

# JCUL SPECIAL ISSUE: FREE SPEECH AND ACADEMIC FREEDOM ON CAMPUS: RECENT CHALLENGES AND OPPORTUNITIES

## AN INTRODUCTION TO THE SPECIAL ISSUE

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Issues of free speech continue as high profile and contested issues on many college and university campuses. Free speech debates and discussions also reverberate well beyond campus, drawing interest from elected officials, various interest groups, and, at times, from the general public. Just as our nation is often sharply divided along political and ideological lines, free speech issues on campus reflect competing visions of higher education and society.

The articles in this special issue take on some of the key areas of controversy and possibilities for how institutions can build campus environments committed to free speech and to connected concepts such as academic freedom. Several of the articles also push us to consider how to reconcile protections for free speech and open inquiry with efforts to foster campus environments that prioritize access and belonging or commitments to diversity and inclusion. Whether readers find themselves in agreement or disagreement with views offered in specific articles, the pieces contained in the special issue prompt deeper reflection on the ongoing work and challenges of making colleges and universities unique spaces in society for free speech and intellectual freedom.

While distinct from general free speech protections, considerations of academic freedom represent a crucial aspect of ensuring open inquiry in colleges and universities. Indicative of this importance, all articles in the special issue touch on some dimension of academic freedom. Academic freedom represents a concept widely touted in higher education in the United States, and globally, but one that is encompassed by ambiguity and debate, including legally, over the conditions needed for it to thrive. In U.S. higher education, there remains broad dedication to the ideals and goals of academic freedom, but there exist considerable questions over how best to operationalize academic freedom as an institutional value and over the current state of academic freedom in colleges and universities. For instance, alongside writing that touts the importance of tenure and laments its decline,<sup>1</sup> other authors contend that tenure, if ever useful, has largely outlived its effectiveness as a mechanism to foster innovation

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and discovery in higher education.<sup>2</sup> Critiques of tenure often contend that faculty members in higher education are, along with institutions generally, too far left leaning.<sup>3</sup>

Three articles in the special issue provide distinctive contributions to issues of academic freedom. Of these, the one from Frank Fernandez and Volha Chykina prompts us to think about academic freedom not only in the United States but from a global perspective as well as how tools of empirical inquiry provide a way to move beyond anecdotal evidence in examining the value of academic freedom to higher education in supporting the public good. Much of the literature on academic freedom in the United States has a singular focus on American academics and higher education institutions. Fernandez and Chykina remind readers of the usefulness of considering academic freedom from a comparative and international perspective.

The United States developed a higher education system in the period after World War II that became envied and emulated by much of the rest of the world.<sup>4</sup> Now, however, world-class colleges and universities are located around the globe.<sup>5</sup> My comments are not premised on a competitive orientation, which often is where much of the rhetoric on global higher education is centered, but, instead, on the notion that discussions of academic freedom the United States potentially benefit from the experiences, both positive and negative, of other nations. Fernandez and Chykina's article helps put into perspective the implications of a lack of meaningful academic freedom protections for a nation's higher education system, consequences which are potentially sometimes obscured in the United States by the system's overall successes.

Another noteworthy contribution of the Fernandez and Chykina article is prompting consideration of how to evaluate or measure the impact of academic

1 See, e.g., HENRY REICHMAN, UNDERSTANDING ACADEMIC FREEDOM (2021); Steven Mintz, *Academic Tenure: In Desperate Need of Reform or of Defenders?*, INSIDE HIGHER ED (Sept. 23, 2021), <https://www.insidehighered.com/blogs/higher-ed-gamma/academic-tenure-desperate-need-reform-or-defenders>; David Wippman & Glenn C. Altschuler, *3 Reasons Why Tenure Remains Indispensable*, INSIDE HIGHER ED (Dec. 12, 2021), <https://www.insidehighered.com/views/2021/12/13/why-tenure-remains-vital-today-opinion>; Jacques Berlinerblau, *They've Been Scheming to Cut Tenure for Years. It's Happening: We're in the Execution Phase of the Profession's Demise*, THE CHRONICLE OF HIGHER EDUCATION (Feb. 1, 2023), <https://www.chronicle.com/article/theyve-been-scheming-to-cut-tenure-for-years-its-happening>.

2 See, e.g., Todd J. Williams, *No Tenure? No Problem: A College President Explains Why Lifetime Employment for Faculty Isn't Necessary*, THE JAMES G. MARTIN CENTER FOR ACADEMIC RENEWAL (Oct. 19, 2022), <https://www.jamesgmartin.center/2022/10/no-tenure-no-problem-2/>; Michael Lind, *Why Ending Tenure Is Only a Start*, TABLET (Oct. 21, 2021), <https://www.tabletmag.com/sections/news/articles/ending-tenure-michael-lind>; James C. Wetherbe, *It's Time for Tenure to Lose Tenure*, HARVARD BUSINESS REVIEW (March 13, 2013), <https://hbr.org/2013/03/its-time-for-tenure-to-lose-te>

3 See, for example, the sources cited in footnote 2.

4 For more on the development of U.S. higher education in the twentieth century, see, for example, John R. Thelin's highly regarded history of higher education. JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION (3rd ed. 2019). Specifically, chapter seven reviews the "Golden Age" of American higher education and its global rise to prominence after World War II. *Id.* at 260-316.

5 While university rankings are, at best, a highly imperfect measure of institutional quality, see, for example, the *Times Higher Education* world ranking of higher education institutions for more on the global distribution of institutions in the ranking. TIMES HIGHER EDUCATION, *World University Rankings: 2025*, <https://www.timeshighereducation.com/world-university-rankings/latest/world-ranking> (last visited Jan. 10, 2025).

freedom protections for individual faculty and for higher education generally. Often, commentary around academic freedom, perhaps especially when tackled through a legal lens, is framed by anecdotes based on specific incidents. Distinct events or individual stories are, of course, not without value in examining academic freedom and attendant legal standards. However, legal scholarship centered on academic freedom benefits from the ways in which social science research aids in understanding better and more precisely the outcomes when faculty members possess or are denied academic freedom in their research and teaching. Notably, such research inquiry could help to assess or measure the impact of various types of legal protections for academic freedom, such as ones based on the First Amendment, tenure, or collective bargaining. The Fernandez and Chykina article is valuable in modeling and advocating for research that better informs policy makers, institutional leaders, and faculty members on how academic freedom protections, or their absence, impact scholarly work and research productivity.

Considering academic freedom in the context of state laws aimed at undoing diversity, equity, and inclusion (DEI) efforts in higher education, Jeffrey C. Sun and Heather A. Turner categorize different strands of scholarship, different schools as characterized by the authors, focused on academic freedom. Some of the schools identified by Sun and Turner focus on specific legal standards to uphold academic freedom, such as the First Amendment. The authors also consider how scholars not relying on legal methods, such as taking a socio-historical approach, have sought to analyze and conceptualize academic freedom. In drawing from multiple schools or lines of scholarship, the authors highlight how different forces affect the contemporary state of higher education and influence how academic freedom operates, or not, at the individual, institutional, and system levels. With the abundance of scholarship on academic freedom, Sun and Turner's efforts are beneficial in helping us to grapple with these multiple literature streams, including from legal scholars, on conceptualizations of academic freedom and the role of legal standards in connection to academic freedom protections.

Along with providing an informative contextualization and categorization of academic freedom from multiple legal and scholarly perspectives, Sun and Turner, focusing on anti-DEI legislation in Florida, offer their views on how courts should structure First Amendment protections for faculty members in public higher education. Specifically, the authors argue for a framework that provides First Amendment legal protection for public higher education faculty members while also acknowledging institutional interests. Additionally, the authors highlight the importance of professional standards as bolstering academic freedom and institutional autonomy in public higher education along with the continuing importance of these standards in private colleges and universities. Sun and Turner's article highlights current legal and policy battles over the extent of academic freedom for public higher education faculty members and the extent of control that state governments should be able to exert over public colleges and universities, including in the classroom and research endeavors.

One way to think about the efforts to disallow certain topics from the classroom examined in Sun and Turner's article is how some state governments, both directly and indirectly, are seeking a role in curricular and institutional administration matters more akin to what has been exercised by states in relation to elementary

and secondary education curricula and operations. Along with efforts to limit topics in the classroom, efforts to abolish tenure or to make it easier to dismiss tenured faculty members could be grouped into these overall efforts.<sup>6</sup> Similarly, there have been initiatives to reduce the role of faculty members in shared governance in some states and institutions, often noting the need to make public institutions more sensitive to their status as public institutions.<sup>7</sup> The Sun and Turner article provides a helpful contribution to these ongoing developments around the balance between faculty independence, especially in the classroom, versus the prerogative of institutional leaders and boards and state governments to determine classroom subjects and content and to curtail the faculty role in shared governance and institutional decisions.

The importance of academic freedom, alongside broader commitments to free speech in higher education, is a key focus of the article by Elizabeth Kaufer Busch and William E. Thro. In setting out their vision for academic freedom and free speech in higher education, in this thought-provoking article, Busch and Thro argue for colleges and universities, especially public ones, to commit to what they term the American Proposition. They define the American Proposition as based on the idea of a nation of equality and rights and where constitutional standards place checks on governmental authority. They offer the American Proposition as a strategy to overcome national divisions, not only those of a partisan nature but also over the worth of our constitutional republic. Busch and Thro contend that those on both the political left and right have rejected and abdicated the constitutional tools intended to alleviate the tensions that punctuate our nation — Free Speech, Religious Liberty, Due Process, and legal equality regardless of race, sex, or sexual orientation. Pointing to how these tensions also exist in higher education, the authors argue that colleges and universities should embrace and teach the American Proposition.

Busch and Thro urge higher education to embrace the American Proposition, arguing that colleges and universities 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.” They issue a call for higher education institutions to promote academic freedom not only for the faculty but for the entire university community. According to the authors, the responsibility to accept and teach the American Proposition is especially relevant for public colleges and universities. An institutional commitment to the Academic Proposition requires colleges and universities to assume academic responsibility and teach civic literacy, enhance understanding of the constitution, and promote what John Inazu

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6 See, e.g., Barrett J. Taylor & Kimberly Watts, *Tenure Bans: An Exploratory Study of State Legislation Proposing to Eliminate Faculty Tenure, 2012-2022*, REV. HIGHER EDUC. (online preprint published July 25, 2024), <https://dx.doi.org/10.1353/rhe.0.a934009>; 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>; Monica Potts, *Why Republicans Are Targeting Professors' Job Security*, FIFTYTHREE (May 11, 2023), <https://fivethirtyeight.com/features/college-tenure-republican-attacks-education/>.

7 See, e.g., Alan Blinder, *Professors Are Uniquely Powerful. That May Be Changing*. N.Y. TIMES (Nov. 2, 2024), <https://www.nytimes.com/2024/11/02/us/faculty-power-shared-governance-university-presidents.html>.

calls “confident pluralism.”<sup>8</sup> As part of setting out the attributes of the American Proposition, especially in relation to public colleges and universities, Busch and Thro consider the rights to and limits on academic freedom at both the individual and institutional levels. As with the other pieces in the special issue, the authors provide analysis and proposals dealing with free speech and academic freedom that go beyond a singular focus on legal standards.

An emphasis in looking beyond legal rules in connection with free speech in higher education is also an integral part of the article by Brandi Hephner LaBanc and myself. In the free speech realm, we challenge college and university leaders to guide efforts to build campuswide initiatives that are holistic in nature and aimed at multiple constituencies, including students, faculty and staff members, board members, alumni, and parents of students. In the case of students, we recommend that colleges and universities need to support efforts in both curricular and co-curricular spaces. In these endeavors, we challenge institutions to avoid an emphasis on cursory engagement and, instead, to foster an institutional focus on deep learning around issues connected to free speech. Additionally, these endeavors should not ignore how free speech intersects with other compelling issues and institutional values, such as implications for access and belonging on campus. We contend an important part of institutional efforts is recognition of the need for a campus-wide approach and commitment, which means that responsibility for free speech issues on campus is not siloed away in particular units such as student affairs or the general counsel’s office.

While a major ambition of the Hutchens and Hephner LaBanc article is to spur institutions to go beyond a rule-centric approach in cultivating engagement and education on free speech, legal standards, especially for public colleges and universities, play an essential role in establishing the conditions for free speech on campus and permissible limits on speech. As such, the article provides an overview of key legal standards shaping legal speech rights in higher education, including ones in addition to the First Amendment, such as civil rights laws. This coverage of legal standards may especially prove useful to non-attorneys working in higher education. The overview of legal rules connected to free speech is premised on the notion that legal literacy should comprise part of educational and engagement efforts connected to free speech while also contributing to sound institutional policy and practice.

Despite distinctiveness in orientation and the specific free speech topic undertaken, all the articles in this special issue show the consistently evolving nature of discourse connected to free speech and open inquiry in higher education. The articles highlight as well how free speech and academic freedom, at least in terms of how actually operationalized on campus, continue to generate disagreement and contention. The special issue presents opportunities for readers to further synthesize and develop their thinking on established topics, such as potential First Amendment rights for faculty academic freedom in public higher education. The articles also provide a venue to engage with ideas about how to enrich initiatives at higher education institutions to further dialogue and learning around free speech and open inquiry.

As editor for this special issue, I want to express my deep gratitude to the authors for contributing their time and expertise to this project. Thanks is also due to *JCUL* editor Barbara A. Lee for her tremendous support and dedicated work on this special issue. I would also like to express appreciation to the National Association of College and University Attorneys, publisher of *JCUL*, and their excellent staff for support of this special issue and the journal. Last but not least, I want to thank my University of Kentucky colleague Zitsi Mirakhur for her excellent assistance in hosting an online symposium held as a precursor to this special issue.