

# THE LAW OF TENURE IN THE ERA OF TRUMP:

## Attempted Bans, New Reviews, and Threats to Academic Freedom and Property Rights

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### *Abstract*

*Beginning in 2015 and continuing over the next decade, legislation aimed at weakening or terminating tenure rights proliferated through Republican-controlled state governments. This rise in partisan challenges to the legal rights of tenured faculty coincided with the culture wars of the 1990s and early 2000s, partly aimed at higher education, that were exploited by Donald Trump and helped get him elected. Trump's policies targeting "divisive issues" like critical race theory, and interpreting diversity, equity, and inclusion (DEI) programs as discriminatory, rippled through state-based legislation that would cripple tenure and stifle academic freedom.*

*This article traces the early history of tenure in Europe and the United States, and it describes U.S. Supreme Court decisions protecting academic freedom and property rights in tenure. Challenging these rights, Trump's rhetoric and policies, from his first campaign to the first five months in his second term, echoed across state legislation and regulations considered through mid-2025 that jeopardized faculty members' employment if they teach or research diversity or critical race issues (Florida, Alabama), required proof of "intellectual diversity" to attain and retain tenure (Indiana, Ohio), withdrew property rights from tenure (Kansas, Texas), imposed post-tenure reviews (Arkansas, Florida, Georgia, Kentucky), and proposed outright bans on tenure (Iowa, North Carolina, Nebraska).*

*The Trump administration itself used cuts in federal funding, prohibitions on DEI programs, demands for greater government efficiency, and investigations into alleged violations of Titles VI and IX as leverage to force colleges—and faculty—to comply with its vision of higher education. The situation was compared to the McCarthy era and was called "an existential threat." More broadly, Trump's attempts to control higher education appeared to be part of a more extensive strategy resembling the "illiberal democracy" of Hungary under Prime Minister Viktor Orbán, raising alarms over the rise in the United States of a twenty-first-century model of autocracy called "competitive authoritarianism."*

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*Those who won our independence ... knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination.*

– U.S. Supreme Court Justice Louis Brandeis<sup>1</sup>

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1 Whitney v. Cal., 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

## INTRODUCTION

In her 2025 State of the State address, Sarah Huckabee Sanders, the governor of Arkansas who had served as White House press secretary under President Donald Trump from 2017 to 2019,<sup>2</sup> squarely placed tenure within the culture wars of the twenty-first century. She said: “Arkansas students go to our colleges and universities to learn, not to be bombarded with anti-American, historically illiterate, woke nonsense. We will make it so that any professor—tenured or not—that wastes time indoctrinating instead of educating can be terminated from their job.”<sup>3</sup> One month later, Senate Bill 246—named the “ACCESS bill” for Acceleration, Common Sense, Cost, Eligibility, and Scholarships<sup>4</sup>—was introduced in the Arkansas Legislature. Among its provisions, the bill allowed a post-tenure review process to result in “removal of tenure status,” and it would also allow state-supported institutions of higher education to “require an immediate for[-] cause review of a faculty member, including a faculty member with tenure, at any time”—if among other circumstances—the institution determines that the faculty member “[e]xhibited professional incompetence in the performance of his or her mandatory job duties,” or “[e]ngaged in unprofessional conduct that adversely affects the state-supported institution of higher education or the faculty member’s performance of duties or meeting of responsibilities.”<sup>5</sup> The bill passed quickly through the Arkansas Legislature, and Governor Sanders signed it on March 18, 2025.<sup>6</sup>

The legislation in Arkansas followed an anti-tenure trend that arguably began in 2015 in Wisconsin, and at least seven states in 2025 alone considered legislation “to crack down on tenure at public institutions, either by effectively eliminating it, calling for a stricter system of post-tenure review, or some combination.”<sup>7</sup> Building on that foundation, this study scans the decade between 2015 and the spring legislative sessions in 2025 for legal attacks on tenure, encompassing legislation, regulations, and lawsuits challenging the constitutionality of those laws.

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2 Archives of Women’s Pol. Comm., Carrie Chapman Catt Center for Women and Politics, Iowa State University, Sarah Huckabee Sanders (2025), <https://awpc.cattcenter.iastate.edu/directory/sarah-huckabee-sanders/>.

3 Press Release, Arkansas Governor’s Office, Governor Sanders Delivers State of the State Address (Jan. 15, 2025), [https://governor.arkansas.gov/news\\_post/governor-sanders-delivers-state-of-the-state-address-2/](https://governor.arkansas.gov/news_post/governor-sanders-delivers-state-of-the-state-address-2/).

4 Press Release, Arkansas Governor’s Office, Sanders Announces Arkansas ACCESS, Higher Education Reform Legislation (Feb. 14, 2025), [https://governor.arkansas.gov/news\\_post/sanders-announces-arkansas-access-higher-education-reform-legislation/](https://governor.arkansas.gov/news_post/sanders-announces-arkansas-access-higher-education-reform-legislation/).

5 S.B. 246, 95th Gen. Assem., Reg. Sess. (Ark. 2025).

6 Ainsley Platt, *Sanders Signs Higher Education ACCESS Act into Law During Economic Conference*, ARK. DEMOCRAT GAZETTE (Mar. 19, 2025), <https://www.arkansasonline.com/news/2025/mar/19/sanders-signs-higher-education-access-act-into/>; see 2025 Ark. Acts 340.

7 Maya Stahl, *States Are Once Again Taking Aim at Tenure. This Time Might Be Different*, CHRON. HIGHER EDUC. (Feb. 27, 2025), <https://www.chronicle.com/article/states-are-once-again-taking-aim-at-tenure-this-time-might-be-different>.

The backdrop to these state-based actions is the influence of the policies and rhetoric of Donald Trump, as a candidate and as president during each of his terms in office, regarding higher education. His first term's criticism of "divisive concepts,"<sup>8</sup> and his second term's ban on "diversity, equity, and inclusion" programs,<sup>9</sup> spawned legislation in many Republican-led states that jeopardized tenure at public institutions. In 2025, federal civil rights investigations and cuts in federal research funding under the Trump administration put the work of faculty at several Ivy League institutions at risk, with the objective "to shift the ideological tilt of the higher education system, which [Trump and his top aides] see as hostile to conservatives and intent on perpetuating liberalism."<sup>10</sup> This "campaign to expunge 'woke' ideology from college campuses"<sup>11</sup> was just one move in a larger project. From the perspective of "some of Mr. Trump's closest advisers and key donors, leftists have seized control of America's most powerful institutions, including pillars of higher education, and wresting back power is key to the future of Western civilization."<sup>12</sup>

Scholars see the "ideological threads of authoritarianism" in Trump's views of culture and history that threaten to "overturn American democracy."<sup>13</sup> Unlike a dictatorship, however, Trump's approach resembled "a more 21st-century model of autocracy: competitive authoritarianism—a system in which parties compete in elections but incumbent abuse of power systematically tilts the playing field against the opposition."<sup>14</sup> Incumbents under competitive authoritarianism "deploy the machinery of government to punish, harass, co-opt, or sideline their opponents—disadvantaging them in every contest, and, in so doing, entrenching themselves in power."<sup>15</sup>

Hungary under Viktor Orbán's second stint as prime minister, starting in 2010, is a quintessential example of competitive authoritarianism. Orbán himself defined "the new state" he was constructing in Hungary as "an illiberal state, a non-liberal state. It does not reject the fundamental principles of liberalism such as freedom, ... but it does not make this ideology the central element of state organization, but instead includes a different, special, national approach."<sup>16</sup> Through "a precise and

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8 Exec. Order No. 13,950, § 2, 85 Fed. Reg. 60,683 (Sept. 28, 2020), revoked by Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

9 Exec. Order No. 14,173, 90 Fed. Reg. 8,633 (Jan. 31, 2025).

10 Michael C. Bender et al., *Inside the Plan to Target Funds for Universities*, N.Y. TIMES, Apr. 16, 2025, at A1.

11 *Id.*

12 *Id.*

13 HEATHER COX RICHARDSON, *DEMOCRACY AWAKENING: NOTES ON THE STATE OF AMERICA* 141 (2023).

14 Steven Levitsky, *The New Authoritarianism*, THE ATLANTIC (Feb. 10, 2025), <https://www.theatlantic.com/ideas/archive/2025/02/trump-competitive-authoritarian/681609/>. See also STEVEN LEVITSKY & LUCIAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* 5 (2010) ("Such regimes are competitive in that opposition parties use democratic institutions to contest seriously for power, but they are not democratic because the playing field is heavily skewed in favor of incumbents. Competition is thus real but unfair.").

15 Levitsky, *supra* note 14.

16 Prime Minister Viktor Orbán, Speech at the 25th Bálványos Summer Free University and Student

fundamental transformation of political institutions,” Orbán and his party, Fidesz, passed a new constitution that increased their power, recast the judiciary, and brought universities and religious groups “under control with registration and other requirements.”<sup>17</sup> Orbán’s specific actions toward higher education, and the parallels between Orbán and Trump to control universities as one play within a larger authoritarian playbook, are explored in Parts IV and V.

This article relies on the modern conception of tenure, which means a conditional guarantee of faculty employment without a mandatory date of termination.<sup>18</sup> To attain tenure, faculty must persist through a probationary period of peer review, and after attaining this “Holy Grail” of academic employment,<sup>19</sup> they may continue to work at their institution until they want to leave, subject to termination only for adequate cause, and with procedural due process protections.<sup>20</sup> As a cornerstone of higher education, tenure protects faculty members’ academic freedom to engage in independent scholarly inquiry without fearing political or ideological interference.<sup>21</sup>

## I. TENURE: THE FIRST 800 YEARS

### A. *European Roots of Tenure: From the Holy Roman Empire to Mid-Nineteenth Century Prussia*

Laws have protected, at least in some way, the professional status of instructors of higher learning for over eight hundred years. Emperor Fredrick I Barbarossa of Germany and the Holy Roman Empire, to assure that the scholars who taught in medieval universities known as *studia generalia* (universal places of study) could move freely throughout the empire, provided them a type of job security under

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Camp (July 26, 2014), <https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>.

17 Ann Grzymala-Busse, *Global Populisms and Their Impact*, 76(S1) *SLAVIC REV.* S3, S7 (2017).

18 William Van Alstyne, *Tenure: A Summary, Explanation, and “Defense,”* 57 *AAUP BULL.* 328, 328 (1971).

19 Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 *CATH. U. L. REV.* 67, 68 (2006).

20 *Id.* at 67. It is important to distinguish between the rights of faculty at public and private institutions. While “the faculty contract ... is the starting point for determining both a public and a private institution’s responsibilities,” “[p]ublic institutions must be concerned ... with constitutional considerations under the First and Fourteenth Amendments,” including the right to free speech under the First Amendment and the due process clause under the Fourteenth Amendment. WILLIAM A. KAPLIN ET AL., *THE LAW OF HIGHER EDUCATION: ESSENTIALS FOR LEGAL AND ADMINISTRATIVE PRACTICE* 294, 303, 304 (2024).

21 Michael S. McPherson & Morton Owen Schapiro, *Tenure Issues in Higher Education*, 13 *J. ECON. PERSPECTIVES* 85, 94 (1999). While this article broaches academic freedom, its major focus is the protection of employment under tenure. For an in-depth examination of the law of academic freedom and its five “zones”—“classrooms and laboratories,” faculty as “a citizen in the academy,” “faculty members as citizens in society,” “institutional academic freedom,” and “academic freedom for others on campus”—see MICHAEL A. OLIVAS & AMY GAJDA, *THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT* 135–274 (4th ed. 2016). See also KEITH E. WHITTINGTON, *YOU CAN’T TEACH THAT! THE BATTLE OVER UNIVERSITY CLASSROOMS* (2024).

a decree issued in 1155 known as the *Authentica Habita*, which guaranteed that scholars traveling within the Holy Roman Empire would receive safe passage, and if they suffered an unlawful injury during their travels, the person committing the unlawful act would reimburse them for their lost wages.<sup>22</sup> As word of the *Authentica Habita* spread through Europe, heads of surrounding nations, including the Roman Papacy, extended similar protection to scholars within their countries.<sup>23</sup>

The protection of a faculty member's freedom of expression has its roots in a major reform made by Wilhelm von Humboldt when he was the minister of education in Prussia between 1809 and 1810: the need for freedom in teaching and learning.<sup>24</sup> This reform led to the establishment of three principles undergirding German universities, which included the unity of teaching and research, self-governance by professors, and academic freedom, or *Lehrfreiheit*.<sup>25</sup>

The concept of *Lehrfreiheit* was enshrined in the Prussian constitution adopted in 1850, which declared that "Science and its teachings shall be free."<sup>26</sup> While the idea of *Lehrfreiheit* did not provide unconditional employment for faculty, "it did institute the belief of freedom of speech within the classroom, as well as establishing a professional environment that promoted research and instruction as the responsibilities of a faculty member without fear of recrimination."<sup>27</sup>

## ***B. Higher Education in the United States: From Colonial Terms of Employment to the Birth of the AAUP***

### *1. Terms of Employment*

The issue of "term of employment" for faculty within the American colonial colleges started at Harvard in 1716. The Corporation for Harvard College adopted the Triennial Act, which limited tutor (faculty) appointments to three-year terms with an option for renewal.<sup>28</sup> The Triennial Act addressed a limitation in Harvard's charter. Before its adoption, the Corporation had the authority to dismiss a tutor only for cause.<sup>29</sup> In 1760, Harvard's Corporation added language to its charter limiting the amount of time that a tutor could spend within a specific academic rank to a maximum of eight years.<sup>30</sup>

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22 MATTHEW J. HERTZOG, PROTECTIONS OF TENURE AND ACADEMIC FREEDOM IN THE UNITED STATES: EVOLUTION AND INTERPRETATION 24 (2017); see also 548 THE HERITAGE OF EUROPEAN UNIVERSITIES (Nuria Sanz & Sjur Bergan eds., 2006).

23 HERTZOG, *supra* note 22.

24 *Id.* at 29.

25 *Id.*; see also WILHELM HUMBOLDT, THE SPHERE AND DUTIES OF GOVERNMENT (Joseph Coulthard, Jr. trans.) (London: John Chapman, 1854).

26 PRUSSIA CONSTITUTION of January 31, 1850, title II, art. 20.

27 HERTZOG, *supra* note 22, at 38.

28 *Id.* at 35; see also 1 JOSIAH QUINCY, THE HISTORY OF HARVARD UNIVERSITY (Cambridge: J. Owen, 1840).

29 HERTZOG, *supra* note 22, at 38.

30 *Id.*; see also 2 JOSIAH QUINCY, THE HISTORY OF HARVARD UNIVERSITY (Boston: Crosby, Nichols, Lee & Co., 1860).

Like Harvard, other colonial colleges—principally Yale and William and Mary—entered contractual agreements with their faculty members in the mid-eighteenth century, introducing “the concept of faculty retention based on duration of time served in the profession rather than collegial consensus.”<sup>31</sup> A common practice was to hire a faculty member to a one-year contract that renewed automatically at the end of the year.<sup>32</sup>

In the nineteenth century, at institutions of higher education across the country, professorships comprising various levels of employment status replaced the tutor system. From lowest to highest, the ranks were instructor, assistant professor, associate professor, and professor.<sup>33</sup> Tutors were now ranked below instructor, creating “a two-class system where a non-promoted tutor could be reappointed after a 3-year term; however, the tutor wouldn’t receive the benefit of job security that was awarded to his academically ranked colleagues.”<sup>34</sup>

## 2. *The Evolution of Academic Freedom from the Nineteenth Century to the Early Twentieth Century*

During the nineteenth century, thousands of Americans who studied at the non-sectarian universities in Germany brought home not only their academic credentials,<sup>35</sup> but also the concept of *Lehrfreiheit*, which provided “academic professionals the freedom to research and present their findings without the fear of retribution from the administration.”<sup>36</sup> Before the twentieth century, universities in the United States expected faculty to adhere to the beliefs of the institution, of donors, and of their governing boards.<sup>37</sup>

Academic freedom expanded at the dawn of the twentieth century, but it had its limits, as described by University of Chicago President William R. Harper in his 1903 report to his board of trustees. Quoting a recent convocation address of his, Harper wrote, “Freedom of expression must be given the members of a university faculty, even though it be abused; for, as has been said, the abuse of it is not so great an evil as the restriction of such liberty.”<sup>38</sup> Harper proceeded to list six examples of abuse, including when a faculty member “proclaim[s] to the public a truth

31 HERTZOG, *supra* note 22, at 36.

32 *Id.*; see also RYAN AMACHER & ROGER MEINERS, *FAULTY TOWERS: TENURE AND THE STRUCTURE OF HIGHER EDUCATION* (2004).

33 HERTZOG, *supra* note 22, at 36–37; see also FREDRICK RUDOLPH, *THE AMERICAN COLLEGE & UNIVERSITY* (1990).

34 HERTZOG, *supra* note 22, at 37; see also CHRISTOPHER LUCAS, *AMERICAN HIGHER EDUCATION: A HISTORY* (2006).

35 Between 1870 and 1900, about 8,000 U.S. college students studied in Germany. Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 *TEX L. REV.* 1265, 1269 (1988).

36 HERTZOG, *supra* note 22, at 38–39.

37 *Id.* at 14; see also AMACHER & MEINERS, *supra* note 32; BENJAMIN GINSBERG, *THE FALL OF THE FACULTY* 132, 137–39 (2011).

38 WILLIAM R. HARPER, *PRESIDENT’S REPORT* (1903), reprinted in 1 *THE DECENNIAL PUBLICATIONS OF THE UNIVERSITY OF CHICAGO*, at xxiii (A Committee Appointed by the Senate ed., University of Chicago Press, 1903).

discovered which is yet unsettled and uncertain;" "takes advantage of a classroom [sic] exercise to propagate the partisan views of one or another of the political parties;" "seeks to influence his pupils or the public by sensational methods;" "undertakes to speak authoritatively on subjects which have no relationship to the department in which he was appointed to give instruction;" "undertakes to instruct his colleagues or the public concerning matters in the world at large in connection with which he has had little or no experience;" and "fails to exercise that quality ordinarily called common sense, which, it must be confessed, in some cases the professor lacks."<sup>39</sup> While a professor could "do all of these things and yet remain an officer in the University," Harper wrote that a professor's "resignation will be demanded, and will be accepted, when, in the opinion of those in authority, he has been guilty of immorality, or when for any reason he has proved himself to be incompetent to perform the service called for."<sup>40</sup>

President Nicholas Butler of Columbia University added "loyalty" as a key consideration to retain faculty. In 1921, Butler wrote:

Security of tenure is desirable, but competence and loyalty are more desirable still, and a secure tenure purchased at the price of incompetence and disloyalty must sound a death-knell to every educational system or institution where it prevails. These are all matters of grave importance in the government of an educational system or an educational institution. They cannot be dismissed with phrases or formulas, but must be met and decided in accordance with sound principle and the public interest.<sup>41</sup>

A prominent case highlighting faculty members' vulnerability over academic freedom, especially when it clashed with a university's administration, occurred in 1900, when Stanford University fired economist Edward Ross. Recruited in 1893, Ross increasingly took public positions—such as opposing the use of Asian laborers and supporting railway union strikes—that were sensitive to Jane Stanford, a trustee of the university and the widow of Leland Stanford, the founder of the university who made his fortune building railroads.<sup>42</sup> After Jane Stanford demanded Ross's resignation, university president David Jordan fired Ross in June 1900.<sup>43</sup>

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39 *Id.*

40 *Id.*

41 NICHOLAS MURRAY BUTLER, *SCHOLARSHIP AND SERVICE: THE POLICIES AND IDEALS OF A NATIONAL UNIVERSITY IN A MODERN DEMOCRACY* 170–71 (1921).

42 WILLIAM G. TIERNEY & ESTELA MARA BENSIMON, *PROMOTION AND TENURE: COMMUNITY AND SOCIALIZATION IN ACADEME* 23–24 (1996). Ross's opposition to Asian laborers was actually based on White supremacy. As Chinese workers began leaving the United States after enactment of the Chinese Exclusion Act of 1882, Japanese immigrants replaced them, and in a public speech, Ross said Japanese immigrants represented a threat to American workers and should be banned. Champions of capitalism, like the Stanfords, preferred the cheap source of labor provided by immigrants over native-born workers. Sunmin Kim, *Edward A. Ross*, *Am. Soc. Ass'n*, (Mar. 18, 2024), <https://www.asanet.org/edward-a-ross>.

43 HERTZOG, *supra* note 22, at 4.

### 3. *The AAUP and the Principles of Academic Freedom and Tenure*

The precariousness of faculty members' job security led to the creation of the American Association of University Professors (AAUP). In 1915, Arthur Lovejoy, a philosophy professor at Johns Hopkins University who had investigated violations of academic freedom, organized a meeting in New York of 650 faculty members from across the country "with the stated goal of defining academics as professionals and not simply as employees."<sup>44</sup> At the end of the two-day meeting, the attendees established the AAUP, and by the end of 1915, the organization adopted its founding document, the 1915 Declaration of Principles on Academic Freedom and Academic Tenure.<sup>45</sup> The document defined "academic freedom" to have three elements: "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action."<sup>46</sup> With regard to tenure, the document stated: "the tenure of professorships and associate professorships, and of all positions above the grade of instructor after ten years of service, should be permanent (subject to ... removal upon charges)."<sup>47</sup> Institutions "gradually began to recognize tenure as a right of faculty" in the years following the publication of the 1915 principles.<sup>48</sup>

The probationary period of ten years was not consistently adopted by institutions,<sup>49</sup> and in 1940, the AAUP issued a new document called the *Statement of Principles on Academic Freedom and Tenure* that reduced the probationary timeframe from ten years to no more than seven years.<sup>50</sup> At the end of the probationary period, "teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies."<sup>51</sup>

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44 *Id.* See also HANS-JOERG TIEDE, UNIVERSITY REFORM: THE FOUNDING OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 2 (2015) ("the AAUP was not founded specifically as the primary defender of academic freedom that it subsequently became: in addition to bringing about changes to the prevailing mode of governance, the association was founded to serve as a national body to speak for the profession as a whole in response to efforts to organize and standardize American higher education").

45 Am. Ass'n Univ. Professors, History of the AAUP, <https://www.aaup.org/about/history-aaup> (last visited July 8, 2025).

46 AM. ASS'N UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 292 app. I (10th ed. 2006).

47 *Id.* at 300.

48 HERTZOG, *supra* note 22, at 5.

49 *Id.*

50 Am. Ass'n Univ. Professors, 1940 Statement of Principles on Academic Freedom and Tenure 15, [https://www.aaup.org/file/1940\\_Statement\\_of\\_Principles.pdf](https://www.aaup.org/file/1940_Statement_of_Principles.pdf). The 1940 statement was itself a restatement of the principles adopted following a conference organized by the American Council on Education in 1925 to craft a statement of principles on academic freedom and tenure that was shorter than the AAUP's 1915 declaration. This 1925 Conference Statement on Academic Freedom and Tenure was endorsed by the AAUP in 1926. *Id.* at 13.

51 *Id.* at 15. Adequate cause includes incompetence, neglect of duty, moral turpitude, criminal behavior, poor performance, dishonesty, ethical violations, breach of institutional policy, or improper personal conduct, such as sexual harassment or substance abuse. See Cathy A. Trower, *What Is Current Policy?*, in THE QUESTIONS OF TENURE 32, 57 (Richard P. Chait ed., 2002). For a legal

The 1940 document also fleshed out the meaning of academic freedom. The document stated:

1. Teachers are entitled to full freedom in research and in the publication of the results . . . .
2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. . . .
3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.<sup>52</sup>

### C. *Post–World War II, the Red Scare, and Tenure as a Property Right in the 1970s*

#### 1. *The G.I. Bill, Increases in Enrollment, and the Growth in Faculty*

Recognizing a need to help the 15 million returning servicemembers integrate into civilian life as World War II came to an end,<sup>53</sup> Congress passed, and Franklin Roosevelt signed, the Servicemembers' Readjustment Act of 1944, better known as the G.I. Bill.<sup>54</sup> Among other benefits, the G.I. Bill paid for tuition, books, and supplies for one year of college for almost all veterans with one year's service or less, and an additional year of college for each additional year served.<sup>55</sup> The program attracted 2.2 million former servicemembers to enroll in college between 1945 and 1949.<sup>56</sup> This influx of new students led to a hiring spree for faculty members. Between the academic years 1939–40 and 1949–50, the number of faculty at postsecondary institutions in the United States increased 69%, from 146,929 to 246,722.<sup>57</sup>

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examination of the meaning of "financial exigencies," see Michael W. Klein, *Declaring an End to "Financial Exigency"?: Changes in Higher Education Law, Labor, and Finance, 1971–2011*, 38 J.C. & U.L. 221 (2011).

52 Am. Ass'n Univ. Professors, *supra* note 50, at 14.

53 National Archives, Servicemen's Readjustment Act (1944), <https://www.archives.gov/milestone-documents/servicemens-readjustment-act>.

54 Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, § 400, 58 Stat. 284.

55 Richard M. Freeland, *The World Transformed: A Golden Age for American Universities, 1945–1970*, in *THE HISTORY OF HIGHER EDUCATION* 590 (Lester F. Goodchild & Harold S. Wechsler eds., 2d ed. 1997).

56 *Id.*

57 Nat'l Center for Educ. Statistics, *Historical Summary of Faculty, Enrollment, Degrees Conferred, and Finances in Degree-Granting Postsecondary Institutions: Selected Academic Years, 1869–70 Through 2020–21*, DIG. EDUC. STATISTICS, table 301.20 (2022), [https://nces.ed.gov/programs/digest/d22/tables/dt22\\_301.20.asp](https://nces.ed.gov/programs/digest/d22/tables/dt22_301.20.asp).

## 2. *McCarthyism and the Protection of Academic Freedom by the Supreme Court*

The advent of the Cold War, and high-profile cases of Soviet espionage in the United States,<sup>58</sup> tested the strength of tenure policies. Senator Joseph McCarthy of Wisconsin and others accused professors of supporting the Communist Party and, in turn, the Soviets. Accusations—featuring little evidence—against professors at fifty-eight institutions were made between 1947 and 1956,<sup>59</sup> and in 1949, the University of California required faculty to sign a loyalty oath and swear that they were not members of the Communist Party.<sup>60</sup> Although many targeted professors who had been members of the Communist Party had left the party by the 1940s, colleges and universities dismissed them anyway, with tenure providing little protection.<sup>61</sup>

During the McCarthy era, a faculty member in New Hampshire charged under state law with being subversive brought his case to the U.S. Supreme Court to assert his rights under the Fourteenth Amendment, and the decision has become a cornerstone of academic freedom.<sup>62</sup> In 1951, New Hampshire enacted a law under which an individual was identified as a “subversive person” if they aided in any act intended to assist in the alteration of the constitutional form of government or overthrow the government by force or violence.<sup>63</sup> The law prohibited a “subversive person” from state employment, including as teachers at a public educational institution, and it required public employees and candidates for elective office to make a sworn statement that they were not “subversive persons.”<sup>64</sup>

On January 5, 1954, the attorney general of New Hampshire, as part of an investigation authorized by the legislature, subpoenaed Paul Sweezy, a guest lecturer at the University of New Hampshire, to testify about his past conduct and associations, including his service during World War II with the Office of Strategic Services.<sup>65</sup> Sweezy denied ever being a member of the Communist Party or part of any program to overthrow the government by force or violence,<sup>66</sup> but he declined to answer questions that “were not pertinent to the subject under inquiry as well

58 “Ever since Hiroshima, Americans had been taught to depend on nuclear superiority, to assume that the technology involved was uniquely their own. When the Russians matched it, the people felt betrayed. Someone must have given these secrets away. Certainly the Soviets could not have developed such a weapon by themselves. On July 18[ 1950] . . . FBI agents arrested a New York engineer named Julius Rosenberg. A month later his wife Ethel and his friend Morton Sobell joined him in prison. All were charged with transmitting atomic secrets to Russia.” DAVID M. OSHINSKY, *A CONSPIRACY SO IMMENSE: THE WORLD OF JOE McCARTHY* 172 (1983).

59 LIONEL S. LEWIS, *COLD WAR ON CAMPUS: A STUDY OF THE POLITICS OF ORGANIZATIONAL CONTROL* 235 (1988).

60 GEORGE R. STEWART, *THE YEAR OF THE OATH: THE FIGHT FOR ACADEMIC FREEDOM AT THE UNIVERSITY OF CALIFORNIA* 20 (1950).

61 ELLEN SCHRECKER, *NO IVORY TOWER: McCARTHYISM AND THE UNIVERSITIES* 265–66 (1986).

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

63 New Hampshire Subversive Activities Act of 1951, N.H. Rev. Stat. Ann., 1955, ch. 588, *repealed* 1973, N.H. Laws 1011, ch. 532:26, XVIII.

64 N.H. Rev. Stat. Ann., 1955, ch. 588, *supra* note 63.

65 *See Sweezy*, 354 U.S. at 238.

66 *Id.*

as those which transgress the limitations of the First Amendment," including his knowledge of the Progressive Party in New Hampshire and people with whom he was acquainted in the party.<sup>67</sup>

The attorney general summoned Sweezy for a second round of questioning on June 3, 1954, during which Sweezy was asked about a guest lecture he delivered on March 22, 1954 to a class of one hundred students in a humanities course at the University of New Hampshire.<sup>68</sup> Sweezy declined to answer the following questions, saying again that they were not pertinent to the inquiry and they infringed on his rights under the First Amendment:

"What was the subject of your lecture?"

"Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?"

"Did you advocate Marxism at that time?"

"Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?"

"Did you in this last lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialism?"

"Do you believe in Communism?"<sup>69</sup>

The attorney general brought Sweezy before a trial court, where Sweezy continued to refuse to answer the questions, and the court held him in contempt.<sup>70</sup> Sweezy appealed to the Supreme Court of New Hampshire, alleging his right of political affiliation under the Fourteenth Amendment had been violated, but the court affirmed the lower court's decision.<sup>71</sup> Sweezy appealed again, to the U.S. Supreme Court.

Chief Justice Earl Warren, writing the majority decision, overturned the New Hampshire courts and agreed that the state had infringed Sweezy's constitutional rights and academic freedom. Warren wrote:

Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.

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67 *Id.* at 239–40, 241–42.

68 *Id.* at 243.

69 *Id.* at 243–44.

70 *See id.* at 244–45.

71 *Id.* at 245; *see also* *Wyman v. Sweezy*, 100 N.H. 103, 121 A.2d 783 (1956), *rev'd*, *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. ... Scholarship cannot flourish in an atmosphere of suspicion and distrust. 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.<sup>72</sup>

Going a step further, Justice Felix Frankfurter, quoting a statement from a conference in South Africa in his concurring opinion, articulated the “four essential freedoms” of the university:

“It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>73</sup>

### 3. *The 1970s: Is Tenure a “Property Right”? It Depends*

With tenure firmly entrenched nationwide by the mid-to-late 1960s,<sup>74</sup> the next major legal battle involved faculty members’ rights to due process when their contracts were not renewed. In *Board of Regents v. Roth*<sup>75</sup> and *Perry v. Sindermann*,<sup>76</sup> the U.S. Supreme Court considered whether faculty members have a right to a fair hearing under the due process clause of the Fourteenth Amendment when the loss of their position deprives them of a “property interest” or a “liberty interest.”<sup>77</sup>

In *Roth*, David Roth was hired as an assistant professor of political science at Wisconsin State University-Oshkosh for a fixed term of one academic year, beginning September 1, 1968, and ending June 30, 1969, and he was informed at the end of that year that he would not be rehired.<sup>78</sup> Wisconsin’s tenure law at the time made it clear that Roth was in a probationary period, stating: “All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher.”<sup>79</sup> Rules promulgated by the Board of Regents required that nontenured teachers must be notified before February 1 whether they would be retained, while “no reason for non-retention need be given,”

72 See *Sweezy*, 354 U.S. at 250.

73 *Id.* at 263 (quoting The Open Universities in South Africa 10–12. (A statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand)).

74 HERTZOG, *supra* note 22, at 7.

75 408 U.S. 564 (1972).

76 408 U.S. 593 (1972).

77 U.S. CONST. amend. XIV, § 1: “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

78 *Roth*, 408 U.S. at 566.

79 *Id.* n.2 (citing Wis. Stat. § 37.31(1) (1967)).

and “[n]o review or appeal is provided in such case.”<sup>80</sup> Complying with the rules, the president of Wisconsin-Oshkosh “informed the respondent before February 1, 1969, that he would not be rehired for the 1969–70 academic year,” giving “no reason for the decision and no opportunity to challenge it at any sort of hearing.”<sup>81</sup> Roth sued in federal court, alleging that the university’s failure both to give him notice of any reason for his dismissal and an opportunity for a hearing violated the right to procedural due process under the Fourteenth Amendment.<sup>82</sup>

The key issue framed by the Supreme Court was “whether the [professor] had a constitutional right to a statement of reasons and a hearing on the university’s decision not to rehire him for another year.”<sup>83</sup> The Court ruled that Roth had no such right because the nonrenewal had not violated either a “liberty” or a “property” interest. With regard to “liberty,” the Court wrote:

The state, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. ... In the present case ... there is no suggestion whatever that the respondent’s “good name, reputation, honor, or integrity” is at stake.

Similarly, there is no suggestion that the state, in declining to reemploy the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.<sup>84</sup>

Concluding its consideration of liberty rights, the Court wrote that “all that clearly appears is that [Roth] was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of ‘liberty’ when he simply is not rehired in one job but remains as free as before to seek another.”<sup>85</sup>

Analyzing Roth’s property interest, the Court considered Roth’s underlying right to a hearing. The Court reasoned:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it ... It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims

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80 *Id.* at 567.

81 *Id.* at 568.

82 *Id.* at 568–69. Roth also asserted rights under the First Amendment, alleging he was not retained because he had made critical statements about the university. *Id.* at 568 n.5.

83 *Id.* at 569.

84 *Bd. of Regents v. Roth*, 408 U.S. 564, 573–74 (1972).

85 *Id.* at 575.

of entitlement to those benefits ... Respondent's "property" interest in employment at Wisconsin State University–Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.<sup>86</sup>

The Court determined that under Roth's circumstances, he "surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the university authorities to give him a hearing when they declined to renew his contract of employment."<sup>87</sup>

In a case decided the same day as *Roth*, Robert Sindermann fared better against the Texas state college system than Roth had against the Wisconsin system. Over a ten-year period between 1959 and 1969, Perry worked at three institutions under one-year contracts, serving the last four years at Odessa Junior College. In the 1968–69 academic year, Sindermann was elected president of the Texas Junior College Teachers Association, through which he testified several times before the Texas Legislature and advocated, among other issues, to change Odessa's status from a two-year to a four-year institution, which the Board of Regents opposed.<sup>88</sup> In May 1969, the Board of Regents voted not to offer Sindermann a new contract, and, despite issuing a press release charging him with insubordination, it did not offer an official reason for not renewing his contract and provided no opportunity for a hearing.<sup>89</sup>

Like Roth, Sindermann argued that his administration's failure to provide an opportunity for a hearing had denied him his right to procedural due process under the Fourteenth Amendment.<sup>90</sup> Unlike *Roth*, the Supreme Court found "an interest in continued employment" at the college under "a *de facto* tenure program, and that [Sindermann] had tenure under that program" because he had "legitimately relied upon an unusual provision that had been in the college's official Faculty Guide for many years," which said:

*Teacher Tenure:* Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his coworkers and his superiors, and as long as he is happy in his work.<sup>91</sup>

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86 *Id.* at 577–78.

87 *Id.* at 578.

88 *Perry v. Sindermann*, 408 U.S. 593, 594–95 (1972).

89 *Id.* at 595.

90 *Id.* Also like Roth, Perry argued that he was not rehired because of his public criticism of the institution, which violated his right to free speech. *Id.*

91 *Id.* at 600.

Sindermann had also relied on guidelines adopted by the Coordinating Board of the Texas College and University System that provided that teachers employed in the state college and university system for seven years or more had “some form of job tenure.”<sup>92</sup>

Because of Sindermann’s reliance on Odessa College’s de facto tenure system, the Court found he had a property interest. According to the Court:

We have made clear in *Roth* ... that “property” interests subject to procedural due process protection are not limited by a few rigid technical forms. Rather, “property” denotes a broad range of interests that are secured by “existing rules or understandings.” ... A person’s interest in a benefit is a “property” interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing... . In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent “sufficient cause.” ... [W]e agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of “the policies and practices of the institution.” ... [S]uch proof would obligate officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.<sup>93</sup>

Taken together, the *Roth* and *Perry* cases provide clear guidance to colleges and universities regarding due process. “Whenever a nonrenewed faculty member has a basis for making a liberty or property interest claim, administrators should consider providing a hearing.”<sup>94</sup> Such a hearing reflects the seriousness of potential dismissal, which can “effectively end the individual’s academic career.”<sup>95</sup> Therefore, “the termination decision should require a detailed, fair review conducted and supported by the judgment of peers.”<sup>96</sup>

## II. EROSION OF TENURE IN THE RUN-UP TO THE TRUMP ERA

### A. *The Fragility of Higher Education Finance, Plus the Culture Wars*

Before examining efforts between 2015 and 2025 to dilute or dismantle tenure, it is important to understand the shrinking numbers of tenured and tenure-track faculty at institutions of higher education in the United States. According to the American Association of University Professors’ analysis of National Center for Education Statistics data, about 39% of all faculty members either had tenure or

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92 *Id.*

93 *Id.* at 601–03.

94 KAPLIN ET AL., *supra* note 20, at 320.

95 Adams, *supra* note 19, at 76.

96 *Id.*

were on the tenure track in 1987, but that share fell to 24% in 2021.<sup>97</sup> Institutions are increasingly relying on contingent faculty who are ineligible for tenure.<sup>98</sup> In 1987, about 47% of faculty at colleges and universities in the United States held contingent appointments, and that number increased to 68% in 2021. Put succinctly by Timothy R. Cain, a professor of higher education at the University of Georgia: “Any conversation about tenure should start with the understanding that most faculty don’t have it.”<sup>99</sup>

Cost savings significantly explain why institutions employ fewer tenured faculty. A study of changing faculty employment at four-year colleges and universities in the United States found that higher education institutions tend to “employ faculty whose salaries and benefits are relatively less expensive.”<sup>100</sup> Explaining further, the authors wrote, “The large gap in compensation between part-time faculty and full-time faculty has certainly contributed to the increasing use of part-time faculty over time . . . . [T]he slowly deteriorating financial situations at most colleges and universities have led to an over-reliance on contingent academic workers.”<sup>101</sup>

In the twenty-first century, the Great Recession of 2007–2009 and then the 2020 recession caused by the COVID-19 pandemic hit higher education hard and led to significant staff reductions. As a result of the Great Recession, in 2010, “state and locally financed educational appropriations for public higher education hit the lowest level . . . per FTE . . . in a quarter century, driven by accelerating enrollment growth and modest inflation, and the failure of state and local funding to keep pace with either during the previous two years.”<sup>102</sup> At the start of the Great Recession, there was a “relatively widespread announcement of hiring freezes, salary freezes, and work furloughs—particularly at public universities,” which “amount to reductions in real earnings.”<sup>103</sup> In response to the coronavirus pandemic in spring 2020, colleges and universities suspended in-person classes, causing them to lose “billions of dollars in revenue, and these losses . . . continued to mount during the subsequent year,” while at the same time revenue from campus services like housing and dining shriveled.<sup>104</sup> As enrollment declined by 2.5% between fall 2019 and fall

97 Am. Ass’n of Univ. Professors, *Data Snapshot: Tenure and Contingency in US Higher Education* (Mar. 2023), <https://www.aaup.org/sites/default/files/AAUP%20Data%20Snapshot.pdf>.

98 Contingent faculty include those with contract-renewable appointments, who are usually full-time and non-tenure track, and adjunct appointments, who are usually part-time and fixed-term or temporary. *Id.*

99 Stahl, *supra* note 7.

100 Liang Zhang et al., *Changing Faculty Employment at Four-Year Colleges and Universities in the United States*, 22–23 (Nat’l Bureau of Econ. Rsch., Working Paper No. 21827, 2015).

101 *Id.* at 23.

102 St. Higher Educ. Executive Officers, *SHEF: FY2015, State Higher Educ. Finance* 19 (2016). Available at [https://sheeo.org/wp-content/uploads/2019/03/SHEF\\_FY15-2.pdf](https://sheeo.org/wp-content/uploads/2019/03/SHEF_FY15-2.pdf)

103 Sarah E. Turner, *The Impact of the Financial Crisis on Faculty Labor Markets*, in *HOW THE FINANCIAL CRISIS AND GREAT RECESSION AFFECTED HIGHER EDUCATION* 175,185 (Jeffrey R. Brown & Caroline M. Hoxby eds., 2015).

104 Robert Kelchen et al., *The Lingering Fiscal Effects of the COVID-19 Pandemic on Higher Education 2* (Fed. Reserve Bank of Phila., Discussion Paper No. 21–01, 2021).

2020,<sup>105</sup> colleges and universities laid off hundreds of thousands of workers: higher education employment fell 13% between February 2020 and February 2021.<sup>106</sup>

In addition to institutional financial constraints, some scholars ascribe the antipathy toward tenure in part to the “culture wars” of the late twentieth- and early twenty-first centuries.<sup>107</sup> The “culture wars” have been defined as “a conflict between advocates of traditional and progressive values roiling every level of state and civil society” starting around the 1990s, as the “biggest wave of immigration since the first decade of the twentieth century and the changing demographic face of America created a great deal of worry about what ‘multiculturalism’ meant for national unity.”<sup>108</sup> Within the culture wars, scholars identified “a multi-pronged campaign against the so-called liberal academy” by conservative business leaders and foundations that “helped shift U.S. public discourse to the right” and “put the entire academic community on the defensive,”<sup>109</sup> charged with undermining “the basis of Western civilization.”<sup>110</sup> The conservative campaign against higher education “demonized professors by stereotyping them as overpaid deadbeats and radicals who indoctrinate their students, write incomprehensible prose, and only work twelve hours a week.”<sup>111</sup>

The conservative campaign against higher education appeared to help sway public opinion. Americans’ confidence in higher education fell to 36% in 2023, down from 48% in 2018 and 57% in 2015.<sup>112</sup> A poll in 2017 found that only 33% of Republicans and Republican-leaning independents had “a great deal or quite a lot of confidence” in colleges and universities, compared to 56% of Democrats and Democratic-leaning independents.<sup>113</sup> The Republicans cited “their belief that colleges and universities are too liberal and political, that colleges don’t allow students to think for themselves and are pushing their own agenda, or that students are not taught the right material or are poorly educated.”<sup>114</sup>

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105 *Id.* at 2.

106 Dan Bauman, *A Brutal Tally: Higher Ed Lost 650,000 Jobs Last Year*, CHRON. HIGHER EDUC. (Feb. 5, 2021), <https://www.chronicle.com/article/a-brutal-tally-higher-ed-lost650-000-jobs-last-year>.

107 Ellen Schrecker, *Academic Freedom in the Corporate University*, 93 RADICAL TCHR. 38, 42 (2012); JOHN GANZ, *WHEN THE CLOCK BROKE: CON MEN, CONSPIRACISTS, AND HOW AMERICA CRACKED UP IN THE EARLY 1990s* 14–16 (2024).

108 GANZ, *supra* note 107, at 14–15 (citing JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991)).

109 Schrecker, *supra* note 107, at 42.

110 GANZ, *supra* note 107, at 16.

111 Schrecker, *supra* note 107, at 93.

112 Megan Brenan, *Americans’ Confidence in Higher Education Down Sharply*, GALLUP (July 11, 2023), <https://news.gallup.com/poll/508352/americans-confidence-higher-education-down-sharply.aspx>.

113 Frank Newport & Brandon Busteed, *Why Are Republicans Down on Higher Ed?*, GALLUP (Aug. 16, 2017), <https://news.gallup.com/poll/216278/why-republicans-down-higher.aspx>.

114 *Id.*

### B. *Wisconsin and Governor Scott Walker, 2015*

The twenty-first century legislative campaign against tenure arguably began in Wisconsin in 2015. Governor Scott Walker, a political conservative who would soon enter the race for the 2016 Republican nomination,<sup>115</sup> used the deliberations over Wisconsin's 2015–17 biennial budget to remove “the notion of tenure in the university system from state statute” and give authority over tenure to the state's Board of Regents, which oversees the system's thirteen four-year universities.<sup>116</sup>

Within language embedded in the budget, Walker amended the Wisconsin statute governing the University of Wisconsin System by vesting the chancellors of each institution “with the responsibility of administering board policies,” including—“in consultation with their faculties”—“defining and administering institutional standards for faculty peer evaluation and screening candidates for appointment, promotion and tenure.”<sup>117</sup>

The 2015–17 Wisconsin budget made another significant change to the state's tenure laws. The statute titled “Lapse of appointments” was retitled “Termination due to certain budget or program changes,” and the amendment broadened the authority of the Board of Regents to terminate faculty and academic staff. Instead of requiring “a financial exigency to exist,” the amendment said “the board may, with appropriate notice, terminate any faculty or academic staff appointment when such an action is deemed necessary due to a budget or program decision requiring program discontinuance, curtailment, modification, or redirection.”<sup>118</sup>

In his line-item veto message on the 2015–17 budget, Walker wrote that the tenure-related language “[m]odernizes the concept of tenure by authorizing the Board of Regents to enact such policies.”<sup>119</sup> In other remarks, Walker said the changes to tenure were needed “to give the state university system more flexibility and financial leverage,” and he also emphasized the cost savings to students

115 Patrick Healy, *Walker Enters Race, Pledging Unwavering Conservative Agenda*, N.Y. TIMES, June 14, 2015, at A1. “Mr. Walker described himself as a former Boy Scout and son of the heartland who would defend the ‘unborn,’ the Americans who oppose same-sex marriage on religious grounds, and more broadly the conservative and traditional citizens who feel under attack from what they consider coastal elites.” *Id.*

116 Monica Davey & Tamar Lewin, *Unions Subdued, Walker Turns to Tenure at Wisconsin Colleges*, N.Y. TIMES, June 2, 2015, at A1.

117 2015 Wis. Sess. Laws 333. The session law, 2015 Wis. Act 55 § 1139g, amended WIS. STAT. § 36.09(3) (a). The Board of Regents adopted the tenure policies in March 2016. Peter Schmidt, *Wisconsin Regents Approve New Layoff and Tenure Policies Over Faculty Objections*, CHRON. HIGHER EDUC. (Mar. 10, 2016), <https://www.chronicle.com/blogs/ticker/wisconsin-regents-approve-new-layoff-and-tenure-policies-over-faculty-objections>.

118 2015 Wis. Sess. Laws 335. The session law, 2015 Wis. Act 55 § 1214g, amended WIS. STAT. § 36.21. In 2016, the Board of Regents adopted policies that eliminated the right for faculty to review proposed program cuts and authorized administrators “to base programmatic decisions solely on profitability concerns rather than on a combination of financial and educational factors.” Joseph W. Yockey, *Resolving Regulatory Threats to Tenure*, 57 U. RICH. L. REV. 579, 603 (2023).

119 Scott Walker, Wis. Act 55 veto message at xi (2015), <https://doa.wi.gov/budget/SBO/2015-17%20Veto%20Message.pdf>.

resulting from a two-year tuition freeze and a \$250 million cut over two years to the University of Wisconsin System under the budget.<sup>120</sup>

Wisconsin's weakening of tenure was "perceived as a bellwether for public universities across the country."<sup>121</sup> Indeed, a national study of thirteen pieces of state legislation to ban tenure that were introduced but not enacted between 2012 and 2022—all but one of which were introduced after 2015—found that "[i]nstead of responding to budget problems, tenure bans seemed to be associated with underlying political hostility toward higher education," and with a state "with unified Republican control of government[which] was likelier than a state with other governing arrangements to entertain a tenure ban."<sup>122</sup> Moreover, the bills "were concentrated in states where partisan political arrangements and social dynamics suggested skepticism of public higher education... . Such legislation seems intended to remake a higher education system that political partisans dislike rather than to improve operations within that system."<sup>123</sup>

### III. STATE-BASED LEGISLATION TO ROLL BACK TENURE IN THE TRUMP ERA, 2017–25

Scott Walker dropped out of the Republican presidential primary race in September 2015 and was among the speakers at the Republican National Convention in 2016 that formally nominated Donald Trump as the party's candidate for president.<sup>124</sup> Trump went on to defeat Hillary Clinton in the general election,<sup>125</sup> and scholars observed that by the end of his term, Trump "had radicalized the Republican Party, and Republican governors competed to pick up his voters."<sup>126</sup> Animating the conservative wing of the Republican Party were ideas from Russian President Vladimir Putin and Hungarian Prime Minister Viktor Orbán that "liberal democracy was obsolete. Because democracy welcomes minorities, immigrants, women, and LGBTQ people as equal, they argue, it undermines the virtue necessary for society to function."<sup>127</sup> During Trump's first term, "the American right openly embraced this ideology," which was reflected in Trump's higher education policies and in several Republican-led states.<sup>128</sup>

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120 Kimberly Hefling, *Walker Erodes College Professor Tenure*, POLITICO (July 12, 2015), <https://www.politico.com/story/2015/07/scott-walker-college-professor-tenure-120009>.

121 Karen Herzog, *Tenure at UW System Now Seen as Bellwether by Educators Across U.S.*, MILWAUKEE J. SENTINEL (June 30, 2015), <https://archive.jsonline.com/news/education/tenure-at-uw-now-seen-as-bellwether-by-educators-across-us-b99527146z1-310977231.html>.

122 Barrett J. Taylor & Kimberly Watts, *Tenure Bans: An Exploratory Study of State Legislation Proposing to Eliminate Faculty Tenure, 2012–2022*, REV. HIGHER EDUC. 519, 537 (2025).

123 *Id.* at 538.

124 Nick Gass, *Walker 'Absolutely' Endorses Trump*, POLITICO (July 20, 2016), <https://www.politico.com/story/2016/07/rnc-2016-scott-walker-donald-trump-endorsement-225914>.

125 Fed. Elections Comm'n, *Federal Elections 2016: Election Results for the U.S. President, the U.S. Senate, and the U.S. House of Representatives* (Dec. 2017), <https://www.fec.gov/resources/cms-content/documents/federalections2016.pdf>.

126 RICHARDSON, *supra* note 13, at 250.

127 *Id.* at 141.

128 *Id.* at 142.

## A. *Influence of Donald Trump and His Evolving Agenda for Higher Education*

### 1. *Trump's First Campaign and First-Term Higher Education Policies, 2015–21*

During the 2016 campaign, after winning the Nevada caucuses, Donald Trump said, “We won with young. We won with old. We won with highly educated. We won with poorly educated. I love the poorly educated.”<sup>129</sup> Trump “rose to prominence by symbolizing, modeling, and espousing particular cultural values,” including “anti-intellectualism while attacking traditionally acknowledged authorities on truth, such as (climate) scientists and (mainstream) journalists.”<sup>130</sup> By “strategically utilizing fault lines about gender, race/ethnicity, nativism, and authorities on truth,” Trump “benefited politically.”<sup>131</sup> A study of public opinion data from October 2016 from a large national U.S. sample found that “Trump was able to garner trust and support by tapping into growing anti-intellectual and anti-science strains in American culture and politics,” and he “continued to solidify his status by openly criticizing college professors, scientists, journalists, and educators; calling the press ‘enemies of the people;’ and designating all media reports critical of Trump ‘fake news.’”<sup>132</sup>

Once in office, Trump and his administration did not consider “the ability of higher education to support broader goals of the entire nation.”<sup>133</sup> In fact, Trump proposed and enacted policies criticizing the cost and value of college, taxing institutional endowments, purportedly enforcing free speech, and targeting the teaching of critical race theory. This skepticism toward higher education influenced legislation in several Republican-led states over the next decade.

a. **Workforce Training Over a College Degree.** Trump expressed a “preference for workforce training over traditional higher education.”<sup>134</sup> This position was reflected in an executive order promoting apprenticeships and workforce development programs, which stated, “Higher education ... is becoming increasingly unaffordable. Furthermore, many colleges and universities fail to help students graduate with the skills necessary to secure high-paying jobs in today’s workforce. Far too many individuals today find themselves with crushing student debt and no direct connection to jobs.”<sup>135</sup>

129 Jennifer C. Kerr, *Trump Overwhelmingly Leads Rivals in Support from Less Educated Americans*, PBS NEWS (Apr. 3, 2016), <https://www.pbs.org/newshour/politics/trump-overwhelmingly-leads-rivals-in-support-from-less-educated-americans>. In the general election, the fifty counties with a minimum population of 50,000 where the smallest share of the population has bachelor’s degrees “are really the places that won Donald Trump the presidency, especially given that a fair number of them are in swing states such as Ohio and North Carolina.” Nate Silver, *Education, Not Income, Predicted Who Would Vote for Trump*, FIVETHIRTYEIGHT (Nov. 22, 2016), <https://fivethirtyeight.com/features/education-not-income-predicted-who-would-vote-for-trump/>.

130 Chris Knoesterer & Matthew Knoesterer, *Social Structure, Culture, and the Allure of Donald Trump in 2016*, 45 NEW POL. SCI. 33, 34 (2023).

131 *Id.*

132 *Id.* at 55.

133 ALLISON L. PALMADESSA, *HIGHER EDUCATION DIVIDED: NATIONAL EXPECTATIONS AND THE BIFURCATION OF PURPOSE AND NATIONAL IDENTITY, 1946–2016* at 133, 134 (2020).

134 *Id.* at 134.

135 Exec. Order No. 13,801, 82 Fed. Reg. 28,229 (June 15, 2017), *revoked by* Exec. Order No. 14,016, 86

**b. Tax on Endowments.** Turning to elite colleges and universities, Trump's Tax Cuts and Jobs Act of 2017 took aim at university endowments. In addition to reducing the rate of five of the seven individual income tax brackets and creating a single flat corporate tax rate of 21%,<sup>136</sup> the law imposed a 1.4% excise tax on the net investment income of private institutions with at least five hundred students and with endowments (defined as "the aggregate fair market value of the assets" of the institution) worth at least \$500,000 per student.<sup>137</sup> In 2023, fifty-six universities paid about \$380 million under the endowment tax.<sup>138</sup> Republican Congressman Tom Reed of New York, a long-time advocate of taxing large college endowments, believed the new tax would "force colleges to open their books" and said, "Hopefully, through this process we bring more transparency to the issue" because endowments accumulate tax-free dollars, and lawmakers should "ask the hard questions of accountability and oversight to say, 'We want to know where the money is going.'"<sup>139</sup>

**c. The First Amendment and "Diverse Debate" on Campus.** In 2019, an executive order threatened colleges and universities with cuts in federal research funding if they violated the First Amendment. The order seemed a reaction to free-speech incidents at the University of California Berkeley, including violent protests that caused the cancelation of an appearance by far-right political commentator Milo Yiannopoulos in 2017,<sup>140</sup> and to a 2018 article by authors from the American Enterprise Institute, a conservative think tank, that suggested, "Taxpayer funds should not be subsidizing research at higher education institutions where the conditions of free inquiry are compromised."<sup>141</sup>

Broadly describing the executive order, Trump said at the signing ceremony, "If a college or university does not allow you to speak, we will not give them money. It's that simple."<sup>142</sup> The executive order itself stated that the policy behind it was to "encourage institutions to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First

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Fed. Reg. 11,089 (Feb. 17, 2021).

136 Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017). The law has been described as "arguably the most sweeping realignment of the US tax code since the Tax Reform Act of 1986." William G. Gale et al., *Sweeping Changes and an Uncertain Legacy: The Tax Cuts and Jobs Act of 2017*, 38 J. ECON. PERSPECT. 3, 3 (2024).

137 Tax Cuts and Jobs Act, *supra* note 136, at 131 Stat. 2167.

138 Garrett Watson & Daniel Bunn, *New Efforts on Taxing Endowments Raise Questions on Neutrality and Revenue Collection*, TAX FOUND. (Jan. 28, 2025), <https://taxfoundation.org/blog/taxing-endowments-revenue-analysis/>.

139 Michael Stratford & Benjamin Wermund, *The New Tax on Harvard*, POLITICO (Dec. 22, 2017), <https://www.politico.com/story/2017/12/22/harvard-tax-college-endowments-252892>.

140 Scott Jaschik, *Trump Vows Executive Order on Campus Free Speech*, INSIDE HIGHER ED (Mar. 3, 2019), <https://www.insidehighered.com/news/2019/03/04/president-trump-vows-issue-executive-order-barring-research-funds-colleges-dont>.

141 Frederick M. Hess & J. Grant Addison, *Restoring Free Inquiry on Campus*, NAT'L AFF. (2018), <https://www.nationalaffairs.com/publications/detail/restoring-free-inquiry-on-campus>.

142 Andrew Kreighbaum, *Trump Signs Broad Executive Order*, INSIDE HIGHER ED (Mar. 21, 2019), <https://www.insidehighered.com/news/2019/03/22/white-house-executive-order-prods-colleges-free-speech-program-level-data-and-risk>.

Amendment for public institutions and compliance with stated institutional policies regarding freedom of speech for private institutions.”<sup>143</sup>

The enforcement of the executive order was more ambiguous than its intent. The order directed twelve federal grant-making agencies—including the Department of Defense, the Department of Education, the National Science Foundation, and NASA—to coordinate with the Office of Management and Budget to “take appropriate steps, in a manner consistent with applicable law, including the First Amendment, to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies.”<sup>144</sup> Anticipating “inconsistent interpretations at federal agencies,” Jonathan Friedman, the project director for campus free speech at PEN America, said, “It’s essentially an order designed to create a lot of chaos and confusion.”<sup>145</sup>

**d. Trump in the Classroom: Critical Race Theory and the 1619 Project.** In his last year in his first term, Trump focused attention on classroom instruction, first at the U.S. military academies and then, more broadly, by invoking the American Revolution. In an executive order titled “Combating Race and Sex Stereotyping,” Trump complained about critical race theory and about diversity, equity, and inclusion (DEI) programs without naming either directly, stating:

many people are pushing a different vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans. This destructive ideology is grounded in misrepresentations of our country’s history and its role in the world. ... Such ideas may be fashionable in the academy, but they have no place in programs and activities supported by Federal taxpayer dollars.<sup>146</sup>

The executive order prohibited “the United States Uniformed Services”—including the Armed Forces—from teaching any member, including those “attending a military service academy,” to “believe any of the divisive concepts” defined in the order. The definitions in the order covered “divisive concepts,” “race or sex stereotyping,” and “race or sex scapegoating,” defined as follows:

“Divisive concepts” means the concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an

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143 Exec. Order No. 13,864 § 2, 84 Fed. Reg. 11,401 (Mar. 26, 2019).

144 *Id.* § 3.

145 Kreighbaum, *supra* note 142.

146 Exec. Order No. 13,950, *supra* note 8, at § 1.

individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term "divisive concepts" also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

"Race or sex stereotyping" means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.

"Race or sex scapegoating" means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.<sup>147</sup>

This executive order quickly inspired several states to replicate its language and prohibitions. By November 2021, nine states passed legislation to ban the teaching of critical race theory, and almost twenty other states introduced or plan to introduce similar legislation.<sup>148</sup>

Trump concluded his first term combatting "a series of polemics grounded in poor scholarship" that "vilified our Founders and our founding," under which "many students are now taught in school to hate their own country, and to believe that the men and women who built it were not heroes, but rather villains."<sup>149</sup> Without naming it, Trump was criticizing the 1619 Project, an initiative of *The New York Times* marking "the 400th anniversary of the beginning of American slavery" that "aims to reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative."<sup>150</sup>

Trump answered the 1619 Project with the President's Advisory 1776 Commission. An executive order signed in November 2020 charged the commission with

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147 *Id.* at § 2. The executive order also prohibited federal contractors from using "use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating." *Id.* at § 4.

148 Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS INST. (Nov. 2021), <https://www.brookings.edu/articles/why-are-states-banning-critical-race-theory/>.

149 Exec. Order No. 13,958, 85 Fed. Reg. 70,951 (Nov. 5, 2020), *revoked by* Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 25, 2021).

150 N.Y. TIMES MAGAZINE, THE 1619 PROJECT (Aug. 8, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html>.

producing a report “regarding the core principles of the American founding and how these principles may be understood to further enjoyment of ‘the blessings of liberty’ and to promote our striving ‘to form a more perfect Union.’”<sup>151</sup> The commission published its report in January 2021 and criticized how colleges and universities teach the “scholarship of freedom”:

Universities in the United States are often today hotbeds of anti-Americanism, libel, and censorship that combine to generate in students and in the broader culture at the very least disdain and at worst outright hatred for this country.

The founders insisted that universities should be at the core of preserving American republicanism by instructing students and future leaders of its true basis and instilling in them not just an understanding but a reverence for its principles and core documents. Today, our higher education system does almost the precise opposite. Colleges peddle resentment and contempt for American principles and history alike, in the process weakening attachment to our shared heritage.<sup>152</sup>

Without specifying secondary or postsecondary education, the commission outlined elements of a curriculum for civics and government classes. Such classes “should rely almost exclusively on primary sources,” including the Declaration of Independence, the U.S. Constitution, and the Federalist Papers.<sup>153</sup> They should “teach students about the philosophical principles and foundations of the American republic, including natural law, natural rights, human equality, liberty, and constitutional self-government” in the following way:

Students should learn the reasons why our constitutional order is structured as a representative democracy and why a constitutional republic includes such features as the separation of powers, checks and balances, and federalism. They should study the benefits and achievements of our constitutional order, the Civil War’s challenge to that order, and the ways the Constitution has been changed—not only by amendment and not always for the better—over the course of time. Finally, these classes ought to culminate in the student’s understanding and embracing the responsibilities of good citizenship.<sup>154</sup>

**e. Support for HBCUs.** Despite Trump’s intrusions into the curricula and finance of higher education, it must be noted that the first Trump administration implemented several policies that benefited historically black colleges and universities (HBCUs). Trump signed an executive order that established the White House Initiative on HBCUs to “work with agencies, private-sector employers, educational associations, philanthropic organizations, and other partners to

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151 Exec. Order No. 13,958, *supra* note 149, at § 2.

152 PRESIDENT’S ADVISORY 1776 COMM’N, THE 1776 REPORT 18 (2021), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf>.

153 *Id.* at 38, app. IV.

154 *Id.*

increase the capacity of HBCUs to provide the highest quality education to an increasing number of students.”<sup>155</sup> In 2018, the Department of Education forgave over \$300 million in hurricane relief loans that four HBCUs had incurred to recover from hurricanes Katrina and Rita in 2005.<sup>156</sup> And in 2019, the Fostering Undergraduate Talent by Unlocking Resources for Education (FUTURE) Act provided permanent federal funding for minority serving institutions through the Higher Education Act.<sup>157</sup>

2. *Trump’s 2024 Campaign and the First One Hundred Days of His Second Term: Escalating Rhetoric and Action Against Higher Education*

During his campaign to reclaim the White House in 2024, Donald Trump upped his attack on higher education. During a campaign video in 2023, he said, “The time has come to reclaim our once great educational institutions from the radical Left, and we will do that.”<sup>158</sup> He promised to “fire the radical Left accreditors that have allowed our colleges to become dominated by Marxist Maniacs and lunatics,” and “impose real standards on colleges” that would include “defending the American tradition and Western civilization, protecting free speech, eliminating wasteful administrative positions that drive up costs incredibly, [and] removing all Marxist diversity, equity, and inclusion bureaucrats.”<sup>159</sup> Trump also promised “to direct the Department of Justice to pursue federal civil rights cases against schools that continue to engage in racial discrimination,” and institutions “that persist in explicit unlawful discrimination under the guise of equity will not only have their endowment taxed, but through budget reconciliation, I will advance a measure to have them fined up to the entire amount of their endowment.”<sup>160</sup> Trump concluded: “Colleges have gotten hundreds of billions of dollars from hard-working taxpayers[,] and now we are going to get this anti-American insanity out of our institutions once and for all.”<sup>161</sup>

Trump’s nominee to be vice president, Ohio Senator J.D. Vance, shared and perhaps exceeded Trump’s antipathy toward higher education. In a keynote address to the National Conservatism Conference in 2021, Vance—then a candidate for the Senate—said, “I think if any of us want to do the things that we want to do for our country and for the people who live in it, we have to honestly and aggressively attack the universities in this country.”<sup>162</sup> He declared that “universities do not

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155 Exec. Order No. 13,779, 82 Fed. Reg. 12,449 (Mar. 3, 2017).

156 Danielle Douglas-Gabriel, *Education Department Forgives \$322 Million in Loans to Help Historically Black Colleges Recover from Hurricanes*, WASH. POST (Mar. 15, 2018), <https://www.washingtonpost.com/news/grade-point/wp/2018/03/15/education-department-forgives-322-million-in-loans-to-help-historically-black-colleges-recover-from-hurricanes/>.

157 Pub. L. No. 116-91, 133 Stat. 1189 (2019).

158 AGENDA47, *Protecting Students from the Radical Left and Marxist Maniacs Infecting Educational Institutions* (May 2, 2023), <https://www.donaldjtrump.com/agenda47/agenda47-protecting-students-from-the-radical-left-and-marxist-maniacs-infecting-educational-institutions>.

159 *Id.*

160 *Id.*

161 *Id.*

162 National Conservatism, *J.D. Vance | The Universities are the Enemy | National Conservatism Conference*

pursue knowledge and truth, they pursue deceit and lies,” and he stated that universities “care more about fake culture wars[,] ... identity politics[,] and] ... diversity, equity, and inclusion than they do their own society and ... the people who live in it.”<sup>163</sup> Vance concluded his speech by quoting Richard Nixon:<sup>164</sup> “The professors are the enemy.”<sup>165</sup>

During his campaign, Trump pledged to eliminate the Department of Education,<sup>166</sup> and he took early steps to do just that. Although legislation is constitutionally required to eliminate a federal department—“[p]rimary constitutional responsibility for the structural organization of the executive branch, as well as the creation of the principal components of that branch, rests with Congress”<sup>167</sup>—Trump signed an executive order on March 20, 2025, that required Secretary of Education Linda McMahon “to the maximum extent appropriate and permitted by law, take all necessary steps to facilitate the closure of the Department of Education and return authority over education to the States and local communities.”<sup>168</sup> Trump’s first proposed budget would start starving the Department of Education of funding, cutting \$12 billion,<sup>169</sup> or 15.3%,<sup>170</sup> after the staff had already been pared by 1,900 employees through a combination of layoffs, deferred resignations, and buyouts.<sup>171</sup>

In addition to proposing to dismantle the Department of Education, the Trump administration, in its first weeks in office, employed a “flood the zone” strategy to enact its agenda “at breakneck speed as part of an intentional plan to knock his

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*II*, YouTube (Nov. 10, 2021), <https://www.youtube.com/watch?v=0FR65Cifnhw>.

163 *Id.*

164 VIETNAM, OCTOBER 1972–JANUARY 1973, at 678 (John M. Carland ed., 2010).

165 *Id.*

166 Steve Inskeep & Taylor Haney, *What Trump’s Pledge to Close Dept. of Education Means for Students, GOP-Led States*, MORNING EDITION (Nov. 15, 2024), <https://www.npr.org/2024/11/14/nx-s1-5181966/a-look-at-the-potential-impact-of-shutting-down-the-department-of-education>.

167 Henry B. Hogue, *Abolishing a Federal Agency: The Interstate Commerce Commission*, CONG. RES. SERV. 24 (Jan. 10, 2024), [https://www.congress.gov/crs\\_external\\_products/R/PDF/R47897/R47897.2.pdf](https://www.congress.gov/crs_external_products/R/PDF/R47897/R47897.2.pdf). “Congress, in exercising its powers to legislate under Article I, Section 8, and other provisions of the Constitution, is empowered to provide for the execution of those laws by officers appointed pursuant to the Appointments Clause (art. II, § 2, cl. 2). In addition, under the Necessary and Proper Clause (art. I, § 8, cl. 18), Congress has the authority to create and locate offices, establish their powers, duties, and functions, determine the qualifications of officeholders, prescribe their appointments, and generally promulgate the standards for the conduct of the offices.” *Id.* at 24 n.151.

168 Exec. Order No. 14,242, 90 Fed. Reg. 13,679 (Mar. 25, 2025).

169 Katherine Knott, *What Trump’s Proposed Budget Cuts Mean for Education, Research*, INSIDE HIGHER ED (May 2, 2025), <https://www.insidehighered.com/news/government/student-aid-policy/2025/05/02/trump-proposes-deep-cuts-education-and-research>.

170 Natalie Schwartz, *Trump’s FY26 Budget Plan Slashes Education Department Programs*, HIGHER ED DIVE (May 2, 2025), <https://www.highereddive.com/news/trumps-fy26-budget-plan-slashes-education-department-programs/747060/>.

171 Eric Kelderman, *Trump’s Education Secretary Described a ‘Final Mission.’ Now She’s Enacting Mass Layoffs*, CHRON. HIGHER EDUC. (Mar.11, 2025), <https://www.chronicle.com/article/trumps-education-secretary-described-a-final-mission-now-shes-enacting-mass-layoffs>.

opponents off balance and dilute their response."<sup>172</sup> With regard to higher education, that agenda included eliminating DEI programs, punishing the recognition of transgender athletes, and addressing antisemitism on college campuses.

a. **Continued Attacks on DEI.** On his first full day back in office, Trump signed an executive order terminating DEI programs in the federal government and calling for the enforcement of civil rights laws against DEI programs in the "private sector."<sup>173</sup> Moreover, the executive order required each federal agency to "identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars."<sup>174</sup>

The following month, the Department of Education's Office of Civil Rights distributed a "Dear Colleague" letter asserting that the U.S. Supreme Court's decision in *Students for Fair Admissions v. Harvard*<sup>175</sup> applied not only to admissions but also to the consideration of race in "hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life."<sup>176</sup>

Another executive order aiming to reform accreditation prohibited institutional DEI programs and claimed, dubiously, to protect academic freedom.<sup>177</sup> The order authorized the Department of Education to deny, monitor, suspend, or terminate an accreditor's recognition if it requires institutions "seeking accreditation to engage in unlawful discrimination in accreditation-related activity under the guise of 'diversity, equity, and inclusion' initiatives."<sup>178</sup> The Department is also required to ensure that "accreditation requires that institutions support and appropriately prioritize intellectual diversity amongst faculty in order to advance academic freedom, intellectual inquiry, and student learning."<sup>179</sup>

b. **Transgender Athletes and Title IX.** Trump signed an executive order directed against trans women athletes that, among other provisions, prioritized Title IX enforcement actions "against educational institutions ... that deny female students an equal opportunity to participate in sports and athletic events by requiring them, in the women's category, to compete with or against or to appear unclothed

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172 Luke Broadwater, *Trump's 'Flood the Zone' Strategy Leaves Opponents Gasping in Outrage*, N.Y. TIMES (Jan. 28, 2025), <https://www.nytimes.com/2025/01/28/us/politics/trump-policy-blitz.html>.

173 Exec. Order No. 14,173, *supra* note 9.

174 *Id.*

175 600 U.S. 181 (2023).

176 U.S. Dep't Educ., *Dear Colleague Letter* (Feb. 14, 2025), <https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf>. On April 24, 2025, a federal court enjoined the Department of Education from "enforcing and/or implementing" the Dear Colleague letter. *Nat'l Educ. Ass'n v. United States Dep't of Educ.*, No. 25-CV-091-LM (D.N.H. Apr. 24, 2025).

177 Exec. Order No. 14,279, 90 Fed. Reg. 17529 (Apr. 23, 2025).

178 *Id.*

179 *Id.*

before males.”<sup>180</sup> This executive order built on an executive order signed by Trump on his first day back in office that declared a national policy “to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality.”<sup>181</sup> The executive order defined “sex” to “refer to an individual’s immutable biological classification as either male or female. ‘Sex’ is not a synonym for and does not include the concept of ‘gender identity.’” Moreover, the executive order directed the attorney general to provide guidance to federal agencies to undo the Biden administration’s position that *Bostock v. Clayton County*—which held that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sexual orientation or gender identity<sup>182</sup>—requires “gender identity-based access to single-sex spaces under, for example, Title IX.”<sup>183</sup>

c. **Antisemitism Investigations.** Another executive order required federal agencies to report authorities and actions within their jurisdiction that could “curb or combat anti-Semitism,” and to report “all pending administrative complaints ... against or involving institutions of higher education alleging civil-rights violations related to or arising from post-October 7, 2023, campus anti-Semitism.”<sup>184</sup> Pursuant to the executive order, the Department of Education’s Office of Civil Rights quickly opened Title VI investigations into five institutions “where widespread antisemitic harassment has been reported”: Columbia University, Northwestern University, Portland State University, the University of California, Berkeley, and the University of Minnesota, Twin Cities.<sup>185</sup> The investigations were “in response to the explosion of antisemitism on American campuses following the Hamas massacre of Israeli civilians on Oct. 7, 2023.”<sup>186</sup>

The antisemitism executive order also spurred the formation of the Task Force to Combat Anti-Semitism, composed of representatives from the departments of Justice, Education, and Health and Human Services, with a priority to “root out anti-Semitic harassment in schools and on college campuses.”<sup>187</sup> On February 28, 2025, the task force announced it would be “visiting 10 university campuses that have experienced antisemitic incidents since October 2023” and “may have failed

180 Exec. Order No. 14,201, 90 Fed. Reg. 9,279 (Feb. 11, 2025).

181 Exec. Order No. 14,168, 90 Fed. Reg. 8,615 (Jan. 30, 2025).

182 590 U.S. 644 (2020).

183 Exec. Order No. 14,168, *supra* note 181.

184 Exec. Order No. 14,188, 90 Fed. Reg. 8,847 (Feb. 3, 2025). October 7, 2023, was the day Hamas attacked Israel, sparking a war in Gaza. Patrick Kingsley & Isabel Kershner, *Palestinian Militants Stage Attack on Israel*, N.Y. TIMES (Oct. 8, 2023), at A1.

185 Press Release, U.S. Dep’t Educ., U.S. Department of Education Probes Cases of Antisemitism at Five Universities (Feb. 3, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-probes-cases-of-antisemitism-five-universities>.

186 *Id.*

187 Press Release, U.S. Dep’t Just., Justice Department Announces Formation of Task Force to Combat Anti-Semitism (Feb. 3, 2025), <https://www.justice.gov/opa/pr/justice-department-announces-formation-task-force-combat-anti-semitism>.

to protect Jewish students and faculty members from unlawful discrimination.”<sup>188</sup>

On March 10, 2025, the Education Department sent warning letters to sixty universities under investigation for Title VI violations related to “antisemitic harassment and discrimination.”<sup>189</sup> The sixty institutions included the five institutions already being directly investigated,<sup>190</sup> plus fifty-five additional universities “under investigation or monitoring in response to complaints” filed with the department’s Office of Civil Rights.<sup>191</sup>

**d. Extended Reach into Classrooms and Cultural Institutions.** Extending the reach of the executive order from his first term that prohibited the Armed Forces from teaching “divisive concepts,”<sup>192</sup> Trump signed an executive order on January 27, 2025 mandating specific concepts to be taught and a review of curriculum and instructors at the U.S. military academies. The new executive order prohibited the “Department of Defense and the Armed Forces, including any educational institution operated or controlled thereby . . . from promoting, advancing, or otherwise inculcating the following un-American, divisive, discriminatory, radical, extremist, and irrational theories.”<sup>193</sup> In addition to repeating the definition of “divisive concepts” and “race or sex stereotyping” from the 2020 executive order, the 2025 order prohibited the military academies from teaching “that America’s founding documents are racist or sexist.”<sup>194</sup> It further ordered the secretaries of Defense and Homeland Security to “review the leadership, curriculum, and instructors of the United States Service Academies and other defense academic institutions associated with their respective Departments to ensure alignment with” the order, and required the institutions “to teach that America and its founding documents remain the most powerful force for good in human history.”<sup>195</sup>

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188 Press Release, U.S. Dep’t Just., Federal Task Force to Combat Antisemitism Announces Visits to 10 College Campuses that Experienced Incidents of Antisemitism (Feb. 28, 2025), <https://www.justice.gov/opa/pr/federal-task-force-combat-antisemitism-announces-visits-10-college-campuses-experienced>. The ten institutions were Columbia University; George Washington University; Harvard University; Johns Hopkins University; New York University; Northwestern University; the University of California, Los Angeles; the University of California, Berkeley; the University of Minnesota; and the University of Southern California. *Id.*

189 Press Release, U.S. Dep’t Educ., U.S. Department of Education’s Office for Civil Rights Sends Letters to 60 Universities Under Investigation for Antisemitic Discrimination and Harassment (Mar. 10, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-office-civil-rights-sends-letters-60-universities-under-investigation-antisemitic-discrimination-and-harassment>.

190 Press Release, *supra* note 185.

191 Press Release, *supra* note 189.

192 Exec. Order No. 13,950, *supra* note 8.

193 Exec. Order No. 14,185, 90 Fed. Reg. 8,763 (Feb. 3, 2025).

194 *Id.*

195 *Id.* One faculty member at West Point described the executive order and a subsequent implementation memo from the Secretary of Defense as “brazen demands to indoctrinate, not educate,” which led to “a sweeping assault on the school’s curriculum and the faculty members’ research.” Graham Parsons, *West Point Is Supposed to Educate, Not Indoctrinate*, N.Y. TIMES, May 12, 2025, at A22.

Mirroring the language of the President's Advisory 1776 Commission, an executive order from March 2025, titled "Restoring Truth and Sanity to American History," lamented "a concerted and widespread effort to rewrite our Nation's history, replacing objective facts with a distorted narrative driven by ideology rather than truth."<sup>196</sup> The executive order singled out the Smithsonian Institution for coming "under the influence of a divisive, race-centered ideology. This shift has promoted narratives that portray American and Western values as inherently harmful and oppressive."<sup>197</sup> The order called on the leadership of the Smithsonian to "remove improper ideology," and it pledged that future appropriations would prohibit "exhibits or programs that degrade shared American values, divide Americans based on race, or promote programs or ideologies inconsistent with Federal law and policy."<sup>198</sup> Beyond the Smithsonian, the order directed the Secretary of the Interior to determine whether "public monuments, memorials, statues, markers, or similar properties within the Department of the Interior's jurisdiction have been removed or changed to perpetuate a false reconstruction of American history, inappropriately minimize the value of certain historical events or figures, or include any other improper partisan ideology."<sup>199</sup>

Many of these measures, and their direct effect through federal actions on tenure and academic freedom, are explored in Part IV. This article, with its focus on tenure, does not provide a comprehensive list of all the initiatives taken by the second Trump administration against higher education. The American Council on Education maintains a thorough accounting of the Trump administration's higher education initiatives, encompassing federal funding and government restructuring; the Department of Education and civil rights; DEI; immigration and international students; and gender and Title IX.<sup>200</sup>

Against this federal backdrop, there was also "[a]n equally important revolution ... occurring at the state and local level" challenging "the status quo in higher education."<sup>201</sup> Between 2017 and 2025, Republican-controlled states, some explicitly following Trump's lead, pursued legislation targeting higher education, particularly faculty. To be clear, no state has yet "fully banned tenure at public institutions."<sup>202</sup> But the parade of initiatives included attempting to end tenure, removing property rights from tenure, and imposing post-tenure reviews that could result in the dismissal of tenured faculty. Academic freedom was in jeopardy, too, with requirements for intellectual diversity in teaching, and mechanisms for students to report faculty interference with intellectual diversity.

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196 Exec. Order No. 14,253, 90 Fed Reg. 14,563 (Apr. 3, 2025).

197 *Id.*

198 *Id.*

199 *Id.*

200 Am. Council on Educ., *Higher Education & The Trump Administration* (2025), <https://www.acenet.edu/Policy-Advocacy/Pages/2025-Trump-Administration-Transition.aspx>.

201 Richard Vedder, *Ohio Takes the Lead Against Woke Schools*, WALL ST. J., Mar. 28, 2025, at A13.

202 Ryan Quinn, *A General Counsel Seeks to Eviscerate Tenure After Being Sued for Ignoring It*, INSIDE HIGHER ED (Feb. 25, 2025), <https://www.insidehighered.com/news/faculty-issues/tenure/2025/02/25/top-lawyer-targets-tenure-after-being-sued-ignoring-it>.

## B. Threats to Academic Freedom

### 1. Florida, 2023 Legislation

Building on Trump's first-term policies and filling the void while he was out of office, Florida seemed to become "the center of gravity for a lot of conservative policymaking."<sup>203</sup> Florida Governor Ron DeSantis, who had presidential aspirations of his own, pursued many policies "as part of an explicit new culture war, which he frames as pitting conservative values against 'woke' policies and perspectives," which had "significant and negative implications for freedom of expression in the state."<sup>204</sup>

In reviewing state legislation across the country in 2021, PEN America coined the phrase "educational gag orders" to describe legislation that restricts teaching issues related to race, racism, gender, and American history "designed to chill academic and educational discussions and impose government dictates on teaching and learning."<sup>205</sup> Two years later, Florida enacted "arguably 2023's most censorious gag order."<sup>206</sup>

The legislation, coupled with its accompanying regulations, potentially imperiled faculty members' pay if they taught or researched certain concepts. The legislation, enacted on July 1, 2023, prohibited two ways in which Florida's public colleges and universities could expend "any state or federal funds to promote, support, or maintain any programs or campus activities."<sup>207</sup> First, programs or campus activities cannot violate the Florida Educational Equity Act, which prohibits discrimination "on the basis of race, color, national origin, sex, disability, religion, or marital status against a student or an employee in the state system of public K-20 education."<sup>208</sup> Discrimination under the act includes subjecting "any student or employee to training or instruction that espouses, promotes, advances, inculcates, or compels such student or employee to believe" any of eight specific concepts—quite similar to "divisive concepts" delineated in Trump's 2020 executive order<sup>209</sup>—including

A person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex. ...

A person, by virtue of his or her race, color, national origin, or sex, bears responsibility for, or should be discriminated against or receive adverse

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203 Tim Craig, *GOP Lawmakers Follow Florida's Lead with DeSantis Copycat Bills*, WASH. POST (Feb. 9, 2023), <https://www.washingtonpost.com/nation/2023/02/09/ron-desantis-florida-governor-bills/>.

204 PEN Am., *The Florida Effect: How the Sunshine State is Driving the Conservative Agenda on Free Expression* (Nov. 28, 2023), <https://pen.org/report/the-florida-effect/>.

205 PEN Am., *Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach 4* (2021), [https://pen.org/wp-content/uploads/2021/11/PEN\\_EducationalGagOrders\\_01-18-22-compressed.pdf](https://pen.org/wp-content/uploads/2021/11/PEN_EducationalGagOrders_01-18-22-compressed.pdf).

206 PEN Am., *America's Censored Classrooms 2023* (Nov. 9, 2023), <https://pen.org/report/americas-censored-classrooms-2023/>.

207 2023 Fla. Laws 1015, 1020–21.

208 Fla. Stat. § 1000.05(2)(a) (2025).

209 Exec. Order No. 13,950, *supra* note 8; *see also supra* text accompanying notes 146–47.

treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex.

A person, by virtue of his or her race, color, national origin, or sex, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.

A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.

Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, national origin, or sex to oppress members of another race, color, national origin, or sex.<sup>210</sup>

Second, public colleges and universities cannot expend funds on programs or campus activities that “[a]dvocate for diversity, equity, and inclusion, or promote or engage in political or social activism, as defined by rules of the State Board of Education and regulations of the Board of Governors.”<sup>211</sup>

Four definitions under the Board of Governors’ regulations implementing the second category of prohibited expenditures are the key to understanding the law’s effect on the protections of tenure. First, the regulations define “diversity, equity and inclusion” as “any program, campus activity, or policy that classifies individuals on the basis of race, color, sex, national origin, gender identity, or sexual orientation and promotes differential or preferential treatment of individuals on the basis of such classification.”<sup>212</sup> The regulations define “political or social activism” as “any activity organized with a purpose of effecting or preventing change to a government policy, action, or function, or any activity intended to achieve a desired result related to social issues, where the university endorses or promotes a position in communications, advertisements, programs, or campus activities.”<sup>213</sup> “Social issues” are “topics that polarize or divide society among political, ideological, moral, or religious beliefs.”<sup>214</sup>

210 FLA. STAT. § 1000.05(4)(a). The law states that the provision regarding training or instruction “may not be construed to prohibit discussion of the concepts listed therein as part of a larger course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts.” *Id.* at § 1000.05(4)(b). These provisions regarding training and instruction were added by H.B. 7, 2022 Leg. (Fla. 2022); 2022 Fla. Laws 534. In *Pernell v. Florida Board of Governors of the State University System*, 641 F. Supp. 3d 1218, 1287 (2022), the court imposed a preliminary injunction against enforcement of the law, finding that its provisions “unconstitutionally discriminate on the basis of viewpoint in violation of the First Amendment and are impermissibly vague in violation of the Fourteenth [Amendment].” The Eleventh Circuit denied the Board of Governor’s motion to stay the injunction pending appeal. *Pernell v. Florida Bd. of Governors of the State Univ.*, 2023 U.S. App. LEXIS 6591 (11th Cir. Mar. 16, 2023).

211 2023 Fla. Laws 1021.

212 FLA. BD. GOVERNORS REGUL. ch. 9.016(1)(a).1. (2025).

213 *Id.* at ch. 9.016(1)(a).2.

214 *Id.* at ch. 9.016(1)(a).3.

The regulations list three categories of programs and campus activities.<sup>215</sup> The first and most significant category is “[a]cademic programs subject to review as outlined in sections 1001.706(5)(a) and 1007.25, Florida Statutes, other than classroom instruction.” Statutory section 1001.706(5)(a), part of the 2023 legislation, requires the Board of Governors to “periodically review the mission” of each public university, after which the board must review “existing academic programs for alignment with the mission.”<sup>216</sup> This review of academic programs must include

a directive to each constituent university regarding its programs for any curriculum that violates [the Florida Educational Equity Act] or that is based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social political, and economic inequities.<sup>217</sup>

Statutory section 1007.25, amended by the 2023 legislation, focuses on the curriculum for “general education core courses.”<sup>218</sup> The 2023 amendment added the following language:

General education core courses may not distort significant historical events or include a curriculum that teaches identity politics, violates [the Florida Educational Equity Act], or is based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities.<sup>219</sup>

The second and third categories of “programs or campus activities” that cannot receive state or federal funds involve “[s]tudent participation, other than classroom instruction,” and “[h]iring, recruiting, evaluating, promoting, disciplining, or terminating university employees or contractors.”<sup>220</sup>

These regulatory definitions have been criticized as “overly vague, broad, and punitive,” and for going “far beyond the requirements of the law; they will chill speech of faculty and students and are primed for over-application and abuse.”<sup>221</sup> PEN America has noted, “The Supreme Court has long held that the First Amendment ‘does not tolerate laws that cast a pall of orthodoxy over the classroom.’”<sup>222</sup>

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215 *Id.* at ch. 9.016(1)(a).4.

216 FLA. STAT. § 1001.706(5)(a) (2025).

217 2023 Fla. Laws 1015, 1017; FLA. STAT. § 1001.706(5) (2025).

218 Under Florida law, “general education core courses” consist of “a maximum of five courses within each of the subject areas of communication, mathematics, social sciences, humanities, and natural sciences,” and “must contain high-level academic and critical thinking skills and common competencies that students must demonstrate to successfully complete the course.” FLA. STAT. § 1007.25(a), (b) (2025).

219 2023 Fla. Laws 1015, 1026; FLA. STAT. § 1007.25(3)(c).

220 FLA. BD. OF GOVERNORS REGUL. ch. 9.016 (2025).

221 PEN America, PEN America Submits Comment to Florida Board of Governors on Policy that “Will Chill Speech of Faculty and Students” (Dec. 21, 2023), <https://pen.org/pen-america-submits-comment-to-florida-board-of-governors-on-policy-that-will-chill-speech-of-faculty-and-students/>.

222 PEN America, *The Florida Effect* (Nov. 28, 2023), quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

## 2. *Alabama, 2024 Legislation*

Described as “a ‘classic’ educational gag order, with language drawn from the Trump administration’s 2020 executive order ‘combating race and sex stereotyping,’”<sup>223</sup> Senate Bill 129 became law in Alabama in 2024 and put tenured faculty at risk.<sup>224</sup> The law prohibits public institutions of higher education from requiring “its students, employees, or contractors to attend or participate in any diversity, equity, and inclusion program or any training, orientation, or course work that advocates for or requires assent to a divisive concept.”<sup>225</sup> “Divisive concept” means any of the following eight concepts, which bear a striking resemblance to the divisive concepts delineated in Donald Trump’s “Combating Race and Sex Stereotyping” executive order:<sup>226</sup>

- a. That any race, color, religion, sex, ethnicity, or national origin is inherently superior or inferior.
- b. That individuals should be discriminated against or adversely treated because of their race, color, religion, sex, ethnicity, or national origin.
- c. That the moral character of an individual is determined by his or her race, color, religion, sex, ethnicity, or national origin.
- d. That, by virtue of an individual’s race, color, religion, sex, ethnicity, or national origin, the individual is inherently racist, sexist, or oppressive, whether consciously or subconsciously.
- e. That individuals, by virtue of race, color, religion, sex, ethnicity, or national origin, are inherently responsible for actions committed in the past by other members of the same race, color, religion, sex, ethnicity, or national origin.
- f. That fault, blame, or bias should be assigned to members of a race, color, religion, sex, ethnicity, or national origin, on the basis of race, color, religion, sex, ethnicity, or national origin.
- g. That any individual should accept, acknowledge, affirm, or assent to a sense of guilt, complicity, or a need to apologize on the basis of his or her race, color, religion, sex, ethnicity, or national origin.
- h. That meritocracy or traits such as a hard work ethic are racist or sexist.<sup>227</sup>

The law authorizes public institutions of higher education to “discipline or terminate” any employee “who knowingly violates” the law.<sup>228</sup>

223 PEN America, *America’s Censored Classrooms 2024* (Oct. 8, 2024), <https://pen.org/report/americas-censored-classrooms-2024>. See *supra* text accompanying notes 131–32.

224 S.B.129 enrolled (Ala. 2024); ALA. CODE § 41-1-91 (2024).

225 ALA. CODE § 41-1-91(3).

226 Exec. Order No. 13,950, *supra* note 8. See *supra* text accompanying notes 146–47.

227 ALA. CODE § 41-1-90(2) (2024).

228 ALA. CODE § 41-1-92.

The law provides exceptions based on objectivity and historical accuracy, and it claims it upholds academic freedom. The law explicitly states that it does not prohibit

- public institutions of higher education “from authorizing the teaching or discussion of any divisive concept in an objective manner and without endorsement as part of a larger course of academic instruction, provided the institution and its employees do not compel assent to any divisive concept,” or
- “the teaching of topics or historical events in a historically accurate context.”<sup>229</sup>

Moreover, the law asserts that no provision “[m]ay be construed to inhibit or violate the First Amendment rights of any student or employee, or to undermine the duty of a public institution of higher education to protect, to the greatest degree, academic freedom, intellectual diversity, and free expression.”<sup>230</sup>

The exception for teaching a divisive concept “in an objective manner” may not, in the end, prove helpful. Tyler Coward, lead counsel for government affairs at the Foundation for Individual Rights and Expression, said the carveout “doesn’t really do the job.”<sup>231</sup> First, the legislation does not define “objectivity.” Second, academic freedom includes the right for faculty to take positions in classroom discussions,<sup>232</sup> which the law seems to forbid. Ultimately, the language of the bill makes it “unclear to faculty what they can or cannot say in the classroom,” Coward said.<sup>233</sup>

### 3. *Indiana*

a. **2024 Legislation and Subsequent Court Challenges.** Directly engaging in the culture wars and invoking the student protests that followed the October 2023 Hamas attack on Israel and the subsequent war in Gaza, Indiana Senator Spencer Deery introduced Senate Bill 202 in 2024 to address “the hyper-politicalization and monolithic thinking of American higher education institutions.”<sup>234</sup> While acknowledging that “infringing on academic freedom is a red line we should not cross,” Deery said “we don’t need to give up on those values to curb the excessive politicalization and viewpoint discrimination that threaten our state’s workforce goals.”<sup>235</sup>

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229 ALA. CODE § 41-1-93.

230 *Id.*

231 Ryan Quinn, *As Alabama Republicans Target DEI, They Propose ‘Gag Order’ on Professors*, INSIDE HIGHER ED (Mar. 1, 2024), <https://www.insidehighered.com/news/faculty-issues/academic-freedom/2024/03/01/ala-gop-targets-dei-it-proposes-professor-gag-order>.

232 Am. Ass’n Univ. Professors, *supra* note 50.

233 Quinn, *supra* note 231.

234 Laura Spitalniak, *Indiana Proposal to Overhaul Tenure Moves Forward*, HIGHER ED DIVE (Feb. 9, 2024), <https://www.highereddive.com/news/indiana-proposal-to-overhaul-tenure-moves-forward/707155/>.

235 *Id.*

Senate Bill 202, signed into law on March 13, 2024, and effective July 1, 2024,<sup>236</sup> embedded faculty viewpoints into the processes for granting and reviewing tenure. The legislation required each board of trustees of the public four-year colleges and universities in Indiana<sup>237</sup> to establish a policy providing that a faculty member may not be granted tenure or a promotion if, based on past performance or other determination by the board of trustees, the faculty member is

1. unlikely to foster a culture of free inquiry, free expression, and intellectual diversity within the institution;
2. unlikely to expose students to scholarly works from a variety of political or ideological frameworks that may exist within and are applicable to the faculty member's academic discipline; or
3. likely, while performing teaching duties within the scope of the faculty member's employment, to subject students to political or ideological views and opinions that are unrelated to the faculty member's academic discipline or assigned course of instruction.<sup>238</sup>

The law also required the boards of trustees to establish a five-year post-tenure review process to determine whether a faculty member meets the following criteria:

1. Helped the institution foster a culture of free inquiry, free expression, and intellectual diversity within the institution.
2. Introduced students to scholarly works from a variety of political or ideological frameworks that may exist within the curricula established by the [board of trustees or faculty].
3. While performing teaching duties within the scope of the faculty member's employment, refrained from subjecting students to views and opinions concerning matters not related to the faculty member's academic discipline or assigned course of instruction.
4. Adequately performed academic duties and obligations.
5. Met any other criteria established by the board of trustees.<sup>239</sup>

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236 Bill Text: IN SB0202, 2024, Regular Session, Enrolled, LegisScan <https://legiscan.com/IN/text/SB0202/2024>.

237 These institutions are Ball State University, Indiana State University, Indiana University, Ivy Tech Community College, Purdue University, the University of Southern Indiana, and Vincennes University. 2024 Ind. Acts 1742, 1746; IND. CODE § 21-39.5-1-2 (2024).

238 2024 Ind. Acts 1742, 1748; IND. CODE § 21-39.5-2-1. The law prohibits the board from considering the following actions by a faculty member: "(1) Expressing dissent or engaging in research or public commentary on subjects. (2) Criticizing the institution's leadership. (3) Engaging in any political activity conducted outside the faculty member's teaching or mentoring duties at the institution." 2024 Ind. Acts 1742, 1747-48; IND. CODE § 21-39.5-2-1.

239 2024 Ind. Acts 1742, 1748; IND. CODE § 21-39.5-2-2. The post-tenure review may not consider the same three activities not to be considered for the granting of tenure. *See supra* note 238; 2024 Ind. Acts 1742, 1748-49; IND. CODE § 21-39.5-2-2 (2024)

If, during a post-tenure review, the board of trustees determines that a tenured faculty member has failed to meet one or more of the criteria, it can take disciplinary actions that include “(1) termination; (2) demotion; (3) salary reduction; (4) other disciplinary action as determined by the institution; or (5) any combination of subdivisions (1) through (4).”<sup>240</sup>

In addition to a post-tenure review, faculty could also face complaints from students and employees, which could affect whether they gain tenure, are promoted, or pass their five-year review. Senate Bill 202 required the board of trustees to establish a procedure “that allows both students and employees to submit complaints that a faculty member ... is not meeting the criteria” considered during post-tenure review.<sup>241</sup> The complaints would be “considered “in employee reviews and tenure and promotion decisions.”<sup>242</sup>

Senate Bill 202 could be viewed as both ambiguous and disingenuous. The law did not define “free inquiry” or “free expression,” but it defined “intellectual diversity” to mean “multiple, divergent, and varied scholarly perspectives on an extensive range of public policy issues.”<sup>243</sup> And despite all the provisions detailed above, the law purports to uphold academic freedom. It says that nothing in the statute “may be construed to ... [l]imit or restrict the academic freedom of faculty members or prevent faculty members from teaching, researching, or writing publications about diversity, equity, and inclusion or other topics.”<sup>244</sup>

The bill has raised concerns about how faculty teach in their classroom and where they choose to work. The post-tenure review could cause faculty members to “refrain from opening up dialogue on controversial topics out of fear that a student might accuse them of not living up to the trustees’ standard of ‘viewpoint diversity.’”<sup>245</sup> In addition, faculty with “public-facing scholarship and high-impact research” could leave Indiana, “lest they become targets of frivolous campaigns by political groups whose values and aims might be at odds with scholarship on any given subject,” resulting in a chilling effect on all teaching and research.<sup>246</sup>

Rather than flee the state, two faculty members at Purdue University Fort Wayne and one at Indiana University Bloomington sued in federal court under 42 U.S.C. § 1983, seeking a preliminary injunction to enjoin enforcement of the law.<sup>247</sup>

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240 2024 Ind. Acts 1742, 1749; IND. CODE § 21-39.5-2-2.

241 2024 Ind. Acts 1742, 1749; IND. CODE § 21-39.5-2-2.

242 2024 Ind. Acts 1742, 1750; IND. CODE § 21-39.5-2-4.

243 2024 Ind. Acts 1742, 1747; IND. CODE § 21-39.5-1-5.

244 2024 Ind. Acts 1742, 1753–54; IND. CODE § 21-39.5-6-1.

245 Clare Carter, “Viewpoint Diversity” *Indiana Law Denies Students the Ability to Digest This Election Season in the Classroom*. PEN America (Dec. 17, 2024), <https://pen.org/viewpoint-diversity-indiana-law-denies-students-the-ability-to-digest-this-election-season-in-the-classroom/>.

246 Hussein Banai, *Bill to Make Indiana Colleges More Conservative Would Cause Conformity, Fleeing Faculty*, INDIANAPOLISSTAR (Feb. 16, 2024), <https://www.indystar.com/story/opinion/columnists/2024/02/16/senate-bill-202-indiana-republicans-want-conservative-universities/72617947007/>.

247 Carr v. Trs. of Purdue Univ., No. 1:24-cv-00772-SEB-MJD, 2024 U.S. Dist. LEXIS 144534, at \*1–2, \*7 (S.D. Ind. Aug. 14, 2024).

Joined by two more professors, they alleged that the law violated their academic freedom under the First Amendment “to determine the content of their instruction without state interference” and the Fourteenth Amendment’s due process clause because the law was “impermissibly vague.”<sup>248</sup> In their complaint, the plaintiffs claimed:

they do not know what it means to ‘foster a culture of free inquiry, free expression, and intellectual diversity within the institution,’ and, consequently, they “cannot discern what they are required to do or refrain from doing to avoid running afoul of the statute” and risking exposure to adverse employment actions.<sup>249</sup>

The State of Indiana, after moving to intervene, moved to dismiss the complaint for lack of subject matter jurisdiction, claiming the faculty members lacked standing and that their claims—characterized as a “pre-enforcement challenge”—were not ripe.<sup>250</sup> The court agreed with the state and granted its motion to dismiss on August 14, 2024.<sup>251</sup>

The court focused on two issues under the case-or-controversy requirement of Article III: demonstration of an injury-in-fact to determine standing and the doctrine of ripeness, which requires “that the case stand independent of ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’”<sup>252</sup> The court found no injury to the plaintiffs because the law “governs the Boards [of Trustees], not individual faculty members,” and—because the policies required under Senate Bill 202 were not yet in place—the professors’ “speculations as to how the Boards might interpret and apply [Senate Bill] 202’s goals of fostering free inquiry, free expression, and intellectual diversity within the academy—standing alone—do not suffice to demonstrate that they are being harmed by [Senate Bill] 202 now or will be in the future.”<sup>253</sup>

With regard to ripeness, the court said that “contingencies abound”: the board of trustees had not promulgated, implemented, and enforced any final policies, and without the policies in place, it remained unknown whether they “conflict with Plaintiffs’ conceptions of intellectual diversity; compel changes in their curricula; or otherwise infringe on their asserted constitutional right to academic freedom.”<sup>254</sup> In summary, the court wrote, “Our decision today obviously turns on the premature timing of Plaintiffs’ claims” and that “[t]he source of Plaintiffs’ alleged injury/injuries lies in university policies that do not yet exist, rendering their allegations unfit for judicial review.”<sup>255</sup> Ultimately, the court said, “[W]e

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248 *Id.* at \*7–8.

249 *Id.* at \*8.

250 *Id.* at \*9.

251 *Id.*

252 *Id.* at \*10 (citing *Trump v. N.Y.*, 592 U.S. 125, 131 (2020); see U.S. CONST. art. III, § 2, c. 1).

253 *Carr*, 2024 U.S. Dist. LEXIS 144534, at \*15, \*16–17.

254 *Id.* at \*17.

255 *Id.* at \*18.

express no view as to the merits of their constitutional claims, which must await further factual development.”<sup>256</sup>

Two of the plaintiffs from the dismissed case filed a subsequent case on September 13, 2024, after Indiana University adopted the policies required under the law.<sup>257</sup> The causes of action mirror those in the dismissed case: violations of the First Amendment and due process.<sup>258</sup>

**b. 2025 Biannual Appropriation Bill: “A Sweeping Takeover of Higher Education in Indiana.”** In late April 2025, the Indiana legislature made swift and significant changes to the state’s higher education system through the budget process, reminiscent of the maneuver used by Wisconsin ten years earlier. In addition to cutting funding for the state’s public institutions of higher education by 5%,<sup>259</sup> the biennial appropriation bill revised the post-tenure policy established just the year before, required the review of academic programs for possible closure, diminished shared governance, and provided the governor with greater control over Indiana University’s Board of Trustees.

The bill required each state institution to establish a post-tenure review process for tenured faculty members that “measures productivity” and includes a minimum of four elements: “faculty member’s teaching workload,” the “total number of students who the faculty member teaches at the graduate and undergraduate level,” the “time spent on instructional assignments and the time spent on overseeing graduate students,” and the “research and creative scholarship productivity of the faculty member.”<sup>260</sup> The policy must include “a requirement that the institution place a faculty member on probation, which may result in dismissal of the faculty member, if productivity requirements established by the institution are not met.”<sup>261</sup>

Question rose immediately over how “productivity” would be measured, especially regarding the number of courses and students taught. A leader of the Bloomington Faculty Council at Indiana University asked, “Will there be some consideration of the vast differences between, say, a scientist compared to a humanist compared to a performing artist? Their types of productivity look vastly different.”<sup>262</sup>

The bill dictates criteria and processes for program closures, which could jeopardize tenured positions. First, state institutions must ask the Commission for Higher

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256 *Id.*

257 Complaint at 6–8, *McDonald v. Trs. of Ind. Univ.*, 1:24-cv-01575 (S.D. Ind. Sept. 13, 2024).

258 *Id.* at 17–18.

259 Laura Spitalniak, ‘A Complete Takeover’: Indiana Lawmakers Pass Last-Minute College Governance Overhaul, *HIGHER ED DIVE* (Apr. 29, 2025), <https://www.highereddive.com/news/a-complete-takeover-indiana-lawmakers-pass-last-minute-college-governanc/746654>.

260 House Enrolled Act 1001, 124th Gen. Assem. (Ind. 2025), § 267.

261 *Id.*

262 Christa Dutton, *In Indiana, Last-Minute Additions to the Budget Take Aim at Higher Ed*, *CHRON. HIGHER EDUC.* (Apr. 29, 2025), <https://www.chronicle.com/article/in-indiana-last-minute-additions-to-the-budget-take-aim-at-higher-ed>.

Education for approval to continue a degree program if the average number of students who graduate over the immediately preceding three years is fewer than:

- A. ten (10) students for a particular associate degree program;
- B. fifteen (15) students for a particular bachelor's degree program;
- C. seven (7) students for a particular master's degree program;
- D. three (3) students for a particular education specialist program; or
- E. three (3) students for a particular doctorate degree program.<sup>263</sup>

If the commission does not grant approval, the institution must eliminate the program.<sup>264</sup>

The legislation also establishes a State Educational Institution Degree Program Review that could also lead to program closures.<sup>265</sup> Each state institution must conduct a degree program review every seven years, which must include "an analysis of enrollment and both quantitative and qualitative data."<sup>266</sup> The review must "evaluate the effectiveness of the institution's degree programs to address the quality, viability, and productivity" in teaching and learning, scholarship, and service, "as appropriate to the institution's mission."<sup>267</sup> Institutions must use the results from the degree program reviews "for the progressive improvement and adjustment of degree programs in the context of the institution's strategic plan," with such adjustments including "degree program enhancement," "maintenance of a degree program at its current level," "degree program reduction in scope," or "consolidation or elimination of a degree program."<sup>268</sup> Institutions must also submit the program reviews to the Commission for Higher education, and post the reviews on their website.<sup>269</sup>

The speed of approval of the legislation was as extraordinary as the breadth of the changes within it. As one news article described it, "The Republican-controlled Indiana General Assembly passed the legislation—which runs more than 200 pages—less than two days after revealing it Wednesday, April 23. The state House approved it around 12:45 a.m. Friday, followed by the Senate's agreement at about 1:20 a.m."<sup>270</sup> Governor Mike Braun signed the budget bill on May 7, 2025, touting that it delivered "key priorities—including education, public safety, and tax relief."<sup>271</sup>

263 House Enrolled Act 1001, *supra* note 260, at § 248.

264 *Id.*

265 *Id.* at § 269.

266 *Id.*

267 *Id.*

268 *Id.*

269 *Id.*

270 Ryan Quinn, *Indiana Budget Bill Contains Sweeping Higher Ed Changes*, INSIDE HIGHER ED (Apr. 30, 2025), <https://www.insidehighered.com/news/faculty-issues/academic-freedom/2025/04/30/indiana-budget-bill-contains-sweeping-higher-ed>.

271 Leslie Bonilla Muñiz, *Gov. Braun Signs Indiana's Next \$44B Budget into Law*, IND. CAP. CHRON. (May 7, 2025), <https://indianacapitalchronicle.com/2025/05/07/gov-braun-signs-indianas-next-44b-budget-into-law/>.

One faculty member directly tied Indiana's higher education overhaul to the influence of President Trump. He said, "This Legislature is following the Trump lead—wishing to put an airtight lid on free expression. And if you're wishing to do that, universities are an obvious place to start."<sup>272</sup>

#### 4. *Ohio, 2025 Legislation*

In 2024, Ohio narrowly failed to pass "a wide-ranging piece of public higher education legislation"<sup>273</sup> that was similar in several ways to Indiana's 2024 law. Ohio Senate Bill 83 of 2023–24, in the version reported by the House Higher Education Committee that then stalled and was not posted for vote in the House,<sup>274</sup> would have required institutional policies on "intellectual diversity,"<sup>275</sup> defined as "multiple, divergent, and varied perspectives on an extensive range of public policy issues."<sup>276</sup> Ohio Senate Bill 83 would have also required each state college and university to adopt a post-tenure review policy,<sup>277</sup> and it would have required state colleges and universities to "respond to complaints regarding any administrator, faculty, member, staff, or student who interferes with the intellectual diversity rights ... of another."<sup>278</sup>

Taking another swing, the sponsor of the 2023–24 legislation introduced a similar bill in 2025, this time with greater success. Senate Bill 1,<sup>279</sup> like its predecessor, aimed to overhaul public higher education, with the 2025 legislation including provisions that ban the state's public colleges and universities from having DEI offices, prohibit institutional positions on "controversial" topics—such as "climate policies, electoral politics, foreign policy, diversity, equity, and inclusion programs, immigration policy, marriage, or abortion"—and mandate a U.S. American civic literacy course with prescribed readings, including the U.S. Constitution and at least five essays from the Federalist Papers.<sup>280</sup>

The bill requires boards of the state institutions of higher education to adopt a policy that includes at least three provisions endangering academic freedom

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272 Quinn, *supra* note 270.

273 Ryan Quinn, *GOP State Lawmakers Targeting DEI and Tenure Again*, INSIDE HIGHER ED (Feb. 11, 2025), <https://www.insidehighered.com/news/diversity/2025/02/11/gop-state-lawmakers-again-targeting-dei-and-tenure>. In addition to the tenure provisions described here, the bill would have banned mandatory DEI programs and—in some iterations of the bill—prohibited faculty strikes. *Id.*

274 Megan Henry, *Ohio House Speaker Stephens Said He Won't Bring Massive Higher Education Bill to House Floor*, OHIO CAP. J. (Nov. 24, 2024), <https://ohiocapitaljournal.com/2024/11/20/ohio-house-speaker-stephens-said-he-wont-bring-massive-higher-education-bill-to-house-floor/>.

275 Substitute S.B. 83, 135th General Assem., Reg. Sess. (Ohio 2023–2024), § 3345.0217(B)(3).

276 *Id.* at § 3345.0217(A)(2).

277 *Id.* at § 3345.453.

278 *Id.* at § 3345.0218 (B).

279 Substitute S.B. 1, 136th Gen. Assem., Reg. Sess. (Ohio 2025).

280 Laura Spitalniak, *Ohio Senate Passes Bill to Ban DEI and Faculty Strikes at Public Colleges*, HIGHER ED DIVE (Feb. 13, 2025), <https://www.highereddive.com/news/ohio-senate-sb1-bill-ban-dei-faculty-strikes-tenure-review/740139/>.

and the security of tenured faculty. First, the policy must declare that “faculty and staff shall allow and encourage students to reach their own conclusions about all controversial beliefs or policies and shall not seek to indoctrinate any social, political, or religious point of view.”<sup>281</sup> The bill defines a “controversial belief or policy” to mean “any belief or policy that is the subject of political controversy, including issues such as climate policies, electoral politics, foreign policy, diversity, equity, and inclusion programs, immigration policy, marriage, or abortion.”<sup>282</sup> Second, the policy must “[d]emonstrate intellectual diversity for course approval, approval of courses to satisfy general education requirements, student course evaluations, common reading programs, annual reviews, strategic goals for each department, and student learning outcomes.”<sup>283</sup> Like the previous year’s bill, Senate Bill 1 defines “intellectual diversity” to mean “multiple, divergent, and varied perspectives on an extensive range of public policy issues.”<sup>284</sup> Third, and also similar to Senate Bill 83, Senate Bill 1 requires state colleges and universities to “respond to complaints from any student, student group, or faculty member about an alleged violation of the prohibitions and requirements included in the policy” regarding controversial belief and policy and intellectual diversity.<sup>285</sup>

With regard to tenure, the final version of SB 1 imposes policies encompassing annual workloads, annual reviews, post-tenure reviews, and collective bargaining. Since 1994, Ohio has required state universities to adopt a faculty workload policy,<sup>286</sup> and SB 1 extended the requirement to “all state institutions of higher education” and specified four elements that must be in the policy:

- a. An objective and numerically defined teaching workload expectation based on credit hours ...;
- b. A definition of all faculty workload elements in terms of credit hours ... with a full-time workload minimum standard ...;
- c. A definition of justifiable credit hour equivalents for activities other than teaching, including research, clinical care, administration, service, and other activities as determined by the state institution of higher education;
- d. Administrative action that a state institution of higher education may take, including censure, remedial training, for-cause termination, or other disciplinary action, regardless of tenure status, if a faculty member fails to comply with the policy’s requirements.<sup>287</sup>

The legislation requires state institutions of higher education to adopt “a faculty annual performance evaluation policy” and “conduct an annual evaluation for each

281 Substitute S.B. 1, *supra* note 279, at § 3345.0217(B)(4).

282 *Id.* at § 3345.0217(A)(1).

283 *Id.* at § 3345.0217(B)(5).

284 *Id.* at § 3345.0217(A)(2).

285 *Id.* at § 3345.0217(C).

286 OHIO REV. CODE ANN. § 3345.45 (LexisNexis 2025).

287 Substitute S.B. 1, *supra* note 279, at §§ 3345.45(A), (D)(2).

full-time faculty member who it directly compensates.”<sup>288</sup> The evaluation must assess the performance for each of the following areas on which that the faculty member spent at least 5% of their annual work time over the preceding year: teaching, research, service, clinical care, administration, and other categories determined by the institution.<sup>289</sup> At least 25% of the “teaching” component is accounted by student evaluations of faculty,<sup>290</sup> which are mandated by the legislation and must focus on “teaching effectiveness and student learning” and include the question: “Does the faculty member create a classroom atmosphere free of political, racial, gender, and religious bias?”<sup>291</sup> Each of the performance areas is assessed as “exceeds performance expectations,” “meets performance expectations,” or “does not meet performance expectations.”<sup>292</sup>

The legislation mandates post-tenure review policies at each state institution of higher education.<sup>293</sup> Post-tenure reviews are triggered under three circumstances. An institution must conduct a post-tenure review “if a tenured faculty member receives a ‘does not meet performance expectations’ evaluation within the same evaluative category for a minimum of two of the past three consecutive years” on their annual performance evaluation.<sup>294</sup> If a faculty member maintains tenure after a post-tenure review and then receives an additional “does not meet performance expectations” assessment on any area of their annual performance evaluation in the next two years, then the state institution must subject the faculty member to an additional post-tenure review.<sup>295</sup> If a faculty member “has a documented and sustained record of significant underperformance” outside of the their annual performance evaluation, the department chair, dean of faculty, or provost of their institution “may require an immediate and for cause post-tenure review at any time.”<sup>296</sup>

At the conclusion of a post-tenure review, the state institution’s provost must submit a recommended outcome “to the institution’s entity that is responsible for the final decision of post-tenure review pursuant to the institution’s policy.”<sup>297</sup> Institutions can take administrative action that includes “censure, remedial training, or for-cause termination, regardless of tenure status, and any other action permitted by the institution’s post-tenure review policy.”<sup>298</sup>

The for-cause trigger for post-tenure review, and the possibility of termination,

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288 *Id.* at §§ 3345.452(B), (C).

289 *Id.* at § 3345.452(D)(2).

290 *Id.* at § 3345.452(D)(4).

291 *Id.* at § 3345.451.

292 *Id.* at § 3345.452(D)(3).

293 *Id.* at § 3345.453.

294 *Id.* at § 3345.453(C).

295 *Id.* at § 3345.453(D).

296 *Id.* at § 345.453(E). In these instances, “for cause” cannot “be based on a faculty member’s allowable expression of academic freedom.” *Id.*

297 *Id.* at § 345.453(G).

298 *Id.*

caused the head of the executive director of the Ohio Conference of the AAUP to say, “This bill eliminates tenure. If certain administrators can call for post-tenure review at any time and fire a faculty member without due process, that is not real tenure, that is tenure in name only.”<sup>299</sup>

Finally, the legislation excludes issues regarding tenure from collective bargaining. The bill prohibits state college and university employees from collectively bargaining with their institution over faculty workload policies, faculty annual performance evaluation policies, post-tenure review policies, and policies on tenure and retrenchment.<sup>300</sup>

Despite vociferous opposition throughout the legislative process,<sup>301</sup> the bill passed the Ohio Senate February 12, 2025, passed the Ohio House on March 19, 2025, and was signed by Governor Mike DeWine on March 28, 2025. Earlier that week, DeWine said:

One of the goals of this bill is to make sure that we do everything that we can so that a student feels free to express their point of view, whether that be in a classroom or whether that be someplace else on campus. That should be part of what we’re doing in higher education.<sup>302</sup>

Litigation over the new law is expected. The American Civil Liberties Union of Ohio called Senate Bill 1 a “confusing and contradictory mix of language and provisions,” and also warned that the legislation threatened faculty members’ First Amendment rights.<sup>303</sup> It is likely that any legal challenge would be filed in federal court rather than state court, since the Ohio Supreme Court has a 6–1 Republican supermajority.<sup>304</sup>

299 Ryan Quinn, *Ohio and Kentucky Ban DEI, Reduce Tenure Protections*, INSIDE HIGHER ED (Apr. 1, 2025), <https://www.insidehighered.com/news/faculty-issues/academic-freedom/2025/04/01/ohio-and-kentucky-ban-dei-reduce-tenure-protections>.

300 Substitute S.B. 1, *supra* note 279, at § 3345.455. State colleges and universities must “develop policies on tenure and retrenchment” under § 3345.454(B). The law also requires state institutions to eliminate undergraduate degree programs that confer an average of fewer than five degrees annually over a three-year period. The chancellor can grant a waiver to continue the program. *Id.* at § 3345.454.

301 In the Senate Higher Education Committee on February 11, 2025, “hundreds of critics spoke out against the proposal during an hours-long hearing.” Spitalniak, *supra* note 280. During the vote on the bill in the Ohio House on March 19, 2025, “students marched from Ohio State University’s campus to the Ohio Statehouse to protest the changes.” Jessie Balmert, *Ohio House Passes Higher Education Overhaul, DEI Ban*, COLUMBUS DISPATCH (Mar. 19, 2025), <https://www.dispatch.com/story/news/politics/2025/03/19/ohio-house-passes-higher-education-overhaul-dei-ban/82368545007/>.

302 Jessie Balmert, *Ohio Gov. Mike DeWine Signs Higher Ed Bill that Eliminates DEI, Bans Faculty Strikes*, COLUMBUS DISPATCH (Mar. 28, 2025), <https://www.dispatch.com/story/news/politics/2025/03/28/dewine-signs-higher-ed-bill-that-eliminates-dei-bans-faculty-strikes/82688476007/>.

303 Balmert, *supra* note 301.

304 Tom Hodson, *Senate Bill 1 Guts Academic Freedom and Reshapes Ohio’s Public Universities*, OHIO CAP. J. (Mar. 20, 2025), <https://ohiocapitaljournal.com/2025/03/20/senate-bill-1-guts-academic-freedom-and-reshapes-ohios-public-universities>. In addition to a possible court challenge, professors at Youngstown State quickly organized a signature-gathering campaign for a referendum to repeal SB 1. Laura Hancock, *Ohio Colleges Could Lose State Funding if They Don’t Implement New*

### 5. *Texas, 2025 Legislation*

When the University of Texas at Austin's faculty council passed a resolution in 2022 opposing the state's new law prohibiting high school social studies classes from discussing tenets of critical race theory, it ignited a firestorm aimed at ending tenure in Texas's public institutions of higher education.<sup>305</sup> The tenure ban was amended to curtail property interests only.<sup>306</sup> But the ban on courses using "identity politics" boomeranged back onto higher education in 2025.

In 2021, Texas enacted a public education law that, "[f]or any social studies course in the required curriculum," barred teachers from requiring or making part of a course ten delineated concepts.<sup>307</sup> These ideas included "an individual, by virtue of the individual's race or sex," is "inherently racist, sexist, or oppressive, whether consciously or unconsciously," or "bears responsibility for actions committed in the past by other members of the same race or sex;" that "the advent of slavery in the territory that is now the United States constituted the true founding of the United States;" and that "with respect to their relationship to American values, slavery and racism are anything other than deviations from, betrayals of, or failures to live up to, the authentic founding principles of the United States, which include liberty and equality."<sup>308</sup>

In 2025, legislation echoing the 2021 K-12 law pitched a "bruising battle over academic freedom" in Texas that conservative lawmakers said "would hold institutions more accountable and ensure curriculum is 'free from ideological bias.'"<sup>309</sup> The final version of the bill would require the governing board of each institution of higher education, at least once every five years, to conduct "a comprehensive review of the general education curriculum established by the institution" to ensure courses in the curriculum—among other standards—"are foundational and fundamental to a sound postsecondary education," and "ensure a breadth of knowledge in compliance with applicable accreditation standards."<sup>310</sup> Separate legislation passed in 2025, effective September 1, 2025, removed the statutory requirements under Texas law for institutions of higher education to be accredited by the Southern Association of Colleges and Schools, and defined "recognized accrediting agency" to mean "any association or organization so designated" by the Texas Higher Education Coordinating Board.<sup>311</sup>

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*Higher-Ed Law, Bill Architect Says*, CLEVELAND.COM (Apr. 17, 2025), <https://www.cleveland.com/news/2025/04/ohio-colleges-could-lose-state-funding-if-they-dont-implement-new-higher-ed-law-bill-architect-says.html>.

305 See *infra* text accompanying notes 383–91.

306 Comm. Substitute S.B. 18, 88th Leg., Reg. Sess. (Tex. 2023).

307 H.B. 3979, 87th Leg. (Tex. 2021).

308 *Id.*

309 Molly Hennessy-Fiske, *Texas Lawmakers Moving to Greatly Increase Control of State Universities*, WASH. POST (May 5, 2025), <https://www.washingtonpost.com/nation/2025/05/05/texas-universities-legislature-state-control/>.

310 S.B. 37 Sub., 89th Leg. Reg. Sess. (Tex. 2025).

311 S.B. 530, 89th Leg. Reg. Sess. (Tex. 2025).

“Minor degree and certificate programs” would undergo a review every five years by the president of their institution, and those with low enrollment would face “consolidation or elimination.”<sup>312</sup> To avoid consolidation or elimination, minor degree and certificate programs must have “specific industry data to substantiate workforce demand.”<sup>313</sup>

Senate Bill 37 would also expand the power of institutional governing boards over certain hiring decisions, and it would dilute shared governance. The bill granted governing boards with the authority to “approve or deny the hiring of an individual for the position of provost or deputy, associate, or assistant provost by each institution under” the governing boards’ control and to “overturn any hiring decision for the position of vice president or dean.”<sup>314</sup> Regarding shared governance, the bill declared a “faculty council or senate is advisory only and may not be delegated the final decision-making authority on any matter,” and that “[s]hared governance structures may not be used to obstruct, delay, or undermine necessary institutional reforms or serve as a mechanism for advancing ideological or political agendas.”<sup>315</sup>

The bill sidelined faculty regarding academic decisions and hiring. It states that faculty “may provide recommendations on academic matters, but that input is only advisory in nature, ensuring that governing boards and institutional leadership retain clear and ultimate decision-making authority,” and faculty who do not “serve in an administrative leadership position may not have final decision-making authority on the hiring of an individual for any faculty or administrative leadership position at the institution.”<sup>316</sup>

Finally, the bill would establish the Office of Ombudsman under the Texas Higher Education Coordinating Board that could investigate actions by faculty. The ombudsman would “receive and, if necessary, investigate complaints ... regarding an institution of higher education’s failure to comply” with provisions of the legislation regarding the review of general education curriculum; faculty councils or senates; presidential responsibilities; grievance, hiring, and discipline decision-making authority; and curriculum advisory committees;<sup>317</sup> as well as the law prohibiting DEI initiatives.<sup>318</sup> Written complaints could be submitted by a “student or faculty or staff member at an institution of higher education who has reason to believe an institution of higher education has failed to comply” with the provisions of the Education Code enumerated in the legislation. If a governing board does not resolve a noncompliance issue within the legislation’s timeline, the ombudsman is authorized “to recommend to the legislature that the institution of higher education not be allowed to spend money appropriated to the institution

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312 S.B. 37 Sub., *supra* note 310.

313 *Id.*

314 *Id.*

315 *Id.*

316 *Id.*

317 *Id.*

318 TEX. EDUC. CODE ANN. § 51.3525 (2025).

for a state fiscal year until the institution's governing board certifies compliance and the state auditor confirms the institution's compliance."<sup>319</sup>

Governor Gregg Abbott signed the bill on June 20, 2025. Two weeks earlier, the governor's press secretary hinted that the governor would sign the bill, saying, "Governor Abbott was clear in his State of the State address: Woke college professors have too much influence over who is hired to educate our kids... . Texas needs legislation that prohibits professors from having any say over employment decisions."<sup>320</sup>

### C. *Proposed Bans on Tenure that Failed (So Far)*

#### 1. *Iowa*

The election of 2016 in Iowa brought Republican majorities to both chambers of the state legislature and to the governor's office for the first time since 1998,<sup>321</sup> causing the faculty at the state's public universities to worry that Iowa might follow the lead of its neighbor Wisconsin and attack tenure rights.<sup>322</sup> They had good cause to be concerned. State Senator Brad Zaun introduced a bill on January 10, 2017, that would have prohibited, "at each institution of higher learning governed by the state board of regents, the establishment or continuation of a tenure system for any employee of the institution."<sup>323</sup> The Iowa Board of Regents governs the University of Iowa, Iowa State University, and the University of Northern Iowa.<sup>324</sup> Zaun's aim was straightforward: he said, "My thoughts are obviously to end tenure. I think the university should have the flexibility to hire and fire professors and then I don't think that bad professors should have a lifetime position guaranteed at colleges. It is as simple as that."<sup>325</sup>

Similar legislation in 2021 progressed farther than its predecessor, getting past the introductory stage.<sup>326</sup> House File 49 passed the House Committee on

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319 S.B. 37 sub., *supra* note 310.

320 Ryan Quinn, *In Texas, University Presidents May Soon Control Faculty Senates*, INSIDE HIGHER ED (June 9, 2025), <https://www.insidehighered.com/news/faculty-issues/shared-governance/2025/06/09/texas-presidents-may-soon-control-faculty-senates>. See TEX. SENATE J., 89th Leg., Reg. Sess. 3862 (2025).

321 William Petroski & Brianne Pfannenstiel, *2017 Iowa Legislature Convenes Amid Pomp, Speeches*, DES MOINES REG. (Jan. 9, 2017), <https://www.desmoinesregister.com/story/news/politics/2017/01/09/2017-iowa-legislature-convenes-amid-pomp-color/96338210/>.

322 Jeff Charis-Carlson & William Petroski, *Iowa Lawmaker Looking to End Tenure at Public Universities*, DES MOINES REG. (Jan. 12, 2017), <https://www.desmoinesregister.com/story/news/education/2017/01/12/iowa-lawmaker-looking-end-tenure-public-universities/96460626/>.

323 S.F. 41, 87th Gen. Assem., Reg. Sess. (Iowa 2017).

324 Iowa Board of Regents, Institutions (2025), <https://www.iowaregents.edu/institutions>.

325 Charis-Carlson & William Petroski, *supra* note 322.

326 Eric Kelderman, *Why Would Iowa Want to Kill Tenure?*, CHRON. HIGHER EDUC. (Feb. 21, 2021), <https://www.chronicle.com/article/why-would-iowa-want-to-kill-tenure>.

Education,<sup>327</sup> while its Senate companion passed a subcommittee.<sup>328</sup> Ultimately, however, the legislation “failed to survive a fixed procedural cut-off date.”<sup>329</sup>

Despite the legislation’s failure to move forward, the majority leader in the Iowa House of Representatives said the initiative to ban tenure was “a live round” that would stay on the Republican’s agenda beyond 2021.<sup>330</sup> Legislators said ending tenure was necessary “so institutions can fire faculty members who discriminate against students expressing conservative political views.”<sup>331</sup> One Republican legislator said his party needed to limit tenure because “there is no longer diversity of thought” at the state’s public universities.<sup>332</sup> The legislation reappeared in 2023 but was tabled by a subcommittee.<sup>333</sup>

## 2. North Carolina

An effort in 2023 to ban tenure in North Carolina followed the initial refusal of the Board of Trustees of the University of North Carolina at Chapel Hill between 2020 and 2021 to vote to grant tenure upon the hiring of Nikole Hannah-Jones—a UNC alumna, MacArthur “genius” grant recipient, and Pulitzer Prize-winning journalist behind the 1619 Project—for the Knight Chair in Race and Investigative Journalism.<sup>334</sup> Board members and conservative alumni objected to hiring Hannah-Jones largely because of the 1619 Project, which included upending-historical statements such as, “Conveniently left out of our founding mythology is the fact that one of the primary reasons some of the colonists decided to declare their independence from Britain was because they wanted to protect the institution of slavery.”<sup>335</sup> To avoid the issue of tenure, the trustees attempted to hire Hannah-Jones as a contract employee, but they eventually voted to offer tenure, which Hannah-Jones declined and instead accepted a tenured position at Howard University.<sup>336</sup>

327 H.F. 49, 89th Gen. Assem., Reg. Sess. (Iowa 2021). Procedurally, the bill was renumbered as H.F. 496 after it passed the House Education Committee. H.F. 496, 89th Gen. Assem., Reg. Sess. (Iowa 2021).

328 S.F. 41, 89th Gen. Assem., Reg. Sess. (Iowa 2021).

329 Yockey, *supra* note 118, at 583.

330 Katarina Sostaric, *Bill to Ban Tenure ‘A Live Round’ in Iowa House, Advances in Both Chambers*, Iowa Pub. Radio (Feb. 12, 2021, 7:05 AM), <https://www.iowapublicradio.org/state-government-news/2021-02-12/bill-to-ban-tenure-a-live-round-in-iowa-house-advances-in-both-chambers>.

331 Kelderman, *supra* note 326.

332 Shane Vander Hart, *Iowa House Committee Passes Bill Eliminating Tenure at Regent Universities*, IOWA TORCH (Feb. 10, 2021), <https://iowatorch.com/2021/02/10/iowa-house-committee-passes-bill-eliminating-tenure-at-regent-universities/>.

333 H. F. 48, 90th Gen. Assem., Reg. Sess. (Iowa 2023).

334 Scott Jaschik, *Hannah-Jones Turns Down UNC Offer*, INSIDE HIGHER ED (July 6, 2021), <https://www.insidehighered.com/news/2021/07/07/nikole-hannah-jones-rejects-tenure-offer-unc-job-howard-u>.

335 Nikole Hannah-Jones, *Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES MAGAZINE, *supra* note 150. Several prominent historians wrote an open letter to the editor of the *New York Times Magazine* objecting to this and other historical claims. *The Thread*, N.Y. TIMES MAGAZINE, Dec. 29, 2019, at 6.

336 Joe Killian, *New Bill Targets Tenure, Calls for Scrutiny of Research at UNC System Campuses, Community Colleges*, NC NEWSLINE (Apr. 19, 2023), <https://ncnewsline.com/2023/04/19/new-bill-targets-tenure-calls-for-scrutiny-of-research-at-unc-system-campuses-community-colleges/>.

In the wake of this controversy, House Bill 715 of 2023 would have eliminated tenure for University of North Carolina System and community college faculty hired after July 1, 2024.<sup>337</sup> The bill would have required the Board of Governors to adopt a policy on faculty contracts that allowed employment at will or term contracts for one, two, three, or four years. If an institution decided not to renew the contract of a faculty member, it had to provide “timely notice.” Faculty could not be discharged, suspended without pay, or demoted except for incompetence, neglect of duty, serious misconduct, unsatisfactory performance, institutional financial exigency, or “[m]ajor curtailment or elimination of a teaching, research, or public-service program.”<sup>338</sup>

The sponsor of the legislation, Representative David Willis, when describing the rationale for the bill, made no mention of the Nikole Hannah-Jones controversy, but instead focused on cost savings. “Salaries are one of the biggest expenses for constituent institutions of the UNC System and the North Carolina Community College System, and they need to be better managed and regularly evaluated through rigorous study,” he said.<sup>339</sup> The bill did not pass committee.<sup>340</sup>

### 3. *Hawaii*

Legislation in Hawaii in 2022 would have required the University of Hawaii Board of Regents to adopt the report of a task force it formed in February 2021 that recommended several significant changes to the tenure system.<sup>341</sup> Chief among the provisions was a required procedure that could be seen as reducing the number of tenure-track positions. It said,

Before recruitment for tenure-track positions occurs, and before award of tenure, the administration shall ensure that: (1) the position fulfills current enrollment requirements and strategic growth priorities for the university and the State; (2) there are no qualified faculty in other units that are available and that could meet the needs of the hiring unit; (3) the balance of tenure-track and other faculty is appropriate given enrollment, mission, and accreditation standards; and (4) the unit is successful and relevant in contributing to the institutional mission and goals.<sup>342</sup>

Another provision would have created a new class of faculty called “Support Faculty and Extension Agents” that would not be eligible for tenure. This new classification was defined as “faculty that are not primarily engaged in direct instruction, but are engaged in academic support including student, research, and

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337 H.B. 715, 156th Leg. (N.C. 2023).

338 *Id.*

339 Ned Barnett, *NC Republicans Launch ‘Most Egregious’ Attack in the Country on UNC. Why?*, RALEIGH NEWS & OBSERVER (Apr. 23, 2023), <https://www.aol.com/nc-republicans-launch-most-egregious-080000272.html>.

340 N.C. Gen. Assem., House Bill 715 (2023), <https://www.ncleg.gov/BillLookup/2023/HB715>.

341 S.B. 3269, 31st Leg. (Haw. 2022).

342 UNIV. OF HAW. BD. REGENTS, PERMITTED INTERACTION GROUP ON TENURE, attach. A, § III.B.2. (Sept. 10, 2021), [https://www.hawaii.edu/offices/bor/regular/materials/202109160830/BOR\\_09\\_16\\_2021\\_Materials.pdf](https://www.hawaii.edu/offices/bor/regular/materials/202109160830/BOR_09_16_2021_Materials.pdf).

academic program support, or are engaged in agricultural extension activities.”<sup>343</sup> The report also recommended requiring tenured faculty to “participate in a periodic review at least once every five years.”<sup>344</sup>

Senator Donna Mercado Kim, the sponsor of the bill and chair of the Senate Higher Education Committee, echoed lawmakers in Wisconsin and North Carolina (although she is a Democrat) by citing cost savings as the legislation’s goal. “My priority is to keep education affordable. That is my No. 1 priority,” she said.<sup>345</sup> In her view, the current tenure system allows researchers not to teach or not attract sufficient research funds, in turn requiring the university to hire more instructors, thereby increasing instructional costs that get passed down to students.<sup>346</sup> Emphasizing the importance of keeping the University of Hawaii affordable for students, Kim said, “The only way we can do that is to make sure the university is being very efficient.”<sup>347</sup>

The Hawaii Senate amended the bill twice before passing it on March 8, 2022. The Hawaii House of Representatives, however, did not act on the bill.<sup>348</sup>

#### 4. Nebraska

A state senator in Nebraska, after failing to completely eliminate tenure in 2024, took a slightly more measured approach in 2025, which still drew “nearly universal opposition” during a committee hearing.<sup>349</sup> Senator Loren Lippincott, attempting to address what he called a “woke ideology” at the University of Nebraska,<sup>350</sup> introduced a bill in 2024 that would have replaced tenure with “employee agreements” at state colleges and universities that required “[a]nnual performance evaluations,” “[m]inimum standards of good practice,” “[s]tandards for review and discipline,” and “[p]rocedures for dismissal for cause, program discontinuance, and financial exigency.”<sup>351</sup>

In 2025, Lippincott sponsored a bill that would prohibit the University of Nebraska, the Nebraska State Colleges, and the state’s community colleges from establishing or authorizing “an academic system of tenure for any employee”

343 *Id.* at attach. B, § III.E.2.c.

344 *Id.* at attach. C, § IIIB.

345 Josh Moody, *Hawaii Senator Takes Aim at Tenure—and More*, INSIDE HIGHER ED (Mar. 7, 2022), <https://www.insidehighered.com/news/2022/03/08/hawaii-senator-takes-aim-tenure%E2%80%9494and-more>.

346 *Id.*

347 *Id.*

348 Haw. St. Legis., 2022 Archives, SB3269 SD2, [https://www.capitol.hawaii.gov/session/archives/measure\\_indiv\\_Archives.aspx?billtype=SB&billnumber=3269&year=2022](https://www.capitol.hawaii.gov/session/archives/measure_indiv_Archives.aspx?billtype=SB&billnumber=3269&year=2022).

349 Josh Reyes, *Tenure, DEI Bills Draw Sharp Opposition*, OMAHA WORLD-HERALD, Mar. 18, 2025, at A3.

350 Paul Hammel, *Senators Seek to Eliminate Tenure for College Professors, End State Inheritance Tax*, NEB. EXAMINER (Jan. 8, 2024), <https://nebraskaexaminer.com/2024/01/08/senators-seek-to-eliminate-tenure-for-college-professors-do-away-with-state-inheritance-tax/>.

351 L.B. 1064, 108th Leg., 2d Sess. (Neb. 2024).

“who is not tenured prior to the effective date” of the bill.<sup>352</sup> Employees not yet tenured would have “employee agreements” similar to those outlined in the previous year’s legislation.<sup>353</sup>

At a hearing in the Education Committee on March 17, 2025, the heads of University of Nebraska Board of Regents and the Nebraska State Colleges Board of Trustees, faculty, and students testified against the bill.<sup>354</sup> Nebraska University President Jeffrey Gold said enacting the bill would jeopardize the university’s membership in the Big Ten conference and its aspirations to rejoin the Association of American Universities. He called it a “reality that would severely harm our standing and our reputation as a leader in research and education.”<sup>355</sup> The committee took no action on the bill.<sup>356</sup>

#### *D. Property Rights Removed from Tenure*

##### *1. Kansas*

Legislation in Kansas in 2025 specifying that tenure is not a property right (which was ultimately unsuccessful) had its roots in emergency workforce management rules adopted by the Kansas Board of Regents in response to the COVID-19 pandemic, followed by Emporia State University’s adoption of policy under those rules, and then a lawsuit by professors laid off by Emporia State. On January 20, 2021, the Board of Regents—which has authority over seven public universities, including the University of Kansas and Kansas State University—adopted rules effective until December 31, 2022, that allowed institutions to suspend, dismiss, or terminate “any state university employee, including a tenured faculty member” under “a framework for the university’s decision-making” based on factors including “performance evaluations, teaching and research productivity, low service productivity, low enrollment, cost of operations, or reduction in revenues for specific departments or schools.”<sup>357</sup> The rules specified that “[d]eclaration of financial exigency and the processes associated with declaration of financial exigency shall not be a prerequisite to any suspension, dismissal, or termination authorized by this provision.”<sup>358</sup> Employees given notice of termination under the authority of these workforce management rules could appeal to the Office of

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352 L.B. 551, 109th Leg, 1st Sess. (Neb. 2025).

353 *Id.*

354 Reyes, *supra* note 349; Justin Diep, *NU Officials, UNL Faculty, Students Testify Against Anti-Tenure, DEI Bills*, DAILY NEBRASKAN (Mar. 19, 2025), [https://www.dailynebraskan.com/news/nu-officials-unl-faculty-students-testify-against-anti-tenure-dei-bills/article\\_df530a7c-d4e0-4674-b891-9d0b96211035.html](https://www.dailynebraskan.com/news/nu-officials-unl-faculty-students-testify-against-anti-tenure-dei-bills/article_df530a7c-d4e0-4674-b891-9d0b96211035.html).

355 Diep, *supra* note 354.

356 *Id.*

357 Emma Pettit, *Kansas Regents Make It Easier to Dismiss Tenured Professors*, CHRON. HIGHER EDUC. (Jan. 21, 2021), <https://www.chronicle.com/article/kansas-regents-allow-sped-up-dismissals-of-tenured-faculty-members/>; KAN. BD. REGENTS, BOARD POLICY MANUAL, ch. II, § C.6.b.iii. (2025), [https://www.kansasregents.gov/about/policies-by-laws-missions/board\\_policy\\_manual\\_2/chapter\\_ii\\_governance\\_state\\_universities\\_2/chapter\\_ii\\_full\\_text](https://www.kansasregents.gov/about/policies-by-laws-missions/board_policy_manual_2/chapter_ii_governance_state_universities_2/chapter_ii_full_text).

358 KAN. BD. REGENTS, *supra* note 357.

Administrative Hearings,<sup>359</sup> which conducts proceedings for many Kansas state agencies.<sup>360</sup>

On September 1, 2022, Emporia State University proposed to the Board of Regents a framework reflecting the requirements of the workforce management rules.<sup>361</sup> The president of Emporia State said the university needed to readjust campus resources “to address the university’s structural deficits that have been ongoing for several years.”<sup>362</sup> The Board of Regents approved the policy on September 14, 2022,<sup>363</sup> and the next day, Emporia State terminated thirty-three faculty members,<sup>364</sup> twenty-three of whom were tenured.<sup>365</sup>

Eleven of the tenured professors who had been terminated sued Emporia State in federal court under 42 U.S.C. § 1983 for violations of procedural and substantive due process under the Fifth and Fourteenth Amendments, liberty interests under the Fourteenth Amendment (“their reputations and careers as tenured public employees”),<sup>366</sup> equal protection rights under the Fourteenth Amendment, and freedom-of-association rights under the First Amendment.<sup>367</sup> Before filing their case, the eleven faculty members appealed their termination to the Office of Administrative Hearings, which affirmed four of the terminations but reversed seven of the others.<sup>368</sup> Emporia State filed a case in state court to challenge the seven reversals. Before the appeals could be decided, the eleven faculty members filed their federal complaint.<sup>369</sup>

On December 5, 2024, the district court dismissed some claims against members of the Board of Regents, including the liberty-interest claim,<sup>370</sup> but it denied most of the motions to dismiss, including a motion based on the defendants’ invocation

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359 *Id.*

360 Kan. Office Admin. Hearings, About (2025), <https://oah.ks.gov/Home/About>.

361 Tim Carpenter, *Emporia State University Seeks Authority to Begin Campus Workforce Restructuring*, KAN. REFLECTOR (Sept. 7, 2022), <https://kansasreflector.com/2022/09/07/emporia-state-university-seeks-authority-to-begin-campus-workforce-restructuring/>.

362 *Id.*

363 Emma Pettit, *Emporia State University Is Told It Can Fire Employees, Including Tenured Professors*, CHRON. HIGHER EDUC. (Sept. 15, 2022), <https://www.chronicle.com/article/emporia-state-university-is-told-it-can-fire-employees-including-tenured-professors>.

364 Anne Marie Tamburro, *Emporia State Guts Tenure Protections, Fires 33 Professors Including One Who Publicly Criticized New Policy*, FOUND. FOR INDIVIDUAL RTS. AND EXPRESSION (Nov. 2, 2022), <https://www.thefire.org/news/emporia-state-guts-tenure-protections-fires-33-professors-including-one-who-publicly>.

365 Ryan Quinn, *A General Counsel Seeks to Eviscerate Tenure After Being Sued for Ignoring It*, INSIDE HIGHER ED. (Feb. 25, 2025), <https://www.insidehighered.com/news/faculty-issues/tenure/2025/02/25/top-lawyer-targets-tenure-after-being-sued-ignoring-it>.

366 *Miracle v. Hush*, No. 23-4056-JAR-GEB, 2024 U.S. Dist. LEXIS 220331, at \*24 (D. Kan. Dec. 5, 2024).

367 *Id.* at \*14–15. The plaintiffs also made several conspiracy claims. *Id.*

368 *Id.* at \*14.

369 *Id.*

370 *Id.* at \*31.

of qualified immunity because the plaintiffs failed to demonstrate “the violation of a clearly established property right.”<sup>371</sup> The court found that the plaintiffs “sufficiently allege that they were entitled to continued employment as defined by Kansas law,”<sup>372</sup> writing:

The entire premise of Plaintiffs’ case is that under longstanding KBOR [Kansas Board of Regents] policy, as tenured faculty, they were terminable only for cause. They allege that this was the policy in place when they were hired and obtained tenure, and there is no dispute that this was ESU’s [Emporia State University’s] policy before the WMP [Workforce Management Plan] and ESU Framework changed the policy. Thus, Plaintiffs do identify a state-law source of their property interest in continued employment. . . . Plaintiffs sufficiently allege that they held property rights in their continued employment.<sup>373</sup>

The defendants filed a subsequent motion to reconsider, claiming in part that the court misapplied Tenth Circuit precedent regarding the property-interest claims.<sup>374</sup> In its review of the motion to reconsider, the court cited the U.S. Supreme Court case on which the Tenth Circuit’s decisions were based, *Board of Regents v. Roth*, and quoted several passages from it, including “the Court has held that a public college professor dismissed from an office held under tenure provisions, and college professors and staff members dismissed during the terms of their contracts, have interests in continued employment that are safeguarded by due process.”<sup>375</sup> The court denied the motion to reconsider except to correct the court’s mistaken reference to “leave without pay and benefits” while characterizing the status of the seven plaintiffs reinstated after their appeal to the Office of Administrative Hearings (they were placed on administrative leave with pay and benefits).<sup>376</sup>

While the terminated faculty members’ case continued in court, the Kansas legislature considered a bill that specified that tenure does not create a property right. House Bill No. 2348 stated:

- a. An award of tenure may confer certain benefits, processes or preferences, but tenure shall be discretionary and conditional and shall not, nor shall it be interpreted to, create any entitlement, right or property interest in a faculty member’s current, ongoing or future employment by an institution.
- b. The board of regents and any institution shall not define, award or otherwise recognize tenure as an entitlement, right or property interest in a faculty member’s current, ongoing or future employment by an institution.
- c. No award of tenure by the board of regents or any institution in existence on the effective date of this act shall be considered or deemed an entitlement,

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371 *Id.* at \*34.

372 *Id.* at \*37–38.

373 *Id.* at \*38.

374 *Miracle v. Hush*, No. 23-4056-JAR-GEB, 2025 U.S. Dist. LEXIS 24401, at \*4 (D. Kan. Feb. 11, 2025).

375 *Id.* at \*6 (citing *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972)).

376 *Id.* at \*15–16, \*14.

right or property interest in a faculty member's current, ongoing, or future employment by an institution.

d. Any special benefits, processes or preferences conferred on a faculty member by an institution's award of tenure can be at any time revoked, limited, altered or otherwise modified by the awarding institution or by the state board of regents.<sup>377</sup>

Kansas Representative Steven Howe introduced the bill at the request of Emporia State University General Counsel Steven Lovett, a defendant in the faculty members' case but who insisted he asked for the bill as a private citizen.<sup>378</sup> Testifying in favor of the bill during a hearing of the House Committee on Judiciary on February 11, 2025, Lovett said, "While I am in favor of tenure, and this bill does not abolish tenure, I am not in favor of it being a property right because it obligates Kansans to a long-term, unfunded fiscal liability."<sup>379</sup> Several public higher education leaders testified against the bill, including the president of the Kansas Board of Regents, the chancellor of the University of Kansas, and the president of Kansas State University.<sup>380</sup>

The bill did not pass. House Republicans tried to procedurally move the bill to another committee "before returning it to House [J]udiciary."<sup>381</sup> Kansas Governor Laura Kelly believed the bill "lacked traction" in the legislature and predicted it would not pass in the 2025 session, saying, "I'd be very surprised if it gets to my desk."<sup>382</sup>

## 2. Texas

On February 14, 2022, the Faculty Council of the University of Texas at Austin approved a resolution that rejected "any attempts by bodies external to the faculty to restrict or dictate the content of university curriculum on any matter, including matters related to racial and social justice."<sup>383</sup> The council resolved to "stand firm against any and all encroachment" on faculty authority, including by the legislature.<sup>384</sup> Texas Lieutenant Governor Dan Patrick condemned the resolution, writing on Twitter, "I will not stand by and let looney Marxist UT professors poison

377 H.B. 2348, 2025 Sess. (Kan. 2025).

378 Sophia Best & Ainsley Smyth, *A Kansas House Bill Would Transform Tenure*. [WICHITA ST. UNIV.] SUNFLOWER (Feb. 12, 2025), <https://thesunflower.com/92935/news/a-kansas-house-bill-would-transform-tenure-many-in-higher-education-worry-about-potential-implications/>.

379 Maya Stahl, *A University's Top Lawyer Is Behind a Bill to Weaken Tenure. The University Had No Idea*. CHRON. HIGHER EDUC. (Feb. 11, 2025), <https://www.chronicle.com/article/a-universitys-top-lawyer-is-behind-a-bill-to-weaken-tenure-the-university-had-no-idea>.

380 *Id.*

381 Tim Carpenter, *Gov. Laura Kelly Skeptical Kansas House's Anti-Tenure Legislation Will Reach Her Desk*, KAN. REFLECTOR (Feb. 24, 2025), <https://kansasreflector.com/2025/02/24/gov-laura-kelly-skeptical-kansas-houses-anti-tenure-legislation-will-reach-her-desk/>.

382 *Id.*

383 Nick Anderson & Susan Svrluga, *College Faculty Are Fighting Back Against State Bills on Critical Race Theory*, WASH. POST (Feb. 19, 2022), <https://www.washingtonpost.com/education/2022/02/19/colleges-critical-race-theory-bills>.

384 *Id.*

the minds of young students with Critical Race Theory. We banned it in publicly funded K-12 and we will ban it in publicly funded higher ed.”<sup>385</sup> Three days after his tweet, on February 18, 2022, Patrick issued a statement saying, “Universities across Texas are being taken over by tenured, leftist professors, and it is high time that more oversight is provided,” and that one of his legislative priorities was “eliminating tenure at all public universities in Texas,” along with changing tenure reviews from every six years to annually for “already-tenured professors” and defining “teaching Critical Race Theory in statute as a cause for a tenured professor to be dismissed.”<sup>386</sup>

Senate Bill 18 of 2023, as introduced on March 10, 2023, would have accomplished Patrick’s major goal. It proposed to eliminate tenure for faculty hired by public colleges and universities after September 1, 2023.<sup>387</sup>

The Texas House Committee on Higher Education amended the bill via a substitute on May 22, 2023 that restored tenure but diminished its benefit. The substitute omitted the provision prohibiting a public institution of higher education from granting tenure to an institution employee.<sup>388</sup> The substitute, however, added a provision stating: “The granting of tenure may not be construed to create a property interest in any attribute of a faculty position beyond a faculty members continuing employment, including his or her regular annual salary and any privileges incident to his or her status as a tenured professor.”<sup>389</sup> The substitute incorporated the language regarding property rights into a new definition of tenure: “‘Tenure’ means the entitlement of a faculty member of an institution of higher education to continue in the faculty member’s academic position unless dismissed by the institution for good cause in accordance with the policies and procedures adopted by the institution” under a separate section in the legislation.<sup>390</sup> The Senate concurred with the House amendments, and Governor Greg Abbott signed the bill on June 17, 2023, with an effective date of September 1, 2023.<sup>391</sup>

A bill introduced in 2025 aimed to enact Lieutenant Patrick’s original idea of eliminating tenure. House Bill 1830, assigned to the House Committee on Higher Education on March 14, 2025, would prohibit public institutions of higher education from granting “an employee of the institution tenure or any type of permanent employment status,” with an exception for employees and faculty employed by

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385 Dan Patrick (@DanPatrick), TWITTER (Feb. 15, 2022, 4:09 PM), <https://x.com/DanPatrick/status/1493694009600053250>.

386 Press Release, Lt. Gov. of Tex. Dan Patrick, Statement on Plans for Higher Education and Tenure (Feb. 18, 2022), <https://www.ltgov.texas.gov/2022/02/18/lt-gov-dan-patrick-statement-on-plans-for-higher-education-and-tenure/>.

387 S.B. 18, 88th Leg., Reg. Sess. (Tex. 2023).

388 Comm. Substitute S.B. 18, 88th Leg., Reg. Sess. (Tex. 2023).

389 *Id.*

390 *Id.*

391 Drew Shaw, *Gov. Greg Abbott Signs Senate Bills 17 and 18*, THE [UNIV. OF TEX. AT ARLINGTON] SHORTHORN, June 14, 2023, [https://www.theshorthorn.com/news/gov-greg-abbott-signs-senate-bills-17-and-18/article\\_5b1ce70c-0af9-11ee-879c-3fe6c0fc698e.html](https://www.theshorthorn.com/news/gov-greg-abbott-signs-senate-bills-17-and-18/article_5b1ce70c-0af9-11ee-879c-3fe6c0fc698e.html).

the institution “on September 1, 2025, and who was awarded tenure or any type of permanent employment status by the institution before September 1, 2025.”<sup>392</sup>

### *E. Proposed Dilutions of Tenure Rights that Morphed into Post-Tenure Reviews*

#### *1. South Carolina*

Between 2022 and 2024, South Carolina considered legislation to end tenure, then studied the effects of a ban, and then considered a post-tenure review system. Under the initial legislation, public colleges and universities would have phased out their tenure systems until “there are no faculty members covered by the system who remain employed by the institution,” and they could “not award tenure to, or enter into an employment contract for a period longer than five years with, a person hired by the institution after December 31, 2022.”<sup>393</sup> Opposition from South Carolina’s higher education commission, public colleges and universities, the AAUP, and legislators from both sides of the aisle “killed the bill’s chances to move forward.”<sup>394</sup> The sponsor of the bill said he “agreed to ‘slow the bill down’ after it raised a ‘great amount of ruckus among universities and professors,’” and the legislature ordered an independent economic study of the bill’s potential consequences.<sup>395</sup>

In 2024, a bill in the South Carolina Senate would have required public institutions of higher education to establish “a tenure review process for every tenured faculty member.”<sup>396</sup> The review would occur at least once every six years after a faculty member had gained tenure. The tenure review process was required to “ensure that the faculty member has continued to meet the high standards for tenure that are outlined in the institution’s faculty guidelines.”<sup>397</sup> The Senate passed the bill unanimously, but the House did not hear the bill.<sup>398</sup>

#### *2. North Dakota*

North Dakota, in consecutive legislative sessions between 2023 and 2025, considered significant curtailments to tenure at a small set of institutions but then deliberated—and finally adopted—post-tenure reviews for a wider set of colleges and universities. In 2023, House Bill 1446—as introduced—would have created a four-year pilot program at Bismarck State College and Dickinson State University requiring tenured faculty members to meet the following criteria:

392 H.B. 1830, 89th Leg., Reg. Sess. (Tex. 2025).

393 H.R. 4522, 124th Gen. Assemb., Reg. Sess. (S.C. 2021–22).

394 Jeremy Bauer-Wolf, *South Carolina Bill to End Tenure at Public Colleges Won’t Advance This Year*, HIGHER ED DIVE (Feb. 24, 2022), <https://www.highereddive.com/news/south-carolina-bill-to-end-tenure-at-public-colleges-wont-advance-this-yea/619330/>.

395 David Montgomery, *GOP Targets Tenure to Curb Classroom Discussions of Race, Gender*, STATELINE (Mar. 14, 2022), <https://stateline.org/2022/03/14/gop-targets-tenure-to-curb-classroom-discussions-of-race-gender/>.

396 S. 538, 125th Gen. Assemb., Reg. Sess. (S.C. 2023–24).

397 *Id.*

398 *Id.*; [https://www.scstatehouse.gov/sess125\\_2023-2024/bills/538.htm](https://www.scstatehouse.gov/sess125_2023-2024/bills/538.htm).

1. Generate more tuition or grant revenue than the combined total of the salary, fringe benefits, compensation, and other expenses of the tenured faculty member plus all other costs of employing the faculty member, including employment taxes. ...
2. Comply with the policies, procedures, and directives of the institution, the institution's president and other administrators, the state board of higher education, and the North Dakota university system.
3. Effectively teach and advise a number of students approximately equal to the average campus faculty teaching and advising load.
4. Engage in measurable and effective activities to:
  - a. Help recruit and retain students for the institution.
  - b. Help students achieve academic success.
  - c. Further the best interests of the institution including providing advice and shared governance to campus leaders, and exercising mature judgment to avoid inadvertently harming the institution, especially in avoiding the use of social media or third-party internet platforms to disparage campus personnel or the institution.
5. Perform all other duties outlined in any applicable contract and position description.<sup>399</sup>

In addition, the bill authorized the presidents at Bismarck State College and Dickinson State University to review the performance of tenured faculty members "at any time the president deems a review is in the institution's best interest."<sup>400</sup> If a president determined that a tenured faculty member failed to comply "with a duty or responsibility of tenure," the president "may not renew the contract of the tenured faculty member, unless the president specifically articulates why it is in the interest of the institution to continue to employ the faculty member despite the faculty member's failure to comply with the duties and responsibilities of tenure."<sup>401</sup>

The bill failed to pass the legislature but pitted institutional leaders against each other. The North Dakota House of Representatives, after slightly amending the bill,<sup>402</sup> overwhelmingly passed it by a vote of 66–27 on February 20, 2023.<sup>403</sup>

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399 H.B. 1446, 68th Legis. Assemb. (N.D. 2023).

400 *Id.*

401 *Id.*

402 H.B. 1446 First Engrossed, 68th Legis. Assemb. (N.D. 2023). Among other changes, the amendments removed the requirement that tenured faculty generate more revenue than their combined expenses.

403 Ryan Quinn, *N.D. Senate Narrowly Rejects Bill on Firing Tenured Faculty*, INSIDE HIGHER ED (Apr. 3, 2023), <https://www.insidehighered.com/quicktakes/2023/04/03/nd-senate-narrowly-rejects-bill-firing-tenured-faculty>.

The North Dakota Senate narrowly defeated the bill, 23–21, on March 31, 2023.<sup>404</sup> The president of Dickinson State actually drafted a version of the bill for House Majority Leader Mike Lefor, the prime sponsor of the bill, while the chancellor of the North Dakota University System testified against the bill before the North Dakota Senate, saying, “The [State] [B]oard [of Higher Education] feels strongly that the award of academic tenure” should stay under the board’s “constitutional authority.”<sup>405</sup>

In the wake of the legislative defeat, the North Dakota State Board of Higher Education Board discussed tenure policies at several meetings in 2024. It amended one policy to say that tenured faculty have an “expectation to continuous academic year employment in an academic unit or program area” instead of a “right” to employment.<sup>406</sup> It rejected a proposal to require reviews of tenured faculty every three years instead of the already-required five years.<sup>407</sup>

Legislation introduced in 2025 would have banned tenure for any faculty member hired after July 1, 2026, at North Dakota’s two-year institutions.<sup>408</sup> The bill’s primary sponsor, Rep. Mike Motschenbacher, explained, “I don’t see any advantage to the students to have somebody who can basically hide behind a protection where they could almost never be let go.”<sup>409</sup>

The House Government and Veterans Affairs Committee amended the bill on February 14, 2025 by replacing the tenure ban with provisions requiring two- and four-year public institutions to adopt post-tenure review policies for tenured faculty by July 1, 2026.<sup>410</sup> For “newly tenured faculty members,” the first evaluation “must happen within the first three years of being awarded tenure,” and “[s]ubsequent evaluations must occur every five years or more frequently.”<sup>411</sup> The policy must also define “the outcome of an unsatisfactory review of post-tenured faculty, which may be removal from the position,” a decision that “must be made by the employing institution and the state board of higher education.”<sup>412</sup>

The amended version of the bill passed both chambers of the North Dakota legislature, after a surprise vote in the Senate. The House passed the bill by a vote

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404 *Id.*

405 Ryan Quinn, *Tenure Under Fire—Again—in North Dakota*, INSIDE HIGHER ED (May 30, 2024), <https://www.insidehighered.com/news/faculty-issues/tenure/2024/05/30/tenure-under-fire-again-north-dakota>.

406 N.D. St. Bd. of Higher Educ. Policy Manual, Policy 605.1§ 6.b; Jeff Beach, *Higher Education Board Wades into Details of Tenure Policy*, N.D. MONITOR (Dec. 11, 2024), <https://northdakotamonitor.com/2024/12/11/higher-education-board-wades-into-details-of-tenure-policy/>.

407 Beach, *supra* note 406.

408 H.B. 1437, 69th Legis. Assemb. (N.D. 2025). The bill identified the two-year institutions as Bismarck State College, Dakota College at Bottineau, Lake Region State College, North Dakota State College of Science, and Williston State College.

409 Quinn, *supra* note 273.

410 H.B. 1437 first engrossed, 69th Legis. Assemb. (N.D. 2025).

411 *Id.*

412 *Id.*

of 84-5, with the North Dakota University System's vice chancellor satisfied that the bill "mostly reiterates work already done by the State Board of Higher Education."<sup>413</sup> The Senate Education Committee made minor amendments to the bill, changing the language as follows: "The first post-tenure evaluation must be completed within three years. Subsequent post-tenure evaluations must be completed at least every five years or more frequently."<sup>414</sup> After the Senate initially defeated the bill by six votes on March 25, 2025, a motion to reconsider put the bill up for a second vote the next day, when it passed 28-19.<sup>415</sup> The chair of the Senate Education Committee explained that the bill "aligns with a recent policy that was put in place in higher ed. So higher ed did agree that the parameters in here did match what they recently put into place."<sup>416</sup> The governor signed the bill on April 18, 2025.<sup>417</sup>

## F. *Post-Tenure Reviews in Other States*

### 1. *Florida*

Post-tenure review laws enacted in Florida in 2022 and 2023, and the institutional policies they authorized, led to at least three lawsuits. The 2022 law allowed, but did not require, the Board of Governors—which oversees the twelve four-year institutions within the State University System of Florida—to "adopt a regulation requiring each tenured state university faculty member to undergo a comprehensive post-tenure review every 5 years."<sup>418</sup> The legislation stipulated that the regulations must include the following criteria: "1. Accomplishments and productivity; 2. Assigned duties in research, teaching, and service; 3. Performance metrics, evaluations, and ratings; and 4. Recognition and compensation considerations, as well as improvement plans and consequences for underperformance."<sup>419</sup>

Legislation in 2023 mandated that the Board of Governors adopt such post-tenure review regulations.<sup>420</sup> In addition, the bill limited the ability to appeal tenure and termination decisions, eliminating the option of arbitration. The legislation stated that:

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413 Jeff Beach, *Amended Tenure Policy Bill Advances to North Dakota Senate*, N.D. MONITOR (Feb. 19, 2025), <https://northdakotamonitor.com/briefs/amended-tenure-policy-bill-advances-to-north-dakota-senate/>.

414 H.B. 1437 first engrossment with Sen. amends., 69th Legis. Assemb. (N.D. 2025).

415 Dave Thompson, *State Senate Reverses Itself, Passes 'Tenure' Bill*, PRAIRIE PUBLIC BROAD. (Mar. 27, 2025), <https://news.prairiepublic.org/local-news/2025-03-27/state-senate-reverses-itself-passes-tenure-bill>.

416 *Id.*

417 N.D. Legis., 69th Legislative Assembly (2025-27), HB 1437, [https://ndlegis.gov/assembly/69-2025/regular/bill-actions/ba1437.html?bill\\_year=2025&bill\\_number=1437](https://ndlegis.gov/assembly/69-2025/regular/bill-actions/ba1437.html?bill_year=2025&bill_number=1437).

418 2022 Fla. Laws, 486.

419 *Id.* at 487.

420 2023 Fla. Laws 82, 1015. Under earlier versions of the legislation, tenured professors would have faced post-tenure review at any time or for any cause, but that language was removed by the bill's sponsor. Eva Surovell, *'Diversity, Equity, and Inclusion' Is Stripped Out of Florida's Higher-Ed Reform Bill*, CHRON. HIGHER EDUC. (Apr. 13, 2023), <https://www.chronicle.com/article/diversity-equity-and-inclusion-is-stripped-out-of-floridas-higher-ed-reform-bill>.

personnel actions or decisions regarding faculty, including in the areas of evaluations, promotions, tenure, discipline, or termination, may not be appealed beyond the level of a university president or designee. Such actions or decisions must have as their terminal step a final agency disposition, which must be issued in writing to the faculty member, and are not subject to arbitration. The filing of a grievance does not toll the action or decision of the university, including the termination of pay and benefits of a suspended or terminated faculty member.<sup>421</sup>

The Board of Governors adopted post-tenure review regulations in 2023. The review criteria included

1. The level of accomplishment and productivity relative to the faculty member's assigned duties in research, teaching, and service, including extension, clinical, and administrative assignments. The university shall specify the guiding documents. Such documents shall include quantifiable university, college, and department criteria for tenure, promotion, and merit as appropriate.
2. The faculty member's history of professional conduct and performance of academic responsibilities to the university and its students.
3. The faculty member's non-compliance with state law, Board of Governors' regulations, and university regulations and policies.
4. Unapproved absences from teaching assigned courses.
5. Substantiated student complaints.
6. Other relevant measures of faculty conduct as appropriate.<sup>422</sup>

The regulations established four performance ratings. They include "[e]xceeds expectations," "[m]eets expectations," "[d]oes not meet expectations," and "[u]nsatisfactory."<sup>423</sup> A faculty member who receives a final performance rating of "unsatisfactory" "shall receive a notice of termination from the chief academic officer."<sup>424</sup>

The first reviews under the new regulations, conducted in the spring of 2024, resulted in several dismissals at the state's flagship institution. At the University of Florida, 17% of the 226 faculty members who underwent reviews were rated in the two lowest categories: five were rated as "unsatisfactory" and received a notice of termination, while thirty-four were rated as "does not meet expectations" and were placed on a one-year performance-improvement plan.<sup>425</sup> The University of

421 2023 Fla. Laws 1015, 1020.

422 FLA. BD. OF GOVERNORS REGUL. ch. 10.003 (2025).

423 *Id.* at ch. 10.003 §§ (4)(f), (4)(i).

424 *Id.* at ch. 10.003 § (5)(d).

425 Megan Zahneis, *Why U. of Florida Professors Decry 'Chaotic' Post-Tenure Review that Failed Nearly a Fifth of Those Evaluated*, CHRON. HIGHER EDUC. (Aug. 19, 2024), <https://www.chronicle.com/>

Central Florida had the next-highest proportion of professors in the bottom-two ratings—11.1%—while all professors reviewed at Florida State University either met or exceeded expectations.<sup>426</sup>

Three tenured professors filed a lawsuit in state court to challenge the constitutionality of the post-tenure review laws.<sup>427</sup> The Florida Constitution established the “Statewide Board of Governors” and gave it the authority to “operate, regulate, control, and be fully responsible for the management of the whole university system. These responsibilities shall include, but not be limited to, defining the distinctive mission of each constituent university and its articulation with free public schools and community colleges, ensuring the well-planned coordination and operation of the system, and avoiding wasteful duplication of facilities or programs.”<sup>428</sup> The plaintiffs argued that the tenure law limited “the Board of Governors’ authority to make policies and decisions with respect to tenure,” while also imposing “direct requirements on the Board with respect to tenure.”<sup>429</sup> Therefore, every provision of the tenure law “that usurps, encroaches on, modifies or controls the Board of Governor’s constitutional powers and duties prescribed in Article IX § 7(d) [of the] Florida Constitution is unconstitutional.”<sup>430</sup>

The plaintiffs claimed that the tenure law caused them injuries in two ways. First, they argued that the law constructively ended tenure in Florida, causing them “immediate harm . . . as the termination of tenure affects their career opportunities.”<sup>431</sup> They argued, “Because traditional tenure has been abolished in Florida, Plaintiffs can no longer represent to the public and to their peers that they are fully-tenured professors,” making it difficult for them “to advance in their field,” especially outside of Florida, and “secure government grants.”<sup>432</sup> The plaintiffs characterized the law as:

[t]echnically . . . abolish[ing] only lifetime or indefinite tenure in favor of a five-year review process. But that means that Plaintiffs can no longer truthfully represent that they have life-time tenure. At most, they can represent that they have a five-year contract which may or may not be renewed.<sup>433</sup>

The plaintiffs also argued that the tenure law infringed on “the substantive and procedural protections of tenured professors.”<sup>434</sup> They asked the court to find

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article/why-u-of-florida-professors-decry-chaotic-post-tenure-review-that-failed-nearly-a-fifth-of-those-evaluated.

426 *Id.*

427 Complaint at 2–3, *Hernandez v. Bd. of Governors of the St. Univ. of Fla.*, 2024 CA 001238 (Fla. Cir. Ct. July 30, 2024).

428 FLA. CONST. art. IX, § 7.

429 Complaint, *supra* note 427, at 10–11.

430 *Id.* at 15.

431 *Id.* at 16.

432 *Id.* at 17.

433 *Id.* at 16 n. 5.

434 *Id.* at 19.

the law unconstitutional and to impose an injunction against its enforcement.<sup>435</sup>

Faculty members and faculty unions pursued cases in state and federal courts to challenge the tenure law's elimination of arbitration. Hugo Viera-Vargas, a faculty member at New College, was denied tenure in April 2023 and subsequently denied the right to appeal through arbitration because of the tenure law's provision against it.<sup>436</sup> Viera-Vargas teamed with the United Faculty of Florida in court to assert that the tenure law violated collective-bargaining rights and unconstitutionally impaired a union contract. A collective bargaining agreement between New College and United Faculty of Florida in effect between 2021 and 2024 included a provision governing grievance procedures and arbitration.<sup>437</sup> Noting this provision, the complaint stated, "The arbitration ban cannot survive any level of constitutional scrutiny. There is no remotely sufficient governmental interest in this prohibition. Nor do the state's means bear an adequate connection to any purported interest. Instead, the prohibition serves only to undermine plaintiffs' constitutionally protected collective bargaining and contractual rights."<sup>438</sup> The college's motion to dismiss was denied, with the judge writing, "Here, plaintiffs alleged the arbitration provisions in the collective bargaining agreement were bargained-for. This claim is more than plausible given that the collective bargaining agreement's arbitration provisions go well beyond the requirements (of part of state law) by setting out the scope and procedures of any arbitration in detail."<sup>439</sup>

United Faculty of Florida also brought a suit in federal court to protect arbitration rights. The complaint cited the 100-year-old Federal Arbitration Act (FAA),<sup>440</sup> which "reflects a long-standing federal policy favoring arbitration and preempts state laws that ban arbitration of particular types of claims or treat agreements to arbitrate differently from any other type of contract."<sup>441</sup> Relying on the Supremacy Clause of the U.S. Constitution,<sup>442</sup> the plaintiffs' first count argued, "The Arbitration Ban directly conflicts with the FAA because the Arbitration Ban purports to invalidate terms providing for arbitration of adverse personnel

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435 *Id.* at 18, 20.

436 Jim Saunders, *New College of Florida Professor, Unions Sue State Over Arbitration*, FLA. NEWS SERV. (Aug. 7, 2023), [https://www.newsserviceflorida.com/latest/headlines/unions-new-college-prof-challenge-state-law/article\\_125dd81a-32df-11ee-9c48-d3752b3dfb22.html](https://www.newsserviceflorida.com/latest/headlines/unions-new-college-prof-challenge-state-law/article_125dd81a-32df-11ee-9c48-d3752b3dfb22.html).

437 New Coll. of Fla. Bd. of Trs. and New Coll. United Faculty of Fla. (2021), *Collective Bargaining Agreement 2021–2024*, art. 20, <https://www.ncf.edu/wp-content/uploads/2024/05/NCUFF-Collective-Bargaining-Agreement-2021-2024-BOT-Approved-08.10.23-1.pdf>.

438 Saunders, *supra* note 436.

439 Josh Moody, *Tenure Denial Lawsuit Against New College Moves Forward*, INSIDE HIGHER ED (July 19, 2024), <https://www.insidehighered.com/news/quick-takes/2024/07/19/tenure-denial-lawsuit-against-new-college-moves-forward>.

440 9 U.S.C. § 1-16.

441 Complaint at 6, *United Faculty of Fla. v. Lamb*, 1:24-cv-136 (N.D. Fla. Aug. 7, 2024). The FAA guarantees that "[a] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

442 U.S. CONST. art. VI, cl. 2.

decisions for higher education faculty in Florida and stands as an obstacle to Congress's objectives and purpose of promoting arbitration and enforcing arbitration agreements as written."<sup>443</sup>

United Faculty of Florida sought declaratory judgment that the arbitration ban is invalid regarding all collective bargaining agreements covered by the Federal Arbitration Act.<sup>444</sup> It also requested a permanent injunction enjoining the Florida Board of Governors from enforcing the arbitration ban, including any action to impair "contractual right to arbitrate grievances before a neutral arbitrator under the operative CBAs."<sup>445</sup>

## 2. Georgia

In 2021, the Georgia Board of Regents adopted a revised post-tenure review policy that the president of the Georgia Conference of the AAUP described as "the death of tenure and due process in Georgia."<sup>446</sup> In effect, the policy separated the post-tenure review process from the due-process protections under the system's faculty dismissal policy.<sup>447</sup> The process to remove tenured professors includes a peer review with other faculty,<sup>448</sup> but under the 2021 revisions, faculty at public universities could be removed after failing two consecutive annual reviews without a final faculty review.<sup>449</sup> Additional revisions in 2023 addressed due process, but left the final decision in the hands of institutional presidents.<sup>450</sup>

The post-tenure review policy requires each tenure-granting institution in the University System of Georgia to establish criteria and a process to evaluate the performance of each tenured faculty member.<sup>451</sup> Each institution was required to develop its policies "in consultation with the institution's faculty and ... include appropriate due-process mechanisms."<sup>452</sup> The criteria must include "evaluation of instruction, student success activities, research/scholarship, and service as is appropriate to the faculty member's institution, school or college, and department."<sup>453</sup>

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443 Complaint, *supra* note 441, at 28.

444 *Id.* at 30.

445 *Id.*

446 Dave Williams, *University System of Georgia Faculty Fighting Changes to Tenure System*, ATHENS BANNER-HERALD (Oct. 12, 2021), <https://www.onlineathens.com/story/news/2021/10/12/university-system-georgia-set-adopt-tenure-changes-opposed-faculty/8428426002/>.

447 Colleen Flaherty, *Tenure Changes Ahead*, INSIDE HIGHER ED (Oct. 12, 2021), <https://www.insidehighered.com/news/2021/10/13/georgia-board-set-vote-controversial-tenure-changes>.

448 See *infra* text accompanying note 460.

449 Giulia Heyward, *Board's Move Allows Firing of Professors with Tenure*, N.Y. TIMES, Oct. 14, 2021, at A19.

450 See *infra* text accompanying notes 458–60.

451 Univ.Sys.ofGa., *Bd. for Regents Policy Manual*, §8.3.5.4(2025), [https://www.usg.edu/policymanual/assets/policymanual/documents/bor\\_policy\\_manual.pdf](https://www.usg.edu/policymanual/assets/policymanual/documents/bor_policy_manual.pdf).

452 *Id.*

453 *Id.* These criteria largely mirror the criteria already considered for pre-tenure reviews and decisions regarding retention, promotion, and tenure. *Id.* at 8.3.5.1.

Each tenured faculty member must “participate in a post-tenure review within five years following the award of tenure and again at least once every five years thereafter.”<sup>454</sup> If the results of the post-tenure review are unfavorable, then the appropriate department chair and dean, in consultation with the faculty member, create “a performance improvement plan.”<sup>455</sup> If the faculty member successfully completes the performance improvement plan, their next post-tenure review will take place on the regular five-year schedule. If the faculty member fails to make sufficient progress in performance as outlined in the performance improvement plan (or refuses to engage reasonably in the process) as determined by the department chair and dean after considering feedback from the committee of faculty colleagues, then the institution “shall take appropriate remedial action corresponding to the seriousness and nature of the faculty member’s deficiencies,” with options including but not limited to “suspension of pay, salary reduction, revocation of tenure, and separation from employment.”<sup>456</sup> The president makes the final determination of the remedial action, which is “not governed by or subject to the Board Policy on Grounds for Removal or Procedures for Dismissal.”<sup>457</sup>

Procedural due process was the major difference between the method to impose remedial action after a post-tenure review—including separation from employment—and the procedures to remove or dismiss a faculty member. The policy on Grounds for Removal lists nine reasons to dismiss a tenured or non-tenured faculty member “before the end of his or her contract term ... provided that the institution has complied with procedural due process requirements.”<sup>458</sup> The policy on Procedures for Dismissal establish “the minimum standards of due process” that an institution must follow, including four “preliminary procedures” that include a “letter to the faculty member forewarning that he or she is about to be terminated for cause and informing him or her that a statement of charges will be forwarded to him or her upon request,” and a “statement of charges, if requested by the faculty member” along with advisement of “the names of the witnesses to be used against him or her together with the nature of their expected testimony.”<sup>459</sup> The faculty member also has “the right to be heard by a faculty hearing committee,” and hearings must comply with fourteen specific procedures, including “[s]ervice of notice of the hearing with specific reasons or charges against the faculty member together with the names of the members of the hearing committee,” the right of both sides to have counsel, the keeping of a tape recording or transcript of the proceedings, and the right of both sides “to confront and cross-examine all witnesses.”<sup>460</sup>

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454 *Id.* at § 8.3.5.4.

455 *Id.*

456 *Id.*

457 *Id.* at § 8.3.5.4.

458 *Id.* at § 8.3.9.1.

459 *Id.* at § 8.3.9.2.

460 *Id.*

In 2023, the Board of Regents added language to try to address due process concerns over terminations resulting from post-tenure reviews by providing a final faculty hearing. After consulting with the University System of Georgia Faculty Council, the board recommended “an expeditious faculty hearing to evaluate due process, and one that is not binding on the President, at the final stage of the post-tenure review process,” thereby making the post-tenure review policy “self-sufficient [sic] for separation of employment cases that are based on a post-tenure review.”<sup>461</sup> The additional language stated,

[I]f the remedial action is separation from employment, the faculty member has the right to request a final faculty hearing for the purpose of confirming that due process was followed in reaching the decision of separation of employment. The outcome of the faculty hearing shall not be binding, but only advisory to the President who shall make the final decision.<sup>462</sup>

Press reports noted that the final faculty hearing “would be to ‘evaluate due process’—not the ostensible reason for dismissal.”<sup>463</sup> The AAUP, in a report critical of the 2021 revisions, concluded that the University System of Georgia administration and the Board of Regents had “effectively abolished tenure in Georgia’s public colleges and universities,” explaining, “Under the new policy, a system institution can dismiss a tenured professor for failing to remediate deficiencies identified through post-tenure evaluation without having afforded that professor an adjudicative hearing before an elected faculty body in which the administration demonstrates adequate cause for dismissal,” and by “thus denying academic due process to tenured faculty members dismissed through post-tenure review,” the policy was a “flagrant violation of the joint 1940 *Statement of Principles on Academic Freedom and Tenure*.”<sup>464</sup>

### 3. Kentucky

A law enacted in Kentucky in 2025 through a veto override requires presidents and faculty at the state universities,<sup>465</sup> the Kentucky Community and Technical

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461 Univ. Sys. of Ga., *Board of Regents Agenda*, Apr. 18–19, 2023 at 78, [https://www.usg.edu/regents/assets/regents/documents/board\\_meetings/BoR\\_Agenda\\_April\\_18th\\_19th\\_2023\\_%28Public%29\\_with\\_cover\\_page\\_4-13-23pm.pdf](https://www.usg.edu/regents/assets/regents/documents/board_meetings/BoR_Agenda_April_18th_19th_2023_%28Public%29_with_cover_page_4-13-23pm.pdf). The board questioned the need for this language, stating in the abstract to the proposed rules: “While a final faculty hearing seems redundant for post-tenure review outcomes given the extensive steps already incorporated into the post-tenure review process, adding such a hearing would better align a separation of employment based on post-tenure review with a separation of employment based on other reasons.” *Id.*

462 *Id.* at 82; *see also* Univ. Sys. of Ga., *supra* note 451, at § 8.3.5.4.

463 Ryann Quinn, *Georgia System Board OKs Post-Tenure Review Change*, INSIDE HIGHER ED (Apr. 20, 2023), <https://www.insidehighered.com/news/quick-takes/2023/04/20/georgia-system-board-oks-posttenure-review-change>.

464 Am. Ass’n Univ. Professors, *Academic Freedom and Tenure: University System of Georgia* 12 (2021), [https://www.aaup.org/file/Bulletin2022Final-2-USG\\_0.pdf](https://www.aaup.org/file/Bulletin2022Final-2-USG_0.pdf). In March 2022, the AAUP voted to censure the University System of Georgia “for the unilateral action of its administration and governing board to remove the protections of tenure and academic freedom from the system’s post-tenure review policy.” Am. Ass’n Univ. Professors, *AAUP Censures University System of Georgia* (Mar. 5, 2022), <https://www.aaup.org/news/aaup-censures-university-system-georgia>.

465 Eastern Kentucky University, Morehead State University, Murray State University, Western

College System, the University of Kentucky, and the University of Louisville to undergo an evaluation of their “performance and productivity” every four years.<sup>466</sup> Each institution’s board must establish an evaluation process by 2026. “Failure to meet performance and productivity requirements may result in removal” of a president or faculty member.<sup>467</sup>

During the vote on the legislation in the Kentucky Senate, a senator who is an assistant professor at the University of Louisville warned about the bill’s effect on academic freedom. Noting that universities already have evaluation systems and that the governing boards are “inherently political organizations that are appointed by the governor and confirmed by” the Senate, “there are no guard rails in this legislation that require that the policies or procedures that they set actually be tied to an employee’s employment contract or to their work obligations,” he said.<sup>468</sup>

Governor Andy Beshear, in his veto message, shared concerns about the legislation’s encroachment on academic freedom.<sup>469</sup> The veto message stated, “In a time of increased federal encroachment into the public education, this bill will limit employment protections of our postsecondary institution teachers,” and “limit Kentucky’s ability to hire the best people and threatens academic freedom.”<sup>470</sup> Two days later, the Republican-majority legislature overrode the Democratic governor’s veto by a vote of 80–20 in the House and 29–9 in the Senate.<sup>471</sup>

### ***G. Governance over Tenure in Mississippi: Transfer of Decision-Making, and New “Communications” and “Collegiality” Criteria***

In 2022, the Institutions of Higher Learning Board of Trustees in Mississippi, which governs the eight public universities in the state,<sup>472</sup> amended three of its eight tenure policies: minimum standards for tenured employment, promotions in rank, and post-tenure review.<sup>473</sup> In a governance change, the authority to grant

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Kentucky University, Northern Kentucky University, and Kentucky State University. KY. REV. STAT. ANN. § 164.290 (2025).

466 H.B. 424 veto override, 2025 Gen. Assemb., Reg. Sess. (Ky. 2025).

467 *Id.*

468 Monica Kast, ‘No Guard Rails’: KY University Performance Evaluation Bill Passes Despite Tenure Concerns, LEXINGTON HERALD-LEADER (Mar. 14, 2025), <https://www.kentucky.com/news/local/education/article302062789.html>.

469 Veto Message from the Governor of the Commonwealth of Kentucky Regarding House Bill 424 of the 2025 Regular Session, Mar. 25, 2025.

470 *Id.*

471 Quinn, *supra* note 299; McKenna Horsley, *Bills Become Law Ending DEI in Public Colleges, Stirring Uncertainty About Tenure’s Future in KY*, KY. LANTERN (Mar. 27, 2025), <https://kentuckylantern.com/2025/03/27/ky-bills-ending-dei-in-public-colleges-creating-uncertainty-about-tenures-future-become-law/>.

472 Alcorn State University, Delta State University, Jackson State University, Mississippi State University, Mississippi University for Women, Mississippi Valley State University, the University of Mississippi, and the University of Southern Mississippi. MISS. INSTITUTIONS OF HIGHER LEARNING, *Institutions of Higher Learning*, <http://www.mississippi.edu/about/> (last visited July 10, 2025).

473 Molly Minta, *College Presidents Now Have Final Say on Tenure After IHL Quietly Revises Policy*, MISS.

tenure was transferred from the board to the institutional presidents.<sup>474</sup> The policy to grant tenure was amended to add eight criteria to be considered:

- Professional training and experience;
- Effectiveness of teaching;
- Effectiveness, accuracy and integrity in communications; The Board endorses the American Association of University Professors' (AAUP) Statement of Principles on Academic Freedom and Tenure, which states in part: "When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence, they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution."
- Effectiveness in interpersonal relationships, including collegiality, professional ethics, cooperativeness, resourcefulness, and responsibility;
- The absence of malfeasance, inefficiency and contumacious conduct in the faculty member's performance of his/her faculty position at the university;
- Professional growth, such as research, publications, and creative activities;
- Service and other non-teaching activities, which reflect favorably upon the institution; and
- Any other criteria for granting tenure set out in the applicable institution's tenure policies, which are not inconsistent with this policy.<sup>475</sup>

Several of those criteria were already part of the consideration for promotions in rank, but the amendments added the elements regarding "effectiveness, accuracy and integrity in communications," the "absence of malfeasance, inefficiency and contumacious conduct," and additional criteria from institutional policies.<sup>476</sup> For post-tenure review, all the tenure-related criteria except "professional training and experience" were added as criteria to be considered, along with the phrase "and/or research" added after "[e]ffectiveness of teaching."<sup>477</sup>

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TODAY (Apr. 21, 2022), <https://mississippitoday.org/2022/04/21/tenure-ihl-revises-policy/>.

474 MISS. BD. TRS. OF STATE INSTS. HIGHER LEARNING, *Board Book* 82 (Apr. 21, 2022), <https://web.archive.org/web/20220421201149/http://www.mississippi.edu/board/downloads/boardbooks/2204.pdf>; see also MISS. BD. TRS. STATE INSTS. HIGHER LEARNING, *Policies and Bylaws*, § 403.0101 (2024).

475 MISS. BD. TRS. STATE INSTS. HIGHER LEARNING, *Board Book*, *supra* note 474, at 82–83; MISS. BD. TRS. STATE INSTS. HIGHER LEARNING, *Policies and Bylaws*, *supra* note 474.

476 MISS. BD. TRS. STATE INSTS. HIGHER LEARNING, *Board Book*, *supra* note 474, at 81; MISS. BD. TRS. STATE INSTS. HIGHER LEARNING, *Policies and Bylaws*, *supra* note 474, at § 402.03.

477 MISS. BD. TRS. STATE INSTS. HIGHER LEARNING, *Board Book*, *supra* note 474, at 84; MISS. BD. TRS. STATE

The ambiguity of words like “collegiality” can be problematic. Neal Hutchens, a professor of higher education who specializes in higher education law,<sup>478</sup> said, “I worry these new terms would be used to try and chill faculty speech and participation in shared governance.”<sup>479</sup> Hutchens also said, “The problem is that such terms can be so vague as to really be more about whether faculty are subservient to institutional leaders and be a ground to dismiss faculty for unwarranted reasons or to deny tenure.”<sup>480</sup>

The AAUP opposes the use of “collegiality” as a criterion to evaluate faculty. In a statement with origins dating back to 1999, the AAUP asserts that “collegiality is not a distinct capacity to be assessed independently of the traditional triumvirate of teaching, scholarship, and service. Evaluation in these three areas will encompass the contributions that the virtue of collegiality may pertinently add to a faculty member’s career.”<sup>481</sup> The statement explains how the “invocation of ‘collegiality’” can “threaten academic freedom”:

In the heat of important decisions regarding promotion or tenure, as well as other matters involving such traditional areas of faculty responsibility as curriculum or academic hiring, collegiality may be confused with the expectation that a faculty member display “enthusiasm” or “dedication,” evince “a constructive attitude” that will “foster harmony,” or display an excessive deference to administrative or faculty decisions where these may require reasoned discussion. Such expectations are flatly contrary to elementary principles of academic freedom, which protect a faculty member’s right to dissent from the judgments of colleagues and administrators.<sup>482</sup>

Moreover, a specific criterion of collegiality “also holds the potential of chilling faculty debate and discussion. Criticism and opposition do not necessarily conflict with collegiality.”<sup>483</sup>

#### ***H. Task Force that Did Not Meet, Bill that Did Not Pass, But Issue Persisted: Louisiana***

A task force established by the Louisiana legislature in 2022 to scrutinize tenure was never convened, and legislation the following year that would have required annual faculty reviews did not proceed. Still, tenure remained a hot-button issue in Louisiana in 2025.

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INSTS. OF HIGHER LEARNING, *Policies and Bylaws*, *supra* note 474, at § 403.0103.

478 See KAPLIN ET AL., *supra* note 20. Hutchens was at the University of Mississippi from 2016 to 2022 and is now at the University of Kentucky. *Id.* at xxxi.

479 Minta, *supra* note 473.

480 *Id.*

481 AM. ASS’N UNIV. PROFESSORS, *On Collegiality as a Criterion for Faculty Evaluation* 1 (2016), <https://www.aaup.org/file/AAUP%20Collegiality%20report.pdf>.

482 *Id.* at 1–2.

483 *Id.* at 2.

Louisiana Senate Concurrent Resolution 6, sponsored by Senator Stewart Cathey, created the Task Force on Tenure in Postsecondary Education in 2022.<sup>484</sup> Signaling the sponsor's skepticism of tenure, the resolution stated that "tenure policies may provide competent faculty the freedom to perform scholarly research, impart their knowledge, and debate controversial or emerging issues without any political influence or fear of reprisal," and that

postsecondary education students should be confident that they are being exposed to the spectrum of viewpoints, including those that are dissenting; that they are graded solely on the basis of their reasoned answers and appropriate knowledge; and that faculty members are not using their courses for the purposes of political, ideological, religious, or antireligious indoctrination.<sup>485</sup>

The Task Force on Tenure in Public Postsecondary Education established by the resolution was required "to perform an in-depth review of the merits of and need for tenure, to study public postsecondary tenure policies, and to propose any recommendations regarding tenure policies."<sup>486</sup>

The composition of the nineteen-member task force led to its demise, with the majority of its members supporting tenure. The task force was "dominated by academics and politicians skeptical of the panel's stated mission."<sup>487</sup> Only two members, Senator Cathey and fellow Republican Senator Kirk Talbert, had publicly criticized tenure. Four House members appointed by the House Speaker had voted against the resolution.<sup>488</sup> University administrators—including the president of the University of Louisiana System and the president-chancellor of the Southern University System—and several faculty members filled a total of nine seats. The four remaining seats belonged to legislators who had not shared a position on tenure.<sup>489</sup>

Given the perception that the task force was "stacked with academics and pro-tenure legislators," Senator Cathey, as the chair of the task force, decided not to convene it.<sup>490</sup> Instead, he sponsored legislation that would require annual evaluations of all faculty members at public colleges and universities.<sup>491</sup>

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484 Sen. Con. Res. No. 6, 2022 Reg. Sess. (La. 2022).

485 *Id.*

486 *Id.*

487 Piper Hutchinson, *Louisiana Task Force to Scrutinize University Tenure Is Made Up of People Who Support Tenure*, LA. ILLUMINATOR (Aug. 3, 2022), <https://lailluminator.com/2022/08/03/louisiana-task-force-to-scrutinize-university-tenure-is-made-up-of-people-who-support-tenure/>.

488 *Id.*

489 *Id.*

490 Piper Hutchinson, *Higher Ed Tenure Task Force Will Not Meet; Sponsor Plans Legislation*, LA. ILLUMINATOR (Jan. 31, 2023), <https://lailluminator.com/2023/01/31/higher-ed-tenure-task-force-will-not-meet-sponsor-plans-legislation/>.

491 S.B. 174, 2023 Reg. Sess. (La. 2023).

The bill would have required criteria that assigned “a weight to each of the areas of teaching, professional activity, and service.”<sup>492</sup> Department heads needed to develop a written job description for each faculty position that included “detailed job duties in the three areas of teaching, professional activity, and service,” and upon employment, each faculty member would receive the job description, the evaluation criteria, and the weight assigned to each of the three areas, along with “a list of performance goals.”<sup>493</sup>

Department heads would annually evaluate each full-time and part-time faculty member, and the evaluation would be used to determine promotion, reappointment, and merit raises.<sup>494</sup> Evaluations would determine whether a faculty member’s performance was “adequate or not.”<sup>495</sup> Under the bill, a faculty member needed to meet at least 75% of the performance goals in an area to be determined “adequate or higher.”<sup>496</sup>

Failure to be evaluated as adequate over two consecutive years triggered a “mandatory plan of remediation,” and if a faculty member refused to concur with the plan as approved by the provost, their tenure would be rescinded.<sup>497</sup> A tenured faculty member under a mandatory plan of remediation who failed “to achieve significant progress as outlined in the remediation plan within the designated timetable shall forfeit tenure and may become subject to academic dismissal.”<sup>498</sup>

The faculty-evaluation bill did not proceed beyond the committee stage in the Louisiana Senate,<sup>499</sup> but tenure remained a controversial topic in the state. During a lecture on January 14, 2025, a tenured criminal law professor at Louisiana State University, Ken Levy, “dropped f-bombs against then-president-elect Donald Trump and Louisiana governor Jeff Landry, and told students who like Trump that they need his ‘political commentary,’” and LSU quickly removed him from

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492 *Id.* The legislation specified areas of emphasis in each of the three areas. For example, evaluations of teaching needed to “emphasize activities which engage students in learning, encourage”; evaluations of professional activity needed to “emphasize activities requiring professional or academic expertise that support and advance a discipline pertinent to the faculty member’s position and the professional development of students through publications, performances, and exhibitions”; and evaluations of service needed to “emphasize professional contributions made to the institution, to students, and to the larger community meaningful academic and career guidance.” *Id.*

493 *Id.*

494 *Id.*

495 *Id.*

496 *Id.*

497 S.B. 174, *supra* note 491.

498 *Id.*

499 La. St. Legis., Bill Search for the 2023 Regular Session, SB174, <https://legis.la.gov/legis/BillInfo.aspx?s=23RS&b=SB174&sbi=y>.

his teaching duties.<sup>500</sup> Levy sued to be reinstated.<sup>501</sup> While Levy's case progressed, Governor Landry posted on X an alleged criminal law exam given by Levy that included a section on sex crimes,<sup>502</sup> and Landry commented, "Disgusting and inexcusable behavior from Ken Levy. Deranged behavior like this has no place in our classrooms! If tenure protects a professor from this type of conduct, then maybe it's time to abolish tenure."<sup>503</sup> After the governor's post, it was anticipated that Senator Cathey was likely to file legislation similar to his previous tenure-related bill.<sup>504</sup>

#### IV. TRUMP'S EFFECTS ON TENURE THROUGH FEDERAL ACTION IN HIS SECOND TERM: "EXISTENTIAL TERROR," DEI, DOGE, AND TITLES VI AND IX AS TRUNCHEONS

Rather than attacking tenure and academic freedom directly, the second Trump administration used cuts in federal funding; prohibitions on DEI programs; calls for greater efficiency; and allegations of violations of Titles VI and IX as leverage to force colleges to comply with its vision of higher education, which in effect weakened tenure rights. Trump used bullying announcements, executive orders, and investigations as the means toward his ends.<sup>505</sup>

Early in his second term, Trump decided that withholding funds from "elite academic institutions" was "the fastest way to force policy changes ... that the new administration believes it has a mandate to pursue."<sup>506</sup> An architect of this plan was Christopher Rufo, a senior fellow at the Manhattan Institute, a conservative think tank, who had earlier worked with Florida Governor Ron Desantis to defund DEI

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500 Ryan Quinn, *This Law Professor's Job Has Become a Legal Drama*, INSIDE HIGHER ED (Feb. 20, 2025), <https://www.insidehighered.com/news/faculty-issues/academic-freedom/2025/02/20/law-professors-job-has-become-legal-drama>.

501 "Levy received notice on January 17 that LSU was relieving him of his teaching duties, 'effective immediately, pending an investigation into student complaints of inappropriate statements made in your class during the first week of the Spring Semester 2025.' Levy's status has since oscillated between being allowed to teach and being removed from the classroom. On Feb. 20, after weeks of back and forth concerning Levy's status in the classroom, Louisiana's First Circuit Court of Appeal vacated the part of the lower court's order that ordered LSU to reinstate Levy after a two-day evidentiary hearing. Levy just appealed that decision to the Louisiana Supreme Court." Letter from Graham Piro, Foundation for Individual Rights and Expression to William F. Tate, President, Louisiana State University (Mar. 12, 2025), <https://www.thefire.org/research-learn/fire-letter-louisiana-state-university-march-12-2025>.

502 For the text of the exam questions, see Quinn, *supra* note 500.

503 Governor Jeff Landry (@LAGovJeffLandry), X (Feb. 12, 2025, 6:06 PM), <https://x.com/LAGovJeffLandry/status/188981332222149888>.

504 Piper Hutchinson, *Political Anxiety on Display at LSU Board Meeting*, LA ILLUMINATOR (Feb. 21, 2025), <https://lailluminator.com/2025/02/21/political-anxiety-on-display-at-lsu-board-meeting/>.

505 As mentioned earlier, this article, with its focus on tenure, does not attempt to catalog all the actions taken by the Trump administration against higher education in general and against specific institutions. See *supra* text accompanying note 200. See also CHRONICLE Staff, *Tracking Trump's Higher-Ed Agenda*, CHRON. HIGHER EDUC. (June 26, 2025), <https://www.chronicle.com/article/tracking-trumps-higher-ed-agenda>.

506 Annie Linskey, *President Ramps Up His Bid to Settle Scores*, WALL ST. J., Mar. 22, 2025, at A4.

initiatives at public colleges and universities.<sup>507</sup> Rufo described the defunding plan as a way to put “the universities into contraction, into a recession, into declining budgets” in the following way:

adjust the formula of finances from the federal government to the universities in a way that puts them in an existential terror and have them say, *Unless we change what we're doing, we're not going to be able to meet our budget for the year.* We're going to have to wind certain things down and then make the universities make those hard decisions.<sup>508</sup>

In 2025, the Trump administration imposed this “existential terror” through attacks on DEI programs, investigations into institutions’ responses to antisemitism and compliance with Title IX, and faux calls for government efficiency.

### ***A. Funding Threats over DEI Initiatives***

On March 14, 2025, following up on Trump’s executive order calling for civil rights enforcement against DEI programs and the Department of Education’s Dear Colleague letter warning institutions that failure to comply with this civil rights interpretation could result in the loss of federal funding,<sup>509</sup> the Department of Education announced investigations into more than fifty universities.<sup>510</sup> Forty-five institutions were investigated over their relationship with the PhD Project, a nonprofit organization that helps underrepresented students get business degrees and diversify the business world.<sup>511</sup> The department said that the PhD Project bases eligibility on race and that its partner institutions are “engaging in race-exclusionary practices in their graduate programs.”<sup>512</sup> The department was investigating six other institutions for awarding “impermissible race-based scholarships.”<sup>513</sup>

### ***B. Antisemitism Investigations***

A major conduit to create “existential terror” was the Federal Task Force to Combat Anti-Semitism, which was established under the authority of an executive order to combat antisemitism,<sup>514</sup> and given a charge to “eradicate antisemitic harassment in schools and on college campuses.”<sup>515</sup> On February 28, 2025, the task

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507 Josh Moody, *The New Conservative Playbook on DEI*, INSIDE HIGHER ED (Feb. 6, 2023), <https://www.insidehighered.com/news/2023/02/07/desantis-debuts-new-conservative-playbook-ending-dei>.

508 Ross Douthat, *The Anti-D.E.I. Crusader Taking Aim at Education*, N.Y. TIMES, Mar. 7, 2025, at SR5.

509 See *supra* text accompanying notes 173–76.

510 Collin Binkley, *More Than 50 Universities Face Federal Investigations as Part of Trump’s Anti-DEI Campaign*, AP NEWS (Mar. 14, 2025), <https://apnews.com/article/trump-dei-universities-investigated-f89dc9ec2a98897577ed0a6c446fae7b>.

511 *Id.*

512 *Id.*

513 *Id.*

514 Exec. Order No. 14,188, 90 Fed Reg. 8,847 (Feb. 3, 2025).

515 Press Release, U.S. Dep’t of Justice, Federal Task Force to Combat Antisemitism Announces

force announced that it would investigate ten institutions that “may have failed to protect Jewish students and faculty members from unlawful discrimination” during protests over the war in Gaza between Israel and Hamas in 2024.<sup>516</sup> Under another initiative, the Department of Education announced on March 10, 2025, that it had sent letters to sixty universities already under investigation for Title VI violations relating to antisemitic harassment and discrimination, warning them of potential enforcement actions if they did not “protect Jewish students on campus, including uninterrupted access to campus facilities and educational opportunities.”<sup>517</sup>

### 1. *Columbia University*

At the top of the Federal Task Force to Combat Anti-Semitism’s list, and not just alphabetically, sat Columbia, which quickly became an example of the extent of the Trump administration’s reach to control academics. On March 7, 2025, the administration announced it was canceling \$400 million in federal grants and contracts to the university “due to the school’s continued inaction in the face of persistent harassment of Jewish students.”<sup>518</sup> In a letter to Columbia’s president and board co-chairs on March 13, 2025, the administration outlined “immediate next steps that we regard as a precondition for formal negotiations regarding Columbia University’s continued financial relationship with the United States government,” including starting “the process of placing the Middle Eastern, South Asian, and African Studies department under academic receivership for a minimum of five years.”<sup>519</sup> Academic receivership—a concept “largely absent from the professional

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Visits to 10 College Campuses that Experienced Incidents of Antisemitism (Feb. 28, 2025), <https://www.justice.gov/opa/pr/federal-task-force-combat-antisemitism-announces-visits-10-college-campuses-experienced>.

516 *Id.*

517 Press Release, U.S. Dep’t of Educ., U.S. Department of Education’s Office for Civil Rights Sends Letters to 60 Universities Under Investigation for Antisemitic Discrimination and Harassment (Mar. 10, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-office-civil-rights-sends-letters-60-universities-under-investigation-antisemitic-discrimination-and-harassment>.

518 Press Release, U.S. Dep’t of Ed., DOJ, HHS, ED, and GSA Announce Initial Cancellation of Grants and Contracts to Columbia University Worth \$400 Million (Mar. 7, 2025), <https://www.ed.gov/about/news/press-release/doj-hhs-ed-and-gsa-announce-initial-cancellation-of-grants-and-contracts-columbia-university-worth-400-million>. In April 2024, students supporting the Palestinian liberation movement pitched about fifty tents in the center of Columbia’s campus to protest the war in Gaza. Chants, posters, and literature at the encampment expressed support for the October 7, 2023, attack by Hamas against Israel, and many Jewish students feared for their safety, especially after protesters targeted some Jewish students with antisemitic verbal abuse, leading the university to call for classes to be taught online. Luis Ferré-Sadurní et al., *Some Jewish Students Report Being Targeted as Protests at Columbia Press On*, N.Y. TIMES, Apr. 23, 2024, at A14. Other pro-Palestinian incidents included a student takeover of Hamilton Hall, a protest against a class taught by former Secretary of State Hillary Clinton, and the disruption of an Israeli history class. Liam Stack & Katherine Rosman, *A Chill at Columbia: ‘Nobody Can Protect You’*, N.Y. TIMES, Mar. 13, 2025, at A1.

519 N.Y. TIMES, *Read the Letter to Columbia University*, Mar. 14, 2025, <https://www.nytimes.com/interactive/2025/03/14/nyregion/columbia-letter.html>. The department “has long been in a pitched battle over its scholarship and the employment of professors who describe themselves as anti-Zionist.” Troy Closson, *Ceding to Trump, Columbia Agrees to Alter Policies*, N.Y. TIMES, Mar. 22,

literature”—“is a situation in which the department is judged incapable of governing itself[,] and an outside chair is imposed upon the department by the dean, provost, or college/university president.”<sup>520</sup>

Reflecting on the federal government’s funding freeze and subsequent demands against Columbia University, Lee C. Bollinger, the former president of Columbia, said, “Never has the government brought such leverage against an institution of higher education.”<sup>521</sup> He added, “The university is in an incredibly unprecedented and dangerous situation. It is an existential threat.”<sup>522</sup>

On March 21, 2025, Columbia—which receives about 20% of its operating revenues from the federal government<sup>523</sup>—largely acceded to the Trump administration’s preconditions. Among them, the university agreed to appoint a new senior vice provost to oversee regional studies programs, starting with programs on the Middle East, including the department of Middle East, South Asian, and African Studies.<sup>524</sup> Among the new official’s responsibilities, the senior vice provost will “review the educational programs to ensure the educational offerings are comprehensive and balanced,” “create a standard review process for the hiring of non-tenured faculty,” and “review the processes for approving curricular changes.”<sup>525</sup> Columbia did not describe the change in authority over the Middle Eastern studies department as receivership, “but several faculty members said that it appeared to resemble that measure.”<sup>526</sup>

Despite Columbia’s meeting the Trump administration’s initial demands, the government did not immediately restore Columbia’s funding. Instead, the Trump administration said Columbia’s policy changes were “early steps” and a “positive sign.”<sup>527</sup> Through mid-April 2025, no agreement had been reached between Columbia and the federal antisemitism task force, and the university president vowed to “reject heavy-handed orchestration from the government that could potentially damage our institution,” including any agreement that “dictates what

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2025, at A1.

520 Tammy Stone, *Departments in Academic Receivership: Possible Causes and Solutions*, 33 INNOV. HIGHER EDUC. 229, 230 (2009).

521 Katherine Rosman, *Trump Tactics on Columbia May Be Illegal, Experts Say*, N.Y. TIMES, Mar. 18, 2025, at A17.

522 *Id.*

523 Alan Blinder et al., *Columbia’s Interim President Departs*, N.Y. TIMES, Mar. 30, 2025, at A29.

524 COLUM. UNIV. PRESIDENT, *ADVANCING OUR WORK TO COMBAT DISCRIMINATION, HARASSMENT, AND ANTISEMITISM AT COLUMBIA*3 (Mar. 21, 2025), <https://president.columbia.edu/sites/default/files/content/03.21.2025%20Columbia%20-%20FINAL.pdf>.

525 *Id.*

526 Closson, *supra* note 519. Ilya Somin, a law professor at George Mason University, questioned the legality of imposing receivership on an academic department. “There is no question but that this goes far beyond of the scope of the law.’ ... The internal workings of an academic institution are ‘not something that should be within the government’s control.’” Rosman, *supra* note 521.

527 Alyce McFadden, *Trump’s Cuts Were ‘Gun to the Head,’ Faculty Lawsuit Says*, N.Y. TIMES, Mar. 26, 2025, at A19.

we teach, research, or who we hire,” or that “would require us to relinquish our independence and autonomy as an educational institution.”<sup>528</sup>

Trump officials reportedly considered pursuing a consent decree to ratify an eventual agreement with Columbia.<sup>529</sup> A consent decree would give a federal judge responsibility to ensure Columbia adheres to the terms of the agreement, including finding the university in contempt of court if it is not in compliance. A step above the usual voluntary agreements that resolve education-related civil rights issues, a consent decree “is unprecedented in its expansiveness,” said John Thelin, a historian of higher education and professor emeritus at the University of Kentucky.<sup>530</sup>

## 2. *Harvard University*

Harvard became the most prominent target on the antisemitism task force’s list of ten institutions. On March 31, 2025, the Trump administration announced it was reviewing approximately \$9 billion in federal grants and contracts awarded to Harvard, comprising \$256 million in contracts and \$8.7 billion in “multiyear grant commitments,” which included funding for hospitals affiliated with Harvard’s medical school.<sup>531</sup> Harvard President Alan Garber indicated that the university would work with the federal government “to ensure that they have a full account of the work we have done and the actions we will take going forward to combat antisemitism.”<sup>532</sup>

The federal government, on April 3, 2025, made nine demands, one of which reached into faculty instruction. In a letter co-signed by officials at the three agencies composing the task force, the Trump administration listed nine “immediate next steps ... regard[ed] as necessary for Harvard University’s continued financial relationship with the United States government.”<sup>533</sup> Under the heading “Oversight and accountability for biased programs that fuel antisemitism,” the first demand stated: “Programs and departments that fuel antisemitic harassment must be reviewed and necessary changes made to address bias, improve viewpoint diversity, and end ideological capture.”<sup>534</sup>

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528 Troy Closson, *Columbia Takes Tougher Approach to White House Threats*, N.Y. TIMES, Apr. 16, 2025, at A15.

529 Liz Essley Whyte & Douglas Belkin, *Trump Seeks Consent Decree on Columbia*, WALL ST. J., Apr. 11, 2025, at A2.

530 *Id.*

531 Alan Blinder et al., *Trump Administration Will Review Billions in Funding for Harvard*, N.Y. TIMES, Mar. 31, 2025, <https://www.nytimes.com/2025/03/31/us/trump-administration-harvard-funding.html>.

532 *Id.* An internal report on antisemitism at Harvard revealed “a campus climate in which some Jewish students were told by peers and, in some cases, faculty members, ‘that they were associated with something offensive, and, in some cases, that their very presence was an offense,’” “partisan and one-sided pedagogy’ that failed to represent Jewish and Israeli perspectives,” and Israeli Jewish students “feeling unwelcome and ‘shunned’ on campus.” Kate Hidalgo Bellows et al., *Harvard Reports on Antisemitism and Islamophobia Offer Stark Findings, Divergent Solutions*, CHRON. HIGHER EDUC. (Apr. 29, 2025), <https://www.chronicle.com/article/harvard-releases-reports-on-campus-climate>.

533 Dhruv T. Patel & Grace E. Yoon, *Trump Administration Conditions Harvard’s Funding on Eliminating DEI, Restricting Protests*, HARV. CRIMSON (Apr. 3, 2025), <https://www.thecrimson.com/article/2025/4/4/harvard-federal-funding-demands/>.

534 *Id.* A few days before receiving the letter, Harvard dismissed the director and associate director

In a letter on April 11, 2025, that stated it “incorporates and supersedes the terms of the federal government’s prior letter,” the Trump administration demanded more intrusive control over Harvard, spanning governance, hiring, admissions, and student discipline.<sup>535</sup> The letter demanded “reducing the power held by faculty (whether tenured or untenured) and administrators more committed to activism than scholarship,” and an external audit of “the student body, faculty, staff, and leadership for viewpoint diversity, such that each department, field, or teaching unit must be individually viewpoint diverse.”<sup>536</sup> After the audit, departments and fields “found to lack viewpoint diversity must be reformed by hiring a critical mass of new faculty within that department or field who will provide viewpoint diversity; every teaching unit found to lack viewpoint diversity must be reformed by admitting a critical mass of students who will provide viewpoint diversity.”<sup>537</sup>

The April 11 letter also demanded a similar external audit of “those programs and departments that most fuel antisemitic harassment or reflect ideological capture,” singling out the Divinity School, Graduate School of Education, School of Public Health, Medical School, Religion and Public Life Program, FXB Center for Health & Human Rights, Center for Middle Eastern Studies, Carr Center for Human Rights in the Kennedy School of Government, Department of Near Eastern Languages and Cultures, and the International Human Rights Clinic at Harvard Law School.<sup>538</sup> The audit would, chillingly, identify “individual faculty members who discriminated against Jewish or Israeli students or incited students to violate Harvard’s rules following October 7,” with the university and the federal government cooperating “to determine appropriate sanctions for those faculty members within the bounds of academic freedom and the First Amendment.”<sup>539</sup>

Harvard refused. The university’s lawyers, in a letter to the three signatories to the April 11 letter, wrote that the government’s demands violated the First Amendment and denied Harvard its statutory rights to have accusation against it to be proven “through mandatory processes established by Congress and required by law.”<sup>540</sup> The letter also stated, “The university will not surrender its independence or relinquish its constitutional rights. Neither Harvard nor any other private university can allow itself to be taken over by the federal government.”<sup>541</sup> Harvard President

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of the Center for Middle Eastern Studies, which had been criticized for failing to represent Israeli perspective and for programming considered by some to be antisemitic. William C. Mao & Veronica H. Paulus, *Harvard Dismisses Leaders of Center for Middle Eastern Studies*, HARV. CRIMSON (Mar. 29, 2025), <https://www.thecrimson.com/article/2025/3/29/harvard-cmes-director-departure>.

535 Letter from Josh Gruenbaum, Thomas E. Wheeler, & Sean R. Keveney to Alan M. Garber & Penny Pritzker (Apr. 11, 2025), <https://static01.nyt.com/newsgraphics/documenttools/092f8701fdf305fd/4d7d152d-full.pdf>.

536 *Id.* at 2.

537 *Id.* at 3.

538 *Id.*

539 *Id.*

540 Letter from William A. Burck & Robert K. Hur to Josh Gruenbaum, Thomas E. Wheeler, & Sean R. Keveney (Apr. 14, 2025), <https://static01.nyt.com/newsgraphics/documenttools/bd81d9a77d5dfaa2/b051520f-full.pdf>.

541 *Id.* at 2.

Alan Garber, in a statement to the university, said, “No government—regardless of which party is in power—should dictate what private universities can teach, whom they can admit and hire, and which areas of study and inquiry they can pursue.”<sup>542</sup> In response to Harvard’s defiance, the Trump administration froze \$2.2 billion in multiyear grants and a \$60 million contract.<sup>543</sup>

Harvard then sued the federal government to undo the freeze order. On April 21, Harvard filed a complaint in federal court,<sup>544</sup> stating plainly, “Defendants’ actions are unlawful.”<sup>545</sup> The complaint focused on the First Amendment, due process requirements—such as notice, a hearing, and an express finding—under Title VI, and the arbitrary and capricious nature of the funding freeze. In violation of the First Amendment, by requiring Harvard “to modify its hiring and admissions practices to achieve a particular balance of viewpoints in every department, ‘field,’ and ‘teaching unit,’” the government “wielded the threat of withholding federal funds in an attempt to coerce Harvard to conform with the Government’s preferred mix of viewpoints and ideologies.”<sup>546</sup> Moreover, “The Government’s demands on Harvard cut at the core of Harvard’s constitutionally protected academic freedom because they seek to assert governmental control over Harvard’s research, academic programs, community, and governance.”<sup>547</sup> Under Title VI, Congress specified that the government “must follow the delineated statutory procedures *first* and freeze research funding *after* (and then only as a last resort),” while in this case, members of the Trump administration “have done the precise opposite: they issued a Freeze Order on research funding first (with no process or opportunity for voluntary compliance) and used that freeze as leverage to negotiate. Such action is flatly unlawful and contrary to statutory authority.”<sup>548</sup> Finally, Harvard alleged that the funding freeze was arbitrary and capricious: “The Government has not—and cannot—identify any rational connection between antisemitism concerns and the medical, scientific, technological, and other research it has frozen that aims to save American lives, foster American success, preserve American security, and maintain America’s position as a global leader in innovation.”<sup>549</sup>

With the court case underway, the Trump administration continued cutting federal funds to Harvard. On May 13, the Task Force to Combat Anti-Semitism announced that eight federal agencies terminated approximately \$450 million in grants to Harvard. Explaining the cuts, the task force stated, “Harvard University

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542 Vimal Patel, *Harvard Says It Won’t Obey U.S.*, N.Y. TIMES, Apr. 15, at A1.

543 *Id.* It is unclear how the Trump administration calculated the \$2.2 billion. It was speculated that it equaled all of “the roughly \$650 million the federal government provides the university’s researchers annually and the life span of any multiyear contracts.” Alan Blinder et al., *Harvard Decided Fight Was Worth the Risk*, N.Y. TIMES, Apr. 17, 2025, at A13.

544 Stephanie Saul, *Harvard Sues Over Threats to Block Funding*, N.Y. TIMES, Apr. 22, 2025, at A22.

545 Amended complaint at 5, *Harvard Coll. v. U.S. Dep’t of Health and Human Servs.*, No. 1:25-cv-11048 (D. Mass. May 13, 2025).

546 *Id.* at 35.

547 *Id.* at 37.

548 *Id.* at 44–45.

549 *Id.* at 6.

has repeatedly failed to confront the pervasive race discrimination and anti-Semitic harassment plaguing its campus,” and as a result, “institutional leaders have forfeited the school’s claim to taxpayer support.”<sup>550</sup>

### 3. *Princeton University*

Not appearing on the federal task force’s top-ten list provided no protection from federal funding cuts. On April 1, 2025, Princeton University received notices that agencies including the departments of Energy and Defense, as well as NASA, were ending “several dozen” research grants.<sup>551</sup> The grants reportedly totaled \$210 million, representing almost half of amount of federal grants and contracts that Princeton receives from the federal government.<sup>552</sup>

While Princeton University President Christopher Eisgruber said in an email to the campus community that “[t]he full rationale for this action is not yet clear,” a White House official said the notices were “a proactive pause in funding pending an investigation into alleged antisemitism.”<sup>553</sup> It has been speculated that an opinion piece written by Eisgruber in *The Atlantic* following the situation at Columbia University brought retribution from the Trump administration. On March 19, 2025, Eisgruber wrote, “The Trump administration’s recent attack on Columbia University” presented “the greatest threat to American universities since the Red Scare of the 1950s. Every American should be concerned.”<sup>554</sup> He went on to say, “The attack on Columbia is a radical threat to scholarly excellence and to America’s leadership in research. Universities and their leaders should speak up and litigate forcefully to protect their rights.” Jon Fansmith, senior vice president for government relations at the American Council on Education, noted that the Trump administration froze Princeton’s federal grants soon after Eisgruber’s piece appeared in *The Atlantic*.<sup>555</sup>

### 4. *Brown University*

In April 2025, the Trump administration announced it would block \$510 million in federal contracts and grants for Brown University.<sup>556</sup> The Brown Corporation was

550 Michael C. Bender & Alan Blinder, *Additional \$450 Million In Federal Grants Is Cut in Battle with Harvard*, N.Y. TIMES, May 14, 2025, at A14. Beyond cutting federal research funds, the Trump administration targeted Harvard in many ways, including prohibiting it from enrolling international students (Harvard won an injunction in court); investigating disclosures of foreign gifts; and threatening to revoke its tax-exempt status. Michael C. Bender, *All the Actions the Trump Administration Has Taken Against Harvard*, N.Y. TIMES (June 5, 2025), at <https://www.nytimes.com/2025/05/22/us/politics/harvard-university-trump.html>.

551 Joseph Pisani, *White House Targets Princeton*, WALL ST. J., Apr. 2, 2025, at A3.

552 Megan Zahneis, *Nearly Half of Princeton U.’s Federal Funding Has Reportedly Been Frozen by the Trump Administration*, CHRON. HIGHER EDUC. (Apr. 1, 2025), <https://www.chronicle.com/article/nearly-half-of-princeton-u-s-federal-funding-has-reportedly-been-frozen-by-the-trump-administration>. In the 2024 fiscal year, Princeton received \$455 million in federal research funds. *Id.*

553 Pisani, *supra* note 551.

554 Christopher L. Eisgruber, *The Cost of the Government’s Attack on Columbia*, THE ATLANTIC (Mar. 19, 2025), <https://www.theatlantic.com/ideas/archive/2025/03/columbia-academic-freedom/682088/>.

555 Ryan Quinn, *As Universities Yield to Trump, Higher Ed Unions Are Fighting*, INSIDE HIGHER ED (Apr. 4, 2025), <https://www.insidehighered.com/news/faculty-issues/labor-unionization/2025/04/04/universities-yield-trump-higher-ed-unions-fight>.

556 Anemona Hartocollis et al., *White House Plans to Halt \$510 Million For Brown*, N.Y. TIMES, Apr. 5,

among the few governing boards at U.S. universities that agreed to the demand of pro-Palestinian protesters to vote on divesting from Israel.<sup>557</sup> Brown voted against divestment, saying it held no direct investments in companies identified by the protesters with ties to Israel.<sup>558</sup>

### C. *Elon Musk and the So-Called “Department of Government Efficiency”*

Another agent of existential terror was Elon Musk, the head of the Trump administration’s so-called Department of Government Efficiency (DOGE). Established by an executive order and given a mandate to “implement the President’s DOGE Agenda, by modernizing Federal technology and software to maximize governmental efficiency and productivity,”<sup>559</sup> the initiative was led by Musk, with a special focus on dismantling the U.S. Agency for International Development (USAID).<sup>560</sup>

Johns Hopkins University suffered a funding loss twice as large as Columbia’s when the federal government terminated \$800 million in grants related to the university’s work with USAID on March 11, 2025.<sup>561</sup> Under USAID, Johns Hopkins helped run a transgender health clinic in India, which Musk criticized on X, the social media outlet he owns.<sup>562</sup> In response to a tweet from World of Statistics on February 28, 2025, reporting that “India’s first transgender clinic, Mitr Clinic in Hyderabad, shuts down due to USAID fund freeze,” Musk responded, “That’s what American tax dollars were funding.”<sup>563</sup> After the cuts were announced, Johns Hopkins President Ronald Daniels, in a letter to the campus community, noted that nearly half of the institution’s revenue in 2023–24 came from research done on behalf of the federal government and wrote, “The breadth and depth of this historic relationship means that cuts to federal research will affect research faculty, students, and staff and will ripple through our university.”<sup>564</sup>

### D. *Title IX and Transgender Student Athletes*

#### 1. *University of Pennsylvania and Transgender Athletes*

Researchers across seven schools at the University of Pennsylvania received

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2025, at A16.

557 Josh Moody, *Students’ Demands for Divestment from Israel Have Mostly Failed*, INSIDE HIGHER ED (Sept. 5, 2024), <https://www.insidehighered.com/news/governance/trustees-regents/2024/09/05/student-divestment-demands-have-mostly-failed>.

558 Hartocollis et al., *supra* note 556.

559 Exec. Order No. 14,210, 90 Fed. Reg. 9669 (Feb. 14, 2025).

560 Bobby Allyn & Shannon Bond, *Elon Musk Is Barreling into Government with DOGE, Raising Unusual Legal Questions*, NPR (Feb. 2, 2025), <https://www.npr.org/2025/02/03/nx-s1-5285539/doge-musk-usaid-trump>.

561 Liz Essley Whyte & Nidhi Subbaraman, *Johns Hopkins Braces for Cutbacks*, WALL ST. J., Mar. 12, 2025, at A3.

562 *Id.*

563 Elon Musk (@elonmusk), X (Feb. 28, 2025, 4:13 AM), <https://x.com/elonmusk/status/1895402040400212271>.

564 Whyte & Subbaraman, *supra* note 561.

stop work orders for \$175 million in federally funded research on March 19, 2025, because the university allowed a transgender athlete to compete on its women's swim team in 2022,<sup>565</sup> which retroactively violated Trump's 2025 executive order that, in its words, intended to keep "men out of women's sports."<sup>566</sup> Unlike the funding freezes that were connected at least superficially to investigations into antisemitism, the funding freeze at Penn was "[an] immediate proactive action to review discretionary funding streams to ... universities," according to a statement from a White House official.<sup>567</sup> The official also noted that the funds were frozen because Penn "infamously permitted a male to compete on its women's swimming team."<sup>568</sup> The statement referred to Lia Thomas, who initially competed on the men's swimming team at Penn, transitioned, and then swam for the women's team during the 2021–22 season, going on to win the NCAA five-hundred-yard freestyle championship.<sup>569</sup>

While the funding freeze was purportedly a "proactive" measure, the Department of Education had started an investigation on February 5, 2025, to examine whether Penn had violated Title IX by allowing Thomas to compete on the women's swim team.<sup>570</sup> On April 28, 2025, the department announced that Penn had violated Title IX "by denying women equal opportunities by permitting males to compete in women's intercollegiate athletics and to occupy women-only intimate facilities."<sup>571</sup> The government presented Penn with three demands to resolve the investigation:

- i. Issue a statement to the University community stating that the University will comply with Title IX in all of its athletic programs;
- ii. Restore to all female athletes all individual athletic records, titles, honors, awards or similar recognition for Division I swimming competitions misappropriated by male athletes competing in female categories; and
- iii. Send a letter to each female athlete whose individual recognition is restored expressing an apology on behalf of the University for allowing her educational experience in athletics to be marred by sex discrimination.<sup>572</sup>

On July 1, 2025, the University of Pennsylvania acceded to the Trump administration's demands. Under a resolution reached with the Department of

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565 Valeri Guevarra & Alex Dash, *Trump Administration Freezes \$175 Million in Federal Funding to Penn*, DAILY PENNSYLVANIAN (Mar. 19, 2025), <https://www.thedp.com/article/2025/03/penn-trump-freezes-federal-funding-transgender-participation-sports>.

566 Exec. Order No. 14,201, 90 Fed. Reg. 9,279 (Feb. 11, 2025).

567 Guevarra & Dash, *supra* note 565.

568 *Id.*

569 Alan Blinder & Michael C. Bender, *Penn Targeted with Defunding for Trans Policy*, N.Y. TIMES, Mar. 19, 2025, at A1.

570 *Id.*

571 Katherine Knott, *Education Dept. Gives Penn 3 Demands After Finding Title IX Violation*, INSIDE HIGHER ED (Apr. 29, 2025), <https://www.insidehighered.com/news/quick-takes/2025/04/29/education-dept-says-penn-violated-title-ix>.

572 *Id.*

Education, the university agreed to revoke Lia Thomas's records for the women's swim team, issue apologies to affected female swimmers, adopt "biology-based definitions" for the words "male" and "female," and issue public statements to the university community stating that it will comply with Title IX, specifying that the university will not allow males to compete in female athletic programs.<sup>573</sup>

## 2. Title IX Special Investigations Team

Experts saw "a more aggressive use of Title IX to further President Donald Trump's anti-trans agenda," based on the quick investigation against Penn, the "unusual demands," and the fact that Penn was in compliance with Title IX when Thomas swam for the women's team.<sup>574</sup> In fact, on April 4, the Department of Education and the Department of Justice announced a joint Title IX Special Investigations Team spanning the two departments to "streamline Title IX investigations."<sup>575</sup> With the stated goal of protecting female athletes "from the pernicious effects of gender ideology in school programs and activities," U.S. Secretary of Education Linda McMahon warned, "To all the entities that continue to allow men to compete in women's sports and use women's intimate facilities: there's a new sheriff in town. We will not allow you to get away with denying women's civil rights any longer."<sup>576</sup>

### E. Freeze Funds First, Ask (Legal) Questions Later: No Due Process

Starting with the termination of \$400 million from Columbia and the Trump administration's list of compliance requirements, it was clear to legal experts that "the administration doesn't have the legal or constitutional authority to impose [such] demands. Columbia is still a private university that possesses its own constitutional rights."<sup>577</sup> Eighteen legal scholars, in a co-written article, stated, "any sanctions imposed on universities for Title VI violations must follow that statute's well-established procedural rules."<sup>578</sup> The initial "cancellation of \$400 million in federal funding to Columbia University did not adhere to such procedural safeguards," and neither did the subsequent "ultimatum stipulating that Columbia

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573 Sarah Randazzo, *Penn to Revoke Records of Transgender Swimmer*, WALL ST. J., July 2, 2025, at A3. Thomas holds three all-time school records in freestyle events and one relay record. *Id.* On July 2, 2025, the Department of Education reported that the university would receive the \$175 million that had been frozen. Katherine Knott, *Trump Admin. Reportedly Restores Federal Funding to Penn*, INSIDE HIGHER ED (July 3, 2025), <https://www.insidehighered.com/news/quick-takes/2025/07/03/penn-gets-funding-back-after-agreeing-trumps-demands>.

574 Johanna Alonso, *Trump Is Using Title IX as a 'Battering Ram,' Experts Say*, INSIDE HIGHER ED (May 8, 2025), <https://www.insidehighered.com/news/diversity/sex-gender/2025/05/08/education-depts-penn-demands-show-shift-title-ix>.

575 Press Release, U.S. Dep't of Education & Justice, U.S. Department of Education and U.S. Department of Justice Announce Title IX Special Investigations Team (Apr. 4, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-and-us-department-of-justice-announce-title-ix-special-investigations-team>.

576 *Id.*

577 David French, *It Won't Stop with Mahmoud Khalil*, N.Y. TIMES, Mar. 16, 2025, at SR7.

578 Eugene Volokh et al., *A Statement from Constitutional Law Scholars on Columbia*, N.Y. REV. BOOKS (Mar. 20, 2025), <https://www.nybooks.com/online/2025/03/20/a-statement-from-constitutional-law-scholars-on-columbia/>.

make numerous changes to its academic policies ... as 'a precondition for formal negotiations regarding Columbia University's continued financial relationship with the United States government.'"<sup>579</sup>

Title VI—like other civil rights laws, including Title IX—has an administrative enforcement provision.<sup>580</sup> Such provisions “generally authorize agencies to enforce their rules implementing the nondiscrimination mandates through enforcement proceedings that can suspend or terminate assistance” but only after “they have alerted the recipient of their noncompliance and determined that compliance cannot be reached voluntarily.”<sup>581</sup> The enforcement provisions of the Department of Justice’s regulations implementing Title VI for the programs it funds “provide a helpful model for how the civil rights spending statutes may be enforced.”<sup>582</sup>

Under its regulations, the Department of Justice conducts periodic compliance reviews and conducts an investigation when it is appropriate.<sup>583</sup> If an investigation reveals that a funding recipient is in noncompliance, the department seek to resolve the issue informally.<sup>584</sup> If a funding recipient fails or refuses to comply with Title VI, the department may suspend or terminate the funding assistance.<sup>585</sup> Before doing so, however, the department must notify the recipient of the failure to comply and determine that compliance cannot be attained voluntarily.<sup>586</sup> Moreover, the department can suspend or terminate funding only after an opportunity for a hearing and a finding on the record of noncompliance.<sup>587</sup> As additional steps, the attorney general must approve decisions to terminate or suspend assistance,<sup>588</sup> and termination may only occur after thirty days’ notice to Congress.<sup>589</sup> Requirements like these “aim to ensure that any withdrawal of funds is based on genuine misbehavior,” namely, “illegal toleration of discriminatory conduct, not just on allowance of First Amendment-protected expression.”<sup>590</sup>

From the Trump administration’s perspective, “there is a logical bridge between antisemitism, anti-Western ideologies and what they contend is an intolerant progressive orthodoxy on campus.”<sup>591</sup> For example, “theories on ‘settler colonialism’

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579 *Id.*

580 42 U.S.C. § 2000d-1 (Title VI); 20 U.S.C. § 1682 (Title IX).

581 Christine J. Back & Jared P. Cole, *Federal Financial Assistance and Civil Rights Requirements*, CONG. RES. SERV. 15–16 (May 18, 2022).

582 *Id.* at 16.

583 28 C.F.R. § 42.107(a), (c) (2025).

584 *Id.* at § 42.107(d)(1).

585 *Id.* at § 42.108 (2025).

586 *Id.*

587 *Id.* at § 42.108(c)(1), (2).

588 *Id.* at §§ 42.108(c)(3), 42.110(e) (2025).

589 28 C.F.R. § 42.10(c)(4) (2025).

590 Volokh, *supra* note 578.

591 Liz Essley Whyte et al., *Little-Known Group Tears Through Universities*, WALL ST. J., Apr. 16, 2025, at A1.

hold that Israel is a white supremacist state created by the theft of land from Palestinians. Demonizing Zionism has fueled antisemitism on college campuses.”<sup>592</sup>

### F. *Is Trump Playing by the Authoritarian Playbook?*

“History, which for a time seemed to be running from west to east, now seems to be moving from east to west,”<sup>593</sup> so it is useful to turn to Eastern Europe to assess its influence on politics and higher education policy in the United States. Hungary’s “illiberal democracy” under Viktor Orbán—described by former U.S. Secretary of State Madeleine Albright as “democratic because it respects the will of the majority; illiberal because it disregards the concerns of the minorities”<sup>594</sup>—has been cited as a model by influential members of the conservative wing of the Republican Party. J.D. Vance, as a U.S. senator in 2024, said:

You know, the closest that conservatives have ever gotten to successfully dealing with left-wing domination of universities is Viktor Orbán’s approach in Hungary. I think his way has to be the model for us: not to eliminate universities, but to give the[m] a choice between survival or taking a much less biased approach to teaching.<sup>595</sup>

Despite Vance’s description, Orbán and his government did not present much of a choice to the universities in Hungary. First, the government cut university funding by about 40%, which “really completely changed the academic landscape in Hungary” since “this is Europe where almost all the universities are public universities,” said Princeton University legal scholar Kim Lane Scheppele.<sup>596</sup> Second, in 2017, the Hungarian Parliament amended its National Higher Education Act ostensibly to change the way foreign universities operate in Hungary but in effect aimed to force Central European University (CEU)—founded by Hungarian American billionaire George Soros and accredited in the United States—out of the country.<sup>597</sup> Established in 1991, CEU “symbolized liberal academic values in

592 *Id.*

593 TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSON FROM THE TWENTIETH CENTURY 68 (2017) (ebook).

594 MADELEINE ALBRIGHT, FASCISM: A WARNING 172 (2018) (ebook).

595 Rod Dreher, “I Would Like to See European Elites Actually Listen to Their People for a Change”: An Interview with J.D. Vance, EUR. CONSERVATIVE (Feb. 22, 2024), <https://europeanconservative.com/articles/dreher/i-would-like-to-see-european-elites-actually-listen-to-their-people-for-a-change-an-interview-with-j-d-vance/>.

596 Joshua Coe, *How Hungary’s Higher Education Overhaul Became a Model for US Conservatives*, THE WORLD, (May 28, 2025), <https://theworld.org/stories/2025/05/28/how-hungarys-higher-education-overhaul-became-a-model-for-us-conservatives>.

597 Petra Bárd, *The Open Society and Its Enemies: An Attack Against CEU, Academic Freedom and the Rule of Law*, 2017/14 CEPS POL’Y INSIGHTS 1 (Apr. 2017). Among three requirements for a foreign university to be able to function in Hungary, the most onerous was “an intergovernmental agreement between Hungary and the respective country in which the program is accredited,” with the additional burden for institutions based in “federal countries” like the United States to enter a treaty with the Hungarian government (institutions accredited in the European Union/European Economic Area were exempt from the new requirements). *Id.* In 2020, the European Court of Justice ruled that “Lex CEU,” as the law was nicknamed (Coe, *supra* note 596), violated E.U. law. “But by then it was too late. C.E.U.’s academic operations had been transferred to

postcommunist Hungary,<sup>598</sup> and Orbán “refashioned Soros as his archenemy, the personification of everything real Hungarians should reject: decadent globalism, open borders, ‘gender ideology,’ a rootless cosmopolitan élite.”<sup>599</sup> Third, in 2021, Orbán’s government transferred control of eleven state universities—“along with billions of euros in related state assets” that included real estate and shares in Hungarian companies—to quasi-public foundations whose initial members were appointed by the Orbán government, suggesting that “the autonomy of teaching and research staff is not ensured,” according to a former Hungarian minister of education.<sup>600</sup> A former member of Hungary’s parliament, Gábor Scheiring, said the law “creates these institutions that seem to be independent, but they are not. They are run by people who were directly appointed by Viktor Orbán ... ex-Fidesz politicians ... and the owners and CEOs of the biggest corporations in the country”<sup>601</sup> who are now able “to exert more influence over the country’s next generation of leaders.”<sup>602</sup>

In his actions toward higher education, Trump seems to be following Orbán’s footsteps. “Orbán’s main weapon of attack against all independent institutions, including the universities, was always financial,” said Kim Lane Scheppele. “That’s exactly what we’re seeing here” in the United States.<sup>603</sup> Trump and Orbán also made an example of the most prestigious university in their respective country. CEU was the highest-ranked university in Hungary,<sup>604</sup> and Harvard is “the oldest and richest school in the United States.”<sup>605</sup> Orbán put most of Hungary’s public universities under the control of private foundations led by his loyalists, and Trump demanded control over specific academic departments at Columbia and Harvard, reforms to faculty hiring at Harvard in the name of “viewpoint diversity,” and audits of specific schools and programs at Harvard that could lead to sanctions against faculty found to have discriminated against Jewish or Israeli students.<sup>606</sup>

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Vienna, leaving a large number of students in limbo, and causing many of Hungary’s top scholars to leave the country.” Andrew Marantz, *Is It Happening Here?*, NEW YORKER, 26, at 29, June 5, 2025.

598 Coe, *supra* note 596.

599 Marantz, *supra* note 597, at 28. Soros is also a target of vehement antisemitism. “It appears remarkable that so much of the contemporary visible, high-profile, international antisemitism has focussed on one man, George Soros. A Hungarian born Jew, Holocaust survivor, Soros acquired considerable wealth in the United States as a hedge fund manager, wealth that he has spent the last 40 years investing in liberal and progressive causes around the world. ... The unifying thread of many ... anti-Soros conspiracies is the charge that he is interfering to cause national disturbance and disorder.” Jelena Subotic, *Antisemitism in the Global Populist International*, 24(3) BRIT. J. POL. & INT’L REL. 458, 466 (2021).

600 Benjamin Novak, *Orban’s Allies Given Control of Universities*, N.Y. TIMES, Apr. 27, 2021, at A12.

601 *Id.*

602 Marantz, *supra* note 597, at 29.

603 Coe, *supra* note 596.

604 Bárd, *supra* note 597, at 1.

605 Alan Blinder, *Reasons for Singling Out Universities for Defunding Run Deep*, N.Y. TIMES, Apr. 10, 2025, at A17.

606 See *supra* text accompanying notes 519, 524–25, 535–39.

Despite the similarities between Orbán's and Trump's respective attempts to control higher education, close observers note that the "exact steps from the Hungarian playbook cannot be replicated here" in the United States.<sup>607</sup> They started with Orbán's party winning a legislative super-majority, which it used to rewrite the Hungarian constitution. In our sclerotic two-party system, it's become nearly impossible for either party to sustain a long-standing majority; and, even if Trumpists held super-majorities in both houses of Congress, this wouldn't be enough to amend the Constitution. ... All talk of playbooks aside, an autocratic breakthrough is not something that any leader can order up at will, by following the same ten easy steps.<sup>608</sup>

Ultimately, "Taking over the US is much more complicated," Princeton professor Kim Lane Scheppele said. "The checks and balances of the US system are far stronger than what Viktor Orbán faced."<sup>609</sup>

## V. CONCLUSION

In a foundational decision protecting tenure rights during the McCarthy era, Chief Justice Earl Warren wrote that "the areas of academic freedom and political expression" are "areas in which government should be extremely reticent to tread."<sup>610</sup> During the era of Donald Trump, government stomped all over those areas.

There is a "systematic attack being conducted on the professoriate, and it is manifesting through the attacks at the federal level with defunding research through federal agencies, the attacks on academic freedom of faculty and what they can teach through anti-DEI efforts, and then the tenure attacks at the state level," said Adrianna Kezar, director of the Pullias Center of Higher Education at the University of Southern California.<sup>611</sup> "So it is all tied to a larger and broad-scale attack on faculty."<sup>612</sup>

The consequences of state actions aimed at faculty are immediate and long-lasting. In Ohio, in response to Senate Bill 1's requirement to cut academic programs that graduate five or fewer students annually over a three-year span, the University of Toledo announced it would stop offering nine undergraduate majors, including Africana Studies, Disability Studies, and Philosophy.<sup>613</sup> In 2023, surveys of 4250 faculty in Florida, Georgia, North Carolina, and Texas found that two-thirds of respondents indicated they would not recommend their state as "a desirable place for academic work," and one-third said they planned to interview for positions in

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607 Marantz, *supra* note 597, at 34.

608 *Id.*

609 Coe, *supra* note 596.

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

611 Stahl, *supra* note 7.

612 *Id.*

613 Amy Morona, *University of Toledo Axing Nine Majors in Response to Controversial Ohio Higher Ed Law*, SIGNAL CLEV. (Apr. 22, 2025), <https://signalcleveland.org/university-of-toledo-axing-nine-majors-response-ohio-sb1/>.

other states in the coming year.<sup>614</sup> While salary was the major reason for faculty dissatisfaction, “more than half the respondents cited political climate and academic freedom” as the reason.<sup>615</sup>

The chilling effect of the Trump administration’s investigations on faculty can be profound. The “specter of investigations on campuses—this list of 60 campuses [being investigated for alleged antisemitism], this idea that if you’re on a campus that’s potentially going to be under investigation—might impact what you say in class, outside of class, how you teach, everything that’s fundamental to the academy,” said Michelle Deutchman, executive director of the University of California National Center for Free Speech and Civic Engagement.<sup>616</sup>

Even at institutions not under investigation, faculty have concerns “that executive actions targeting diversity, equity, and inclusion efforts would force them to change what they were teaching or how they were supporting students.”<sup>617</sup> Faculty at Delta College, a community college in Michigan, were “on edge” over the vague and far-reaching words of Trump’s executive orders and directives,<sup>618</sup> such as the phrase “all other aspects of student, academic, and campus life” in the Dear Colleague letter that declared, “Federal law ... prohibits covered entities from using race in decisions pertaining to admissions, hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life.”<sup>619</sup>

As the second Trump administration entered its second hundred days, the investigations continued to mount, and under different and expanded means. On May 19, 2025, the Department of Justice launched the Civil Rights Fraud Initiative, under which the department will enforce the “False Claims Act against those who defraud the United States by taking its money while knowingly violating civil rights laws.”<sup>620</sup> In an internal memo describing the initiative, the department stated that “a university that accepts federal funds could violate the False Claims Act when it encourages antisemitism, refuses to protect Jewish students ... or requires women to compete against men in athletic competitions. Colleges and universities

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614 Matt Krupnick, *Attacks on Tenure Leave College Professors Eyeing the Exits*, CENTER FOR PUB. INTEGRITY (Dec. 19, 2023), <https://publicintegrity.org/education/academic-freedom/attacks-tenure-college-professors-exits/>.

615 *Id.*

616 Johanna Alonso, *5 Questions on Open Expression in the Era of Trump*, INSIDE HIGHER ED (May 21, 2025), <https://www.insidehighered.com/news/students/free-speech/2025/05/21/free-speech-expert-discusses-open-expression-and-trump>.

617 Eric Kelderman, *Most Colleges Aren’t a Target of Trump (Yet). Here’s How Their Presidents Are Leading*, CHRON. HIGHER EDUC. (May 20, 2025), <https://www.chronicle.com/article/most-colleges-arent-a-target-of-trump-yet-heres-how-their-presidents-are-leading>.

618 *Id.*

619 U.S. Dep’t of Educ., *Dear Colleague Letter*, *supra* note 176.

620 Katherine Knott, *DOJ Starts Fraud Team to Investigate Civil Rights Violations*, INSIDE HIGHER ED (May 21, 2025), <https://www.insidehighered.com/news/quick-takes/2025/05/21/doj-starts-fraud-team-investigate-civil-rights-violations>. *See also* False Claims Act, 31 U.S.C. § 3729.

cannot accept federal funds while discriminating against their students.”<sup>621</sup> The memo also said, “The False Claims Act is also implicated whenever federal-funding recipients or contractors certify compliance with civil rights laws while knowingly engaging in racist preferences, mandates, policies, programs, and activities, including through diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, ethnicity, or national origin.”<sup>622</sup> Even before the announcement of the new initiative, the department had already opened an investigation against Harvard under the False Claims Act.<sup>623</sup>

In the end, some of the anti-tenure policies of the states that copied the Trump administration’s initiatives, and some of the Trump directives themselves, may be found unconstitutional and contrary to federal and state laws. Florida’s “gag order” law,<sup>624</sup> which parrots Trump’s list of “divisive issues,”<sup>625</sup> has been enjoined by a federal court because it violates both the First Amendment (it discriminates on the basis of viewpoint) and the Fourteenth Amendment (its provisions are impermissibly vague).<sup>626</sup> In Indiana, faculty members filed similar charges based on the First Amendment and Fourteenth Amendment against that state’s post-tenure review law’s criterion that requires them “to foster a culture of free inquiry, free expression, and intellectual diversity.”<sup>627</sup> In Kansas, faculty members who were tenured but terminated under Emporia State University’s post-tenure review framework, which was authorized by system rules, claimed they were denied procedural and substantive due process under the Fifth and Fourteenth Amendments, and liberty interests under the Fourteenth Amendment, over their property interest in tenure.<sup>628</sup> Faculty in Florida have challenged the state’s post-tenure law for violating higher-education governance provisions in the Florida Constitution.<sup>629</sup>

The Trump administration itself, in the first one hundred days of its second term, faced “at least 220 lawsuits ... challenging more than two dozen executive orders, the firing of twenty high-ranking government officials, and dozens of other executive actions.”<sup>630</sup> As of June 22, 2025, at least 197 rulings “have at least

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621 Memorandum from the Deputy Att’y Gen. to Off. of the Assoc. Att’y Gen., Civ. Div., Civ. Rts. Div., Crim. Rts. Div., Exec. Off. for U.S. Att’ys, All U.S. Att’ys (May 19, 2025).

622 *Id.*

623 Michael C. Bender & Michael S. Schmidt, *New Justice Dept. Investigation Escalates Trump’s Feud with Harvard*, N.Y. TIMES, May 16, 2025, at A17.

624 2023 Fla. Laws 1015. *See supra* text accompanying notes 205–20.

625 Exec. Order No. 13,950, *supra* note 8; *see also supra* text accompanying notes 146–47.

626 *Pernell v. Fla. Bd. of Governors*, 641 F. Supp. 3d 1218, 1287 (N.D. Fla. 2022).

627 *McDonald v. Trs. of Ind. Univ.*, 1:24-cv-01575 (S.D. Ind. Sept. 13, 2024); *see supra* text accompanying notes 247–58.

628 *Miracle v. Hush*, No. 23-4056-JAR-GEB, 2024 U.S. Dist. LEXIS 220331 (D. Kan. Dec. 5, 2024); *see supra* text accompanying notes 357–77.

629 *Hernandez v. Bd. of Governors of the St. Univ. of Fla.*, 2024 CA 001238 (Fla. Cir. Ct. July 30, 2024); *see supra* text accompanying notes 427–33.

630 Peter Charalambous, *220 Lawsuits in 100 Days: Trump Administration Faces Unprecedented Legal Blitz*, ABC NEWS (Apr. 29, 2025), <https://abcnews.go.com/US/220-lawsuits-100-days-trump-administration-faces-unprecedented/story?id=121252266>.

temporarily paused some of the administration's initiatives."<sup>631</sup> Harvard could add to that number. In its federal case to unfreeze the federal grants withheld by the Trump administration over alleged violations of Title VI involving antisemitism on campus, Harvard based its complaint on the First Amendment, the arbitrary and capricious nature of the freeze, and due process requirements—such as notice, a hearing, and an express finding—under Title VI.<sup>632</sup>

By June 20, 2025, however, negotiations between Harvard and the Trump administration resumed after Harvard's leaders were "increasingly convinced in recent weeks that the school has little choice but to try to strike a deal with the White House,"<sup>633</sup> signaling a larger concern about the state of American democracy. Harvard officials "believe that if the university remains at odds with the administration that it is likely to become far smaller and less ambitious as Mr. Trump tries to keep pummeling it with funding cuts, federal investigations and limits on visas for international students."<sup>634</sup> Trump's tactics against Harvard mirror the strategies used by "elected autocrats ... to subvert democratic institutions."<sup>635</sup>

This is how elected autocrats subvert democracy—packing and "weaponizing" the courts and other neutral agencies, buying off the media and the private sector (or bullying them into silence), and rewriting the rules of politics to tilt the playing field against opponents. The tragic paradox of the electoral route to authoritarianism is that democracy's assassins use the very institutions of democracy—gradually, subtly, and even legally—to kill it.<sup>636</sup>

State government, too—especially those Republican-led state governments that have mimicked Trump's treatment of higher education—can subvert democracy. During Trump's first term in office, scholars noted, "American states, which were once praised by the great jurist Louis Brandeis as 'laboratories of democracy,' are in danger of becoming laboratories of authoritarianism as those in power rewrite electoral rules, redraw constituencies, and even rescind voting rights to ensure that they do not lose."<sup>637</sup>

Three scholars of democracy—Steven Levitsky, Lucan Way, and Daniel Ziblatt—asked in May 2025, "How, then, can we tell whether America has crossed the line

631 Alex Lemonides et al., *Tracking the Lawsuits Against Trump's Agenda*, N.Y. TIMES (June 22, 2025), <https://www.nytimes.com/interactive/2025/us/trump-administration-lawsuits.html>.

632 *Harvard Coll. v. U.S. Dep't of Health and Human Servs.*, No. 1:25-cv-11048 (D. Mass. May 13, 2025). See *supra* text accompanying notes 544–49. See also *supra* text accompanying notes 577–92.

633 Michael S. Schmidt & Alan Blinder, *Harvard and Trump Administration Restart Talks to End Their Bitter Dispute*, N.Y. TIMES, June 22, 2025, at A23.

634 *Id.*

635 STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 14 (2018) (ebook).

636 *Id.* at 15.

637 *Id.* at 10. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

into authoritarianism?"<sup>638</sup> They proposed "a simple metric: the cost of opposing the government,"<sup>639</sup> and they concluded, "When citizens must think twice about criticizing or opposing the government because they could credibly face government retribution, they no longer live in a full democracy. By that measure, America has crossed the line into competitive authoritarianism."<sup>640</sup> Trump's actions against universities alone provided ample evidence:

Mr. Trump has ... followed other autocrats in assaulting universities. The Department of Education opened investigations into at least 52 universities for their participation in diversity, equity and inclusion programs, and it has placed some 60 universities under investigation for antisemitism, threatening them with severe penalties. The administration illegally suspended hundreds of millions of dollars in approved funding to leading schools such as Brown, Columbia, Princeton and the University of Pennsylvania. It has frozen \$2.2 billion in government grants to Harvard, asked the I.R.S. to revoke the university's tax-exempt status and threatened to revoke its eligibility to host foreign students.<sup>641</sup>

"Americans are living under a new regime. The question now is whether we will allow it to take root," Levitsky, Way, and Ziblatt stated.<sup>642</sup> It is important to remember that the United States is not alone: Timothy Snyder, a prominent professor of history formerly at Yale and now at the University of Toronto, wrote, "The present difficulties in the United States are an element of a larger trend."<sup>643</sup> Government interference into public and private higher education is part of that trend. Academic freedom and institutional autonomy "have been increasingly questioned, challenged, and even dismantled, as geopolitical tensions, nationalist policies, and ideological shifts toward populism, illiberal democracy, and autocracy reshape the landscape of global higher education."<sup>644</sup> The Academic Freedom Index—which "assesses de facto levels of academic freedom across the world based on five indicators: freedom to research and teach; freedom of academic exchange and dissemination; institutional autonomy; campus integrity; and freedom of academic and cultural expression"<sup>645</sup>—indicated that "in the last decade, academic freedom has declined in 22 countries representing more than half of the global population, including major democracies like Brazil, India, the United Kingdom, and the United States."<sup>646</sup>

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638 Steven Levitsky et al., *No One Has Ever Defeated Autocracy from the Sidelines*, N.Y. TIMES, May 11, 2025, at SR4.

639 *Id.*

640 *Id.*

641 *Id.*

642 *Id.*

643 Snyder, *supra* note 593, at 67. See also Matina Stevis-Gridneff, *Some Professors Leave U.S., Seeing Canada as More Congenial*, JUNE 29, 2025, N.Y. TIMES, at A6.

644 Daniela Craciun, *Academic Freedom at a Crossroads*, 123 INT'L HIGHER EDUC. 11, 11 (2025).

645 Academic Freedom Index, <https://academic-freedom-index.net/>.

646 Craciun, *supra* note 644, at 11.

It may seem ironic for an article of this length to call for more research into the role of government intrusion into tenure and academic freedom, but “[u]nderstanding the new threats and broader impacts of academic freedom erosions is crucial for effective policy action.”<sup>647</sup> Ultimately, “a comprehensive comparative examination across regions and disciplines is needed to identify commonalities and differences in how academic freedom is shaped, contested, and defended in varying sociopolitical and institutional landscapes,”<sup>648</sup> including the United States.

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<sup>647</sup> *Id.* at 12.

<sup>648</sup> *Id.*