, write, listen, challenge, and learn*” and “*to discuss any problem that presents itself.*”¹⁰⁴ Every institution must have a “*commitment to free expression and free inquiry. All views, beliefs, and perspectives deserve to be articulated free from interference. This commitment underpins every part of [the institution’s] mission.*”¹⁰⁵

Of course, “*the ideas of different members of the University community will often and quite naturally conflict,*” but institutional officials should not “*attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.*”¹⁰⁶ Indeed, the public university’s chief mission is to assist in the search for truth, and that very goal necessitates engagement with ideas that may seem discordant, uncomfortable, or even offensive.

101 University of Chicago, *Kalven Committee: Report on the University’s Role in Political and Social Action* (1967), https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf).

102 Ryan Quinn, *Robert George’s Speech About Free Speech Shouted Down*, INSIDE HIGHER EDUC. (Sept. 27, 2023), <https://www.insidehighered.com/news/students/free-speech/2023/09/27/robert-georges-speech-about-free-speech-shouted-down>.

103 Thomas Jefferson, *Bill for Establishing a System of Public Education* (1817); James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785); Benjamin Franklin, *Proposals Relating to the Education of Youth in Pennsylvania* (1747); Abraham Lincoln, *The Perpetuation of Our Political Institutions* (Lyceum Address) (1838)

104 University of Chicago, *Statement on the Freedom of Expression* (2015).

105 University of Virginia, *Statement of the Committee on Free Expression and Free Inquiry* (June 7, 2021), <https://news.virginia.edu/content/statement-committee-free-expression-and-free-inquiry>.

106 University of Chicago, *supra* note 104.

Faculty members must also be able to challenge the priorities of the Nation and of their campus. This means they can criticize the Supreme Court's jurisprudence as unduly *restrictive*¹⁰⁷ or overly *permissive* of racial preferences.¹⁰⁸ Researchers in the academy must be able to challenge administrative policies and to argue any side of policy issues, including whether affirmative action actually hurts those students admitted through such programs¹⁰⁹ or should be expanded to include students from high poverty backgrounds.¹¹⁰ And though meaningful disagreements must also be civil, "concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some" individuals.¹¹¹ In other words, decorum on campus cannot mean the silencing of ideas.

The right of Academic Freedom stems from the First Amendment of the Constitution, which states the government's prohibition from limiting free speech, petition, and press with the intent of protecting everyone's freedom of conscience.¹¹² While it is obvious that teachers must have Academic Freedom to challenge the thought processes of students, so, too, must administrators, students, and staff members in order to question themselves and others. "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment."¹¹³ "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."¹¹⁴

While necessary, "fitting academic freedom within the rubric of the first amendment is in many respects an extremely difficult challenge. The term is nowhere mentioned in the text of the first amendment. It is inconceivable that those who debated and ratified the first amendment thought about academic freedom."¹¹⁵ Consequently, Academic Freedom is a term that is often used, but little explained, by federal courts.¹¹⁶ In particular, confusion exists as to the exact scope of Academic Freedom.¹¹⁷

107 RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, & THE LAW* (2013).

108 RUSSELL K. NIELL, *WOUNDS THAT WILL NOT HEAL: AFFIRMATIVE ACTION AND OUR CONTINUING RACIAL DIVIDE* (2012).

109 RICHARD SANDER & STUART TAYLOR JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS ITS INTENDED TO HELP AND WHY UNIVERSITIES WON'T ADMIT IT* (2012).

110 SHERYLL CASHIN, *PLACE NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA* (2014).

111 University of Chicago, *supra* note 104.

112 JOHN STUART MILL, *ON LIBERTY* (1859).

113 *Keyishian v. Bd. of Regents of Univ. of State of New York*, 385 U.S. 589, 603 (1967) (use of lower case for Academic Freedom original).

114 *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

115 David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 *LAW & CONTEMP. PROBS.* 227, 237 (1990).

116 *Urofsky v. Gilmore*, 216 F.3d 401, 409 (4th Cir. 2000) (en banc) (lower case for academic freedom is original).

117 See STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* (2014).

A. *Constitutional Definition*

On the one hand, there is a constitutional definition.¹¹⁸ On public campuses, Everyone—students, nonfaculty employees, faculty members, and visitors—at have broad First Amendment rights.

In this constitutional sense, Academic Freedom is not limited to the faculty, but extends to students, nonfaculty scientists and researchers, and even administrators. These individuals frequently make significant scholarly contributions. For example, law students—through student written law review notes and case comments—can help to shape the law. At major research institutions, staff researchers often author more papers than their faculty counterparts. Administrators, many of whom had significant scholarly and policy accomplishments before assuming their current roles, continue to publish extensively. Under the constitutional definition, if one is part of the public college or university community, one enjoys Academic Freedom.

B. *Professional Definition*

On the other hand, there is a professional definition of Academic Freedom.¹¹⁹ The American Association of University Professors (AAUP) “conceived academic freedom as a professional norm, not a legal one” and “justified academic freedom on the basis of its social utility as a means of advancing the search for truth, rather than its status as a manifestation of First Amendment rights.”¹²⁰ Simply put, it was the “professional norms of the academy, which are in turn grounded in custom and usage,”¹²¹ not the Constitution, which provides the substance of the professional definition.¹²²

The professional definition of academic freedom is narrower than the constitutional definition. The German notion of academic freedom, which inspired the AAUP, includes both a freedom of faculty to teach as they see fit (*Lehrfreiheit*) and a freedom of students to learn (*lernfreiheit*).¹²³ In this sense, the German notion resembles the constitutional definition of everyone having academic freedom. Surprisingly, when the AAUP first articulated the professional definition of academic freedom in 1915¹²⁴ it explicitly dropped the students’ freedom to learn (*lernfreiheit*).¹²⁵ The organization “has always assumed that student freedom is not

118 Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1267 (1988).

119 *Id.* at 1267.

120 *Urofsky*, 216 F.3d at 411.

121 WILLIAM A. KAPLIN ET AL., *THE LAW OF HIGHER EDUCATION* 753 (6th ed. 2020).

122 Am. Assoc. of Univ. Professors, *Statement of Principles on Academic Freedom and Tenure* (1940), <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.

123 RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 386–91 (1955).

124 Am. Assoc. of Univ. Professors, *Declaration of Principles* (1915), <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>.

125 Metzger, *supra* note 118, at 1271–72.

an integral part of academic freedom, but is something different—and something less.”¹²⁶ The AAUP’s focus is exclusively on the rights of the faculty members.¹²⁷

C. *Academic Freedom of Faculty Is Limited*

Because of the differences in scope, the constitutional and professional definitions of academic freedom “are seriously incompatible and probably ultimately irreconcilable.”¹²⁸ Even so, it is conventional wisdom¹²⁹ among public higher education faculty that the constitutional and professional definitions are synonymous.¹³⁰ Many faculty members believe “every professor possesses a constitutional right to determine for himself, without the input of the university (and perhaps even contrary to the university’s desires), the subjects of his research, writing, and teaching.”¹³¹ In short, these faculty members believe they have a special “constitutional right enjoyed by only a limited class of citizens.”¹³²

The faculty members’ conventional wisdom is wrong. The AAUP professional definition is not part of our constitutional fabric. To say otherwise “asks the courts to treat publicly employed academics differently from all other classes of public employees” and “requires the courts to designate scholarly and classroom speech as uniquely valuable, as compared with the job-required speech of non-academic public employees, and even the non-academic speech of academic public employees.”¹³³ Such a result betrays the “the bedrock of all First Amendment protection”—the emphasis “on the prevention of content and viewpoint discrimination, as well as discrimination against particular speakers.”¹³⁴

D. *The Teaching/Research Exception to Garcetti*

While the Constitution does not adopt the AAUP professional definition of academic freedom, faculty members’ speech in classrooms or in the context of their research may well receive different constitutional scrutiny than the on-the-job speech of public employees.

In *Garcetti*,¹³⁵ the Supreme Court declared that a public employee’s speech pursuant to their official duties is not constitutionally protected.¹³⁶ Still, it is unclear

126 *Id.* at 1272.

127 Am. Assoc. of Univ. Professors, *supra* note 122.

128 Metzger, *supra* note 118, at 1267.

129 Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1324 (1988).

130 Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677, 678 (2014).

131 *Urofsky v. Gilmore*, 216 F.3d 401, 409–10 (4th Cir. 2000) (en banc).

132 *Id.* at 412.

133 Bauries, *supra* note 130, at 731.

134 *Id.* at 729–30.

135 *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

136 *Id.*

“whether the First Amendment protects faculty from reprisals by their institutions for speech within the duties of their job.”¹³⁷ *Garcetti* “may not have directly imperiled speech rights, but it may have done something worse—left academics and school teachers in a troubling state of uncertainty about their rights.”¹³⁸

Justice Souter, in dissent, expressed “hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to . . . official duties.’”¹³⁹ Yet, the Court explicitly declined to answer the address whether “the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”¹⁴⁰

The Supreme Court’s refusal to say whether *Garcetti* applies to a faculty member’s academic speech may be an implicit suggestion that *Garcetti* does not apply and can also be viewed as an implicit endorsement of the view that *Garcetti* does not apply to academic speech within the classroom or during research.¹⁴¹ Conversely, the court’s refusal may be an implicit acknowledgment of the differences between faculty members, who have a large amount of autonomy, and public employees who refuse to carry out their supervisors’ instructions, which was the situation in *Garcetti*. The Supreme Court itself may have to decide.

Of course, there are important policy reasons for saying *Garcetti* should not apply to academic speech.¹⁴² First, because “democracy and speech, including academic speech, assist one another,” faculty with “expertise within their given fields can aid popular representatives in reaching decisions and in shaping an informed response to rapid change.”¹⁴³ Second, because most private institutions, through contract or policy, extend a large degree of individual academic freedom, faculty members will simply leave if they feel the public institution is overly regulating their activities.¹⁴⁴ Third, if there is no exception to *Garcetti* for teaching and scholarship, then “the academic speech of public university professors is among the *least protected forms of speech*.”¹⁴⁵ “[A]cademic speech is indisputably high-value speech, but in the public university workplace, it qualifies for the same protection as indisputably low-value speech—no protection.”¹⁴⁶

137 J. Peter Byrne, *Neo-Orthodoxy in Academic Freedom*, 88 TEX. L. REV. 143, 163–64 (2009) (reviewing MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (2009) & STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* (2008)).

138 Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines: Garcetti v. Ceballos in the Federal Appellate Courts*, 262 EDUC. L. REP. 357, 388 (2011).

139 *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).

140 *Garcetti*, 547 U.S. at 425.

141 Bauries & Schach, *supra* note 138, at 388–89.

142 *Urofsky v. Gilmore*, 216 F.3d 401, 425 (4th Cir. 2000) (en banc). (Luttig, J., concurring); *Id.* at 434–35 (Wilkinson, J., concurring).

143 *Id.* at 434–35 (Wilkinson, J., concurring)

144 *Id.* at 425 (Luttig, J., concurring).

145 Bauries, *supra* note 130, at 715 (emphasis original).

146 *Id.*

Given the Supreme Court's previous pronouncements about the importance of academic discourse, all of the lower appellate courts to consider the issue have recognized an exception to *Garcetti* for a faculty member's speech in the classroom or in academic research.¹⁴⁷ As the Sixth Circuit explained, "the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not. The need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings."¹⁴⁸ More specifically, officials in public higher education "cannot force professors to avoid controversial viewpoints altogether in deference to a state-mandated orthodoxy."¹⁴⁹

While the lower federal appellate courts have universally recognized an exception to *Garcetti* for teaching and academic research, the exact scope of this exception is likely narrow.¹⁵⁰ Faculty members must adhere to "professional norms" in their classroom expression or academic research.¹⁵¹ For example, astronomy faculty members should not teach their students that the moon is made of green cheese or author research papers defending such a proposition.¹⁵² If faculty members defy these professional norms, they may find that the *Garcetti* exception does not apply.

At the same time, the exception to *Garcetti* does not extend to those aspects of faculty members' responsibilities that do not involve teaching or scholarship. When faculty members perform administrative work, serve on an institutional committee, or represent their institution in a nonacademic setting, the faculty members' expressions logically should receive the same treatment as the speech of any other public employee.¹⁵³ Similarly, faculty members, like other employees, must adhere to the institutional policies regarding procurement, use of equipment, and approvals for outside employment.

Even if the teaching and scholarship exception to *Garcetti* applies and a faculty member's expression is private citizen speech, the constitutional analysis does not end. Even if a public employee is speaking as a private citizen, then a court must determine whether the employee's speech involves a matter of public concern.¹⁵⁴ If it does involve a matter of public concern, courts must strike "a balance between

147 *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021); *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011).

148 *Meriwether*, 992 F.3d at 507.

149 *Id.*

150 *Josephson v. Ganzel*, 115 F.4th 771, 784 (6th Cir. 2024) (Professor's remarks at a panel discussion of his area of expertise falls within the *Garcetti* exception.).

151 ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 76 (2012).

152 *Id.* at 76–77.

153 *Porter v. Bd. of Trs. of N. Carolina State Univ.*, 72 F.4th 573, 584, (4th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024).

154 *Lane v. Franks*, 573 U.S. 228, 241 (2014)

the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹⁵⁵

E. *Institutional Academic Freedom*

1. *Nature of Institutional Academic Freedom*

Some late twentieth-century judicial decisions suggested there was an “institutional academic freedom.”¹⁵⁶ Unlike private institutions, public colleges and universities are still subject to control by the State that created the campuses. Institutional academic freedom assumes either the U.S. Constitution or the State Constitution limits the power of the State Government over a public college or university.

Institutional academic freedom involves the “autonomous decision making by the academy itself.”¹⁵⁷ As described by Justice Frankfurter in a concurring opinion, it allows the institution to determine, without interference from outside the academy, who may teach, what may be taught, how it will be taught, and who may study.¹⁵⁸

The sheer complexity of the academic task demands a degree of institutional autonomy. It is one thing for a legislature or a centralized state agency to define a public university’s mission, establish a program in a particular discipline, or mandate that an institution be selective in its admissions. It is something altogether different for a state government to hire faculty members, determine the best approach to teaching a specific subject or sort through the thousands of applications that some institutions receive for admissions. Because educating undergraduate and graduates or pursuing academic inquiry in a variety of fields is fundamentally different from most governmental functions, public higher education requires a greater degree of flexibility and independent discretion.

While there is an obvious practical need for some form of institutional academic freedom against the creating State and while there is language in Supreme Court opinions supporting the concept, “the Court has never invalidated a statute, regulation, or policy because it violates institutional academic freedom.”¹⁵⁹ As discussed more fully below, the Supreme Court implicitly rejected the notion of a state public institution having a national constitutional institutional academic freedom against the creating State. At the same time, in some States, the State Constitution or state law may give public colleges and universities a state institutional academic freedom against the creating State.

2. *No National Institutional Academic Freedom*

State colleges or universities have no *national* constitutional right to institutional academic freedom against the creating State. Indeed, in those instances where the State

155 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

156 KAPLIN ET AL., *supra* note 121, at 775–79.

157 Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 226 n. 12 (1985).

158 Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring).

159 Urofsky v. Gilmore, 216 F.3d 401, 411–12 (4th Cir. 2000) (en banc).

seeks to regulate a public institution, judicial recognition of a federal constitutional right to institutional academic freedom undermines the principles of democratic accountability. Many, if not most, States have adopted statutes mandating that the public institutions are subject to control by the Governor and/or the state legislature.

Most obviously, the governing boards of the institution of higher education, sometimes called visitors, regents, trustees, or governors, typically are appointed by the Governor with the advice and consent of at least one legislative chamber. These provisions reinforce a basic point: A public institution belongs to the sovereign People of a State, not to the university administration, faculty, alumni, or students. If the sovereign People, through their elected representatives, want to define admissions criteria, the admissions processes, curricula, or tuition levels, then the sovereign People have that right.

The Supreme Court implicitly rejected the notion a federal constitutional right to institutional academic freedom in *Schutte*.¹⁶⁰ In deciding the People of a State could amend their State Constitution to remove the ability of a state university to consider race in the admissions process, Justice Kennedy, announcing the judgment of the Court, observed, “there is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside [state] laws that commit this policy determination to the voters. ... Democracy does not presume that some subjects are either too divisive or too profound for public debate.”¹⁶¹

3. *The State Constitution or State Law May Provide State Institutional Academic Freedom*

As Justice Scalia, joined by Justice Thomas, noted in *Schutte*, each State has “near-limitless sovereignty ... to design its governing structure as it sees fit.”¹⁶² A State may choose to create a university or close a university.¹⁶³ It may choose to allow state institutional officials to make certain decisions and then abolish or transfer that decision-making authority to others.¹⁶⁴ Therefore, if officials at public colleges or universities possess a state institutional academic freedom against the creating State, it is because the State Constitution or statute grants such rights.

Given the diversity of the Nation, it is not surprising that the States vary widely in whether the State Constitutions provide institutional academic freedom against the creating State. Analyzing the various state constitutional provisions and the judicial decisions and attorney general opinions, one scholar suggested four distinct categories of “constitutional autonomy.”¹⁶⁵

160 *Schutte v. Coalition to Defend Affirmative Action by Any Means Necessary*, 572 U.S. 291, 314 (2013).

161 *Id.* at 314 (Kennedy, J., joined by Roberts, C.J., and Alito, J., announcing the judgment of the Court).

162 *Id.* at 327 (Scalia, J., joined by Thomas, J., concurring).

163 *Id.* at 328 (Scalia, J., joined by Thomas, J., concurring).

164 *Id.* at 335–36 (Breyer, J., concurring).

165 Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, 35 J.C. & U.L. 271, 281 (2009).

First, in California, Michigan, and Minnesota, the “state courts have offered relatively well-developed standards for the overall legal framework of constitutional autonomy, and, most significantly, where cases reflect considerable judicial deference to the constitutional autonomy possessed by institutional or system governing boards.”¹⁶⁶

Second, in Idaho, Louisiana, Montana, Nevada, New Mexico, North Dakota, and Oklahoma,¹⁶⁷ there is “favorable judicial treatment of constitutional autonomy but with relatively fewer cases and, even more importantly, with a less well-developed legal framework regarding the contours of constitutional autonomy in the state.”¹⁶⁸ “A substantially restricted form of constitutional autonomy may exist in Nebraska and South Dakota.”¹⁶⁹

Third, in Florida, Georgia, and Hawaii,¹⁷⁰ the courts have “not clearly answered whether constitutional autonomy exists as a recognized legal doctrine by state courts.”¹⁷¹

Finally, in Alabama, Alaska, Arizona, Colorado, Mississippi, Missouri, and Utah,¹⁷² the “courts have either explicitly rejected constitutional autonomy or cast heavy doubt on the potential for its recognition by courts”¹⁷³ More specifically, “recognition by courts of constitutional autonomy in Alabama, Alaska, and Mississippi, though not completely settled, appears unlikely.”¹⁷⁴ “For Arizona, Colorado, Missouri, and Utah, legal decisions and attorney general opinions indicate that constitutional autonomy does not enjoy judicial recognition.”¹⁷⁵

Of course, in some States there is no indication in the State Constitutions of any sort of constitutional autonomy for public institutions. Nevertheless, the legislature, through the enactment of statutes, may have given officials at public colleges and universities a degree of state institutional academic freedom. For example, the Supreme Court of Kentucky has determined state universities are part of the executive branch,¹⁷⁶ but independent of the Governor’s control.¹⁷⁷ Unlike state constitutional provisions, a legislative provision granting autonomy can be repealed at any time. Thus, if a legislative majority is dissatisfied with how college or university officials have exercised this statutory autonomy, the legislature may modify or repeal the statute conferring the autonomy.

166 *sId.* at 281–82

167 *Id.* at 311.

168 *Id.* at 281.

169 *Id.* at 311.

170 *Id.*

171 *Id.* at 282.

172 *Id.* at 311.

173 *Id.* at 282.

174 *Id.* at 311.

175 *Id.*

176 *Univ. of Kentucky v. Moore*, 599 S.W.3d 798 (2019).

177 *Beshear ex rel. Kentucky v. Bevin ex rel. Kentucky*, 498 S.W.3d 355 (Ky. 2016).

While there is no national institutional academic freedom, state constitutions may define and mandate it. In addition, while faculty must have academic freedom in their search for truth, this freedom is limited. The constitutional structures mandated by the American Proposition including federalism, which divides national and state authority, as well as an independent federal judiciary with the responsibility of interpreting the scope of our First Amendment freedoms, determine the limits of academic freedom on campus. Thus, the necessary counterpart to Academic Freedom is Academic Responsibility, the necessity of understanding the scope of Academic Responsibility, enforcing its limits appropriately across the entire campus community.

III. THE AMERICAN PROPOSITION REQUIRES ACADEMIC RESPONSIBILITY

With great Academic Freedom comes great Academic Responsibility. But how is this Academic Freedom, however defined, as well as the American Proposition, which is the fountain of Academic Freedom, to be perpetuated? Moreover, how can citizens over two centuries after the ratification of the Constitution meaningfully consent to and promulgate the American Proposition in our time? Thomas Jefferson proposed that the republic must provide publicly funded education whose purpose was to enable the youth to become adult citizens and leaders capable of preserving our constitutional republic.¹⁷⁸ He warned that even under the rule of the People or well-meaning leaders “those entrusted with power have, in time, and by slow operations, perverted [good republics] into tyranny.”¹⁷⁹ The only way to prevent this danger is to educate the public in the tenets of the American Proposition.

James Madison says more is needed. The “first duty of Citizens, and one of the noblest characteristics of the late Revolution,” he says, is “prudent jealousy” to guard against any “experiment on our liberties.”¹⁸⁰ He explains that the “free men of America did not wait till usurped power had strengthened itself. . . . They saw all the consequences in the principle.”¹⁸¹ The duty to uphold, defend, and promote the principles articulated in the Declaration of Independence, however, cannot happen without the requisite civic and constitutional education. While the author of the Declaration insists that these principles must be known by all citizens and promulgated by public institutions, Madison adds that they must also be enforced by the People, that is, by ordinary citizens capable of anticipating problems before they happen. Madison assumes that ordinary citizens will possess prudence, or practical wisdom, and knowledge of principles, that is, the rights and responsibilities of free citizens. While these traits may have characterized many of the Founding era, Lincoln observed them waning in the decades following.¹⁸²

While Academic Freedom fuels the public university’s truth-seeking mission, Academic Responsibility ensures that the public university is equipping students

178 Thomas Jefferson, Bill for Establishing a System of Public Education (1817).

179

180 *Id.*

181 *Id.*

182 Abraham Lincoln, The Perpetuation of Our Political Institutions (Lyceum Address) (1838).

with the knowledge and skills to become adult citizens capable of consenting to the Constitution and holding their leaders and themselves accountable. For those “who do not understand the rights protected by the Constitution can neither cherish nor invoke them; those who do not know which party controls the House and Senate may misattribute credit or blame for action or inaction.”¹⁸³

The public university has an institutional obligation to (1) teach civic literacy (*how* the government works); (2) educate with constitutional knowledge (*why* our Constitution is structured as it is); and (3) have an institutional responsibility to promote Confident Pluralism (*how* to be a responsible citizen in a diverse Nation).¹⁸⁴

183 ANNENBERG PUB. POL’Y CTR., ANNENBERG CONSTITUTION DAY CIVICS SURVEY 2024 (2024), <https://www.annenbergpublicpolicycenter.org/most-americans-cant-recall-most-first-amendment-rights/>.

184 Administrators, staff, and faculty have a responsibility to comply with the laws of the Nation and the State, both in their policies and in their behavior in their professional capacities. To accomplish this goal, at least five things are needed.

First, Administrators need constitutional knowledge to ensure that their institution complies with the U.S. Constitution and the laws of their state, both of which fulfill their duty as leaders of a public university. Faculty too must understand and comply with the Constitution so that they can appropriately engage in the classroom and help to promote a campus culture that reflects and respects the rule of law and the law of the land.

Ideally, the civic component would inform all university policies, would comprise part of the university’s mission, and would occupy a meaningful portion of student requirements. Even better would be for the university to make its civic mission a central rather than peripheral goal. Schools could create majors and minors focusing on civic literacy and constitutional knowledge, or create centers, academic departments, or schools dedicated to this mission. Several universities (Arizona State, Utah Valley State, University of Florida, University of North Carolina, Chapel Hill, Ohio State, and others) are meeting this need by instituting Schools of Civic Thought and Leadership across the country.

Second, with their understanding of the Constitution and state law, faculty and administrators should govern responsibly. Campus handbooks are the social contracts that bind the campus community and should be respected. Faculty handbooks, university handbooks, and student handbooks must include clear processes and guidelines for grievances, conduct violations, and tenure and promotion because even university leaders are imperfect (Premise Three of the American Proposition). These processes must also align with the requirements of the federal and state Constitutions. Handbooks must provide adequate due process and equal protection of all on campus. All campus citizens must know the policies of the institution’s handbooks, follow Federal and State law, and comply with them.

Third, the classroom and the university writ large is meant to prepare students for democratic citizenship, not a means of producing compliance. Yet, increasingly politicized presidential declarations and academic courses are becoming “performative,” that is, they use their presidential or professorial pulpit to indoctrinate students to the proper social justice theory of the moment or to transform students “into revolutionaries” (Robert Pondiscio & Tracey Schirra, *Restoring Trust in Public Schools*, 61 NAT’L AFFS. (2024), <https://www.nationalaffairs.com/publications/detail/restoring-trust-in-public-schools>). See Callie Patteson, *Antifa Teacher Who Wanted to Indoctrinate Students to Reportedly Be Fired*, N.Y. POST (Sept. 2, 2021), <https://nypost.com/2021/09/02/pro-antifa-teacher-gabriel-gipe-reportedly-will-be-fired/>). The contemporary transformation of education into indoctrination shortchanges and belittles students. They do not learn “civic acculturation,” which means they do not “begin the process of being formed into responsible citizens.” Pondiscio & Schirra, *supra*.

All classes, but especially those focusing on civic literacy and constitutional knowledge, should be instructed by individuals trained in these areas and must not aim to indoctrinate students to a particular policy preference of the professor. “Performative teaching is undermining trust in schools.” Pondiscio & Schirra, *supra*. To fit students with the necessary skills of a good steward of a constitutional republic, professors must allow students to form their own opinions, to challenge others and to be challenged themselves, and learn how to voice them in a respectful way. An indoctrinated follower of professors’ opinions does not learn how to think creatively, to problem solve, or to be

A. Teach Civic Literacy

To protect Academic Freedom, our public universities must first cultivate students' civic literacy and constitutional knowledge. Recent surveys, however, indicate that young Americans are often ignorant of the historical facts and enduring lessons of the founding era.¹⁸⁵ We have also failed to inculcate the knowledge of and respect for the constitutional system needed to perpetuate those principles. Our public university campuses, which are microcosms of the Nation, exemplify the problem, which begins at the K–12 level. The National Education Association claims that civic illiteracy is a crisis, as only twenty-five percent of K–12 students reach the “proficient” standard of their NAEP Civics Assessment. Students cannot identify major leaders of the U.S. government (the President of the Senate, the Chief Justice of the Supreme Court),¹⁸⁶ do not know how long they serve,¹⁸⁷ nor can they identify who holds essential powers (such as the authority to declare war or initiate the impeachment process).¹⁸⁸

The situation continues at institutions of higher learning, with only eighteen percent requiring a course in U.S. history or government.¹⁸⁹ Absent a proper grounding in civics and the Constitution, students exhibit a lack of attachment to the Nation and its institutions, with over half of students willing to “flee the country if the United States were invaded.”¹⁹⁰ The civic illiteracy continues after college. One third of adults cannot name the three branches of government,¹⁹¹ and almost three fourths lack knowledge of the First Amendment protections besides free speech.¹⁹² The lack of civic literacy translates into a culture that fails to understand and often undermines constitutional principles.¹⁹³ For example, public colleges and universities' obligation to protect the free speech of students and faculty has not stopped many from the “policing of speech,”¹⁹⁴ suspending of faculty,¹⁹⁵ and threatening students who express ideas or use words that they reject.¹⁹⁶

prudently jealous of their rights, both on campus and in society.

185 Nat'l Assessment of Educ. Progress (NAEP), The Nation's Report Card (2022), <https://www.nationsreportcard.gov/civics/>.

186 AM. COUNCIL OF TRS. & ALUMNI, “LOSING AMERICA'S MEMORY 2.0 A CIVIC LITERACY ASSESSMENT OF COLLEGE STUDENTS 5 (2024), https://www.goacta.org/wp-content/uploads/2024/08/pdf-acta_civiceducation_07_01_2024_collegepulse.pdf.

187 *Id.* at 6.

188 *Id.* at 9.

189 AM. COUNCIL OF TRS. & ALUMNI, WHAT WILL THEY LEARN, 2019–2020 14 (2019), <https://www.goacta.org/wp-content/uploads/ee/download/What-Will-They-Learn-2019-2020.pdf>.

190 AM. COUNCIL OF TRS. & ALUMNI, *supra* note 186, at 24.

191 ANNENBERG PUB. POL'Y CTR., *supra* note 183.

192 *Id.*

193 Ryan Doefer & Samuel Moye, *The Constitution Is Broken and Should Not Be Relinquished*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html>.

194 FRANK FUREDI, WHAT'S HAPPENED TO THE UNIVERSITY? 92 (2017).

195 Ryan Quinn, Penn Professor Amy Wax Punished for 'Derogatory' Statements but Won't Lose Job," INSIDE HIGHER EDUC. (Sept. 24, 2024), <https://www.insidehighered.com/news/faculty-issues/academic-freedom/2024/09/24/penns-amy-wax-punished-statements-wont-lose-job>.

196 FOUND. FOR INDIVIDUAL RTS., SPOTLIGHT DATABASE (2022), <https://www.thefire.org/resources/spotlight/>.

One reason is the politicized nature of public education today: “American public education has drifted toward an oppositional relationship with its founding purpose of forming citizens, facilitating social cohesion, and transmitting our culture from one generation to the next.”¹⁹⁷ Classrooms “have become the latest battleground in our never-ending culture war,”¹⁹⁸ beginning at the K–12 levels. Courses on U.S. history or U.S. government appear as “calculated attempts to advance a range of political aims,”¹⁹⁹ rather than to educate students for responsible citizenship.

George Washington,²⁰⁰ Thomas Jefferson,²⁰¹ Benjamin Rush,²⁰² Benjamin Franklin,²⁰³ and Abraham Lincoln²⁰⁴ all recognized civic education as the foundation of a functioning republic. Franklin called it the “surest Foundation of the Happiness both of private Families and of Commonwealths” and a protection against the “mischievous Consequences that would attend a general Ignorance among us.”²⁰⁵ Washington, in his Farewell Address, exhorted Americans to promote “institutions for the general diffusion of knowledge.”²⁰⁶ Lincoln further recommends not only civic literacy, but that such knowledge should also be revered as a “*political religion*.”²⁰⁷

Civic literacy teaches *what* we are as a Nation and includes the meaning of citizenship rights and responsibilities, historical facts, cultural texts and speeches, and basic facts about the U.S. government. Students should understand the difference between pure democracy and a constitutional republic; the ways in which an individual might engage in the deliberative process of the nation to achieve public goods; and means of participating in addition to voting in federal, state, and local elections. The defining moments of American history—both the triumphs and tragedies—must be included so that students can identify the ways in which the laws, the Constitution, and the Nation have changed over time for better or for worse. In sum, civic literacy includes knowledge of the basic components and features of the American system, such as the structure of government, the limits to that government, and the rights and limits of citizenship, as well as the historical moments that have altered these things over time. The naturalization exam provides a good example of civic literacy.

197 Pondiscio & Schirra, *supra* note 184.

198 *Id.*

199 *Id.*

200 George Washington, Farewell Address (1796), <https://teachingamericanhistory.org/document/farewell-address-4/>.

201 Thomas Jefferson, Bill for Establishing a System of Public Education (1817).

202 Benjamin Rush, Of the Mode of Education Proper in a Republic (1798), <https://press-pubs.uchicago.edu/founders/documents/v1ch18s30.html>.

203 Benjamin Franklin, Proposals Relating to the Education of Youth in Pennsylvania (1747).

204 Abraham Lincoln, The Perpetuation of Our Political Institutions (Lyceum Address) (1838).

205 Benjamin Franklin, Proposals Relating to the Education of Youth in Pennsylvania (1747).

206 George Washington, *supra* note 200.

207 Abraham Lincoln, The Perpetuation of Our Political Institutions (Lyceum Address) (1848).

B. Educate for Constitutional Knowledge

Constitutional knowledge pushes a deeper understanding of the tenets of the American Proposition—the *why* underlying the design, guardrails, limitations, and purpose of our Constitution. It is insufficient for students to learn only historical facts or the names of the three branches of government without a basic understanding of our Constitution as a whole. We use this term “constitutional knowledge” to refer to the understanding of the Constitution’s grounding philosophy, including the reasons for our unique constitutional structure. A constitutionally knowledgeable person understands (1) why an imperfect People must consent to the establishment of a government to secure their unalienable equality and rights and (2) why our government and the People must be limited as a well. Constitutional knowledge provides citizens with the knowledge base to be effective watchdogs over elected and appointed leaders at all levels.

Courses in constitutional knowledge must be a valued part of the university curriculum for all students. The faculty and university leaders should also be constitutionally literate themselves to foster a community of Academic Freedom and Responsibility compliant with the American Proposition. Constitutional knowledge enables administrators, faculty, students, and staff to create campus rules that comply with the U.S. Constitution. It helps all on campus understand if actions taken at work by themselves or others are within the legal framework required. Those who lead these institutions must be constitutionally literate to understand and enforce the constitutional requirements of their universities and to create policies consistent with them. They also must ensure that all members of the campus community know those legal requirements and comply to them.

C. Promoting Confident Pluralism

Universities must embrace their educational mission in the search for truth by modeling civil discourse, civic engagement, and Confident Pluralism. Knowing and following constitutional principles is necessary but not sufficient—universities must also ensure their students, faculty, and staff have a minimal awareness of *how* to properly fulfill their constitutional obligations. Because public colleges and universities owe their existence to the mission of cultivating an educated public capable of governing themselves, they must provide a culture that allows individuals to seek the truth, to disagree openly, and to exercise the freedom of conscience. There are two key components to this culture—dignity and tolerance.

If civic literacy and constitutional knowledge are taught on campus, and if Academic Freedom of the entire community is embraced, we must still confront the fact that our imperfect human nature will lead us to disagree. As Madison observed, “As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. If the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests.”²⁰⁸ Creating responsible

208 THE FEDERALIST No. 10 (James Madison).

campus citizens, therefore, must “begin by acknowledging the depth of those differences. And our differences are indeed deep: We lack agreement about the purpose of our country, the nature of the common good, and the meaning of human flourishing. These differences affect not only what we think but also how we think and how we see the world. Pluralism, the fact of our differences, is a fact of our world.”²⁰⁹ John Inazu coined the term “Confident Pluralism” to describe the skill set needed by those living in our pluralistic constitutional republic. The confident pluralist respects the dignity of each individual and promotes the toleration of those with whom one may disagree.²¹⁰

A confident pluralist recognizes and respects the equal rights of all human beings, as well as their imperfect nature, which is the first premise of the American Proposition. Dignity and toleration necessarily follow that acknowledgment. First, dignity emerges from accepting human equality in unalienable rights. Second, tolerance follows the appreciation of individuals’ “freedom of conscience”²¹¹ along with the recognition of human imperfection, diverse capacities and interests, and sometimes self-interested motivations. Dignity and toleration pave the way for the civil environment in which the university’s accumulation of knowledge and fruitful truth-seeking can occur.

1. *Dignity of All*

First, the Academic Responsibility of our institutions of higher learning is to educate in the meaning of, and model for the entire campus community, the American Proposition’s respect for the equal dignity of all humans. All individuals on campus need to be taught to respect one another as beings of the same intrinsic worth as one another. In a Nation where everyone has the “freedom to say almost anything to anyone,”²¹² those who speak must recognize all persons “have dignity in their own distinct identity.”²¹³ All members of a college community, whose mission is the search for the truth, must respect the dignity of all in that search.

Dignity is a constitutional assumption. The Fourteenth Amendment codifies the self-evident truth proclaimed by the Declaration of Independence²¹⁴ that all are created equal in requiring a recognition of the rights to life, liberty, and the pursuit of happiness of all persons as well as the entitlement of all persons to equal protection under the law. The fact that someone on campus is White or Black, long hair or short hair, male or female, cisgender or nonbinary, gay or straight is completely irrelevant to how public institutions of higher learning treat them. All are equally citizens of the campus community. No one is denied admission, class entry, employment, or any other opportunity, simply because of some immutable aspect of their identity.

209 John Inazu, *Why I’m Still Confident About “Confident Pluralism,”* CHRISTIANITY TODAY (August 13, 2018), <https://www.christianitytoday.com/ct/2018/august-web-only/john-inazu-why-im-still-confident-about-confident-pluralism.html>.

210 See INAZU, *supra* note 13.

211 MILL, *supra* note 112.

212 INAZU, *supra* note 13, at 96.

213 *Obergefell v. Hodges*, 576 U.S. 644, 660 (2015).

214 THE DECLARATION OF INDEPENDENCE, *supra* note 22, ¶ 2.

At the same time, while individuals have the right to think what they will and express themselves within the confines of the Freedom of Speech and Expression, the institution should encourage all members of the university community to treat each other as human beings worthy of respect. While the campus may not legally be able to ban an antisemitic comment, it can foster a moral community in which such comments would rarely, if ever, be uttered. Moreover, recognizing dignity as an essential element of Academic Responsibility entails acting when legal hateful speech becomes an illegal threat.

Dignity is and must be reinforced by Due Process, the foundation of any system of justice that seeks a fair outcome. Due Process is ultimately a search for truth, a way of ensuring that the innocent—particularly those who are poor, unpopular, marginalized, opponents of the government, or those who refuse to conform to societal norms—are not punished.²¹⁵ In practical terms, this means that when a student, faculty, or staff is accused of misconduct, there is a process that applies equally to all and is consistent with the Constitution. Such an orientation could have prevented much of the campus due process controversies that resulted from Title IX enforcement over the last decade.

Specifically, there must be clear guidelines in the student and faculty handbooks regarding procedures for handling misconduct that must apply equally to all individuals. This includes a presumption of innocence when one is accused of misconduct or a crime, no matter what the crime. As Blackstone noted, it is better for ten guilty persons to go free than for an innocent person to be imprisoned.²¹⁶ A false acquittal of a guilty person does not serve justice, but such false acquittals are the price we pay to prevent the false conviction of the innocent. Colleges and universities must affirm the dignity of all within their walls by promulgating appropriate due process measures and campus policies respecting the dignity of each person.

2. *Tolerance*

The American Proposition, especially the requirements of the First Amendment, demands tolerance, “a willingness to accept genuine difference, including profound moral disagreement.”²¹⁷ Tolerance necessarily accompanies the appreciation of the equal possession of unalienable rights and individuals’ freedom of conscience.

This notion of tolerance rejects most speech codes, requirements of safe spaces, and bans of microaggressions. Tolerance is perfectly consistent with promoting civility and kindness on campus, but also teaches young and older adults to learn to navigate disagreements in a mature fashion in and out of the classroom. Public institutions of higher learning must permit views that some find “deeply unacceptable” or “blasphemously, disastrously, obscenely wrong.”²¹⁸ As Inazu argues,

215 See David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469 (1992).

216 See 2 WILLIAM BLACKSTONE, COMMENTARIES *358 (1765) (“[B]etter that ten guilty persons escape, than that one innocent suffer.”).

217 INAZU, *supra* note 13, at 87.

218 Bernard Williams, *Tolerance: An Impossible Virtue*, in TOLERATION: AN ELUSIVE VIRTUE 18 (David Heyd ed., 1998). See also INAZU, *supra* note 13, at 87 (quoting the same passage from Williams to make a similar point).

those who come from a religious tradition can and must learn to “live with those we regard as damned.”²¹⁹ Likewise, those from secular, atheistic, or agnostic backgrounds, members of the LGBTQ+ community, and other intellectual skeptics must coexist with individuals whose religiosity may be irreconcilable or offensive to their own personal beliefs. The only alternative to this freedom of conscience, expression speech, assembly, and press would be censorship of beliefs and ideas. As equal individuals, each of us is permitted to hold private and personal beliefs that others may not share. A tolerant campus community can foster individuals learning “to be steadfast in our personal convictions, while also making room for the cacophony that may ensue when others disagree with us.”²²⁰

Although tolerance—as that word was traditionally understood—is an appropriate application of the American Proposition to campus, larger society has “forgotten what tolerance actually means” and tends to require tolerance only of certain individuals or groups.²²¹ The contemporary definition of “tolerance” requires positive regard only for marginalized groups.²²² Indeed, there is no tolerance for those who dissent from the orthodoxy on certain untouchable topics such as abortion, climate change, COVID policies, the existence of “systemic racism,” the effectiveness of current antipoverty policies, or transgender issues.²²³ When presidents issue statements that affirm the orthodoxy of the moment, it appears intolerance of those who do not agree with the orthodoxy of the moment.

The American Proposition requires “true tolerance” that recognizes that intelligent and good people sometimes disagree with one another, for how else is one to learn and grow in their opinions and understanding of the world. As Justice Brandeis observed, “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”²²⁴ “Members of the campus community have the right to engage in vigorous political debate and even to articulate extreme political views.”²²⁵ Without a degree of toleration, meaningful discussions of important ideas will not happen. Instead, young adults on campus will isolate into their virtual or physical silos of likeminded peers echoing opinions back and forth to one another, rather than learning and maturing intellectually. Further, the mere fact that a discussion makes someone feel “uncomfortable” or even “unsafe” does not justify intolerance. The First Amendment Freedoms—no Establishment of Religion, Free Exercise of Religion, Freedom of Speech, Freedom of Press, Assembly, and Petition—“extend not only to our own interests but also to ideas and groups that we don’t like.”²²⁶

219 INAZU, *supra* note 13, at 5–6.

220 *Id.* at 8.

221 DAVID FRENCH, *DIVIDED WE FALL: AMERICA’S SECESSION THREAT AND HOW TO RESTORE OUR NATION* 185 (2020).

222 *Id.*

223 Joseph Epstein, *The Tyranny of the “Tolerant*, WALL ST. J. (Oct. 10, 2020), <https://www.wsj.com/articles/the-tyranny-of-the-tolerant-11602278220?mod=searchresults&page=1&pos=1>.

224 *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring)

225 Academic Freedom Alliance, *supra* note 10.

226 INAZU, *supra* note 13, at 16.

Of course, the Freedom of Speech is not absolute, as the Supreme Court has found “new categories of speech that the government can regulate or punish.”²²⁷ Administrators, faculty, and students “have no right to try to intimidate or menace other members of the community, violate university policies or state and federal laws, or interfere with the education or lawful activities of other members of the campus community.”²²⁸ The resignations of the three Ivy League presidents was in part due to the inability to recognize these limits of Free Speech and Expression. Even so, “new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.”²²⁹ The Court has refused to recognize categorical exclusions for depictions of animal cruelty²³⁰ and depictions of violence to children,²³¹ but it has declared that incitement,²³² and true threats are not protected.²³³ Moreover, while “there is no categorical ‘harassment exception’ to the First Amendment’s free speech clause,”²³⁴ the Supreme Court held that educational entities can incur monetary liability under Title IX for responding with deliberate indifference to one student’s “harassment” of another student.²³⁵

Tolerance and Dignity go a long way in alleviating the moral dilemmas that university presidents have faced while making public statements on the political disputes of the day. However, these are just words, if they are divorced from the provisions and requirements of the Constitution and the State, or from their own institutional mission. In terms of policy, at least four things should guide universities. Dignity and tolerance should be bolstered by Institutional Neutrality (no more politicized letters by university administrators), a robust free speech policy like the Chicago statement, and an end to efforts to ban “divisive concepts”²³⁶ and mandatory “diversity statements.”²³⁷ The Academic Freedom Alliance explains that

227 *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., joined by Ginsburg, Sotomayor, & Kagan, JJ., concurring).

228 Academic Freedom Alliance, *supra* note 10.

229 *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 791 (2011).

230 *United States v. Stevens*, 559 U.S. 460, 472 (2010).

231 *Brown*, 564 U.S. at 799.

232 Incitement is limited to advocacy “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*).

233 The Supreme Court’s definition of threat “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). To be considered a threat, the speaker must intend to make an actual threat or act with knowledge that the communication will be viewed as a threat. *Elonis v. United States*, 575 U.S. 723, 740 (2015).

234 *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.).

235 *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). Of course, “non-expressive, physically harassing *conduct* is entirely outside the [scope] of the free speech clause. *Saxe*, 240 F.3d at 206. While drawing the line between speech and conduct can be difficult, [court] precedents have long drawn it, and the line is long familiar to the bar.” *Nat’l Inst. of Fam. & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018).

236 Academic Freedom Alliance, *supra* note 9.

237 Academic Freedom Alliance, *Statement on use of Diversity Statements*, (Aug. 22, 2022),

universities should be “neutral and peaceful forum[s] for robust political and social debate. Universities will be distrusted and ultimately weakened if they are perceived to be inconsistent in their adherence to their own stated principles, understood to be willing to sacrifice their own scholarly mission to political causes, or thought unwilling to secure the physical safety of their community members and the integrity of their operations.”²³⁸ The collective implication of these four policies, which comply with the U.S. Constitution, would be to advise public university presidents to stop asserting official university positions on the divisive issues of the day and facilitate the civil exchange of ideas so that a path for resolving these controversies may emerge.

CONCLUSION

“America’s public schools are the nurseries of democracy.”²³⁹ Those who embrace American Proposition are the Nation’s best hope for guiding citizens out of their partisan echo chambers into the light of day, where they can begin to see all human beings for what they are—imperfect individuals with equal rights and dignity. When members of the campus community demonstrate the courage to disagree with the prevailing ideologies of the moment instead of silencing them, the collective search for knowledge and truth can be renewed. This true “free exchange” of ideas “must include the protection of unpopular ideas” to “facilitate[e] an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People’s will.”²⁴⁰

The solution to what ails the Nation must begin at the bottom, with the proper civic and constitutional education of America’s youth. A public university that embraces the American Proposition will protect Academic Freedom and ensure Academic Responsibility of all its members to achieve this end. When new generations of citizens understand that the United States is “wide enough” for red states and blue states, urban and rural, the secular and the sacred, the new immigrant and the Tribal Nations, the descendants of slaves and the descendants of pilgrims, People of faith and people of no faith, those who remember Pearl Harbor and those who do not remember 9/11, the critical race theorist and the constitutional originalist, the gay and the straight, the cisgender and the transgender/nonbinary,²⁴¹ then a “new birth of freedom”²⁴² in this Nation can begin. As Dr. King recognized the deep divisions of his day, so, too, must this generation. “Now is the time”²⁴³ for public schools and universities “to make real the promises of democracy; to “rise up and live out the true meaning of [America’s] creed: We hold these truths to be self-evident, that all men are created equal.”²⁴⁴

<https://academicfreedom.org/wp-content/uploads/2022/08/AFA-DEI-Statement-081822.pdf>;)

238 Academic Freedom Alliance, *supra* note 10.

239 Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2046 (2021).

240 *Id.* at 2046.

241 Lin-Manuel Miranda, *The World Was Wide Enough* (2015) (penultimate song in the musical *Hamilton* (2015)).

242 Lincoln, *supra* note 19.

243 King, *supra* note 19.

244 *Id.*