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“Two Essays on Academic Freedom”

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Two Essays on Academic Freedom

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I. Individual and Collective Academic Freedom

1.

The second Trump administration’s attacks on academic freedom require a unified response from its defenders. But the unity that this moment requires has been stymied, so far, by the inconvenient fact that academic freedom’s defenders don’t agree about what academic freedom means.

On one side—the better funded one¹—you’ll find the University of Chicago, long seen (not least by itself) as a national leader on academic freedom and free speech issues, as well as newer but increasingly prominent organizations like the Foundation for Individual Rights and Expression (FIRE, formerly the Foundation for Individual Rights in Education), Heterodox Academy, and the Academic Freedom Alliance. These organizations have each, and sometimes together, waged campaigns to convince or pressure other colleges and universities to adopt Chicago’s specific policies on academic freedom and free speech: the Kalven Report and the so-called Chicago Principles.² FIRE’s annual and influential “College Free Speech Rankings” penalizes universities that fail to do so.³

Within this camp, academic freedom is primarily if not exclusively viewed as individual right for professors and possibly students to speak as they choose, free of regulation or even competing speech by the universities where they work or study. For some in this camp, especially FIRE, academic freedom is largely the same as free speech, and as such, it requires only minimal balancing with competing values, whether those be non-discrimination or diversity and inclusion concerns. The goal is

¹ See RALPH WILSON & ISAAC KAMOLA, FREE SPEECH AND KOCH MONEY: MANUFACTURING A CAMPUS CULTURE WAR 86-92 (2021); \$100 Million Gift Will Advance UChicago’s Commitment to Free Expression, UCHICAGO NEWS (Sep. 26, 2024), <https://news.uchicago.edu/story/100-million-gift-advance-uchicagos-commitment-to-free-expression>.

² See UNIV. CHICAGO, A History of Commitment to Free Expression, <https://freeexpression.uchicago.edu/history/> (last visited Dec. 21, 2025); Kalven Report, *infra* note 33.

³ See FIRE, How We Rank Colleges on Free Speech, <https://rankings.thefire.org/methodology> (last visited Jan. 15, 2026) (awarding 6 points for schools that have adopted something substantially similar to the Kalven Report and Chicago Principles).

to maximize speech by individuals on campus and any outside speakers they decide to invite.

On the other side is the American Association of University Professors (AAUP) and its “Committee A” on Academic Freedom and Tenure, which has worked since 1915 to define and defend the principles of academic freedom and to censure universities that fail to live up to them. Full disclosure: I am currently a member of Committee A, though I don’t speak for it here, and I am a faculty member at UC Davis, one of the ten campuses of the University of California system, arguably the leading exemplar of the AAUP’s approach.

This second camp shares with Chicago and FIRE a concern for the non-negotiable freedom of individual professors to teach, research, and publish as they see fit, governed only by their professional responsibilities and judged only (or at least primarily) by their disciplinary peers according to the standards of their field. These freedoms are necessary to the work of the university and its contribution to the public good. But they are not sufficient. On the AAUP’s account, academic freedom also requires and supports a system of *shared governance*—the joint effort among faculty, administration, and trustees to set a university’s mission and decide how best to advance it.⁴

To speak of “collective academic freedom” is thus to talk of the ways that academic freedom differs from an individual academic’s free speech rights. Less controversially, it focuses on the prerogatives of what Robert Post calls “disciplinary communities” to enforce their standards.⁵ More controversially, it extends to the collective judgments made as part of shared governance, the process of institutional decision-making that inevitably impacts the opportunities faculty have in teaching, research, and public expression.

This essay focuses primarily on the latter, more controversial sense in which academic freedom proves to be a collective enterprise. The challenge of collective academic freedom—the challenge of shared governance—is to explain how collective decision-making can be harmonized with individual rights: how to avoid letting majoritarian votes trample the academic freedom of dissenters, while still protecting the role of the faculty, as a body, to help set an institution’s mission and values.

Recent highly publicized conflicts between the Chicago/FIRE camp and the AAUP, on issues as important to higher education as diversity, equity and inclusion, campaigns for institutional neutrality, and, especially, calls for boycotts surrounding

⁴ AAUP, *Statement on Government of Colleges and Universities*, AAUP, <https://www.aaup.org/reports-publications/aaup-policies-reports/topical-reports/statement-government-colleges-and> (last visited Dec. 23, 2025); see *infra* notes 25-26 and accompanying text.

⁵ Robert C. Post, *The Classical First Amendment Tradition Under Stress: Freedom of Speech and the University*, in THE FREE SPEECH CENTURY 106, 117. (Lee C. Bollinger & Geofrey R. Stone eds., 2019).

the Israel-Gaza conflict, put the issue of collective academic freedom into stark relief.⁶ This essay provides tools to address those conflicts by analyzing the two conflicting visions of academic freedom at their root. At stake is the question of what universities, and those who care about them, should ultimately be fighting for when they fight the unrelenting attacks on academic freedom that are currently shaping the future of higher education.

2.

The traditional conception of academic freedom, dating back to the AAUP's 1915 Declaration of Principles, is one on which both sides of the debate at least nominally agree.⁷ But it's worth at least quickly reviewing its contours, if only to see the extent to which the potential dangers of collective judgment—the source of the present debate at the level of shared governance—already exist and are more widely accepted at the level of academic disciplines.

The 1915 Declaration emphasized the collective aspect of traditional academic freedom when it asserted that universities' "distinctive and indispensable service to society" requires "not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession."⁸ What academic freedom protects is not the First Amendment's freedom to say (largely) whatever you want; "[t]he liberty of the scholar within the university to set forth his conclusions ... is conditioned by their being conclusions gained by a scholar's method and held in a scholar's spirit."⁹ And the job of deciding whether scholars have lived up this requirement can only rest with other scholars.

University professors' teaching and research¹⁰ are routinely judged by their peers, applying the standards of their particular discipline, in hiring, tenure, or

⁶ See *infra* note 31.

⁷ But see Greg Lukianoff, *The Fall of the AAUP, THE ETERNALLY RADICAL IDEA* (Nov. 20, 2024), <https://eternallyradicalidea.com/p/the-fall-of-the-aaup> ("The AAUP have championed a stark distinction between free speech and academic freedom, which is dangerous to both.").

⁸ American Association of University Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, in *Policy Documents and Reports* 11 (12th ed., 2025); see also Robert Post, *Academic Freedom in the Time of Trump*, in *ACADEMIC FREEDOM IN THE ERA OF TRUMP* *2 (Lee Bollinger & Geoffrey Stone eds., Oxford University Press forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5286936 [hereinafter Post] ("Academic freedom does not involve individual rights, but instead the autonomous self-government of a scholarly profession dedicated to disciplinary excellence.").

⁹ *Id.* at 9.

¹⁰ I put aside here the somewhat different issues that surround intramural and extramural speech by professors. Extramural speech needn't be held to the professions' scholarly or pedagogical standards, but AAUP policies at least require that discipline can be imposed for extramural speech only if it shows faculty to be unfit for the profession, and that judgment must again be "primarily reserved for faculty determination." MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 148 (2009); see also *Committee A Statement on*

advancement decisions, in peer review before publication, and in disciplinary proceedings. Professors are free from repercussions for their teaching and research only insofar as both meet the standards of their discipline. Thus it's the freedom to develop and enforce those standards themselves that actually lies at the heart of academic freedom. As Robert Post has put it: “[A]cademic freedom protects neither the individual rights of professors nor the institutional rights of organizations that happen to call themselves universities. It instead safeguards the professional standards that allow true universities both to teach and to increase knowledge.”¹¹

The particulars of Post's account remain the object of some dispute.¹² The head of FIRE, Greg Lukianoff, has claimed that Post and the AAUP have “championed a stark distinction between free speech and academic freedom, which is dangerous to both.” The danger to free speech is that professors, protected by a distinct thing called academic freedom, will stop standing up for the general First Amendment protections that apply to “regular mortals”; the danger to academic freedom is that, once “divorced” from the judicially enforceable First Amendment, professors simply have to rely on their institutions to provide them with the “tools and resources to preserve academic freedom”—what Lukianoff describes as “an unearned trust in ‘management’ that is truly bizarre coming from a union like the AAUP.”¹³

The central idea distinguishing academic freedom from general free speech principles is widely shared, however, even among the AAUP's critics. This is the notion that disciplinary expertise must be used to regulate the former, but emphatically not the latter. FIRE might sometimes define academic freedom without

Extramural Utterance, AAUP, <https://www.aaup.org/reports-publications/aaup-policies-reports/topical-reports/committee-statement-extramural> (last visited Dec. 22, 2025).

¹¹ Post, *supra* note 8, at 32 n.114.

¹² FIRE, for example, claims that “because of the lack of guidance from the Supreme Court, there remains an ongoing debate over who actually possesses the right to academic freedom — students, professors, and/or the university itself.” *Academic Freedom of Professors and Colleges*, FIRE, <https://www.thefire.org/research-learn/academic-freedom-professors-and-colleges> (last visited Dec. 22, 2025).

¹³ *Supra* note 7. Lukianoff greatly overstates the Post/AAUP position insofar as he describes them as treating academic freedom and general First Amendment principles as “separate and non-overlapping.” At public universities, government employee speech protections obviously overlap with academic freedom protections, even if their animating logic, as Post has shown, doesn't fit well with the academic enterprise. See ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 85 (2012). Lukianoff's concern that professors need legally enforceable First Amendment claims only applies to those teaching at public schools, whereas universities' widespread adoption of AAUP policies into their faculty handbooks provides legally enforceable contract claims to professors at many private, as well as public, schools. And in any case, David Rabban's magisterial recent account of academic freedom as a *distinctive* First Amendment right proves we can treat academic freedom as its own category of First Amendment analysis even while recognizing how it “fosters two central First Amendment values”: knowledge-production and democratic citizenship. DAVID M. RABBAN, ACADEMIC FREEDOM: FROM PROFESSIONAL NORM TO FIRST AMENDMENT RIGHT 8 (2024).

reference to academic responsibilities, disciplinary expertise, or peer review,¹⁴ but the academic institution it idolizes, the University of Chicago, clearly cares about each. Even before the AAUP was founded, Chicago's first president, William Rainey Harper, had explained in a Convocation Address in 1900 the ways a professor could "abuse his privilege of freedom of expression." Among them: claiming ideas as true that hadn't been "tested scientifically" by disciplinary colleagues, speaking on subjects that have no relation to the professor's department, and introducing partisan views into the classroom.¹⁵

The crucial role played by peer review introduces a collective aspect into what otherwise might seem to be an individual academic freedom right regarding teaching, research, and publication. And before moving on to the far more contested way that shared governance can affect individual professors' autonomy, it's worth pausing to note the challenges that result even here, at the disciplinary level.

Joan Wallach Scott writes of the "necessarily paradoxical way" that discipline functions: "the institution of the discipline, which protects the academic freedom of individuals, also operates to deny some of them that freedom."¹⁶ Drawing from John Dewey and Arthur Lovejoy, Scott explains the traditional view that disciplinary communities support individual academics by "verifying [their] technical expertise and qualifications" in order to help them stand up to outside interference, whether from politicians, religious authorities, or even university administrators.¹⁷ "But the inseparable other side of that regulatory and enabling authority is that it secures

¹⁴ See *supra* note 12. But see Sarah Viren, *A Professor Was Fired for Her Politics. Is That the Future of Academia?*, N.Y. TIMES ONLINE (June 6, 2025), <https://www.nytimes.com/2025/06/06/magazine/academic-freedom-politics.html> ("Nico Perrino, executive vice president for FIRE, told me that his organization sees academic freedom more as an individual right, but he said it also supports the idea of faculty members' governing themselves to a certain degree.").

¹⁵ THE CHICAGO CANON ON FREE INQUIRY AND EXPRESSION 48 (Tony Banout & Tom Ginsburg eds., 2024). According to Harper, these abuses could lead the university to decide not to renew temporary appointments, but not permanent ones, which could be revoked only for immorality or when the professor "has proven himself to be incompetent to perform the service called for." *Id.* at 49. For two additional perspectives from within the Chicago camp, see Brian Leiter, *Why Academic Freedom?*, in THE VALUE AND LIMITS OF ACADEMIC SPEECH: PHILOSOPHICAL, POLITICAL, AND LEGAL PERSPECTIVES 31, 33 (2018) ("[A]cademic freedom ... has definite limits, but those limits are to be set by those with expert competence in the relevant *Wissenschaft* [a science, broadly understood], not by offended members of the polity at large or by politicians or business leaders whose interests might be adversely affected by *wissenschaftlich* research or teaching."); and, from the author of Chicago's "Criteria of Academic Appointment" (the "Shils Report"), Edward Shils, *Do We Still Need Academic Freedom*, 62 AM. SCHOLAR 187, 194 (1993) ("Academic freedom certainly extend[s] to intellectual originality. It [is] for the departmental colleagues of their own university and their peers outside their own university, when one of them departed from that consensus, to decide whether the individual in question [is] being original, or divergent within reasonable limits, or eccentric to the point of mental incapacity, or impermissibly arbitrary, indolent, or otherwise irresponsible.").

¹⁶ Joan Wallach Scott, *Academic Freedom as an Ethical Practice*, in KNOWLEDGE, POWER, AND ACADEMIC FREEDOM 15, 24-25 (2019) [hereinafter Scott].

¹⁷ *Id.* at 23.

consensus by exclusion,” Scott observes. “And the grounds for exclusion can be, historically have been … difference from some representative type [male, white] … or difference from the reigning philosophical and methodological assumptions.”¹⁸ Since the concept and practice of discipline is “necessarily exclusionary,” threats to individual autonomy come from within the discipline, not just from outside.¹⁹

“Disciplines … live in the tension between freedom of inquiry and judgments of competence,” Robert Post has written, agreeing with Scott about the internal dangers. According to Post: “Disciplines that do not allow freedom of inquiry wither and atrophy; but disciplines that do not evaluate the quality and merit of disciplinary work disintegrate and become incoherent.”²⁰ Sometimes their standards of practice fail to meet changing knowledge-production needs; other times members of a discipline seek to go beyond the methods and techniques of their discipline in order to assert what Post calls charismatic authority within the public sphere.

Either can provoke interference from outside the discipline. If currently existing disciplinary boundaries or methods aren’t meeting the problems universities exist to address, “universities possess incentives to engage in interdisciplinary approaches” or to generate new disciplines within the university (with correspondingly new disciplinary organizations, journals, etc. outside the university).²¹ Traditional disciplinary boundaries thereby get eroded. If, by contrast, academics take on the role of “sage amateurs [seeking] to advise their fellow citizens,” Post says their scholarship “disclaims disciplinary authority,” “places itself outside the protective shield of academic freedom[,] and renders itself vulnerable to the ordinary political recrimination and reprisal that envelops all citizens who enter the public realm.”²²

All of this is just to emphasize the challenges and dangers of disciplinarity as a collective enterprise. Overemphasize the collective’s power and you diminish the freedom of individual scholars to disrupt the orthodoxies of their field. The exclusivity meant to ensure quality can be used instead to perpetrate racial, gender, religious, or

¹⁸ *Id.* at 24.

¹⁹ *Id.* at 23.

²⁰ See Robert C. Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, in THE FREE SPEECH CENTURY 106, 116 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

²¹ Robert Post, *Debating Disciplinarity*, 35 CRITICAL INQUIRY 749, 755 (2009). Post mentions examples like climate change, artificial intelligence, and racial and gender issues as problems that create a need for universities to push for interdisciplinarity or the creation of new disciplines.

²² *Id.* at 764. Writing of the challenge universities face to “successfully distinguish between scholarship and charlatanism,” Dennis Arjo has recently noted that “a chorus growing louder by the day insists that a sizable number of entire disciplines now exist that do little but provide sinecures for political activists posing as scholars.” Dennis Arjo, *Academic Standards in an Age of Distrust*, 15 AAUP J. OF ACADEMIC FREEDOM (2024); *see also* Leiter, *supra* note 15 (describing the problem of “demarcating *Wissenschaften* from pretenders” and identifying those fields that fail to uphold their side of the academic freedom bargain, given that “there are no necessary and sufficient conditions for what makes a mode of inquiry epistemically reliable”).

political biases. Overemphasize individual autonomy, on the other hand, and you increase the potential for charlatanism or indoctrination. Allow disciplines too much autonomy and they might fail to adapt to changing societal needs for knowledge; allow too much outside interference and the very premise of academic freedom as liberty constrained by disciplinary expertise gets undermined. These problems are intractable—and note, they’re the ones that arise from the aspect of academic freedom that the two sides I described above are most likely to *agree* about.

3.

What, then, of the challenges and dangers that arise when the collective aspect of academic freedom expands beyond the disciplinary level to that of a faculty engaged in shared governance?

Shared governance, as the AAUP explained in its 1966 *Statement on Government of Colleges and Universities*²³ and its 1994 report *On the Relationship of Faculty Governance to Academic Freedom*,²⁴ involves a joint effort among the governing board, administration, and faculty, with each taking the lead in areas where they have the most expertise and responsibility. Since the faculty “has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process,” its voice should be authoritative there.²⁵ “The faculty should have primary authority over decisions about such matters—which is to say, the administration should ‘concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.’”²⁶

The 1994 Report argues that “a sound system of institutional governance is a necessary condition for the protection of faculty rights and thereby for the most productive exercise of essential faculty freedoms.”²⁷ This is where the AAUP and the FIRE/Chicago types tend to part ways: in emphasizing the necessity of shared governance to academic freedom.

The academic freedom individualists in the FIRE/Chicago camp are surely right to fight (as the AAUP does as well) to protect individual professors’ freedom of teaching, research, and publication. But that freedom isn’t worth much if those professors’ departments get shut down, graduate admissions get paused, or their labs aren’t funded. If their individual academic freedom is to be meaningfully employed,

²³ AAUP, *Statement on Government of Colleges and Universities*, AAUP, <https://www.aaup.org/reports-publications/aaup-policies-reports/topical-reports/statement-government-colleges-and> (last visited Dec. 22, 2025).

²⁴ AAUP, *On the Relationship of Faculty Governance to Academic Freedom*, 80 ACADEME 47 (1994).

²⁵ AAUP, *Statement on Government of Colleges and Universities*, 52 AAUP BULLETIN 375, 378 (1966) [hereinafter 1966 Statement].

²⁶ AAUP, *Report: On the Relationship of Faculty Governance to Academic Freedom*, 80 ACADEME 47, 47 (1994) [hereinafter 1994 Report]

²⁷ *Id.*

faculty need a genuine voice in larger institutional decisions on topics like these. And this requires collective activity: that of the faculty (or its subdivisions) acting together as part of shared governance.

Of course, no one has an academic freedom right to a certain level of funding for their lab facilities or travel, or a certain number of graduate students and colleagues to work with. Individual faculty don't have a right to dictate their institution's curricular priorities (what gets included in general education requirements, for example), or the way it balances its values through its DEI or freedom of expression policies, its budgetary compromises, or its public statements.²⁸ Yet each of these decisions is likely to affect the opportunities individual professors have to exercise their academic freedom. These decisions shape, in potentially decisive ways, the context in which their teaching, research, and publication occurs—or, at the extreme, whether it will be able to occur at all.

This is why the AAUP argues both that academic freedom for intramural speech is a necessary condition “for the practice of governance unhampered by fear of retribution”²⁹ and, more controversially, that shared governance is a necessary condition for academic freedom itself to flourish. Necessary is not the same as sufficient, however. Shared governance is no guarantee that academic freedom will be protected. As the 1994 Report notes: “Even with a sound governance system in place and with a faculty active in self-government and operating under rules and regulations protective of academic freedom, dysfunctions that undermine academic freedom may still occur: subtle (or not so subtle) bullying on the part of the faculty itself, a covertly enforced isolation, a disinclination to respect the views of the off-beat and cranky among its members.”³⁰

The AAUP’s critics sometimes lose sight of this and act as if insisting on shared governance just reduces academic freedom to anything a majority within some faculty senate or department decides. As Len Gutkin of the *Chronicle of Higher Education* recently summarized the view:

It certainly seems true that the AAUP has in the last two years come to emphasize the corporate over the individual aspects of academic freedom, as in Committee A’s 2024 pronouncement that an “appropriate larger group, such as a faculty senate or a department,” can require DEI statements from faculty members for hiring or promotion. In a similar vein, the AAUP now believes that individual faculty members can be forced to conform to the terms of an academic boycott so long as “there was a democratic process followed”.... In both cases, academic freedom

²⁸ See generally BRIAN SOUCEK, THE OPINIONATED UNIVERSITY: ACADEMIC FREEDOM, DIVERSITY, AND THE MYTH OF NEUTRALITY IN AMERICAN HIGHER EDUCATION (2026) (treating all of these choices as ways that a university determines and expresses its particular mission).

²⁹ 1994 Report, *supra* note 26.

³⁰ *Id.* at 49.

as an individual right is subordinated to one or another vision of social justice, so long as that vision has some kind of majority support. As Yale Law's Keith E. Whittington, an expert on the law and theory of academic freedom, wrote last year, "Some in the AAUP increasingly conflate academic freedom with majoritarian decision-making. That will not end well."³¹

These allegations present a genuine challenge, as what Gutkin and others describe would be a serious threat to academic freedom coming from within the faculty.

Taking the threat seriously, however, doesn't mean that we have to abandon collective decision-making in order to maximize individual freedom. But nor need we, or should we, reduce academic freedom to whatever the majority decides.

Here, the academic freedom problems of shared governance start to resemble those surrounding disciplinarity, canvassed earlier. Just as we can't give up on disciplinary standards or ignore the way they can ossify and unjustly exclude, neither can we just give up either on collective decision-making as part of governance or on the autonomy of individual academics. Following Joan Wallach Scott's advice, instead of "attempt[ing] to resolve the necessary tension ... by forcing a choice between them," we should engage in what she describes as an "ethical practice" in which we determine how best to navigate the space between "what is and what ought to be."³² Practically, this means we need individuals who recognize that they don't control on their own the conditions and context in which their academic freedom is exercised. But we also need shared governance that respects individuals' academic freedom and can be criticized when it violates it, even through democratic processes.

³¹ Len Gutkin, *The Review: The AAUP's Revised Concept of Academic Freedom*, CHRON. OF HIGHER EDUC. (Oct. 27, 2025), <https://www.chronicle.com/newsletter/the-review/2025-10-27> [hereinafter Gutkin] (citing AAUP Committee A on Academic Freedom and Tenure, *Diversity, Equity, and Inclusion Criteria for Faculty Evaluation*, AAUP, <https://www.aaup.org/sites/default/files/DEI-Faculty-Evaluation.pdf>); Len Gutkin, *The Review: Does the AAUP Know What It Means*, CHRON. OF HIGHER EDUC. (Sept. 16, 2024), <https://www.chronicle.com/newsletter/the-review/2024-09-16> (quoting Rana Jaleel, chair of the AAUP's Committee A on Academic Freedom and Tenure); Jeffrey Sachs (@JeffreyASachs), X, *Consider the implications. What the @AAUP is saying is that when a department votes to deny you conference funding for political reasons (it's a Zionist dept. and the conference is in Qatar), that is not necessarily a violation of academic freedom.* (Sep. 11, 2024), <https://x.com/kewhittington/status/1833916660388168162> (reposted from AAUP, @AAUP). For another, similar claim from within the University of Chicago, pitting his school's vision of academic freedom against that of the AAUP, see Tom Ginsburg, *Can Academic Freedom Survive the AAUP*, CHRON. OF HIGHER EDUC. (Feb. 18, 2025), <https://www.chronicle.com/article/can-academic-freedom-survive-the-aaup> [hereinafter Ginsburg] ("Rather than focusing on the academic freedom of the individual scholar, Committee A emphasizes collective academic freedom, which it conflates with 'shared governance.' It offers us a vision of higher education in which departments promiscuously opine on politics, diversity screening is imposed in hiring and promotion, and unlimited encampments have the warrant of academic freedom. Let's see how that works out.").

³² Scott, *supra* note 16, at 26, 36 (quoting Michel de Certeau) (Michel de Certeau, *History: Science and Fiction, in HETEROLOGIES: DISCOURSE ON THE OTHER* 199 (trans. Brian Massumi, 1989)).

Recent statements by the AAUP on institutional neutrality, DEI criteria for faculty evaluation, and academic boycotts each attempt to carve out this space for ethical practice and then—to varying extents—to suggest how it might best be navigated. I want to suggest, adapting Scott's words again, that it's the statements' shared failure to "resolve the necessary tension" between collective and individual academic freedom "by forcing a choice between them" that makes them so unsatisfying to critics, particularly those in the individualist camp.

On Institutional Neutrality

The tension is easily seen in the context of statements made by universities or their departments on contested social or political issues. The University of Chicago has long applied a "heavy presumption" that these should instead be left to the individual, since "if it takes collective action ... it does so at the price of censuring any minority who do not agree with the view adopted."³³ The AAUP's recently expressed position, by contrast, is that "institutional neutrality is neither a necessary condition for academic freedom nor categorically incompatible with it. But like many of the other decisions a university makes, choices about when it will speak ... must always be made in ways that respect and advance the principles of academic freedom."³⁴

The insistence that institutional and departmental speech is not categorically different than other institutional and departmental actions is important here. We're used to the tension between collective and individual autonomy in regard to any number of institutional actions aside from speech. When a department makes a curricular decision through its established voting procedures, feelings might run hot. Untenured members of the department, caught in the cross-fire, might keep their heads down, their expression chilled. Once a decision is made, say, about the classes that count towards a major, some professors' teaching preferences will be affected. Their individual freedom will be constrained by the department's new curricular needs. But making a collective choice—*some* collective choice—is necessary here.

That doesn't mean that we shouldn't worry about ways the majority could unnecessarily violate their colleagues' academic freedom. If the vote was motivated by illicit considerations like race, gender, religious bias, or irrelevant political judgments, the majority would have violated the AAUP's standards of professional ethics and infringed the academic freedom of those unfairly affected, regardless of whether this could be proven or redressed. The same would be true if the majority

³³ Kalven Committee, *Report on the University's Role in Political and Social Action*, 1 UNIV. CHICAGO (Nov. 11, 1967), https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf

³⁴ AAUP, *On Institutional Neutrality*, <https://www.aaup.org/reports-publications/aaup-policies-reports/policy-statements/institutional-neutrality> (last visited Dec. 22, 2025) [hereinafter *On Institutional Neutrality*].

dictated what viewpoints professors had to express in their classes. Decisions aren't consistent with academic freedom simply because a majority of faculty voted for them.

So too with statements. Nothing about them is categorically incompatible with academic freedom—as suggested by the fact that Chicago imposes a presumption rather than a rule against them.³⁵ But it doesn't follow that universities or their units should issue statements cavalierly, without considering the chilling effect they might have on people who disagree. As the AAUP notes, this chill “is likely to vary based on the subject matter of the statements, the way they are formulated, and the background policies and culture surrounding the protection of dissent at the institution in question.”³⁶

There is one other important point to note in the AAUP’s approach: its refusal to identify institutional statements solely with university administration. At the Symposium that gave rise to this essay, a speaker described the tension between university administrators taking positions and individual faculty doing so. But those aren’t the only two options. A university is not its administration. The faculty should also be able to speak collectively on behalf of their university, school, or department. This can be an important part of shared governance. And when they do so, at least on topics within their disciplinary expertise, it’s hard to see any difference between their speech acts and any other actions the faculty might collectively authorize.

Diversity, Equity, and Inclusion Criteria for Faculty Evaluation

Among the actions that the faculty might collectively authorize, we could include a university’s decision to “institutionally value (1) recruiting and retaining a diverse student population, (2) recruiting and retaining a diverse faculty to teach those students, and (3) teaching, research, and service that respond to the needs of a diverse global public.”³⁷ Those aren’t neutral positions, to be sure, and a university’s choice of values will inevitably lead to dissent.

But as Committee A wrote in its 2024 statement, *Diversity, Equity, and Inclusion Criteria for Faculty Evaluation*: “While faculty members have the right to engage in extramural or intramural expression criticizing any such policies—as they do with any other institutional policy—the AAUP does not consider it a violation of academic freedom *per se* when an appropriate larger group, such as a faculty senate or a

³⁵ Robert Post, *The Kalven Report, Institutional Neutrality, and Academic Freedom*, in REVISITING THE KALVEN REPORT: THE UNIVERSITY’S ROLE IN SOCIAL AND POLITICAL ACTION (Keith E. Whittington & John Tomasi eds., Johns Hopkins Press, Forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4516235.

³⁶ *On Institutional Neutrality*, *supra* note 34.

³⁷ AAUP, *Diversity, Equity, and Inclusion Criteria for Faculty Evaluation*, AAUP, <https://www.aaup.org/reports-publications/aaup-policies-reports/policy-statements/diversity-equity-and-inclusion> (last visited Dec. 22, 2025) [hereinafter *DEI Criteria*].

department, collectively adopts an educational policy or goal and evaluates individual faculty members' performance by reference to [it] even though they dissent.”³⁸

This is the qualified support Committee A gave for diversity statements, which universities were increasingly requiring until they recently became a target of conservative backlash and started getting legislatively banned.³⁹ Let’s say a university—I’ll use mine as an example—decides through a process of shared governance that diversity is “integral to the University’s achievement of excellence.”⁴⁰ Having done so, it realizes that it should reward teaching, research, and service activities that advance that aspect of the university’s mission. Faculty and administration work together to revise the faculty manual to treat DEI contributions as a type of merit within the faculty personnel process. Recognizing this merit means that faculty need to report what contributions they’ve made. Diversity statements are the way they do that.

The idea of faculty, acting collectively, setting educational policies or goals and then deciding on procedures to evaluate what individual faculty do to advance those goals is nothing unusual. That doesn’t mean, though, that the goals they set or the means they establish for judging faculty against those goals are always consistent with academic freedom. A faculty vote doesn’t make it so.

For example, certain educational policies or goals may be contrary to principles of academic freedom either because they are not really educational, or because they presuppose or impose an orthodoxy that cuts off potentially promising areas of research or ways of teaching. Some think this is true of universities’ commitments to diversity.⁴¹ The AAUP has, for over fifty years, taken a different path, emphasizing how efforts to overcome discrimination and systemic disadvantage and advance faculty and student body diversity is “essential to fulfill[ing] the promise of academic freedom.”⁴² The basic idea here is that a university’s efforts to discover and disseminate knowledge shouldn’t be abstracted from questions about who produces and, especially, who benefits from that knowledge.

³⁸ *Id.*

³⁹ Vimal Patel, *University of California Will Stop Requiring Diversity Statements in Hiring*, NY TIMES (ONLINE) (Mar. 20, 2025); *DEI Legislation Tracker*, CHRON. OF HIGHER EDUC. (Aug. 22, 2025), <https://www.chronicle.com/article/here-are-the-states-where-lawmakers-are-seeking-to-ban-colleges-dei-efforts> (tracking legislation on anti-DEI initiatives).

⁴⁰ *Regents Policy 4400: Policy on University of California Diversity Statement* (adopt. Sep. 20, 2007, amend. Sep. 16, 2010, Nov. 14, 2024). This history is described in Brian Soucek, *Diversity Statements*, 55 UC DAVIS L. REV. 1989 (2022) [hereinafter *Diversity Statements*].

⁴¹ Finkin, *infra* note 55.

⁴² AAUP, *On Eliminating Discrimination and Achieving Equality in Higher Education* 1, 2 (Jan. 2024), https://www.aaup.org/sites/default/files/Discrimination_Statement_final.pdf; see also Marx W. Wartofsky et. al., *Affirmative Action in Higher Education: A Report by the Council Commission on Discrimination*, 59 AAUP BULLETIN 178 (1973); AAUP, *On Discrimination*, AAUP (adopt. Oct. 1976, rev. Nov. 1994, June 1995), <https://www.aaup.org/discrimination>.

Some critics accept diversity concerns as valuable, but believe diversity statements are the wrong way to advance them.⁴³ The AAUP's response, here again, strives for nuance: "when implemented appropriately in accordance with sound standards of faculty governance, DEI criteria—including DEI statements—can be a valuable component in the efforts to recruit, hire, and retain a diverse faculty with a breadth of skills needed for excellence in teaching, research, and service."⁴⁴

This response needs to be parsed because it can easily be read to support critics' claims that the AAUP simply equates majoritarian decision-making with academic freedom.⁴⁵ But it can, and I think should, be read in the other direction, as recognition that there are sound and unsound ways of using diversity statements. Complying with "sound standards of faculty governance" is necessary if universities are going to use diversity statements the right way. As I've argued at length elsewhere,⁴⁶ diversity statements should be treated like other elements of a faculty application or advancement file: evaluated not top down by administrators but by disciplinary experts according to rubrics they have set based on needs within their field or particular department. It's the content of what's asked and the process in place for evaluating the answer—not the diktat of a governing faculty majority—that makes diversity statements consistent with academic freedom.

Statement on Academic Boycotts

The previous two AAUP statements share a common structure: each rejects the categorical claim that a particular practice (expressing institutional or departmental opinions, requiring diversity statements) is inconsistent with academic freedom—or, for that matter, necessary for it. Having opened up this space for ethical practice, the statements go on to say a bit more (in the former case) or less (in the latter) about what that practice must look like to comply with the principles of academic freedom.

A third and even more controversial statement, about academic boycotts, takes the same form and has, for similar reasons, been accused of subordinating individual freedom to collective action. It provides an especially concrete test case for exploring what ethical practice could look like when individual and collective academic freedom stand in tension.

In 2006, Committee A released a statement, *On Academic Boycotts*, officially opposing them as a tactic even for "obtaining better conditions of academic freedom" in places where it is lacking. Committee A acknowledged that its position sat uncomfortably with the AAUP's longstanding practice of censuring colleges and universities that violate principles of academic freedom. But the censure list is

⁴³ Video posted by Open to Debate, YOUTUBE, *Debate: Are DEI Mandates for University Faculties a Bad Idea?* (Nov. 02, 2023), <https://www.youtube.com/watch?v=eKay5lcv7Ic&t=4s>.

⁴⁴ *DEI Criteria*, *supra* note 37.

⁴⁵ Gutkin, *supra* note 31.

⁴⁶ *Diversity Statements*, *supra* note 40.

different, Committee A suggested, because it “leav[es] it to individuals to decide how to act on the information they have been given”; “AAUP engages in no formal effort to discourage faculty from working at these institutions or to ostracize the institution and its members from academic exchanges.”⁴⁷

Similarly, the 2006 boycott statement “recognize[d] the right of individual faculty members or groups of academics not to cooperate with other individual faculty members or academic institutions with whom or with which they disagree.”⁴⁸ But it held that “when such noncooperation takes the form of a systematic academic boycott, it threatens the principles of free expression and communication on which we collectively depend.”⁴⁹

In 2024, Committee A reversed course, at least on the permissibility of what the earlier statement had referred to as a “systematic academic boycott.” The 2024 *Statement on Academic Boycotts* concluded instead “that individual faculty members and students should be free to weigh, assess, and debate the specific circumstances giving rise to calls for systematic academic boycotts and to make their own choices regarding their participation in them. To do otherwise contravenes academic freedom.”⁵⁰ According to the 2024 Statement, both support for and opposition to academic boycotts should be protected under academic freedom; those considering an academic boycott should first consider alternative tactics; political and religious tests are off limits in determining the targets of a boycott; and those targeted can only be institutions, not individual “scholars and teachers engaged in ordinary academic practices, such as publishing scholarship, delivering lectures and conference presentations, or participating in research collaborations.”⁵¹

⁴⁷ AAUP, *On Academic Boycotts*, <https://www.aaup.org/reports-publications/aaup-policies-reports/topical-reports/academic-freedom-tenure-and-due-2> (last visited Dec. 22, 2025) [hereinafter 2006 Boycott Statement].

⁴⁸ Some critics fail to highlight the fact that the 2006 statement allowed not just individual action, but action by “groups of academics.” See, e.g., Cary Nelson, *The AAUP Abandons Academic Freedom*, CHRON. OF HIGHER EDUC. (Aug. 13, 2024), <https://www.chronicle.com/article/the-aaup-abandons-academic-freedom> [hereinafter Nelson] (“Individual students and faculty have always had the right to advocate for academic boycotts, and it is disingenuous to suggest otherwise.”); Jeffrey Sachs, *The AAUP’s Incoherent New Boycott Policy*, CHRON. OF HIGHER EDUC. (Aug. 16, 2024), <https://www.chronicle.com/article/the-aaups-incoherent-new-boycott-policy> [hereinafter Sachs] (“While recognizing the right of each individual academic to refuse collaboration with a given university, [the AAUP] has opposed what it calls a ‘systematic academic boycott’”). This elision matters, as it allows some critics to ascribe dangers to the 2024 Statement that were already present in the group boycotts allowed under the 2006 Statement. See, e.g., Ginsburg, *supra* note 31 (linking to an article in which the harms experienced by individual Israeli scholars are not traced to “systematic academic boycotts” as opposed to those the 2006 Statement already allowed).

⁴⁹ *Id.*

⁵⁰ AAUP, *Statement on Academic Boycotts*, AAUP, <https://www.aaup.org/reports-publications/aaup-policies-reports/policy-statements/statement-academic-boycotts> (last visited Dec. 22, 2025) [hereinafter 2024 Statement].

⁵¹ *Id.*

These limits did little to assuage critics. “The AAUP Abandons Academic Freedom,” said one headline—for an article written by the AAUP’s former president. “The AAUP’s credibility has been destroyed,” wrote its former general counsel and Committee A chair. A more measured response spoke of “The AAUP’s Incoherent New Boycott Policy.” A less measured one asked whether “Academic Freedom Can Survive the AAUP.”⁵²

One of the AAUP’s more nuanced critics, political scientist Jeffrey Sachs, started one essay by admitting that he didn’t know whether the 2024 Boycott Statement was “a tempest in a teapot” or “a disaster in the making” because he couldn’t fully understand what the policy actually means. “Even worse,” he wrote, “the AAUP doesn’t seem to know either.”⁵³ What follows, then, is my—not the AAUP’s—attempt to figure out what the 2024 Statement should be read to entail.⁵⁴

An initial interpretive question goes to the main issue on which the AAUP’s two boycott statements differ: what are these “systematic academic boycotts” that AAUP no longer sees as inconsistent with the principles of academic freedom?⁵⁵

I understand a “systematic” boycott to differ from a boycott by “groups of academics” (which the 2006 Statement allowed) insofar as it involves a process through which individuals come to speak not just for themselves, but some larger collective. If a department or center within a university, or a learned society within a discipline, were to employ its usual decision-making procedures to declare *the department’s, center’s, or society’s* boycott of some particular institution, this would be a systematic boycott. By contrast, when a group of faculty members all decide to boycott that same institution, they are not conducting a systematic boycott, they are just forming one the 2006’s Statement’s “group of academics” who have an unquestioned right not to cooperate with schools “with which … they disagree.” (The right may have been unquestioned by the 2006 Statement, but I think individual faculty and groups of faculty could easily have violated the AAUP’s Statement on Professional Ethics in making these choices.⁵⁶) Even if the entire faculty of a

⁵² Finkin, *infra* note 55; Nelson, *supra* note 48; Sachs, *supra* note 48; Ginsburg, *supra* note 31. Authors are seldom responsible for the headlines their op-eds are given, but in these cases, the articles themselves are equally incendiary.

⁵³ Sachs, *supra* note 48.

⁵⁴ I am grateful to Sachs for his correspondence on these issues. I was not involved in the drafting of the 2024 Policy although I had joined AAUP’s Committee A by the time it was approved.

⁵⁵ Matthew Finkin, *The Collapse of AAUP Credibility*, UNIV. OF IL COLL. OF L. LEGAL STUD. RSCH. (Jan. 30, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5118255 [hereinafter Finkin] (arguing that, even in the 2006 Statement, “the distinction between allowable individual and disallowed systematic group action was not further explained nor the line between them explored; it should have been”).

⁵⁶ AAUP, *Statement on Professional Ethics*, AAUP, <https://www.aaup.org/reports-publications/aaup-policies-reports/policy-statements/statement-professional-ethics> (last visited Dec. 22, 2025) (“As colleagues, professors have obligations that derive from common membership in the community of scholars. Professors do not discriminate against or harass colleagues. They respect and defend the free inquiry of associates, even when it leads to findings and conclusions that differ from

department decided as a group to boycott a certain university, this would not be a *systematic* boycott unless they did so on behalf of their department, using whatever procedures are needed to make that the case.⁵⁷

This understanding of a systematic academic boycott as one which leverages the voice of some official collective, like a department, as opposed an ad hoc group that individuals can join and leave at will, is one that puts the tension between collective and individual academic freedom in starker relief. For a systematic boycott, by definition, applies at least in some ways to the members of the collective whether they support the boycott or not. The question is, in *what ways* can the collective boycott bind individuals who don't themselves endorse it?

Consider a range of things that Department Y's boycott of Institution X might involve:

- (1) Department Y releases a public statement in its name condemning Institution X for its violations of academic freedom or the fundamental rights on which academic freedom depends.
- (2) Y ends a special partnership such as a faculty exchange or a study abroad program with X.
- (3) Y ends its recruiting trips to X, where it traditionally participated in X's grad school fair.
- (4) Y refuses to co-sponsor conferences with X.
- (5) Y prohibits the use of its competitively awarded faculty travel stipends for travel to X.
- (6) Y refuses to approve sabbatical leave for faculty who plan to spend their sabbatical at X.
- (7) Y prohibits its professors from writing recommendation letters for students wanting to study at University X.
- (8) Y allows its professors decline to write recommendation letters for students wanting to study at X.

Each of these steps has the potential to impact an individual faculty member's academic freedom. The question here is how the collective can achieve its goals without unduly coopting the freedom of its members. After all, some collective

their own. Professors acknowledge academic debt and strive to be objective in their professional judgment of colleagues.”).

⁵⁷ Matthew Finkin, the AAUP's former general counsel, disagrees with the claim that there is a relevant difference between a department statement and one by a large group of its faculty: “[T]hat the department was not identified as the actor would seem to be a distinction without a difference as the impact on students ... who wish to pursue academic work in Israel or on incumbent or potential faculty members who would wish to engage in collaborative projects there would seem to be as much as were the department to have acted in its name.” Finkin, *supra* note 55, at *13-14.

decisions are unavoidable, and unavoidably collective: the department will either have a faculty exchange program with University X or it will not. It will speak out about University X's bad actions or it won't. Doing these things potentially affects everyone in the department, but that can't be helped. Other actions on the list, however, don't just affect individual faculty, they compel individual faculty members' participation. Thinking of academic freedom as an ethical practice tasked with navigating the space between collectives and individuals requires us to make prudential judgments about where to draw the line.

To my mind, the real crux of the issue is the divide between options (1), (2), (3), and (4) on the one hand, and options (5) and (6) on the other. Option (1), the departmental statement, would have been allowed even under the AAUP's 2006 policy, which called "the adoption of resolutions ... entirely appropriate." Meanwhile, (2), (3), and (4) all involve actions taken by the department itself. These are necessarily collective decisions about programming, spending, recruitment, and the use of the department's name.

By contrast, the way a faculty member chooses to use their research or travel grants or spend their sabbatical is something their department or school should judge without reference to the boycott. Faculty can be denied funding for financial reasons (if the money runs out) or because other faculty's scholarly projects are deemed more important or promising. But it would violate the faculty member's academic freedom to withhold funding or benefits to which they would otherwise be entitled, simply because they do not support the department's boycott. The same would be true if a faculty member did not support a labor strike or a curricular decision and lost funding as a result. The 2024 Statement gets at this, somewhat obliquely, in saying that "Faculty members' choices to support or oppose academic boycotts should not themselves be the basis of formal reprisal."⁵⁸ The guiding principle is that faculty research projects should only be judged by experts in the discipline based on relevant scholarly criteria—not based on the applicant's agreement with collectively-decided departmental policies.

There is a close analogy here to free speech doctrine surrounding government speech versus limited public forum funding, especially funding for university student groups that bring in outside speakers. The university has wide leeway to decide whom it wants to honor or invite to speak, but it can't control who student groups bring to campus, even when they use university funds to do so.⁵⁹

This leaves the issue of recommendation letters. Prohibiting faculty from writing them, as in (7), would be an obvious academic freedom violation. Allowing faculty to withhold recommendations as part of a boycott, as in (8), is a much more complicated issue—though, notably, it's one that was as likely to arise under the 2006 Statement

⁵⁸ 2024 Statement, *supra* note 50.

⁵⁹ See SOUCEK, *supra* note 28, at 121-24.

as the new one.⁶⁰ In this collision of *individual versus individual* rights (as opposed to individual versus collective ones), here, the freedom of a faculty member versus that of a student, I think the student's interest should prevail. Just as a professor shouldn't grade students based on their politics and can't refuse to teach them because of the ways they'll eventually use the knowledge learned, neither should a professor be able to limit their students' opportunities by withholding a recommendation as part of a boycott.

4.

The AAUP's critics are right to notice a common theme in its recent statements: on the topic of boycotts, DEI considerations in faculty hiring and advancement, and institutional neutrality, the AAUP has pushed for nuance while recognizing the importance of collective action by the faculty. When it comes to academic freedom, some find "it depends" to be an unhelpful form of guidance; in place of nuance, they want rules—rules that maximize the academic freedom rights of individual professors.

But crucial as it is to defend individual professors' freedom to teach, research, and publish, that defense can't simply ignore the unavoidable, collective decisions made in each of the areas the AAUP has recently examined. These collective decisions shape the environment in which teaching, researching, and publishing occur. To treat the collective as simply a threat to individual academic freedom is to give up on the possibility that the faculty will be collectively involved in making the decisions that shape its work, and that a university, as institution, might be seen as more than just its administration.

⁶⁰ Len Gutkin, *Academic Freedom's Fierce Internal Fracas*, CHRON. OF HIGHER EDUC. (Nov. 21, 2025), <https://www.chronicle.com/article/academic-freedoms-civil-war> (quoting Committee A chair Rana Jaleel as saying that "[a] lot of the supposed harms that people bring up around academic boycotts happened under the old policy as well. Those included ... people not writing or choosing not to write letters of recommendation that involved places that they believed were violating academic freedom or human rights.").

II. The Neutrality Illusion

1.

Should restaurants ever express positions on political or social issues, or would it be if they just stayed neutral?

The latter option is tempting for those who might want to enjoy Chick-fil-A and In-and-Out, or Chipotle and Starbucks, without getting dragged into debates over marriage equality¹ or race relations.²

But things get complicated quickly. What if the political controversy stems from the bible verses printed on In-and-Out's packaging? Should we evaluate that differently than if its religious commitments manifest instead in the company's decision to provide an industry-leading wage for its employees?³ What if the thing that makes Chipotle so "woke" is its refusal to use genetically modified ingredients?⁴

The possibility of "neutrality" in these last examples starts to seem illusory, since restaurants are either going to be GMO-free or not; they are going to choose to pay a livable wage or stick to prevailing market rates. Assuming that is true, do those pushing neutrality simply want restaurants not to *talk* about the politically freighted choices they inevitably make? Is neutrality simply to be equated with silence? Or is

¹ Justin Kirkland, *Chick-Fil-A's Owner is Newly Connected to Anti-Equality Act Donations*, ESQUIRE (Jun. 3, 2021, 4:29PM EDT), <https://www.esquire.com/food-drink/restaurants/a36622217/chick-fil-a-owner-donations-against-equality-act/>; Sarah Aarthun, *Chick-Fil-A Wades into a Fast-Food Fight Over Same-Sex Marriage Rights*, CNN (July 28, 2021, 11:39 AM EDT); Peter Wood, *Is Chick-Fil-A Anti-Gay?*, CHRON. OF HIGHER EDUC. (Jan. 31, 2011), <https://www.chronicle.com/blogs/innovations/is-chick-fil-a-anti-gay?sra=true>.

² Khushbu Shah, *Can Starbucks Fix Racism with a Message on a Cup?*, EATER (Mar. 17, 2015, 9:09AM PDT), <https://www.eater.com/2015/3/17/8231973/can-starbucks-fix-racism-with-a-message-on-a-cup>.

³ Melia Robinson, *In-N-Out Employees Can Work Their Way Up to \$160,000 a Year With No Degree or Previous Experience*, BUSINESS INSIDER (Jan 22, 2018, 10:41 AM PT), <https://www.businessinsider.com/in-n-out-employee-pay-2018-1>.

⁴ Carole Zimmer, *Chipotle Says Adios to GMOs, as Food Industry Strips Away Ingredients*, NPR (Apr. 27, 2015, 5:04PM ET), <https://www.npr.org/blogs/thesalt/2015/04/27/402632212/chipotle-says-adios-to-gmos-as-food-industry-strips-away-ingredients>.

the claim perhaps that restaurants can make choices like these as long as they do so for non-political reasons? Perhaps higher wages lead to lower turnover and better service; GMO-free ingredients taste better. Would these types of justifications make a restaurant's unavoidable decisions more neutral in some relevant sense?

And what sense would that be? Let's say a restaurant makes a relevantly neutral decision when its choice is based only on what I'll call "restauranting" reasons, as opposed to external considerations like partisan politics, contested visions of social justice, religious commitments, or so on.

Neutrality, on this latter view, is something other than silence. It recognizes that a restaurant can wade into political controversy as much by what it does as what it says. Restaurants, after all, are usually doers more than speakers, at least insofar as that's a meaningful distinction—that speaking isn't just another thing restaurants do. The question is: What *do* restaurants exist to do? What is restauranting? And the obvious answer seems to be: Feeding people, standardly for pay.

This definition excludes certain activities as irrelevant to restauranting. A restaurant doesn't repair cars or wash your clothes. There could, of course, be some business called "Soak and Sip," or "Fold and Feed," which serves food and drink to customers as they do their laundry. But that would be a hybrid "restaurant-and-" kind of business, like a dinner theater.

"Feeding for pay" takes some options off the table, but it is much too general a definition to be helpful in answering the closer questions about what "restauranting" properly involves. Restaurants simply come in too many varieties: fast-food and Michelin-starred, vegan and/or southern, French, Persian, Peruvian, organic, seafood, steak, sustainable, farm-to-table, localvore, sassy-waitstaffed, and so on. The precise type or sourcing of ingredients is internal to restauranting at some of these, but not at others. So too the racial identity of the cooks or wait staff, or the cultural authenticity of their restaurant's recipes and decor.

Restauranting is no one thing, and I think most people are ok with that. Most of us are pluralists about restaurants. We see little point in ranking them all qualitatively on a single list. This multiplicity of identities and aims raises questions, however, about who gets to choose what any particular restaurant will try to be—and thus what is internal rather than external to its conception of restauranting. It might be the owner or investors, or the chef, particular a celebrity chef at the kind of restaurant where the chef's name is widely known. The restaurant might be collectively owned and managed by its employees. Regardless, *someone* will decide what a particular restaurant is to be, and the market will decide whether that decision leads to an experience diners value enough to keep afloat.

2.

It will come as no surprise that all of this is just a belabored analogy to the institutional neutrality debate that has lately roiled American higher education, after lying somewhat dormant since its previous heyday in the Vietnam era.

During that era, in 1969, the American Association of University Professors put out a call for a nationwide debate about whether universities should take stands on political issues like the war in Vietnam. As part of the ensuing discussion, which the AAUP published, historian Winton Solberg argued that the “principle of institutional neutrality”—the idea that the university as a corporate body is obligated “to refrain from official pronouncements on disputed political, moral, philosophical, and scientific issues”—is “essential to the proper functioning of a genuine university.”⁵ The AAUP characterized his side of the debate as believing that open dialogue and academic freedom are “possible only if the institution within which this dialogue is to take place is itself, as an institution, neutral on the issues being debated.”⁶

Neither these nor the many statements that followed referenced what has now become the standard citation in discussions of institutional neutrality: the University of Chicago’s 1967 Kalven Report, named after its author, the First Amendment scholar Harry Kalven.⁷ For years, the Kalven Report shared the fate of most faculty committee reports: near total obscurity.⁸ But no longer. In the last decade, conservative activists have drawn on the Kalven Report to create model legislation on campus speech.⁹ In the past two years, a well-funded national campaign has been

⁵ Donald N. Koster and Winton U. Solberg, “On Institutional Neutrality,” *AAUP Bulletin* 56, no. 1 (March 1970): 11, <https://www.aaup.org/sites/default/files/OnInstitutionalNeutrality.pdf>; see also Carl Landauer et al., “Further Comments on Institutional Neutrality,” *AAUP Bulletin* 56, no. 2 (June 1970): 123: “I wish to state my opinion that institutional neutrality is an indispensable condition of academic freedom, that all arguments for the opposite position are spurious, and that our Association [the AAUP] would destroy its own foundation if it were to countenance institutional partisanship.”

⁶ AAUP, “A Statement of the Association’s Council: The Question of Institutional Neutrality,” *AAUP Bulletin* 55, no. 4 (December 1969): 488, <https://www.jstor.org/stable/40223872>.

⁷ Kalven Committee, *Report on the University’s Role in Political and Social Action* (University of Chicago, 1967), <https://provost.uchicago.edu/reports/report-universitys-role-political-and-social-action> [hereinafter Kalven Report]. The Kalven Report is also collected alongside other University of Chicago policies and speeches on free speech and academic freedom in Tony Banout and Tom Ginsburg, eds., *The Chicago Canon on Free Inquiry and Expression* (University of Chicago Press, 2024). Tom Ginsburg also offers a particularly clear argument for why other schools should follow Chicago in “The Case for University Silence,” *Persuasion*, October 25, 2023, <https://www.persuasion.community/p/the-case-for-university-silence>.

⁸ Post, “Kalven Report,” *6–7, *6n17.

⁹ STANLEY KURTZ, ET AL., CAMPUS FREE SPEECH: A LEGISLATIVE PROPOSAL (The Goldwater Institute 2017); American Association of University Professors, *Campus Free-Speech Legislation: History, Progress, and Problems*, <https://www.aaup.org/reports-publications/aaup-policies-reports/topical-reports/campus-free-speech-legislation-history>.

waged to convince boards of trustees to commit their universities to neutrality.¹⁰ The Trump administration’s recent “Compact for Higher Education,” its latest attempt to leverage federal funding to impose its values, includes an institutional neutrality requirement among its demands.¹¹ And these efforts have paid off: Heterodox Academy, one of the campus speech organizations behind the recent campaign, now claims that nearly 150 universities have signed on to the Kalven Report or some similar pledge to stay quiet about political or social issues.¹²

Given the canonical status the Kalven Report has now achieved, it’s worth saying something about its background and argument. In May 1966, “one of the first major sit-ins of a university administration building” occurred at the University of Chicago, prompted by its president’s decision to provide class ranks to draft boards on students’ request.¹³ The following January, two hundred University of Chicago students picketed a bank downtown, then rallied on campus, demanding that their university cut off ties with the bank unless it divested from apartheid South Africa.¹⁴ In June 1967, students again took over the Administration Building, returning to the issue of class rankings. This time, fifty-eight of those students received suspensions from a faculty disciplinary committee chaired by none other than law professor Harry Kalven.¹⁵

Amidst these protests, Professor Kalven was also chairing a group of seven faculty tasked with examining “The Role of the University in Political and Social Action”—also the title of its resulting report. The Kalven Report, as it’s more commonly known, described its aim modestly, as simply “providing a point of departure for discussion in the University community” about what its political and social role should be.¹⁶ It located this “point of departure” in a pathmarking statement adopted in 1899, under

¹⁰ “An Open Letter to College and University Trustees and Regents: It’s Time to Adopt Institutional Neutrality,” Academic Freedom Alliance, Heterodox Academy, and Foundation for Individual Rights and Expression, last updated July 11, 2024, <https://institutionalneutrality.org/>.

¹¹ Laura Meckler & Susan Svriluga, *White House Considers Funding Advantage for Colleges that Align with Trump Policies*, WASHINGTON POST ONLINE (Sep. 28, 2025); *Compact for Academic Excellence in Higher Education*, (Oct. 1, 2025), <https://s3.documentcloud.org/documents/26179328/compact-for-academic-excellence-in-higher-education-10197.pdf>

¹² Heterodox Academy reports that by the end of 2024, 148 colleges and universities had adopted something akin to an institutional neutrality statement, most in the previous year. Alex Arnold, *The Rising Tide of Statement Neutrality in Higher Education: How Universities Are Rethinking Institutional Speech* (Heterodox Academy, 2025), https://content.heterodoxacademy.org/uploads/HxA_Statement-Neutrality-Report_FINAL.pdf.

¹³ John W. Boyer, *Annual Report to the Faculty: The University of Chicago in the 1960s and 1970s* (The College of the University of Chicago, 1999), 20–21, https://college.uchicago.edu/sites/default/files/documents/BoyerOccasionalPapers_V4.pdf.

¹⁴ John W. Boyer, *Academic Freedom and the Modern University: The Experience of the University of Chicago* (The College of the University of Chicago, 2016), 88–89, https://news.uchicago.edu/sites/default/files/attachments/Academic_Freedom_V1.pdf.

¹⁵ Boyer, *Annual Report to the Faculty*, 21.

¹⁶ This and the quotes that follow from the Kalven Report.

the University of Chicago's first president, William Rainey Harper, which declared "that the University, as such, does not appear as a disputant on either side upon any public question."¹⁷

According to the report, "A university faithful to its mission will provide enduring challenges to social values, policies, practices, and institutions." But who is to do the challenging? Only individual faculty and students, it turns out. "The university is the home and sponsor of critics; it is not itself the critic." A university, the report says,

is a community which cannot take collective action on the issues of the day without endangering the conditions for its existence and effectiveness. There is no mechanism by which it can reach a collective position without inhibiting that full freedom of dissent on which it thrives. It cannot insist that all of its members favor a given view of social policy; if it takes collective action, therefore, it does so at the price of censuring any minority who do not agree with the view adopted.

The argument seems to be that an institution's positions or views or collective actions—it's notable that the Kalven Report treats these interchangeably—necessarily endanger its members' academic freedom, without which the university cannot "perform its mission": fostering teaching and research that will "challenge existing social arrangements." Carrying out the university's "proper role in political and social action" thus turns out to depend on maintaining its "neutrality as an institution."

3.

Back for a moment, then, to restaurants. For all the ways that restaurants and universities might prove analogous with regard to neutrality, one thing seems to be strongly disanalogous. If the Kalven Report is to be believed, a university cannot even be a university unless it maintains neutrality as an institution.¹⁸ Institutional neutrality is a necessary condition for the academic freedom that allows teaching and research to flourish. Call this the strong claim for institutional neutrality, or hardline Kalvenism.

¹⁷ William Rainey Harper, "The Thirty-Sixth Quarterly Statement of the President of the University," *University Record* 5, no. 42 (January 18, 1901): 376, <https://campub.lib.uchicago.edu/view/?docId=mvol-0007-0005-0042#page/8/mode/1up>. Longtime UChicago dean and historian John Boyer notes that Chicago's then-provost Edward Levi sent the 1899 statement to Kalven while he was drafting the committee's report. Boyer, *Academic Freedom and the Modern University*, 94.

¹⁸ As former UChicago Provost and First Amendment scholar Geoffrey Stone has written, "once a university takes sides, it is no longer a university." Geoffrey Stone, "Darfur and the Kalven Report: A Personal Journey," *The University of Chicago Law School Faculty Blog*, February 9, 2007, https://web.archive.org/web/20250910232105/https://uchicagolaw.typepad.com/faculty/2007/02/darfur_and_the_.html.

There seems to be no parallel in the case of restaurants. Those who want their burgers without a side of Christianity are not claiming that a restaurant that is vocal about those types of commitments somehow ceases to be a restaurant. Non-neutrality might be a distraction from the core work of restauranting, it might affect profits (though in which direction isn't always clear), and it might contribute to the ever-increasing balkanization of an America where the red/blue divide extends beyond polling booths to news sources, social media apps, vacation destinations, music and alcohol preferences, and, eventually, even restaurants.

These reasons to favor restaurant neutrality each have parallels in the university neutrality literature. There, institutional speech is said to be a distraction from the true work of universities,¹⁹ a danger to enrollment (though here again it's hard to know whether, and which, institutional statements will alienate more students than they attract), and a contributor to intellectual siloing, with woke and anti-woke universities or departments speaking only to themselves.²⁰ These consequentialist reasons prove parallel, and yet there is no restauranting analog to hardline Kalvenism's central claim: that institutional non-neutrality poses an existential threat to academic freedom, and thus, to the very essence of a university.

Should we believe hardline Kalvenism's central claim, though? Or would we do better to treat universities more like restaurants when it comes to neutrality?

4.

To start, we might ask: Why can't a university take collective action without insisting that all of its members share its view? Why should we think that anyone who disagrees from some institutional position is thereby "censured"? Some of Kalven's supporters talk as if voicing an opinion for an institution necessarily means speaking for all of the institution's members, or sending the message that there can be only one correct view.²¹ Neither is true. The idea that a group can't express a collective position without inhibiting the "full freedom of dissent" is especially curious in a committee report that itself includes a dissent from one of its members. (Professor George Stigler attached a "special comment" disagreeing with the report's view on the university's actions as employer and property owner.)

¹⁹ Ginsburg, "A Constitutional Perspective on Institutional Neutrality," 2; Anthony J. Casey and Tom Ginsburg, "Kalven for Corporations: Should For-Profit Corporations Adopt Public Statement Policies?" *University of Chicago Business Law Review* 3 (2024): 303–22.

²⁰ H.B. 999, 2023 Leg., Reg. Sess. (Fla. 2023).

²¹ See, e.g., Peter C. Herman, "Institutional Neutrality Doesn't Go Far Enough," *Inside Higher Ed.* (Oct. 1, 2024), <https://www.insidehighered.com/opinion/views/2024/10/01/institutional-neutrality-doesnt-go-far-enough-opinion>; Daniel Diermeier, "Scholarly Associations Aren't Entitled to Their Opinions," *Wall Street Journal* (Sept. 6, 2024), <https://www.wsj.com/opinion/scholarly-associations-arent-entitled-to-their-opinions-it-chills-debate-harms-young-faculty-2584c09c?mod=e2two>.

As Robert Post has recently argued,²² the claim that institutional statements are *inherently* incompatible with academic freedom is undermined by the Kalven Report's later, less categorical call for "a heavy *presumption* against the university taking collective action or expressing opinions." Post argues that the Kalven Report is better understood as an empirical argument that faculty are likely to feel pressured to conform to official positions taken by their employer. This seems intuitive in some circumstances, but far from all. As Post asks, does anyone really think UChicago's faculty would have felt pressure to change what they taught or wrote simply because their employer had decided to divest from South Africa—as more than 150 other universities in fact went on to do?²³

I would expect answers to Post's empirical question about the chilling effect of institutional statements to vary quite widely depending on the topic the statement addresses, how dogmatic the university is in expressing it, and what academic freedom protections the university has committed to, both in policy and practice, to assure those who disagree that their dissent will not be punished.

In this, institutional statements prove similar to any number of other actions universities routinely take. Many of these prove no less expressive, often on issues that are just as politically contested. They not only have the capacity to chill faculty or student speech, but sometimes even make it impossible, for example by defunding forums where the speech previously occurred. Whether this is consistent with academic freedom or not is likely to hinge both on the protections in place for those advocating for contrary action, and on the shared governance that may or may not have led to the university's choice of action in the first place.

The Kalven Report itself supports the idea that institutional speech should not be treated as something categorically different from other institutional actions. Recall its conflation of collective positions, views, and actions in the passage quoted earlier. It's notable that the Report was written to address controversies that *required* the university to take sides. Providing rankings to the Draft Board and divesting from South Africa both share something in common. Compared, say, to the emails and press releases sent out after the October 7 attacks, a statement about whether the University of Chicago will provide class ranks or alter its investment strategy is more than just "thoughts and prayers"; it's an announcement of some concrete *action* the university plans to take. The school had to choose either to share the rankings or not, to continue investing in South Africa or to stop doing so.

²² Robert Post, "The Kalven Report, Institutional Neutrality, and Academic Freedom," in *Revisiting the Kalven Report: The University's Role in Social and Political Action*, ed. Keith E. Whittington and John Tomasi (John Hopkins University Press, forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4516235, *5n14 (hereinafter Post, "Kalven Report"). Emphasis is added in the quotation from the Kalven Report.

²³ Post, "Kalven Report," *10; Richard Knight, "Sanctions, Divestment, and U.S. Corporations in South Africa," in *Sanctioning Apartheid*, ed. Robert E. Edgar (Africa World Press, 1990), 69.

Addressing a new divestment controversy nearly forty years after the Kalven Report, Chicago's Geoffrey Stone wrote, "Those who demand divestment want the University to make a statement about what is morally, politically, and socially 'right.' And that is precisely what the University should not do."²⁴ What Stone doesn't acknowledge is that a decision to continue investing in something makes a statement of its own. Preserving the status quo is not the same thing as neutrality. More broadly, Stone fails to acknowledge just how routinely universities, through their actions, make statements about what is morally, politically, and socially right. His argument against doing so would prove far too much.

Just look at the names universities give their schools, buildings, classrooms, and the scholarships and chairs they award. Universities express something with these choices.²⁵ I am lucky to work at King Hall, named after Martin Luther King Jr.; his words are on my school's walls and a statue of him stands in our lobby. Some other law schools near mine haven't been so fortunate. UC Berkeley no longer refers to its law school as Boalt Hall, having discovered how grossly anti-Chinese its namesake was.²⁶ And the first law school in California, once known as UC Hastings, is now UC Law SF—a much less catchy name, but one that's at least not as strongly associated with the massacre of Native Americans.²⁷ Renaming efforts may strike some as hopelessly woke,²⁸ but keeping a name is no less value-laden. Inertia isn't neutral, it's just a choice to put tradition, or branding, over other considerations that are at stake when making what turn out to be unavoidably political and expressive decisions.

²⁴ Stone, "Darfur and the Kalven Report."

²⁵ "In its building names and its campus symbols, the University communicates values, confers honor, and expresses gratitude to those who have contributed to its mission. In other words, the University itself speaks through its building names." Committee to Establish Principles on Renaming, "Letter of the Committee to Establish Principles on Renaming," Yale University, November 21, 2016, 3, https://president.yale.edu/sites/default/files/files/CEPR_FINAL_12-2-16.pdf.

²⁶ A Time for Change: Contextualizing the Removal of 'Boalt Hall' from the Law School's Identity," UC Berkeley Law, <https://www.law.berkeley.edu/atetimeforchange/>.

²⁷ "Chancellor & Dean David Faigman: Board of Directors Votes on New Name for the College," University of California College of the Law, San Francisco, July 27, 2022, <https://www.uclawsf.edu/2022/07/27/chancellor-dean-david-faigman-board-of-directors-votes-on-new-name-for-the-college/>. Changing the name of UC Hastings required the school both to get state legislation passed and to survive litigation seeking to stop the name change. See A.B. 1936, 2021–2022, Reg. Sess. (Cal. 2022); Karen Sloan, "Lawsuit Over UC Hastings Name Change Is Tossed," Reuters, February 7, 2024, <https://www.reuters.com/legal/government/lawsuit-over-uc-hastings-name-change-is-tossed-2024-02-07/>.

²⁸ For example, Harmeet Dhillon—the attorney who represented the descendants of Serranus Hastings in opposing the UC Hastings name change in court—framed the law school's decision as another "woke issue du jour." Sergio Quintara, "Legal Fight Over Renaming San Francisco Law School," NBC Bay Area, October 4, 2022, <https://www.nbcbayarea.com/news/local/san-francisco/legal-fight-renaming-san-francisco-law-school/3021281/>. Dhillon now leads the Civil Rights Division at the US Department of Justice.

In 2017, Yale University renamed one of its residential colleges, previously named for one of the nineteenth century's leading theorists of southern secession, John C. Calhoun.²⁹ In doing so, the committee charged with setting standards for renaming rightly recognized that "the University speaks through its building names," and that "when the University speaks, it chooses its message in light of its mission." Yale decided to honor the mathematician, computer scientist, and rear admiral Grace Murray Hopper in place of Calhoun. But by renaming the school for this reason, Yale was doing "precisely what the University should not do," according to Stone. It was "mak[ing] a statement about what is morally, politically, and socially 'right'"—and, of course, which is morally, politically, and socially wrong.³⁰

Professor Stone's own university is little different from Yale in this regard. Not long ago, the University of Chicago renamed what was formerly its Oriental Institute, now called the Institute for the Study of Ancient Cultures. It did so in part to avoid the "pejorative connotations of the word ['oriental.]" Sometimes the University of Chicago just lets a controversial name quietly fade away, as when it got rid of its Robert A. Millikan Distinguished Service chair without fanfare, after Chicago had been publicly urged to follow other schools that had removed Millikan's name because of his involvement with eugenics.³¹

Ubiquitous and expressive as names are on nearly every campus, statements are also made—and heard—when universities decide what paintings or photographs to hang on their walls or what statues to erect or tear down on their lawns. When I was a student at Yale Law School, there were seventy-six portraits in our building, but only six were of women.³² My school was sending a message, intentionally or not. Its

²⁹ "Commemoration expresses values. . . . [A] change in the way a community memorializes its past offers a way to recognize important alterations in the community's values. . . . [A] great university will rightly decide what to commemorate and what to honor, subject always to the obligation not to efface the history that informs the world in which we live." "Letter of the Committee to Establish Principles on Renaming," 3. Yale University's Witt Report from 2016 very helpfully recommends a presumption against renaming, made stronger when the name honors someone who made major contributions to the university. This presumption can be overcome, however, if the namesake's principal legacy is "fundamentally at odds with the mission of the University," especially if that legacy was problematic even at the time the namesake lived, if it was part of the reason why the university honored the namesake, and if the name marks something (like a building or residential college) that is meant to build community. "Letter of the Committee to Establish Principles on Renaming."

³⁰ Stone, "Darfur and the Kalven Report."

³¹ Robert Michaelson, "Should UChicago Rename the 'Robert A. Millikan Professorship?'" *Chicago Maroon*, March 4, 2021, <https://chicagomaroon.com/28355/viewpoints/letter/uchicago-rename-robert-millikan-professorship/>. Compare "Twenty-Three UChicago Faculty Receive Named, Distinguished Service Professorships in 2019," *UChicago News*, December 30, 2019, <https://news.uchicago.edu/story/twenty-three-uchicago-faculty-receive-named-distinguished-service-professorships-2019>, with "Seventeen UChicago Faculty Members Receive Named, Distinguished Service Professorships," *UChicago News*, January 3, 2023, <https://news.uchicago.edu/story/seventeen-uchicago-faculty-members-receive-named-distinguished-service-professorships>.

³² Qi Xu, "Law School Project Pushes for Portraits of Females," *Yale News*, November 19, 2015, <https://yaledailynews.com/blog/2015/11/19/law-school-project-pushes-for-portraits-of-females/>.

attempt to commission a more diverse set of portraits in the years since has been similarly expressive.

Is there a possibility of neutrality in decisions like these? Whether it is Calhoun or Hopper, a residential college needs a name, and these are bound to express a message, unless the colleges of Yale are just going to be labeled with letters or numbers. Similarly, the paintings on a university's walls need subjects, unless the school is going to forgo art entirely or move toward non-representational art. (Our federal courts have increasingly done this in recent years to avoid any appearance of partiality. As Judith Resnik and Denny Curtis have pointed out, Lady Justice was no longer so effective at signaling neutrality once women were finally recognized as legal persons.³³) Each of these choices comes at a cost, and probably not one that universities are willing to bear. Getting rid of names would eliminate major fundraising opportunities, and it could impact community-building on campus. Universities regularly choose these other values over neutrality, presumably because they think the other values are more important in advancing the university's mission.

But what if universities tried to set neutral principles to govern who gets a portrait or a building named after them? This, in fact, is what Yale Law School was originally doing: alums and faculty who become a US president, a Supreme Court justice, or chief judge of a federal court of appeals were automatically approved for a portrait, as were the school's former deans.³⁴ This policy at least got the law school out of the business of picking and choosing which Supreme Court justices to honor. It sidestepped fights over whether students and faculty wanted the face of Justice Sotomayor but not Justice Alito, or vice versa, looking at them from a classroom wall. The policy reduced conflict by taking certain issues off the table—one of the arguments made on behalf of institutional neutrality generally.³⁵

But making certain decisions automatic is not the same as making them neutral. “Neutral” principles like these just change the level of generality at which a substantive decision takes place. My law school may not have been judging Sotomayor against Alito when it put up both their portraits, but it was still speaking loudly about what constitutes success for its graduates. Why honor federal appellate judges but not state supreme court judges? And why judges rather than advocates for civil rights or the poor—or, for that matter, successful prosecutors or corporate

³³ Judith Resnik and Denny Curtis have traced in colorful detail the shift in the iconography of justice from figurative to increasingly abstract. Significant commissions for contemporary art in courthouses built in the last few decades have tended to go toward artists like Ellsworth Kelly, whose monochromes fill the Moakley Federal Courthouse in Boston. Brian Soucek, “Not Representing Justice: Ellsworth Kelly’s Abstraction in the Boston Courthouse,” *Yale Journal of Law & the Humanities* 24, no. 1 (2012): 287–304; Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale University Press, 2011).

³⁴ Xu, “Law School Project Pushes for Portraits of Females.”

³⁵ Tom Ginsburg, “A Constitutional Perspective on Institutional Neutrality,” in *Revisiting the Kalven Report*, ed. Whittington and Tomasi.

lawyers? A school often ends up taking a stand about what it prizes even when making rules that are meant to ensure neutrality. And that stand says something about how the school sees its mission. A law school that aims to produce the future leaders of America is quite different from one that aims to nurture competent and ethical members of the local bar, or one that seeks to increase access to justice. Each of those schools will likely have different pictures on their walls and different names on their buildings. There isn't a "neutral" choice among them.

5.

To be fair, levels-of-generality arguments like this are always available, and often not very interesting. We want the refs at a football game to be "neutral" as to which team wins when they decide what penalties to impose. But of course we don't think they should be neutral about whether roughing the kicker is a good or bad thing, or whether an incomplete pass should stop the clock. Pointing out this higher-level opinionatedness shouldn't cause us to conclude that that neutrality is just an illusion—as the title of this essay suggests.

For similar reasons, although I just offered examples of choices, like whether to divest, in which all choices prove expressive, it is not true that a decision to stay quiet always speaks volumes, or expresses anything meaningful at all. Take universities' silence about which candidate should win a particular election. My school's refusal to make an endorsement should not be read as expressive; it's just a requirement of state law and IRS rules. A rule like that about when to stay silent—"Don't make statements about who should be elected to public office"—has a clear and largely uncontested meaning.

The same cannot be said of the Kalven Report and its progeny. Soon after it claims that the university "cannot take collective action on the issues of the day without endangering the conditions for its existence," the Kalven Report goes on to describe when collective action is not just possible but necessary: when political or social events "threaten the very mission of the university."³⁶ By its own lights, the Kalven Report, like nearly all the other neutrality pledges it has inspired, thus makes the permissibility of institutional speech dependent on a university's understanding of its mission.

A university doesn't "speak" through its silence on elections because what counts as an election is not itself a particularly value-laden claim. But what a particular university's *mission* is to be is one of the most deeply and rightly contested questions a university confronts. The Kalven Report makes every institutional speech decision

³⁶ "From time to time instances will arise in which the society, or segments of it, threaten the very mission of the university and its values of free inquiry. In such a crisis, it becomes the obligation of the university as an institution to oppose such measures and actively to defend its interests and its values." Kalven Report, *supra* note 7.

also a decision about that school's mission. This is why talk of neutrality doesn't get us very far.

6.

To say this, however, is to invoke a particular notion of the mission of a university. I say "a" university rather than "the" university in order to make room for a pluralist account of what university missions can be. Here the opening analogy to restaurants and restauranting provides some guidance. Just as I said that restauranting involves feeding people for pay, we might say of universities that they all exist for the sake of teaching and research. But that's much too general to be helpful.

Different schools—public or private, religious or secular, global or local, progressive or tradition based, HBCUs or women's colleges, those oriented more toward cutting-edge research, civic engagement, or social mobility—might each balance different values in different ways without thereby becoming something other than a true university. And that point goes for departments and other units within a university as well. When I talk about a university's mission, I mean something deeper than its "mission statement." I understand a university's mission to emerge not just from policies that explicitly state its aims, but also from those that define, protect, or advance values like freedom of expression, academic freedom, academic merit, and diversity, equity, and inclusion. A university's mission is reflected in the kinds of students and faculty it works to attract. It can be seen in a school's curricular requirements. It's found in the details of an institution's budget and investment decisions. And a school's mission can sometimes be gleaned from the public statements its leaders choose to make.

But do universities actually vary anywhere close to as widely as restaurants do? Stanford may care about different things than Smith, and Salve Regina is a very different place than Southern University. But at least within different categories of schools, we might wonder if universities' missions are different enough to matter. Isn't one big research university engaged in more or less the same business as the next?

Pluralism about universities' missions doesn't require us to deny what they have in common. As Stanley Fish has rightly observed, "A university would still be one if all it contained were classrooms, a library, and facilities for research. A university would not be one if all it contained was a quad with some tables on it, a student union with a food court, an auditorium and a bowling alley, a gymnasium with a swimming pool and some climbing walls."³⁷ The commonalities can hide important variation, however.

³⁷ Stanley Fish, "Free Speech Is Not an Academic Value," *Chronicle of Higher Education*, March 20, 2017, <https://www.chronicle.com/article/Free-Speech-Is-Not-an-Academic/239536>.

Consider curricular requirements. Three times in my life I've taken or taught a required set of classes based around the so-called Great Books. The books themselves were pretty much the same at all three places, but the point of reading them was wildly different. At Boston College, a Jesuit school, the goal was to help students develop morally and spiritually, to consider what makes for a life worth living. At Columbia, the humanities core was developed during World War I to help students understand the democratic values they'd be fighting for. And at the University of Chicago, the Great Books were taught largely because of their greatness. They were seen as the texts most worth the intellectual effort. What from a certain distance may have looked like a shared curriculum was, at closer range, really three different educational projects reflective of three institutions with importantly different conceptions of themselves—which is to say, three different missions.³⁸

7.

If, as I've claimed, the Kalven Report turns decisions about when a university should speak into decisions about the scope of that university's mission, the University of Chicago's own experience in deciding when the Kalven Report allows (or compels) it to speak should tell us something important about its conception of itself as an institution.

Chicago has weighed in on public policy controversies any number of times in the decades since the Kalven Report was written. Its critics sometimes allege hypocrisy here, suggesting that institutional neutrality is just a smoke screen that Chicago's administrators deploy opportunistically whenever they don't want to take a particular stand.³⁹ I want to take a different approach: to take the Kalven carve-out seriously, presume that Chicago has tried to apply it in good faith, and ask what this

³⁸ For a subtle and spirited defense of this variation, see Judith Jarvis Thomson, "Ideology and Faculty Selection," *Law and Contemporary Problems* 53, no. 3 (Summer 1990): 165:

Reasonable people both on and off campus will disagree with the conclusions we reach at Such and Such College, whether about assessments of fields or educational mission. And different schools—even different schools that hope to attract similar student bodies—will therefore offer different programs. But that can hardly be regarded as ground for complaint; quite to the contrary, it is a sign of health in the nation's educational system that it allows for these differences. I may think your views on such matters grossly mistaken, idiotic in fact, and you may think the same of mine; we should both welcome the variety in institutional programs that grows out of our differences.

³⁹ This criticism has come both from inside and outside the University of Chicago, and from both the left and the right. See, for example, Wood, *The Illusion of Institutional Neutrality*, 22, 29; Anton Ford, "The Cynicism of Institutional Neutrality," *Chronicle of Higher Education*, May 29, 2024, <https://www.chronicle.com/article/the-cynicism-of-institutional-neutrality>; Max Servetar, "The University of Chicago Is Not Neutral," *Chicago Maroon*, October 12, 2020, <https://chicagomaroon.com/28025/viewpoints/op-ed/university-chicago-neutral/>; Eli Nova Rose, "Kalven Report and Chicago Academic Politics," *Decasia*, November 30, 2008, https://decasia.org/academic_culture/2008/11/kalven-report-and-chicago-academic-politics/index.html.

tells us about how the University of Chicago understands its mission—and how other schools might understand theirs differently.

Chicago has released statements and even filed court briefs on a number of high-profile political controversies in the last decade, including the Trump travel ban, the attempt to end the DACA program for Dreamers, and attacks on affirmative action in university admissions.⁴⁰ The recent affirmative action cases against Harvard and the University of North Carolina offer the easiest fit with the Kalven Report's exception for mission-related threats. A university's choices about which students to admit is one of the core elements of its institutional academic freedom. So a lawsuit that takes away UChicago's ability to use race-conscious admissions to diversify its student body can easily be characterized as a "threat to the very mission of the university."

The University of Chicago's engagement with Trump-era immigration law offers a harder case. Soon after Trump, during his first term, released an executive order barring immigrants and visitors from seven Muslim-majority countries, Chicago's president and provost issued a statement decrying "unnecessary restrictions on the flow of talented scholars and students into the United States," which they said "damage the University's capacity to fulfill its highest aspirations in research, education, and impact." (The letter separately "reaffirm[ed], in the strongest terms," University's endorsement of the DACA program.⁴¹) Two weeks later, Chicago filed a brief asking a federal court to block Trump's Muslim ban alongside sixteen other universities, each of which claimed it "has a global mission" that depends on the schools' "ability to welcome international students, faculty, and scholars into their communities."⁴²

The threat Trump's immigration restrictions posed to the University of Chicago's "global mission" wasn't fanciful. At the time it spoke out, UChicago had twenty-three students from Iran and one from Syria, and its Oriental Institute (still bearing that name) was running excavation projects in Iran and Iraq. And yet, if the claim was that Chicago's global mission depends on its ability to bring people from anywhere in

⁴⁰ Brief of Amici Curiae Brown University et al. in Support of Respondents, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707); Brief for Amici Curiae Nineteen Colleges and Universities in Support of Respondents, Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588, and 18-589); Brief of Amici Curiae Colleges and Universities in Support of Respondents, Trump v. Hawaii, 585 U.S. 667 (2018) (No. 17-965); Paul Alivisatos and Katherine Baicker, "Upholding the Value of Diversity," University of Chicago Office of the Provost, June 29, 2023, <https://provost.uchicago.edu/announcements/upholding-value-diversity>; Robert J. Zimmer and Daniel Diermeier, "Message Regarding Immigration," *UChicago News*, January 29, 2017, <https://news.uchicago.edu/story/message-regarding-immigration>.

⁴¹ Zimmer and Diermeier, "Message Regarding Immigration."

⁴² Brief of Brown University et al. as Amici Curiae in Support of the Relief Sought by Petitioners and Intervenor-Plaintiff, 1, Darweesh v. Trump, No. 17 CIV. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017) (1:17-cv-00480).

the world to its Hyde Park campus, and to send its researchers throughout the entire world as well, any international disruption or policy that prevents that movement would presumably fall within the Kalven carve-out.

The structure of the argument is what really matters here. Chicago found it appropriate to speak out against the travel ban only because Trump's policy posed a threat to the university's mission. That's a substantive judgment about the University of Chicago's particular mission. Not every university has a "global mission" like Chicago and its fellow brief-signers. A university focused on its local community, or on educating the people of its state, would see its role differently.

For a concrete recent example of how universities with different missions have responded differently to events in the world, consider the Supreme Court's *Dobbs* decision, which put an end to the constitutional right to abortion.⁴³ Deciding to speak about *Dobbs* is easiest at a secular university that has a medical school and other health sciences programs. A court decision that affects the ability of medical professionals to teach and practice evidence-based standards of care clearly implicates the mission of that sort of university, especially if it's located in a state that banned abortions after *Dobbs*.

This is presumably the reason why UChicago's provost, the dean of its medical school, and the head of its health system jointly issued a statement on the day *Dobbs* was decided. The statement reaffirmed their university's commitment to "providing high-quality, evidence-based reproductive healthcare," including abortion.⁴⁴ Meanwhile the president of my own university system—himself a physician—said something similar, if in somewhat stronger terms:

The Court's decision is antithetical to the University of California's mission and values. We strongly support allowing individuals to access evidence-based health care services and to make decisions about their own care in consultation with their medical team. Despite this decision by the Court, we will continue to provide the full range of health care options possible in California, including reproductive health services.⁴⁵

Elsewhere in his statement, the University of California's president went significantly further than that of the University of Chicago by expressing his concern that *Dobbs* "could pave the way for other fundamental rights to be removed." He pledged to "stand with California leaders and health care advocates who are taking

⁴³ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

⁴⁴ "Reproductive Services Through the University of Chicago Medicine," UChicago Medicine, June 24, 2022, <https://www.uchicagomedicine.org/forefront/news/2022/june/reproductive-services-through-the-university-of-chicago-medicine>.

⁴⁵ Michael V. Drake, "UC Statement on *Dobbs v. Jackson Women's Health Organization* Decision," UC Office of the President, June 24, 2022, <https://www.universityofcalifornia.edu/press-room/uc-statement-dobbs-v-jackson-womens-health-organization-decision>.

critical steps to protect Californians' human rights." Where UChicago and UC both saw the provision of evidence-based health care as part of their missions, the University of California also emphasized its commitment to a particular, substantive vision of fundamental rights.

On the other side of the abortion debate, religious schools with pro-life commitments also spoke up when *Dobbs* was decided, in their case because they saw *Dobbs* as removing a threat to their institutional missions. The president of Catholic University wrote of the "unholy idea that there is a constitutional right to kill unborn children," then announced an institutional commitment to more lovingly support mothers, fathers, and "the babies who are born into our community rather than aborted."⁴⁶

The question of whether a university should speak about an issue as politically divisive as abortion becomes harder at schools that aren't religious or don't have a hospital or medical school. Some of those might still choose to speak out because, like the University of California, they see within their mission a commitment to advancing human rights, including a right to reproductive autonomy. Other universities, though, might feel justified in speaking out about *Dobbs* for an entirely different reason. They might speak simply because they have many students, staff, and faculty who have the potential to become pregnant.

Why is that fact relevant to a university's mission? After all, the university also has many students, staff, and faculty who owe federal income taxes, but that doesn't mean adjustments to individual tax brackets necessarily constitute a threat to any university's mission. The best answer, to my mind, borrows a page from the University of Chicago's argument in the travel ban case. Just as Chicago worried that the Trump travel ban limited some students' ability to attend, other universities might feel that *Dobbs* does the same. If some students and faculty can't make the reproductive choices necessary to continue their schooling, teaching, or research, is that not a threat to the university's ability to carry out its mission?

Where some schools self-identify as having a "global mission," others might see diversity or equity at the core of what they do. Schools in the latter camp would be more justified in speaking out about a decision like *Dobbs*, given its inequitable effects on pregnant people's ability to participate in the university's work.

The larger point here is this: When the University of Chicago applies the principles of the Kalven Report, including its carve-out for mission threats, it does so based on its self-understanding of its own mission. In fact, these choices over time are part of what constitutes the university's mission. But there is no reason why other schools need to define their missions the same way Chicago does. The University of

⁴⁶ John Garvey, "On *Dobbs*: Let's Build a Civilization of Love," Catholic University of America, June 24, 2022, <https://garvey.catholic.edu/communications/letters/on-dobbs-lets-build-a-civilization-of-love.html>.

Chicago, in other words, is not making a determination about what counts as genuine neutrality—much less a genuine university. When it decides to speak out about the travel ban but not abortion, Chicago is making a *decidedly non-neutral judgment about its own institutional identity*.

In some ways, then, a university with a neutrality policy like the Kalven Report becomes even more expressive—precisely on those political and social issues that Kalven worried about—than those, like mine, that leave speech to the pragmatic discretion of administrators or the faculty, speaking collectively. When, say, the Trump administration attempts to define transgender people out of existence and a Kalvenist university invokes its neutrality policy and says nothing, it’s silence is actually saying something quite clear: that defending trans rights, and trans people, is not part of its mission. By contrast, a university without that policy might be choosing not to speak because a statement in that particular context might be futile, or counterproductive.

Kalvenism can’t ultimately deliver the neutrality it promises. In the end, it’s Kalven’s loophole which ensures that universities like Chicago will always be saying something—about their mission, if nothing else—even when they maintain the institutional silence the Kalven Report is so famous for recommending.

8.

Where, then, does the analogy between neutrality in restauranting and in running a university ultimately land?

Our pluralism about restaurants was meant to prefigure the pluralism I hope more people will acknowledge when it comes to universities’ missions. The extent to which restaurants express political views through their actions, not just their speech, finds a parallel in higher education, and often, making an expressive choice about how to act is unavoidable in both contexts.

If neutrality is to mean something, then, it has to mean that restaurants, like universities, should act only for reasons that are internal to their particular mission. To do otherwise is to engage in an unnecessary and potentially alienating distraction from that mission. Hardline Kalvenists would add that when it comes to a university—though *not* a restaurant—to do otherwise is also to “endanger[] the conditions for its existence.” I think this is overwrought and misguided, so I have rejected what would have otherwise been a major disanalogy.

If neutrality has come to mean acting only on reasons internal to a restaurant’s or university’s mission, but we are pluralists about what their mission might be—in fact, we see the choice of mission to be a vital and rightly contested one—then talk of neutrality hasn’t gotten us very far.

But this contestation also, finally, reveals one important difference between restaurants and universities: At universities, it matters—crucially—how a decision about the mission ultimately gets made.

There is no restaurant analog to shared governance, the topic that loomed so large in the first of these essays. Collective or collaborative decisions can of course be made at restaurants, just as they should be in universities. But nothing core to restauranting turns on that, in the way that (I have argued) academic freedom turns on shared governance.

Kalvenism rests on a snowflake account of academic freedom. Institutional neutrality is necessary, it's said, because faculty dissent will surely melt in the face of a university that expresses any opinions of its own. Were faculty truly so fragile, there would be little hope for shared governance, depending as it does on faculty pushback against administrators and board members who might otherwise run universities little differently than any other corporation—or restaurant.

To reject the view of faculty as snowflakes is to expect that they'll be hardy enough to persevere in their work even when their institution expresses a view they don't share. And happily, it's that very hardiness—the willingness to dissent, to organize, and to do the often hard work of shared governance—that opens the possibility that faculty might help determine the opinions their university ends up expressing, whether in what it says or, just as importantly, in what it chooses to do.