COMMENTS

Academic Freedom and Misgendered Honorifics in the Classroom

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In recent years, public universities have promulgated pronoun policies designed to encourage professors and students to respect the pronouns that others use to identify themselves. A professor who does not follow the pronoun policy and instead misgenders a student—or uses gendered words or pronouns that do not match that student's gender identity—may be disciplined by their university for violating the pronoun policy.

This Comment argues that professorial speech misgendering students in the classroom should not be protected by a professor's First Amendment right to academic freedom, which traditionally covers teaching and scholarship. The First Amendment protects some exercises of academic freedom by public-university professors and public universities, but the bounds of these protections are not well defined. When a professor violates an official university pronoun policy by purposefully misgendering a student as part of a classroom-management device, a conflict arises between the professor's individual academic freedom and the university's institutional academic freedom. This Comment first seeks to situate this type of conflict within the history of academic freedom and the judicial principles that the Supreme Court and lower courts have used to discuss academic freedom. The Comment then argues that courts evaluating a conflict between individual and institutional academic freedoms should rule in favor of whichever exercise of academic freedom ensures that students can fully access the content of the lecture. In the case of misgendering as classroom management, the professor's exercise of academic freedom harms the misgendered student and makes it difficult for that student to fully engage with the lecture, while the university's exercise of academic freedom to promulgate a pronoun policy furthers a pedagogical environment in which all students can equally access educational content. Thus, the university's exercise of academic freedom should override the professor's in this conflict.

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INTRODUCTION

Ms. Doe, a young transgender woman, had been living as female "in all aspects of her life for over five years."[1] She enrolled as a student at Shawnee State University in Portsmouth, Ohio, in spring 2017.[2] One year later, she enrolled in a class taught by Professor Nicholas Meriwether because she was interested in the

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[1] Jane Doe and Sexuality and Gender Acceptance's Mot. to Intervene as Defendants at 5, Meriwether v. Trustees of Shawnee State Univ., No. 18-CV-753 (S.D. Ohio Sept. 5, 2019), 2018 WL 9814058 [hereinafter Mot. to Intervene].

[2] *Id.*

topic—political philosophy.[3] On the first day of the class, Meriwether misgendered Ms. Doe, calling her a male honorific.[4] After class, Ms. Doe informed him that she was a woman and asked him to use female honorifics.[5] Meriwether refused.[6] He insisted on continuing to use male honorifics and pronouns for Ms. Doe.[7] Following his lead, her classmates occasionally copied Meriwether's incorrect use of male honorifics and pronouns.[8] Feeling singled out and disrespected in class caused significant psychological strain and distress for Ms. Doe.[9] She "had regular crying spells outside of class," and her gender dysphoria increased in both severity and duration.[10] Unfortunately, Ms. Doe's experience is not unique for people whose gender identity differs from their sex assigned at birth.

Transgender[11] people may identify with or express a gender that differs from society's expectations of the sex assigned to them at birth.[12] To reflect this expressed gender, which is called a gender identity,[13] they may specify the pronouns that they and others will use when referring to them.[14] For example, a transgender person who identifies as a woman may ask people to refer to her using the pronouns "she" and "her." Misgendering occurs when a

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3 *Id.*

4 *Id.*

5 *Id.*

6 Mot. to Intervene, *supra* note 1, at 5.

7 *Id.*

8 *Id.* at 6.

9 *Id.*

10 *Id.*; *see also* Mayo Clinic Staff, *Gender Dysphoria*, MAYO CLINIC (Feb. 26, 2022), https://perma.cc/CL4U-TD29 ("Gender dysphoria is the feeling of discomfort or distress that might occur in people whose gender identity differs from their sex assigned at birth or sex-related physical characteristics.").

11 Throughout this Comment, I focus on the experience of those who identify as transgender because *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), a case that this Comment discusses in depth, concerned a transgender student. In reality, the harms that come from misgendering do not affect only those who identify as transgender. The experiences of those who do not use the pronouns assigned at birth—including gender nonconforming, gender nonbinary, and asexual folks—would likely be encompassed in the analysis. Essentially, the experience of misgendering can apply to many who are not cisgender. *See* Helana Darwin, *Challenging the Cisgender/Transgender Binary: Nonbinary People and the Transgender Label*, 34 GENDER & SOC'Y 357, 369–73 (2020).

12 MATSON LAWRENCE & STEPHANIE MCKENDRY, SUPPORTING TRANSGENDER AND NON-BINARY STUDENTS AND STAFF IN FURTHER AND HIGHER EDUCATION: PRACTICAL ADVICE FOR COLLEGES AND UNIVERSITIES 18–20 (2019).

13 *See id.* at 18.

14 *See id.* at 21–23.

transgender person is addressed with a word or pronoun that does not accurately reflect their gender identity.[15]

The classroom setting creates unfortunate opportunities for misgendering students, and misgendering a student can cause tangible harm. A lack of respect for gender-identity choices can negatively impact transgender students' learning outcomes.[16] For example, transgender students face an increased risk of negative academic outcomes.[17] Beyond academics, misgendering makes college students feel less like they are a part of their chosen community.[18] Tragically, misgendering and gender-orientation harassment also leads to a higher risk of suicide among transgender youth.[19]

To mitigate the harm caused by misgendering, many universities have sought to provide more inclusive environments for transgender people by promulgating pronoun policies.[20] These pronoun policies allow students to choose to be addressed by the pronouns that reflect their gender identities.[21] Pronoun policies

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15 LAURA WEISS ROBERTS, STUDENT MENTAL HEALTH: A GUIDE FOR PSYCHIATRISTS, PSYCHOLOGISTS, AND LEADERS SERVING IN HIGHER EDUCATION 427 (2018); *see also* LAWRENCE & MCKENDRY, *supra* note 12, at 25.

16 *See, e.g.*, Jonathan T. Pryor, *Out in the Classroom: Transgender Student Experiences at a Large Public University*, 56 J. COLL. STUDENT DEV. 440, 451 (2015) ("Just anticipating . . . [being outed or misgendered in the classroom] created anxiety about what [a particular student interview subject's academic] experience may be like.").

17 *See id.* at 445–53; Michael R. Woodford, Jessica Y. Joslin, Erich N. Pitcher & Kristen A. Renn, *A Mixed Methods Inquiry into Trans* Environmental Microaggressions on College Campuses: Experiences and Outcomes*, 26 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK 95, 106–09 (2017); Rob S. Pusch, *Objects of Curiosity: Transgender College Students' Perceptions of the Reactions of Others*, 3 J. GAY & LESBIAN ISSUES IN EDUC. 45, 51 (2008):

> Coming out as transgender can become all-consuming, as the person tries to come to terms with one's identity. For Mary, this resulted in doing poorly in school, forcing her to move back with her parents in a small town with no local support, where she attends a nearby two-year college.

18 *See* Abbie E. Goldberg & Katherine A. Kuvalanka, *Navigating Identity Development and Community Belonging When "There Are Only Two Boxes to Check": An Exploratory Study of Nonbinary Trans College Students*, 15 J. LGBT YOUTH 106, 108–09 (2018).

19 *See* Michael L. Hendricks & Rylan J. Testa, *A Conceptual Framework for Clinical Work with Transgender and Gender Nonconforming Clients: An Adaptation of the Minority Stress Model*, 43 PRO. PSYCH.: RSCH. & PRAC. 460, 463–64 (2012); *see also* Amaya Perez-Brumer, Jack K. Day, Stephen T. Russell & Mark L. Hatzenbuehler, *Prevalence and Correlates of Suicidal Ideation Among Transgender Youth in California: Findings from a Representative, Population-Based Sample of High School Students*, 56 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 739, 742–44 (2017).

20 *See, e.g.*, Occidental College, *Lived Name & Pronoun Policy*, OXY.EDU, https://perma.cc/2QDK-DBJV; Hampshire College, *Preferred First Name and Pronoun Policy*, HAMPSHIRE.EDU.

21 *See, e.g.,* NYU, *Pronouns*, NYU.EDU, https://perma.cc/9TC8-YK7C; Ohio University, *Preferred Pronouns Policy*, OHIO.EDU, https://perma.cc/RH6Q-VDVV; Occidental College,

can tangibly benefit students. For example, research has shown that providing students with a structured way to notify their professors of their pronouns can reduce the pressure related to "coming out."[22] In addition, these policies benefit universities by reducing their litigation risk. Discrimination against transgender students is illegal: Title IX[23] prohibits schools from discriminating against students on the basis of sex—which, as the Supreme Court recognized in the context of interpreting Title VII[24] in *Bostock v. Clayton County*,[25] can include discrimination on the basis of gender identity.[26] Finally, pronoun policies provide guidance to professors, helping them avoid conduct that may give rise to allegations of discrimination from their students.

However, not all professors welcome this guidance. Some professors have objected to their universities' pronoun policies. For instance, Meriwether violated his university's pronoun policy by misgendering his student, Ms. Doe.[27] In *Meriwether v. Hartop*,[28] the Sixth Circuit evaluated Meriwether's claim that his university's decision to discipline him for this violation infringed on his First Amendment[29] right to academic freedom.[30] He argued that his use of gendered honorifics in the classroom as a classroom-management device should be protected.[31]

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supra note 20; Hampshire College, *supra* note 20. It's not immediately clear on the face of these policies whether faculty would be punished for not following the pronoun policies. In the case of the professor who was punished in *Meriwether*, the pronoun policy was published and the faculty were separately informed that they were bound by the terms of the pronoun policy and could be disciplined for transgressions. *See Meriwether*, 992 F.3d at 498.

22 *See* LAWRENCE & MCKENDRY, *supra* note 12, at 81–83.

23 Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688).

24 Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. 2000e–2000e-17 (2000)).

25 140 S. Ct. 1731 (2020).

26 *Id.* at 1741; *see also* Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637, 32,638 (June 22, 2021) (interpreting the Supreme Court's decision in *Bostock*, which outlawed discrimination against transgender employees as discrimination on the basis of sex under Title VII, to apply to students) [hereinafter Title IX in Light of *Bostock*].

27 *Meriwether*, 992 F.3d at 499–500.

28 992 F.3d 492 (6th Cir. 2021).

29 U.S. CONST. amend. I.

30 *Meriwether*, 992 F.3d at 503. The Sixth Circuit also considered whether the university had violated the Free Exercise Clause of the First Amendment by disciplining Meriwether for not following the pronoun policy. *Id.* at 512. That topic is outside the scope of this Comment.

31 *See id.* at 503.

Meriwether's violation came from instances in which he repeatedly misgendered Ms. Doe because he believed that gender must always match the sex assigned at birth.[32] As noted above, Ms. Doe identified as female and asked Meriwether to use female pronouns and honorifics when referring to her, in accordance with her gender identity.[33] Meriwether refused to use female pronouns for Ms. Doe.[34]

Ms. Doe and university administrators asked Meriwether to respect Ms. Doe's pronouns. After the first misgendering incident, Ms. Doe approached Meriwether to request that he use her female pronouns.[35] She then submitted a Title IX complaint.[36] Following Ms. Doe's Title IX complaint, the dean approached Meriwether about the misgendering.[37] They settled on a compromise: Meriwether would call all the other students by their gendered honorifics but would refer to Ms. Doe only by her last name.[38] After Ms. Doe complained twice more—once because she was dissatisfied with the compromise and once because he misgendered her yet again—Meriwether offered an accommodation where he would use Ms. Doe's pronouns but with a disclaimer in his syllabus that he was doing so under "compulsion."[39] The university rejected this accommodation as violating the university's pronoun policy.[40] After receiving another complaint from Ms. Doe because of the "discriminatory mistreatment,"[41] the university informed Meriwether that he could either (1) cease using gendered honorifics when referring to students or (2) refer to Ms. Doe using feminine pronouns.[42]

Meriwether eventually received a warning letter threatening future punishment if he continued to misgender Ms. Doe.[43] Following an investigation, the Title IX office concluded that Meriwether had engaged in discrimination and created a hostile environment for Ms. Doe.[44] Meriwether was then formally warned

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32 *Id.* at 501, 507.
33 *Id.* at 499.
34 Mot. to Intervene, *supra* note 1, at 5–6; *see also Meriwether*, 992 F.3d at 499–500.
35 *Meriwether*, 992 F.3d at 499.
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.* at 499–500.
40 *Meriwether*, 992 F.3d at 500.
41 Mot. to Intervene, *supra* note 1, at 6.
42 *See Meriwether*, 992 F.3d at 500.
43 *Id.* at 501.
44 *See id.* at 500–01.

that if he did not change the way he addressed transgender students, he could be subject to further corrective action.[45] After the Shawnee State faculty union filed an internal grievance on Meriwether's behalf, a committee found that he had violated Title IX by engaging in differential treatment and upheld his formal warning.[46] Meriwether then filed a lawsuit asking for a declaratory judgment that the university's pronoun policies violated his First Amendment rights and an injunction prohibiting the university from enforcing the pronoun policy against him because he feared further punishment from the school.[47] The district court dismissed the lawsuit for failure to state a claim, and Meriwether appealed the decision to the Sixth Circuit.[48]

The Sixth Circuit held that Meriwether's use of misgendered honorifics was protected under his First Amendment right to academic freedom, and the court reversed and remanded for further proceedings.[49] The Sixth Circuit's decision cast a broad net: the court held that a professor's academic freedom "covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."[50] This decision was unique among other academic-freedom cases because of its broad protection of the professor's academic freedom in the classroom.[51]

Meriwether raises a broader question regarding pronoun policies and misgendering: When a professor defies their university's pronoun policy by misgendering a student in the classroom, does this action fall under the professor's First Amendment right to academic freedom?

Among other things, the First Amendment protects the right to freedom of speech from undue government intrusion.[52] Academic freedom is an unsettled doctrine in First Amendment jurisprudence. The Supreme Court has repeatedly acknowledged that

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45 *Id.* at 501.

46 *See id.* at 501–02.

47 *See Meriwether*, 2020 WL 704615, at *1.

48 *Id.* at *2.

49 *Meriwether*, 992 F.3d at 503, 518.

50 *Id.* at 507.

51 *See, e.g.*, Piggee v. Carl Sandburg Coll., 464 F.3d 667, 672 (7th Cir. 2006) (noting that, while professors have the right under their academic freedom to communicate controversial ideas in the classroom, they must stay within the university's curriculum); Bishop v. Aronov, 926 F.2d 1066, 1071–77 (11th Cir. 1991) ("Dr. Bishop's interest in academic freedom and free speech do not displace the University's interest inside the classroom.").

52 Virginia v. Black, 538 U.S. 343, 358–59 (2003).

academic freedom is a "special concern of the First Amendment" but has never decided a case solely on the basis of academic freedom.[53] The Court has, however, indicated that both universities and individual professors have First Amendment rights to academic freedom.[54] The bounds of these freedoms are ill-defined, particularly when the university's academic freedom (its "institutional academic freedom") and the professor's academic freedom (their "individual academic freedom") are in conflict with each other.[55]

The misgendering in *Meriwether* arose during the use of a classroom-management device. The ultimate purpose of classroom management is to establish an environment where students can engage in meaningful academic learning.[56] This may involve changing the structure of instruction or using group-management methods.[57] For example, Meriwether used gendered honorifics to control the classroom discussion.[58] Other examples of classroom-management devices include the Socratic method, student-led brainstorming,[59] and classroom discipline.[60]

When a professor contravenes a university's pronoun policy through the use of misgendered honorifics as a classroom-management device, that action puts individual and institutional academic freedoms at odds. This situation implicates the university's academic freedom to institute a pronoun policy and the professor's academic freedom to control the form of the lecture.

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53 Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

54 *See, e.g.*, *id.*; Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

55 While this issue could presumably arise in the K-12 context, that is outside the scope of this Comment. *See* William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS., 79, 146 (citing West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943)):

> Academic freedom plays out somewhat differently in the milieu of primary and secondary public education. It is drawn in principally as a constitutional check against state tendencies to misuse powers of educational command to censor materials or instruction, but it plays out much more ambiguously and without the same breadth of reach.

56 *Cf.* HANDBOOK OF CLASSROOM MANAGEMENT: RESEARCH, PRACTICE, AND CONTEMPORARY ISSUES 4 (Carolyn M. Evertson & Carol S. Weinstein, eds., 2011) ("In other words, classroom management has two distinct purposes: It not only seeks to establish and sustain an orderly environment so students can engage in meaningful academic learning, it also aims to enhance students' social and moral growth.").

57 *See id.* at 5.

58 *Meriwether*, 992 F.3d at 499.

59 *See, e.g.*, Vega v. Miller, 273 F.3d 460, 462–63 (2d. Cir. 2001).

60 *See, e.g.*, Bhattacharya v. SUNY Rockland Cmty. Coll., 719 F. App'x 26, 27 (2d Cir. 2017) (unpublished table decision).

In this Comment, I argue that courts should consider the student's interest in gaining access to the marketplace of ideas when determining whether the professor or the university is able to claim protection under the First Amendment using academic freedom. One of the justifications that the Court has given for recognizing academic freedom is that academic freedom ensures that ideas are passed on to students.[61] When individual and institutional academic freedoms conflict, courts should consider which actor's exercise of academic freedom promotes this goal. This idea aligns with the principles used by the Court in its jurisprudence on academic freedom.[62] In addition, some lower courts have considered the student's interests when evaluating academic freedom, although none have done so explicitly.[63] To account for student interests, these courts have considered the impact of the professor's use of academic freedom on the student's experience in the classroom.[64] Finally, the norms of professional academic freedom—the understanding of academic freedom promulgated by universities and professors, which is separate from the constitutional academic freedom recognized by the Court under the First Amendment—can inform the application of constitutional academic freedom by urging courts to consider the effects on students when evaluating exercises of academic freedom. Professional academic freedom, which prioritizes individual academic freedom, also can supply helpful guideposts for limiting individual academic freedom in relation to student interests.

In the case of gendered honorifics, the professor's exercise of individual academic freedom through misgendered honorifics decreases the student's access to the lecture content, while the university's exercise of institutional academic freedom through its pronoun policy protects student interests. Therefore, the university's use of its institutional academic freedom to protect student interests should enable it to validly infringe on the professor's individual academic freedom by requiring the professor to cease misgendering. For litigation purposes, a professor who was punished by a university for misgendering a student in violation of a

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61 *See infra* Part II.B.3.

62 *See infra* Part II.B.

63 *See infra* Part IV.A.

64 *See, e.g.*, Martin v. Parrish, 805 F.2d 583, 585–86 (5th Cir. 1986) (finding that a college instructor's use of profanity in the classroom was unprotected speech because it lacked any academic purpose or justification and had a negative impact on students and classroom instruction).

university pronoun policy would not be able to rely on their individual academic freedom as grounds for maintaining their practice of misgendering students, because their academic freedom would have given way to the conflicting institutional academic freedom.

Because public-university professors are public employees, Part I of this Comment first discusses academic freedom in the broader context of public-employment litigation. Part II then examines the history of academic freedom and the principles behind the doctrine, as explained by the Supreme Court. Part III explains how the misgendering of a student by a public-university professor in contravention of a university pronoun policy should be contextualized under the framework of academic freedom. Part IV suggests that the proper way to evaluate whether misgendering as classroom management constitutes a protected exercise of individual academic freedom is to consider the interests of the student as part of a balancing process between individual academic freedom to control lecture contents and institutional academic freedom to set the university's pedagogical goals. To do so, this Comment invokes the Supreme Court's principles of academic freedom, lower court decisions that consider student interests, and professional academic freedom norms.

I. FREEDOM OF SPEECH AND ACADEMIC FREEDOM FOR PUBLIC EMPLOYEES

Public-university professors are public employees. Public employees do not relinquish all First Amendment rights by virtue of public employment, but "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."[65]

To analyze First Amendment claims brought by most public employees, a court must first determine whether the employee is speaking pursuant to their official duties per the test set by the Supreme Court in *Garcetti v. Ceballos*.[66] The Court in *Garcetti* considered the case of a prosecutor who spoke up after discovering significant misrepresentations in a search warrant affidavit.[67] He

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65 Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

66 547 U.S. 410 (2006).

67 *See id.* at 413–14.

raised his concerns to his superiors, who proceeded with the prosecution anyway.[68] He then faced employment actions that he felt were in retaliation for his speech, and so he sued his supervisors, alleging that his First Amendment rights had been violated.[69] In ruling against the prosecutor, the *Garcetti* Court established a fairly bare-bones test: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[70]

If the employee is not speaking pursuant to their official duties, then courts apply the *Pickering-Connick* framework.[71] Under the *Pickering-Connick* framework, courts first consider whether the employee speaks "as a citizen upon matters of public concern."[72] If not, there is no First Amendment protection.[73] If the employee is speaking "as a citizen upon matters of public concern," the burden shifts to the government entity to show an adequate justification for regulating the speech.[74] The *Pickering-Connick* framework was the predominant test before *Garcetti*. Prior to *Garcetti*, this meant that if faculty members spoke on matters of public concern and suffered adverse employment actions, they could later sue in federal court.[75] After *Garcetti*, faculty members must first show that they were not speaking under their official duties before a court will examine the nature of the speech.[76] Functionally, this places more public-employee speech beyond the reach of the First Amendment.

Public-employee speech concerning a matter of only personal interest is not protected under the *Pickering-Connick* framework.[77] The Supreme Court has acknowledged that the boundaries of what constitutes a "matter of public concern" are "not well

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68 *See id.* at 414.

69 *See id.* at 415.

70 *Id.* at 421.

71 This framework is named after *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983).

72 Connick, 461 U.S. at 147.

73 *See id.*

74 *See id.* at 147, 150.

75 *See* Suzanne R. Houle, *Is Academic Freedom in Modern America on Its Last Legs After* Garcetti v. Ceballos*?*, 40 CAP. U. L. REV. 265, 274–75 (2012).

76 *Garcetti*, 547 U.S. at 421.

77 *See Connick*, 461 U.S. at 147; *cf.* Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("'[N]ot all speech is of equal First Amendment importance,' however, and where matters of purely

defined."[78] To determine "[w]hether an employee's speech addresses a matter of public concern," a court must examine "the content, form, and context of a given statement."[79] Speech deals with a matter of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community."[80] In contrast, a matter of private concern would only interest an employee personally, such as "assignments, promotion, or salary."[81] For example, a court has considered a professor's ideas for improving the Communications Department at his school a matter of public concern because those ideas were connected to broader proposals for the school.[82] Outside of the education context, speech protesting a gay soldier's funeral dealt with a matter of public concern because the signs touched on issues of "homosexuality in the military,"[83] and a police officer's refusal to lie about a sergeant's use of force dealt with a matter of public concern because "[e]xposure of official misconduct . . . is generally of great consequence to the public."[84] On the other hand, complaints by professors about the internal process used to select professors[85] and objections to the closing of their laboratories[86] have been treated as "classic personnel struggle[s]" that did not implicate matters of public concern.[87]

After *Garcetti*, employee speech is much less protected by the First Amendment. Because the *Garcetti* Court stated that an employee who is speaking "pursuant to their official duties" is not speaking as a citizen, that form of employee speech no longer receives First Amendment protection under the *Pickering-Connick* framework.[88] If *Garcetti* applies, the employee's speech is automatically excluded from First Amendment protection.

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private significance are at issue, First Amendment protections are often less rigorous." (alteration in original) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988))).

78 *Snyder*, 562 U.S. at 452 (quoting San Diego v. Roe, 543 U.S. 77, 83 (2004)).

79 *Connick*, 461 U.S. at 147–48.

80 *See id.* at 146.

81 Jackler v. Byrne, 658 F.3d 225, 236 (2d Cir. 2011).

82 Demers v. Austin, 746 F.3d 402, 414–17 (9th Cir. 2014).

83 *See Snyder*, 562 U.S. at 454.

84 *See Jackler*, 658 F.3d at 236.

85 Clinger v. N.M. Highlands Univ., Bd. of Regents, 215 F.3d 1162, 1166 (10th Cir. 2000) (finding no matter of public concern where a professor publicly disagreed with the Board of Trustees "on the internal process they followed in selecting a president and reorganizing the University").

86 Brooks v. Univ. of Wis. Bd. of Regents, 406 F.3d 476, 479–80 (7th Cir. 2005).

87 *Id.* at 480.

88 *See Garcetti*, 547 U.S. at 421.

Justice David Souter dissented in *Garcetti* out of concern for the effects that the "official duties" test might have on academic freedom.[89] He noted that *Garcetti* could impair the academic freedom of professors at "public colleges and universities, who[ ] [ ] necessarily speak and write 'pursuant to . . . official duties.'"[90] The *Garcetti* majority explicitly acknowledged Justice Souter's concerns. Cognizant of the potential threat to professors' speech within areas of their academic expertise and the chill that the *Garcetti* test might have on classroom conversations about controversial ideas, the Court left open whether the *Garcetti* test applied to "speech related to scholarship or teaching."[91]

Some circuits have held that the "scholarship or teaching" language establishes an academic-freedom exception to *Garcetti*. Instead of applying *Garcetti* to academic-freedom claims by public-university professors, these circuits apply the *Pickering-Connick* framework.[92]

Other circuits have not yet recognized an academic-freedom exception to *Garcetti*. In those circuits, much more of the professor's speech may be unprotected as part of their official duties.[93] For example, courts applying *Garcetti* have held that advising a student,[94] applying for academic funding,[95] complaining about an academic program,[96] and maintaining classroom discipline by refusing to allow students to cheat on an exam[97] were part of the professor's official duties and therefore unprotected by the First Amendment.

Classroom actions related to scholarship and teaching—such as lecturing on a controversial topic—could be considered part of a professor's official duties and therefore unprotected; however,

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89 *Id.* at 438 (Souter, J., dissenting).

90 *Id.* (quoting *Garcetti*, 547 U.S. at 421 (majority opinion)).

91 *Id.* at 425.

92 *See, e.g.*, Adams v. Trustees of Univ. of N.C.-Wilmington, 640 F.3d 550, 562–65 (4th Cir. 2011); Buchanan v. Alexander, 919 F.3d 847, 852–54 (5th Cir. 2019); *Demers*, 746 F.3d at 410–12.

93 *See, e.g.*, Oren R. Griffin, *Academic Freedom and Professorial Speech in the Post-*Garcetti *World*, 37 SEATTLE U. L. REV. 1, 20–21 (discussing the actions of public-university professors that would likely fall under official duties).

94 Gorum v. Sessoms, 561 F.3d 179, 185–86 (3d Cir. 2009).

95 Renken v. Gregory, 541 F.3d 769, 773–75 (7th Cir. 2008).

96 Alberti v. Carlo-Izquierdo, 548 F. App'x 625, 638–39 (1st Cir. 2013) (unpublished table decision).

97 Bhattacharya v. SUNY Rockland Cmty. Coll., 719 F. App'x 26, 27 (2d Cir. 2017) (unpublished table decision).

no circuit has applied *Garcetti* to these actions thus far.[98] In the circuits that do not recognize an academic-freedom exception to *Garcetti*, a court would presumably apply the *Garcetti* test to a professor's use of gendered honorifics as classroom management. Using honorifics to call on students during lecture seems like part of that professor's official duties, and thus the speech would not be protected by the First Amendment.[99] By contrast, in circuits that do recognize an academic-freedom exception to *Garcetti*, a court would apply the *Pickering-Connick* framework to the misgendered honorifics. For example, the *Meriwether* court determined that misgendered honorifics implicated a matter of public concern, citing Supreme Court precedent stating that gender identity is a matter of "profound value and concern to the public."[100]

Thus, the question of whether a public-university professor's act of misgendering is a protected exercise of academic freedom will matter when it comes to litigating the professor's claims under public employee First Amendment jurisprudence. In circuits recognizing an academic-freedom exception to *Garcetti*, academic-freedom protections would allow the professor's actions to be evaluated under the more employee-friendly *Pickering-Connick* framework instead of the stricter *Garcetti* test. A professor might still be able to claim academic-freedom protections and bypass the *Garcetti* test in the circuits that do not yet recognize an academic-freedom exception, because these circuits have not yet applied the *Garcetti* test to an act of scholarship or teaching. If a court did find that an act of teaching or scholarship by a professor deserves academic-freedom protections, it would be much more difficult for a university to prove that disciplining the professor was lawful under the First Amendment because the professor would be litigating under the *Pickering-Connick* framework. If, in contrast, an act was not protected by the professor's individual academic freedom, it would be much more difficult for the professor to prove that their activity was protected because the case would be evaluated under the *Garcetti* test.

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98 *Cf.* Houle, *supra* note 75, at 283–86 (implying that, while it is conceivable that *Garcetti* could apply in such circumstances, no circuit court cases have yet broached the issue).

99 *Cf.* Griffin, *supra* note 93, at 20–21.

100 *Meriwether*, 992 F.3d at 506 (quoting Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2476 (2018)).

II. ACADEMIC FREEDOM: A SPECIAL CONCERN OF THE FIRST AMENDMENT

In order to evaluate whether academic freedom should protect a professor's use of misgendered honorifics from a university's pronoun policy, it's important to understand the history of academic freedom. Created by professors and universities, professional academic freedom preceded and is separate from the constitutional academic freedom recognized by the Supreme Court under the First Amendment. The history of constitutional academic freedom can also assist in understanding its (ill-defined) boundaries. In Part III.A, I examine the history of professional academic freedom. In Part III.B, I build on that history to identify the principles of constitutional academic freedom indicated by the Court and interpreted by lower courts.

A. The History of Professional Academic Freedom

Professional academic freedom preceded the Court's recognition of the constitutional doctrine of academic freedom, and it can inform our understanding of how the justices of the Supreme Court thought about constitutional academic freedom in the first instance. Some scholars argue that the scope of constitutional and professional academic freedoms have semiconverged. Their suggestion is that, while constitutional and professional academic freedoms now basically cover the same individual *activities* of professors, professional academic freedom doesn't evaluate institutional academic freedom and instead focuses only on the bounds of individual academic freedoms.[101] Others argue that professional academic freedom still informs the debate but that constitutional academic freedom is narrower.[102] Professional academic freedom protects professors at private universities as well as at public universities, while constitutional academic freedom—which requires state action—applies only to public universities.[103] Professional academic freedom has been widely accepted and has

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[101] *Cf.* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L. J. 945, 985–88 (2009).

[102] Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of* Garcetti v. Ceballos *to Public University Faculty*, 59 CATH. U. L. REV. 125, 128 (2009) (citing David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 L. & CONTEMP. PROBS. 227, 237–39, 255 (1990)).

[103] Rabban, *supra* note 102, at 237 n.31.

informed the principles used by the Court in defining constitutional academic freedom.[104]

Professional academic freedom evolved to protect professors from being disciplined due to their ideas. The American Association of University Professors (AAUP) was concerned about outside actors, such as trustees, who would advocate for the punishment of professors who held ideas contrary to the interests of the trustees.[105] For example, economics faculty who had written on the need to regulate monopolies might be removed per the request of trustees who had benefited from monopolies.[106] Such interference was in sharp contrast with the German ideal of *Lehrfreiheit*, with which many American professors in the early 1900s were familiar because they had studied at German universities.[107] *Lehrfreiheit* was the principle that university professors should be free to explore new topics, especially those that are controversial, without administrative rules infringing on this exercise of inquiry.[108]

To effect their goal of allowing more freedom for professors to research and produce scholarship, in 1915 the AAUP signed the General Declaration of Principles (the "1915 Declaration").[109] The 1915 Declaration established that academic freedom is the defining characteristic of universities and should be protected through a variety of administrative safeguards, such as tenure and faculty review rather than layperson review of academic dismissal decisions.[110]

The AAUP reformulated the 1915 Declaration with the 1940 Statement of Principles on Academic Freedom and Tenure (the "1940 Statement") in an effort to simplify its statements on academic freedom (and to remove a line stating that professors could be removed for treason, which was an "eyesore" that had haunted the AAUP when the House Un-American Activities Committee began pursuing subversives).[111] The 1940 Statement has been

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104 *Cf. id.* at 237 ("[A] convincing justification for constitutional academic freedom requires a thorough comparison of general first amendment theories with nonlegal theories of academic freedom, yielding conclusions about where these various theories do and do not overlap.").

105 Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J. COLL. & U.L. 791, 800–04 (2010).

106 *Id.* at 799.

107 *Id.* at 796.

108 *See id.*

109 *Id.* at 801.

110 *See* White, *supra* note 105, at 801.

111 Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 LAW & CONTEMP. PROBS. 3, 29–30 (1990).

widely adopted by universities and is considered the "most influential expression of academic freedom principles to be found anywhere in the extensive literature on American higher education."[112] The 1940 Statement not only established freedom for faculty members to teach their subjects without interference but also encouraged faculty members to avoid introducing "controversial matter[s] which ha[ve] no relation to their subject."[113]

The AAUP's directives since the 1940 Statement have expanded to consider the role of students in academic freedom.[114] The current AAUP policy statement on the academic freedom of students emphasizes that "[f]reedom to teach and freedom to learn are inseparable facets of academic freedom."[115] Students are entitled to an environment "conducive to learning."[116]

B. Judicial Principles of Constitutional Academic Freedom

The Supreme Court first took notice of constitutional academic freedom twelve years after the 1940 Statement in Justice William O. Douglas's dissenting opinion in *Adler v. Board of Education*.[117] The Court was considering a case brought by a professor claiming that the Feinberg Law—a state-law attempt to root out communism by making a list of every government employee's organizational affiliations—was unconstitutional.[118] While the majority of the Court upheld the Feinberg Law, Justice Douglas dissented, arguing that the law would "raise havoc with academic freedom."[119] Justice Douglas stated that requiring teachers to show their connection with a listed organization would discourage the "pursuit of truth" and noted that "it was the pursuit of truth which the First Amendment was designed to protect."[120]

Justice Douglas's dissent is important not only for its groundbreaking language of academic freedom as it relates to the First

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112 White, *supra* note 105, at 802; *see* Metzger, *supra* note 111, at 3.

113 *Id.* at 803 (quoting AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP.ORG, https://perma.cc/QG2L-A3RX).

114 *See, e.g.*, Van Alstyne, *supra* note 55, at 82 (describing the increasingly complex canon of the AAUP in the years since the 1940 Statement).

115 AAUP, POLICY DOCUMENTS AND REPORTS 141 (1984).

116 *Id.* at 135.

117 342 U.S. 485 (1952), *overruled in part by* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

118 *Id.* at 486–92.

119 *Id.* at 509 (Douglas, J., dissenting).

120 *Id.* at 511.

Amendment but also because he didn't frame academic freedom as "parasitic" on traditional free speech rights under the First Amendment.[121] Instead, he established it as its own independent First Amendment concern, which would allow it to gain a "recognizable shape" within First Amendment law.[122] As Professor J. Peter Byrne notes, "[a]cademic freedom is the only First Amendment right enjoyed solely by members of a particular profession."[123] The concept of the right to academic freedom is both broader and narrower than the traditional right to free speech: as part of their exercise of academic freedom, a professor could show a movie for educational purposes that would be considered obscene (and hence unprotected) in other circumstances, but that same professor could also be punished for teaching that gravity doesn't exist, a statement that may be protected speech for others.[124]

Following the first appearance of the term "academic freedom" in Justice Douglas's dissent, the Supreme Court has repeatedly taken note of academic freedom.[125] The arc of academic-freedom opinions parallels a broader Supreme Court trend during this period toward increasing First Amendment protections.[126] The Court has not, however, decided a case solely on the concept of academic freedom.[127] Some scholars argue that academic freedom therefore does not exist as a constitutional right.[128] Others have questioned that view by pointing out that the protection of academic freedom is necessary because of the role of universities and professors in seeking out truth—one of the quintessential purposes of the First Amendment.[129] Regardless of the lack of a Supreme Court decision based solely in academic freedom, the lower courts have used Supreme Court statements on academic freedom to determine whether they should apply the protections

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[121] Van Alstyne, *supra* note 55, at 107.

[122] *Id.*

[123] J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 264 (1989).

[124] *See* Rabban, *supra* note 102, at 242.

[125] Van Alstyne, *supra* note 55, at 107–54 (discussing changes in First Amendment Supreme Court jurisprudence).

[126] *See id.* at 112 ("The trend of the [academic freedom] cases [following *Adler*] yielded a strengthened first amendment philosophy within the Court.").

[127] *See generally* Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677 (2014).

[128] *See generally id.*; Lawrence Rosenthal, *Does the First Amendment Protect Academic Freedom?*, 46 J. COLL. & U.L. 51 (2021).

[129] *See* Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 963–64 (2006).

of academic freedom in cases before them.[130] Unfortunately, the lack of a clear rule on the bounds of academic freedom has led to a variety of situations where academic freedom has been applied inconsistently: "Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles."[131]

Despite this uncertainty, the Supreme Court has used three guiding principles when discussing constitutional academic freedom. First, individual teachers should be free to investigate and exchange ideas without a chill or "pall of orthodoxy over the classroom."[132] Second, universities must be able to use institutional academic freedom to decide "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[133] Third, the core of academic freedom is its democratic value, which requires a wide exposure of students to the "robust exchange of ideas" to be effective.[134]

These judicial principles of constitutional academic freedom may not map perfectly onto misgendering of a student as classroom management because of the nature of the disputes on which the Court has spoken. All of the Court's opinions concerning academic freedom have dealt with external policies, meaning policies that impacted academic freedom but originated outside of the university environment, such as from a state legislature. Misgendering in contravention of a university pronoun policy implicates an internal conflict between individual and institutional academic freedoms. While that distinction will be discussed further in Part III.A, it's useful to understand that the principles on which the Court relies apply specifically to the academic freedom being considered—institutional or individual—instead of to the muddied interactions between individual and institutional academic freedoms.

1. A professor's academic freedom includes the ability to

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130 *See infra* Parts II.B.1, II.B.2.

131 Byrne, *supra* note 123, at 253.

132 *Keyishian*, 385 U.S. at 603.

133 Sweezy v. N.H., 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting CONFERENCE OF REPRESENTATIVES OF THE UNIVERSITY OF CAPE TOWN AND THE UNIVERSITY OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (1957) [hereinafter CAPE TOWN CONFERENCE]).

134 *Keyishian*, 385 U.S. at 603.

choose which ideas to communicate in the classroom.

The landmark case for academic freedom for professors—and the first time that a majority opinion considered academic freedom[135]—is the case that overturned *Adler*. In *Keyishian v. Board of Regents of the University of the State of New York*,[136] the Court struck down the same Feinberg Law that required professors to disclose "subversive" organizational affiliations and was upheld in *Adler*.[137] Although the *Keyishian* Court struck down the Feinberg Law on substantive First Amendment grounds because the law was unconstitutionally vague and did not cite Justice Douglas's *Adler* dissent, the Court did discuss the chilling effect on teachers.[138] During this discussion, the *Keyishian* Court affirmed the idea that teachers should be able to inquire into new subjects in pursuit of knowledge and should be given the freedom to communicate those ideas to the nation's future leaders.[139] The Court emphasized that new understandings are out there to be discovered and that the more different ideas that students can be exposed to, the better.[140] The *Keyishian* Court expanded on the plurality opinion in *Sweezy v. New Hampshire*[141]—which had discussed the idea that teachers must always retain the space for free inquiry[142]—to establish that teachers should be allowed to pursue their scholarship and communicate it in the classroom without a "pall of orthodoxy."[143] The *Sweezy* plurality evaluated the case of a state attorney general who questioned a lecturer about comments he made in class to determine whether those comments contained subversive content.[144] The *Sweezy* opinion stated that this questioning would tread on teachers' opportunities to practice free inquiry.[145]

There are other Supreme Court opinions affirming this freedom for teachers. For example, in *Wieman v. Updegraff*,[146] the

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135 White, *supra* note 105, at 810.

136 385 U.S. 589 (1967).

137 *Id.* at 605–10.

138 *Id.* at 597–610.

139 *Id.* at 603 (first citing United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945); and then citing *Sweezy*, 354 U.S. at 250).

140 *See id.*

141 354 U.S. 234 (1957).

142 *See id.* at 250.

143 *Keyishian*, 385 U.S. at 603.

144 *Sweezy*, 354 U.S. at 243–44.

145 *Id.* at 250–52.

146 344 U.S. 183 (1952).

Court analyzed a statute requiring an oath of loyalty for all state employees.[147] Among other things, the oath of loyalty required employees to swear that they were not members of a communist or subversive agency.[148] While the Court struck down the law on due process grounds, Justice Felix Frankfurter, a former academic, noted in his concurring opinion (joined by Justice Douglas, also a former academic) that this law also implicated the academic freedom of teachers.[149] Justice Frankfurter decried the use of the oath not only because it would decrease freedom of inquiry and association but also because that inhibition would decrease the "free spirit" of teachers to cultivate and practice open-mindedness.[150] He noted that teachers needed the freedom to both inquire into new ideas and to communicate those ideas to students.[151] The Court again recognized the importance of academic freedom in *Edwards v. Aguillard*,[152] in which it struck down a Louisiana law requiring teachers to teach "[c]reationism" alongside evolution.[153] There, the majority noted that the Louisiana law failed to protect academic freedom because teachers could no longer teach science as they chose.[154]

But these Supreme Court decisions do not clearly define the boundaries of individual academic freedom. The Court neither defines "pall of orthodoxy" nor specifies how far the ability to inquire and communicate controversial ideas should extend. None of the Court's opinions clearly states the answers to these questions. Both scholars and lower courts have attempted to expand upon and clarify this doctrine.

Scholars have attempted to build a framework for individual academic freedom based on this patchwork of Supreme Court opinions. Generally, scholars agree that individual academic freedom extends to the pursuit of controversial ideas—the core of the professor's academic freedom is the protection of critical inquiry.[155] As part of that pursuit, professors should be allowed to

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147 *Id.* at 184–85.

148 *Id.* at 186.

149 *Id.* at 195–98 (Frankfurter, J., concurring).

150 *Id.* at 195.

151 *See Wieman*, 344 U.S. at 196.

152 482 U.S. 578 (1987).

153 *Id.* at 581, 596–97.

154 *Id.* at 587–89.

155 Van Alstyne, *supra* note 55, at 87:

> A faculty, especially a research faculty, is employed professionally to test and propose revisions in the prevailing wisdom, not to inculcate the prevailing wisdom in others, store it as monks might do, or rewrite it in elegant

teach within their trained fields of competence without state interference with the ideas presented. Because professors are generally required to publish their work and disseminate it through teaching, it would be counterproductive to extend protection to the work but not to the dissemination of that same work, so teaching is also protected.[156] Most scholars have bound a professor's use of academic freedom to the professional norms and standards of their field: a mathematics professor may seek out controversial ideas, but can't escape punishment if they teach that two plus two equals five.[157]

Lower courts generally seem to have embraced the principle that professors can teach controversial ideas. For example, in *Dube v. State University of New York*,[158] the Second Circuit considered the case of a public-university professor who was denied tenure allegedly because he taught that Zionism in Israel was a form of racism.[159] After a public outcry over the professor's lecture contents, the university took action against the professor that he felt was retaliation for his classroom teachings.[160] The court allowed the professor's First Amendment retaliation claim to proceed, stating that it would be impermissible for the university to defend its tenure decision on the basis of the controversy his ideas caused.[161] The reason for the court's decision was that such retaliation would cast a "'pall of orthodoxy' over the free exchange of ideas in the classroom" in violation of the professor's First Amendment rights.[162]

Kerr v. Hurd[163] is another example of a court applying academic freedom protection when the professor was: (1) teaching and (2) within the professional standards of their field. There, a medical school professor claimed that he faced retaliation because of his advocacy for forceps delivery over cesarean sections.[164] The

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> detail. Its function is primarily one of critical review: to check conventional truth, to reexamine ("re-search") what may currently be thought sound but may be more or less unsound. Its purpose is likewise to train others to the same critical skills.

156 Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom"*, 45 STAN. L. REV. 1835, 1843–44 (1993).

157 *Id.* at 1844–45.

158 900 F.2d 587 (2d Cir. 1990).

159 *Id.* at 588–91.

160 *Id.*

161 *Id.* at 598.

162 *See id.* (quoting *Keyishian*, 385 U.S. at 603).

163 694 F. Supp. 2d 817 (S.D. Ohio 2010).

164 *Id.* at 834.

Kerr court noted that the expressed views were "well within the range of accepted medical opinion" and occurred during the professor's teaching and that those views should "certainly" have received protection under the First Amendment as part of the professor's academic freedom.[165] Because of this holding, the court found that the claim fell within an academic-freedom exception to *Garcetti*, and it analyzed Dr. Kerr's claims under the *Pickering-Connick* framework.[166]

2. A university's academic freedom includes the ability to set the curriculum and pursue legitimate pedagogical interests.

Institutional academic freedom is rooted in the university's role as the facilitator of public education's purpose—the robust exchange of ideas—and in the "expansive freedoms of speech and thought associated with the university environment."[167] The Supreme Court has written that "universities occupy a special niche in our constitutional tradition."[168] Universities occupy this special niche due to their role in providing the atmosphere that is "most conducive" to experimentation of thought.[169] Institutional academic freedom stems from the need to protect this role.[170] Thus, the First Amendment covers "[t]he freedom of a university to make its own judgment as to education."[171]

The Supreme Court first recognized the idea of institutional academic freedom after individual academic freedom for professors had been acknowledged.[172] Justice Frankfurter's concurrence in *Sweezy* identified freedom to inquire as a necessary precondition for a professor's exercise of individual academic freedom.[173] To that end, Justice Frankfurter emphasized that it is the "business of a university to provide that atmosphere."[174] Since then, the Supreme Court has recognized academic freedom of universities

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165 *Id.* at 844.

166 *Id.* at 843–44.

167 Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

168 *Id.*

169 *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (quoting CAPE TOWN CONFERENCE, *supra* note 133, at 11).

170 *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312–13 (1978).

171 *See id.* at 312.

172 Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1, 12–13 (2007).

173 *Sweezy*, 354 U.S. at 261–63 (Frankfurter, J., concurring).

174 *Id.* at 263 (quoting CAPE TOWN CONFERENCE, *supra* note 133, at 11).

as "educational autonomy" that is "grounded in the First Amendment."[175] The Court's jurisprudence centers this freedom on the university's right to choose "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[176] The Court specifically discussed a university's academic freedom when considering a student's challenge to his university's decision to dismiss him.[177] The Court found institutional academic freedom relevant because the decision required an academic determination of the quality of the student's work product.[178]

The Court in *Grutter v. Bollinger*[179] considered the university's academic freedom when deferring to the affirmative action admission decisions of a public university.[180] The *Grutter* Court reasoned that institutional academic freedom, which allowed universities to ensure the proper educational environment, included the ability to select its own students.[181] Citing language from past academic-freedom cases like *Keyishian*, *Wieman*, and *Sweezy*, the *Grutter* Court stated that universities have a compelling government interest in making their "own judgments as to education" and "seek[ing] to achieve a goal that is of paramount importance in the fulfillment of [their] mission[s]."[182] The Court has also

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[175] *Grutter*, 539 U.S. at 329.

[176] *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (quoting CAPE TOWN CONFERENCE, *supra* note 133, at 12).

[177] Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 215, 225–26 (1985).

[178] *Id.* at 226–28.

[179] 539 U.S. 306 (2003).

[180] *See id.* at 311.

[181] *See id.* at 329. The Court discussed Justice Powell's concurrence in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), linking student diversity and academic freedom. *See Grutter*, 539 U.S. at 329 (citations omitted) (quoting *Bakke*, 438 U.S. at 312–13):

> We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission."

[182] *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 312, 313). The Court cited language from past academic freedom cases to support the proposition that universities "occupy a special niche in our constitutional tradition." *Id.* (collecting cases).

acknowledged that state restrictions on speech in public universities present "complicated First Amendment issues . . . because government is simultaneously both speaker and regulator."[183] The Court has noted that judges may not be equipped with the expertise and specialization required to review decisions made by universities, and so courts should defer to the university.[184] According to the Court, judges should respect "*legitimate* academic decisionmaking."[185]

The Supreme Court's guidance on the boundaries of institutional academic freedom is also unclear. As the Court itself has noted, its jurisprudence has focused on the university's right to be free of content-based, direct infringements on academic freedom by the government.[186] Beyond acknowledging that universities do have a right to academic freedom, however, the Court has been short on details.

Scholars have interpreted the Supreme Court's jurisprudence as acknowledging a First Amendment academic-freedom right for public universities that is independent from a public university's role as an employer or a government regulator and is instead based on its unique role as an educator.[187] Institutional academic freedom comes from, among other things, two broad ideas. First, universities have the status, unique to their role as educator, as the "preeminent institution[s] in our society where knowledge and understanding are pursued with detachment or disinterestedness"—i.e., they are charged with the search for truth that the Court has mentioned is so important.[188] Second, the university-as-educator aspires to instill young people with knowledge and the capacity for building good judgment.[189] By

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183 Univ. of Pa. v. EEOC, 493 U.S. 182, 198 n.6 (1990).

184 *Ewing*, 474 U.S. at 226–27.

185 *See Univ. of Pa.*, 493 U.S. at 199 (emphasis in original).

186 *See id.* at 197–98 (differentiating the Court's past academic-freedom cases, which involved content-based regulations dependent on the university's speech, from the case at hand, which involved an "indirect" infringement on academic freedom in requiring universities to produce tenure-decision files in an employment dispute).

187 *See, e.g.*, Areen, *supra* note 101, at 988–93; Byrne, *supra* note 123, at 300 ("To this extent, Chief Justice Rehnquist is correct in insisting that government as educator is different from government as sovereign.").

188 Byrne, *supra* note 123, at 333.

189 *Id.* at 333–36; *see also* Chen, *supra* note 129, at 964 (citing *Grutter*, 539 U.S. at 329):

> Universities serve a different function than any other governmental institution or any other governmental employer. They exist for the purpose of creating and disseminating knowledge. They are created as institutions of both teaching and research, which advance social interests in producing educated citizens and increasing understanding across multiple academic disciplines. . . . By protecting

providing a place for disinterested inquiry and for students to learn how to evaluate the world around them, the public university deserves its own institutional form of constitutional academic freedom.[190]

Many lower courts have held that universities have the right to set curricula and determine course content. Universities should be permitted to set the course direction and grading policy and to determine whether homework loads are appropriate for the level of the course.[191] Because they may exercise their freedom to set curricula, universities are not required to permit a professor who they have asked to teach chemistry to instead focus on the art of tea making. Institutional academic freedom allows universities to determine the knowledge and skills that they expect students who take the course to obtain, and it permits universities to tell instructors what topics they must cover.[192]

For example, in *Piggee v. Carl Sandburg College*,[193] the Seventh Circuit considered the case of a cosmetology professor who frequently discussed religion in the classroom and told several students that they "ha[d] the devil in [them]."[194] After noting that professors do have the right to discuss controversial ideas in class under the academic-freedom framework, the court distinguished the statements at issue in *Piggee* because they were outside of the curriculum set by the university.[195] First, the court stated that universities have an interest in an instructor's adherence to the subject matter that they were hired to teach.[196] Second, the court noted that universities should be able to discipline a professor whose actions interfere with the school's educational mission.[197] The court came to this conclusion after noting that one student said they avoided the professor because of her actions.[198] The court

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> and encouraging a diversity of viewpoints and perspectives, universities enhance the search for truth. Indeed, the process of that search is desirable from a societal perspective, even if the truth is never, or cannot ever be, attained. If academic freedom protection belongs in the Constitution, it belongs nowhere else than the First Amendment.

190 *See* Byrne, *supra* note 123, at 338.

191 Lovelace v. Se. Mass. Univ., 793 F.2d 419, 425–26 (1st Cir. 1986).

192 James D. Gordon III, *Individual and Institutional Academic Freedom at Religious Colleges and Universities*, 30 J. COLL. & U.L. 1, 7–8 (2003).

193 464 F.3d 667 (7th Cir. 2006).

194 *See id.* at 672.

195 *Id.* at 671–72.

196 *Id.* at 671.

197 *See id.* at 671–72.

198 *Piggee*, 464 F.3d at 672.

therefore found that the professor's actions had inhibited her ability to perform her job by undermining her relationship with her students.[199]

In another case dealing with religion, the Eleventh Circuit in *Bishop v. Aronov*[200] evaluated a physiology professor who frequently discussed religion in class and held "optional classes" discussing a Christian perspective on physiology.[201] The university affirmed its commitment to the professor's academic freedom but requested that he refrain from bringing up his religion during class time and asked him to stop any optional religion-based classes connected to the course.[202] The court upheld this restriction as part of the university's prerogative not only to regulate the curriculum but also to exercise some authority over the conduct of teachers that bears significantly on the delivery of the curriculum.[203]

Both *Piggee* and *Bishop* involved incidents that happened during class time. Courts might previously have placed classroom instruction exclusively within the domain of the professor's academic freedom to control the content of lectures. Instead, while neither *Piggee* nor *Bishop* held that institutional academic freedom categorically overrides individual, the courts were clear that the university can control classroom time in a way that contravenes the professor's wishes without running afoul of the First Amendment.

3. Students have an interest in free access to the "marketplace of ideas."

The Supreme Court has never recognized a right to academic freedom for students.[204] Yet, as Professor Walter Metzger has noted, leaving students out of the analysis would mean that "a major part of the constitutional story of academic freedom would go untold."[205]

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199 *Id.* at 671–72.

200 926 F.2d 1066 (11th Cir. 1991).

201 *Id.* at 1068–69.

202 *Id.* at 1069.

203 *Id.* at 1074–77.

204 *See* Byrne, *supra* note 123, at 262–63.

205 Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1304–05 (1988).

The Supreme Court has continuously emphasized that one effect of protecting academic freedom is the promotion of democratic values in students. The *Keyishian* Court noted that the "Nation's future" depends on giving future leaders "wide exposure to th[e] robust exchange of ideas."[206] In *Sweezy*, the Court stated that "[t]eachers *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."[207] In *Barenblatt v. United States*,[208] the Court claimed that "learning-freedom," which was a corollary to "academic teaching-freedom," was so essential to the "well-being of the Nation" that the Court would "always be on the alert against intrusion . . . into this constitutionally protected domain."[209] Finally, the Court in *Baggett v. Bullitt*[210] considered a claim brought by both students and faculty that a state statute requiring a loyalty oath infringed on their academic freedom.[211] The Court declined to rule on whether students had standing to bring the suit, noting that "the interests of the students at the University in academic freedom are fully protected by a judgment in favor of the teaching personnel."[212] These cases demonstrate that academic freedom is not protected in a vacuum; instead, it is partially important because of its effects on students. The cases do not recognize an academic-freedom right for students, however.

Scholars generally follow the Court's analysis by not recognizing a student right to academic freedom. Byrne argues that none of the free speech rights that are currently recognized for students represent an affirmative right for students to exercise academic freedom because the rights don't concern scholarship or learning.[213] Instead, student speech rights represent general civil rights, and cases on students' rights enforce students' civil rights against schools, rather than protecting academic work and values.[214] Notably, much of the scholarship on students' academic-freedom rights comes from students themselves, who have argued for the consideration of student interests with regard to identity

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206 *Keyishian*, 385 U.S. at 603.
207 *Sweezy*, 354 U.S. at 250 (emphasis added).
208 360 U.S. 109 (1959).
209 *Id.* at 112.
210 377 U.S. 360 (1964).
211 *Id.* at 361–66.
212 *Id.* at 366 n.5.
213 Byrne, *supra* note 123, at 262–63.
214 *Id.*

issues in the university context. One student note argued that student interests should be used to consider whether a professor can be punished for their out-of-classroom racist speech due to concerns about discrimination in grading, self-esteem issues, and impeding student performance.[215] Another student note considered cases involving sexual harassment in the classroom and suggested that some weight should be given to the student's right to a learning environment free from sexual harassment.[216]

Lower courts have not explicitly described student interests as an element of academic freedom. However, some courts have considered student access to the marketplace of ideas when deciding conflicts between university and professorial academic freedoms, as discussed below in Part III.A.

III. CONTEXTUALIZING THE USE OF GENDERED HONORIFICS WITHIN ACADEMIC FREEDOM

As noted above, the term "classroom-management devices" is a blanket term for classroom activities that help facilitate the learning process but that are not directly related to the content of the lecture.[217] There are contexts other than misgendering where classroom-management devices may cause conflicts between professors and universities. For example, a university may object to a seemingly low-value classroom-management device, such as a sports-based peer-approval system.[218] A professor may allow a brainstorming exercise that turns "pornographic" to continue to the dismay of university officials.[219] Thus, the question of how to evaluate classroom-management devices under the academic-freedom framework is potentially significant for many aspects of a professor's behavior in the classroom.

A professor's use of a classroom-management device in contravention of university policy implicates several different academic-freedom considerations. First, the university policy is an internal rule because it's promulgated by the university, unlike an externally promulgated rule from the legislature. As noted above, past Supreme Court cases concerning academic freedom

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[215] Donna Prokop, Note, *Controversial Teacher Speech: Striking A Balance Between First Amendment Rights and Educational Interests*, 66 S. CAL. L. REV. 2533, 2568–77 (1993).

[216] *See generally*, Lisa M. Woodward, Comment, *Collision in the Classroom: Is Academic Freedom a License for Sexual Harassment?*, 27 CAP. U. L. REV. 667 (1999).

[217] *See supra* Introduction.

[218] *See, e.g.*, Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1174–75 (3d Cir. 1990).

[219] *See, e.g.*, Vega v. Miller, 273 F.3d 460, 470 (2d. Cir. 2001).

all dealt with external rules. Second, because classroom-management devices can impact the professor's delivery of their ideas and the curriculum set by the university, there is conflict between the professor's academic freedom to communicate their ideas and the university's academic freedom to set how subjects may be taught. These conflicts help contextualize why misgendering in a case like *Meriwether* is not easily addressed by established academic-freedom concepts.

A. Pronoun Policies as Internal Disputes Between Institutional and Individual Academic Freedoms

"Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself."[220] The pronoun-policy dispute at issue in *Meriwether* implicates both the university's institutional and the professor's individual academic freedoms.

All of the Supreme Court's academic-freedom jurisprudence has involved external disputes.[221] An external dispute involves a rule originating from outside the university system that is promulgated by an actor that does not possess their own academic freedom. The Court's cases thus far analyzed an infringing action from non-university governmental bodies, like legislatures[222] or agencies.[223] The government actor had done something to *either* the university *or* the professor, and the university or professor had claimed that their academic freedom had been infringed as a result. For instance, the Feinberg Law in *Keyishian* allowed the New York State Board of Regents, rather than individual universities, to promulgate rules and collect lists of alleged subversive violators, and schools did not retain discretion over whether the violating employees were fired.[224] *Sweezy* involved questioning by the Attorney General to discover whether subversive activities had taken place in the classroom.[225]

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[220] Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) (citations omitted) (first citing *Keyishian*, 385 U.S., at 603; then citing *Sweezy*, 354 U.S. at 250, 263; and then citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)).

[221] White, *supra* note 105, at 827.

[222] *See, e.g.*, *Keyishian*, 385 U.S. at 593–94.

[223] *See* Univ. of Pa. v. EEOC, 493 U.S. 182, 198 (1990).

[224] 385 U.S. at 591–99.

[225] 354 U.S. at 236–37, 243–45.

By contrast, pronoun policies that are promulgated *by* the university and used *against* a professor are entirely internal. Because these policies sometimes implicate Title IX concerns—as illustrated by Ms. Doe's Title IX complaint in *Meriwether*—the dispute may seem external. However, unlike the laws implicated in the early Supreme Court cases, which operated as rules *on* the individual universities and employees,[226] neither Title IX nor the documents interpreting it explicitly tell universities the way that they must act to avoid litigation. Instead, they act more as standards, allowing universities to determine the best way to meet antidiscrimination requirements, whether through prophylactic rules, disciplinary procedures, or both.[227]

The Supreme Court has not spoken on internal disputes about academic freedom and on whether they should be evaluated differently than external disputes.[228] Therefore, I am assuming that the principles used by the Supreme Court to evaluate external conflicts are equally applicable to internal conflicts. This is because the judicial principles that set out why universities and professors have academic freedom[229] are all functionally intrinsic to the interest at stake that must be protected, not to the actor causing the freedom to be called into question. For instance, the professor has the individual academic freedom to communicate ideas without a chill or "pall of orthodoxy." That goal doesn't depend on whether the infringing force is internal or external—the chill would result from either the university's or the legislature's restrictive action. The same idea applies to the institutional academic freedom to determine the curriculum. The value comes from the university's role in facilitating the critical exchange of ideas, and so a university can act to prevent disruption to this important mission, regardless of where the threat to that mission originates.[230]

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[226] *See, e.g.*, White, *supra* note 105, at 804–12 (describing how the laws involved in early academic-freedom cases typically involved laws or state action, which resulted in the termination of employment).

[227] *See, e.g.*, Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 545 (1987) (noting that Title IX's procedural requirements are intended as a "preemptive strike against harassing behavior"); Christopher J. Roederer, *Free Speech on the Law School Campus: Is it the Hammer or the Wrecking Ball that Speaks?*, 15 U. ST. THOMAS L.J. 26, 53–57 (2018) (discussing freedom of speech conflicts from universities promulgating policies in excess of explicit Title IX requirements to avoid Title IX litigation).

[228] White, *supra* note 105, at 827.

[229] *See supra* Part II.B.

[230] *See Sweezy*, 354 U.S. at 262–63 (Frankfurter, J., concurring).

Because the Supreme Court has not yet heard a case where institutional and individual academic freedoms conflict, it is difficult to determine from the Court's jurisprudence alone how to weigh individual academic freedom against institutional academic freedom.[231] Circuit courts have recognized this difficulty and have split on whether they (1) recognize a rule that institutional academic freedom overrules individual academic freedom within the classroom, (2) recognize a rule that individual academic freedom overrules institutional academic freedom within the classroom, or (3) conduct a case-by-case balancing of the two freedoms whenever there is a conflict. The following discussion considers each of these frameworks in turn.

Some of the lower courts have explicitly determined that, in the classroom, institutional academic freedom controls. For instance, in *Edwards v. California University of Pennsylvania*,[232] the Third Circuit held that a public-university professor did not have a First Amendment right to choose curriculum materials in contravention of the university's dictates; that right fell within institutional academic freedom.[233] The Seventh Circuit in *Piggee* held that the university had primacy in setting its own educational mission, and so the instructor's frequent religious discussions in the classroom, which infringed on that mission, were not protected by her academic freedom.[234]

By contrast, the Sixth Circuit in *Meriwether* held that in the classroom the professor's academic freedom controls while the professor is teaching, regardless of whether the professor's speech is germane to the content of the lecture.[235] The *Meriwether* court explicitly upheld this protection against the university's argu-

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[231] *See* White, *supra* note 105, at 827.

[232] 156 F.3d 488 (3d Cir. 1998).

[233] *Id.* at 491.

[234] 464 F.3d at 671–72.

[235] *See Meriwether*, 992 F.3d at 507 ("Thus, the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."). There may be a question as to whether this unduly infringes on the university's academic freedom and so should be considered wrongly decided. The Sixth Circuit's decision in *Meriwether* does not clearly fall outside of the principles set out by the Court, however. The *Meriwether* court did not say that a professor could go against any restriction set by the university as long as the professor was in the classroom. *See id.* at 507 ("Of course, some classroom speech falls outside the exception: A university might, for example, require teachers to call roll at the start of class, and that type of non-ideological ministerial task would not be protected by the First Amendment.").

ment that academic freedom belongs to public universities instead of professors. The court stated that professors have "'First Amendment rights when teaching' that they may assert against the university."[236]

Other circuits balance these interests on a case-by-case basis, frequently putting the onus on the university to prove a legitimate interest in order to justify the infringement on the professor's academic freedom. For example, the Second Circuit in *Levin v. Harleston*[237] considered the case of a professor who was punished for his out-of-classroom comments denigrating the "intelligence and social characteristics" of Black people.[238] The *Levin* court held that the professor could be punished only if the university showed that the harm to the university's educational mission outweighed the infringement on the professor's First Amendment rights.[239] The Second Circuit has also upheld the right of a university to require teaching demonstrations and "place parameters on scholarship" if the university can show relation to a legitimate university interest.[240] The Eleventh Circuit has similarly held that courts should consider the strength of the university's interest when evaluating a restriction on individual academic freedom. For instance, in *Bishop*, the court upheld a university's ability to impose reasonable restrictions inside the classroom because a university has a strong interest in the classroom conduct of its professors.[241] Thus, courts sometimes do evaluate whether the claim to institutional academic freedom is sufficiently strong to overcome the exercise of individual academic freedom.

B. Misgendered Honorifics as an Exercise of Academic Freedom(s)

The use of misgendered honorifics to manage classroom discussion falls between the two poles of classroom academic freedom: (1) the professor's individual right to communicate their area of scholastic expertise and (2) the university's institutional right to determine how subjects will be taught.

Professors have a clear right to communicate controversial ideas as long as those ideas are part of their academic expertise

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236 *Id.* at 507 (quoting Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 680 (6th Cir. 2001)).
237 966 F.2d 85 (2d Cir. 1992).
238 *Id.* at 87.
239 *See id.* at 88.
240 Bruce Comm. v. Yen, 764 F. App'x 68, 69 (2d Cir. 2019) (unpublished table decision).
241 *See Bishop*, 926 F.2d at 1076.

and fit within the curricula assigned by their universities. Classroom-management devices can fit within the concept of the professor's academic freedom because classroom management can impact the communication of a lecture.[242] For example, we might find a state law mandating the use of the Socratic Method and prohibiting lecturing to be problematic for a professor who is trying to teach a complex class, such as differential equations, where students need lecture in order to get their feet wet on most concepts.

Effective classroom management is unique to both the teacher and the makeup of each class.[243] Effective classroom management decreases disruptions to lecture and improves student outcomes.[244] Because a lack of classroom management can mean that classroom time is spent on discipline rather than on lecturing, it seems likely that courts would find that rules that allow no flexibility for classroom management would impermissibly restrict the academic freedom of a lecturer to communicate their ideas. Some speech is equally clearly part of the university's academic freedom—setting grading policies, setting the bounds of the curriculum, etc.

Classroom management also relates to course administration. Because professors are public employees, it can be difficult to separate the university's interest in effective classroom management originating from the university's role as an educator from the interest in classroom management emanating from the university's role as an employer. Professors are unique among public employees because of individual academic freedom, which they can wield against their employer to get more leeway in the classroom.[245] Therefore, even though classroom management

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[242] *See* Donal M. Sacken, *Taking Teaching Seriously: Institutional and Individual Dilemmas*, 61 J. HIGHER EDUC. 548, 550 n.2 (1990) ("Although the core issue for academic freedom is undoubtedly content oriented, others have accepted the notion that *how* a subject is taught is cognizable under the academic freedom rubric." (emphasis in original) (citing STEVEN G. OLSWANG & BARBARA A. LEE, ASS'N FOR THE STUDY OF HIGHER EDUC., FACULTY FREEDOMS AND INSTITUTIONAL ACCOUNTABILITY: INTERACTIONS AND CONFLICTS 26–28 (1984))).

[243] HUE MING-TAK & LI WAI-SHING, CLASSROOM MANAGEMENT 9–12 (2008).

[244] *See* Margaret C. Wang, Geneva D. Haertel, & Herbert J. Walberg, *Toward a Knowledge Base for School Learning*, 63 REV. EDUC. RSCH. 249, 277–78 (1993); Mareike Kunter, Jürgen Baumert & Olaf Köller, *Effective Classroom Management and the Development of Subject-Related Interest*, 17 LEARNING & INSTRUCTION 494, 500–07.

[245] *See* Rabban, *supra* note 102, at 242 ("The requirement of scholarly independence for the proper performance of academic work entitles the professor to more freedom from employer control than enjoyed by the typical employee.").

could fall under institutional academic freedom alone, I also consider it under individual academic freedom because the role of the university as employer does not automatically override the professor's exercise of academic freedom.[246]

Meriwether claimed that the use of honorifics was solely within his right to academic freedom, not the university's, because he used the honorifics as a classroom-management device to encourage respectful communication.[247] As noted above, classroom-management choices also fit within the university's right to determine how subjects will be taught.

Meriwether also claimed that his use of gendered honorifics to misgender Ms. Doe—essentially, his use of *mis*gendered honorifics—was part of his academic-freedom right to communicate controversial ideas.[248] Meriwether lectured about gender identity in other portions of his class, and the university action at issue in *Meriwether* was not directed to his *lectures* about gender identity.[249] Importing a controversial idea into a classroom-management device does not automatically transform that idea into part of the lecture contents. The honorifics were instead focused on managing the classroom discussion to ensure that it was "respect[ful]" and sufficiently "weighty."[250] Thus, the use of misgendered honorifics, even to communicate an idea, should not automatically fall solely under the professor's individual academic freedom, which traditionally would have covered lecturing. The controversial idea he intended to communicate was secondary to his purpose of managing the classroom discussion. Therefore, it should be analyzed as a classroom-management device.

Lower courts are not clear about how to evaluate teaching language that is not part of a subject-matter lecture but still occurs within the classroom. For instance, the Fifth Circuit held that a university could punish a professor who used profanity while seeking to "motivate" his students.[251] In addition, the Second Circuit has held that *nonscholastic* speech in the classroom that relates to classroom management is not a part of the professor's

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246 *See id.* at 242–43.

247 *See Meriwether*, 992 F.3d at 499.

248 *See id.* at 502.

249 *See id.* at 502, 506. Note that Meriwether did say that he avoided lecturing further on gender identity issues because he was concerned that the university would investigate him again. However, the cause of the principal investigation was the misgendering of Ms. Doe, not an issue with lecture materials. *Id.*

250 *Meriwether*, 992 F.3d at 499.

251 Martin v. Parrish, 805 F.2d 583, 585 (5th Cir. 1986).

academic freedom.[252] The court applied this rule to classroom discipline by a professor, holding that under *Garcetti*, classroom discipline was one of the quintessential "official duties" of the professor and did not fall into the traditional framework of a professor's academic freedom.[253] Unlike the Second Circuit, the Sixth Circuit held in *Meriwether* that a classroom-management technique can be considered part of a professor's academic freedom as a component of the professor's speech in the classroom, regardless of whether the speech was related to the *content* of the lecture.[254] The *Meriwether* court rejected an attempt by the university to categorize honorifics as simply "ministerial."[255]

In summary, misgendering of a student by a public-university professor in contravention of a university pronoun policy creates a conflict between individual and institutional academic freedoms. The action does not fall totally under one concept of academic freedom—it does not solely involve the professor lecturing on a controversial topic, which would be the professor's individual academic freedom, and it does not fall solely under administration of a course, which would be the university's institutional academic freedom.

IV. STUDENT INTERESTS SHOULD INFORM ANALYSIS ON USE OF CLASSROOM-MANAGEMENT DEVICES AS A FACET OF ACADEMIC FREEDOM

As noted above, classroom-management devices do not squarely fall on either side of the academic-freedom conflict. While they help facilitate the exchange of ideas, they are not simply a communication of a professor's ideas and so do not fully qualify as an exercise of individual academic freedom. On the other hand, they are not purely ministerial in the way that setting a curriculum, requiring roll call, or administering classroom discipline would be. In addition, appropriate classroom management enhances the goals of both individual academic freedom, which facilitates dissemination of ideas, and institutional academic free-

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[252] Bhattacharya v. SUNY Rockland Cmty. Coll., 719 F. App'x 26, 27 (2d Cir. 2017) (unpublished table decision).

[253] *Id.*

[254] *Meriwether*, 992 F.3d at 507.

[255] Id. ("[T]he academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not.").

dom, which facilitates its mission of educating students. "Effective classroom management has been shown to increase student engagement, decrease disruptive behaviors, and enhance use of instructional time, all of which results in improved student achievement."[256]

I argue that courts should explicitly consider the student's interest when evaluating cases where individual and institutional academic freedoms conflict during use of classroom-management devices. When a court is determining which exercise of academic freedom, institutional or individual, should override the other during a conflict involving a student, the court should give additional weight to whichever exercise of academic freedom better enhances the student's interest for three reasons. First, this type of balancing would expand upon the Supreme Court's principle that academic freedom exists in part to increase student access to ideas because it would explicitly consider the student's interest when determining which party can claim protection through academic freedom. Second, it would align with the decisions of some lower courts that have considered the student perspective when evaluating the conflict between individual and institutional academic freedoms. Finally, it would comport with norms of professional academic freedom, which consider the interests of the student when evaluating the use of individual academic freedom and can provide guidance to help judges determine when the student's interests should be used.

A. Courts Should Explicitly Consider Students' Interests when Academic Freedoms Conflict

As noted above, the Supreme Court has considered the value of student access to the marketplace of ideas when discussing academic freedom.[257] The interest of the student can add additional weight to individual academic freedom or institutional academic freedom when the two are in conflict, depending on which exercise better protects the student's interest. For instance, a professor should be able to decide that the Socratic method is the best way for students to learn the lecture contents. Because the Socratic method has not been demonstrated to inhibit the access of students to the lecture contents, this should be protected as an exercise of individual academic freedom. Therefore, the university

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[256] Wang, Haertel & Walberg, *supra* note 244, at 262.

[257] *See supra* Part II.B.3.

should not be permitted to demand that a professor cease using the Socratic method because there is no reason for institutional academic freedom to override the individual's academic freedom. However, if a professor determined that female students did not provide good answers to questions unrelated to childbearing, that professor should not be able to decline to ask or answer any questions of a female student in violation of a university policy that prohibited differential treatment under Title IX. Such a denial would infringe on the female student's access to the content of the lecture. Under my theory of balancing, in this situation the pendulum would swing in favor of the university regulating the professor, because the university rules would increase female students' access to the marketplace of ideas.

This would also address the hypothetical posed by the *Meriwether* court: What if a university promulgated a policy stating that professors were *never* permitted to use pronouns that matched the student's gender identity if those pronouns didn't match the pronouns assigned at birth?[258] In that case, the professor's exercise of academic freedom to use properly gendered honorifics would increase student access to the content of the lecture, and the professor would be able to utilize their academic freedom in opposition of the university's rule requiring misgendering.

While lower courts have not done the sort of explicit balancing of student interest that I am recommending, they have occasionally had opportunities to assess professors' use of classroom-management devices under the framework of academic freedom. Even though courts have not explicitly stated that they are balancing the interests of the students, they appear to recognize that a professor's expression can affect the student's ability to exchange ideas and have allowed this to influence their decisions.

For example, in *Martin v. Parrish*,[259] the Fifth Circuit considered a professor who would "motivate" his students by complaining about their attitude and cursing while doing so.[260] After student complaints and several warnings by administrators,

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[258] *Meriwether*, 992 F.3d at 506. While this would be illegal under the current interpretation of sex discrimination under Title IX, *see* Title IX in Light of *Bostock*, *supra* note 26, at 32,638, the Trump administration promulgated no such interpretation immediately after *Bostock*. *Bostock*'s holding was limited to Title VII of the Civil Rights Act of 1964. *See generally Bostock*, 140 S. Ct. 1731. Further rules by the Biden administration applied this interpretation of sex discrimination to Title IX. *See* Title IX in Light of *Bostock*, *supra* note 26, at 32,639.

[259] 805 F.2d 583 (5th Cir. 1986).

[260] *Id.* at 585.

Professor J.D. Martin's employment was terminated.[261] He brought a lawsuit claiming deprivation of his First Amendment rights.[262] At trial, he argued that his speech was protected under the First Amendment as part of his right to academic freedom.[263]

The Fifth Circuit rejected his claims.[264] The court held that Martin's speech had no educational function, and the court therefore did not decide how far the right to academic freedom should extend.[265] As part of the decision, the court commented that Martin's behavior "degrade[d]" the educational mission of the university and "detract[ed] from the subjects he [was] trying to teach."[266] According to the *Martin* court, the goals of higher education are to instill democratic values and nurture the pursuit of knowledge.[267] The Fifth Circuit noted that the college had introduced evidence showing that his behavior hindered instruction and that students had "lost interest" in economics and feared asking questions in class.[268] Because his behavior had hindered his effectiveness as a teacher by decreasing the access of students to the class, the court held that the college's discipline of Martin was appropriate and did not offend First Amendment public-employee principles.[269] The *Martin* court was essentially protecting the exercise of institutional academic freedom that served to decrease the adverse effects on students in the professor's class.

Another example is *Carley v. Arizona Board of Regents*,[270] a case dealing with a professor who would leave the classroom frequently during class time because he thought that it would help students be more "self-reliant."[271] Professor Denny Carley stated that his teaching methods should have been protected under his individual academic freedom.[272] The university pointed to student evaluations that were explicitly critical of Carley's teaching methods

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261 *Id.* at 584.

262 *Id.*

263 *Id.*

264 *Martin*, 805 F.2d at 585–86.

265 *Id.* at 585–86 (finding that Martin's language had "no academic purpose or justification").

266 *Id.*

267 *See id.* at 585.

268 *Id.*

269 *Id.* at 585–86 ("To the extent that Martin's profanity was considered by the college administration to inhibit his effectiveness as a teacher, it need not be tolerated by the college.").

270 737 P.2d 1099 (Ariz. App. 1987).

271 *See id.* at 1101.

272 *See id.*

to justify its decision not to rehire Carley.[273] The *Carley* court upheld the use of student evaluations as a tool to determine whether the professor's teaching methods were infringing on the university's institutional academic-freedom rights to determine how to educate students.[274] While doing so, the court expressly noted that the university declined to rehire Carley not because of his expression of unpopular opinions or controversial ideas but instead because "he was not an effective teacher."[275] Thus, the *Carley* court noted that the students' access to the lecture not only could be considered by the university without infringing on the professor's academic freedom but was also helpful for deciding whether to place the university's academic freedom over the professor's.

Consider also *Piggee*, the Seventh Circuit case discussing the professor who told a student that they had "the devil in [them]."[276] The *Piggee* court evaluated whether the professor's exercise of academic freedom was curtailing the university's pedagogical goals.[277] The court mentioned that the instructor's speech actually inhibited her ability to do her job because it undermined her relationship with students who were offended by her religious speech.[278]

The consideration of students' experiences when evaluating the exercise of a professor's academic freedom is therefore not unprecedented. No court has explicitly weighed the student interest as a component of its analysis when considering an academic-freedom conflict. The test I propose would bring the student interest to the forefront and require courts to consider it as part of their analysis of a conflict between institutional and individual academic freedom. This balancing, as noted above, would have led the *Meriwether* court to uphold the university's right to discipline Meriwether for contravening the university's pronoun policy.

B. Applying Constitutional Academic Freedom Principles to Misgendered Honorifics as a Classroom-Management

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[273] *See id.* at 1100–01.
[274] *See id.* at 1103.
[275] *Carley*, 737 P.2d at 1103.
[276] *See Piggee*, 464 F.3d at 672.
[277] *See id.* at 671–72.
[278] *Id.* at 672.

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A professor's ability to disseminate controversial ideas within their subject of expertise is clearly protected by individual academic freedom under the principles set out by the Supreme Court, which prioritize freedom of critical inquiry for professors.[279] Universities have institutional academic freedom to ensure that their professors are furthering the pedagogical environment at the school, which advances the principles protecting the university as an educator of the nation's future leaders.[280] The use of misgendered honorifics brings those two academic freedoms into conflict because it is a classroom-management device co-opted for the secondary purpose of conveying an idea. In the *Meriwether* case, the classroom-management device was used to disproportionally impact a single student because of her gender identity.[281]

Meriwether allegedly used gendered honorifics as a "pedagogical tool" in class for two primary reasons.[282] First, he believed that addressing students as "Mr." or "Ms." helped students "view the academic enterprise as a serious, weighty endeavor."[283] Second, he believed it "foster[ed] an atmosphere of seriousness and mutual respect."[284] The Sixth Circuit noted that choices about how to lead the classroom discussion can ultimately shape the content of the instruction.[285]

Misgendering has been shown to interfere with the misgendered student's experience in the classroom relative to other students in the classroom who are properly gendered. For instance, even awareness of other students' interactions with gender prejudice can negatively impact a particular gender-nonconforming student's feelings of ease and belonging on campus.[286] As noted above, misgendering a student can lead to an increased chance of a negative academic outcome, something that is expressly against the goals of a university.[287] Therefore, using misgendered honorifics can actually serve to undercut the point

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279 *See supra* Part II.B.1.

280 *Keyishian*, 385 U.S. at 603.

281 *See Meriwether*, 992 F.3d. at 499–500.

282 *Id.* at 499 (quoting Amended Complaint at 1475, Meriwether v. Trustees of Shawnee State Univ., No. 18-CV-753, 2020 WL 704615 (S.D. Ohio Feb. 12, 2020)).

283 *Id.*

284 *Id.*

285 *Id.* at 506.

286 LAWRENCE & MCKENDRY, *supra* note 12, at 79.

287 *See, e.g.*, Pusch, *supra* note 17, at 51; Woodford, Joslin, Pitcher & Renn, *supra* note 17, at 106–09; *cf.*, *e.g.*, Pryor, *supra* note 16, at 451.

of using honorifics in the first place: rather than creating a respectful environment, the misgendered student feels actively disrespected.

For example, Meriwether's acts of misgendering negatively impacted Ms. Doe. While the *Meriwether* court mentioned that Meriwether gave Ms. Doe a high grade and that he thought that she participated in class discussions,[288] this trivialized the harm—a common problem with misgendering.[289] The harm was not trivial: it was significant enough for Ms. Doe to complain. Ms. Doe, in her motion to intervene, stated that she dreaded participating in Meriwether's class because of the misgendering but felt that she had to because Meriwether graded on the basis of class participation.[290] In addition, Ms. Doe stated that "[b]eing singled out and treated disrespectfully [ ] caused Ms. Doe significant psychological strain and distress, including an increase in both the severity and duration of her gender dysphoria."[291]

Misgendering is also part of a broader social context that denigrates the lived experiences of transgender people. Misgendering is seen as a type of "dishonorific," communicating "disrespect, disfavor, or inferiority" and demeaning a person rather than addressing them.[292] The act of misgendering is a practice similar to the use and lack of use of honorifics to convey social subordination of marginalized groups.[293]

Given the broader negative effects on transgender students that arise from using the wrong gender honorifics to identify them, efforts by universities to ensure use of the proper gendered pronouns should be protected under institutional academic freedom. This would ensure that students do not have their academic experiences negatively impacted by misgendering. Misgendering is similar to the situation the *Martin* court addressed, where the professor's actions were clearly negatively impacting the students, and so the *Martin* court prioritized the university's exercise of academic freedom to create a pedagogical environment.[294]

A professor's use of their academic freedom to misgender a student under the guise of classroom management interferes with

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[288] *Meriwether*, 992 F.3d at 500.

[289] Chan Tov McNamarah, *Misgendering*, 109 CAL. L. REV. 2227, 2265–93.

[290] *See* Mot. to Intervene, *supra* note 1, at 5–6.

[291] *Id.* at 6.

[292] McNamarah, *supra* note 289, at 2237–38, 2252–55 (describing other dishonorifics, such as unnaming Black men by calling them "boy").

[293] *Id.* at 2237–55.

[294] *See supra* notes 259–64 and accompanying text.

the student's access to the marketplace of ideas; the use of a pronoun policy as part of the university's academic freedom to determine how subjects may be taught does not. Therefore, in this dispute between institutional and individual academic freedom, the student's interest weighs against the protection of misgendering for classroom management as an exercise of a professor's individual academic freedom. Here, institutional academic freedom should override the individual's academic freedom.

There are limits to this balance—activities that are very clearly protected by a professor's or a university's academic freedom do not need to be balanced. For instance, a professor's lecture about sex assigned at birth would clearly be a protected exercise of their individual academic freedom so long as it fell within the curriculum prescribed by the university (for instance, in a gender studies class and not calculus). That would not be a case tied to increasing student participation.

The idea that misgendering a student has no place in a classroom-management device is rooted in two principles of academic freedom. First, universities have an institutional academic freedom that does cover some aspects of a professor's communications in class. Second, students have an interest in accessing the intended fruits of the use of academic freedom: a robust marketplace of ideas. To put it another way, a professor can't spend a chemistry-teaching period speaking only about the best way to weave a basket underwater. Similarly, a professor shouldn't be able to co-opt classroom management, a component of instruction that falls between individual and institutional academic freedom, in a way that diminishes a student's access to the marketplace of ideas. Under this theory, the opposite is also true for a university's exercise of academic freedom. A university can't tell a professor not to speak about the most cutting-edge research in their chemistry-teaching period when that is the professor's area of expertise. Similarly, a university can't require a professor to misgender and decrease the effectiveness of the professor's communication of their ideas. Because both the university and the professor should be aligned in increasing access of the student to the content of the lecture, an actor that does not do so and thus creates a conflict of academic freedoms cannot claim that their exercise of academic freedom overrides.

Balancing toward the student in *Meriwether* would still have led to an outcome consistent with the principles of academic freedom for all parties. Meriwether would still be permitted to teach

his own thoughts about gender identity—the pronoun policy does not cast a "pall of orthodoxy" over his *lecture* of his ideas in the classroom. Instead, the pronoun policy impacts his use of gendered honorifics during classroom management, a choice he could change and still communicate his ideas through the lecture (for example, calling every student "colleague" to still retain a respectful environment). As part of institutional academic freedom, the university had allowed the professor to lecture on his ideas about gender identity but had also required the professor to only refer to students by their chosen pronouns. The first protected the professor's academic freedom to disseminate his controversial ideas, and the second protected the students' and universities' interests in an environment that was conducive to learning for transgender students. Under this framework, Meriwether would not have been permitted to claim that misgendering was an exercise of his academic freedom.

C. Utilizing Professional Academic Freedom to Understand Misgendered Honorifics as Classroom Management

As explained in Part II.A, the 1940 Statement, which has been widely adopted by colleges and universities around the country, has helped to develop well-defined bounds for the norms of professional academic freedom.[295] Later policy statements updating the 1940 Statement have introduced some ideas regarding where students fit into the exercise of professional academic freedom.[296] The members of the AAUP are largely considered experts on professional academic freedom, and the bounds they set, which are mostly concerned with the professor's academic freedom,[297] help define how to consider the student's interests in accessing the content of the lecture along with the professor's ability to teach the lecture.

1. The AAUP's policy statements indicate that a student's interests should be considered when a professor

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[295] *See* Edward J. Graham, *New Endorsers of the 1940 Statement*, AAUP.ORG (2014), https://perma.cc/DHZ2-U8HM.

[296] *See generally* AAUP, *supra* note 115.

[297] Metzger, *supra* note 205, at 1272.

exercises their academic freedom.

The AAUP's 1915 Declaration and 1940 Statement were primarily intended to establish the academic-freedom rights of professors.[298] They have since been updated with policy statements from the AAUP that expressly consider the interests of students.[299]

The AAUP's publications contemplate that exercises of professional academic freedom should consider the effects on students. A professor should encourage "the free pursuit of learning in [their] students."[300] Faculty members should be cognizant of the inherent authority they possess in the instructional role; students "should not be forced by th[is] authority . . . to make particular personal choices as to . . . [their] own part in society."[301] As teachers, faculty members are expected to show respect for each student "as an individual" during exercises of professional academic freedom.[302] Even under the AAUP's (expansive) conception of academic freedom, the AAUP recognizes that in some circumstances the university may curtail the professor's individual academic freedom to ensure that the student is able to access the learning environment fully—the AAUP's policy statements clearly state that professional academic freedom does not protect purposeful misgendering.[303] While academic freedom protects potentially uncomfortable conversations about sexuality and gender, misgendering does not "demonstrate respect for students as individuals," which the AAUP also considers an important facet of professional academic freedom.[304]

Meriwether, by misgendering Ms. Doe, did not consider the effects that his speech would have on her in the way that the AAUP's policy statements intended. Misgendering by a professor requires the student to (1) either bow to the professor's authority and accept the professor's erasure of the student's gender identity or (2) resist and not experience the full range of the academic experience. The AAUP's policy statements clearly decline to view either of these options as positive outcomes of academic freedom.

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[298] *See* White, *supra* note 105, at 801–04 (describing provisions of the AAUP's 1915 Declaration and 1940 Statement).

[299] AAUP, *supra* note 115, at 141.

[300] *Id.* at 133.

[301] *Id.* at 135.

[302] *Id.* at 133.

[303] *On Academic Freedom and Transphobia*, AAUP.ORG (Nov. 22, 2021), https://perma.cc/DM5S-HSLV.

[304] *Id.*

2. Norms of professional academic freedom recognize the difference between respecting a student's identity and respecting a student's ideas.

Norms of professional academic freedom draw a clear line: while professors do not have to respect a student's ideas, they must respect the student as a person.[305] The "pedagogical purpose of higher education [is] to introduce critical distance between students and their own ideas," essentially to develop the students' ability to distinguish a critique of their identity and personhood from a critique of their ideas.[306] A professor's use of academic freedom for classroom speech should not involve offensive speech that is functionally harassment directed at specific students.[307]

To prevent individual academic freedom from being swallowed by the subjective sensitivities of students, courts can use professional norms to evaluate academic freedom.[308] Professional academic freedom is only protected when it stays within professional norms.[309] Professional standards suggest that an instructor who accidentally misgenders a student should "acknowledge the misgendering, apologize, and move on."[310] The purpose of this exercise is to send a "message of respect" without dwelling on the misgendering and calling attention to the student.[311]

Meriwether was entitled to lecture about his beliefs on gender identity. It could have been a valid use of his academic freedom for him to argue with Ms. Doe about her *ideas* on gender identity during his lecture on the subject. By using those ideas to treat Ms. Doe differently because of her gender identity, however, Meriwether crossed the line from idea to person and violated norms of professional academic freedom. Respecting a person's gender identity is core to respecting that person. The consideration of the student's interest would ensure that professors cannot point to academic freedom to justify actions that disrespect people.

CONCLUSION

Misgendering of a student can have significant harms on a transgender student's access to the educational environment.

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305 MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD 105 (2009).

306 *Id.*

307 *See* DAVID E. BERNSTEIN, YOU CAN'T SAY THAT! 66–67 (2003).

308 *See* FINKIN & POST, *supra* note 305, at 110.

309 ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM 67 (2012).

310 *See* ROBERTS, *supra* note 15, at 23.

311 *Id.*

While the Supreme Court has been clear that both individual and institutional academic freedoms should be protected, the Court has not explained how these freedoms should be balanced when they are in conflict. I submit that the proper way to assess classroom-management devices is to defer to whichever exercise of academic freedom, either individual or institutional, preserves the student's interest in accessing the learning environment.

Consideration of the student's interest in accessing the marketplace of ideas is supported by the Supreme Court's First Amendment jurisprudence, the lower courts' use of the student experience in assessing the strength of academic-freedom claims, and professional norms of academic freedom. All of these contemplate a base environment where the student is able to fully participate in the exchange of ideas when universities and professors exercise their academic freedom.