Academic Freedom by Other Names: Historical Foundations for the First Amendment Right

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Academic freedom was not even formally recognized as a First Amendment right by the Supreme Court until 1957. Yet Anglo-American law has long safeguarded it under other doctrinal banners. This Note is the first to trace that hidden pedigree across four disparate arenas—the Copyright Clause's promotion of the "Progress of Science," the Founders' conception of a national university, the Contract Clause's protection for educational charters, and historical English and American blasphemy prosecutions—before converging on modern First Amendment doctrine. The historical record reveals consistent constitutional solicitude for the advancement and dissemination of knowledge, with democratic citizenship as an important corollary. Blasphemy cases supply the clearest analogue for speech cases: Even the "fundamentals of religion" could be attacked without liability "if the decencies of controversy are observed" by "learned" persons, confirming that protection turned on scholarly mode and purpose. Recovering these antecedents yields several pay-offs. First, it supplies historical analogues for the regulation of academic speech. Second, it clarifies how courts might balance interests under the Pickering *test. Third, it brings contemporary proposals to limit academic freedom back into alignment with the historical breadth of the right. By mapping academic freedom's forgotten lineage, this Note offers both a richer historical account and more principled guidance for determining the contours of that "distinctive" First Amendment right.*

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Introduction

The Supreme Court has stated that academic freedom is a "special concern" of the First Amendment.[1] Yet before 1957, there were no American legal precedents that recognized academic freedom as a component of the First Amendment. But these protections did not come out of nowhere. Although concern for the advancement and dissemination of knowledge is most often invoked today within the general umbrella of academic freedom, this interest has long been of paramount value in law. Protection for academic concerns *broadly conceived* is a longstanding staple of Anglo-American law, including in cases concerning the regulation of speech. In several distinct domains, Anglo-American law has long shown special solicitude for free inquiry and the advancement of knowledge. In the Intellectual Property Clause, the Constitution secures property rights in "Writings and Discoveries" in order to "promote the Progress of Science and useful Arts."[2] In the enduring Founding Era debates over a national university, time and

1. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).
2. U.S. CONST. art. I, § 8.

time again its sponsors recognized it as an essential adjunct to the "general diffusion of knowledge."[3] Nineteenth century cases interpreting the Contract Clause, which provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts,"[4] were careful to weigh that vital social function when states threatened to interfere with the autonomy of educational institutions.

This is true even when the advancement of knowledge has collided with other foundational values. In England and early American practice, prosecutions for blasphemy—the offense of "maliciously reviling God"[5]—were careful to protect good-faith intellectual argumentation. Despite being compatible with general First Amendment law, these prosecutions were understood to exclude "disputes between learned men upon particular controverted points."[6] Thus, the law was thought not to prevent sober and scholarly critique of orthodoxy—even those orthodoxies deemed sacred by the public. Leading blasphemy cases demonstrate how, even in highly sensitive contexts, expert advancement of knowledge enjoyed protection far antedating the formal acceptance of academic freedom as a First Amendment right.

Recovering that lineage matters: A deeper historical account helps to supply principled criteria for distinguishing protected scholarly judgment from legitimately proscribable speech. Recent scholarship underscores both the urgency and the promise of such an undertaking.[7] Though widely regarded as a foundational right, "academic freedom and free speech . . . can no longer really be taken for granted and need to be . . . defended."[8] Recent actions by state legislatures, the Executive branch, donors, trustees, and the dissenting public threaten to test protections for scholarly inquiry. Yet while debate proliferates, few commentators have systematically excavated the

3. George Washington, Farewell Address to the People of the United States 17 (Sep. 19, 1796) [hereinafter Washington's Farewell Address].

4. U.S. CONST. art. I, § 10.

5. People v. Ruggles, 8 Johns. 290, 293 (N.Y. Sup. Ct. 1811).

6. R v. Woolston (1729) 93 Eng. Rep. 881, 882 (KB).

7. *See* Nadine Strossen, *Disciplining Academic Freedom*, INQUISITIVE (Feb. 20, 2025), https://inquisitivemag.org/articles/book/disciplining-academic-freedom/ [https://perma.cc/YZ7B-JETP] ("[DAVID RABBAN, ACADEMIC FREEDOM: FROM PROFESSIONAL NORM TO FIRST AMENDMENT RIGHT (2024)] provides a much-needed defense of academic freedom just when it is imperiled on campuses nationwide."); David M. Rabban, *Academic Freedom: From Professional Norm to First Amendment Right*, UNIV. OF TEX. AT AUSTIN SCH. OF L. (Aug. 13, 2024), https://law.utexas.edu/faculty/publications/2024-academic-freedom-from-professional-norm-to-first-amendment-right/ [https://perma.cc/TAM8-QSK8] (quoting Keith Whittington's assertion that Rabban's book "could not be more timely and more necessary" and Robert Post's view that "[a]cademic freedom is a perennially contested subject, particularly in its constitutional dimensions").

8. INSIDE YALE LAW SCHOOL: *Keith Whittington Tells Why Free Speech Can't Be Taken for Granted*, at 1:24 (Spotify, Jan. 14, 2025).

constitutional pedigree of academic freedom—a gap that this Note aims to fill. This Note is the first to explicitly trace the lineage of academic freedom—broadly conceived—from the Copyright Clause, debates over the national university, and Contract Clause cases, through English and American blasphemy prosecutions, to modern Supreme Court doctrine. This Note argues that a robust historical foundation can help address pressing disputes that now imperil the academic enterprise.

In Part I, I briefly define academic freedom and detail the major cases in which the Supreme Court has acknowledged it as a First Amendment right. In Part II, I argue that the Copyright Clause, debates over the national university, and cases concerning the Contract Clause cognized these very same interests now understood to be within the bailiwick of First Amendment academic freedom. In Part III, I move from the general to the specific, examining how blasphemy prosecutions showed special solicitude for good-faith argument and free inquiry in speech cases. I argue that this tradition provides additional support for the First Amendment protection of academic speech, even when that speech is highly controversial or unorthodox. I also argue that these features are present in modern academic freedom cases. In Part IV, I suggest that this historical record can help recalibrate the balancing of interests in academic speech cases. My purpose is to show that academic freedom—understood as a species of protection for free inquiry and the production of knowledge—has considerable historical pedigree as a distinctive Anglo-American value.

I. What Is Academic Freedom?

Much like democracy, academic freedom in its general formulation is probably a so-called "essentially contested" concept.[9] Courts, faculty, and commentators invoke the same phrase to advance distinct and sometimes opposing interests.[10] Individual expressive liberty and institutional autonomy—values that do not often point in the same direction—are often advanced simultaneously under the banner of academic freedom. The term is beset by persistent disagreement over its proper use. In this Part, I focus on two sources of meaning. The first is a semi-authoritative conceptual account by the American Association of University Professors (AAUP). This definition provides the conceptual core of academic freedom used by this Note. The second is legal and descriptive, derived from how the Supreme Court has defined the term. I argue these sources sketch the contours of

9. *See* W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 171–72, 180 (1956) (discussing the core features of an essentially contested concept and using democracy as an example).

10. *See* STANLEY FISH, VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION 3–7 (2014) (characterizing the expansion of academic freedom to "be indistinguishable from . . . the flourishing of every positive value known to humankind").

academic freedom with sufficient definition to identify its historical foundations in Parts II and III.

A. Conceptual Foundations

Prior to its acknowledgement as a First Amendment right, academic freedom was best understood as a professional norm.[11] In 1915, the AAUP offered the most influential American statement of academic freedom.[12] Because this concept of academic freedom is more or less accepted in the literature, albeit with some minor deviations, I will treat it as authoritative.[13] Three features of this account are instructive.

First, academic freedom is tripartite. It contains the freedom of *inquiry*, freedom of *teaching*, and freedom of *extramural utterance*.[14] These components are often interrelated but reduce fundamentally to "the unrestricted research and unfettered discussion of impartial investigators."[15]

Second, academic freedom is moored in vocation. Scholarly *mode*, *manner*, and *expertise* are prerequisites for protection.[16] Professors are members of a learned profession with "specialized technical training" who

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11. *See* DAVID M. RABBAN, ACADEMIC FREEDOM: FROM PROFESSIONAL NORM TO FIRST AMENDMENT RIGHT 15 (2024) (describing how academic freedom was "a professional norm within the academic community decades before the Supreme Court identified it as a First Amendment right"); WALTER P. METZGER, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY 367–69, 387, 393–95 (1955) (detailing how American academic freedom was heavily influenced by the German tradition, which viewed academic freedom not as "an inalienable endowment of all men" but rather "the distinctive prerogative of the academic profession"); FRIEDRICH PAULSEN, THE GERMAN UNIVERSITIES AND UNIVERSITY STUDY 228 (Frank Thilly & Wiliam W. Elwang trans., 1906) (discussing the freedom of teaching's origins in the German tradition).

12. AM. ASS'N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915), *reprinted in* AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 3 (12th ed. 2025) [hereinafter 1915 DECLARATION].

13. Two leading scholars agree that academic freedom "refers to a set of vocational liberties: to teach, to investigate, to do research, and to publish on any subject as a matter of professional interest" without liability, save only for a breach of professional ethics. William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, 404 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 146 (1972); *see* RABBAN, *supra* note 11, at 8–9 (agreeing in general with Van Alstyne's analysis). However, they both disagree with the AAUP that extramural political utterances should be encompassed by the right. *See* Van Alstyne, *supra*, at 141–46 (criticizing the AAUP's expanded definition of academic freedom to encompass aprofessional political rights); RABBAN, *supra* note 11, at 15 (writing that academic freedom should adopt the justifications from the 1915 declaration but reject the extension to general political expression).

14. 1915 DECLARATION, *supra* note 12, at 4.

15. *Id.* at 5.

16. *See* AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 14 (1940), https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure#1 [https://perma.cc/VF78-HRMQ] (discussing teachers' unique position as scholars, which imposes special obligations such as to "be careful not to introduce into their teaching controversial matter which has no relation to their subject" and to "at all times be accurate, . . . exercise appropriate restraint, [and] show respect for the opinions of others").

are "trained for, and dedicated to, the quest for truth."[17] But the protections that follow are not without concomitant obligations of form and substance. With expertise comes "peculiar obligation[s] to avoid hasty or unverified or exaggerated statements and to refrain from intemperate or sensational modes of expression."[18]

Third, academic freedom is justified on several functional grounds. The first is "to promote inquiry and advance the sum of human knowledge"; a justification of *production*.[19] The second and third functions are of *dissemination* and *democratic citizenship*.[20] Free inquiry, teaching, and utterance permit the circulation of knowledge in order to inform the citizen, aid the legislator, and improve democratic governance.[21]

Finally, academic freedom is just that: a freedom, not a right. It "establishes *an immunity* from the power of others to use their authority to restrain its exercise," a kind of non-liability.[22] I argue in Part III that this kind of immunity is akin to the historical exception to blasphemy.

B. A "Special Concern" of the First Amendment

Academic freedom was not even mentioned by the Supreme Court, let alone endorsed, until a 1952 dissent by Justice Douglas in *Adler v. Board of Education*.[23] Nor did it emerge as a right until a series of decisions in the 1950s and 1960s.[24] Even today, it remains subsumed within general First Amendment doctrine rather than as a set of separate and distinct considerations akin to, say, the freedom of association.[25] Because the

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17. 1915 DECLARATION, *supra* note 12, at 6.

18. *Id.* at 10.

19. *See id.* at 7 (describing the incompleteness of human knowledge and therefore the necessity of "unlimited freedom to pursue inquiry and publish [the] results [of scientific activity]").

20. *See id.* at 7–9 (discussing how because democracy tends toward "overwhelming and concentrated public opinion," the university can supply an "inviolable refuge" from that tyranny of orthodoxy as an "intellectual experiment station, where new ideas . . . , though still distasteful to the community as a whole, may be allowed to ripen").

21. *See id.* at 7 (listing the third essential purpose of universities as "to develop experts for various branches of the public service").

22. Van Alstyne, *supra* note 13, at 147 (emphasis added). It does not, by contrast, command a right in the sense of a claim of duty upon the institution or others to subsidize every object of professional endeavor that might be in the interest of free inquiry or teaching. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 717 (1917) (setting forth a narrow definition of a "right" as "the correlative of duty," best synonymized with a "claim").

23. *See* 342 U.S. 485, 508–10 (1952) (Douglas, J., dissenting) (writing that "[t]here can be no real academic freedom in th[e] environment" created by the law at issue).

24. RABBAN, *supra* note 11, at 52.

25. *See* Van Alstyne, *supra* note 13, at 142–43 (explaining that the Supreme Court has "interpreted the First Amendment in a manner to provide separate and distinct protection for freedom of association," but "nothing equivalent has yet developed in respect to academic freedom").

Supreme Court has often adverted to it in dicta and in contexts beyond speech cases, I will organize its explicit mention in the case law according to the interests invoked by the Court: freedom of inquiry, the advancement of knowledge, and democratic citizenship. That is because these interests are the conceptual core of academic freedom and, as I will argue, far antedate its formal recognition in the foregoing case law—even if traveling under other auspices.

1. Freedom of Inquiry and the Advancement of Knowledge.—Several cases at the Supreme Court have discussed or justified academic freedom with respect to its essential protections for the freedom of inquiry and the advancement of knowledge. In *Adler*, the above-mentioned Supreme Court debut of academic freedom, the majority upheld a New York law that required dismissal of state educational employees who deliberately "advocate[d], advise[d], or [taught] . . . that the government of the United States . . . should be overthrown or overturned by force, violence, or any unlawful means."[26] But it was Justice Douglas in dissent who for the first time explicitly connected academic freedom to the First Amendment. He argued that the law "cannot go hand in hand with academic freedom" because the air of suspicion and distrust it created was anathema to "the pursuit of truth."[27] In his view, "it was *the pursuit of truth which the First Amendment was designed to protect*."[28] Thus, in its very first mention, academic freedom was conceptualized as a First Amendment protection for free inquiry, the pursuit of truth, and the production of knowledge.

It was not until five years later that a Supreme Court plurality formally recognized this notion of academic freedom as a distinctive right protected by the First Amendment. In *Sweezy v. New Hampshire*,[29] a Marxist economist at the University of New Hampshire challenged a law that authorized the state attorney general to investigate possible violations of an earlier state law that made "[s]ubversive persons" ineligible for employment by state government and declared "[s]ubversive organizations" unlawful.[30] Echoing Douglas's sentiments in *Adler*, Chief Justice Warren conceived of academic freedom as an essential immunity from interference with the process of free inquiry: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding . . . ."[31]

26. *Adler*, 342 U.S. at 487 n.3.
27. *Id.* at 510–11 (Douglas, J., dissenting).
28. *Id.* at 511 (emphasis added).
29. 354 U.S. 234 (1957).
30. *Id.* at 236–39, 243.
31. *Id.* at 250–51 (writing also that "[m]ere unorthodoxy or dissent from the prevailing mores is not to be condemned" under the First Amendment).

In these two seminal cases, academic freedom is conceived of as a protection for free inquiry that advances the boundary of human knowledge. This proposition has been echoed repeatedly, too, in dicta.[32] Despite its doctrinal shiftiness, the Court has been clear that these interests are constitutionally protected.

2. Connection to Democratic Citizenship.—The Court has also understood academic freedom as safeguarding the robust exchange and dissemination of ideas. This interest is a corollary of production and an important input to democratic citizenship. This proposition was first put forth forcefully in a 1952 concurrence by Justice Frankfurter in *Wieman v. Updegraph*,[33] a case in which the Court invalidated an Oklahoma statute that required a loyalty oath disavowing membership in communist organizations.[34] In concurrence, Justice Frankfurter wrote that the law unduly interfered with the role of teachers as "the priests of our democracy," whose special task is to "foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens."[35]

The Court in *Sweezy* also endorsed this view. In invalidating the attorney general's investigative authority, the Court recognized the "vital role in a democracy that is played by those who guide and train our youth."[36] Ten years later, in *Keyishian v. Board of Regents*,[37] a case that struck down the very same statutory scheme that *Adler* upheld, the Court quoted *Sweezy* at length and framed the classroom as a "marketplace of ideas," wherein "leaders [are] trained through wide exposure to that robust exchange of ideas."[38] Together, these cases cognize the exchange and dissemination of ideas as a central concern of democracy. They depict educational institutions as the training grounds for future leaders and citizen-participants. And it is the First Amendment that provides the constitutional basis for asserting these interests.

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32. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes . . . freedom of inquiry, freedom of thought, and freedom to teach . . . ." (citations omitted)); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is . . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."); Wieman v. Updegraff, 344 U.S. 183, 195–97 (1952) (Frankfurter, J., concurring) (asserting that teachers "must have the freedom of responsible inquiry" into the meanings of ideas and "the checkered history of social and economic dogma").

33. 344 U.S. 183 (1952).

34. *Id.* at 184 & n.1, 191–92.

35. *Id.* at 196 (Frankfurter, J., concurring).

36. *Sweezy*, 354 U.S. at 250.

37. 385 U.S. 589 (1967).

38. *Id.* at 593–95, 603–04.

II. Historical Protections for Academic Freedom Broadly Conceived

Both as a modern professional norm and in contemporary Supreme Court doctrine, academic freedom is a species of First Amendment protections for speech intertwined with the production and dissemination of knowledge. That is because the advancement of knowledge as an adjunct to democracy is a core First Amendment interest. But in the colleges and universities proximate to the ratification of the First Amendment, the concept of academic freedom *as such* was nearly inconceivable.[39]

Nevertheless, I argue these same interests were protected or recognized by other means. In three distinct constitutional contexts, the production and dissemination of knowledge have enjoyed considerable protection and promotion: the adoption of the Copyright Clause, the debates to establish a national university, and cases concerning the charters of educational institutions under the Contract Clause. Although these three contexts rarely spoke to one another—the sole exception is Chief Justice Marshall's invocation of the Copyright Clause in *Trustees of Dartmouth College v. Woodward*[40]—they converge upon the same animating value: the systematic production and dissemination of knowledge. It is this parallel protection that provides the historical pedigree for academic freedom and the set of constitutional interests it protects.

A. Copyright and "the Progress of Science"

"The dominant view among American intellectual property scholars is that both copyright and patent law . . . are granted only to incentivize the development of valuable intellectual objects."[41] This subpart argues that the development of American copyright protection also reveals particular concern for the advancement of knowledge. By transplanting the Statute of Anne into the Constitution, the Framers constitutionalized a structural safeguard for works that enlarge the intellectual commons. On this view, copyright is not merely an economic incentive but also a constitutional

39. *See* RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 263 (1955) ("For the most part, the concept of academic freedom as it is usually expressed today had not received a clear formulation in the ante-bellum period."); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 269–70 (1989) (describing the goal of higher education in the antebellum period to conclude that, until the 1870s and 1880s, "academic freedom as we know it simply had no meaning").

40. *See* 17 U.S. (4 Wheat.) 518, 640, 643–44, 646 (1819) (quoting the Copyright Clause in a case involving the constitutionality of Dartmouth's charter under the Contract Clause).

41. Mala Chatterjee, *Understanding Intellectual Property: Expression, Function, and Individuation*, 70 J. COPYRIGHT SOC'Y 57, 63 (2023); *accord*. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 325–29 (1989) (analyzing copyright protection as an economic incentive for creation and investment).

safeguard for the cultivation and circulation of learned knowledge, much like the later doctrine of academic freedom.[42]

Article I, Section 8, clause 8 of the Constitution reads that "Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[43] Apparently uncontroversial, this language was neither debated in the Constitutional Convention nor referenced in any minute in the Committee.[44] Perhaps that is because the clause can be traced directly to the Statute of Anne of 1710, the English copyright statute that supplied the basis for its American constitutional analogue and follow-on statutes.[45] The title of the English statute read: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned."[46]

To understand the significance of the American copyright clause and follow-on statutes, which effectively adopted the English version, it is helpful to examine the development of the Statute of Anne. The Statute was designed to destroy booksellers' monopoly and power of censorship.[47] It provided for a right "that made *the author* the initial owner of copyright (relegating booksellers to the status of assignees), made the creation of a *new work* a condition for copyright, and *limited the term* of copyright . . . to two terms of fourteen years each."[48] These limitations of authorship, novelty, and term created a bona fide public domain for information and literature, free from indefinite capture or censorship, so as to encourage the free flow of

42. *Cf.* RABBAN, *supra* note 11, at 142 (demonstrating the compatibility of First Amendment doctrine and the Copyright Clause by citing cases in which the Copyright Clause has been construed to promote free expression and the dissemination of ideas) (citing Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); Harper & Row Publishers Inc. v. Nation Enters., 471 U.S. 539, 558 (1985)).

43. U.S. CONST. art. I, § 8, cl. 8. I note here that, perhaps counterintuitively to modern audiences, "Congress' copyright authority is tied to the progress of science; its patent authority, to the progress of the useful arts." *Golan v. Holder*, 565 U.S. 302, 324 (2012).

44. Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 11 J. PAT. OFF. SOC'Y. 438, 443 (1929).

45. *See* L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y. 365, 374 (2000) (writing that "the direct source of the ideas in the copyright clause is the Statute of Anne of 1709").

46. Statute of Anne 1710, 8 Ann. c. 19 (Eng.).

47. Patterson, *supra* note 45, at 379–80; Edward C. Waltersheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315, 336 (2000). Prior to the Statute of Anne, England operated under the "stationers' copyright," which was an exclusive right of the "copyright" owner to publish the work in perpetuity. *Id.* at 333, 336. Booksellers used this unrestricted monopoly, granted by royal charter to the stationers' guild, to control the operation of the printing press. *Id.* at 333. It thus became a highly effective means not only of dominating the bookselling trade but also suppressing information, including "seditious and heretical books." Patterson, *supra* note 45, at 390.

48. Patterson, *supra* note 45, at 379 (emphasis added).

knowledge and learning.[49] In the interest of "the encouragement of learning,"[50] the Statute of Anne replaced the prior "perpetual-natural-law copyright" with a new "limited-statutory-grant copyright."[51]

This compromise was equally reflected in the American Copyright Clause. In *Wheaton v. Peters*,[52] a landmark 1834 case construing the Copyright Clause, the Court explicitly rejected the perpetual common law copyright.[53] Moreover, newly vested with the power of legislating in the field of patent and copyright, Congress enacted the Copyright Act of 1790: "An Act for the *encouragement of learning*, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned."[54] Not only did this expressly adopt the language of the Statute of Anne (i.e., "the encouragement of learning"), but the legislative correspondence prior to its enactment also echoed the very same interest in the promotion and dissemination of knowledge. Immediately prior to its proposal, in January 1790, President George Washington addressed the joint meeting of Congress, stating that "there is nothing which can better deserve your patronage, than the promotion of science and literature."[55] The House and Senate agreed, replying that "[l]iterature and science are essential to the preservation of a free constitution."[56] The House also concurred in its own right: "[T]he promotion of science and literature will contribute to the security of a free Government . . . ."[57]

Early cases construing the Copyright Act likewise confirm that copyright law was in part designed to promote expert knowledge. In *Clayton v. Stone*,[58] an 1829 case denying copyright protection for certain news reports, the court emphasized that "the act of congress is for the encouragement of learning, and was not intended for the encouragement of mere industry, unconnected with learning and the sciences."[59]

The meaning of "Progress of Science" in the Copyright Clause also supports reading this constitutional provision to enshrine an interest in the

49. *Id.* at 379–80.

50. Statute of Anne 1710, 8 Ann. c. 19 (Eng.).

51. Patterson, *supra* note 45, at 392.

52. 33 U.S. (8 Pet.) 591 (1834).

53. *Id.* at 591–92.

54. Copyright Act, ch. 15, 1 Stat. 124 (1790) (emphasis added).

55. S. JOURNAL, 1st Cong., 2d Sess. 103 (1790). Washington continued on to state that "[k]nowledge is, in every country, the surest basis of public happiness" and "[t]o the security of a free constitution it contributes . . . by teaching the people themselves . . . to discriminate the spirit of liberty from that of licentiousness, cherishing the first, avoiding the last, and uniting a speedy but temperate vigilance against encroachments, with an inviolable respect to the laws." *Id.*

56. *Id.* at 105.

57. H. JOURNAL, 1st Cong., 2d Sess. 139 (1790).

58. 5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2,872).

59. *Id.* at 1003 (citation omitted).

production and dissemination of knowledge. Modern courts interpret the meaning of the phrase to encompass copyright protection for general knowledge or learning.[60] Leading scholars share this understanding.[61] This conventional interpretation holds that "because expression regarding *any content* adds to the general store of knowledge, [the phrase "Progress of Science"] extends copyright to all content."[62] But even on this extremely permissive reading of the phrase, copyright protection is inextricably bound with contribution to the general store of knowledge and learning. The progress of science—understood as general knowledge or learning—is a necessary condition without which the speech or material could not enjoy protection.

Narrower historical readings of the "Progress of Science" only bring copyright into closer proximity with academic freedom. Professor Ned Snow writes that the original meaning of "Science" was a system of knowledge comprising distinct, expert branches of study.[63] This original meaning closely parallels the expert speech and scholarly mode that are today protected under the umbrella of academic freedom. Indeed, in many of the state copyright statutes that preceded the Copyright Clause, "the theme of learning in a scholastic or educational sense is . . . most prevalent."[64] These state statutes conceived of copyright as a protection designed to encourage activity of learned persons and advance knowledge.[65] Massachusetts, New Hampshire,

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60. *See, e.g.*, Golan v. Holder, 565 U.S. 302, 324 (2012) ("The 'Progress of Science,' petitioners acknowledge, refers broadly to 'the creation and spread of knowledge and learning.'"); Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) (explaining the public benefit of copyright as "the proliferation of knowledge" in order to "ensure[] the progress of science" (quoting Am. Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992))); *id.* at 243 (Breyer, J., dissenting) (explaining that by using the term "Science" in the Copyright Clause, "the Framers meant learning or knowledge").

61. *See, e.g.*, 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 123 (1994) ("The term 'science' as used in the Constitution refers to the eighteenth-century concept of learning and knowledge."); L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 48 (1991) ("[T]he word *science* retains its eighteenth-century meaning of 'knowledge or learning.'"); NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 106 (2008) (describing the Copyright Clause's "overriding purpose of promoting the 'progress of science'" as "broadly understood to include all products of the mind").

62. Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BYU L. REV. 259, 261 (2013) (emphasis added).

63. *Id.* at 263, 299.

64. *Id.* at 280 n.81.

65. *See generally* COPYRIGHT OFF., COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 1–21 (1973) (detailing states' copyright laws enacted between 1783 and 1786). Connecticut, Georgia, and New York each explained that copyright encourages men or persons "of learning and genius to publish their writings." *Id.* at 1, 17, 19. Massachusetts and Rhode Island likewise linked copyright with "the efforts of learned and ingenious persons"; similarly, New Hampshire linked copyright with "the efforts of ingenious persons." *Id.* at 4, 8–9. Maryland portrayed the purpose of copyright as "for the encouragement of

and Rhode Island, for example, explicitly cited "the *improvement* of knowledge" as a reason for copyright.[66]

On either understanding of "Science," the Copyright Clause sets forth a requirement for protection: contribution to general knowledge or learning. This interest draws additional vitality from its English progenitor, the Statute of Anne, which aimed to curb censorship by emphasizing authorship, novelty, and duration. The First Congress and President adopted this view in passing the Copyright Act, an act for the "encouragement of learning," designed "to promote science and literature." These interests were viewed as essential adjuncts to free government by the Framers and explicitly connected with learned knowledge at the state level. The narrow, original meaning of science even more so supports the view that copyright was designed in particular to advance academic or expert knowledge.[67] Together, these features suggest that the impetus behind copyright law in the early Republic was very much akin to that of contemporary academic freedom: protection for the production and dissemination of expert knowledge.

B. The Debates over a National University

The early debates over a national university demonstrate an enduring concern for the dissemination of knowledge and the contribution of learning to democratic citizenship. In 1787, the very first mention of a national university argued that the American Revolution would not be complete until the United States had prepared "the principles, morals, and manners of our citizens, for these [new] forms of government."[68] To effectuate this purpose, the author proposed the establishment of a "federal university" wherein principles of government and commerce would be "taught by competent professors" so as to prepare citizens for the "honours and offices of the united states."[69] Thus, even in its first conception, a national university was understood to play a vital role in facilitating the newfound American democracy.

Later that year, in August, James Madison proposed the power "[t]o establish an University" to the Convention.[70] But because it was thought that

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learned men," and Pennsylvania similarly portrayed copyright as "for the encouragement of learned men to compose and write useful books." *Id.* at 5, 10.

66. *Id.* at 4, 8–9 (emphasis added).

67. It is worth noting that copy*right* is of a different nature than academic *freedom*. Copyright is not an immunity so much as a claim-right. *See* Hohfeld, *supra* note 22, at 717, 725 (providing a narrow definition of "right" that is synonymous with "claim" and listing "copyright interests" as an example of a right). Copyright entails a right to exclude in the sense that others have duties to refrain from infringing acts. It also includes a power to license or transfer.

68. Benjamin Rush, *Address to the People of the United States*, 1 AM. MUSEUM 8, 8 (1787).

69. *Id.* at 10.

70. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 324–25 (Max Farrand ed., 1911).

the federal government would already possess that power, or that it should be left for the States in their separate capacities, the Convention rejected Madison's proposal.[71] Nevertheless, on many subsequent occasions, the President, members of Congress, and other advocates were adamant that a university was essential because it would disseminate knowledge, stimulate learning, and therefore safeguard the nation.

In President Washington's first annual address, not only did he encourage the patronage of science and literature through general means (which would include the Copyright Act), but he specifically referred to educational institutions: "Whether this desirable object will be best promoted by affording aids to seminaries of learning already established, by the institution of a national university, or by any other expedients will be well worthy of a place in the deliberations of the Legislature."[72] He recognized that a national university was essential to a well-functioning democracy, admonishing Congress in his farewell address to promote "as an object of primary importance, institutions for the general diffusion of knowledge" so that "public opinion should be enlightened."[73]

Washington also viewed a national university as an opportunity for divergent views to reconcile toward truth. In a 1795 letter to Governor Robert Brooke of Virginia regarding his plan to dedicate shares in the "Potomak" and "James River" companies to fund the establishment of a university, Washington wrote that one efficacious remedy for prejudice "entertained in one part of the Union against another" would be "the freedom of intercourse and collision of sentiment" provided by a national university.[74] Much like the modern analogue of academic freedom, he conceived of this as an antecedent condition to seeking "the direction of truth" and a mechanism for "mutual conciliation."[75]

Unfortunately for Washington, his immediate efforts were in vain. One reason was the very same "provincialism and intellectual backwardness that a national university was intended to combat."[76] Concerns about taking away local revenues, promoting elitism, and the university's inability to establish a "uniformity of principles and manners throughout the Union" garnered opposition in the House and resulted in a vote to postpone the subject of a

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71. Albert Castel, *The Founding Fathers and the Vision of a National University*, 4 HIST. EDUC. Q. 280, 282 (1964).

72. George Washington, First Annual Address (Jan. 8, 1790), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 58 (James D. Richardson ed., 1897) [hereinafter MESSAGES OF THE PRESIDENTS].

73. Washington's Farewell Address, *supra* note 72, at 17.

74. Letter from George Washington to Robert Brooke (Mar. 16, 1795), https://founders.archives.gov/documents/Washington/05-17-02-0443# [https://perma.cc/TL6D-T8P9].

75. *Id.*

76. Castel, *supra* note 71, at 287.

university "for later consideration."[77] Washington's university, at least in the first Congresses, was consigned to dormancy.

It was not until Thomas Jefferson's second administration that the national university reemerged, this time with an even greater focus on the advancement of knowledge and the education of citizens. One particularly influential conception was an 1806 pamphlet entitled *Prospectus of a National Institution* published by Joel Barlow, a Yale graduate and friend of Jefferson.[78] Barlow conceived of an institution that would combine both "the advancement of knowledge by associations of scientific men, and the dissemination of its rudiments by the instruction of youth."[79] Concerned by the prospect that the recent acquisition of the Louisiana Territory would "create a strong tendency to diverge and separate" public sentiment, Barlow saw a national university as a means to teach the citizenry to "habitually feel that community of interest on which their federal system is founded . . . . by the operations of the government . . . [and by] literature, sciences and arts."[80] He envisioned an institution that would "encourage independent research through grants and prizes, publish scholarly works . . . , and serve as consultant to the federal government."[81] Thus, on his account, the university would serve the dual purpose of advancing knowledge and improving the quality of government.

Barlow's idea made its way to the Senate in a proposal by his friend and ally Senator George Logan of Pennsylvania.[82] Senator Logan introduced "A bill to incorporate a National Academy," asking his fellow colleagues in Congress to "promote . . . the cultivation of the sciences which enlighten and embellish the human mind, and which are . . . necessary to promote the peace, happiness, and prosperity of our country[.]"[83] Rather forcefully, he tied the idea of a national university to the success of democracy: "Where the rulers are chosen by the people, how necessary is it that the republic should not vegetate in the barbarity of ignorance! What kind of representatives will they choose? What will be their laws?"[84] In his annual message, Jefferson singled out the university as alone capable of "supply[ing] those sciences which though rarely called for are yet necessary."[85] Once more, however, the Senate

77. *Id.* at 286–87 (quoting 6 ANNALS OF CONG. 1700).

78. *Id.* at 288–89.

79. JOEL BARLOW, PROSPECTUS OF A NATIONAL INSTITUTION 4 (1806).

80. *Id.* at 4–5.

81. Castel, *supra* note 71, at 289.

82. *Id.*

83. FREDERICK B. TOLLES, GEORGE LOGAN OF PHILADELPHIA 271 (1953).

84. *Id.* at 271–72.

85. Thomas Jefferson, Sixth Annual Message (Dec. 2, 1806), *in* MESSAGES OF THE PRESIDENTS, *supra* note 72, at 397.

tabled the proposal after striking "National" from its title and referring it back to a new committee where it would lie dormant again.[86]

The national university gasped for life several more times under both President James Monroe and President John Quincy Adams, but never would it fully come to fruition.[87] As one commentator observed, "[t]he idea of a national university has one marked characteristic: it persists."[88] Constitutional doubts, the desire to protect states' rights, and sheer indifference conspired to consign it to the constitutional dustbin.[89] But these obstacles do not, in my view, seriously undermine the importance to the Founders of the national university's core interest: the production and dissemination of knowledge for democratic citizenship. That interest was echoed by its many champions time and time again. Taken together, these objections amount to a debate over *means*, not *ends*. The same congresses that balked at a national university affirmed the civic indispensability of "Science and useful Arts,"[90] established the Library of Congress in 1800,[91] and endowed West Point for specialized instruction in 1802.[92] Opposition therefore better reflected concerns over constitutional design, fears of centralized indoctrination, and fiscal prudence—not a rejection of the national university's central values. Recognizing those motives preserves the central claim that even when the institutional vehicle was contested, the Founders shared a deep commitment to advancing and disseminating knowledge as a safeguard of democratic citizenship.

It is true enough, as one scholar argues, that "'academic freedom' was not even an expression" during that era and "only a miracle" would have prevented the national university from being destroyed by controversy, political pressure, or indoctrination.[93] But perhaps it is the fact that no national university ever came to fruition that postponed the development of academic freedom. It was the disputes between professors and boards of trustees of major universities in the early twentieth century that "stimulated both the founding of the AAUP and its 1915 Declaration."[94] One of the national university's animating purposes was to advance knowledge through the "collision of sentiment."[95] Presumably, the fledgling university would have been forced to confront conflicts between the academic views of

86. Castel, *supra* note 71, at 290.
87. *Id.* at 294–95.
88. EDGAR BRUCE WESLEY, PROPOSED: THE UNIVERSITY OF THE UNITED STATES 3 (1936).
89. Castel, *supra* note 71, at 296–97.
90. U.S. CONST. art. I, § 8, cl. 8.
91. Act of Apr. 24, 1800, ch. 37, 2 Stat. 55, 56.
92. Act of Mar. 16, 1802, ch. 9, 2 Stat. 132, 137.
93. Castel, *supra* note 71, at 298.
94. RABBAN, *supra* note 11, at 18.
95. Letter from George Washington to Robert Brooke, *supra* note 74.

professors and the concrete interests of its trustees in a manner consistent with that purpose.[96] I do not claim the resolution of those conflicts would have been favorable to free inquiry and learning, but at the very least they would have tested the high sentiments of the national university's founders against the realities of operation. And the historical record makes those sentiments clear: The Founders' vision of a national university contained special concern for the central values now understood to be within the bulwark of First Amendment academic freedom.

C. The Impairment of Contracts and Educational Charters

The Copyright Clause and debates over the national university primarily show concern for the production and dissemination of knowledge through the eyes of early congresses. But the courts, too, protected these values. Prior to the First Amendment, the Contract Clause was the first major vehicle for constitutional analysis of explicitly academic concerns, particularly in the context of conflicts between the university and the state. In *Dartmouth College* and cases that followed, the Supreme Court explicitly recognized education and the advancement of knowledge as interests protected by the Contract Clause and thereby safeguarded them from external interference. It recognized that the constitutional limitations on impairing contracts were not simply about preserving private property rights; they were also about protecting charitable pursuits (like education) and the institutional frameworks required for their flourishing.

In 1754, Reverend Eleazer Wheelock "established at his own expense . . . a charity school for the instruction of Indians in the christian religion."[97] He applied to the Crown for a charter to establish Dartmouth College "for the education and instruction of the youth of the Indian tribes . . . and also of English youth, and any others," naming several trustees (including the Earl of Dartmouth).[98] Over 50 years later, following dissension between the trustees and the president,[99] the New Hampshire legislature amended the original charter to give the Governor power to appoint members to an enlarged board of trustees and to a new board of overseers with ultimate

96. *See* RABBAN, *supra* note 11, at 18–19 (discussing specific conflicts between professors and trustees around the time of the AAUP's 1915 Declaration). Under Barlow's conception, the national university's board would have "consist[ed] of a chancellor and fifteen trustees appointed by the President." Castel, *supra* note 71, at 289.

97. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 631 (1819).

98. *Id.*

99. *See* RABBAN, *supra* note 11, at 36–37 (describing the conflict between the trustees and the president, John Wheelock).

control.[100] These amendments provoked litigation by John Wheelock, the then-president and primary financial backer of Dartmouth College.[101]

The Contract Clause reads that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[102] The question therefore, in the words of the Court, was whether the charter was "such a contract, as the constitution intended to withdraw from the power of State legislation[.]"[103] According to the New Hampshire Supreme Court, the answer was no.[104] It maintained that the Contract Clause was designed to "protect private rights of property, not to limit the power of states over 'civil institutions' [and] 'public corporations.'"[105] The court noted that the charter set forth purposes that were matters of public concern, such as "spreading . . . knowledge" and "furnishing the best means of education."[106] It therefore concluded that the charter created a public corporation that could be modified by the State without abridging the Contract Clause.

The United States Supreme Court disagreed, instead holding that the amendments constituted an unconstitutional interference with the charter.[107] Chief Justice Marshall began by noting that Dartmouth College was incorporated to perpetuate particular "eleemosynary" purposes: "the dissemination of useful knowledge among the youth of the country" and the "propagation of the christian religion."[108] He rejected the view of the New Hampshire court that these "public" purposes converted the college to a civil institution.[109] Nor did he agree that there was any basis for concluding that the Contract Clause should except educational charters from its remit.[110] Marshall wrote that "these objects are not deemed unimportant in the United States" and noted that the Framers had specially protected them elsewhere.[111] In particular, he pointed to the Copyright Clause as evidence of their "respect for science," which led them to "withdraw[] science, and the useful arts, from

100. *Dartmouth Coll.*, 17 U.S. at 626.

101. RABBAN, *supra* note 11, at 36.

102. U.S. CONST. art. I, § 10, cl. 1.

103. *Dartmouth Coll.*, 17 U.S. at 641.

104. Trs. of Dartmouth Coll. v. Woodward, 1 N.H. 111, 133–34 (1817).

105. RABBAN, *supra* note 11, at 38; *see Dartmouth Coll.*, 1 N.H. at 132 ("[The Contract] clause was not intended to limit the power of the states, in relation to their own public officers and servants, or to their own civil institutions.").

106. *Dartmouth Coll.*, 1 N.H. at 119.

107. *Dartmouth Coll.*, 17 U.S. at 715.

108. *Id.* at 640 ("Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty.").

109. *See id.* at 638–39 (asserting that the charter cannot "change the character of a private eleemosynary institution").

110. *See id.* at 644–45 (failing to find any "safe and intelligible ground" to recognize an exception for educational contracts).

111. *Id.* at 646.

the action of the State governments."[112] He saw these concrete interests as incompatible with excluding contracts "made for the advancement of literature" from the protection of the Contract Clause.[113]

Though they ultimately reached different conclusions, both the New Hampshire Supreme Court and the United States Supreme Court recognized two interests in their analysis of the Contract Clause that are now understood within the bailiwick of academic freedom. The first is the valuable social function of disseminating information provided by higher education.[114] While this led the New Hampshire court to conclude it was a public institution, neither court belittled this vital interest nor attributed subordinate constitutional status to educational interests as opposed to private ones. The second is that this social function can be jeopardized by external interference.[115] Their disagreement was over the greatest source of that threat (whether the trustees or the legislature), not about the importance of institutional autonomy to dispensing that function. While the *Dartmouth College* case has come to be understood as a foundational case in corporate law, it can also be viewed as an early footprint in the development of academic freedom and indeed has been by some scholars.[116]

Later cases confirmed that the Contract Clause protected educational interests. Nearly fifty years later in *State ex rel. Pittman v. Adams*,[117] the Missouri Supreme Court concluded that college trustees could validate legislative modifications to educational charters if the changes were "necessary to further the objects of the charity."[118] Applying this standard and following the holding of *Dartmouth College*, the court held that legislation requiring an ecclesiastical body to approve the choice of trustees violated the Contract Clause and could not be accepted by later consent of

112. *Id.*

113. *Id.* at 646–47.

114. *See* Trs. of Dartmouth Coll. v. Woodward, 1 N.H. 111, 118–19 (1817) (describing the College's charter as serving the public interest by educating youth in useful knowledge); *Dartmouth Coll.*, 17 U.S. at 634 (recognizing education as "an object of national concern"); *see also* David M. Rabban, *From Impairment of Contracts to Institutional Academic Freedom: The Enduring Significance of the* Dartmouth College *Case*, 18 U.N.H. L. REV. 9, 11–13 (2019) (tracing how both courts emphasized education's important public function).

115. *See Dartmouth Coll.*, 1 N.H. at 135–36 (noting that unchecked trustee control could frustrate the public purpose of education and therefore warranted legislative oversight by the state); *Dartmouth Coll.*, 17 U.S. at 652, 654 (concluding that state legislative interference with the College's governance impaired the institution's independence and violated the Contract Clause); *see also* Rabban, *supra* note 114, at 15 (noting that both the New Hampshire court and the Supreme Court believed universities were susceptible to external influence).

116. *See* Rabban, *supra* note 114, at 10 (arguing that *Dartmouth College* should be read not only as a seminal corporate law decision but also as an early articulation of institutional academic freedom).

117. 44 Mo. 570 (1869).

118. *Id.* at 580–83.

the board.[119] But, it noted carefully that it was not necessary to "hold all changes [to the charter] to be absolutely prohibited."[120] That is because "altered conditions of society and of pursuits" could render the objects of an immutable charter obsolete.[121] In particular, the court focused on changes in the conditions of knowledge as circumstances that might justify deviation from "strict adherence to all the formal requirements" of a charter.[122] It suggested that "if in centuries past the founder of a college had enumerated alchemy and astrology among its studies, the study of chemistry and astronomy might be deemed a truer compliance with the object of the charity."[123]

In effect, the Missouri Supreme Court understood the Contract Clause to operate as a dynamic safeguard of the charter's educational object: It bars alteration that would undermine the fundamental purpose of learning yet accommodates revisions for changing intellectual conditions that would frustrate the charter's overarching purpose to promote knowledge. *Dartmouth College* and its progeny illustrate that the Contract Clause was the Nation's first constitutional bulwark for academic concerns. These cases affirmed that educational institutions devoted to the "dissemination of useful knowledge"[124] enjoy immunity from legislative interference that would undermine their core mission. *State ex rel. Pittman* reaffirmed this principle while refining that protection into a more nuanced standard: The Contract Clause continues to bar amendments that would divert a college from its foundational purpose yet tolerates adaptations that are necessary to further the advancement of knowledge.

Together, the adoption of the Copyright Clause, debates over the national university, and applications of the Contract Clause to higher education reveal early impressions of academic freedom broadly conceived. These distinct constitutional contexts show special concern for the production and dissemination of knowledge and the vital role of education in democratic citizenship and free society. It is those very interests that First Amendment academic freedom doctrine would later develop to protect. With these general interests in mind, Part III evaluates a narrower, speech-specific historical context: blasphemy. I argue that free inquiry has long received special solicitude in the context of blasphemy prosecutions. Even in this highly sensitive context, learned speech made in scholarly manner operated as a form of immunity from liability for otherwise blasphemous utterances. The cases show that free inquiry and discussion, a core component of

119. *Id.* at 576, 578, 589.
120. *Id.* at 580.
121. *Id.* at 580–81.
122. *Id.* at 581.
123. *Id.*
124. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 640 (1819).

academic freedom, has always been a First Amendment value—even if it was historically more narrowly circumscribed.

III. Blasphemy: Protections for Free Inquiry in Speech Cases

Though seemingly inconceivable today, up until well into the twentieth century, blasphemy—the offense of "maliciously reviling God"[125]—was understood to be perfectly compatible with the First Amendment. The Supreme Court only reversed course in 1952, when it held in *Joseph Burstyn, Inc. v. Wilson* that anti-blasphemy laws are unconstitutional under the First Amendment.[126] While some scholars accept *Burstyn*, others argue persuasively that neither the Free Exercise, Free Speech, nor Establishment Clauses of the First Amendment prohibit blasphemy laws.[127] Cases from the Founding until the pre-War period consistently upheld blasphemy laws and prosecutions against First Amendment challenges.[128] Indeed, the very same legislatures that ratified the Free Exercise Clause contemporaneously passed statutes that criminalized blasphemy.[129] This original understanding of the First Amendment as revealed by early practice presents an unusual case study for academic freedom. That is because the common law, courts, and treatise writers carefully parsed the dividing line between speech that "profane[ly] ridicule[d] Christ" and speech that the First Amendment protected—namely, "disputes between learned men upon particular controverted points."[130] Out of this practice a familiar principle emerges: immunity for speech made in scholarly manner by learned individuals. I argue this immunity is a historical twin—or at least a common ancestor—of academic freedom as a First Amendment right.

Although no American or English court ultimately found the requisite "learned discussion" on the facts before it, the exception's doctrinal authority was never questioned. Nineteenth-century judges, legislators, and treatise

125. People v. Ruggles, 8 Johns. 290, 293 (N.Y. Sup. Ct. 1811).

126. 34 U.S. 495 (1952).

127. *Compare, e.g.*, Evelyn M. Aswad, Rashad Hussain & M. Arsalan Suleman, *Why the United States Cannot Agree to Disagree on Blasphemy Laws*, 32 B.U. INT'L L.J. 119, 126 (2014) (relying on *Burstyn* to establish that "[i]n the United States, blasphemy bans are unconstitutional"), *with* Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689, 690 (2021) (contending that the Free Speech, Free Exercise, and Establishment Clauses do not categorically forbid anti-blasphemy laws under the Constitution's original meaning).

128. *See, e.g.*, *Ruggles*, 8 Johns. at 296–98 (finding the offense of blasphemy to be consistent with the freedom of religion and expression); Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 408 (Pa. 1824) (same); State v. Chandler, 2 Del. (2 Harr.) 553, 574–75, 577, 579 (Ct. Gen. Sess. 1837) (same); Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 218–21 (1838) (same); Oney v. Oklahoma City, 120 F.2d 861, 865 (10th Cir. 1941) (same).

129. *See Blasphemy and the Original Meaning of the First Amendment*, *supra* note 127, at 691–93 (detailing the blasphemy laws of Massachusetts, New Hampshire, Vermont, New Jersey, and Pennsylvania alongside their very own constitutional guarantees of free exercise).

130. *Ruggles*, 8 Johns. at 293–94.

writers invoked it as an axiomatic curb on blasphemy prosecutions, and no reported decision repudiated the principle. Functioning as a background norm—shaping jury instructions, guiding prosecutorial discretion, and marking the outer boundary of liability—it affirmed that sincere, scholastic inquiry laid beyond the reach of the criminal law even when juries deemed particular defendants insufficiently scholarly or sincere.

Writing on the First Amendment in 1868, Thomas Cooley recognized that the constitutional liberty of speech did not extend so far as to protect blasphemy.[131] He defined blasphemy as "speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God."[132] He explained that for speech to be considered blasphemous, it must be "uttered in a wanton manner" with "wicked and malicious disposition."[133] That wicked intent, generally speaking, was to "lessen men's reverence of God" by, for example, "denying his existence, or his attributes as an intelligent Creator."[134] But, he carefully noted, it does not follow that "one is not at liberty to dispute and argue against the truth of the Christian religion, or of any accepted dogma."[135] Rather, "[t]o forbid discussion upon this subject" and its "controverted points" would "abridge the liberty of speech" in a context that, "with many, would be regarded as most important of all."[136] Cooley explicitly staked out "candid investigation and [serious] discussion" as exceptions to blasphemy liability.[137] In this way, the learned intent, manner, and substance of the speech provided a zone of immunity from blasphemy prosecution under the First Amendment.[138]

A. *English Progenitors*

The English common law crime of blasphemy shared this distinction. English courts explicitly framed "disputes between learned men upon particular controverted points" as an exception to criminal liability for

131. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 474 (1868) ("No person is therefore deprived of a right when he is prohibited, under penalties, from uttering [blasphemous language].").

132. *Id.* at 472.

133. *Id.* at 474.

134. *Id.* at 472.

135. *Id.* at 474.

136. *Id.*

137. *Id.*

138. One question is whether it is more aptly described as a true defense or an affirmative defense. It is probably the former, which suggests the elements of the crime are not met. But another way of viewing it is as a defense to otherwise identical utterances in *context*. That is, liability would obtain for the utterance "Christ is a fable" when shouted in the face of a worshiper, whereas it would not for the identical phrase uttered in the context of a learned discussion.

blasphemy.[139] A 1729 case, *Rex v. Woolston*,[140] upheld liability for publications that argued that the miracles of Christ should be interpreted in an allegorical sense.[141] The court interpreted that position as striking "at the very root of Christianity," not as a mere "difference[] in opinion,"[142] and therefore found it sufficient to constitute an offence, in general, punishable at common law.[143] But the court also "desired it might be taken notice of, that they laid their stress upon the word *general*," and the offence should not include disputes between learned men.[144] Expert speech was thus set aside as a specific exception to the general rule against blasphemy.[145]

Follow-on cases retained this exception while also distancing themselves from the proposition that mere denial of Christ could constitute blasphemy, thus ceding even more territory to free inquiry and discussion. In *Queen v. Hetherington*,[146] Lord Chief Justice Denman noted that whether a statement was blasphemous was "not altogether a matter of opinion," but instead a question of "the tone, and style, and spirit, in which [the] inquiries are conducted."[147] In his jury charge, he emphasized that discussions undertaken in a "sober and temperate and decent style" are tolerated by the law, whereas words that "cannot be truly called an appeal to the judgment" are not.[148] Later, in *Queen v. Ramsay*,[149] Lord Chief Justice Coleridge explained that whatever the "old cases" may have said, "the mere denial of the truth of Christianity is not enough[;]" rather, there must be "wilful misrepresentations or wilful sophistry, calculated to mislead the ignorant and unwary."[150] He went on to explain that "if the *decencies of controversy* are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy."[151] These cases thus carved out certain "scholarly" norms of inquiry from liability, making greater allowance for learned discussion.

139. R v. Woolston (1729) 93 Eng. Rep. 881, 882 (KB).

140. R v. Woolston (1729) 94 Eng. Rep. 655 (KB).

141. *Id.* at 655–56.

142. *Id.* at 656.

143. *Woolston*, 93 Eng. Rep. at 881–82.

144. *Id.* at 882 (emphasis added).

145. However, it is worth noting that, much like the American progeny that would follow, this principle did not always find steady application. *See, e.g.*, R v. Williams (1797) 26 Howell's St. Tr. 653, 661 (KB) (discussing a blasphemy prosecution against Thomas Williams for publishing Thomas Paine's "Age of Reason," no doubt a serious piece of scholarship, but one that the judge expressed "astonishment and disgust" at after reading).

146. (1841) 4 St. Tr. N.S. 563 (QB).

147. *Id.* at 588, 590.

148. *Id.*

149. (1883) 15 Cox C.C. 231 (QB).

150. *Id.* at 235–36.

151. *Id.* at 238 (emphasis added).

Indeed, the state of blasphemy law grew so protective of scholarly manner and expertise that it became a sore point during parliamentary debates in the 1930s on a proposed law to abolish the common law crime. Kingsley Griffith, a member of the House of Commons, complained that "where opinions are strongly held by an educated man, those opinions will be expressed in a way which the law cannot touch, while those expressed by an uneducated man, simply because he is uneducated, will come under the penalties of the law."[152] His colleague Ernest Thurtle echoed this sentiment, lamenting that well-known scientists, philosophers, and writers were able to critique religion without fear of prosecution, whereas less-educated men expressing "the same point of view more bluntly and crudely" would be held liable.[153] These members of parliament were dissatisfied with the apparently elitist flavor of the common law, which protected learned discussion in view of the expertise, tone, and style of the speaker.

B. American Progeny

The English common law understanding of blasphemy was incorporated into American practice and defined the scope of First Amendment protection. The American progeny likewise shows heightened protection for learned discussion and scholarly manner. The first appellate case on blasphemy, *People v. Ruggles*,[154] explicitly cited the English case *Rex v. Woolston* in upholding a blasphemy prosecution under New York law.[155] As Chief Justice Kent explained, though the First Amendment guaranteed "free and decent discussions on any religious subject," it did not contemplate protection for "malicious and blasphemous contempt."[156] Because Ruggle's speech was a far cry from "serious discussion on a controverted point," the court had no problem imposing liability consistent with the First Amendment.[157] But this exception for learned discussion, though in principle strongly recognized, would not always find steady application.

In 1824, a young man named Abner Updegraph participated in a debate on the fallibility of the Bible at his club in Pittsburgh.[158] Updegraph took the "con" position, arguing that "the Holy Scriptures were a mere fable, that they were a contradiction, and that although they contained a number of good

152. HC Deb (24 Jan. 1930) (234) col. 535.

153. *Id.* at col. 499.

154. 8 Johns. 290 (N.Y. Sup. Ct. 1811).

155. *Id.* at 292–93.

156. *Id.* at 295.

157. *Id.* at 293, 296–97. The defendant was charged with stating that "*Jesus Christ* was a bastard, and his mother must be a whore." *Id.* at 292–93.

158. Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 399 (Pa. 1824).

things, yet they contained a great many lies."[159] He was prosecuted—and ultimately convicted—under a Pennsylvania law that imposed a ten pound fine for blasphemy.[160] In *Updegraph v. Commonwealth*,[161] the Pennsylvania Supreme Court upheld the conviction, noting that the jury found that Updegraph spoke those words intemperately and with malicious intent.[162] For the court, the tenor of the words meant "it was impossible that they could be spoken seriously and conscientiously."[163] The court thus agreed with the jury, characterizing Updegraph's statements as a low-grade "invective" and therefore a crime under the law.[164] Justice Duncan nevertheless paid lip service in his opinion to *Rex v. Woolston*, noting the oft-cited exception for "disputes between learned men" and stating that "no author . . . who fairly and conscientiously promulgates the opinions with whose truths he is impressed, for the benefit of others, is answerable as a criminal."[165] Indeed, the Pennsylvania law specifically distinguished "opinions seriously, temperately, and argumentatively expressed," from "despiteful railings."[166]

How is it possible, then, that Updegraph—participating in a debating exercise—was held liable? One answer is that the debating society was viewed as an unserious exercise, not intended to advance knowledge or seek truth. Updegraph's counsel submitted that because the expressions were uttered "in a deliberative assembly" and "in a discussion," they should not constitute an offense.[167] But Justice Duncan vehemently disagreed with this characterization of the forum. He was shocked that there was an association in which "so serious a subject" was treated with "so much levity, indecency and scurrility."[168] He feared that the organization would "prove a nursery of vice" and operate as a "school of preparation to qualify young men for the gallows, and young women for the brothel."[169] In short, the reason the institutional context did not provide protection is because the court did not see it as a sponsor to good-faith investigation. Justice Duncan likely viewed debate as a performative exercise lacking the sober manner of serious inquiry and ultimately agnostic to the advancement of knowledge. The mechanics of debate, in which opposing parties take intentionally provocative views, might serve to decouple good-faith and inquiry. And, for that matter, young Abner

159. *Id.* at 398.
160. *Id.* at 398–99.
161. 11 Serg. & Rawle 394 (Pa. 1824).
162. *Id.* at 398–99, 408.
163. *Id.* at 399.
164. *Id.*
165. *Id.* at 400–01, 405.
166. *Id.* at 400.
167. *Id.* at 395.
168. *Id.* at 399.
169. *Id.*

was not any sort of expert on theological or philosophical matters. It was therefore no problem for Justice Duncan to infer malicious intent and avoid triggering the exception for learned discussion.

The Supreme Court of Massachusetts also recognized an immunity for free and sober inquiry, albeit while upholding a conviction under a 1782 statute for blasphemous statements in a written article. In the 1838 case *Commonwealth v. Kneeland*,[170] the Massachusetts court wrote that the blasphemy statute could not "prohibit the fullest inquiry, and freest discussion, for all honest and fair purposes, *one of which is, the discovery of truth*."[171] Chief Justice Shaw reasoned that when the "true and honest purpose [is] the discovery and diffusion of truth," liability could not be imposed for that speech, regardless of "whatever result such inquiries may lead."[172] The court therefore explicitly connected the immunity for free inquiry and discussion to the advancement and diffusion of knowledge. True, Kneeland merely denied belief in God.[173] But because his article did not affirmatively advance knowledge, the court viewed that utterance as one that "calmuniate[d] and disparage[d]" God.[174] In short, Kneeland lacked the essential requirements of learned mode and purpose that protected otherwise objectionable speech.

The distinction between learned inquiry and blasphemy is likewise confirmed in popular commentary proximate to the Reconstruction Era. In an 1879 article commenting on an English trial, *The New York Times* endorsed the reasoning of *Ruggles* and *Kneeland* to explain the difference between the state of blasphemy law in England and the United States. It wrote that a "larger freedom of inquiry and discussion in religious matters is recognized and guaranteed by law in this country than in England."[175] The article underscored that in the United States, "the law does not prohibit the expression of any opinions or beliefs, however extreme," so long as "they are conscientiously entertained and promulgated with propriety."[176] It quoted both cases for the proposition that full inquiry and free discussion were protected when made in pursuit of truth.[177]

170. 37 Mass. (20 Pick.) 206 (1838).

171. *Id.* at 220 (emphasis added).

172. *Id.*

173. *Id.* at 212.

174. *See id.* at 216–17, 220 (accepting the verdict that the defendant's statements were wilful, and interpreting that term to mean "an intended design to calumniate and disparage the Supreme Being").

175. *Legal Checks on Religious Discussion*, N.Y. TIMES (Sep. 11, 1879), https://www.nytimes.com/1879/09/11/archives/legal-checks-on-religious-discussion.html [https://perma.cc/3JN9-T2LM].

176. *Id.*

177. *Id.*

Together, the English and American case law stand for the ironclad proposition that blasphemy liability did not trespass unto discussions between learned men on controverted points. This was understood as a corollary of the First Amendment, state free speech provisions, and the elements of the common law crime. Yet none of the seminal cases in fact apply the exception to the rule. What accounts for its dormancy?

One possible explanation is a period-specific interpretation of speech context. Today, most consider debate societies or editorials as good-faith attempts to contribute to knowledge. But because neither Updegraph nor Kneeland avowed particular expertise, observed scholarly norms, or robustly defended their views, the courts had no problem interpreting their statements as unserious and therefore made with malicious intent. It may thus be anachronistic to project today's understanding of debate societies and editorials unto the period in which the cases were decided.

Another possible explanation is that juries were, on the whole, fairly pious. This may have led jurors faced with inflammatory speech against religion to nullify the exception. The cases make clear that the law permitted inquiry into the sacred and sensitive subject of religion, provided the inquirer observed certain standards of decorum and proper purpose. But that determination was submitted to the jury. It may be that juries' interpretations of the speech context were informed by their reaction to its raw content, leading them to convict more often than the scope of the exception would suggest.[178] In any event, blasphemy prosecutions provide a window into early First Amendment protections for free inquiry and discussion. They suggest that even in highly sensitive contexts, the law was careful to protect speech that was intended to advance and disseminate knowledge.

C. *Contemporary Parallels*

These principles revealed by blasphemy prosecutions also help explain the resolution of contemporary academic disputes. Modern cases show that First Amendment protections hinge on the very same distinctions drawn in the blasphemy context: the seriousness of the inquiry and the scholarly mode and manner.

178. *C.f.* Irwin A. Horowitz, Norbert L. Kerr & Keith E. Niedermeier, *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207, 1208, 1210 (2001) (describing jury nullification and observing that jurors may "return verdicts that reflect prejudiced or bigoted community standards and convict when the evidence does not warrant a conviction"); Monica K. Miller, Julie A. Singer & Alayna Jehle, *Identification of Circumstances Under Which Religion Affects Each Stage of the Trial Process*, 4 APPLIED PSYCH. CRIM. JUST. 135, 138–39 (2008) (discussing circumstances under which a defendant's religiosity may affect a juror's propensity to impose certain sentences).

In *Hardy v. Jefferson Community College*,[179] the Sixth Circuit upheld a claim under 42 U.S.C. § 1983 by an adjunct professor who maintained that the school had retaliated against him based on his exercise of his constitutionally protected right of free speech.[180] "Following a classroom discussion examining the impact of [certain] oppressive and disparaging words," which included the use of race-sensitive expletives, one of Hardy's African-American students complained.[181] Hardy's teaching contract was subsequently not renewed.[182] On balance, the court concluded that Hardy's in-class speech deserved constitutional protection.[183] It evaluated the strength of that interest under the *Pickering* framework—according to which the court must consider whether a public employee's comments (1) "meaningfully interfere with the performance of his duties or with the employer's general operations," (2) "undermine a legitimate goal or mission of the employer," or (3) "create disharmony among coworkers."[184] In weighing the issue, the court heavily emphasized the pedagogical relevance of the speech—i.e., how germane the objectionable speech was to the inquiry. The court noted the "limited" use of the offensive words, that the lecture included "discussion and analysis" of those words, and that the discussion was "academically and philosophically challenging."[185] These factors supported the conclusion that Hardy's "rights to free speech and academic freedom outweigh the College's interest in limiting that speech."[186] In effect, because the discussion and inquiry were undertaken conscientiously and seriously, Hardy was entitled to immunity from retaliation.

By contrast, in *Bonnell v. Lorenzo*,[187] the Sixth Circuit denied similar protections to a professor who was suspended from his teaching position for the use of vulgar and obscene language in the classroom.[188] Because the professor used the obscenities gratuitously, not in a manner "germane to the subject matter," the court reasoned that his First Amendment right did not outweigh the interests of the college.[189] True, it noted, "the clash of viewpoints" is a necessary mechanism to "spur intellectual growth."[190] But it

179. 260 F.3d 671 (6th Cir. 2001).
180. *Id.* at 674.
181. *Id.*
182. *Id.*
183. *Id.* at 682.
184. *Id.* at 680–81; *see also* Pickering v. Bd. of Educ., 391 U.S. 563, 568–70 (1968) (holding that a public school teacher's First Amendment rights must be balanced against the state's interest in promoting efficiency of public services, and providing examples of relevant factors).
185. *Hardy*, 260 F.3d at 674–75, 679.
186. *Id.* at 682.
187. 241 F.3d 800 (6th Cir. 2001).
188. *Id.* at 802–03.
189. *Id.* at 820, 823.
190. *Id.* at 821.

did not consider the professor's continuous use of expletives integral to that process. Without any explicit connection to "informing public debate" or further learning—in other words, having little pedagogical relevance—the speech was not entitled to absolute First Amendment protection.[191] These cases and others illustrate that the seriousness of the inquiry, as inferred from pedagogical relevance, is often the determinative *Pickering* factor in evaluating the strength of protection for otherwise objectionable speech.[192]

Similarly, other claims of First Amendment academic freedom tend to hinge on the manner in which the speech is uttered. In *Lux v. Board of Regents*,[193] a New Mexico state court denied protection to a professor who criticized the administration for its failure to implement a functional ethnic studies program.[194] In a speech before the University Regents, he called the administration "lack-luster" "grinning clowns" that were "morally and ethically bankrupt" and characterized by "incredible mediocrity."[195] Though nominally about the programmatic concerns at the university, the court characterized his comments as a "diatribe" that did not "serve to foster rational discourse, exchange of ideas, and meaningful discussion."[196] The court focused on the wanton nature of the criticism, citing to a Seventh Circuit decision that stated that academic freedom cannot be "a license for *uncontrolled expression* at variance with established curricular contents."[197] Because his speech failed to perform the core functions "that 'free speech' protections are intended to foster," the New Mexico court concluded that his First Amendment rights had not been violated by non-renewal of his contract.[198]

In sum, although modern cases formally analyze First Amendment academic freedom through the lens of the *Pickering* balancing test, which is discussed in more detail below, they also assign an undeniable weight to the seriousness of the inquiry and mode of speech. These are interests that blasphemy prosecutions long placed beyond the remit of liability.

191. *See id.* at 819–21 (citing prior case law for the proposition that even derogatory speech with the purpose of "influencing or informing public debate" is protected, but speech without such purpose is not).

192. *See also, e.g.*, Silva v. Univ. of N.H., 888 F. Supp. 293, 299, 314 (D.N.H. 1994) (extending protection for a professor's use of frequent analogies to sex in technical writing course); Mahoney v. Hankin, 593 F. Supp. 1171, 1172, 1175 (S.D.N.Y. 1984) (declining to find as a matter of law that a professor's references to campus union organizing in a political science course were unprotected).

193. 622 P.2d 266 (N.M. Ct. App. 1980).

194. *Id.* at 268, 272, 274.

195. *Id.* at 272.

196. *Id.* at 273.

197. *Id.* (emphasis added) (quoting Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972)).

198. *Id.*

III. Recalibrating *Pickering*

The contemporary cases support a common intuition: Courts give the strongest protection to academic speech when it is serious, pedagogically grounded, and germane to the inquiry at hand. As noted above, these decisions are all formally filtered through the capacious framework of *Pickering*, which directs courts to balance a public employee's speech against the government's interest. As typically applied, *Pickering* is a *flat* balancing test—courts weigh whatever interests each side asserts without clear guidance about relative weights. But this indeterminacy has left academic freedom cases vulnerable to ad hoc results.[199] The historical record, however, suggests a more principled method. In this Part, I illustrate how a recalibrated *Pickering* test—one that foregrounds the historical emphases—better explains outcomes in cases such as *Hardy*, *Bonnell*, *Lux*, and (more recently) *Meriwether*, by aligning current doctrine with longstanding constitutional commitments.

A. Pickering *and Its Discontents*

In *Pickering v. Board of Education*,[200] the Court held that a school board could not dismiss a teacher for publishing a letter critical of its budget priorities without balancing the teacher's First Amendment interests against the government's interests in the efficient provision of services.[201] That balancing inquiry has two steps. First, as clarified in *Connick v. Myers*,[202] a court asks whether the employee's expression addressed a "matter of public concern."[203] If not, the speech receives no constitutional protection. If so, the court then weighs the employee's speech interest against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[204]

At this balancing stage, courts consider whether the speech meaningfully interferes with the employee's duties, disrupts harmony among coworkers, undermines the employer's mission, or otherwise obstructs operations.[205] The Supreme Court has noted that the "extent of authority" and "public accountability" of the employee's role may be relevant factors to this

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199. *See* Keith E. Whittington, *What Can Professors Say in Public? Extramural Speech and the First Amendment*, 73 CASE WESTERN L. REV. 1121, 1139–41 (2023) (examining the Supreme Court's lack of guidance on how the *Pickering* balancing test works and lower courts' struggle in applying the proper analysis).

200. 391 U.S. 563 (1968).

201. *Id.* at 564–65, 568.

202. 461 U.S. 138 (1983).

203. *See id.* at 146 (explaining that if the speech at issue "cannot be fairly characterized as constituting speech on a matter of public concern," the analysis ends there).

204. *Pickering*, 391 U.S. at 568.

205. Rankin v. McPherson, 483 U.S. 378, 388 (1987).

balancing test.[206] But beyond that, the framework provides little guidance on how to weigh these competing interests.[207] Thus, courts often recite the *Pickering* factors as if they were commensurable, despite strong arguments that certain considerations should carry greater or less constitutional weight.[208] The historical record, however, provides a more principled method.

History suggests that the factors in *Pickering* balancing are not equally weighted but instead occupy a hierarchy. That is, courts should give the rigor and pedagogical relevance (a proxy for seriousness or conscientiousness) of the contested speech *primary* weight. This reflects both historical and modern emphasis on the advancement of knowledge as the core protected interest. While the Court speaks of both the advancement of knowledge and the training of democratic citizens,[209] the historical record gives the first interest pride of place. The Copyright Clause secures exclusive rights only to works that "promote the Progress of *Science*," not works that improve civic virtue writ large;[210] Dartmouth College was shielded under the Contract Clause because its charter served "the dissemination of useful knowledge," while the republican benefits were merely incidental;[211] and even the national university boosters—from Washington to Barlow—invoked civic concord *as a consequence* of a thriving center of scholarship.[212] Historical blasphemy cases from England, such as *Woolston*, and from the United States, such as *Kneeland*, carved out exceptions for learned discussion by emphasizing the speaker's scholarly qualifications and mode.[213] And modern First

206. *Id.* at 390.

207. Whittington, *supra* note 199.

208. *See id.* at 1144, 1147, 1152 (arguing that in the "distinctive context of universities," certain "institutional interests should be given little to no weight" in the *Pickering* balancing test).

209. *See* Connick v. Myers, 461 U.S. 138, 145–46 (1983) (stating that speech that relates to "matter[s] of political, social, or other concern to the community" or upon which "free and open debate is vital to informed decisionmaking by the electorate" deserves constitutional protection); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (emphasizing that "[t]eachers and students must always remain free to inquire . . . to gain new maturity and understanding," and tying that to the fate of democracy).

210. U.S. CONST. art. I, § 8 (emphasis added).

211. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 640 (1819) (explaining that "the dissemination of useful knowledge among the youth of the country" was Dartmouth's "avowed" and "sole object[]," while "[t]he particular interests of New-Hampshire never entered into the minds of the donors").

212. *See* Castel, *supra* note 71, at 281 ("A number of factors and motives explains the Founding Fathers' interest in a national university. One was their strong personal devotion to learning for its own sake. Another was their conviction that our experiment in republican government could not succeed unless the people and their officials were properly educated.").

213. *See* R v. Woolston (1729) 93 Eng. Rep. 881, 882 (KB) (excluding "disputes between learned men upon particular controverted points" from blasphemous discourse); Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 242 (1838) (noting that one who "engages in the discussion of any subject in the honest pursuit of truth . . . is covered by the aegis of the constitution").

Amendment doctrine continues this line: Expert commentary in a classroom or academic forum carries more weight than polemical assertions unmoored from scholarly norms.

Civic interests—often asserted by the institution as against the employee—remain part of the *Pickering* equation, but historical and doctrinal materials suggest they are of *secondary* weight. These materials demonstrate that the constitutional tradition treats democratic citizenship as a valuable but contingent corollary. Courts should therefore weigh most heavily the speech's contribution to scholarly inquiry—its rigor, methodology, and disciplinary relevance—before crediting more diffuse claims about disrupting "employee harmony" or undermining the employer's mission.[214] The national university debates affirm the Founders' belief that the diffusion of knowledge is vital to civic life. However, these sources also make clear that such civic benefits are derivative of academic rigor—not substitutes for it. As such, while civic contribution is a meaningful input, it should supplement, not supplant, the primary consideration: whether the speech is a bona fide act of scholarly inquiry. Indeed, in *Keyishian*, the Court warned against vague or speculative invocations of institutional harmony as a justification for suppressing dissent.[215] Courts should therefore require strong evidence of substantial operational interference—rather than discomfort or reputational concern—before subordinating scholarly speech in a *Pickering* analysis.

B. Using Historical Weights Properly

Consider *Meriwether v. Hartop*,[216] in which the Sixth Circuit revived a First Amendment claim brought by a university professor disciplined for refusing to use a transgender student's preferred pronouns.[217] The facts as pleaded detail that Meriwether addressed a student using a masculine honorific; after class, the student requested feminine titles and pronouns.[218] Meriwether reported the exchange and sought accommodation that would preserve both his pedagogical method and the student's participation by continuing to use pronouns for other students while referring to this student by last name only; he later proposed that he would use students' preferred

214. *See* Rankin v. McPherson, 483 U.S. 378, 388 (1987) (writing that courts should consider under *Pickering* "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships . . . or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise").

215. *See* Keyishian v. Board of Regents, 385 U.S. 589, 602–03 (1967) (emphasizing that despite the state's legitimate interest in "protecting its education system from subversion," the academic freedom interest is dominant because "[t]he Nation's future depends upon leaders trained through wide exposure to [the] robust exchange of ideas").

216. 992 F.3d 492 (6th Cir. 2021).

217. *Id.* at 498–99.

218. *Id.* at 499.

pronouns but would add a brief syllabus statement explaining that he was doing so under compulsion and contrary to his beliefs.[219] Administrators rejected these suggestions, providing only two options: alter his pedagogy by abandoning all sex-based pronouns for everyone or use feminine titles and pronouns for the student at issue, contrary to his convictions.[220] Meriwether ultimately received a written warning for creating a hostile environment and was directed to change his methods to avoid further corrective actions.[221]

While the underlying issue was politically charged, the Sixth Circuit correctly reframed the question: The issue was not whether the professor's views were agreeable, but whether his mode of classroom expression reflected a sincere and pedagogically grounded viewpoint.[222] The court noted that titles and pronouns themselves convey a message; they are propositional speech about a student's sex or gender identity.[223] Choosing "Ms." rather than "Mr." communicates the speaker's acceptance of the student's asserted gender; refusing to use one or the other communicates the opposite. Since that choice reflects a viewpoint, the Sixth Circuit concluded that its controversial nature could not itself be grounds for discipline.[224] Instead, it strongly weighed the value of "contrarian views" in the classroom and the sincerity of the professor's "core religious and philosophical beliefs" against the interest of the university in preventing what it viewed as discrimination against transgender students.[225] The court pointed to Meriwether's proposed accommodations and established pedagogical practice in crediting the sincerity of his controversial speech.[226] By contrast, because the school's asserted interest against anti-discrimination "mandate[d] orthodoxy" and ignored the fact that "[t]olerance is a two-way street,"[227] the court gave it little weight and accordingly held that the university violated Meriwether's free-speech rights.[228]

This analysis illustrates the hierarchy of interests advanced in this Note. First, speech that is serious, conscientious, and pedagogically integrated

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219. *Id.* at 499–500.

220. *Id.* at 500.

221. *Id.* at 501.

222. *See id.* at 506, 509 (focusing on the fact that the use of pronouns to lead classroom discussion "shape[s] the *content* of the instruction enormously," and the fact that Meriwether's speech related to "his core religious and philosophical beliefs").

223. *See id.* at 507 (noting that the use of pronouns "communicates a message: People can have a gender identity inconsistent with their sex at birth").

224. *See id.* at 506–07 (writing that "public universities do not have a license to act as classroom thought police" and "cannot force professors to avoid controversial viewpoints altogether in deference to a state-mandated orthodoxy").

225. *Id.* at 509–10.

226. *Id.* at 501, 510–11.

227. *Id.* at 511 (quoting Ward v. Polite, 667 F.3d 727, 735 (6th Cir. 2012)).

228. *Id.* at 510–12.

receives the greatest weight, whereas civic interests count only when tied to concrete educational harm. Because Meriwether offered his viewpoint in good faith and did not strongly impair the educational environment, his speech remained immune from retaliation despite the asserted interests of the university. The Sixth Circuit's opinion thus implicitly adhered to the historical hierarchy outlined above: Sincerity and purpose *outrank* diffuse institutional preference to encourage harmony or avoid the appearance of discrimination.[229]

Critics have faulted the decision for granting special protection to conservative viewpoints and for failing to recognize the significance of the university's interest in preventing discrimination.[230] But these objections represent a historically unfaithful calibration of the *Pickering* weights. The Sixth Circuit reinforced the principle that even controversial or offensive views, if expressed in appropriately scholarly mode and for pedagogical ends, deserve strong constitutional protection. That is true even against valid broader civic interests such as inclusivity and anti-discrimination. The case thus exemplifies how a historically grounded *Pickering* framework provides a neutral, principled, and administrable method for courts to evaluate faculty speech.

This hierarchy is further confirmed in other cases applying *Pickering*. In *Landrum v. Eastern Kentucky University*,[231] the district court treated a professor's intra-department crusade as a personal grievance rather than scholarly commentary on institutional policy.[232] The record described repeated internecine clashes over a proposed curriculum, resignations from the curriculum committee, and various ad hominem broadsides.[233] Concluding that the speech's content, form, and context did not make sufficient contribution to curricular reform, the court granted summary judgment to the university under *Pickering*.[234] By contrast, *Johnson v. Lincoln University*[235] involved faculty speech directed at core academic policy—faculty reductions, student enrollment levels, grade inflation, and

229. *See id.* at 511 (writing that "fear of apprehension or disturbance" at school is not enough of a justification to place limits on free speech, especially when the speech at issue does not interfere with the teacher's performance or the school's regular operations).

230. *See, e.g.*, *Sixth Circuit Holds Public University Professor Plausibly Alleged Free Speech Right Not to Use Trans Student's Pronouns*, 135 HARV. L. REV. 2005, 2005 (2022) (arguing that "the university's interest in ensuring a welcoming classroom environment is well supported and serves, rather than undermines, academic freedom").

231. 578 F. Supp. 241 (E.D. Ky. 1984).

232. *Id.* at 246–47.

233. *Id.* at 243–44.

234. *See id.* at 246–47 (describing the professor's speech as "verbal assaults" and emphasizing his "intense hostility" towards the administration).

235. 776 F.2d 443 (3d Cir. 1985).

governance.[236] Even though Johnson's comments arose from department conflict and involved personal criticism of the university president, the Third Circuit held that they could merit protection under *Pickering* because they were germane to the *academic* quality of the institution.[237] Together, *Johnson* and *Landrum* sharpen the *Meriwether* illustration: Where the speech is conscientiously offered and bears on academic matters, courts give it dominant weight. However, where the speech is personal or factional in content, form, and context—thus detached from the advancement of knowledge—more diffuse institutional interests carry the day.

Conclusion

I have argued that the interests currently protected by First Amendment academic freedom have long been central constitutional values. The Copyright Clause, debates over the national university, and Contract Clause each reveal special solicitude for the importance of free inquiry, discussion, and the advancement of knowledge to the proper functioning of democracy. Blasphemy prosecutions at common law in England and in early American practice show that, even in highly sensitive contexts, courts were careful to protect speech that served those core interests. Notably, Chief Justice Marshall supplied the *only* explicit link that any of the historical episodes surveyed in this Note makes to another. They unfolded on parallel tracks, guarding these core interests without citing the others or treating themselves as cognate doctrines. This silence is illuminating—so deeply embedded was the Founding Era commitment to advancing knowledge that it appeared across disparate legal arenas without adverting to a unifying principle. I argue the latent continuity among those arenas sharpens the conceptual core of academic freedom and increases clarity in the weight assigned to asserted interests under the *Pickering* balancing test.

Another upshot of this view is that history may inform potential deviations from traditional conceptions of academic freedom. Professors Bérubé and Ruth, for example, argue that universities should be able to discipline professors as unfit if their extramural speech expresses views outside the range of "legitimate political disagreement."[238] But the enduring constitutional values in the production and dissemination of knowledge and the contours of blasphemy prosecutions suggest this exclusion gets it

236. *Id.* at 448, 452.

237. *See id.* at 452–55 (recognizing that although some of the comments at issue were motivated by personal disputes, they nevertheless "concerned questions of educational standards and academic policy").

238. *See* MICHAEL BÉRUBÉ & JENNIFER RUTH, IT'S NOT FREE SPEECH: RACE, DEMOCRACY, AND THE FUTURE OF ACADEMIC FREEDOM 15 (2022) (writing that "[a]ffirmative action and immigration are subjects about which there can be legitimate political disagreement" whereas "the assertion that Black people are biologically or culturally less capable of self-government" is not).

partially wrong. Blasphemy prosecutions protected learned speech on controversial matters. They distinguished protected speech from unprotected speech based on the style and manner as well as the purpose of the inquiry. So long as it was scholarly, sober, and intended to advance knowledge, liability could not obtain.

Professors Bérubé and Ruth depart from this historical understanding by placing certain subjects beyond the domain of inquiry, notwithstanding that such inquiry could meet those conditions. The danger of their view is that the development of knowledge may be impeded by making categorical subject-matter exclusions from First Amendment protection. If the Founders did not see fit to do so with unorthodox treatment of highly sensitive subjects, neither should we. The blasphemy cases underscore that the line of permissibility tracked scholarly rigor, not topic (no-matter how taboo or sacrosanct): As Lord Coleridge put it, "if the decencies of controversy are observed, *even the fundamentals of religion may be attacked*."[239]

A final consequence is that under the Supreme Court's increasingly historical approach to constitutional adjudication,[240] additional pedigree for academic freedom can only serve to clarify the right. Under this approach, history is not mere ornament but "a method of constitutional construction in cases of underdeterminacy."[241] Original-methods theorists have gone further, insisting that judges must employ "the interpretive methods that the constitutional enactors would have deemed applicable," thereby requiring courts to consult period-specific analogues when confronting modern disputes.[242] Recent doctrine bears that out. In *New York State Rifle & Pistol Association v. Bruen*,[243] the Court held that a firearm regulation survives only if it is "consistent with this Nation's historical tradition."[244] Two years later, *United States v. Rahimi*[245] reaffirmed that the government must ground firearm regulations in historical analogues even as it clarified how close the fit must be.[246] And in *Vidal v. Elster*,[247] the Justices evaluated the validity of

239. R v. Ramsay (1883) 15 Cox C.C. 231, 238 (QB) (emphasis added).

240. *See, e.g.*, Christina Mulligan, *Diverse Originalism, History & Tradition*, 99 NOTRE DAME L. REV. 1515, 1516 (2024) (describing the Court's 2022 decision in *Bruen*, in which the Court "ostensibly" looked to original public meaning to interpret the Second Amendment right to bear arms).

241. Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 448 (2023).

242. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009).

243. 142 S. Ct. 2111 (2022).

244. *Id.* at 2126.

245. 144 S. Ct. 1889 (2024).

246. *See id.* at 1898 ("The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'").

247. 144 S. Ct. 1507 (2024).

a trademark provision under the First Amendment by canvassing the trajectory of analogous speech restrictions from the Founding onward.[248]

Against that backdrop, the historical materials excavated in this Note—copyright's "encouragement of learning," the Founders' debates over a national university, and nineteenth-century blasphemy prosecutions—can do doctrinal work. They can supply "historical analogues" (even if in disparate contexts) that *Bruen* and its progeny demand. They show that the production and dissemination of expert knowledge have long enjoyed a uniquely favored constitutional status. By demonstrating that learned inquiry was cabined from liability even under blasphemy law, and that Congress repeatedly structured institutions to foster scholarly advancement, these materials help specify the original scope of the First Amendment's protection for academic speech. In the vocabulary of Larry Solum's "construction zone," they narrow the range of *permissible* modern constructions by providing concrete evidence of founding-era understandings and practices.[249]

In all, these contexts locate academic freedom firmly within the First Amendment's original design and thereby offer contemporary courts a principled basis for distinctive First Amendment protection of learned speech that, though unorthodox, ultimately advances the bounds of knowledge. In various constitutional fora, history whispers that academic freedom—protection for free inquiry and the production of knowledge—is a distinctive, well-pedigreed, and well-protected Anglo-American value.

248. *See id.* at 1511 ("The history and tradition of restricting trademarks containing names is sufficient to conclude that the names clause is compatible with the First Amendment.").

249. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 12 (2015) (describing the concept of the "construction zone").