

Academic Freedom and Democratic Backsliding

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Academic freedom is under fire in many countries around the globe, fueled by heightened levels of polarization and political conflict.¹ Turkish President Recep Tayyip Erdoğan fired thousands of academics without due process in the wake of the 2016 coup.² Hong Kong academics have been jailed and purged for activities that were routine a few years ago, and their writings subject to censorship. And established democracies have not been immune: The French minister for higher education recently decried “Islamism” in universities.³ For the first time, Japan’s prime minister rejected applicants for a science council because they had criticized government policies.⁴

In the United States, the threat is two-pronged. A wave of Republican-led state legislatures are writing bills that would end tenure for state university faculty, as well as constrain teaching about race, and conservative elites are giving speeches with titles like “Universities Are the Enemy.”⁵ Some GOP politicians are now running on platforms of ending tenure and firing teachers of critical race theory.⁶ Another significant threat comes from forces internal to

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1. KATRIN KINZELBACH ET AL., PUB. POL’Y INST. & SCHOLARS AT RISK NETWORK, FREE UNIVERSITIES: PUTTING THE ACADEMIC FREEDOM INDEX INTO ACTION (Mar. 2021), https://www.gppi.net/media/KinzelbachEtAl_2021_Free_Universities_AFI-2020.pdf; Philip G. Altbach, *Academic Freedom: International Realities and Challenges*, 41 HIGHER ED. 205 (2001) (providing a comparative analysis).
2. Umut Özkirimli, *How to Liquidate a People? Academic Freedom in Turkey and Beyond*, 14 GLOBALIZATIONS 851 (2017).
3. France 24, *French Minister warns of ‘Islamism’ in Universities* (Feb. 17, 2021), <https://www.france24.com/en/live-news/20210217-french-minister-warns-of-islamism-in-universities>.
4. Linda Sieg & Yoshifumi Takemoto, *Japan’s Suga, Under Fire, Defends Rejection of Scholars for Science Panel*, REUTERS (Oct. 5, 2020), <https://www.reuters.com/article/uk-japan-politics-academics-idUKKBN26Q1HO>.
5. 2021-2022 H. 4522, 124th Sess. (S.C. 2012), https://www.scstatehouse.gov/sess124_2021-2022/bills/4522.htm (providing an example from South Carolina); J.D. Vance, *The Universities are the Enemy*, NATIONAL CONSERVATISM, Conference Oct. 31 - Nov. 2, 2021, <https://national-conservatism.org/natcon-2-2021/presenters/jd-vance/>.
6. Kate Mcgee, *Lt. Gov. Dan Patrick Proposes Ending University Tenure to Combat Critical Race Theory*

the university, such as administrators who seek to impose their vision of acceptable ideas and student groups who insist on shouting down opponents. To be sure, we have been here before, and it is important to remember that there was never a golden age in the United States.⁷ Moral panics about higher education are regular features of American life. Two scholars wrote in the 1990s that “[a]cademy-bashing is now among the fastest-growing of major U.S. industries, and the charges are as numerous as the bashers themselves.”⁸ Many of the concerns of the day have not changed since the 1990s: concerns over diversity, a fear that political correctness distorts inquiry and suppresses free speech, the decline of the humanities, and the financial sustainability of various funding streams. Then as now, attacks came from both right and left.⁹

What brings new urgency to the importance of academic freedom, both in the United States and around the world, is the problem of democratic backsliding. As has been well documented, we are in the midst of a global democratic recession. The high point for global democracy was something like 2006, and each year since has brought a decline in both the number of democracies and the number of people living in democracies.¹⁰ Less than half of countries in the world are democracies today, and less than half the global population now lives in a democracy.¹¹

Academic freedom is particularly relevant to democratic backsliding, because universities are a frequent target of leaders who seek to shape the polity to their own making and entrench their hold on power. One of the core strategies of such leaders is to try to control the public sphere.¹² In a “post-truth” era, the importance of epistemic arbiters such as universities, the media, and bureaucracy has never been more important, but it is precisely because these institutions are legitimated by their procedures for assessing facts that they are at risk. A leader or party bent on shaping the perception of the truth will naturally see autonomous knowledge institutions as a threat.¹³

This article lays out some of the strategies used by such politicians, as well as legal mechanisms available to defend academic freedom, drawn from inter-

Teachings, TEXAS TRIBUNE (Feb. 18, 2022).

7. Francis Oakley, *Against Nostalgia: Reflections on Our Present Discontents in American Higher Education*, in THE POLITICS OF LIBERAL EDUCATION 267 (Darryl J. Gless & Barbara Herrnstein Smith eds., 1990).
8. Cary Nelson & Michael Bérubé, *Introduction: A Report from the Front* 1, 1 in HIGHER EDUCATION UNDER FIRE: POLITICS, ECONOMICS, AND THE CRISIS OF THE HUMANITIES (Michael Bérubé & Cary Nelson eds., 1995).
9. *Id.* at 3 (noting that Lynne Cheney and Tom Hayden were prominent critics).
10. FREEDOM HOUSE, FREEDOM IN THE WORLD 2021, at 1 (2022).
11. *Id.*
12. TOM GINSBURG & AZIZ HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018).
13. Vicki C. Jackson, *President's Message: Legal Scholarship and Knowledge Institutions in Constitutional Democracy*, AALS NEWS - SUMMER 2019, <https://www.aals.org/about/publications/newsletters/summer2019/legal-scholarship-and-knowledge-institutions-in-constitutional-democracy/>.

national and comparative law. A handful of international courts and tribunals have considered individual cases, wrestling with the scope of academic freedom. In some cases, international courts have handed down decisions that constrain governments, while in others they have deferred to domestic regulatory autonomy. While such decisions may not easily transfer across borders, their elaboration provides resources for thinking about how to structure claims for academic freedom in a national context.

A word about the set of countries under consideration. The primary focus of this article is on democracies and “hybrid” regimes, meaning those that have some democratic institutions but are not considered full democracies. A long line of studies explores how intellectuals and academics are under threat from—but also sometimes able to carve out some space in—hard-line dictatorships.¹⁴ The strategies of academics under such conditions are myriad, and frequently ingenious. Yet these states are unlikely to be moved by arguments about academic freedom, and it is doubtful that legal rulings holding them liable for violating it would have any effect. This is not the case with established democracies, those that are backsliding or hybrid regimes that maintain some democratic space. At the same time, universities have a special importance in democracies, as places committed to the search for truth. In an era of fake news, preventing the erosion of academic freedom is the critical issue of the day, and the focus of this article.

The article is organized as follows. Part I provides background on academic freedom in the United States and around the world, focusing on national-level constitutions as a source of norms. Part II considers our fraught moment, providing examples of the ways in which academics are increasingly threatened, even in countries nominally committed to constitutional democracy. Part III reviews the state of jurisprudence on academic freedom, among both international and regional bodies, and calls for a more vigorous set of constitutional protections. Part IV concludes.

I. Academic Freedom in a Democracy

Academic freedom is part of a set of norms, only partially institutionalized, that help make democracy work. As Bo Rothstein puts it, democracy depends on “knowledge realism” and “assured knowledge of what is true and what is not.”¹⁵ A liberal society recognizes that the state alone cannot effectively serve this role; instead, it depends on actors in society who are able to pursue truth as a vocation. This requires an institutional basis for knowledge production that must remain, to some extent, distant from politics in order to play its role.

14. See, e.g., ERIC DAVIS, *MEMORIES OF STATE: POLITICS, HISTORY, AND COLLECTIVE IDENTITY IN MODERN IRAQ* (2005); Dmitri N. Shalin, *Intellectual Culture: The End of Russian Intelligentsia* (2012), https://digitalscholarship.unlv.edu/russian_culture/6; Obstacles to Excellence: Academic Freedom and China’s Quest for World-Class Universities SCHOLARS AT RISK NETWORK (Sept. 24, 2019), https://www.scholarsatrisk.org/wp-content/uploads/2019/09/Scholars-at-Risk-Obstacles-to-Excellence_EN.pdf.
15. Bo Rothstein, *What Saved American Democracy?*, SOC. EUROPE (Jan. 13, 2021), <https://socialeurope.eu/what-saved-american-democracy>.

The concept of academic freedom 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).¹⁶ As the United Nations Educational, Scientific and Cultural Organization (UNESCO) puts it, the concept also encompasses "the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies."¹⁷

These ideas crystallized with the emergence of the modern university in Germany in the early nineteenth century. Wilhelm von Humboldt, the Prussian reformer, promoted both the rights of students to learn (*Lernfreiheit*) and of professors to teach and research (*Lehrfreiheit*) without state interference.¹⁸ These became the twin pillars of the modern research university, which was to integrate research and teaching in a holistic way. The university required autonomy from government, and individual scholars required internal freedom to pursue knowledge, both components of what became known as *Akademische Freiheit* (academic freedom). German universities then became the model for Nineteenth Century reformers in the United States and elsewhere, contributing to both ideas about the university and about academic freedom.¹⁹ At the same time, the nineteenth-century German conception did not guarantee political and social commentary outside of the university context.²⁰ A distinct tradition, rooted in the English university stems, is more recognizably liberal in its emphasis on individual rights to opinion and expression.²¹

In the United States, the concept of academic freedom became central in the Progressive Era from the late 1890s through 1920s, when the modern social sciences began to emerge.²² Unlike the natural sciences, in which notions of truth-seeking were relatively uncontroversial (at least by that point), the social sciences grappled with issues that were, by their nature, political. This led to a

16. Jogchum Vrieling et al., *Academic Freedom as a Fundamental Right*, 13 *PROCEDIA: SOC. & BEHAVIORAL SCI.* 117 (2011); Ralph F. Fuchs, *Academic Freedom - Its Basic Philosophy, Function, and History*, 28 *L. CONTEMP. PROB.* 431 (1963).

17. UNESCO, Recommendation Concerning the Status of Higher-Education Teaching Personnel (11 Nov. 1997), ¶ 27, http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html.

18. Walter P. Metzger, *The German Contribution to the American Theory of Academic Freedom*, 41 *BULL. AM. ASSOC. UNIV. PROFESSORS* 214 (1955).

19. *Id.*

20. *Id.*

21. Lord Chorley, *Academic Freedom in the United Kingdom*, 3 *L. CONTEMP. PROBLEMS* 647 (1963).

22. Joan W. Scott, *Knowledge, Power, and Academic Freedom*, 76 *SOC. RSCH: AN INT. Q.* 451 (2009); Mary O. Furner, *ADVOCACY AND OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865-1905* (2011).

threat, not so much from the state as from private funders. The American Association of University Professors (AAUP) issued a “Declaration of Principles” in 1915, a touchstone for the subsequent development of notions of autonomy that also squared well with emerging doctrines of free speech. The Declaration of Principles emphasized tenure as a crucial institutional pillar of academic freedom, which consisted of three subsidiary freedoms: “freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action.”²³ The third element was novel, emerging as it did before the development of First Amendment doctrine on free speech after World War I. Other touchstones of academic freedom are the American Council on Education’s 1925 “Conference Statement on Academic Freedom and Tenure,” the AAUP’s “1940 Statement of Principles on Academic Freedom and Tenure,” and its 1967 Joint Statement on Rights and Freedoms of Students. These documents reflect a story of the society, not the state, developing and defining the contours of academic freedom and tethering it closely to freedoms of expression and opinion.

Unlike in most other countries, academic freedom in the United States has only tenuous constitutional roots. Its main expositors have been isolated cases on the United States Supreme Court, starting in earnest with the McCarthy era of state suppression of speech.²⁴ Former academics William Douglas and Felix Frankfurter were leading figures. In *Adler v. Board of Education*, Douglas dissented from a decision upholding a statute that required public employees to refrain from membership in disfavored organizations.²⁵ Douglas argued that the law would chill academic freedom, which he named as a distinct interest. In a case involving oath requirements for public employees, Frankfurter emphasized the special impositions on teachers, who in his view needed freedom to operate.²⁶ Some years later, in *Sweezy v. New Hampshire*, Frankfurter confronted a case in which a government demanded that a lecturer divulge the content of his lectures.²⁷ In his concurring opinion, he emphasized the special role of universities in a free society, and contrasted it with the role of government in South Africa.²⁸ According to later scholars, these opinions may have “[f]ormulat[ed] academic freedom as an institutional right, [and] stated that universities could determine for themselves what they teach, how they do it or who may be admitted to study

23. *Declaration of Principles on Academic Freedom and Academic Tenure*, AM. ASS’N OF UNIV. PROFESSORS (1915); United Nations General Assembly, Note by the Secretary-General Promotion and Protection of the Right to Freedom of Opinion and Expression, A/75/261, ¶ 9 (2020).

24. See also *Meyer v. Nebraska*, 262 U.S. 390 (1923) (substantive liberty interest in acquiring useful knowledge); *Farrington v. Tokushige*, 273 U.S. 284 (1927) (Fifth Amendment due process interest in teaching and learning).

25. 342 U.S. 485, 508 (1952) (Douglas, J., dissenting).

26. *Wieman v. Updegraff*, 344 US 183, 197 (1952) (“The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and national power.”).

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

28. *Id.* at 262.

...²⁹ More recently, Anthony Kennedy, in the case of *Garcetti v. Ceballos*, which restricted First Amendment rights of public employees speaking in their official capacities, noted academic freedom as an exception.³⁰

In short, academic freedom in the United States rests on judicial decisions that have connected it with certain constitutional rights, most centrally the First Amendment and the Due Process Clause of the Fourteenth Amendment. These tenuous constitutional roots, found only in doctrine, contrast with the situation in other countries in which constitutional recognition has been explicit.

As Figure 1 shows, academic or scientific freedom has been a common feature of national constitutions since 1789. Since its first mention in the Constitution of the Netherlands in 1814, academic freedom has risen so that it is now mentioned in more than forty percent of national constitutions.³¹

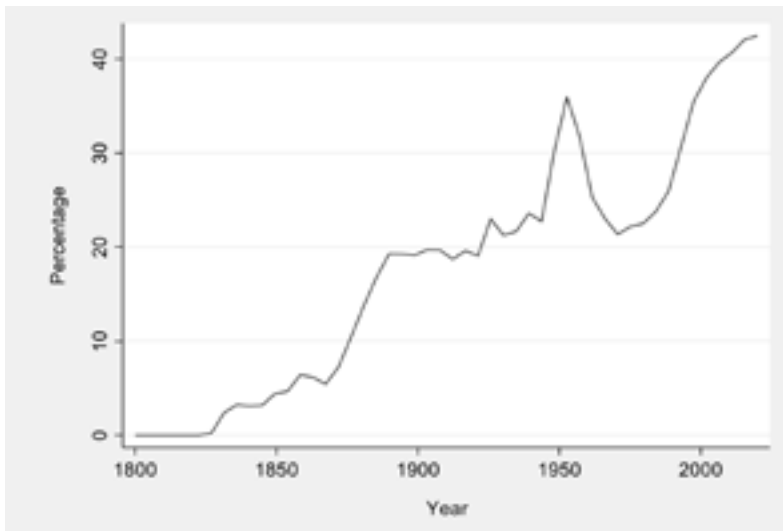


Figure 1: Percentage of National Constitutions Mentioning Academic or Scientific Freedom since 1800³²

29. Eric Barendt & David Bentley, *Academic Freedom and the Law* 4, Summary of the International Law Discussion Group meeting held at Chatham House on Wednesday, 8 December 2010, at 4, <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilo81210summary.pdf>.
30. 547 U.S. 410 (2006).
31. After the Netherlands, constitutional references appear in France in 1830 and Belgium in 1831. Academic freedom then becomes a core feature of Latin American constitutional practice, found in Chile (1833), Bolivia (1851), Mexico (1857), Peru (1868), Costa Rica (1869), Venezuela (1874) and (1881), Guatemala (1879), Honduras (1880), Ecuador (1884), El Salvador (1886), Haiti (1889), Nicaragua (1893), and the Dominican Republic (1896). *See also* Paraguay (1870) and Colombia (1858). It is also found in Romania (1866), as another early example outside Latin America.
32. Data created by author, using data from COMPAR. CONSTS. PROJECT, www.comparativeconstitutionsproject.org (last visited Dec. 12, 2022). The data aggregate CCP variables are ACFREE=1 & ACFREE=96.

These clauses come in various forms. Some require the state to guarantee academic freedom, either generally or for higher education organizations.³³ Others declare academic freedom to be a standalone right,³⁴ or related to freedoms of thought or expression.³⁵ Some clauses direct the legislature to elaborate on the autonomy and freedom of higher education organizations.³⁶ In Malawi, the right is non-derogable even during emergencies.³⁷ Only a handful of the formulations refer to any limitation on the right, and some of these limitations are broad indeed.³⁸

One particularly elaborate formulation is found in the Constitution of Mexico:

Universities and other higher education institutions, upon which the law has conferred autonomy, shall have both the powers and the duty to govern themselves. They must subject themselves to the principles established in this article to educate, do research and promote culture, respecting academic freedom, researching freedom, freedom to apply exams and to discuss ideas. These institutions shall develop their academic plans; they shall establish the terms for admission, promotion and tenure of their academic personnel; and they shall manage their estate. Labor relationships between institution and academic and administrative personnel shall be governed by . . . this Constitution, in accordance with the terms of the National Labor Relations Act for a specially regulated work, without interfering with the autonomy, academic freedom, research freedom and the goals of the institutions referred herein.³⁹

One of the lessons from these constitutional texts, consistent with the German origins of the concept of academic freedom, is the distinct treatment of research and teaching as objects of their own freedoms. The Mexican example goes further to add an element of institutional autonomy for universities, but also provides duties for those bodies. Some commentators have criticized the tendency to conflate academic freedom with freedoms of expression and opin-

33. NIHONKOKU KENPO [KENPO] [Constitution], art. 23 (Japan) (“Academic freedom is guaranteed”); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR (2008), art. 29 (“The State shall guarantee the freedom to teach, academic freedom in higher education, and the right of persons to learn in their own language and cultural environment.”).
34. CONSTITUTION OF SPAIN, section 20(1)(c) (1978) (Spain).
35. CONSTITUTION DE LA RÉPUBLIQUE ALGÉRIENNE DÉMOCRATIQUE ET POPULAIRE 2000, ch. I, art. 79 (Alg.); CONSTITUTION OF THE REPUBLIC OF FIJI 2013, art.17(1)(d); THE CONSTITUTION OF THE REPUBLIC OF GHANA 1992, art. 21(1)(b); CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 2012, chp. 2, section 16(1)(d).
36. KUSHTETUTA E REPUBLIKËS SË SHQIPËRISË [CONSTITUTION] (2016, art. 57(7) (Alb.) (“autonomy and academic freedom of higher education institutions are guaranteed by law.”).
37. CONSTITUTION OF THE REPUBLIC OF MALAWI 2017), art. 45(2)(h).
38. *See, e.g.*, RATTHATHAMMANUN HAENG RATCHA-ANACHAK THAI [CONSTITUTION] 2017, sec. 34, ¶ 2 (“Academic freedom shall be protected. However, the exercise of such freedom shall not be contrary to the duties of the Thai people or good morals, and shall respect and not obstruct the different views of another person.”).
39. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS 2015, art. 3(VII).

ion, as such an approach risks obscuring the special role that academics play in democratic societies and the particular risks that they concomitantly face.⁴⁰ Of course, the particular location of academic freedom in the architecture of rights is of less importance than the larger issue of constitutional implementation in the various countries.

II. The Threat

One of the less frequently noticed features of the global authoritarian populist revival is its assault on academic freedom. The populist phenomenon is an internally diverse one, but one of its common features is a constructed binary between the putatively aggrieved, singular “People” and the various self-dealing elites who have sold them out.⁴¹ Notwithstanding what might be humble origins of individual academics, institutions of higher learning are almost by definition places of elite production. This invites politicians to characterize scholars as part of the elite establishment.

Another problem with the academy, from the point of view of many politicians, is that it is organized around the production of truth. A certain degree of autonomy is necessary for the truth-seeking function that is at the core of the academic mission. Truth tends to expose and unsettle those who exercise power unjustly, and so can be threatening. In our particular “post-truth” era, autonomous sites of knowledge production hinder the populist leader’s mission of constructing his or her own political reality for supporters. For example, right-wing populists have a particular propensity to engage in climate change denialism.⁴² These attitudes correspond with attacks on institutions and on science as a vocation.⁴³ Leaders like Donald Trump and Jair Bolsonaro have attacked scientists working on COVID-19 public health policy.⁴⁴ Such leaders make a target of the academy.⁴⁵

Epistemic institutions are not easily manipulated, but they can be very easily intimidated. There are two modalities by which this is accomplished: bullying from society, and selective application of the law. The former sometimes involves threats of physical violence, while the latter is a central example of what Kim Lane Scheppele calls autocratic legalism, the use of putatively neutral laws for

40. Barendt & Bentley, *supra* note 29, at 2.

41. JAN-WERNER MULLER, *WHAT IS POPULISM?* (2016).

42. Kirsti M. Jylhä & Kahl Hellmer, *Right-Wing Populism and Climate Change Denial: The Roles of Exclusionary and Anti-Egalitarian Preferences, Conservative Ideology, and Antiestablishment Attitudes*, 20 *ANALYSES OF SOC. ISSUES & PUBLIC POL’Y* 315 (2020).

43. Robert A. Huber et al. *From Populism to Climate Scepticism: The Role of Institutional Trust and Attitudes Towards Science*, ENV’TLPOLITICS, DOI: 10.1080/09644016.2021.1978200 (2021).

44. David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114(4) *AM. J. INT’L L.* 608 (2020).

45. Tarunabh Khaitan, *On Scholactivism in Constitutional Studies: Skeptical Thoughts*, 20 *INT’L J. CONST. L.* 547 (2022).

purposes of consolidating power.⁴⁶ In India, for example, we see threats coming from both state and society, which in any case are linked through movements on the Hindu right. Academics have been physically attacked and threatened, with reports suggesting their assailants are associated with the right-wing Hindu organization Rashtriya Swayamsevak Sangh (RSS).⁴⁷ Scholars have been detained under vague anti-terrorism laws.⁴⁸ Prominent academics Amartya Sen and Pratap Bhanu Mehta have each resigned their positions as vice chancellors of major universities because of pressure from trustees and others.

Violence directed at students has also been used in Venezuela, where students have protested the regime's descent to outright dictatorship under President Nikolas Maduro. In 2014, pro-Maduro thugs beat students with National Guardsmen standing by.⁴⁹ Hundreds of students were then arrested, and many killed, with student demonstrations subsequently outlawed. One university recorded 408 attacks on staff, students and facilities in a little over two years.⁵⁰ Sexual violence has also been used.⁵¹

In other countries, the government pressures academics directly. In Mexico, the government has ramped up attacks on academics since the landslide election of populist Andrés Manuel López Obrador (AMLO) in December 2018. The attacks on academia focused initially on the Center for Economic Research and Education (CIDE), one of the country's premier research institutions. In the fall of 2021, the government fired Alejandro Madrazo, who was regional director of CIDE in Aguascalientes. The attorney general then brought charges against thirty-one researchers for receiving government funding that was in fact legal at the time.⁵² The president's appointees are attacking the institution and its faculty by name, targeting them as neoliberals.⁵³ Scholars were threatened with imprisonment in one of the country's notorious prisons.⁵⁴ While the major

46. Kim Lane Scheppele, *Autocratic Legalism*, 85 *UNIV. CHICAGO L. REV.* 545 (2018).

47. FREE TO THINK 2020, *SCHOLARS AT RISK* 26 (2020), <https://www.scholarsatrisk.org/wp-content/uploads/2020/11/Scholars-at-Risk-Free-to-Think-2020.pdf>.

48. FREE TO THINK 2021, *SCHOLARS AT RISK* 4, 38, 67-70 (2021), <https://www.scholarsatrisk.org/wp-content/uploads/2021/12/Scholars-at-Risk-Free-to-Think-2021.pdf>.

49. Mery Mogollon & Chris Kraul, *Venezuela University Officials Decried Attacks on Students*, *L.A. TIMES* (Apr. 4, 2014).

50. Mayda Hocevar, David Gómez, and Nelson Rivas et al., *Threats to Academic Freedom in Venezuela: Legislative Impositions and Patterns of Discrimination Towards University Teachers and Students*, 3 *INTERDISCIPLINARY POL. STUD.* 145, 151 (2017).

51. GLOBAL COALITION TO PROTECT EDUCATION FROM ATTACK, *EDUCATION UNDER ATTACK* 2018, at 255-260 (2018), http://protectingeducation.org/wp-content/uploads/documents/documents_eua_2018_full.pdf.

52. Anna McKie, *Persecution of Mexican Researchers Reaches 'Another Level'*, *INSIDE HIGHER ED.* (Oct. 15, 2021), <https://www.insidehighered.com/news/2021/10/15/persecution-mexican-researchers-reaches-new-level>.

53. *Id.*

54. *Id.*

universities have not been attacked yet, they are vulnerable to defunding and appointments of cronies into leadership.

Another tool is the deployment of libel and defamation law. One prominent target has been Polish-born professor Wojciech Sadurski, a long-standing critic of the country's Law and Justice Party (known by its Polish acronym PiS). In early January 2019, he blamed the country's public broadcaster for contributing to the assassination of the mayor of Gdansk, Pawel Adamowicz, that month, and used an analogy to the Third Reich. The company sued him civilly and he was also prosecuted criminally, a charge that could have led to up to a year in jail.⁵⁵ This led to an acquittal in early 2021.⁵⁶ The ruling party itself sued as well and at this writing is appealing a verdict in Sadurski's favor to the country's Supreme Court.⁵⁷

Selective withholding of resources is another technique. When Hugo Chavez took over Venezuela, he channeled government funds into new institutions of higher education associated with his movement, starving the traditional institutions of resources. The Organic Law on Education of 2009 called for a socialist ethic in university curricula and defined university autonomy in Orwellian terms: "the subordination of training programs and research to the plans of the National Executive Power and the priority needs of the country."⁵⁸ A recent report found many retired faculty of these institutions to be suffering from malnutrition and poverty.⁵⁹ The humanitarian crisis has triggered an exodus of scholars.⁶⁰

In short, governments have numerous tools at their disposal to shape the incentives of academics, and democratic backsliders have used many. All of these myriad techniques have an impact well beyond the immediate targets. Their effect is to bully and intimidate all academics into avoiding sensitive topics, and especially to avoid criticizing government. It is a perfect example of the chilling effect identified by Justices Douglas and Frankfurter in their defense of academic freedom as a core interest, related to similar concerns in the context of free expression.⁶¹

55. Wojciech Sadurski, *I Criticized Poland's Government. Now it's Trying to Ruin Me*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/opinions/2019/05/21/i-criticized-polands-government-now-its-trying-ruin-me/>.

56. *Poland: The Court Acquits Professor Wojciech Sadurski in a Criminal Defamation Case*, ARTICLE 19 (Mar. 5, 2021), <https://www.article19.org/resources/poland-acquits-sadurski/>.

57. Max Shanahan, *USyd Professor Sadurski Acquitted of Criminal Defamation*, HONI SOIT (Sept 26, 2021), <https://honisoit.com/2021/09/usyd-professor-sadurski-acquitted-of-criminal-defamation/>.

58. ASAMBLEA NACIONAL, PROYECTO DE LEY DE EDUCACIÓN UNIVERSITARIA, art. 30 (2009); see generally Mayda Hocevar et al., *Threats to Academic Freedom in Venezuela: Legislative Impositions and Patterns of Discrimination Towards University Teachers and Students*, 3 INT'DISCIPLINARY POL. STUD. 145, 158 (2017).

59. Stephania Taladrid, *Aging and Abandoned in Venezuela's Failing State*, NEW YORKER (Apr. 12, 2022), <https://www.newyorker.com/culture/photo-booth/aging-and-abandoned-in-venezuelas-failing-state>.

60. David Gómez Gambo & Lizzy Anjel-van Dijk, *Academic Freedom and the Untold Story of Venezuelan Scholars Under Pressure*, in *ACADEMICS IN EXILE* 249 (Vera Axonova et al. eds., 2022).

61. See *supra* notes 26–27 and accompanying text.

III. International Norms

A global problem admits of global solutions, or at least the possibility of learning from efforts to address it in specific locations. This section considers the potential role of international and regional law in providing normative resources to protect academic freedom in contexts where it is at risk.

A. Global Treaties

The major international human rights instruments address academic freedom in several ways, typically as a component of other rights, without specifically mentioning the concept. Balakrishnan Rajagopal connects academic freedom to two generally recognized human rights: free expression and education.⁶² We take each in turn.

First, drawing on Article 19 of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) defines freedom of expression in a way that includes the right to “seek, receive and impart information and ideas of all kinds.”⁶³ The Human Rights Commission, the body charged with articulating the ICCPR rights, has not had many opportunities to develop the right. The sole partial exception appears to be a 1990 case, *Aduayom et al. v. Togo*, which involved two teachers at the University of Benin in Lomé who were arrested on the grounds that their academic work constituted *lèse-majesté*.⁶⁴ The victims were later released without charges but dismissed from their university posts. The teachers alleged that the refusal to reinstate them was motivated by the dropped charges “for having carried, read or disseminated documents that contained no more than an assessment of Togolese politics, either at the domestic or foreign policy level.”⁶⁵ The committee found a violation of Article 19 of the ICCPR and ordered restitution.⁶⁶

Second, the International Covenant on Economic, Social and Cultural Rights (ICESR) contains a right to education. The right to receive an education does not directly address academic freedom as an individual right or collective interest.⁶⁷ However, Article 15(3) of the ICESR also provides that “States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.” In 1999, the Committee on Economic, Social and Cultural Rights (CESCR) issued General Comment No. 13, providing that “the

62. Balakrishnan Rajagopal, *Defending Academic Freedom as a Human Right: An Internationalist Perspective*, 33 INT’L HIGHER ED. 4 (2003).

63. Art. 19(2) (“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”).

64. CCPR/C/57/D/422/1990,423/1990,424/1990, <https://juris.ohchr.org/Search/Details/531>.

65. *Id.* at § 3.1.

66. *Id.* at § 8 (violation) and § 9 (restitution).

67. Rajagopal, *supra* note 62.

right to education can only be enjoyed if accompanied by the academic freedom of staff and students.”⁶⁸ It went on to say that, notwithstanding the fact that the issue was not explicitly mentioned in Article 13, it was nevertheless appropriate for the committee to make some observations about academic freedom. In addition to endorsing university autonomy, the committee defined academic freedom broadly as encompassing individual rights to “pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work....”⁶⁹

These two examples from the major global human rights treaties show that, in both cases, the committees that serve as prominent interpreters of the documents have found that primary rights mentioned in the text have strong implications for a right of academic freedom. Although not mentioned, it is implied as being necessary to give full effect to the primary rights.

Academic freedom is also critical to advance other rights beyond those of education and expression, and for democratic preservation. The autonomy of truth-seeking institutions is implied by freedoms of the press and assembly, as well as rights to access to information and to political participation. Academic freedom is seen as instrumental for, and therefore implied by, these rights. As discussed below, international tribunals have endorsed similar arguments. Academic freedom is usually understood as a “defensive” right that protects the academic enterprise from interference and therefore imposes a corollary *negative* obligation of non-interference upon states.⁷⁰

An early international document was the ILO/UNESCO Recommendation concerning the Status of Teachers, which covered all teachers including at primary and secondary levels of education.⁷¹ It set out recommendations on professional standards, training and working conditions. In 1993, UNESCO decided to develop a detailed recommendation on the Status of Higher-Education Teaching Personnel, which was issued in 1997.⁷² This document focuses on the

68. OHCHR, *CESCR General Comment No. 13: The Right to Education (Art. 13)*, E/C.12/1999/10, at § 38 (Dec. 8, 1999), <https://www.refworld.org/pdfid/4538838c22.pdf>.

69. § 39.

70. Monika Stachowiak-Kudła, *Academic Freedom as a Source of Rights' Violations: A European Perspective*, 82 HIGHER EDUC. 1031 (2021); Jürgen Enders et al., *Regulatory Autonomy and Performance: The Reform of Higher Education Re-Visited*, 65 HIGHER EDUC. 5 (2013).

71. *The 1966 ILO/UNESCO Recommendation Concerning the Status of Teachers*, INT'L LABOR ORG. AND UNITED NATIONS EDUC., SCIENTIFIC AND CULTURAL ORG. (1966), https://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@sector/documents/normativeinstrument/wcms_162034.pdf.

72. United Nations Educational, Scientific and Cultural Organization (UNESCO), *Recommendation Concerning the Status of Higher-Education Teaching Personnel* (Nov. 11, 1997); <https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel>. See also World University Service, *The Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education* (6–10 September 1988).

autonomy of the institution as a whole, describing it as a necessary precondition for higher education to play its role in society. Expressing “concern regarding the vulnerability of the academic community to untoward political pressures which could undermine academic freedom,” the document goes on to say “that the right to education, teaching and research can only be fully enjoyed in an atmosphere of academic freedom and autonomy for institutions of higher education and that the open communication of findings, hypotheses and opinions lies at the very heart of higher education....”⁷³ Institutional autonomy is critical to this conception, and institutions have a role in advancing individual rights.

In 2020, David Kaye, the UC Irvine law professor serving as United Nations Special Rapporteur on the right to freedom of opinion and expression, issued an important report that identified academic freedom as a topic of special concern.⁷⁴ He explicitly tied academic freedom to “one of the essential elements of democratic self-governance: the capacity for self-reflection, for knowledge generation and for a constant search for improvements of people’s lives and social conditions.”⁷⁵ He situated the freedom as being within the full protection of human rights law, noting that states not only had an obligation of non-interference, but that they were “under a positive obligation to create a general enabling environment for seeking, receiving and imparting information and ideas.”⁷⁶

B. Regional Norms: Europe

1. The European Convention on Human Rights

Europe is the region of the world with the largest body of case law on human rights, as it includes both European Union law and the larger Council of Europe, which is the keeper of the European Convention on Human Rights. Drawing on the frameworks of global human rights law, the European Convention on Human Rights includes protections for freedoms of thought and expression, including “freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers.”⁷⁷ The main adjudicator is the European Court of Human Rights (ECtHR), but various other bodies of the Council of Europe have expressed the importance of academic freedom.⁷⁸ Because Article 10 of the European Convention on Human

73. *Id.* at Preamble.

74. Note by the Secretary-General, *supra* note 23, at summary.

75. *Id.*

76. *Id.* at § 9. See also Mark Davies, *Academic Freedom: A Lawyer’s Perspective*, 70 HIGHER EDUC. 987 (2015).

77. European Convention on Human Rights, art. 10(1), https://www.echr.coe.int/documents/convention_eng.pdf.

78. Parliamentary Assembly of the Council of Europe, Recommendation 1762, Academic Freedom and University Autonomy (2006), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17469&lang=en>; Council of Europe, Recommendation CM/Rec(2012)7 of the

Rights is “substantially identical” to Article 19 the ICCPR, the two bodies of law are mutually supportive and informative of jurisprudential approaches.⁷⁹

The majority of cases applying these norms to academic freedom in Europe have involved Türkiye, a country with a long history of military government. The rise of Recep Tayyip Erdoğan led to stepped-up attacks on universities as well as other public officials, culminating in a major purge after a failed coup attempt in 2016. Thousands of academics were summarily dismissed, including every university dean in the country.⁸⁰ Some were allowed to apply for their positions again, but of course would not be hired back if they had been too critical of Erdoğan and his political program. The chilling effect was inherent.

Even before the 2016 coup, however, Türkiye had a reputation for tough treatment of academics. A series of ECtHR Cases on Article 10 charts the trajectory of pushback against such governmental abuses. In a 2009 case *Sorguç v. Turkey*, the court ruled in favor of an academic who had been found guilty of defamation by the Turkish courts for an academic paper in which he criticized the system for assessing assistant professors in his field.⁸¹ In the 2012 case of *Aksu v. Turkey*, the court found that an academic publication and two dictionaries that reported the social position of Gypsies in Türkiye, including referencing sociological facts that could be considered derogatory, were protected academic speech and therefore did not violate a Roma applicant’s right to respect for his private life under Article 8 of the Convention.⁸²

In 2014, in *Mustafa Erdoğan and Others v. Turkey*,⁸³ the court ruled in favor of a Turkish academic who had criticized a constitutional court decision to dissolve a political party and had been ordered to pay damages. The judgment stated, in relevant part:

Committee of Ministers to Member States on the Responsibility of Public Authorities for Academic Freedom and Institutional Autonomy (June 20, 2012), <https://www.refworld.org/pdfile/50697ed62.pdf>.

79. Scholar at Risk Network, *Report to the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression: Protection of Academic Freedom under International Human Rights Law* ¶ 30 (2020).
80. Jack Grove, *Deans Fired at Turkish University*, INSIDEHIGHERED.COM (Feb. 4, 2022), <https://www.insidehighered.com/news/2022/02/04/firing-deans-raises-academic-freedom-concerns-turkey> (detailing thousands of firings beginning in 2016).
81. *Sorguç v. Turkey*, No. 17089/03 (June 23, 2009), <https://hudoc.echr.coe.int/fre?i=001-93161>.
82. *Aksu v. Turkey*, Nos. 4149/04 and 41029/04 (Mar. 15, 2012), http://www.concernedhistorians.org/content_files/file/1e/669.pdf.
83. *Mustafa Erdoğan and Others v. Turkey*, Nos. 346/04 and 39779/04 (May 27, 2014), <https://hudoc.echr.coe.int/eng?i=001-144129>.

It is consistent with the Court's case-law to submit to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish their findings This freedom, however, is not restricted to academic or scientific research, but also extends to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence. This may include an examination of the functioning of public institutions in a given political system, and a criticism thereof.⁸⁴

The concurring opinion offered by Judges Kūris, Sajó, and Vučinić is particularly strong in its defense of academic freedom:

[A]lthough scholars' personal academic freedom is by all means a manifestation of freedom of expression covered by Article 10, it would make little sense to attempt to justify the specific instance of "extramural" academic speech by a general reference to "the needs of a democratic society," the typical justification accepted for freedom of expression in the Court's case-law. This would be superficial. Convincing justification for impugned "extramural" academic speech can very often be arrived at only if one takes into consideration the need to communicate ideas, which is protected for the sake of the advancement of learning, knowledge and science.⁸⁵

This subtle formulation recognizes the need for research to be communicated; academic freedom of discovery is not useful if the results of discovery cannot be freely expressed.

Extramural speech by academics remains protected, and the ECtHR docket remains full after the mass purges of academics in Türkiye in the wake of the attempted coup in 2016. The two-year state of emergency, which ended in 2018, involved the dismissal of 406 academics for the mere act of signing a petition in January 2016.⁸⁶ Many others were fired for other offenses, and no doubt more were chilled in their speech and research. Evidently, however, the court is deprioritizing these cases under its recent case-processing strategy.⁸⁷

In a case decided after the mass purge, *Kula v. Turkey*,⁸⁸ the court found that a professor's freedom of expression under Article 10 had been violated when he was sanctioned by his university for participating in a TV interview outside of his town of residency, and this sanction was upheld by the Turkish courts. However, a recent case also demonstrated the limits of the court's academic

84. *Id.* at ¶ 40.

85. *Id.* at Dissent ¶ 5.

86. Başak Çalı & Esra Demir-Gürsel, 'A Court that Matters' to Whom and for What? Academic Freedom as a (Non-)Impact Case, STRASBOURG OBSERVERS (June 11, 2021), <https://strasbourgoobservers.com/2021/06/11/a-court-that-matters-to-whom-and-for-what-academic-freedom-as-a-non-impact-case/>.

87. *Id.*; European Court of Human Rights, *A Court that Matters* (Mar. 21, 2021), https://www.echr.coe.int/Documents/Court_that_matters_ENG.pdf.

88. *Kula v. Turkey*, No. 20233/06 (June 19, 2018), <https://hudoc.echr.coe.int/eng?i=001-184289>.

freedom jurisprudence. In *Akdeniz and Others v. Turkey*,⁸⁹ the court considered a blanket ban on disseminating information related to a Turkish government corruption inquiry. In its holding, it recognized journalists, but not academics, as having standing to allege violation of freedom of expression under Article 10. The court found that, even as “citizen journalists,” the academics were not directly affected by the ban, and an indirect “chilling effect” was insufficient to grant them victim status. However, the court did find that the ban lacked a clear legal basis and therefore violated journalists’ freedom of expression under Article 10.⁹⁰ Thus the ban was struck, but academics were not seen as having any special role in society with regard to exposing corruption.

A smattering of other countries have been subject to claims related to academic freedom. In 2009, in *Lombardi Vallauri v. Italy*,⁹¹ the court found in favor of an Italian professor whose application for a position in the Faculty of Law at the Università Cattolica del Sacro Cuore was denied because the Congregation for Catholic Education did not approve of his views. The professor claimed that the Italian courts’ deference to the congregation had denied him the opportunity for an adversarial debate in which he could learn the reasons for the denial. The court agreed, finding a violation of Article 10 in its procedural aspect, as well as a violation of Article 6.1, which provides for the right to a fair trial.

2. European Union

Compared with the European Convention, the Charter of Fundamental Rights of the European Union is more explicit in its defense of academic freedom. Article 13 provides that “[t]he arts and scientific research shall be free of constraint. Academic freedom shall be respected.”⁹² Because the membership of the European Union is more limited than that of the Council of Europe, academic freedom has deeper protection but in a narrower set of countries in the region.

In recent years, significant democratic backsliding in Hungary and Poland, both EU members, has come to the attention of the Court of Justice. The most high-profile academic freedom dispute has involved the Central European University, a U.S.-chartered institution funded with support from George Soros to provide high-quality education to the countries of the former com-

89. *Akdeniz and Others v. Turkey*, Nos. 41139/15 and 41146/15 (May 4, 2021), <https://hudoc.echr.coe.int/fre?i=002-13243>.

90. *Id.*; T. McGonagle, *Academics Get the Short End of the Stick in News Reporting Judgment*, EUR. HUM. RTS. CASES UPDATES (30 Aug. 30, 2021), https://www.ehrc-updates.nl/commentaar/211626?skip_boomportal_auth=1 (commenting that this is a setback for academic freedom).

91. *Lombardi Vallauri v. Italy*, No. 39128/05 (Oct. 20, 2009), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-2900937-3189238&filename=003-2900937-3189238.pdf> (English summary), <https://hudoc.echr.coe.int/eng?i=001-95150> (official in Italian).

92. Charter of Fundamental Rights of the European Union, 2012/C, 326/02, at art. 13, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>.

munist bloc.⁹³ The Hungarian government under strongman Viktor Orbán has made a cause célèbre out of the CEU, targeting it through amendments to the higher education law in 2017. The amendments barred foreign universities from outside the EU from operating in Hungary without a specific treaty with the home country.⁹⁴ The law also barred foreign-chartered universities from operating unless they also provided educational services in the home country. Because the CEU was specifically designed to operate in Europe, with U.S. accreditation, it failed these tests.

In *Commission v. Hungary*, the European Commission challenged Hungary's Higher Education Law as violating the Charter of Fundamental Rights, including the right of academic freedom, as well as the General Agreement on Trade in Services (GATS).⁹⁵ The court agreed, holding that "mak[ing] the exercise, in Hungary, of teaching activities leading to a qualification by higher education institutions situated outside the European Economic Area (EEA) subject to the condition that the Government of Hungary and the government of the State in which the institution concerned has its seat have agreed to be bound by an international treaty" violated both GATS and Article 13 of the Charter protecting academic freedom.⁹⁶ One of the novel aspects of this case was that the court applied World Trade Organization law directly in a case against a member state brought by the Commission.⁹⁷ While the case was important in terms of upholding the principle of academic freedom, and its use of a collateral branch of international law, it had limited impact on the Central European University, which had to move to Vienna at great expense while the case was being decided.

Still, Europe remains a place where the normative commitment to academic freedom remains high. In 2018, the European Parliament adopted the recommendation in defense of academic freedom, which explicitly connected it to the democratic society: "Academic freedom—including its constituent freedoms of thought, opinion, expression, association, travel, and instruction—contributes to creating the space in which any open and stable pluralistic society is free to think, question, share ideas and produce, consume and disseminate knowledge."⁹⁸ This strong regional expression of the values at stake is one that should be emulated.

93. Petra Lea Láncoš, *The State of Academic Freedom in Hungary: The Saga of the Central European University and the Research Network of the Hungarian Academy of Sciences in Light of National and European Guarantees of Academic Freedom*, in *ACADEMIC FREEDOM UNDER PRESSURE? A COMPARATIVE PERSPECTIVE* 61 (Margrit Seckelmann et al., eds., 2021).

94. *Id.* at 68.

95. Case C-66/18, *Commission v. Hungary*, ECLI:EU:C:2020:792, at ¶ 244 (Oct. 6, 2020), <https://curia.europa.eu/juris/liste.jsf?num=C-66/18>.

96. *Id.* at ¶ 244.

97. Csongor István Nagy, *Case C-66/18*, 115 AM. J. INT'L L. 700, 704 (2021).

98. *Defence of Academic Freedom in the EU's External Action*, P8_TA(2018)0483, at G (Nov. 29 2018), https://www.europarl.europa.eu/doceo/document/TA-8-2018-0483_EN.pdf.

C. Regional Norms: The Americas

As in most of the regions discussed here, academic freedom is addressed only indirectly in the instruments of the Inter-American human rights system, a part of the Organization of American States. The American Declaration of the Rights and Duties of Man, adopted in 1948, provides that “[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”⁹⁹ The American Convention on Human Rights of 1969 includes the “freedom to seek, receive, and impart information and ideas of all kinds” that is found in the UDHR and ICCPR as well.¹⁰⁰ These latter two documents have formed the core of a very robust system of normative articulation of human rights, which has had a profound though uneven impact on the countries of the region.

In a major development for our present topic, the Organization of American States has recently articulated the Inter-American Principles on Academic Freedom and University Autonomy (2021).¹⁰¹ Principle 1 defines the concept and is worth quoting:

Academic freedom entails the right of every individual to seek, generate, and transmit knowledge, to form part of academic communities, and to conduct independent work to carry out scholarly activities of teaching, learning, training, investigation, discovery, transformation, debate, research, dissemination of information and ideas, and access to quality education freely and without fear of reprisals. In addition, academic freedom has a collective dimension, consisting of the right of society and its members to receive the information, knowledge, and opinions produced in the context of academic activity and to obtain access to the benefits and products of research and innovation.

Academic freedom is protected equally inside and outside educational institutions, as well as in any place where teaching and scientific research occur.

This is as comprehensive an articulation of the rationale for and scope of academic freedom as one will find in international legal documents. It roots the freedom in the rights of both individuals and groups and grounds the right squarely in the society’s ability and freedom to receive the products of research.

The primary enforcement institutions of the Inter-American system are two: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (IACtHR), which receives cases recommended by the

99. American Declaration of the Rights and Duties of Man, art. IV (1948), <https://www.cidh.oas.org/basicos/english/basic2.american%20declaration.htm>.

100. American Convention on Human Rights, art. 13(1) (1969), <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

101. Inter-American Principles on Academic Freedom and University Autonomy (2021), https://www.oas.org/en/iachr/reports/questionnaires/2021_principiosinteramericanos_libertadacademica_autonomiauniversitaria_eng.pdf.

Commission for adjudication. The Commission has issued opinions regarding academic freedom in the Bolivarian countries of Venezuela and Nicaragua. In *Situation of Rights in Venezuela*, the Commission expressed its concern at the country's significant interference in university autonomy.¹⁰² While it noted that autonomy is not mentioned in the American Declaration, it linked university governance to academic freedom, which it stated "is necessary for full enjoyment of the right to education recognized at Article XII of the American Declaration."¹⁰³ Similarly, in *Gross Human Rights Violations in the Context of Social Protests in Nicaragua*, the Commission also linked academic freedom to freedom of education, noting that "[i]n higher education, especially, the academic liberty of teachers and students and the autonomy of academic institutions are fundamental pillars for strengthening democratic structures and avoiding political pressures or interference."¹⁰⁴

The other body is the Inter-American Court of Human Rights. In a case related to academic research, *Urrutia Laubreaux v. Chile*,¹⁰⁵ a judge attended a degree course in "human rights and democratization processes" at the Law Faculty at the Universidad de Chile, where he wrote a paper critical of the judiciary's handling of human rights cases during the military regime. After he forwarded the paper to his superiors, the judge was sanctioned under a section of the judicial code of conduct forbidding attacks against the official conduct of judges and justices.¹⁰⁶ Chile's Supreme Court of Justice annulled the sanction in 2018 but could not reach an agreement with the victim on compensation.¹⁰⁷ The court found that Chile had violated the judge's freedom of expression guaranteed by Article 13 of the American Convention on Human Rights and awarded the judge US\$20,000 in nonpecuniary damages.¹⁰⁸

D. Regional Norms: Africa

The African human rights system does not contain specific rights other than those of education and expression. The major case we have identified involves the African Commission on Human and People's Rights, based in Banjul, Gambia. In *Good v. Republic of Botswana*, an Australian professor of political science at the University of Botswana wrote an article criticizing the Botswana government

102. Inter-American Comm'n on Hum. Rts, *Democratic Institutions, the Rule of Law and Human Rights in Venezuela, Country Report*, OEA/Ser.L/V/II., Doc. 209 (Dec. 31, 2017) <http://www.oas.org/en/iachr/reports/pdfs/venezuela2018-en.pdf>.

103. *Id.* at ¶ 458.

104. Inter-American Comm'n on Hum. Rts, *Gross Human Rights Violations in the Context of Social Protests in Nicaragua*, OEA/Ser.L/V/II., Doc. 86 (June 21, 2018), ¶ 170, <http://www.oas.org/en/iachr/reports/pdfs/Nicaragua2018-en.pdf>.

105. *Urrutia Laubreaux v. Chile*, Judgment (Inter-Am. Ct. H.R. Aug. 27, 2020), https://www.corteidh.or.cr/docs/casos/articulos/seriec_409_ing.pdf.

106. *Id.* at ¶¶ 57-65.

107. *Id.* at ¶¶ 67-8.

108. *Id.* at ¶ 96, ¶ 164.

and its system of presidential succession.¹⁰⁹ The President of Botswana subsequently used his executive powers under the 1966 Botswana Immigration Act to declare the professor an “undesirable inhabitant of, or visitor to” the country. The professor brought a constitutional challenge to the Botswana High Court, which ruled that the president had acted within his powers, leading to the professor’s deportation.¹¹⁰ The professor then submitted a complaint with the Commission contending, *inter alia*, that he had been punished for expressing his political views, in violation of Article 9 of the African Charter. The Commission found in favor of the professor on this count.¹¹¹

E. Summary of Trends

The treaty norms and case law presented in this section provide some examples of how international institutions have confronted cases in which academic freedom was under threat. While these norms and institutions are no substitute for the protection of academic freedom at a national level, they can serve as an important complement.¹¹² Where national authorities are unable or unwilling to defend academic freedom, the regional and international institutions can serve as a last resort or backstop and also raise awareness about violations. In addition, the international institutions can help to coordinate understandings about what precisely academic freedom requires in individual cases. Academic freedom is an abstract idea, and its precise boundaries and application require articulation. Constitutional court judges, in interpreting the academic freedom provisions in their own documents, can draw on international case law, and vice versa. Courts, then, provide part of the institutional armor for academics. But courts, of course, are not sufficient to ward off a sustained attack by a determined degrader of democracy.

Many of the threats laid out in Part II cannot realistically be addressed through international or even national adjudication. For instance, the starving of academic budgets is not easily amenable to judicial intervention. In severe cases, as in Venezuela, budgetary deprivation has led to actual hunger among academics. Defenders of academic freedom must also articulate the value of the norm for democratic societies as a whole so that there is a politics of defending the key liberty.

IV. Implications for the United States

Recent years have seen the veneer of American exceptionalism fall by the wayside. Claims that “it can’t happen here” have given way to a vigorous debate

109. *Good v. Botswana*, Case no. 313/05 (Afr. Comm’n on Hum. People’s Rts., May 26, 2010), ¶ 3, <https://www.achpr.org/sessions/descions?id=195>.

110. *Id.* at ¶¶ 4-6.

111. *Id.* at ¶ 122.

112. Tom Ginsburg, *Constitutions and Foreign Relations Law: The Dynamics of Substitutes and Complements*, 111 AM. J. INT’L L. UNBOUND 326 (2017).

and even a sense of malaise about the prospects for our own democracy.¹¹³ What learning can we draw from the experience of other countries in confronting political attacks on the academy?

Of the various techniques we have seen deployed in backsliding democracies, two pose particular threats in the United States: attacks on tenure and selective research funding. The former is directed primarily against public institutions, while the latter affects all research institutions. Take the first: The elimination of tenure as proposed in several state legislatures might not survive constitutional scrutiny, at least of existing faculty, given contractual rights and reliance interests among current professors.¹¹⁴ But the elimination of tenure for new hires would mean that public universities would be unable to compete for new faculty with private institutions. This, in turn, could mean that the public universities, which in aggregate train the vast majority of American college students, might be delivering lower-quality education.

As for selective research funding, although it has the world's most elaborate system of privately funded universities, much of the U.S. research ecosystem depends on public funding. The politicization of most institutions in American society has been one major development in our polarized era. One can imagine a vindictive Congress singling out certain institutions as unable to receive federal funds, or imposing a range of ideological requirements to obtain funding. Such a move might very well survive constitutional scrutiny and could deliver a body blow to academic freedom in the United States.

Thus, academic freedom in the United States remains vulnerable. Unlike for most other democratic countries, there is no international human rights court to protect us or call attention to attacks when they occur. In the face of this situation, it is important for American academics to double down on our duties as truth-tellers and to provide environments in which rigorous research can survive, regardless of its political implications. Liora Lazarus has recently argued that constitutional scholars have a duty analogous to integrity institutions, whose job is to keep government accountable.¹¹⁵ For example, by examining constitutional court decisions, scholars play a vital role in effectuating accountability. More broadly, as a truth institution, the academy has a special duty to produce and disseminate knowledge. While political pressures are an inherent occupational risk for academics, the profession must respond with a sense of duty.¹¹⁶ Academic freedom thus requires administrators who defend the values of truth and resist those of politicization. This is, of course, easy advice to give, and harder to implement. But it also requires thinking of scholars as bearing normative duties to society, an ancient duty, found in numerous traditions.

113. CAN IT HAPPEN HERE? (Cass. R. Sunstein ed., 2017).

114. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972).

115. Liora Lazarus, *Constitutional Scholars as Constitutional Actors*, 48 *FED. L. REV.* 483 (2020).

116. Khaitan, *supra* note 45.

Defending academic freedom is part of a general strategy for democratic recovery and sustenance. Our populist era is one in which norms of professional integrity are under attack in election administration, in academia, and even in public health. These norms are necessary to maintain the institutions that supply epistemic and practical guardrails for democratic politics. Without constant cultivation, such norms can easily wither—posing broader risks to the polity.