

# AN EMPIRICAL CONCERN OF THE FIRST AMENDMENT: AN ESSAY ON THE BENEFITS OF ACADEMIC FREEDOM

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## *Abstract*

*The Supreme Court has previously cited nonlegal or social science evidence in landmark cases related to school desegregation and race-conscious admissions. This article argues that there is strong empirical evidence to support the argument that academic freedom supports the public good through measurable outcomes such as research production in science, technology, engineering, and mathematics fields, and the commercialization of intellectual property or technology transfer through patent applications and citations. We argue that courts should recognize that academic freedom serves the public good by protecting faculty work that supports scientific innovation, economic competitiveness, and national security. Courts should protect academic freedom for its benefits to the public good, apart from any claim to whether academic freedom exists as an institutional right, collective right to all faculty, or an individual right of certain instructors.*

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## TABLE OF CONTENTS

<b>INTRODUCTION .....</b>	<b>127</b>
<b>I. THE COURT HAS PREVIOUSLY RELIED ON SOCIAL SCIENCE EVIDENCE TO INFORM ITS OPINIONS .....</b>	<b>130</b>
<b>II. COURTS SHOULD RECOGNIZE NEW SCHOLARSHIP ON THE IMPORTANCE OF ACADEMIC FREEDOM .....</b>	<b>132</b>
<b>A. HOW SOCIAL SCIENTISTS DEFINE AND MEASURE DIMENSIONS OF ACADEMIC FREEDOM.....</b>	<b>134</b>
<b>B. ACADEMIC FREEDOM, FACULTY WORK, AND THE PUBLIC GOOD .....</b>	<b>135</b>
<b>III. WHY IT MATTERS FOR COURTS AND UNIVERSITY LEADERS TO PROACTIVELY SUPPORT ACADEMIC FREEDOM .....</b>	<b>139</b>
<b>IV. CONCLUSION .....</b>	<b>141</b>

## INTRODUCTION<sup>1</sup>

Recent attacks on academic freedom are part of a larger strategy of undermining social trust in higher education.

<sup>2</sup>The judicial system has historically vacillated between extending deference to public university leaders to govern higher education and reigning in their autonomy.<sup>3</sup> This dynamic reflects a fundamental question about whether public universities should be allowed to operate differently from public primary and secondary schools, as well as from other public agencies.<sup>4</sup> We are now in an era when state legislatures and some courts are restricting university independence. For instance, after decades of precedent that allowed universities to consider race in competitive admissions decisions to pursue the educational benefits of diversity—a form of institutional academic freedom<sup>5</sup>—the U.S. Supreme Court essentially ended the practice in 2023<sup>6</sup> for both public and private colleges and universities. On the legislative side, recent attempts to dismantle institutional diversity efforts at public institutions have encompassed limits on topics that faculty members may teach,<sup>7</sup> resulting in an important test of institutional academic freedom for public

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1 We variously discuss academic freedom as an institutional right (i.e., a university's ability to operate with autonomy from the state) and as an individual right (i.e., applying to members of the professoriate and not being passed through to faculty by a university employer). We try to clarify when we discuss academic freedom as an institutional right, such as when considering a university's right to consider race in determining whom to admit, and when we refer to the rights of individual faculty. This article does not directly address academic freedom over teaching. For a discussion on the importance of protecting academic freedom for improving college instruction, we refer readers to Scott M. Gelber, *Does Academic Freedom Protect Pedagogical Autonomy?*, 48 REV. HIGHER EDUC. 1 (2024).

2 See, e.g., BARRET J. TAYLOR, *WRECKED: DEINSTITUTIONALIZATION AND PARTIAL DEFENSES IN STATE HIGHER EDUCATION POLICY* (2022).

3 See SCOTT M. GELBER, *COURTROOMS AND CLASSROOMS: A LEGAL HISTORY OF COLLEGE ACCESS 1860–1960* (2016) for an overview of how during the twentieth century, courts shifted from deferring to universities to maintain segregated academic programs to then forcing integration. See Vanessa Miller et al., *The Race to Ban Race: Legal and Critical Arguments Against State Legislation to Ban Critical Race Theory in Higher Education*, 88 MO. L. REV. 61 (2023) for a discussion of how in the twenty-first century, courts shifted from deferring to universities to use race conscious admissions to achieve the educational benefits of a diverse student body to limiting and eventually ending the practice in cases like *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).

4 GELBER, *supra* note 2. Our focus on public higher education is not meant to overlook the importance of these issues for private higher education. However, the autonomy of public colleges and universities is under specific threat from proposed and enacted governmental actions, such as in Florida. See, e.g., *Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339 (11th Cir. 2023).

5 J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the Four Freedoms of a University*, 77 U. COLO. L. REV. 929 (2006).

6 *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

7 Miller et al., *supra* note 2; Ryan Quinn, *The Growing Trend of Attacks on Tenure*, INSIDE HIGHER ED (Aug. 5, 2024), <https://www.insidehighered.com/news/faculty-issues/tenure/2024/08/05/growing-trend-attacks-tenure>.

colleges and universities and their autonomy to operate independently from government and political pressure.

In the contested space of academic freedom and institutional independence, we consider how empirical evidence can inform courts faced with interpreting academic freedom protections under the First Amendment. We base our arguments on the premise that academic freedom and institutional independence were integral in fostering an American higher education system that came to lead in the world in the latter half of the twentieth century.<sup>8</sup> Rather than seeing individual academic freedom as serving the interests of individual faculty, it should be seen as serving a broader public good by allowing faculty to do cutting-edge teaching and research in ways that challenge traditional orthodoxy and advance the national interest. Yet, the U.S. Supreme Court has neglected to definitively state whether the First Amendment protects the academic freedom of public higher education faculty.

In *Garcetti v. Ceballos*, the U.S. Supreme Court sidestepped the question of whether the state's authority to limit public employee speech applies to higher education faculty.<sup>9</sup> Based on that legal ambiguity, lower courts have either declined to apply *Garcetti* to cases involving faculty speech or have inconsistently interpreted *Garcetti*.<sup>10</sup> Prior to *Garcetti*, the Court applied a balancing test to weigh whether a public employee's speech addressed a matter of public concern and should be protected by the First Amendment.<sup>11</sup> In *Connick v. Myers*, the Court explained that "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public,"<sup>12</sup> and that matters of public concern must be balanced with "the practical realities involved in the administration of a government office."<sup>13</sup> In *Connick* and *Pickering*, the Court weighed an individual employee's interests with that of an individual employer to consider the efficient administration of a public agency or bureaucracy. We revisit the balancing test because the U.S. Court of Appeals for the Ninth Circuit found in *Demers v. Austin* that *Garcetti* did not apply in a case claiming academic freedom and instead applied the pre-*Garcetti* balancing test.<sup>14</sup>

Because *Garcetti* did not address the concept of academic freedom or faculty speech as an individual or collective right, there was no need for the Court to

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8 THE CENTURY OF SCIENCE: THE GLOBAL TRIUMPH OF THE RESEARCH UNIVERSITY, 33 INT'L PERSPS. EDUC. & SOC. (Justin J. W. Powell et al. eds., 2017).

9 547 U.S. 410 (2006).

10 Neal H. Hutchens & Frank Fernandez, *Academic Freedoms as a Professional, Constitutional, and Human Right: Contemporary Challenges and Directions for Research*, in 38 HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 1 (Laura W. Perna ed., 2023); Neal H. Hutchens et al., *Faculty, the Courts, and the First Amendment*, 120 PENN. ST. L. REV. 1027 (2016).

11 In *Pickering*, the Court set out the goal of achieving "a balance between 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." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

12 461 U.S. 138, 150 (1983).

13 *Id.* at 154.

14 746 F.3d 402, 406 (9th Cir. 2014).

consider whether academic freedom has facilitated speech in ways that constitute a matter of public concern or that would help a university fulfill its broader public responsibility by producing expansive societal benefits. Whereas the First Amendment protects individual speech regardless of whether it has a public benefit, such as flag burning in *Texas v. Johnson*,<sup>15</sup> a strong recognition of academic freedom should recognize that protecting speech of public college and university faculty does benefit the public in measurable ways. In any new Supreme Court case that directly addresses academic freedom and faculty speech rights, the Court should consider the consensus of social science evidence on the benefits of academic freedom to the public and the lack of empirical evidence that protecting academic freedom makes it systematically more difficult to administer public universities. If the Court is not convinced of the need to protect academic freedom as a normative good, then it should protect academic freedom based on empirical research about the benefits to the national interest that accompany greater levels of academic freedom across countries and across time.

In the near future, academic freedom will either be expanded or eroded in the courts. The U.S. Circuit Court of Appeals for the Eleventh Circuit is expected to issue its decision *Pernell v. Lamb*, which involves Florida's attempt to ban university faculty from teaching critical race theory.<sup>16</sup> However the Eleventh Circuit opinion is written, it will likely be appealed. In anticipation of a new case reaching the U.S. Supreme Court, whether *Pernell* or another case, we argue that it is important for courts, university general counsels, and state attorneys general to consider the social science evidence on the benefits of academic freedom.

In Part I, we discuss how courts have previously looked to social science research as context for its decisions. Then, in Part II we present a summary of social science evidence on the challenges to academic freedom and the benefits of academic freedom to the public good. Much of this research is international in nature. It draws on the concept that academic freedom is recognized throughout international law as a universal human right. While we do not advance an independent argument on the merits of academic freedom as a right under international law, we briefly summarize this argument to help situate international statistical research. Finally, in Part III, we argue that it is important for university leaders to understand social science evidence and how it will be presented to the courts, and to defend the institution's role in advancing the public good for the state. Research indicates that university leaders can default to being risk averse and take whatever stances will avoid political scrutiny, even when they should be defending their institution's role as a social institution that advances the public good.

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15 491 U.S. 397 (1989).

16 Press Release, American Civil Liberties Union, Florida Educators Urge Appeals Court to Block Florida's Stop W.O.K.E. Act (June 14, 2024), <https://www.aclu.org/press-releases/florida-educators-urge-appeals-court-to-block-floridas-stop-woke-act>; Arek Sarkissian & Andrew Atterbury, *Appellate Court Appears Divided on DeSantis' 'Stop Woke' Law*, POLITICO (June 14, 2024, 5:15 PM), <https://www.politico.com/news/2024/06/14/desantis-stop-woke-lawsuit-00163536>.

## I. THE COURT HAS PREVIOUSLY RELIED ON SOCIAL SCIENCE EVIDENCE TO INFORM ITS OPINIONS

Our argument—the Supreme Court should recognize social science research findings about the benefits of academic freedom—is not novel. The Supreme Court has historically cited nonlegal evidence in its decisions. In *Brown v. Board of Education of Topeka*, the Court famously evaluated precedent in the light of contemporary social science.<sup>17</sup> Some have questioned whether the Court’s opinion was actually influenced by social science or whether social science was cited to justify a controversial decision. Some legal histories even suggest the justices cited social science because it validated their personal views of society.<sup>18</sup> Whatever reasons that the Court exercised “scientific jurisprudence” in *Brown*,<sup>19</sup> it has continued to do so. For instance, in a concurring opinion in *Students for Fair Admissions* Justice Clarence Thomas not only cited a review of empirical literature, but he also endorsed the use of statistical research methods to offer empirical insight when data are available.<sup>20</sup>

Briefs for petitioners and respondents typically focus on presenting facts and legal arguments.<sup>21</sup> Therefore, non- or extralegal evidence is often presented to the U.S. Supreme Court by amicus curiae or parties not directly involved in litigation.<sup>22</sup> Research shows that amicus briefs are often disproportionately submitted in cases involving civil rights and constitutional questions.<sup>23</sup> Several factors such as the style and substance of briefs, as well as the reputations of amici, influence whether the Court uses language or cites arguments from amicus briefs. Conversely, the Court appears to interpret the volume of amicus briefs submitted in a particular case as a signal of the importance of its broader significance, which influences whether it is willing to grant certiorari. A body of evidence also suggests that the party that has the largest number of amicus briefs submitted on its behalf has higher odds of receiving a favorable opinion from the Court. Finally, volume of amicus briefs predicts whether individual justices write concurring or dissenting opinions.<sup>24</sup>

17 347 U.S. 483, 494 (1954) (“Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.”).

18 Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002).

19 *Id.* at 793.

20 *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 270 n.8 (2023) (Thomas, J., concurring) (“[I]n 2016, the *Journal of Economic Literature* published a review of mismatch literature—coauthored by a critic and a defender of affirmative action—which concluded that the evidence for mismatch was ‘fairly convincing.’ ... And, of course, if universities wish to refute the mismatch theory, they need only release the data necessary to test its accuracy.”) (citing Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Tradeoff*, 54 J. ECON. LIT. 3, 20 (2016)).

21 PAUL M. COLLINS, JR., *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISIONMAKING* (2008).

22 Paul M. Collins, Jr., *The Use of Amicus Briefs*, 14 ANN. REV. L. & SOC. SCIENCE 219 (2018).

23 *Id.*

24 *Id.*

Several recent higher education cases on race-conscious admissions elicited large numbers of amicus briefs: *Grutter v. Bollinger* (2003),<sup>25</sup> *Gratz v. Bollinger* (2003),<sup>26</sup> *Fisher v. University of Texas* (2013),<sup>27</sup> *Fisher v. University of Texas* (2016),<sup>28</sup> *Students for Fair Admissions* (2023).<sup>29</sup> Many of these briefs offered non- or extralegal evidence to inform the Court's opinions.<sup>30</sup> In *Grutter*, the Court cited amicus briefs and social science research to confirm that the use of a suspect practice—the consideration of race to make admissions decisions—advanced a compelling governmental interest, which was achieving educational benefits for all students. The Court recognized that cross-racial interactions could only be facilitated by enrolling racially diverse cohorts of students.<sup>31</sup> For instance, Justice Clarence Thomas cited several social science studies in his opinion that concurred and dissented in parts from the other opinions of the Court.<sup>32</sup>

Before considering recent developments in the study of academic freedom, it is helpful to consider the types of social science research that are often presented by amici to the Court. In *Fisher I*, the plurality (28%) of extralegal sources cited by amici were published as articles in scholarly, non-law review journals.<sup>33</sup> Amici in support of the University of Texas and in support of neither party both cited nonlaw journals most frequently (28% and 23% of citations, respectively).<sup>34</sup> Nonlaw journal articles were the third most cited source by amici in support of Abigail Fisher.<sup>35</sup> In terms of methodology, extralegal sources can be categorized as analytic (generally analyzing secondary sources like documents, records, or media); qualitative (typically using interviews or observations to study a phenomenon); experimental quantitative research that attempt to identify treatment and control groups to estimate causal effects; nonexperimental quantitative studies that aim to identify correlations without studying the causal impact of exposure to a treatment or event; and mixed methods research, which encompasses pairings of qualitative and

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25 539 U.S. 306 (2003).

26 539 U.S. 244 (2003).

27 570 U.S. 297 (2013) [hereinafter *Fisher I*].

28 579 U.S. 365 (2016).

29 *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

30 Liliana M. Garces et al., *Arguing Race in Higher Education Admissions: Examining Amici's Use of Extra-Legal Sources in Fisher*, 14 J. DIVERSITY HIGHER EDUC. 278 (2021); Catherine L. Horn et al., *Shaping Educational Policy Through the Courts: The Use of Social Science Research in Amicus Briefs in Fisher I*, 34 EDUC. POL'Y 449 (2020); Patricia Marin et al., *Uses of Extra-Legal Sources in Amicus Curiae Briefs Submitted in University of Texas at Austin*, 26 EDUC. POL'Y ANALYSIS ARCHIVES 1 (2018); Mike Hoa Nguyen et al., *Mobilizing Social Science Research to Inform Judicial Decision-Making: SFFA v. Harvard*, 28 ASIAN AM. L.J. 4 (2021); OiYan A. Poon et al., *Confronting Misinformation Through Social Science Research: SFFA v. Harvard*, 26 ASIAN AM. L.J. 4 (2019).

31 Gary Orfield, *Affirmative Action Hanging in the Balance: Giving Voice to the Research Community in the Supreme Court*, 42 EDUC. RESEARCHER 179 (2013).

32 *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Thomas, J., concurring in part).

33 Marin et al., *supra* note 29.

34 *Id.*

35 *Id.*

quantitative data.<sup>36</sup> In the *Fisher I* case, 41% of social science studies cited by amici relied on nonexperimental quantitative analyses.<sup>37</sup> Another 8% used experimental quantitative methods. Academic disciplines may draw different distinctions for determining whether quantitative studies support causal inference,<sup>38</sup> yet, in total, nearly half of the social science sources cited by *Fisher I* amici were quantitative.<sup>39</sup> These sources tend to be favored by at least some justices. For instance, Justice Clarence Thomas's references to social science research in *Grutter* and *Students for Fair Admissions* were to quantitative studies.<sup>40</sup>

Framed by the types of empirical research that are most often cited by amici in filings to the court, we proceed to examine recent developments in social science research about academic freedom. We focus on studies that feature statistical analyses of quantitative data. The next part begins with a summary of how academic freedom is conceptualized as a global norm or universal human right to explain why rigorous, cross-national measures of academic freedom have been developed and are now publicly available. We then highlight a few recent studies with important implications for understanding the influence of academic freedom on university output.

## II. COURTS SHOULD RECOGNIZE NEW SCHOLARSHIP ON THE IMPORTANCE OF ACADEMIC FREEDOM

Traditionally, scholarly discussion around academic freedom, especially in the United States, has focused on academic freedom as an individual right.<sup>41</sup> In that vein, academic freedom is usually defined as the ability of a faculty member to teach, research, and publicly speak on the topics of their expertise without fear of being repressed due to the nature of their expertise and opinion.<sup>42</sup> Additionally, many scholars include faculty right to self-governance as a component of academic freedom.<sup>43</sup>

36 Horn et al., *supra* note 29.

37 Marin et al., *supra* note 29.

38 For instance, the statistical approach of using fixed effects to control for unobserved variance in the data and analysis may be considered as approximating causal analysis by some economists but not others and not by researchers in other social science fields. See, e.g., JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, *MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION* (2009).

39 Horn et al., *supra* note 29.

40 We acknowledge that the Justices do not uniformly support considering social science research when considering legal arguments—or they only selectively entertain the use of social science research. In *Gill v. Whitford*, 585 U.S. 48 (2018) (Transcript of Oral Argument), a case about electoral gerrymandering, Chief Justice John Roberts referred to political science research as “sociological gobbledygook,” which Justice Stephen Breyer later parroted as “pretty good gobbledygook.” See Colleen Flaherty, *Sociology's 'Mic Drop' Moment*, *INSIDE HIGHER ED* (Oct. 11, 2017), <https://www.insidehighered.com/news/2017/10/12/chief-justice-john-roberts-calls-data-gerrymandering-sociological-gobbledygook#>.

41 WILLIAM A. KAPLIN ET AL., *THE LAW OF HIGHER EDUCATION* (6th ed. 2019).

42 Philip G. Altbach, *Academic Freedom: International Realities and Challenges*, 41 *HIGHER EDUC.* 205 (2001); MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (2009).

43 Eva Maria Vögtle & Michael Windzio, *Does Academic Freedom Matter for Global Student*

Outside the United States, many scholars and international organizations have affirmed that academic freedom is a global norm and have argued that it is a universal human right.<sup>44</sup> International sources recognize academic freedom as multidimensional and addressing the same domains as American concepts of academic freedom: intramural and extramural speech relevant to teaching, research, public scholarship, and university governance—all of which must be protected from retaliation.<sup>45</sup> Academic freedom is defined and codified in multiple international documents and covenants. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) all make mention of the essential role that academic freedom plays in teaching and research.<sup>46</sup> For example, the Committee on Economic, Social and Cultural Rights, which is a body of international experts who monitor the implementation of ICESCR, while commenting on article 13 of the Covenant, explicitly stated,

Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfill their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds.<sup>47</sup>

Other international covenants and documents assert the importance of academic freedom in similar ways.<sup>48</sup> Thus, infringements on academic freedom should be seen as violations of commitments made by signatory countries. While commitments made in these documents and covenants are notoriously hard to enforce, prior work shows that awareness of these global norms makes the public more willing and equipped to push its government to implement positive change.<sup>49</sup>

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*Mobility? Results From Longitudinal Network Data 2009-2017*, 87 HIGHER EDUC. 433 (2023).

44 Neal H. Hutchens et al., *Academic Freedom Protections in National and International Law*, in INTERNATIONAL ENCYCLOPEDIA OF EDUCATION (4th ed. 2022).

45 For an overview, see Frank Fernandez & Neal Hutchens, *Academic Freedom in Higher Education*, in OXFORD RESEARCH ENCYCLOPEDIA OF EDUCATION (in press).

46 *Academic Freedom and Its Protection Under International Law*, SCHOLARS AT RISK (Oct. 25, 2023), <https://www.scholarsatrisk.org/resources/academic-freedom-and-its-protection-under-international-law/>.

47 U.N. Comm. on Econ., Soc. and Cultural Rights General Comment No. 13, The right to education (Art. 13 of the Covenant) (21st sess.) Nov. 15- Dec. 3, 1999, E/C.12/1999/10, P 1 (Dec. 8, 1999), <https://www.refworld.org/legal/general/cescr/1999/en/37937>.

48 E.g., Fernandez & Hutchens, *supra* note 44.

49 Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOCIO. 1373 (2005); KIYOTERU TSUTSUI, RIGHTS MAKE MIGHT: GLOBAL HUMAN RIGHTS AND MINORITY SOCIAL MOVEMENTS (2018).

Because of the interconnected nature of today's world and of higher education,<sup>50</sup> academic freedom should be understood as a global phenomenon. In the United States, higher education is interconnected with other social institutions, including the government, military, religion, and family.<sup>51</sup> Globally, universities are sites for cross-country connections of students and researchers. Academic freedom norms spread across higher education systems from country to country, and statistical evidence shows that countries that are more embedded in world society are more likely to protect academic freedom.<sup>52</sup> More specifically, countries with more links to international liberal institutions appear to have a higher commitment to academic freedom.<sup>53</sup> Moreover, the effects of academic freedom spill over into neighboring countries, increasing the productivity of their labor force, but the spillover occurs only into countries with weak judicial domestic institutions.<sup>54</sup> This is likely because these countries' institutions are not strong enough to spur innovation by themselves, but they can borrow this innovation from neighboring countries, thus increasing their own labor force productivity.<sup>55</sup> Just like the spread of academic freedom is global, so is the current attack on it.<sup>56</sup> Interestingly, countries with more international illiberal ties appear to restrict arts, humanities, and social sciences while boosting agriculture and engineering.<sup>57</sup> This suggests that the factors that drive the spread and the pushback against academic freedom are not only local<sup>58</sup> but also global,<sup>59</sup> indicating how strongly entrenched the concept of academic freedom is in the global society.

### A. *How Social Scientists Define and Measure Dimensions of Academic Freedom*

As academic freedom has emerged as a global norm, international concern around monitoring and protecting academic freedom has risen.<sup>60</sup> When measuring academic freedom, social scientists have sought to measure academic freedom by considering

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50 See, e.g., Kathryn Mohrman et al., *The Research University in Transition: The Emerging Global Model*, 21 HIGHER EDUC. POL'Y 5 (2008).

51 POWELL ET AL., *supra* note 7.

52 Julia C. Lerch et al., *The Social Foundations of Academic Freedom: Heterogenous Institutions in World Society, 1960 to 2022*, 89 AM. SOCIO. REV. 88 (2024).

53 *Id.*

54 Niclas Berggren & Christian Bjørnskov, *Academic Freedom, Institutions, and Productivity*, 88 S. ECON. J. 1313 (2022).

55 *Id.*

56 Lerch et al., *supra* note 51; Evan Schofer et al., *Illiberal Reactions to Higher Education*, 60 MINERVA 509 (2022).

57 Schofer et al., *supra* note 55.

58 SCOTT M. GELBER, *THE UNIVERSITY AND THE PEOPLE: ENVISIONING AMERICAN HIGHER EDUCATION IN AN ERA OF POPULIST PROTEST* (2011); Emon Nandi, *Governance, Performance and Quality in Higher Education: Evidences from a Case Study*, 19 EDUC. DIALOGUE 37 (2022).

59 Schofer et al., *supra* note 55.

60 See, e.g., Rep. of the Special Rapporteur on the Academic Freedom and the Freedom of Opinion and Expression, UN Doc. A/75/261 (2020); KATRIN KINZELBACH ET AL., *FREE UNIVERSITIES: PUTTING THE ACADEMIC FREEDOM INDEX INTO ACTION*, GLOB. PUB. POL'Y INSTITUTE (2021).

individual rights of students and faculty as well as institutional properties. One of the most widely accepted indices that measures academic freedom is produced by the Varieties of Democracy (V-Dem) Institute at the University of Gothenburg, Sweden.<sup>61</sup> V-Dem asks multiple country experts to code various aspects of academic freedom. V-Dem requests that these country experts answer the following questions:

- “To what extent are scholars free to develop and pursue their own research and teaching agendas without interference?”
- “To what extent are scholars free to exchange and communicate research ideas and findings?”
- “To what extent do universities exercise institutional autonomy in practice?”
- “To what extent are campuses free from politically motivated surveillance or security infringements?”
- “Is there academic freedom and freedom of cultural expression related to political issues?”<sup>62</sup>

V-Dem’s final index incorporates country experts’ answers by computing them into a single score for each country in each year, following a statistical procedure that is used to measure other multifaceted constructs such as democracy, civil society, or human rights.<sup>63</sup> This allows researchers to analyze the overall index,<sup>64</sup> as well as subcomponents of the index separately,<sup>65</sup> to account for the fact that certain facets of academic freedom might change independently of others or may have different levels of influence on country-level outcomes. As seen from above, this Academic Freedom Index (which is but one, albeit widely used, example of how academic freedom is measured) incorporates both individual rights and institutional contexts.

### ***B. Academic Freedom, Faculty Work, and the Public Good***

The assumption that academic freedom is solely about the rights of individual faculty or individual universities is rather reductionist as it does not emphasize the benefits that academic freedom brings to society.<sup>66</sup> Faculty members tend to

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61 Janika Spannagel et al., *The Academic Freedom Index and Other New Indicators Relation to Academic Space: An Introduction*, 2020 V-DEM INSTITUTE 26 (2020), [https://www.v-dem.net/media/publications/users\\_working\\_paper\\_26.pdf](https://www.v-dem.net/media/publications/users_working_paper_26.pdf).

62 *Id.*

63 Janika Spannagel & Katrin Kinzelbach, *The Academic Freedom Index and Its Indicators: Introduction to New Global Time-Series V-Dem Data*, 57 QUALITY & QUALITY 3969 (2022).

64 Lars Lott, *Academic Freedom Growth and Decline Episodes*, 88 HIGHER EDUC. 999 (2024).

65 Volha Chykina et al., *Does Populism Threaten Academic Freedom? A Cross-National Study of Asia, Europe, and Latin America* (unpublished manuscript) (on file with author); Frank Fernandez et al., *Science at Risk? Considering the Importance of Academic Freedom for STEM Research Production Across 17 OECD Countries*, 19 PLoS ONE e0298370 (2024).

66 FINKIN & POST, *supra* note 41.

exercise their right to research the topics of their choosing and to express their professional opinions freely not to benefit themselves but to benefit the public, thus making academic freedom essential for higher education to serve the public good.<sup>67</sup> The entire academic system has several avenues through which it encourages knowledge production to serve the public good and not merely the interests of individual faculty.<sup>68</sup> First, many funding agencies only fund research that explicitly contributes to the public good.<sup>69</sup> Second, many journals require or prefer that researchers include an explanation of how their study has practical implications or offers novel insights into understanding or addressing social problems.<sup>70</sup> Additionally, when faculty are considered for promotion, many institutions ask that academics themselves, and those writing recommendation letters on their behalf, elaborate on how their research has significance to students, the university community, and the public at large.<sup>71</sup>

When examining attacks on academic freedom, a lot of anecdotal evidence points to the attacks on social sciences.<sup>72</sup> It has been long documented that autocratic and populist leaders try to attack social sciences as unnecessary and elitist; they then justify limiting academic freedom as a way to protect people from propaganda and indoctrination that social scientists try to force onto the public.<sup>73</sup> The goal of these leaders is not to interfere with innovation as it relates to agricultural developments, improvements in the military–industrial complex, and workforce benefits that they garner from a more educated populace, but rather to shape the political climate conducive to their electoral success.<sup>74</sup> However, an intricate understanding of many social scientific phenomena is paramount to the vitality and health of society at large. For example, a nuanced, fact-based understanding of abortion and other family planning–related policies might aid the adoption and implementation of the policies that support women’s health, which is a public good.<sup>75</sup> Given the sensitivity of the topic, policy makers can only garner fact-based understanding of these policies and their outcomes if scientists can freely research the topic and disseminate their findings. Other examples of

67 Eve Darian-Smith, *Knowledge Production at a Crossroads: Rising Antidemocracy and Diminishing Academic Freedom*, *STUD. HIGHER EDUC.* (forthcoming 2025); Hutchens & Fernandez, *supra* note 9.

68 See, e.g., Talcott Parsons, *The Science Legislation and the Role of the Social Sciences*, 11 *AM. SOCIO. REV.* 653 (1946); Talcott Parsons, *Considerations on the American Academic System*, 6 *MINERVA* 497 (1968).

69 Holly J. Falk-Krzesinski & Stacey C. Tobin, *How Do I Review Thee? Let Me Count the Ways: A Comparison of Research Grant Proposal Review Criteria Across US Federal Funding Agencies*, 46 *J. RSCH. ADMIN.* 79 (2015); Sean M. Watts et al., *Achieving Broader Impacts in the National Science Foundation, Division of Environmental Biology*, 65 *BIO SCIENCE* 397 (2015).

70 E.g., Glenn Ellison, *Evolving Standards for Academic Publishing: A q-r Theory*, 110 *J. POL. ECON.* 994 (2002).

71 E.g., Sunny Hyon, *Evaluation in Tenure and Promotion Letters: Constructing Faculty as Communicators, Stars, and Workers*, 32 *APPLIED LINGUISTICS* 389 (2011).

72 Paul Boyle, *A U.K. View on the U.S. Attack on Social Sciences*, 341 *SCIENCE* 719 (2013).

73 GELBER, *supra* note 57.

74 *Id.*; DAVID BAKER, *THE SCHOOLED SOCIETY: THE EDUCATIONAL TRANSFORMATION OF GLOBAL CULTURE* (2020).

75 Darian-Smith, *supra* note 66.

social scientific research that is potentially politically contentious but important to countries' development and vitality—and thus in acute need of being protected—are research on labor conditions, immigration, criminal justice, and education policy.

Education, for example, promotes better health and has been referred to as a “social vaccine.”<sup>76</sup> More educated people tend to better understand how to live healthier lives and how to prevent illness.<sup>77</sup> Education also encourages greater voting rates and generally higher levels of civic participation,<sup>78</sup> which are important indicators of the strength of a democracy. Given that students can only fully benefit from education in the atmosphere of academic freedom,<sup>79</sup> it once again underscores the public good nature of academic freedom.

Apart from the social sciences, academic freedom is essential to countries' ability to innovate in industry- and technology-related fields. Academic freedom facilitates long-term innovation because it allows scholars to explore topics and research inventions that are not immediately profitable.<sup>80</sup> Aghion et al. show that early-stage innovative research is more likely to occur in academic institutions than in the private sector and industry, because the latter seek more immediate profits and are not willing to support research that does not meet short-term commercial needs and interests.<sup>81</sup> However, innovation—especially paradigm-shifting advances—does not necessarily stem from ideas that seem immediately profitable, thus making academic freedom offered by the universities essential for the continued development of those ideas. For example, consider the case of Dr. James P. Allison who worked for decades as a university-affiliated cancer researcher, but his work was not seen as viable by the pharmaceutical industry. Allison's research that began in the 1990s ultimately earned him a Nobel Prize in 2018.<sup>82</sup> Further, academic freedom is essential for successful, unbiased university-industry partnerships. The industrial sector, interested in the human capital that academia possesses, often offers to share data or otherwise support university-based research. In these cases, it is essential that academics can carry out their studies in the atmosphere of academic freedom so that they do not feel pressured to report biased results.<sup>83</sup>

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76 David P. Baker et al., *Risk Factor or Social Vaccine? The Historical Progression of the Role of Education in HIV and AIDS Infection in Sub-Saharan Africa*, 38 PROSPECTS 467 (2009).

77 BAKER, *supra* note 73; William C. Smith et al., *A Meta-Analysis of Education Effects on Chronic Disease: The Causal Dynamics of the Population Education Transition Curve*, 127 SOC. SCIENCE & MED. 29 (2015).

78 David E. Campbell, *Civic Engagement and Education: An Empirical Test of the Sorting Model*, 53 AM. J. POL. SCI. 771 (2009); Muriel Egerton, *Higher Education and Civic Engagement*, 53 BRIT. J. SOCIO. 603 (2002).

79 UNESCO, THE UNESCO RECOMMENDATION CONCERNING THE STATUS OF HIGHER-EDUCATION TEACHING PERSONNEL (1997), <https://unesdoc.unesco.org/ark:/48223/pf0000160495>.

80 Philippe Aghion et al., *Academic Freedom, Private-Sector Focus, and the Process of Innovation*, 39 RAND J. ECON. 617 (2008).

81 *Id.*

82 Sharon Begley, *Nobel Prize in Medicine Awarded to Two Cancer Researchers for Immune System Breakthrough*, STAT (Oct. 1, 2018), <https://www.statnews.com/2018/10/01/nobel-prize-medicine-cancer-immunotherapy/>.

83 *Is the University-Industrial Complex Out of Control?*, 409 NATURE 119 (2001).

Recent research shows that when limits are placed on academic freedom, it influences science, technology, engineering, and mathematics (STEM) innovation.<sup>84</sup> In their analyses of several decades of data from seventeen Organization for Economic Cooperation and Development (OECD) countries, Fernandez et al. used multiple measures of academic freedom<sup>85</sup> for individual faculty members to show that decreases in academic freedom lead to a decrease in overall output, both in terms of quantity and quality, of STEM research produced in those countries. Findings were relatively similar across different measures of academic freedom, and the influence of academic freedom was substantial and statistically significant, even after accounting for measures like national financial investment in research and development, size of the national population, country wealth, and size of the higher education sector.<sup>86</sup> Further, examining more than a century of data in 157 countries, Audretsch et al. find that decreases in academic freedom lead to a decreased quantity of patent applications as well as their decreased citations of patent applications.<sup>87</sup> Additionally, countries with more robust academic freedom protections appear to enjoy a higher level of labor force productivity, possibly because academic freedom fosters innovation that then makes the labor force more productive.<sup>88</sup> Countries that innovate more do better economically,<sup>89</sup> thus rendering academic freedom crucial to development and economic prosperity, which makes academic freedom essential to higher education's pursuit of the public good.

Having a strong higher education sector increases overall countries' appeal, especially to young people. Academic freedom is indispensable to having a robust higher education system, so much so that some scholars have asserted that academic freedom is a prerequisite to a world-class university. While there are some examples of well-known, world-class universities in authoritarian regimes where academic freedom is lacking, most of the highly ranked universities are in fact located in democracies with more solid academic freedom protections.<sup>90</sup> Given declining birth rates in most developed countries,<sup>91</sup> attracting and retaining

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84 Fernandez et al., *supra* note 64.

85 *Id.* This study used three of the measures introduced in our discussion of the V-Dem data, including measures of the extent to which scholars free to develop and pursue their own research and teaching agendas without interference, the extent to which scholars free to exchange and communicate research ideas and findings, the extent to which there is academic freedom and freedom of cultural expression related to political issues. Additionally, this study used a V-Dem measure of the extent to which academics publicly criticize government policies.

86 *Id.*

87 Unlike the Fernandez et al., *supra* note 65, study, Audretsch and colleagues used V-Dem's composite index to analyze a single holistic measure of various dimensions of academic freedom. See David B. Audretsch et al., *Academic Freedom and Innovation*, 19 PLoS ONE e0304560 (2024).

88 Berggren & Bjørnskov, *supra* note 53.

89 Jan Fagerberg & Martin Srholec, *National Innovation Systems, Capabilities and Economic Development*, 37 RSCH. POL'Y 1417 (2008); Paul M. Romer, *Increasing Returns and Long-Run Growth*, 94 J. POL. ECON. 1002 (1986).

90 Terence Karran & Lucy Mallinson, *Academic Freedom and World-Class Universities: A Virtuous Circle?*, 32 HIGHER EDUC. POL'Y 397 (2019).

91 Matthias Doepke et al., *The Economics of Fertility: A New Era* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29948, 2023).

talented youth is paramount to countries' prosperity. Brain drain—the tendency of talented youth to leave their place of birth for other more attractive countries—is a concern for many countries and economies.<sup>92</sup> While the evidence regarding academic freedom being a pull factor for international students is inconclusive, Vögtle and Windzio find that countries with higher levels of academic freedom are less likely to lose their students to other countries, thus potentially preventing brain drain.<sup>93</sup>

To recap, in this section, we examine how the concept of academic freedom can be seen as an individual right but also as a public good and a global norm. While most literature conceptualizes academic freedom as an individual right, we provide social scientific evidence as to why it can and should be seen also as a public good and a global norm. Additional research is certainly needed that examines the importance of academic freedom as it relates to teaching for improving instruction and that identifies ways of protecting and optimizing academic freedom (e.g., through tenure or other contractual arrangements that provide job security and economic stability for faculty who take unpopular stances). However, we believe that the evidence introduced in this essay can assist policy makers and legal experts in advocating for protecting academic freedom.

### III. WHY IT MATTERS FOR COURTS AND UNIVERSITY LEADERS TO PROACTIVELY SUPPORT ACADEMIC FREEDOM

Courts should consider how academic freedom as an individual right of faculty, in the aggregate, benefits society and the public good. Social science evidence shows that it is not only individual faculty members who stand to gain by protecting academic freedom. Instead, stronger academic freedom positively relates to scientific research output and commercialization of intellectual property. This aligns with a long-standing position that the First Amendment must protect multiple forms of individual expression, including hate speech, to achieve a broader public benefit.<sup>94</sup>

Educational leaders can be so politically cautious and risk averse that they self-censor and implement more restrictive campus policies and practices than they are required to by courts or state legislation.<sup>95</sup> In some instances, they may even ignore a federal court decision to avoid public scrutiny. One study found that school officials were aware of, and chose to ignore, the 2017 *Whitaker v. Kenosha Unified School District* case<sup>96</sup> that protected transgender students from

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92 Frédéric Docquier & Hillel Rapoport, *Globalization, Brain Drain, and Development*, 50 J. ECON. LITERATURE 681 (2012).

93 Vögtle & Windzio, *supra* note 42.

94 Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1 (1990).

95 Frank Fernandez & Liliana M. Garces, *The Influence of Repressive Legalism on Admissions*, in RETHINKING COLLEGE ADMISSIONS: RESEARCH-BASED PRACTICE AND POLICY 1 (OiYan A. Poon & Michael N. Bastedo eds., 2023); Liliana M. Garces et al., *Repressive Legalism: How Postsecondary Administrators' Responses to On-Campus Hate Speech Undermine a Focus on Inclusion*, 58 AM. EDUC. RSCH. J. 1032 (2021).

96 *Whitaker v. Kenosha Unified School District* (2017). No. 1 Bd. of Ed., 858 F.3d 1034, 1048 (7th Cir).

discrimination. Instead, they adopted and implemented anti-LGBTQ policies that not only undermined the rights of their students but also placed their institutions at increased risk of litigation.<sup>97</sup>

When college and university leaders face external pressure from state officials, media, or donors to limit academic freedom, they should recognize that the social science evidence indicates that academic freedom is essential to higher education's role in serving the national interest. For universities, supporting STEM research production is essential to the pursuit of external research funding and maintaining or improving university prestige or rankings. More broadly supporting academic freedom for faculty work facilitates STEM research production and patent activity to advance economic competitiveness, technology transfer, commercialization of intellectual property, and to develop practical applications for national security. State and federal politicians are accustomed to acknowledging and responding to the concerns of local voters, but higher education leaders also send students to study abroad globally, sometimes to the contexts lacking academic freedom protections. Even U.S. community colleges have global footprints.<sup>98</sup> Higher education leaders should be informed by empirical studies of the importance of academic freedom in a global context and then do the hard work of helping others understand the importance of academic freedom, including by translating social science evidence to a skeptical public and to the courts.

Academic leaders should vigorously defend individual and institutional academic freedom and acknowledge that it allows higher education to address matters of public concern without unduly interfering with college or university operations. They should revisit the early twentieth-century consensus between university leaders and faculty that recognized academic freedom—and using contractual arrangements, including tenure, to protect it—as essential to faculty work and participation in institutional governance.<sup>99</sup> Presidents, trustees, and general counsels should refer to institutional statements, policies, and collective bargaining agreements that guarantee academic freedom and explain its necessity for good teaching, research, and governance.<sup>100</sup> Individual campus leaders should recognize they are not alone in this effort. Around ninety higher education associations around the country signed onto an open letter by the American Council on Education that challenges “efforts to suppress inquiry, curb discussion, and limit what can be studied” as going against “the very purpose of higher education.”<sup>101</sup>

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97 Mollie T. McQuillan et al., *The Disruptive Power of Policy Erasure: How State Legislators and School Boards Fail to Take Up Trans-Affirming Policies While Leaning into Anti-LGBTQ+ Policies*, 38 EDUC. POL'Y 642 (2024).

98 See, e.g., *BMCC Launches Introduction to Diplomacy Academic Course*, BOROUGH OF MANHATTAN CMTY. COLL. (Aug. 12, 2024), <https://www.bmcc.cuny.edu/news/bmcc-launches-academic-introduction-to-diplomacy-course/>.

99 AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS AND REPORTS (11th ed. 2015); Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 L. & CONTEMP. PROBS. 3 (1990).

100 Neal Hutchens & Vanessa Miller, *Florida's Stope WOKE Act: A Wake-Up Call for Faculty Academic Freedom*, 48 J. COLL. & U.L. 35 (2023).

101 Letter from American Council on Education and Higher Education Associations, *Free and*

Campus leaders should align themselves with the principles of their colleagues in challenging constraints on academic freedom and asserting its importance for higher education “to support our economy and national security.”<sup>102</sup>

#### IV. CONCLUSION

Rigorous research studies indicate that there are multiple benefits to academic freedom. Across countries and over decades, greater academic freedom positively influences research output in STEM fields<sup>103</sup> and patent activity.<sup>104</sup> Since World War II, the U.S. government has recognized scientific and technology advances “as handmaidens of economic interests.”<sup>105</sup> Protections for academic freedom have allowed countries to cultivate strong higher education systems.<sup>106</sup> In a global competition for highly skilled workers, academic freedom appears to retain, if not attract, students.<sup>107</sup> When academic freedom is weakened by populist movements in multiple countries around the world,<sup>108</sup> U.S. courts and higher education leaders should view protecting and cultivating academic freedom as a competitive advantage in an increasingly globally competitive environment.

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*Open Academic Inquiry and Debate on Our Campuses is Essential to Our Democracy and National Well-Being* (Mar. 3, 2022), <https://www.acenet.edu/Documents/Community-Statement-on-Free-and-Open-Academic-Inquiry-030322.pdf>.

102 *Id.*

103 Fernandez et al., *supra* note 64.

104 Audretsch et al., *supra* note 84.

105 Talcott Parsons, *The Professions and Social Structure*, 17 *SOC. FORCES* 457 (1939).

106 Karran & Mallinson, *supra* note 87.

107 Vögtle & Windzio, *supra* note 42.

108 Chykina et al., *supra* note 64.

