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The Kalven Report, Institutional Neutrality, and Academic Freedom

by

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The mission of universities is to enlarge human knowledge and to educate students. This mission cannot succeed without academic freedom.¹ University faculty require “freedom in research and in the publication of the results”² so that that they can criticize received knowledge and advocate for new disciplinary understandings.³ Successful universities consequently feature faculty who hold widely disparate perspectives and views.

Just as universities are not responsible for the many different views advocated by the multitude of books in their libraries, so universities are not responsible for the diverging views of their multi-vocal faculty. Faculty are “appointees” of universities, not employees.⁴ This means

¹ In this essay I discuss the academic freedom of university faculty. In the United States, the academic freedom of students is a concept that has not received much in the way of intellectual or institutional development. *See* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1270-72 (1988). Faculty academic freedom is traditionally divided into three dimensions: freedom of research and publication, freedom of teaching, and freedom of extramural speech. American Association of University Professors (“AAUP”), *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, at 14, at <https://www.aaup.org/file/1940%20Statement.pdf>.

² AAUP, *supra* note 1, at 14.

³ On the distinct rationale for “freedom in the classroom,” *id.* at 14, see Robert C. Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, in *THE FREE SPEECH CENTURY* 113-14 (Lee C. Bollinger and Geoffrey R. Stone eds., Oxford University Press 2019).

⁴ *See* AAUP, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, at <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>, at 295.

that a university is not responsible for its faculty's scholarship, nor does a university's faculty "speak for" their university as would its agents.⁵

In this regard faculty differ from university administrators, who necessarily speak for their university. This creates a somewhat awkward and potentially fraught relationship between university administrators and faculty. University administrators must simultaneously protect faculty academic freedom and yet also shape and direct over-all university policy. The implicit strain in this double posture has led some to conclude that universities, speaking through their administrators, must adopt a "norm of institutional neutrality"⁶ with respect to faculty.

The locution of "neutrality," however, does not well describe the relationship between universities and faculty. Universities take very seriously their responsibility to continuously and rigorously assess faculty competence.⁷ This assessment is what connects academic freedom to the university's fundamental mission of expanding knowledge.⁸ Universities therefore constantly monitor and evaluate the merits of faculty research. Universities hire, promote, tenure, and

⁵ Just as the president is not responsible for the decisions of federal judges he appoints, so a university is not responsible for the views of its faculty. 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*, *supra* note 4, at 295. "University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are judges subject to the control of the president, with respect to their decisions; while of course, for the same reason, trustees are no more to be held responsible for, or to be presumed to agree with, the opinions or utterances of professors, than the president can be assumed to approve of all the reasonings of the courts." *Id.*

⁶ Metzger, *supra* note 1, at 1280. *See also* Walter P. Metzger, *Institutional Neutrality: An Appraisal*, BULLETIN NO. 34 OF THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, at 38 (1971)

⁷ ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 61-68 (Yale University Press 2012).

⁸ Contrary to the cliché, knowledge is not produced by a simple marketplace of ideas, but instead through a disciplined exchange among those qualified to judge. *Id.* at 29-33; Robert Post, *Debating Disciplinary*, 35 *CRITICAL INQUIRY* 749 (2009). The production of knowledge never entails the mere freedom to speak; it always involves a complex dialectic between critique and judgment.

support faculty based upon the quality of their work. Such decisions are not “neutral” in any ordinary sense of the word.⁹

The metaphor of “neutrality” has nevertheless recently been revived to describe a distinct facet of university administration. Influenced by a prominent report of the Goldwater Institute—*Campus Free Speech: A Legislative Proposal*—many commentators now use the “principle of institutional neutrality” to sustain the claim that universities “ought to maintain a position of neutrality on the ‘public policy controversies of the day.’”¹⁰ Understood in this way, the metaphor of “neutrality” does not refer to the relationship between universities and their faculty, but instead to the question of whether universities may address significant issues of large social salience.

⁹ Perhaps one way of rehabilitating the language of “neutrality” might be to say that universities should be neutral as to the substance of the views expressed by faculty even as they make judgments concerning the quality of faculty work. But any such sharp distinction between substance and quality is difficult to defend. Another way of rehabilitating the language of neutrality might be to note that academic freedom specifically prohibits administrative university officials from assessing the quality of faculty work. Such judgments must instead be made by qualified faculty. See MATTHEW W. FINKIN AND ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 38-41 (Yale University Press 2009). At the heart of academic freedom is the postulate that only trained faculty, rather than administrators, are equipped to determine the merits of faculty research. Academic freedom is in this sense a claim to professional self-regulation.

¹⁰ STANLEY KURTZ, JAMES MANLEY, & JONATHAN BUTCHER, *CAMPUS FREE SPEECH: A LEGISLATIVE PROPOSAL* 5, 10 (The Goldwater Institute 2017). On the influence of the Goldwater Report, see American Association of University Professors, *Campus Free-Speech Legislation: History, Progress, and Problems*, 104 *BULLETIN OF THE AAUP* 38, 38 (2018) (“One of the main forces driving the current round of free-speech legislation in the United States is the Goldwater Institute.”). Based upon the Goldwater Report, the Board of Trustees of the University of North Carolina at Chapel Hill adopted a resolution affirming “institutional neutrality on political and social issues,” by which it meant that the university could “not take stances as a collective institution on topics that may be perceived as politicized or controversial.” See Victoria Smith Ekstrand & Chengyuan Shao, *The State of Campus Free Expression in North Carolina: A Close Look at the “Restore/Preserve Campus Free Speech Act,”* 19 *FIRST AMEND. L. REV.* 285, 285-87 (2021); Hannah Rosenberger, *Questions Remain about UNC’s implementation of freedom of speech resolutions*, *THE DAILY TAR HEEL* (September 22, 2022), at <https://www.dailytarheel.com/article/2022/09/university-free-speech-explainer>; Jenna A. Robinson, *Did You Know? UNC-Chapel Hill Now Has Some of the Best Free-Speech Policies in the Nation* (August 4, 2022), at <https://www.jamesmartin.center/2022/08/did-you-know-unc-chapel-hill-now-has-some-of-the-best-free-speech-policies-in-the-nation/>.

In this contemporary usage, the principle of “institutional neutrality” holds that universities should never themselves address matters of public controversy. Individual faculty, who do not speak for the university, may address such matters, but university administrators may not do so. Faculty who purport to speak for the university, as for example when acting in a collective and official capacity as a department, are also prohibited from participating in public debates. The maintenance of this kind of institutional neutrality is said to be a fundamental postulate of academic freedom. Every violation of institutional neutrality is said to compromise the academic freedom of a university.

The origins of this concept of institutional neutrality lie in the famous 1967 report of the Kalven Committee at the University of Chicago.¹¹ The report was commissioned at a time when Students for a Democratic Society was demanding that the University divest from South Africa.¹² Chicago president George W. Beadle charged a distinguished committee, headed by the preeminent First Amendment scholar Harry Kalven, with clarifying “the University’s role in political and social action.”¹³

Building on established ideas of academic freedom—on what it called “a few old truths and a cherished tradition”—the Kalven Report takes as its premise that the “mission of the

¹¹ “The phrase ‘institutional neutrality’ is inexorably associated with principles enshrined in the so-called Kalven Report, adopted by the University of Chicago in 1967.” Joshua T. Katz, *Where’s the Line*, CITY JOURNAL (March 2, 2023), at <https://www.city-journal.org/article/wheres-the-line>.

¹² The Kalven Report may be found at <https://provost.uchicago.edu/reports/report-universitys-role-political-and-social-action>. On the activism that prompted the report, see AAUP, *supra* note 10, at 41. For the tumultuous circumstances surrounding the Kalven Report, see Geoffrey Stone, *Dafur and the Kalven Report: A Personal Journey*, UNIVERSITY OF CHICAGO LAW SCHOOL FACULTY BLOG (February 9, 2007), at https://uchicagolaw.typepad.com/faculty/2007/02/darfur_and_the_.html.

¹³ The Kalven Committee was appointed in February 1967. Its report was published in 1 RECORD (No. 1) (November 11, 1967). In addition to Harry Kalven, the members of the committee were John Hope Franklin, Gwin J. Kolb, George Stigler, Jacob Getzels, Julian Goldsmith, and Gilbert F. White. Stigler published a partial dissent. *See infra* note 27.

university is the discovery, improvement, and dissemination of knowledge.” The university must accordingly “embrace, be hospitable to, and encourage the widest diversity of views within its own community.” The Kalven Report deduces from this premise that the university is itself “a community . . . only for the limited, albeit great, purposes of teaching and research.” Because “the university is a community only for these limited and distinctive purposes,” the Kalven Report jumps to the far-reaching conclusion that a university

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

The neutrality of the university as an institution arises then not from a lack of courage nor out of indifference and insensitivity. It arises out of respect for free inquiry and the obligation to cherish a diversity of viewpoints. And this neutrality as an institution has its complement in the fullest freedom for its faculty and students as individuals to participate in political action and social protest.

On close inspection, the Kalven Report is not quite clear about the justification for its bold assertion that universities must adopt a position of “neutrality” with regard to issues of social and political controversy. The Report may have assumed universities necessarily compromise the independence of faculty because universities “speak for” faculty whenever universities address issues of social and political controversy. But this assumption contradicts a basic axiom of academic freedom, which is that universities do not speak for faculty, just as faculty do not speak for universities.¹⁴ It makes more sense, therefore, to interpret the Report as resting on an empirical judgment that whenever a university addresses significant social issues, it

¹⁴ The Kalven Report does not propose an absolute rule of institutional neutrality, but instead asserts only that there should exist “a heavy presumption against the university taking collective action or expressing opinions on the political and social issues of the day, or modifying its corporate activities to foster social or political values.” Kalven Report, *supra* note 12. This conclusion is obviously in tension with any claim that violations of institutional neutrality are *inherently* violations of academic freedom.

implicitly inhibits faculty freedom¹⁵ because it pressures dissenting faculty to conform to an official university position.¹⁶

This is a forceful and consequential claim, but it lacks empirical evidence. It was not generally accepted.¹⁷ Although the Kalven Report was approved by the University of Chicago, it

¹⁵ Institutional neutrality, it is sometimes said, “is a separate and crucial pillar of academic freedom: University leadership should refrain from taking views on behalf of the institution and instead remain neutral. In so doing, it would allow its students and faculty to speak for themselves without the pressure of conforming to or departing from the institutional position. Institutional neutrality is thus necessary to ensure that students and faculty, potentially vulnerable to implicit pressure from the administration, are provided space to voice their conscience and engage in rigorous inquiry that may well lead to more sound conclusions.” David Sacks, *Institutional neutrality comes before viewpoint diversity*, BROWN DAILY HERALD (May 27, 2023), at <https://www.browndailyherald.com/article/2022/12/sacks-22-institutional-neutrality-comes-before-viewpoint-diversity>.

¹⁶ See Robert J. Zimmer, *What is Academic Freedom For?*, in WHO’S AFRAID OF ACADEMIC FREEDOM 243-44 (Akeel Bilgrami & Jonathan Cole, eds., Columbia University Press 2015) (“[T]he focus on rigorous, intense, and open inquiry carried out by the faculty and students of the University must be accompanied by the greatest possible intellectual freedom, in an environment that supports openness and avoids steps that lead to chilling the environment. . . . [I]t follows that the University, as an institution, should take no political positions and should remain neutral on such matters . . . in order to ensure that we have a maximally open environment. Violations of neutrality are a mark against the maintenance of a non-chilling environment.”); Ben Medeiros, *The ideological significance of “institutional neutrality” mandates in state-level campus speech legislation*, 53 FIRST AMENDMENT STUDIES 22, 22 (2019).

¹⁷ Indeed, two years after the Kalven Report the Council of the AAUP issued a statement entitled “The Question of Institutional Neutrality”:

In this time of tension over social and political issues, academic communities have been in no way immune from division and controversy.

This Association has supported principles which encourage debate on all issues and which protect the individual from any reprisal for positions taken on political or social issues.

It again commends these principles, particularly those which support open dialogue and respect for the opinions of others, to all members of the academic community.

The Association is aware, however, that these positions do not end the debate; indeed, debate is generated as to the proper roles of faculties in discussion of those issues.

This debate can be illustrated by the comparison of two clearly stated, contradictory positions. The first can be stated as follows:

The provision of a setting for open dialogue, safe from pressures for reprisal and ensuring respect for the rights of dissent, is possible only if the institution within which this dialogue is to take place is itself, *as an institution*, neutral on the issues being debated. This means that no governing board, no president, and no faculty as a corporate body may give preferred official status to any political position without infringing upon the academic freedom of those in the institution who hold different views.

An opposing principle can be asserted in the following form:

Any institution which exists as part of a political or social system inevitably plays a role—political and social—in the system. Neutrality on political and social questions is therefore unrealizable. Particularly in times of crisis, it is asserted, when oral issues threaten the foundations of society, silence (even in the name of neutrality) is a political act. Proponents of this principle insist that

was not embraced by any other major university for more than five decades. It has, however, been revived in recent years, buoyed by the conservative agenda of the Goldwater Institute. In 2022, the University of North Carolina became the first major university after Chicago to adopt the Kalven Report.¹⁸ A trustee of UNC argued that institutional neutrality was required “to promote more civil conversation around controversial issues without a ‘chilling effect’ from the University or department heads taking a position.”¹⁹ Five years previously, the Goldwater Institute in *Campus Free Speech* had vigorously asserted this same proposition. “When a

the preservation of basic moral values requires that all institutions, especially those of higher education, take formal and collective positions on the basic issues dividing society.

The Council of this Association has not escaped this dispute. It finds itself divided between these principles and intermediate positions that are held with equal earnestness. It therefore feels itself obliged to commend to the community of higher education a searching examination of the issues involved, to be explicit about the risks involved in *any* actions taken, and in any case to ensure freedom for the proponents of *all* points of view.

A Statement of the Association’s Council: The Question of Institutional Neutrality, 55 AAUP BULLETIN 488 (1969). The Council’s statement was apparently prompted by AAUP General Counsel William W. Van Alstyne, who asked whether faculty participation in the Vietnam Moratorium should be addressed by the AAUP. Record of Council Meeting, 56 AAUP BULLETIN 44 (1970). The *AAUP Bulletin* subsequently sponsored a debate on the issue of institutional neutrality. See, e.g., Donald N. Koster & Winton U. Solberg, *On Institutional Neutrality*, 56 AAUP BULLETIN 11 (1970); Carl Landauer, Denis Cowan, Tyrus Hillway and Kalman Goldberg, *Further Comments on Institutional Neutrality*, 56 AAUP BULLETIN 123 (1970); Alan Wolfe, *A Summer Look at the Spring Events*, 56 AAUP BULLETIN 269 (1970); Kinglsey Widmer, *The End of Hired Learning?* 56 AAUP BULLETIN 273 (1970); Samuel Krislov, *The Obligation to Reject Engagement*, 56 AAUP BULLETIN 276 (1970). For a fine and nuanced early discussion of the question of institutional neutrality, see Richard H. Sullivan, *The Socially Involved University*, BULLETIN NO. 34 OF THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, at 64 (1971). The Kalven Report itself seems to have exercised little influence on these contemporaneous debates about the question of institutional neutrality. It is neither mentioned nor discussed.

¹⁸ Katz, *supra* note 11. See Mark McNeilly, *Universities Should Adopt Institutional Neutrality*, HETERODOX: THE BLOG (October 18, 2022), at <https://heterodoxacademy.org/blog/universities-should-adopt-institutional-neutrality/>.

¹⁹ Quoted in Rosenberger, *supra* note 10. See BLUEPRINT FOR REFORM: INSTITUTIONAL NEUTRALITY at 1, THE JAMES G. MARTIN CENTER FOR ACADEMIC RENEWAL, at <https://www.jamesgmartin.center/wp-content/uploads/2020/08/Blueprint-for-Reform-Institutional-Neutrality.pdf> (“‘Institutional Neutrality’ is a guiding principle that states institutions of higher education ‘cannot take collective action on the issues of the day.’ To take such actions will endanger the university’s mission, since it will inhibit the expression of opinion.”); *Cornell Should Adopt the Kalven Report*, CORNELL REVIEW (August 3, 2022), at <https://www.thecornellreview.org/cornell-should-adopt-the-kalven-report/> (“Once the President issues an official statement, students and faculty feel threatened if they continue to debate an issue. This elevates the President to be the arbiter of any and all social and political issues of the day. But her duty is foster a climate of open inquiry and debate rather than to select on her own the best solution to the world’s problems. . . . The University of North Carolina Board of Trustees just adopted the Kalven Report, and Cornell would be wise to do so as well.”).

university, as an institution, takes a strong stand on a major public debate,” it said, “this inherently pressures faculty and students to toe the official university line, thereby inhibiting their freedom to speak and decide for themselves.”²⁰

The vulnerability of this line of argument can be seen in the Institute’s odd use of the adverb “inherently.”²¹ It is a question of fact, not of logic, whether faculty might feel pressured if

²⁰ KURTZ, MANLEY, & BUTCHER, *supra* note 10, at 5. The claim that a violation of institutional neutrality is “inherently” a violation of academic freedom is inconsistent with the assertion in the Goldwater Institute Report that “no institution can be perfectly neutral. Universities must, for example, be able to advocate for tuition increases and other matters essential to their day-to-day functioning. That is why the boundaries of institutional neutrality must remain a matter of judgment for university administrators Despite the aspirational language, in our view, divestment of university holdings on political grounds would clearly raise neutrality issues. . . . But again, the boundaries of the neutrality principle are ultimately a matter of judgment, to be determined by administrators and governing boards.” *Id.* at 10. The Goldwater Report is explicit that its recommendation about “institutional neutrality is aspirational in character. Rather than undertaking the difficult task of identifying a clear boundary in law between issues on which there is a social consensus and issues of public controversy, the bill simply affirms the basic principle of institutional neutrality and leaves its application in the hands of the university governing board.” *Id.* at 6.

If violations of institutional neutrality inherently violate academic freedom, it makes little sense to say that the goal of institutional neutrality is merely “aspirational.” See, e.g., Leslie Spencer, *Harry Kalven, Institutional Neutrality, and the “Charisma” of the First Amendment*, PRINCETONIANS FOR FREE SPEECH (October 11, 2022), at <https://princetoniansforfreespeech.com/harry-kalven-institutional-neutrality-and-charisma-first-amendment> (“Institutional Neutrality requires that a university should not take collective action or positions on issues of the day for fear that by doing so it would undermine the university’s commitment to free and open inquiry by faculty and students on those very issues. . . [T]o be true to its mission a university should never compromise the imperative of institutional neutrality, even in the name of what are thought to be just causes. That means a university, including its academic departments and other units, if true to its mission, should refrain from official statements about supreme court decisions, elections, wars, legislation, or social protests of the day. It should not endorse or condemn Black Lives Matter or Critical Race Theory. It should resist pressure to boycott disfavored countries or industries. It should not impose mandatory diversity statements in hiring and promotion, it should not weigh in on the acceptability of speakers or events on campus, it should not impose speech codes or safe spaces.”).

²¹ It is argued in *Campus Free Speech* that “when the university speaks, it does so with funds that have likely not been given to it for that purpose. This raises the risk that students and faculty could be compelled to fund or be associated with speech they disagree with and that puts the university in the position of making content-based decisions about what speech to fund. Compelling members of the university community to support speech burdens their First amendment rights, since the right to free speech includes the right not to speak. The bedrock principle of the model bill is that members of the university community should not be required to surrender their First Amendment rights in order to participate in the life of the university, protecting the right not to speak is equally important to preserve First Amendment freedoms.

KURTZ, MANLEY, & BUTCHER, *supra* note 10, at 10. Several points should be made about this argument. First, it concerns First Amendment rights, not academic freedom. For a discussion of the difference between First Amendment rights of free speech and academic freedom, see Robert C. Post, *Academic Freedom and Legal Scholarship*, 64 JOURNAL OF LEGAL EDUCATION 530 (2015). Second, the argument turns on the highly controversial proposition that compelled subsidization of speech is equivalent to compelled speech. See Robert C. Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUPREME COURT REVIEW 195. There are many situations in which the compelled subsidization of speech is not deemed to be equivalent to compelled speech, the most prominent being the relationship between taxation and government speech. The

their university decides to state a position in a public debate. As with most questions of fact, there are a whole range of possibilities. At one end of the spectrum, there are obvious examples of universities adopting positions with the intention and effect of suppressing faculty dissent. The Kalven Report might have had in mind, for example, Columbia University's imperious president, Nicholas Murray Butler, who declared in 1917 after the commencement of World War I that Columbia would support the war and suppress all who disagreed:

What has been tolerated before becomes intolerable now. What had been wrongheadedness was now sedition. What had been folly was now treason There is and will be no place in Columbia University for any person who opposes or counsels opposition to the effective enforcement of the laws of the United States, or who acts, speaks or writes treason. . . . This is the University's last and only warning to any among us . . . who are not with whole heart and mind and strength committed to fight with us to make the world safe for democracy.²²

Butler was deadly serious, firing Professors James McKeen Cattell and Henry Wadsworth Longfellow Dana.²³ Butler's clumsy but effective efforts are similar to contemporary legislation

Supreme Court has addressed this issue in the context of universities in *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), in which it intimated that if university spending decisions "were financed by tuition dollars and the University and its officials were responsible" for the allocation of funds, any speech that might exist would be that of "the government itself." The First Amendment does not restrain government speech. *Shurtleff v. City of Boston*, 142 S.Ct. 1583, 1587 (2022). Third, if the argument of the Goldwater Institute were accepted, virtually all university investment decisions, not just those in which a university is deciding to divest, would be subject to constitutional First Amendment challenge, a possibility that hardly seems to admit of a practical solution.

²² Nicholas Murray Butler, 1917 Commencement Address, quoted in CAROL GRUBER, *MARS AND MINERVA: WORLD WAR I AND THE USES OF HIGHER LEARNING IN AMERICA* 199 (Baton Rouge: Louisiana State University Press 1975).

²³ For a discussion, see RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 495-502 (New York: Columbia University Press 1955). In contrast to Butler, Harvard President Abbott Lawrence Lowell stated:

If a university or college censors what its professors may say, if it restrains them from uttering something it does not approve, it thereby assumes responsibility for that which it permits them to say. This is logical and inevitable, but it is a responsibility which an institution of learning would be very unwise in assuming. It is sometimes suggested that the principles are different in time of war; that the governing boards are then justified in restraining unpatriotic expression injurious to the country. But the same problem is presented in war time as in time of peace. If the university is right in restraining its professors, it has a duty to do so, and it is responsible for whatever it permits. There is no middle ground. Either the university assumes full responsibility for permitting its professors to express certain opinions in public, or it assumes no responsibility whatever, and leaves them to be dealt with like other citizens by the public authorities according to the law of the land.

Id. at 503-04.

seeking to compel universities to prohibit Critical Race Theory, the most outstanding example being Florida’s Stop WOKE Act.²⁴

At the other end of the spectrum, however, there are many university commitments that do not seem plausibly connected to faculty research or teaching.²⁵ The Kalven Report was itself motivated by pressure on the University of Chicago to divest from South Africa. Investment policies seem only faintly related to a campus environment of academic freedom. It is quite far-fetched to claim that a university’s financial strategy will in any way inhibit faculty research or teaching. So, for example, by 1988 “some 155 U.S. universities divested, at least in part, from South Africa, including prestigious institutions like Harvard, Cornell, and the University of California.”²⁶ There is no evidence whatever that these divestment decisions ever in any way imperiled academic freedom at these institutions.²⁷

²⁴ Neal Hutchens & Vanessa Miller, *Florida’s Stop WOKE Act: A Wake-Up Call for Faculty Academic Freedom*, 48 J. COL. & UNIV. LAW 35 (2023). See Katherine Mangan, ‘More Cowardly Than Cautious’: Faculty Decry College Leaders’ Silence on DEI Attacks, CHRONICLE OF HIGHER EDUCATION (May 25, 2023), at <https://www.chronicle.com/article/more-cowardly-than-cautious-faculty-decry-college-leaders-silence-on-dei-attacks> (“In Florida, legislation that Gov. Ron DeSantis, a Republican, signed into law this month bans public colleges from spending state or federal funding on DEI unless it’s required by federal law. The colleges will also be banned from offering general-education courses that ‘distort significant historical events,’ teach ‘identity politics,’ or are ‘based on theories that systemic racism, sexism, oppression, or privilege are inherent in the institutions of the United States.’”); Greg Sargent, *How DeSantis’s own lawyers accidentally exposed his anti-woke deceit*, WASHINGTON POST (July 11, 2023), at <https://www.washingtonpost.com/opinions/2023/07/11/desantis-stop-woke-act-affirmative-action-supreme-court/>.

²⁵ See Mike Dorf, *Academic Freedom, Chicago Style*, DORF ON LAW (October 27, 2009), at <http://www.dorfonlaw.org/2009/10/academic-freedom-chicago-style.html>.

²⁶ Eli Thorkelson, *Kalven Report and Chicago Academic Politics*, DECASIA: CRITICAL ANTHROPOLOGY OF ACADEMIC CULTURE (November 30, 2008), at https://decasia.org/academic_culture/2008/11/kalven-report-and-chicago-academic-politics/index.html; Richard Knight, *Sanctions, Disinvestment, and U.S. Corporations in South Africa*, in SANCTIONING APARTHEID (Robert E. Edgar, ed., Trenton: Africa World Press 1990).

²⁷ Which is not to say that university administrations have not at times found it convenient to resist demands to divest on the basis of the Kalven Report. Chicago president Robert Zimmer, for example, invoked the Kalven Report to justify his refusal to divest from Dafur. Thorkelson, *supra* note 26. The Goldwater Institute report is insistent that any “divestment” decision “would tend to inhibit intellectual freedom. This is particularly true for state universities, which should reflect the diverse views of the entire population of the state that provides the university funding.” KURTZ, MANLEY, & BUTCHER, *supra* note 10, at 5-6. It is noteworthy that the Kalven Report itself waffles somewhat on the question of administering university endowments. It states that “in situations involving university

Between these ends of the spectrum surely lie many intermediate cases. Consider, for example, the tweet issued by the Gillings School of Public Health at the University of North Carolina after *Dobbs v. Jackson Women’s Health Organization*:²⁸ “With its decision to overturn *Roe v. Wade*, the Supreme Court set the clock back 50 years. Recent research has demonstrated harmful impacts for those in the U.S. who are denied abortions.”²⁹ Conservative commentators immediately decried the tweet as “a gross violation of institutional neutrality” and hence as a degradation “of discussion and inquiry on campus.”³⁰ Whether the tweet in fact chilled discussion and inquiry, however, is a complex empirical question.

The actual effect of the tweet would seem to depend on many factors, including, most importantly, whether North Carolina faculty trust that the School of Public Health will respect the academic freedom of faculty who disagree with the tweet. Faculty trust lies at the heart of all academic freedom. Without such trust, faculty research can be inhibited by a virtually infinite range of otherwise innocent administrative decisions. With such trust, faculty research can continue unabated even if university leaders stake out strong contrary public positions. Consider,

ownership of property, its receipt of funds, its awarding of honors, its membership in other organizations,” the university of necessity “must act as an institution in its corporate capacity. In the exceptional instance, these corporate activities of the university may appear so incompatible with paramount social values as to require careful assessment of the consequences.” Kalven Report, *supra* note 12. George Stigler dissented on exactly this point. He would have preferred the Report to assert that when acting as a “property owner,” the university should not use its “corporate activities to foster any moral or political values because such use of its facilities will impair its integrity as the home of intellectual freedom.” *Id.* See Jamie Kalven, *Unfinished business of the Kalven Report*, CHICAGO MAROON (November 28, 2006), at <https://chicagomaroon.com/7464/viewpoints/op-ed/unfinished-business-of-the-kalven-report/>.

²⁸ 142 S.Ct. 2228 (2022).

²⁹ Jenna A. Robinson, *Did you Know? Post-Roe, UNC-Chapel Hill Has Struggled to Stay Neutral* (July 14, 2022), at <https://www.jamesgmartin.center/2022/07/did-you-know-post-ro-unc-chapel-hill-has-struggled-to-stay-neutral/>.

³⁰ *Id.*

for example, faculty who are employed at Catholic universities and who work in the area of reproductive rights.

The weakness of a mechanical conception of institutional neutrality is apparent in the context of religious universities. The logical implication of the Goldwater Institute report is that academic freedom cannot exist at a religious university, because the university's extraneous religious commitments would "inherently" degrade the atmosphere of faculty discussion and inquiry. Yet religious universities in the United States have a long and proud history of academic freedom. This strongly suggests that the relationship between academic freedom and a university's public positions depends upon many intervening variables. The mechanical conception of institutional neutrality advanced by the Goldwater Institute is especially problematic in the context of the American higher educational system, which is characterized by a private market in which universities and colleges compete to sell their own unique values and commitments.

The deep complexity of the issues raised by the Kalven Report are illuminated by a recent letter that Stanford Law School Dean Jenny S. Martinez sent her students after they disrupted a federal judge's effort to speak to the Stanford Federalist Society.³¹ Martinez condemned the actions of a Stanford administrator who had "inserted" herself into the "debate" between the judge and protesting students by suggesting that the judge "reconsider" what he had planned to say. The administrator, Martinez said, had imposed "the kind of institutional orthodoxy and coercion that the policy on Academic freedom precludes." Quoting at length from

³¹ Jenny S. Martinez to SLS Community (March 22, 2023), available at <https://law.stanford.edu/wp-content/uploads/2023/03/Next-Steps-on-Protests-and-Free-Speech.pdf>.

the Kalven Report, Martinez argued that “university administrators should avoid exercising their authority in ways that can chill speech.”

Immediately after invoking the Kalven Report, however, Martinez also insisted that “It bears emphasizing that [it] is *not* inconsistent with principles of academic freedom for the university administration to say that our LGBTQ+ students, faculty, and staff are valued members of our community of scholars. That goes to the basic norms of pluralism that underpin our operation as a university, in the same structural way that the normative commitment to free speech underpins those operations.” This passage of Martinez’s letter stakes out a strong position on one of the most controversial “issues of the day.”³² Many who now support a mechanical principle of institutional neutrality argue that university commitments to diversity and inclusion chill faculty speech just as surely as the university administrator condemned by Martinez.³³

The seeming inconsistency in the Martinez letter highlights a second conceptual difficulty lurking behind the slippery façade of institutional neutrality. The Kalven Report itself concedes, as it must, that a university *is* a community for purposes of research and teaching. With respect to these purposes, therefore, a university cannot be neutral. It must speak out to interpret, protect, and advance its own mission.³⁴ Although the nature and entailments of its

³² See, e.g., Spencer, *supra* note 20.

³³ University efforts “to support and reassure our students from diverse backgrounds” are condemned by advocates of institutional neutrality as “political, even anti-American.” Eric Kelderman, *The Silent Treatment: Why college presidents don’t speak out*, CHRONICLE OF HIGHER EDUCATION (July 26, 2022), at <https://chronicle.brightspotcdn.com/3c/a9/cb01914649febc09a2fe31577968/che-080522-x.pdf> (quoting Richard L. Dunsworth, president of the University of the Ozarks). See Iván Marinovic, *Can the University Survive Nihilism*, 17 J. L. ECON. & POL’Y 430 (2022) (condemning “the university’s evolving telos” from “truth-seeking to social justice”); Dorian Abbot, Sergiu Klainerman & Iván Marinovic, *The Political Problem on Campus*, NEWSWEEK (November 4, 2021), at <https://www.newsweek.com/political-problem-campus-opinion-1645065>; George F. Will, *When colleges take political positions, they show who isn’t wanted*, THE WASHINGTON POST (January 29, 2023), at <https://www.washingtonpost.com/opinions/2023/01/20/higher-education-political-stances-unserious/>.

³⁴ The Kalven Report states: “From time to time instances will arise in which the society, or segments of it, threaten the very mission of the university and its values of free inquiry. In such a crisis, it becomes the obligation of the

mission will often be highly controversial, there is no possible “neutral” position.³⁵ In such contexts, therefore, it is almost unintelligible to assert that “once a university takes sides, it is no longer a university.”³⁶

Martinez was accordingly well within her rights to take sides in a public controversy about the educational mission of Stanford Law.³⁷ Those who disagree with her commitment to pluralism and inclusion must do so on the merits and cannot hide behind an abstract and empty postulate of “institutional neutrality.” Many of the most controversial issues on campus today concern competing interpretations of the pedagogical mission of higher education. University leaders have no choice but to articulate their own particular vision of that mission.

When all is said and done, therefore, a mechanical principle of institutional neutrality does rather little analytic work. The principle is immaterial to the many actions and commitments that educational administrators must make when interpreting and implementing their own vision of a university’s core mission. When educational administrators do act and speak about ideals unrelated to a university’s core mission, the essential question is not the loss of neutrality but instead the resulting chill on academic freedom.³⁸ The degree of any such chill will be a contingent and empirical question.

university as an institution to oppose such measures and actively to defend its interests and its values.” Kalven Report, *supra* note 12.

³⁵ See Morris B. Abram, *Reflections on the University in the New Revolution*, 99 DAEDALUS 122, 124 (1970) (“[T]he university can never be neutral about its mission and its commitment.”).

³⁶ Stone, *supra* note 12. See Rick Garnett, *Why Do Universities Exist?*, PRAWFSBLAWG (February 16, 2007), at https://prawfsblawg.blogs.com/prawfsblawg/2007/02/why_do_universi.html; Paul Horowitz, *What is the “University?”*, PRAWFSBLAWG (February 17, 2007), at https://prawfsblawg.blogs.com/prawfsblawg/2007/02/what_is_the_uni.html.

³⁷ See Marc Tessler-Lavigne & Persis Drell, *Advancing free speech and inclusion*, NOTES FROM THE QUAD (November 7, 2017), at <https://quadblog.stanford.edu/2017/11/07/advancing-free-speech-and-inclusion/>.

³⁸ A question that I do not discuss is whether individual university units can issue statements of policy extraneous to a university’s core mission. This question raises the distinct theoretical issue of who exactly should be authorized to

This is not to say that issues currently being debated under the rubric of institutional neutrality are not important and difficult. But the effort of the Kalven Report logically to tie these issues to freedom of teaching and research is theoretically weak. The questions raised by the Kalven Report are better analyzed in terms of the perennial quest of universities to preserve immunity from external control. The ideal of academic freedom is relevant to this quest, but in a different sense than that theorized in the Kalven Report.

The coin of academic freedom has always had two faces. One face is directed inwards at the members of a university community. In this context academic freedom articulates the values and ideals that ought to govern relationships among members of the university community. The other face of academic freedom is directed outwards, toward society at large. It asserts that universities ought not to be regulated in ways that might undercut their mission of producing education and knowledge.³⁹ Universities can be successful only if they are free autonomously to pursue these goods. Ultimately the external argument for academic freedom is only as powerful as society's desire for education and knowledge.

speaking for a university. As a general matter, it can be said that the more that a university authorizes decentralized units to make statements of policy extraneous to the university's core mission, the more it risks creating a confused environment of conflicting policy positions. It can also be said that insofar as a university authorizes front-line academic decision-making units (like departments) to make policy statements that border on faculty research agendas, the greater the risk that academic freedom may actually be chilled. *Compare* Draft Report of the Joint Senate-Administration Workgroup on The Role of the University and its Units in Political and Social Action (University of California at Berkeley) (May 2022), at https://evcp.berkeley.edu/sites/default/files/joint_senate-admin_working_group_report_on_the_role_of_the_university_in_political_action_draft_202205.pdf, with Robert P. George, *Universities Shouldn't Be Ideological Churches*, THE ATLANTIC (June 2023), at <https://www.theatlantic.com/ideas/archive/2023/06/university-statements-political-issues-abortion-princeton/674390/> and Tom Ginsburg, *The Case for University Silence*, PERSUASION (October 25, 2023), at <https://www.persuasion.community/p/the-case-for-university-silence>. For a good discussion, see Brian Soucek, *Academic Freedom and Departmental Speech*, ACADEME (Spring 2022), at 24.

³⁹ On this second sense of academic freedom, see Metzger, *supra* note 1; *Gutter v. Bollinger*, 539 U.S. 306, 329 (2003). On the outwardly facing aspects of academic freedom, see Robert Post, *Why Bother with Academic Freedom*, 9 FL. INT'L U. L. REV. 9 (2013).

When universities invoke the ideal of institutional autonomy in the context of actions extrinsic to their core mission, they cannot claim the protective mantle of this outwardly facing concept of academic freedom. The production of education and knowledge is *ex hypothesi* not at stake. Hence it is one thing for a university to pursue the goal of diversity to improve its educational outcomes, and it quite another if a university seeks to pursue that goal to meet demands of social justice that are unrelated to a university's educational mission.⁴⁰ Although a university can claim the privilege of academic freedom and autonomous self-determination with respect to the former, it cannot with respect to the latter. Universities have no special claim to authority with regard to matters of social justice. Society might well believe that *its* ideals of social justice, democratically determined, ought to be imposed on universities, just as they are imposed on every other institution in society.

When universities do not stick to their mission, therefore, they invite society to impose forms of external regulation that many members of the academic community may deeply oppose. Universities cannot resist such regulation by invoking the external ideal of academic freedom. Universities become more vulnerable to such interventions insofar as their members systematically hold different values than those of the general public,⁴¹ and insofar as universities themselves are targets in a *kulturkampf* aimed at undermining the authority of expertise.⁴² In such situations, universities offer tempting targets for external intervention.

⁴⁰ On the distinction between these two goals, see Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 58-66 (2003); Robert Post, *Preface*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 20-21 (Robert Post & Michael Rogin, eds., New York: Zone Books 1998).

⁴¹ Marinovic, *supra* note 33, at 432-36.

⁴² See Megan Brenan, *Americans' Confidence in Higher Education Down Sharply*, GALLUP NEWS (July 11, 2023), at <https://news.gallup.com/poll/508352/americans-confidence-higher-education-down-sharply.aspx>. Thus President Trump's handpicked advisory commission, in the course of a brief and unabashedly partisan history of the United States, nevertheless took time explicitly to announce:

This does not imply that universities should never pursue goals apart from those of research and education. But it does imply that they should do so only cautiously and with acute attention to the potential vulnerabilities that such actions may induce. The urgency of the extrinsic goal must be weighed against the risks associated with pursuing the goal. In such contexts, university leaders cannot simply follow rules; they must exercise statesmanship. The upshot is perhaps best captured by Princeton President Christopher Eisgruber, who notes that Princeton rejects “a policy of strict ‘institutional neutrality’” and instead embraces a policy of “institutional restraint.”⁴³

The ideal of institutional restraint is attractive. Universities have flourished in the United States because they have made a bargain with society. Universities produce knowledge and education, and in return society refrains from regulating them in ways that might interfere with this production. The ideal of academic freedom preserves the internal culture necessary to produce knowledge and education, and it simultaneously shields universities from outside restraints that may threaten the production of these goods.

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

Deliberately destructive scholarship shatters the civic bonds that unite all Americans. It silences the discourse essential to a free society by breeding division, distrust, and hatred among citizens. And it is the intellectual force behind so much of the violence in our cities, suppression of free speech in our universities, and defamation of our treasured national statutes and symbols.

To restore our society, academics must return to their vocation of relentlessly pursuing the truth and engaging in honest scholarship that seeks to understand the world and America’s place in it.

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

⁴³ Christopher Eisgruber, *Princeton’s Tradition of Institutional Restraint*, PRINCETON ALUMNI WEEKLY (November 7, 2022), at <https://paw.princeton.edu/article/princeton-president-christopher-eisgruber-tradition-institutional-restraint>. See Mohan Setty-Charity, *Stick with institutional restraint, not institutional neutrality*, DAILY PRINCETONIAN (March 7, 2023), at <https://www.dailyprincetonian.com/article/2023/03/princeton-opinion-institutional-restraint-neutrality-free-speech-minority-voices>.

When universities forsake the shelter of this bargain and pursue controversial ends unrelated to the production of knowledge or education, they put their own institutional autonomy in potentially serious jeopardy. They risk presenting themselves as organizations seeking unjustified exemptions from social regulation, hence undermining the external ideal of academic freedom and endangering a precious reservoir of social trust.⁴⁴ A policy of institutional restraint minimizes these risks; it implies that universities should depart from the terms of the original bargain only when truly necessary.

Understood in this way, institutional restraint is a counsel of prudence, not a principle of academic freedom. If, as I have argued, the attempt to link a principle of institutional neutrality directly to the requirements of academic freedom is misguided,⁴⁵ we can now see that the principle additionally suffers from a misleading effort to substitute a mechanical rule for what inevitably must involve statesmanlike calculations. Like most organizations, universities are free to pursue goals based on relevant payoff matrices. As the recent Gaza War illustrates, these matrices can be extremely complex. In contrast to most organizations, however, the counsel of restraint reminds us that universities ought to be cautious when pursuing goals extraneous to their core mission, for the pursuit of such goals can pose serious long-term systemic risks.

Universities occupy a special and privileged position in our society. Claims to professional autonomy and self-regulation have been largely successful. For the most part, universities still stand in the United States as pillars of independence. But this independence is

⁴⁴ For a concise summary of other policy arguments in favor of restraint, see Solberg, *supra* note 17, at 13.

⁴⁵ It is of course inconsistent for advocates of “institutional neutrality” to simultaneously claim that it is a fundamental principle of academic freedom and that it is merely “aspirational.” See *supra* note 20. The same contradiction afflicts the Kalven Report itself. See *supra* note 14. This contradiction might justify the conclusion that even those who advocate for the ideal of institutional neutrality understand that in the last analysis it is not a principle of academic freedom but a counsel of prudence.

justified by the core mission of universities—education and research. The pursuit of goals extrinsic to this mission may invite social interventions designed to weaken university independence. University administrators, who are under a fiduciary obligation to conserve and protect the independence of their universities, ought to use care and prudence in pursuing goals extraneous to education and research.