

ACADEMIC LIMBO: REFORMING CAMPUS SPEECH GOVERNANCE FOR STUDENTS

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This essay examines the structural inequalities in academic freedom protections between faculty and students at private universities, highlighted by the 2023 Gaza-related campus protests. While faculty members enjoy multiple layers of protection through tenure, contracts, and legal precedents, students must rely solely on discretionary university policies interpreted by the administrators who restrict their speech. Through analysis of recent campus conflicts, this essay argues that current frameworks for protecting student academic freedom in private universities are fundamentally inadequate and proposes establishing institutional oversight boards inspired by social media governance models. Unlike temporary committees, these boards would provide consistent, transparent adjudication processes while building precedent for future cases. This essay demonstrates why university implementation of such oversight mechanisms offers distinct advantages over social media models, including manageable case volumes and clearer contextual standards. By creating institutional separation of powers, these reforms would help align administrative actions with stated commitments to academic freedom while maintaining necessary operational control.

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INTRODUCTION

In October 2023, students erected protest encampments across major university campuses - from Columbia to Georgetown.¹ Within days, Columbia's administration suspended two student groups, setting off a chain reaction of protests and administrative crackdowns nationwide.² This moment crystallized a fundamental paradox: while universities celebrate academic freedom in principle, their responses to student expression often reveal a starkly different reality.

Consider the stark disparity in speech protections. When faculty members take controversial positions, they enjoy multiple layers of security - tenure, contracts, and established legal precedent. Students, however, must rely on malleable university policies interpreted by the very administrators restricting their speech. At private institutions beyond Constitutional reach, this power imbalance proves especially acute. When Columbia dismantled protest encampments or Harvard struggled to balance competing speech interests, students found themselves without meaningful recourse to challenge these decisions.³

This essay argues that current frameworks for protecting student academic freedom in private universities are fundamentally broken. The stakes extend far beyond individual disputes - they touch the core mission of higher education itself. Each time administrators shut down controversial expression without principled justification or meaningful review, they signal that institutional convenience trumps the robust discourse essential for knowledge creation and truth-seeking.

Drawing inspiration from recent experiments in social media governance, this Article proposes establishing permanent oversight boards within private universities to adjudicate speech-related conflicts. Unlike temporary committees formed after controversies erupt, these boards would provide consistent, transparent processes while building

1. Kasprzak, *supra* note 1 (“Columbia University students rally in support of Palestine on October 12, 2023, in New York City. Pro-Palestinian groups are staging boycotts on Black Friday.”).

2. Johanna Alonso, *Columbia Suspends 2 Pro-Palestine Groups*, INSIDE HIGHER ED (Nov. 10, 2023), <https://www.insidehighered.com/news/students/free-speech/2023/11/10/columbia-suspends-two-pro-palestinian-groups> (last visited Nov 8, 2024) [<https://perma.cc/H2W9-YRTZ>]; Liset Cruz & Claire Fahy, *Columbia Faces Protests After Suspending 2 Pro-Palestinian Groups*, N.Y. TIMES (Nov. 15, 2023) <https://www.nytimes.com/2023/11/15/nyregion/columbia-university-ban-student-groups-israel-hamas-war.html> [<https://perma.cc/JPJ8-L8MR>].

3. Andrew Marantz, *How Columbia's Campus Was Torn Apart Over Gaza*, NEW YORKER (Apr. 25, 2024), <https://www.newyorker.com/news/daily-comment/how-columbias-campus-was-torn-apart-over-gaza> [<https://perma.cc/CR2H-P4KA>] (arguing that students lacked meaningful recourse when universities took action - facing arrest, suspension, or eviction, while university leadership made decisions under external pressure without student input.).

precedent to guide future cases. The timing for such reform proves especially advantageous - unlike social media platforms dealing with billions of content decisions, universities face manageable case volumes allowing careful consideration of each dispute's broader implications.

Part II examines why current approaches to student academic freedom prove structurally inadequate, particularly in private institutions beyond Constitutional reach. Part III analyzes the specific vulnerabilities that subject students to administrative overreach, using recent campus protests as illustrative case studies. Part IV develops the oversight board proposal, explaining why university implementation offers distinct advantages over social media models while addressing potential challenges to adoption.

I. STRUCTURAL DISPARITIES IN ACADEMIC FREEDOM PROTECTIONS

Academic freedom encompasses three fundamental principles: member independence from university control, institutional autonomy from state interference, and university's duty to safeguard both.⁴ Within university communities, student academic freedom warrants particular attention due to its unique vulnerabilities.

Students contribute essential elements to university education despite their developing expertise.⁵ First, their willingness to receive information from instructors drives intellectual growth.⁶ The right to learn and exchange ideas with teachers embodies academic freedom.⁷ Second, student engagement through questioning and debate forms an essential part of the educational process itself. When students from varied backgrounds challenge assumptions and propose alternative viewpoints, they expand the scope of academic inquiry. A university that suppresses

4. See Jogchum Vrieling, Paul Lemmens & Stephan Parmentier, *Academic Freedom as a Fundamental Right*, 13 *PROCEDIA – SOC. & BEHAV. SCI.* 117, 117 (2011) (“Academic freedom can be considered to comprise . . . individual rights to expressive freedoms for members of the academic community [both staff and students] . . . institutional autonomy . . .”); THOMAS MILES & TOM GINSBURG, *FREEDOM OF ACADEMIC EXPRESSION: A UNIVERSITY OF CHICAGO PERSPECTIVE* 6 (2024) (“[I]t comprises three related principles: (1) the individual rights of professors and students to hold and express opinions; (2) the institutional autonomy of the university from direct state interference; and (3) the state’s obligation to protect and enable (1) and (2).”).

5. See DAVID M. RABBAN, *ACADEMIC FREEDOM: FROM PROFESSIONAL NORM TO FIRST AMENDMENT RIGHT* 283 (2024) (comparing students with faculty about different justifications to exercise academic freedom).

6. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”).

7. See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 237 (Souter, J., concurring) (2000) (“Academic freedom thrives . . . on the independent and uninhibited exchange of ideas among teachers and students . . .”).

student voices risks creating an echo chamber antithetical to genuine scholarship.⁸

Yet despite their importance to academic discourse, students occupy a structurally inferior position regarding speech protections. Faculty members enjoy multiple layers of security - tenure, employment contracts, and often union representation - allowing them to express controversial views with relative safety.⁹ When universities take adverse action against faculty speech, established legal frameworks on employment contract, contract law, and civil procedures provide clear paths for challenge and review.

Students face a markedly different reality. When facing disciplinary decisions, students must rely primarily on internal university procedures to address speech-related grievances.¹⁰ These procedures often grant broad discretion to the same administrators who initiated the original restrictions, creating an inherent conflict of interest. The consequences of speech-related sanctions also weigh more heavily on students. While the contract relationship between the private university and student permits legal action,¹¹ students rarely succeed because courts typically defer to institutional policy interpretations. Also, while faculty members dismissed from one institution can often secure positions elsewhere based on their established reputations and credentials, students face potentially career-ending consequences from expulsions or disciplinary actions that permanently mark their academic records.

8. See *Report of the Ad Hoc Committee on Protest and Dissent*, UNIV. OF CHI. (Jan. 13, 2014), <https://provost.uchicago.edu/sites/default/files/documents/reports/Report%20Protest%20and%20Dissent.pdf> [<https://perma.cc/CR2H-P4KA>] (“Especially in a university community, the absence of dissent and protest—not its presence—is a cause for concern.”).

9. While we here emphasize students' position relative to faculty within academic freedom, we are aware of and share concerns about recent university politics undermining institutional protections for faculty, such as tenure. See Joan Wallach Scott, *Academic Freedom & the Politics of the University*, 153 *DAEDALUS* 149, 160 (2024) (“The current move in red states to outlaw tenure entirely, driven by a desire to get rid of troublesome critical faculty and not necessarily motivated by workforce calculations, will surely finish the job.”).

10. See Jacob E. Gersen & Jeannie Suk Gersen, *Academic Freedom and Discipline: The Case of the Arguably Peaceful Protestors*, 76 *STAN. L. REV.* 1537, 1541 (2024) (“Those complaints are investigated and adjudicated within a university’s disciplinary system, the proceedings and decisions of which are generally confidential.”).

11. See Max M. Schanzenbach & Kimberly Yuracko, *What is the University-Student Contract?*, 65 *ARIZ. L. REV.* 965, 966 (2023) (“Courts today readily accept that the university-student relationship is fundamentally contractual”); K.B. Melear, *The Contractual Relationship between Student and Institution: Disciplinary, Academic and Consumer Contexts Book Review*, 30 *J. COLL. & UNI. L.* 175, 175 (2003) (“In its contemporary manifestation, contract theory provides students an outlet that was previously unavailable to seek redress against their colleges and universities.”).

The structural vulnerability of student academic freedom extends beyond mere procedural inequities. Universities often justify speech restrictions through broadly-worded policies targeting “disruption” or “harm” - malleable concepts that administrators can interpret expansively. Without external oversight or meaningful appeal mechanisms, these policies can become tools for suppressing uncomfortable but valuable discourse rather than protecting legitimate institutional interests.

Yet acknowledging students' inferior position does not imply they should enjoy unlimited expression rights. Universities must balance competing interests - maintaining functional educational environments while protecting robust debate. The challenge lies not in choosing between absolute freedom and complete control, but in developing principled frameworks for drawing appropriate lines between protected and restricted speech.

II. INSTITUTIONAL BARRIERS TO STUDENT EXPRESSION RIGHTS

The fundamental weakness in current approaches to student academic freedom stems from two interconnected problems: the absence of constitutional protections in private institutions and the inadequacy of existing university policies as meaningful substitutes.

Private universities operate outside First Amendment constraints, thereby creating a legal vacuum where student expression rights depend entirely on institutional policies and administrative discretion. The First Amendment applies mainly to government actors, not private institutions.¹² Despite limited exceptions through statutory restrictions¹³ and state action doctrine,¹⁴ most private universities remain unconstrained by constitutional speech protections.

12. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press”).

13. For example, California's Leonard Law (1992) bars “[p]rivate postsecondary educational institutions” from “subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution.” CAL. EDUC. CODE § 94367 (West 2024). The Leonard Law remains the only statute requiring private universities to observe First Amendment protections.

14. In 1946, the Supreme Court adopted the state action doctrine subjecting private property “use[d] by the public in general” to First Amendment restrictions. *Marsh v. Alabama*, 326 U.S. 501, 506 (1946). “Many people in the United States live in company-owned towns . . . There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments.” *Id.* at 508. However, the Supreme Court has never recognized private universities as state actors.

A promising trend appears. Several prestigious private universities claim to observe First Amendment principles.¹⁵ Moreover, many institutions voluntarily adopt free speech principles in campus policies. Major universities involved in Gaza protests - Columbia,¹⁶ Harvard,¹⁷ Pennsylvania,¹⁸ and Northwestern¹⁹ - have enacted such speech policies. This approach attempts to shield classroom speech and protect campus dissent, though scholars criticize this “First Amendment fetishism” as inappropriate for campus settings, particularly regarding hate speech protections.²⁰ While these guidelines provide some framework, their value remains limited.

However, these commitments, this essay argues, represent mere lip service and hollow hopes within academic institutions, rather than meaningful protection for students, because they lack external enforcement mechanisms or consistent interpretation standards.

To be more specific, the University speech policies typically suffer from three critical deficiencies. First, they grant administrators broad

15. Kiara Alfonseca, *Free Speech Debate Intensifies after Controversial Hearing with University Presidents*, ABC NEWS (Dec. 15, 2023, 5:16 AM), <https://abcnews.go.com/US/free-speech-debate-intensifies-after-controversial-hearing-university/story?id=105583764> [<https://perma.cc/N2C7-BHQB>] (then-presidents Claudine Gay at Harvard University and Elizabeth Magill at University of Pennsylvania claimed that the norm of speech in campus is influenced by the First Amendment in a congressional hearing regarding allegations of antisemitism at their schools).

16. *Rules of University Conduct*, COLUMBIA UNIV. POLICIES, <https://universitypolicies.columbia.edu/content/rules-university-conduct> [<https://perma.cc/G77G-XXQC>] (last visited Nov 8, 2024) (“§440. Affirmative Statement . . . Because of the University’s function as an incubator of ideas and viewpoints, the principle of free expression must be jealously guarded.”).

17. *Free Speech Guidelines*, HARVARD FAC. OF ARTS & SCIENCES (Feb. 13 & May 15, 1990), https://handbook.college.harvard.edu/sites/projects.iq.harvard.edu/files/collegehandbook/files/fas_free_speech_guidelines.pdf [<https://perma.cc/QGE4-G4WT>] (“Free speech is uniquely important to the University because we are a community committed to reason and rationale discourse.”).

18. *Guidelines on Open Expression*, UNIV. OF PA., <https://catalog.upenn.edu/pennbook/open-expression/> [<https://perma.cc/EC6W-8C77>] (last visited Nov 8, 2024) (“The University of Pennsylvania, as a community of scholars, affirms, supports and cherishes the concepts of freedom of thought, inquiry, speech, and lawful assembly.”).

19. *Northwestern Policies Overview: Campus Inclusion & Community*, NORTHWESTERN UNIV., <https://www.northwestern.edu/inclusion/respectnu/nu-policies-overview.html> [<https://perma.cc/3RQ2-YY6R>] (last visited Nov 8, 2024).

20. Kenji Yoshino, *Reconsidering the First Amendment Fetishism of Non-State Actors: The Case of Hate Speech on Social Media Platforms and at Private Universities*, 76 STAN. L. REV. 1755, 1757 (2024) (“Penn and Harvard engage in what might be called ‘First Amendment fetishism’ in that they protect speech beyond what law requires.”).

interpretive latitude through vague standards rather than clear rules.²¹ While flexibility in policy application seems desirable in theory, in practice it creates uncertainty that chills student expression. Students facing unclear boundaries and unpredictable enforcement often self-censor rather than risk sanctions.

Second, universities can unilaterally modify these policies without meaningful input from affected students. Unlike traditional contractual relationships where parties negotiate terms as equals, the university-student relationship features inherent power imbalances. Students' theoretical ability to "vote with their feet" by leaving provides little practical leverage given the significant costs of transferring and the limited number of elite institutions.

Third, current frameworks lack meaningful accountability mechanisms for reviewing administrative decisions on speech restrictions. Student speech on campus faces various interferences, from prior restraints to ongoing shutdowns and post-event discipline. While discipline activates remedy procedures, speech shutdowns and prior restraints rarely trigger review processes. The recent Gaza protests at universities demonstrate this gap perfectly. Without formal sanctions, administrators bypass reviewing their interventions. Furthermore, even when sanctions follow 'disruptive' speech, no independent body evaluates whether these actions serve educational purposes or align with institutional principles. Reviews focus solely on disciplinary correctness, ignoring speech intervention legitimacy. Critical questions about the necessity and proportionality of university responses remain unanswered, lost in a void of administrative discretion.

III. OVERSIGHT BOARDS AS CONSTITUTIONAL GOVERNANCE REFORM

The structural deficiencies in protecting student academic freedom demand institutional innovation. Drawing from constitutional principles and recent developments in private sector governance, this article proposes establishing permanent oversight boards within private universities to adjudicate speech-related disputes.

These boards would function as independent bodies within university governance structures, creating a quasi-judicial branch that mirrors the judiciary in the United States' constitutional system. When conflicts arise between student expression and institutional restrictions,

21. UNIV. OF CHI., *supra* note 9 ("The University's policies should . . . make clear what discipline will be imposed for violations of University rules . . . More directly relevant to protest and dissent, we note that the University's statutes appear to provide that discipline can be imposed for '[c]onduct . . . disruptive of the operations of the University.' . . . This prohibition, taken literally, is too broad.").

parties could present their cases before this independent forum. Board decisions would analyze whether administrative actions align with stated university principles and provide detailed reasoning. This process illuminates disciplinary decisions while building consistent precedent for future cases.²²

The effectiveness of such oversight boards depends critically on their independence from regular administrative structures. Board members should include representatives of students, university administration, faculty, and experts possessing relevant expertise in academic freedom, constitutional law, and university governance. Some experts should maintain distance from daily institutional management to ensure unbiased judgment and diverse discussion. Terms of service should be fixed and staggered to prevent political pressure from affecting decision-making.

The Board's judgments would have weak constraint, meaning administrators can reject decisions with articulated reasons. Since the Board includes external experts, strong constraints could interfere with university autonomy, contradicting academic freedom principles. Weak constraints allow administrators to evaluate actions and balance interests. While universities might initially resist binding judgments, even advisory decisions would improve current conditions through reasoned analysis.

Written opinions analyzing speech restrictions would create valuable precedents, developing coherent campus free expression doctrines. First Amendment law might misfit the academic setting given differences between criminal imprisonment and school suspension. A campus doctrine developed by experts and institutional representatives can address each university's unique characteristics. This process would constrain future administrative discretion by requiring justified departures from established principles rather than permitting arbitrary interpretations.

The social media oversight board model, particularly Meta's experience, provides valuable lessons while highlighting why university implementation might prove more successful. Meta's board was established to govern Facebook's problematic content moderation policy in light of international human rights law.²³ However, the board performs

22. See Gersen & Gersen, *supra* note 11, at 1541 (“While a university’s website may publicize its disciplinary policies and procedures, the confidentiality of cases means the public has no way to examine the workings, reasoning, or results of complaints, investigations, and adjudicative decisions”).

23. See generally Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2017) (tracing the formation of content moderation policies in social media); Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L. J. 2418 (2019) (tracing the history and reason for establishing the Oversight Board).

below expectations due to significant challenges: overwhelming case volumes,²⁴ diverse international speech standards,²⁵ and topic-sensitive content moderation needs.²⁶ Unlike Meta's experience, university oversight boards would encounter more favorable conditions for effective operation.

Campus speech disputes arise less frequently than social media conflicts, allowing thorough consideration of each case's implications. Universities also operate within more defined cultural and legal contexts than global platforms, facilitating consistent doctrine development. While social media requires near-instantaneous content moderation, academic freedom disputes typically involve ongoing situations where careful deliberation proves both possible and beneficial.

A permanent oversight structure offers distinct advantages over ad hoc investigation committees sometimes formed after controversial incidents. Temporary bodies, while potentially valuable for specific cases, cannot develop consistent principles or hold administrations accountable over time. Their recommendations remain isolated to particular circumstances, allowing future administrators to distinguish or ignore precedent easily.

Permanent oversight boards, conversely, create institutional memory and consistent pressure for principled decision-making. Their ongoing presence encourages administrators to consider potential review when crafting and implementing speech policies. This accountability mechanism helps align institutional behavior with stated commitments to academic freedom.

CONCLUSION

The current state of student academic freedom in private universities reveals a troubling paradox that undermines higher education's

24. See Evelyn Douek, *The Siren Call of Content Moderation Formalism*, in *SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY* 139, 146 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022) (“The flood of speech that the internet has enabled and that content moderation must govern is truly staggering.”).

25. See *id.* at 145 (“[T]he tens of thousands of them distributed around the globe will never agree on their application, like whether a particular picture meets the specific definition of breast-squeezing”); JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD* 150 (2006) (“[T]here is very little to say in favor of a single global rule for Internet speech . . . These dramatically different attitudes toward proper speech among the mature democracies reflect important differences among the peoples that populate these countries—differences in culture, history, and tastes.”).

26. See Evelyn Douek, *The Meta Oversight Board and the Empty Promise of Legitimacy*, 37 *HARV. J. L. & TECH.* 373, 430 (2023) (“[T]he Board has a clear pattern of ducking the most controversial questions that come before it.”).

fundamental mission. While these institutions proclaim unwavering commitment to free inquiry and open discourse, they simultaneously maintain governance structures that render student expression rights precarious and easily restricted. The consequences of this power imbalance extend beyond individual cases to shape campus culture, potentially discouraging the very forms of challenging discourse that universities should cultivate. As recent campus protests over international conflicts demonstrate, students must rely on malleable university policies interpreted by the same administrators who restrict their speech, while faculty members enjoy multiple layers of security through tenure and established legal precedents.

The establishment of institutional oversight boards within private universities offers a promising solution to this structural inequality, serving both institutional and student interests. By creating transparent, principled processes for resolving speech disputes, universities can demonstrate genuine commitment to academic freedom while maintaining necessary operational control. Unlike social media oversight models, university boards would operate under more favorable conditions with manageable case volumes and clearer contextual standards. The success of these reforms will ultimately depend on institutional willingness to accept meaningful constraints on administrative discretion, recognizing that true commitment to academic freedom requires governance structures that protect student expression rights even when that expression proves uncomfortable or challenging. Universities that embrace such accountability mechanisms will not only protect student academic freedom but also strengthen their educational missions while building more vibrant academic communities.