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Symposium Issue on Free Speech
Neal Hutchens, Special Issue Editor

ARTICLES

equality and unalienable rights and a republic with constitutional standards to check governmental authority. The authors argue that teaching and creating a community consistent with the American Proposition can help overcome our national divisions, not only those of a partisan nature but also over the worth of our constitutional republic. They argue that partisans of both the political left and right have rejected the constitutional tools intended to moderate the People and the government—Free Speech, Religious Liberty, Due Process, and legal equality regardless of race, sex, or sexual orientation. These partisan tensions are heightened at our colleges and universities, which the authors contend have abandoned the search for truth to promote the prevailing popular opinion of the day and have failed to promulgate the legally required constitutional practices.

Colleges and universities can and should embrace and teach the American Proposition, the authors argue, which means aligning themselves with the very constitutional principles that created the first public colleges and universities in the Nation. This means two things. First, institutions of higher learning must promote academic freedom for the faculty, and for the entire university community. Second, public universities must discharge their academic responsibility—teaching civic literacy and constitutional principles and promoting what John Inazu calls "confident pluralism."

Vise Gripping Academic Freedom: Controlling the Learning Movement That Supports Minoritized Voices

Jeffrey C. Sun and Heather A. Turner

This article examines the effects of anti–diversity, equity, and inclusion (DEI) laws to academic freedom within public higher education. Notably, these laws adversely impact faculty autonomy and intellectual diversity. By analyzing the historical and legal foundations of academic freedom, alongside contemporary judicial interpretations, the article situates recent legislative efforts as a metaphorical "vise grip" on the open exchange of ideas critical to higher education. Drawing on foundational court cases and theoretical perspectives, including the Professional and Legal Complement School, the authors highlight the need for robust doctrinal frameworks, namely, the Hazelwood standard, as more fitting to address the societal role of higher education and professors. This analysis underscores the need of safeguarding academic freedom against political encroachments to maintain higher education's role in advancing democratic values, workforce development, and societal progress.

Talking About Free Speech on Campus: Legal Standards and Beyond

Neal H. Hutchens and Brandi Hephner LaBanc

Colleges and universities continue to wrestle with often vexing challenges involving free speech. We contend in this article that rather than solely focusing on legal and campus rules related to free speech, institutional leaders need to look

beyond the “rules”and help lead holistic approaches for multiple stakeholders to wrestle with free speech issues on campus. While arguing for an approach not singularly focused on legal standards, given the importance of legal rules, especially the First Amendment in the context of public higher education, the article reviews some of the basic legal standards that govern free speech at colleges and universities. This overview may be especially useful for non-attorneys working in a range of positions at colleges and universities. Shifting from a focus on legal standards, the article also offers suggestions for ways colleges and universities can better prepare members of the campus community and other stakeholders to engage with and better understand issues connected to free speech. An overarching goal of the article is to help institutional leaders design their own blueprint for making issues surrounding free speech an institutional priority that is holistically tackled across the campus community and in various contexts, including curricular and co-curricular settings for students.

JCUL SPECIAL ISSUE: FREE SPEECH AND ACADEMIC FREEDOM ON CAMPUS: RECENT CHALLENGES AND OPPORTUNITIES

AN INTRODUCTION TO THE SPECIAL ISSUE

NEAL H. HUTCHENS[*]

Issues of free speech continue as high profile and contested issues on many college and university campuses. Free speech debates and discussions also reverberate well beyond campus, drawing interest from elected officials, various interest groups, and, at times, from the general public. Just as our nation is often sharply divided along political and ideological lines, free speech issues on campus reflect competing visions of higher education and society.

The articles in this special issue take on some of the key areas of controversy and possibilities for how institutions can build campus environments committed to free speech and to connected concepts such as academic freedom. Several of the articles also push us to consider how to reconcile protections for free speech and open inquiry with efforts to foster campus environments that prioritize access and belonging or commitments to diversity and inclusion. Whether readers find themselves in agreement or disagreement with views offered in specific articles, the pieces contained in the special issue prompt deeper reflection on the ongoing work and challenges of making colleges and universities unique spaces in society for free speech and intellectual freedom.

While distinct from general free speech protections, considerations of academic freedom represent a crucial aspect of ensuring open inquiry in colleges and universities. Indicative of this importance, all articles in the special issue touch on some dimension of academic freedom. Academic freedom represents a concept widely touted in higher education in the United States, and globally, but one that is encompassed by ambiguity and debate, including legally, over the conditions needed for it to thrive. In U.S. higher education, there remains broad dedication to the ideals and goals of academic freedom, but there exist considerable questions over how best to operationalize academic freedom as an institutional value and over the current state of academic freedom in colleges and universities. For instance, alongside writing that touts the importance of tenure and laments its decline,[1] other authors contend that tenure, if ever useful, has largely outlived its effectiveness as a mechanism to foster innovation

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[*] Editor, *JCUL* Special Issue. Professor, Department of Educational Policy Studies and Evaluation, University of Kentucky.

and discovery in higher education.[2] Critiques of tenure often contend that faculty members in higher education are, along with institutions generally, too far left leaning.[3]

Three articles in the special issue provide distinctive contributions to issues of academic freedom. Of these, the one from Frank Fernandez and Volha Chykina prompts us to think about academic freedom not only in the United States but from a global perspective as well as how tools of empirical inquiry provide a way to move beyond anecdotal evidence in examining the value of academic freedom to higher education in supporting the public good. Much of the literature on academic freedom in the United States has a singular focus on American academics and higher education institutions. Fernandez and Chykina remind readers of the usefulness of considering academic freedom from a comparative and international perspective.

The United States developed a higher education system in the period after World War II that became envied and emulated by much of the rest of the world.[4] Now, however, world-class colleges and universities are located around the globe.[5] My comments are not premised on a competitive orientation, which often is where much of the rhetoric on global higher education is centered, but, instead, on the notion that discussions of academic freedom the United States potentially benefit from the experiences, both positive and negative, of other nations. Fernandez and Chykina's article helps put into perspective the implications of a lack of meaningful academic freedom protections for a nation's higher education system, consequences which are potentially sometimes obscured in the United States by the system's overall successes.

Another noteworthy contribution of the Fernandez and Chykina article is prompting consideration of how to evaluate or measure the impact of academic

1 *See*, *e.g.*, Henry Reichman, Understanding Academic Freedom (2021); Steven Mintz, *Academic Tenure: In Desperate Need of Reform or of Defenders?*, Inside Higher Ed (Sept. 23, 2021), https://www.insidehighered.com/blogs/higher-ed-gamma/academic-tenure-desperate-need-reform-or-defenders; David Wippman & Glenn C. Altschuler, *3 Reasons Why Tenure Remains Indispensable*, Inside Higher Ed (Dec. 12, 2021), https://www.insidehighered.com/views/2021/12/13/why-tenure-remains-vital-today-opinion; Jacques Berlinerblau, *They've Been Scheming to Cut Tenure for Years. It's Happening: We're in the Execution Phase of the Profession's Demise*, The Chronicle of Higher Education (Feb. 1, 2023), https://www.chronicle.com/article/theyve-been-scheming-to-cut-tenure-for-years-its-happening.

2 *See*, *e.g.*, Todd J. Williams, *No Tenure? No Problem: A College President Explains Why Lifetime Employment for Faculty Isn't Necessary*, The James G. Martin Center for Academic Renewal (Oct. 19, 2022), https://www.jamesgmartin.center/2022/10/no-tenure-no-problem-2/; Michael Lind, *Why Ending Tenure Is Only a Start*, Tablet (Oct. 21, 2021), https://www.tabletmag.com/sections/news/articles/ending-tenure-michael-lind; James C. Wetherbe, *It's Time for Tenure to Lose Tenure*, Harvard Business Review (March 13, 2013), https://hbr.org/2013/03/its-time-for-tenure-to-lose-te

3 See, for example, the sources cited in footnote 2.

4 For more on the development of U.S. higher education in the twentieth century, see, for example, John R. Thelin's highly regarded history of higher education. John R. Thelin, A History of American Higher Education (3rd ed. 2019). Specifically, chapter seven reviews the "Golden Age" of American higher education and its global rise to prominence after World War II. *Id*. at 260-316.

5 While university rankings are, at best, a highly imperfect measure of institutional quality, see, for example, the *Times Higher Education* world ranking of higher education institutions for more on the global distribution of institutions in the ranking. Times Higher Education, *World University Rankings: 2025*, https://www.timeshighereducation.com/world-university-rankings/latest/world-ranking (last visited Jan. 10, 2025).

freedom protections for individual faculty and for higher education generally. Often, commentary around academic freedom, perhaps especially when tackled through a legal lens, is framed by anecdotes based on specific incidents. Distinct events or individual stories are, of course, not without value in examining academic freedom and attendant legal standards. However, legal scholarship centered on academic freedom benefits from the ways in which social science research aids in understanding better and more precisely the outcomes when faculty members possess or are denied academic freedom in their research and teaching. Notably, such research inquiry could help to assess or measure the impact of various types of legal protections for academic freedom, such as ones based on the First Amendment, tenure, or collective bargaining. The Fernandez and Chykina article is valuable in modeling and advocating for research that better informs policy makers, institutional leaders, and faculty members on how academic freedom protections, or their absence, impact scholarly work and research productivity.

Considering academic freedom in the context of state laws aimed at undoing diversity, equity, and inclusion (DEI) efforts in higher education, Jeffrey C. Sun and Heather A. Turner categorize different strands of scholarship, different schools as characterized by the authors, focused on academic freedom. Some of the schools identified by Sun and Turner focus on specific legal standards to uphold academic freedom, such as the First Amendment. The authors also consider how scholars not relying on legal methods, such as taking a socio-historical approach, have sought to analyze and conceptualize academic freedom. In drawing from multiple schools or lines of scholarship, the authors highlight how different forces affect the contemporary state of higher education and influence how academic freedom operates, or not, at the individual, institutional, and system levels. With the abundance of scholarship on academic freedom, Sun and Turner's efforts are beneficial in helping us to grapple with these multiple literature streams, including from legal scholars, on conceptualizations of academic freedom and the role of legal standards in connection to academic freedom protections.

Along with providing an informative contextualization and categorization of academic freedom from multiple legal and scholarly perspectives, Sun and Turner, focusing on anti-DEI legislation in Florida, offer their views on how courts should structure First Amendment protections for faculty members in public higher education. Specifically, the authors argue for a framework that provides First Amendment legal protection for public higher education faculty members while also acknowledging institutional interests. Additionally, the authors highlight the importance of professional standards as bolstering academic freedom and institutional autonomy in public higher education along with the continuing importance of these standards in private colleges and universities. Sun and Turner's article highlights current legal and policy battles over the extent of academic freedom for public higher education faculty members and the extent of control that state governments should be able to exert over public colleges and universities, including in the classroom and research endeavors.

One way to think about the efforts to disallow certain topics from the classroom examined in Sun and Turner's article is how some state governments, both directly and indirectly, are seeking a role in curricular and institutional administration matters more akin to what has been exercised by states in relation to elementary

and secondary education curricula and operations. Along with efforts to limit topics in the classroom, efforts to abolish tenure or to make it easier to dismiss tenured faculty members could be grouped into these overall efforts.[6] Similarly, there have been initiatives to reduce the role of faculty members in shared governance in some states and institutions, often noting the need to make public institutions more sensitive to their status as public institutions.[7] The Sun and Turner article provides a helpful contribution to these ongoing developments around the balance between faculty independence, especially in the classroom, versus the prerogative of institutional leaders and boards and state governments to determine classroom subjects and content and to curtail the faculty role in shared governance and institutional decisions.

The importance of academic freedom, alongside broader commitments to free speech in higher education, is a key focus of the article by Elizabeth Kaufer Busch and William E. Thro. In setting out their vision for academic freedom and free speech in higher education, in this thought-provoking article, Busch and Thro argue for colleges and universities, especially public ones, to commit to what they term the American Proposition. They define the American Proposition as based on the idea of a nation of equality and rights and where constitutional standards place checks on governmental authority. They offer the American Proposition as a strategy to overcome national divisions, not only those of a partisan nature but also over the worth of our constitutional republic. Busch and Thro contend that those on both the political left and right have rejected and abdicated the constitutional tools intended to alleviate the tensions that punctuate our nation — Free Speech, Religious Liberty, Due Process, and legal equality regardless of race, sex, or sexual orientation. Pointing to how these tensions also exist in higher education, the authors argue that colleges and universities should embrace and teach the American Proposition.

Busch and Thro urge higher education to embrace the American Proposition, arguing that colleges and universities have "abandoned the search for truth to promote the prevailing popular opinion of the day and have failed to promulgate the legally required constitutional practices." They issue a call for higher education institutions to promote academic freedom not only for the faculty but for the entire university community. According to the authors, the responsibility to accept and teach the American Proposition is especially relevant for public colleges and universities. An institutional commitment to the Academic Proposition requires colleges and universities to assume academic responsibility and teach civic literacy, enhance understanding of the constitution, and promote what John Inazu

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6 See, e.g., Barrett J. Taylor & Kimberly Watts, *Tenure Bans: An Exploratory Study of State Legislation Proposing to Eliminate Faculty Tenure, 2012-2022*, Rev. Higher Educ. (online preprint published July 25, 2024), https://dx.doi.org/10.1353/rhe.0.a934009; Ryan Quinn, *The Growing Trend of Attacks on Tenure*, Inside Higher Ed (Aug. 5, 2024), https://www.insidehighered.com/news/faculty-issues/tenure/2024/08/05/growing-trend-attacks-tenure; Monica Potts, *Why Republicans Are Targeting Professors' Job Security*, FiveThirtyEight (May 11, 2023), https://fivethirtyeight.com/features/college-tenure-republican-attacks-education/.

7 *See, e.g.*, Alan Blinder, *Professors Are Uniquely Powerful. That May Be Changing*. N.Y. Times (Nov. 2, 2024), https://www.nytimes.com/2024/11/02/us/faculty-power-shared-governance-university-presidents.html.

calls "confident pluralism."[8] As part of setting out the attributes of the American Proposition, especially in relation to public colleges and universities, Busch and Thro consider the rights to and limits on academic freedom at both the individual and institutional levels. As with the other pieces in the special issue, the authors provide analysis and proposals dealing with free speech and academic freedom that go beyond a singular focus on legal standards.

An emphasis in looking beyond legal rules in connection with free speech in higher education is also an integral part of the article by Brandi Hephner LaBanc and myself. In the free speech realm, we challenge college and university leaders to guide efforts to build campuswide initiatives that are holistic in nature and aimed at multiple constituencies, including students, faculty and staff members, board members, alumni, and parents of students. In the case of students, we recommend that colleges and universities need to support efforts in both curricular and co-curricular spaces. In these endeavors, we challenge institutions to avoid an emphasis on cursory engagement and, instead, to foster an institutional focus on deep learning around issues connected to free speech. Additionally, these endeavors should not ignore how free speech intersects with other compelling issues and institutional values, such as implications for access and belonging on campus. We contend an important part of institutional efforts is recognition of the need for a campus-wide approach and commitment, which means that responsibility for free speech issues on campus is not siloed away in particular units such as student affairs or the general counsel's office.

While a major ambition of the Hutchens and Hephner LaBanc article is to spur institutions to go beyond a rule-centric approach in cultivating engagement and education on free speech, legal standards, especially for public colleges and universities, play an essential role in establishing the conditions for free speech on campus and permissible limits on speech. As such, the article provides an overview of key legal standards shaping legal speech rights in higher education, including ones in addition to the First Amendment, such as civil rights laws. This coverage of legal standards may especially prove useful to non-attorneys working in higher education. The overview of legal rules connected to free speech is premised on the notion that legal literacy should comprise part of educational and engagement efforts connected to free speech while also contributing to sound institutional policy and practice.

Despite distinctiveness in orientation and the specific free speech topic undertaken, all the articles in this special issue show the consistently evolving nature of discourse connected to free speech and open inquiry in higher education. The articles highlight as well how free speech and academic freedom, at least in terms of how actually operationalized on campus, continue to generate disagreement and contention. The special issue presents opportunities for readers to further synthesize and develop their thinking on established topics, such as potential First Amendment rights for faculty academic freedom in public higher education. The articles also provide a venue to engage with ideas about how to enrich initiatives at higher education institutions to further dialogue and learning around free speech and open inquiry.

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8 John D. Inazu, Confident Pluralism: Surviving and Thriving Through Deep Difference (2016).

As editor for this special issue, I want to express my deep gratitude to the authors for contributing their time and expertise to this project. Thanks is also due to *JCUL* editor Barbara A. Lee for her tremendous support and dedicated work on this special issue. I would also like to express appreciation to the National Association of College and University Attorneys, publisher of *JCUL*, and their excellent staff for support of this special issue and the journal. Last but not least, I want to thank my University of Kentucky colleague Zitsi Mirakhur for her excellent assistance in hosting an online symposium held as a precursor to this special issue.

AN EMPIRICAL CONCERN OF THE FIRST AMENDMENT: AN ESSAY ON THE BENEFITS OF ACADEMIC FREEDOM

FRANK FERNANDEZ[*] AND VOLHA CHYKINA[**]

Abstract

The Supreme Court has previously cited nonlegal or social science evidence in landmark cases related to school desegregation and race-conscious admissions. This article argues that there is strong empirical evidence to support the argument that academic freedom supports the public good through measurable outcomes such as research production in science, technology, engineering, and mathematics fields, and the commercialization of intellectual property or technology transfer through patent applications and citations. We argue that courts should recognize that academic freedom serves the public good by protecting faculty work that supports scientific innovation, economic competitiveness, and national security. Courts should protect academic freedom for its benefits to the public good, apart from any claim to whether academic freedom exists as an institutional right, collective right to all faculty, or an individual right of certain instructors.

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[*] Frank Fernandez is an associate professor of educational leadership and policy analysis at University of Wisconsin, Madison. He earned a PhD in Higher Education Administration at the Pennsylvania State University. Phone: 760-222-5963. Email: frank.fernandez@wisc.edu.

[**] Volha Chykina is an assistant professor of leadership studies at the University of Richmond. She earned a PhD in Educational Theory and Policy and Comparative and International Education at the Pennsylvania State University. Phone: 804-287-6335. Email: vchykina@richmond.edu.

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INTRODUCTION[1]

Recent attacks on academic freedom are part of a larger strategy of undermining social trust in higher education.

[2]The judicial system has historically vacillated between extending deference to public university leaders to govern higher education and reigning in their autonomy.[3] This dynamic reflects a fundamental question about whether public universities should be allowed to operate differently from public primary and secondary schools, as well as from other public agencies.[4] We are now in an era when state legislatures and some courts are restricting university independence. For instance, after decades of precedent that allowed universities to consider race in competitive admissions decisions to pursue the educational benefits of diversity—a form of institutional academic freedom[5]—the U.S. Supreme Court essentially ended the practice in 2023[6] for both public and private colleges and universities. On the legislative side, recent attempts to dismantle institutional diversity efforts at public institutions have encompassed limits on topics that faculty members may teach,[7] resulting in an important test of institutional academic freedom for public

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1 We variously discuss academic freedom as an institutional right (i.e., a university's ability to operate with autonomy from the state) and as an individual right (i.e., applying to members of the professoriate and not being passed through to faculty by a university employer). We try to clarify when we discuss academic freedom as an institutional right, such as when considering a university's right to consider race in determining whom to admit, and when we refer to the rights of individual faculty. This article does not directly address academic freedom over teaching. For a discussion on the importance of protecting academic freedom for improving college instruction, we refer readers to Scott M. Gelber, *Does Academic Freedom Protect Pedagogical Autonomy?*, 48 Rev. Higher Educ. 1 (2024).

2 *See, e.g.*, Barret J. Taylor, Wrecked: Deinstitutionalization and Partial Defenses in State Higher Education Policy (2022).

3 *See* Scott M. Gelber, Courtrooms and Classrooms: A Legal History of College Access 1860–1960 (2016) for an overview of how during the twentieth century, courts shifted from deferring to universities to maintain segregated academic programs to then forcing integration. *See* Vanessa Miller et al., *The Race to Ban Race: Legal and Critical Arguments Against State Legislation to Ban Critical Race Theory in Higher Education*, 88 Mo. L. Rev. 61 (2023) for a discussion of how in the twenty-first century, courts shifted from deferring to universities to use race conscious admissions to achieve the educational benefits of a diverse student body to limiting and eventually ending the practice in cases *like Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).

4 Gelber, *supra* note 2. Our focus on public higher education is not meant to overlook the importance of these issues for private higher education. However, the autonomy of public colleges and universities is under specific threat from proposed and enacted governmental actions, such as in Florida. *See, e.g.*, Pernell v. Fla. Bd. of Governors of State Univ., 84 F.4th 1339 (11th Cir. 2023).

5 J. Peter Byrne, *Constitutional Academic Freedom After* Grutter*: Getting Real About the Four Freedoms of a University*, 77 U. Colo. L. Rev. 929 (2006).

6 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

7 Miller et al., *supra* note 2; Ryan Quinn, *The Growing Trend of Attacks on Tenure*, Inside Higher Ed (Aug. 5, 2024), https://www.insidehighered.com/news/faculty-issues/tenure/2024/08/05/growing-trend-attacks-tenure.

colleges and universities and their autonomy to operate independently from government and political pressure.

In the contested space of academic freedom and institutional independence, we consider how empirical evidence can inform courts faced with interpreting academic freedom protections under the First Amendment. We base our arguments on the premise that academic freedom and institutional independence were integral in fostering an American higher education system that came to lead in the world in the latter half of the twentieth century.[8] Rather than seeing individual academic freedom as serving the interests of individual faculty, it should be seen as serving a broader public good by allowing faculty to do cutting-edge teaching and research in ways that challenge traditional orthodoxy and advance the national interest. Yet, the U.S. Supreme Court has neglected to definitively state whether the First Amendment protects the academic freedom of public higher education faculty.

In *Garcetti v. Ceballos*, the U.S. Supreme Court sidestepped the question of whether the state's authority to limit public employee speech applies to higher education faculty.[9] Based on that legal ambiguity, lower courts have either declined to apply *Garcetti* to cases involving faculty speech or have inconsistently interpreted *Garcetti*.[10] Prior to *Garcetti*, the Court applied a balancing test to weigh whether a public employee's speech addressed a matter of public concern and should be protected by the First Amendment.[11] In *Connick v. Myers*, the Court explained that "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public,"[12] and that matters of public concern must be balanced with "the practical realities involved in the administration of a government office."[13] In *Connick* and *Pickering*, the Court weighed an individual employee's interests with that of an individual employer to consider the efficient administration of a public agency or bureaucracy. We revisit the balancing test because the U.S. Court of Appeals for the Ninth Circuit found in *Demers v. Austin* that *Garcetti* did not apply in a case claiming academic freedom and instead applied the pre-*Garcetti* balancing test.[14]

Because *Garcetti* did not address the concept of academic freedom or faculty speech as an individual or collective right, there was no need for the Court to

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8 The Century of Science: The Global Triumph of the Research University, 33 Int'l Persps. Educ. & Soc. (Justin J. W. Powell et al. eds., 2017).

9 547 U.S. 410 (2006).

10 Neal H. Hutchens & Frank Fernandez, *Academic Freedoms as a Professional, Constitutional, and Human Right: Contemporary Challenges and Directions for Research*, *in* 38 Higher Education: Handbook of Theory and Research 1 (Laura W. Perna ed., 2023); Neal H. Hutchens et al., *Faculty, the Courts, and the First Amendment*, 120 Penn. St. L. Rev. 1027 (2016).

11 In *Pickering*, the Court set out the goal of achieving "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

12 461 U.S. 138, 150 (1983).

13 *Id.* at 154.

14 746 F.3d 402, 406 (9th Cir. 2014).

consider whether academic freedom has facilitated speech in ways that constitute a matter of public concern or that would help a university fulfill its broader public responsibility by producing expansive societal benefits. Whereas the First Amendment protects individual speech regardless of whether it has a public benefit, such as flag burning in *Texas v. Johnson*,[15] a strong recognition of academic freedom should recognize that protecting speech of public college and university faculty does benefit the public in measurable ways. In any new Supreme Court case that directly addresses academic freedom and faculty speech rights, the Court should consider the consensus of social science evidence on the benefits of academic freedom to the public and the lack of empirical evidence that protecting academic freedom makes it systematically more difficult to administer public universities. If the Court is not convinced of the need to protect academic freedom as a normative good, then it should protect academic freedom based on empirical research about the benefits to the national interest that accompany greater levels of academic freedom across countries and across time.

In the near future, academic freedom will either be expanded or eroded in the courts. The U.S. Circuit Court of Appeals for the Eleventh Circuit is expected to issue its decision *Pernell v. Lamb*, which involves Florida's attempt to ban university faculty from teaching critical race theory.[16] However the Eleventh Circuit opinion is written, it will likely be appealed. In anticipation of a new case reaching the U.S. Supreme Court, whether *Pernell* or another case, we argue that it is important for courts, university general counsels, and state attorneys general to consider the social science evidence on the benefits of academic freedom.

In Part I, we discuss how courts have previously looked to social science research as context for its decisions. Then, in Part II we present a summary of social science evidence on the challenges to academic freedom and the benefits of academic freedom to the public good. Much of this research is international in nature. It draws on the concept that academic freedom is recognized throughout international law as a universal human right. While we do not advance an independent argument on the merits of academic freedom as a right under international law, we briefly summarize this argument to help situate international statistical research. Finally, in Part III, we argue that it is important for university leaders to understand social science evidence and how it will be presented to the courts, and to defend the institution's role in advancing the public good for the state. Research indicates that university leaders can default to being risk averse and take whatever stances will avoid political scrutiny, even when they should be defending their institution's role as a social institution that advances the public good.

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15 491 U.S. 397 (1989).

16 Press Release, American Civil Liberties Union, Florida Educators Urge Appeals Court to Block Florida's Stop W.O.K.E. Act (June 14, 2024), https://www.aclu.org/press-releases/florida-educators-urge-appeals-court-to-block-floridas-stop-woke-act; Arek Sarkissian & Andrew Atterbury, *Appellate Court Appears Divided on DeSantis' 'Stop Woke' Law*, Politico (June 14, 2024, 5:15 PM), https://www.politico.com/news/2024/06/14/desantis-stop-woke-lawsuit-00163536.

I. THE COURT HAS PREVIOUSLY RELIED ON SOCIAL SCIENCE EVIDENCE TO INFORM ITS OPINIONS

Our argument—the Supreme Court should recognize social science research findings about the benefits of academic freedom—is not novel. The Supreme Court has historically cited nonlegal evidence in its decisions. In *Brown v. Board of Education of Topeka*, the Court famously evaluated precedent in the light of contemporary social science.[17] Some have questioned whether the Court's opinion was actually influenced by social science or whether social science was cited to justify a controversial decision. Some legal histories even suggest the justices cited social science because it validated their personal views of society.[18] Whatever reasons that the Court exercised "scientific jurisprudence" in *Brown*,[19] it has continued to do so. For instance, in a concurring opinion in *Students for Fair Admissions* Justice Clarence Thomas not only cited a review of empirical literature, but he also endorsed the use of statistical research methods to offer empirical insight when data are available.[20]

Briefs for petitioners and respondents typically focus on presenting facts and legal arguments.[21] Therefore, non- or extralegal evidence is often presented to the U.S. Supreme Court by amicus curiae or parties not directly involved in litigation.[22] Research shows that amicus briefs are often disproportionately submitted in cases involving civil rights and constitutional questions.[23] Several factors such as the style and substance of briefs, as well as the reputations of amici, influence whether the Court uses language or cites arguments from amicus briefs. Conversely, the Court appears to interpret the volume of amicus briefs submitted in a particular case as a signal of the importance of its broader significance, which influences whether it is willing to grant certiorari. A body of evidence also suggests that the party that has the largest number of amicus briefs submitted on its behalf has higher odds of receiving a favorable opinion from the Court. Finally, volume of amicus briefs predicts whether individual justices write concurring or dissenting opinions.[24]

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17 347 U.S. 483, 494 (1954) ("Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority.").

18 Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 Stan. L. Rev. 793 (2002).

19 *Id.* at 793.

20 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 270 n.8 (2023) (Thomas, J., concurring) ("[I]n 2016, the Journal of Economic Literature published a review of mismatch literature—coauthored by a critic and a defender of affirmative action—which concluded that the evidence for mismatch was 'fairly convincing.' … And, of course, if universities wish to refute the mismatch theory, they need only release the data necessary to test its accuracy.") (citing Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Tradeoff*, 54 J. Econ. Lit. 3, 20 (2016)).

21 Paul M. Collins, Jr., Friends of the Supreme Court: Interest Groups and Judicial Decisionmaking (2008).

22 Paul M. Collins, Jr., *The Use of Amicus Briefs*, 14 Ann. Rev. L. & Soc. Science 219 (2018).

23 *Id.*

24 *Id.*

Several recent higher education cases on race-conscious admissions elicited large numbers of amicus briefs: *Grutter v. Bollinger* (2003),[25] *Gratz v. Bollinger* (2003),[26] *Fisher v. University of Texas* (2013),[27] *Fisher v. University of Texas* (2016),[28] *Students for Fair Admissions* (2023).[29] Many of these briefs offered non- or extralegal evidence to inform the Court's opinions.[30] In *Grutter*, the Court cited amicus briefs and social science research to confirm that the use of a suspect practice—the consideration of race to make admissions decisions—advanced a compelling governmental interest, which was achieving educational benefits for all students. The Court recognized that cross-racial interactions could only be facilitated by enrolling racially diverse cohorts of students.[31] For instance, Justice Clarence Thomas cited several social science studies in his opinion that concurred and dissented in parts from the other opinions of the Court.[32]

Before considering recent developments in the study of academic freedom, it is helpful to consider the types of social science research that are often presented by amici to the Court. In *Fisher I*, the plurality (28%) of extralegal sources cited by amici were published as articles in scholarly, non–law review journals.[33] Amici in support of the University of Texas and in support of neither party both cited nonlaw journals most frequently (28% and 23% of citations, respectively).[34] Nonlaw journal articles were the third most cited source by amici in support of Abigail Fisher.[35] In terms of methodology, extralegal sources can be categorized as analytic (generally analyzing secondary sources like documents, records, or media); qualitative (typically using interviews or observations to study a phenomenon); experimental quantitative research that attempt to identify treatment and control groups to estimate causal effects; nonexperimental quantitative studies that aim to identify correlations without studying the causal impact of exposure to a treatment or event; and mixed methods research, which encompasses pairings of qualitative and

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25 539 U.S. 306 (2003).

26 539 U.S. 244 (2003).

27 570 U.S. 297 (2013) [hereinafter *Fisher* I].

28 579 U.S. 365 (2016).

29 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

30 Liliana M. Garces et al., *Arguing Race in Higher Education Admissions: Examining* Amici's *Use of Extra-Legal Sources in* Fisher, 14 J. Diversity Higher Educ. 278 (2021); Catherine L. Horn et al., , *Shaping Educational Policy Through the Courts: The Use of Social Science Research in* Amicus *Briefs in Fisher I*, 34 Educ. Pol'y 449 (2020); Patricia Marin et al., *Uses of Extra-Legal Sources in* Amicus Curiae *Briefs Submitted in University of Texas at Austin*, 26 Educ. Pol'y Analysis Archives 1 (2018); Mike Hoa Nguyen et al., *Mobilizing Social Science Research to Inform Judicial Decision-Making:* SFFA v. Harvard, 28 Asian Am. L.J. 4 (2021); OiYan A. Poon et al., *Confronting Misinformation Through Social Science Research:* SFFA v. Harvard, 26 Asian Am. L.J. 4 (2019).

31 Gary Orfield, *Affirmative Action Hanging in the Balance: Giving Voice to the Research Community in the Supreme Court*, 42 Educ. Researcher 179 (2013).

32 Grutter v. Bollinger, 539 U.S. 306 (2003) (Thomas, J., concurring in part).

33 Marin et al., *supra* note 29.

34 *Id.*

35 *Id.*

quantitative data.[36] In the *Fisher I* case, 41% of social science studies cited by amici relied on nonexperimental quantitative analyses.[37] Another 8% used experimental quantitative methods. Academic disciplines may draw different distinctions for determining whether quantitative studies support causal inference,[38] yet, in total, nearly half of the social science sources cited by *Fisher I* amici were quantitative.[39] These sources tend to be favored by at least some justices. For instance, Justice Clarence Thomas's references to social science research in *Grutter* and *Students for Fair Admissions* were to quantitative studies.[40]

Framed by the types of empirical research that are most often cited by amici in filings to the court, we proceed to examine recent developments in social science research about academic freedom. We focus on studies that feature statistical analyses of quantitative data. The next part begins with a summary of how academic freedom is conceptualized as a global norm or universal human right to explain why rigorous, cross-national measures of academic freedom have been developed and are now publicly available. We then highlight a few recent studies with important implications for understanding the influence of academic freedom on university output.

II. COURTS SHOULD RECOGNIZE NEW SCHOLARSHIP ON THE IMPORTANCE OF ACADEMIC FREEDOM

Traditionally, scholarly discussion around academic freedom, especially in the United States, has focused on academic freedom as an individual right.[41] In that vein, academic freedom is usually defined as the ability of a faculty member to teach, research, and publicly speak on the topics of their expertise without fear of being repressed due to the nature of their expertise and opinion.[42] Additionally, many scholars include faculty right to self-governance as a component of academic freedom.[43]

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36 Horn et al., *supra* note 29.

37 Marin et al., *supra* note 29.

38 For instance, the statistical approach of using fixed effects to control for unobserved variance in the data and analysis may be considered as approximating causal analysis by some economists but not others and not by researchers in other social science fields. *See, e.g.*, Joshua D. Angrist & Jörn-Steffen Pischke, Mostly Harmless Econometrics: An Empiricist's Companion (2009).

39 Horn et al., *supra* note 29.

40 We acknowledge that the Justices do not uniformly support considering social science research when considering legal arguments—or they only selectively entertain the use of social science research. In Gill v. Whitford, 585 U.S. 48 (2018) (Transcript of Oral Argument), a case about electoral gerrymandering, Chief Justice John Roberts referred to political science research as "sociological gobbledygook," which Justice Stephen Breyer later parroted as "pretty good gobbledygook." *See* Colleen Flaherty, *Sociology's 'Mic Drop' Moment*, Inside Higher Ed (Oct. 11, 2017), https://www.insidehighered.com/news/2017/10/12/chief-justice-john-roberts-calls-data-gerrymandering-sociological-gobbledygook#.

41 William A. Kaplin et al., The Law of Higher Education (6th ed. 2019).

42 Philip G. Altbach, *Academic Freedom: International Realities and Challenges*, 41 Higher Educ. 205 (2001); Matthew W. Finkin & Robert C. Post, For the Common Good: Principles of American Academic Freedom (2009).

43 Eva Maria Vögtle & Michael Windzio, *Does Academic Freedom Matter for Global Student*

Outside the United States, many scholars and international organizations have affirmed that academic freedom is a global norm and have argued that it is a universal human right.[44] International sources recognize academic freedom as multidimensional and addressing the same domains as American concepts of academic freedom: intramural and extramural speech relevant to teaching, research, public scholarship, and university governance—all of which must be protected from retaliation.[45] Academic freedom is defined and codified in multiple international documents and covenants. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) all make mention of the essential role that academic freedom plays in teaching and research.[46] For example, the Committee on Economic, Social and Cultural Rights, which is a body of international experts who monitor the implementation of ICESCR, while commenting on article 13 of the Covenant, explicitly stated,

> Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfill their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds.[47]

Other international covenants and documents assert the importance of academic freedom in similar ways.[48] Thus, infringements on academic freedom should be seen as violations of commitments made by signatory countries. While commitments made in these documents and covenants are notoriously hard to enforce, prior work shows that awareness of these global norms makes the public more willing and equipped to push its government to implement positive change.[49]

Mobility? Results From Longitudinal Network Data 2009-2017, 87 HIGHER EDUC. 433 (2023).

44 Neal H. Hutchens et al., *Academic Freedom Protections in National and International Law*, *in* INTERNATIONAL ENCYCLOPEDIA OF EDUCATION (4th ed. 2022).

45 For an overview, see Frank Fernandez & Neal Hutchens, *Academic Freedom in Higher Education*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF EDUCATION (in press).

46 *Academic Freedom and Its Protection Under International Law*, SCHOLARS AT RISK (Oct. 25, 2023), https://www.scholarsatrisk.org/resources/academic-freedom-and-its-protection-under-international-law/.

47 U.N. Comm. on Econ., Soc. and Cultural Rights General Comment No. 13, The right to education (Art. 13 of the Covenant) (21st sess.) Nov. 15- Dec. 3, 1999, E/C.12/1999/10, P 1 (Dec. 8, 1999), https://www.refworld.org/legal/general/cescr/1999/en/37937.

48 *E.g.*, Fernandez & Hutchens, *supra* note 44.

49 Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOCIO. 1373 (2005); KIYOTERU TSUTSUI, RIGHTS MAKE MIGHT: GLOBAL HUMAN RIGHTS AND MINORITY SOCIAL MOVEMENTS (2018).

Because of the interconnected nature of today's world and of higher education,[50] academic freedom should be understood as a global phenomenon. In the United States, higher education is interconnected with other social institutions, including the government, military, religion, and family.[51] Globally, universities are sites for cross-country connections of students and researchers. Academic freedom norms spread across higher education systems from country to country, and statistical evidence shows that countries that are more embedded in world society are more likely to protect academic freedom.[52] More specifically, countries with more links to international liberal institutions appear to have a higher commitment to academic freedom.[53] Moreover, the effects of academic freedom spill over into neighboring countries, increasing the productivity of their labor force, but the spillover occurs only into countries with weak judicial domestic institutions.[54] This is likely because these countries' institutions are not strong enough to spur innovation by themselves, but they can borrow this innovation from neighboring countries, thus increasing their own labor force productivity.[55] Just like the spread of academic freedom is global, so is the current attack on it.[56] Interestingly, countries with more international illiberal ties appear to restrict arts, humanities, and social sciences while boosting agriculture and engineering.[57] This suggests that the factors that drive the spread and the pushback against academic freedom are not only local[58] but also global,[59] indicating how strongly entrenched the concept of academic freedom is in the global society.

A. How Social Scientists Define and Measure Dimensions of Academic Freedom

As academic freedom has emerged as a global norm, international concern around monitoring and protecting academic freedom has risen.[60] When measuring academic freedom, social scientists have sought to measure academic freedom by considering

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50 *See, e.g.*, Kathryn Mohrman et al., *The Research University in Transition: The Emerging Global Model*, 21 Higher Educ. Pol'y 5 (2008).

51 Powell et al., *supra* note 7.

52 Julia C. Lerch et al., *The Social Foundations of Academic Freedom: Heterogenous Institutions in World Society, 1960 to 2022*, 89 Am. Socio. Rev. 88 (2024).

53 *Id.*

54 Niclas Berggren & Christian Bjørnskov, *Academic Freedom, Institutions, and Productivity*, 88 S. Econ. J. 1313 (2022).

55 *Id.*

56 Lerch et al., *supra* note 51; Evan Schofer et al., *Illiberal Reactions to Higher Education*, 60 Minerva 509 (2022).

57 Schofer et al., *supra* note 55.

58 Scott M. Gelber, The University and the People: Envisioning American Higher Education in an Era of Populist Protest (2011); Emon Nandi, *Governance, Performance and Quality in Higher Education: Evidences from a Case Study*, 19 Educ. Dialogue 37 (2022).

59 Schofer et al., *supra* note 55.

60 *See, e.g.*, Rep. of the Special Rapparteur on the Academic Freedom and the Freedom of Opinion and Expression, UN Doc. A/75/261 (2020); Katrin Kinzelbach et al., Free Universities: Putting the Academic Freedom Index into Action, Glob. Pub. Pol'y Institute (2021).

individual rights of students and faculty as well as institutional properties. One of the most widely accepted indices that measures academic freedom is produced by the Varieties of Democracy (V-Dem) Institute at the University of Gothenburg, Sweden.[61] V-Dem asks multiple country experts to code various aspects of academic freedom. V-Dem requests that these country experts answer the following questions:

- "To what extent are scholars free to develop and pursue their own research and teaching agendas without interference?"
- "To what extent are scholars free to exchange and communicate research ideas and findings?"
- "To what extent do universities exercise institutional autonomy in practice?"
- "To what extent are campuses free from politically motivated surveillance or security infringements?"
- "Is there academic freedom and freedom of cultural expression related to political issues?"[62]

V-Dem's final index incorporates country experts' answers by computing them into a single score for each country in each year, following a statistical procedure that is used to measure other multifaceted constructs such as democracy, civil society, or human rights.[63] This allows researchers to analyze the overall index,[64] as well as subcomponents of the index separately,[65] to account for the fact that certain facets of academic freedom might change independently of others or may have different levels of influence on country-level outcomes. As seen from above, this Academic Freedom Index (which is but one, albeit widely used, example of how academic freedom is measured) incorporates both individual rights and institutional contexts.

B. Academic Freedom, Faculty Work, and the Public Good

The assumption that academic freedom is solely about the rights of individual faculty or individual universities is rather reductionist as it does not emphasize the benefits that academic freedom brings to society.[66] Faculty members tend to

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61 Janika Spannagel et al., *The Academic Freedom Index and Other New Indicators Relation to Academic Space: An Introduction*, 2020 V-Dem Institute 26 (2020), https://www.v-dem.net/media/publications/users_working_paper_26.pdf.

62 *Id.*

63 Janika Spannagel & Katrin Kinzelbach, *The Academic Freedom Index and Its Indicators: Introduction to New Global Time-Series V-Dem Data*, 57 Quality & Quality 3969 (2022).

64 Lars Lott, *Academic Freedom Growth and Decline Episodes*, 88 Higher Educ. 999 (2024).

65 Volha Chykina et al., *Does Populism Threaten Academic Freedom? A Cross-National Study of Asia, Europe, and Latin America* (unpublished manuscript) (on file with author); Frank Fernandez et al., *Science at Risk? Considering the Importance of Academic Freedom for STEM Research Production Across 17 OECD Countries*, 19 PLoS ONE e0298370 (2024).

66 Finkin & Post, *supra* note 41.

exercise their right to research the topics of their choosing and to express their professional opinions freely not to benefit themselves but to benefit the public, thus making academic freedom essential for higher education to serve the public good.[67] The entire academic system has several avenues through which it encourages knowledge production to serve the public good and not merely the interests of individual faculty.[68] First, many funding agencies only fund research that explicitly contributes to the public good.[69] Second, many journals require or prefer that researchers include an explanation of how their study has practical implications or offers novel insights into understanding or addressing social problems.[70] Additionally, when faculty are considered for promotion, many institutions ask that academics themselves, and those writing recommendation letters on their behalf, elaborate on how their research has significance to students, the university community, and the public at large.[71]

When examining attacks on academic freedom, a lot of anecdotal evidence points to the attacks on social sciences.[72] It has been long documented that autocratic and populist leaders try to attack social sciences as unnecessary and elitist; they then justify limiting academic freedom as a way to protect people from propaganda and indoctrination that social scientists try to force onto the public.[73] The goal of these leaders is not to interfere with innovation as it relates to agricultural developments, improvements in the military–industrial complex, and workforce benefits that they garner from a more educated populace, but rather to shape the political climate conducive to their electoral success.[74] However, an intricate understanding of many social scientific phenomena is paramount to the vitality and health of society at large. For example, a nuanced, fact-based understanding of abortion and other family planning–related policies might aid the adoption and implementation of the policies that support women's health, which is a public good.[75] Given the sensitivity of the topic, policy makers can only garner fact-based understanding of these policies and their outcomes if scientists can freely research the topic and disseminate their findings. Other examples of

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67 Eve Darian-Smith, *Knowledge Production at a Crossroads: Rising Antidemocracy and Diminishing Academic Freedom*, Stud. Higher Educ. (forthcoming 2025); Hutchens & Fernandez, *supra* note 9.

68 *See, e.g.*, Talcott Parsons, *The Science Legislation and the Role of the Social Sciences*, 11 Am. Socio. Rev. 653 (1946); Talcott Parsons, *Considerations on the American Academic System*, 6 Minerva 497 (1968).

69 Holly J. Falk-Krzesinski & Stacey C. Tobin, *How Do I Review Thee? Let Me Count the Ways: A Comparison of Research Grant Proposal Review Criteria Across US Federal Funding Agencies*, 46 J. Rsch. Admin. 79 (2015); Sean M. Watts et al., *Achieving Broader Impacts in the National Science Foundation, Division of Environmental Biology*, 65 BioScience 397 (2015).

70 *E.g.*, Glenn Ellison, *Evolving Standards for Academic Publishing: A q-r Theory*, 110 J. Pol. Econ. 994 (2002).

71 *E.g.*, Sunny Hyon, *Evaluation in Tenure and Promotion Letters: Constructing Faculty as Communicators, Stars, and Workers*, 32 Applied Linguistics 389 (2011).

72 Paul Boyle, *A U.K. View on the U.S. Attack on Social Sciences*, 341 Science 719 (2013).

73 Gelber, *supra* note 57.

74 *Id.*; David Baker, The Schooled Society: The Educational Transformation of Global Culture (2020).

75 Darian-Smith, *supra* note 66.

social scientific research that is potentially politically contentious but important to countries' development and vitality—and thus in acute need of being protected—are research on labor conditions, immigration, criminal justice, and education policy.

Education, for example, promotes better health and has been referred to as a "social vaccine."[76] More educated people tend to better understand how to live healthier lives and how to prevent illness.[77] Education also encourages greater voting rates and generally higher levels of civic participation,[78] which are important indicators of the strength of a democracy. Given that students can only fully benefit from education in the atmosphere of academic freedom,[79] it once again underscores the public good nature of academic freedom.

Apart from the social sciences, academic freedom is essential to countries' ability to innovate in industry- and technology-related fields. Academic freedom facilitates long-term innovation because it allows scholars to explore topics and research inventions that are not immediately profitable.[80] Aghion et al. show that early-stage innovative research is more likely to occur in academic institutions than in the private sector and industry, because the latter seek more immediate profits and are not willing to support research that does not meet short-term commercial needs and interests.[81] However, innovation—especially paradigm-shifting advances—does not necessarily stem from ideas that seem immediately profitable, thus making academic freedom offered by the universities essential for the continued development of those ideas. For example, consider the case of Dr. James P. Allison who worked for decades as a university-affiliated cancer researcher, but his work was not seen as viable by the pharmaceutical industry. Allison's research that began in the 1990s ultimately earned him a Nobel Prize in 2018.[82] Further, academic freedom is essential for successful, unbiased university–industry partnerships. The industrial sector, interested in the human capital that academia possesses, often offers to share data or otherwise support university-based research. In these cases, it is essential that academics can carry out their studies in the atmosphere of academic freedom so that they do not feel pressured to report biased results.[83]

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76 David P. Baker et al., *Risk Factor or Social Vaccine? The Historical Progression of the Role of Education in HIV and AIDS Infection in Sub-Saharan Africa*, 38 Prospects 467 (2009).

77 Baker, *supra* note 73; William C. Smith et al., *A Meta-Analysis of Education Effects on Chronic Disease: The Causal Dynamics of the Population Education Transition Curve*, 127 Soc. Science & Med. 29 (2015).

78 David E. Campbell, *Civic Engagement and Education: An Empirical Test of the Sorting Model*, 53 Am. J. Pol. Sci. 771 (2009); Muriel Egerton, *Higher Education and Civic Engagement*, 53 Brit. J. Socio. 603 (2002).

79 UNESCO, The UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997), https://unesdoc.unesco.org/ark:/48223/pf0000160495.

80 Philippe Aghion et al., *Academic Freedom, Private-Sector Focus, and the Process of Innovation*, 39 RAND J. Econ. 617 (2008).

81 *Id.*

82 Sharon Begley, *Nobel Prize in Medicine Awarded to Two Cancer Researchers for Immune System Breakthrough*, Stat (Oct. 1, 2018), https://www.statnews.com/2018/10/01/nobel-prize-medicine-cancer-immunotherapy/.

83 *Is the University-Industrial Complex Out of Control?*, 409 Nature 119 (2001).

Recent research shows that when limits are placed on academic freedom, it influences science, technology, engineering, and mathematics (STEM) innovation.[84] In their analyses of several decades of data from seventeen Organization for Economic Cooperation and Development (OECD) countries, Fernandez et al. used multiple measures of academic freedom[85] for individual faculty members to show that decreases in academic freedom lead to a decrease in overall output, both in terms of quantity and quality, of STEM research produced in those countries. Findings were relatively similar across different measures of academic freedom, and the influence of academic freedom was substantial and statistically significant, even after accounting for measures like national financial investment in research and development, size of the national population, country wealth, and size of the higher education sector.[86] Further, examining more than a century of data in 157 countries, Audretsch et al. find that decreases in academic freedom lead to a decreased quantity of patent applications as well as their decreased citations of patent applications.[87] Additionally, countries with more robust academic freedom protections appear to enjoy a higher level of labor force productivity, possibly because academic freedom fosters innovation that then makes the labor force more productive.[88] Countries that innovate more do better economically,[89] thus rendering academic freedom crucial to development and economic prosperity, which makes academic freedom essential to higher education's pursuit of the public good.

Having a strong higher education sector increases overall countries' appeal, especially to young people. Academic freedom is indispensable to having a robust higher education system, so much so that some scholars have asserted that academic freedom is a prerequisite to a world-class university. While there are some examples of well-known, world-class universities in authoritarian regimes where academic freedom is lacking, most of the highly ranked universities are in fact located in democracies with more solid academic freedom protections.[90] Given declining birth rates in most developed countries,[91] attracting and retaining

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84 Fernandez et al., *supra* note 64.

85 *Id.* This study used three of the measures introduced in our discussion of the V-Dem data, including measures of the extent to which scholars free to develop and pursue their own research and teaching agendas without interference, the extent to which scholars free to exchange and communicate research ideas and findings, the extent to which there is academic freedom and freedom of cultural expression related to political issues. Additionally, this study used a V-Dem measure of the extent to which academics publicly criticize government policies.

86 *Id.*

87 Unlike the Fernandez et al., *supra* note 65, study, Audretsch and colleagues used V-Dem's composite index to analyze a single holistic measure of various dimensions of academic freedom. *See* David B. Audretsch et al., *Academic Freedom and Innovation*, 19 PLoS ONE e0304560 (2024).

88 Berggren & Bjørnskov, *supra* note 53.

89 Jan Fagerberg & Martin Srholec, *National Innovation Systems, Capabilities and Economic Development*, 37 Rsch. Pol'y 1417 (2008); Paul M. Romer, *Increasing Returns and Long-Run Growth*, 94 J. Pol. Econ. 1002 (1986).

90 Terence Karran & Lucy Mallinson, *Academic Freedom and World-Class Universities: A Virtuous Circle?*, 32 Higher Educ. Pol'y 397 (2019).

91 Matthias Doepke et al., *The Economics of Fertility: A New Era* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29948, 2023).

talented youth is paramount to countries' prosperity. Brain drain—the tendency of talented youth to leave their place of birth for other more attractive countries—is a concern for many countries and economies.[92] While the evidence regarding academic freedom being a pull factor for international students is inconclusive, Vögtle and Windzio find that countries with higher levels of academic freedom are less likely to lose their students to other countries, thus potentially preventing brain drain.[93]

To recap, in this section, we examine how the concept of academic freedom can be seen as an individual right but also as a public good and a global norm. While most literature conceptualizes academic freedom as an individual right, we provide social scientific evidence as to why it can and should be seen also as a public good and a global norm. Additional research is certainly needed that examines the importance of academic freedom as it relates to teaching for improving instruction and that identifies ways of protecting and optimizing academic freedom (e.g., through tenure or other contractual arrangements that provide job security and economic stability for faculty who take unpopular stances). However, we believe that the evidence introduced in this essay can assist policy makers and legal experts in advocating for protecting academic freedom.

III. WHY IT MATTERS FOR COURTS AND UNIVERSITY LEADERS TO PROACTIVELY SUPPORT ACADEMIC FREEDOM

Courts should consider how academic freedom as an individual right of faculty, in the aggregate, benefits society and the public good. Social science evidence shows that it is not only individual faculty members who stand to gain by protecting academic freedom. Instead, stronger academic freedom positively relates to scientific research output and commercialization of intellectual property. This aligns with a long-standing position that the First Amendment must protect multiple forms of individual expression, including hate speech, to achieve a broader public benefit.[94]

Educational leaders can be so politically cautious and risk averse that they self-censor and implement more restrictive campus policies and practices than they are required to by courts or state legislation.[95] In some instances, they may even ignore a federal court decision to avoid public scrutiny. One study found that school officials were aware of, and chose to ignore, the 2017 *Whitaker v. Kenosha Unified School District* case[96] that protected transgender students from

92 Frédéric Docquier & Hillel Rapoport, *Globalization, Brain Drain, and Development*, 50 J. Econ. Literature 681 (2012).

93 Vögtle & Windzio, *supra* note 42.

94 Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 Tex. L. Rev. 1 (1990).

95 Frank Fernandez & Liliana M. Garces, *The Influence of Repressive Legalism on Admissions*, *in* Rethinking College Admissions: Research-Based Practice and Policy 1 (OiYan A. Poon & Michael N. Bastedo eds., 2023); Liliana M. Garces et al., *Repressive Legalism: How Postsecondary Administrators' Responses to On-Campus Hate Speech Undermine a Focus on Inclusion*, 58 Am. Educ. Rsch. J. 1032 (2021).

96 Whitaker v. Kenosha Unified School District (2017). No. 1 Bd. of Ed., 858 F.3d 1034, 1048 (7th Cir).

discrimination. Instead, they adopted and implemented anti-LGBTQ policies that not only undermined the rights of their students but also placed their institutions at increased risk of litigation.[97]

When college and university leaders face external pressure from state officials, media, or donors to limit academic freedom, they should recognize that the social science evidence indicates that academic freedom is essential to higher education's role in serving the national interest. For universities, supporting STEM research production is essential to the pursuit of external research funding and maintaining or improving university prestige or rankings. More broadly supporting academic freedom for faculty work facilitates STEM research production and patent activity to advance economic competitiveness, technology transfer, commercialization of intellectual property, and to develop practical applications for national security. State and federal politicians are accustomed to acknowledging and responding to the concerns of local voters, but higher education leaders also send students to study abroad globally, sometimes to the contexts lacking academic freedom protections. Even U.S. community colleges have global footprints.[98] Higher education leaders should be informed by empirical studies of the importance of academic freedom in a global context and then do the hard work of helping others understand the importance of academic freedom, including by translating social science evidence to a skeptical public and to the courts.

Academic leaders should vigorously defend individual and institutional academic freedom and acknowledge that it allows higher education to address matters of public concern without unduly interfering with college or university operations. They should revisit the early twentieth-century consensus between university leaders and faculty that recognized academic freedom—and using contractual arrangements, including tenure, to protect it—as essential to faculty work and participation in institutional governance.[99] Presidents, trustees, and general counsels should refer to institutional statements, policies, and collective bargaining agreements that guarantee academic freedom and explain its necessity for good teaching, research, and governance.[100] Individual campus leaders should recognize they are not alone in this effort. Around ninety higher education associations around the country signed onto an open letter by the American Council on Education that challenges "efforts to suppress inquiry, curb discussion, and limit what can be studied" as going against "the very purpose of higher education."[101]

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97 Mollie T. McQuillan et al., *The Disruptive Power of Policy Erasure: How State Legislators and School Boards Fail to Take Up Trans-Affirming Policies While Leaning into Anti-LGBTQ+ Policies*, 38 EDUC. POL'Y 642 (2024).

98 *See, e.g.*, *BMCC Launches Introduction to Diplomacy Academic Course*, BOROUGH OF MANHATTAN CMTY. COLL. (Aug. 12, 2024), https://www.bmcc.cuny.edu/news/bmcc-launches-academic-introduction-to-diplomacy-course/.

99 AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS AND REPORTS (11th ed. 2015); Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 L. & CONTEMP. PROBS. 3 (1990).

100 Neal Hutchens & Vanessa Miller, *Florida's Stope WOKE Act: A Wake-Up Call for Faculty Academic Freedom*, 48 J. COLL. & U.L. 35 (2023).

101 Letter from American Council on Education and Higher Education Associations, *Free and*

Campus leaders should align themselves with the principles of their colleagues in challenging constraints on academic freedom and asserting its importance for higher education "to support our economy and national security."[102]

IV. CONCLUSION

Rigorous research studies indicate that there are multiple benefits to academic freedom. Across countries and over decades, greater academic freedom positively influences research output in STEM fields[103] and patent activity.[104] Since World War II, the U.S. government has recognized scientific and technology advances "as handmaidens of economic interests."[105] Protections for academic freedom have allowed countries to cultivate strong higher education systems.[106] In a global competition for highly skilled workers, academic freedom appears to retain, if not attract, students.[107] When academic freedom is weakened by populist movements in multiple countries around the world,[108] U.S. courts and higher education leaders should view protecting and cultivating academic freedom as a competitive advantage in an increasingly globally competitive environment.

Open Academic Inquiry and Debate on Our Campuses is Essential to Our Democracy and National Well-Being (Mar. 3, 2022), https://www.acenet.edu/Documents/Community-Statement-on-Free-and-Open-Academic-Inquiry-030322.pdf.

102 *Id.*

103 Fernandez et al., *supra* note 64.

104 Audretsch et al., *supra* note 84.

105 Talcott Parsons, *The Professions and Social Structure*, 17 Soc. Forces 457 (1939).

106 Karran & Mallinson, *supra* note 87.

107 Vögtle & Windzio, *supra* note 42.

108 Chykina et al., *supra* note 64.

THE AMERICAN PROPOSITION ON CAMPUS: ACADEMIC FREEDOM AND ACADEMIC RESPONSIBILITY

ELIZABETH KAUFER BUSCH[*] *AND WILLIAM E. THRO*[**]

Abstract

The authors argue that colleges and universities, particularly public institutions, should embrace and teach the American Proposition, to ameliorate the Nation's deep divisions and to return universities to their mission of the search for truth. The American Proposition, the authors explain, is premised on the idea of a human equality and unalienable rights and a republic with constitutional standards to check governmental authority. The authors argue that teaching and creating a community consistent with the American Proposition can help overcome our national divisions, not only those of a partisan nature but also over the worth of our constitutional republic. They argue that partisans of both the political left and right have rejected the constitutional tools intended to moderate the People and the government—Free Speech, Religious Liberty, Due Process, and legal equality regardless of race, sex, or sexual orientation. These partisan tensions are heightened at our colleges and universities, which the authors contend have abandoned the search for truth to promote the prevailing popular opinion of the day and have failed to promulgate the legally required constitutional practices.

Colleges and universities can and should embrace and teach the American Proposition, the authors argue, which means aligning themselves with the very constitutional principles that created the first public colleges and universities in the Nation. This means two things. First, institutions of higher learning must promote academic freedom for the faculty, and for the entire university community. Second, public universities must discharge their academic responsibility—teaching civic literacy and constitutional principles and promoting what John Inazu calls "confident pluralism."

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[*] Laura and Pete Walker Endowed Professor in American Studies and Co-Director of the Center for American Studies, Christopher Newport University.

[**] General Counsel of the University of Kentucky, former Solicitor General of Virginia, and recipient of both the Kaplin Award for Higher Education Law & Policy Scholarship and McGhehey Award for contributions to Education Law. Mr. Thro writes in his personal capacity and his views do not necessarily represent the views of the University of Kentucky.

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INTRODUCTION

Our Nation is deeply divided, not only in a partisan sense, but over the worth of our constitutional republic. The division has entered a new level of viciousness in the last several years—the assassination attempts on President Donald Trump, the pro-Hamas/pro-Palestinian protests and encampments on college campuses, the January 6 riot, the George Floyd protests, the attempt to force vaccination on an unwilling public, the return of the abortion policy to the States, the ongoing crisis on our southern border, and the descent of our cities into chaos—have only intensified those divisions. The resulting frustrations have led many—on both the left and the right—to reject and abdicate the constitutional tools that are meant to alleviate these tensions—Free Speech, Religious Liberty, Due Process, and legal equality regardless of race, sex, or sexual orientation. Without these protective mechanisms, our (federal, state, local, and community) leaders lack the tools to generate consensus through compromise as demanded by our constitutional system. Instead, they either appease the dominant voice of the moment or seek to score points on social media or cable news.

These tensions are playing out at the Nation's colleges and universities.[1] After the murder of George Floyd, universities rushed to issue statements of solidarity and to embrace programs[2] promoting an ideology[3] that Yascha Mounk calls the "identity

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1 Official university actions taken on the left and on the right speak only to their respective constituents and have often sidestepped the art of consensus-building. Their adopted measures have often failed to appreciate the extent and limits of the First Amendment on public college campuses and display a lack of understanding of basic constitutional principles and liberties that mandate Academic Freedom.

More fundamentally, students who often lack basic constitutional knowledge and civic skills are becoming incapable of granting meaningful consent to the U.S. Constitution. All members of the campus community must live together peacefully, even with those with whom they ideologically disagree. The purpose of a constitutional republic, and a university campus as a microcosm of that republic, is to find a way to do this while enabling the flourishing of the individual citizen.

2 Responding to the George Floyd protests, universities created (often executive level) Diversity, Equity, and Inclusion (DEI) Offices and Officers, added or mandated courses in social justice advocacy, and provided additional accommodations for marginalized groups on campus, all to appease their external and internal constituents' desire for swift social justice. *See* Alexa Wesley Chamberlain et al., *Moving from Words to Action: The Influence of Racial Justice Statements on Campus Equity Efforts*, NASPA Report (2021), https://naspa.org/report/moving-from-words-to-action-the-influence-of-racial-justice-statements-on-campus-equity-efforts. Universities added mandatory DEI training for faculty, students, and staff, mandated faculty applicants to include "diversity statements," which have been acknowledged as ideological "litmus tests," and required students to take newly developed social justice courses. See Komi Frey, *We Know Diversity Statements and Political Litmus Tests*, Chron. Higher Educ. (Jan. 4, 2024), https://www.chronicle.com/article/we-know-diversity-statements-are-political-litmus-tests.

3 The ideological framework typically employed by these social justice programs—"anti-racism" and "equitable policy"—employs advocacy tactics rather than educational ones like civil discourse or critical thought. They do not merely teach, but rather promote critical race theory and "white privilege" doctrines popularized by Ibram X. Kendi, Robin DiAngelo, the 1619 Project, and the Black Lives Matter movement. A class whose purpose is to create advocates, rather than critically thinking adults, stifles the intellectual maturation of students and explicitly undermines the truth-

synthesis."[4] Yet, after the October 7 massacre in Israel, many university presidents remained silent or muted[5] as their campuses engaged in increasingly threatening activity, including calling for genocide of the Jewish population, bombarding Jewish students in university buildings,[6] or turning campuses into pro-Palestinian encampments.[7] Because state universities ultimately belong to the People, state legislators, as the People's "Agents,"[8] intervened to address both the embrace of the "identity synthesis"[9] and the toleration of unlawful activities after October 7.[10]

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seeking mission of the university. Open inquiry by faculty and students within a culture that respects and protects free speech and expression is prerequisite for the university's search for truth.

4 YASCHA MOUNK, THE IDENTITY TRAP (2023).

5 Adrienne Lu, *The Apolitical University*," CHRON. HIGHER EDUC. (Dec. 2, 2022), https://www.chronicle.com/article/the-apolitical-university); Editorial Board, "*We Expect Too Much of Our University Presidents*," CAVALIER DAILY, (Jan. 18, 2024), https://www.cavalierdaily.com/article/2024/01/editorial-we-expect-too-much-of-our-university-presidents); Laura Schwartz, *Against University Statements*, WASHINGTON MONTHLY (Oct. 27, 2023), https://washingtonmonthly.com/2023/10/27/against-university-statements/); Lindsay McKenzie, *Words Matter for College Presidents, but So Will Actions*, INSIDE HIGHER EDUC. (June 7, 2020), https://www.insidehighered.com/news/2020/06/08/searching-meaningful-response-college-leaders-killing-george-floyd#:~:text=Dozens%20of%20college%20presidents%20published,against%20racism%20and%20police%20brutality.

6 Luke Tress, *Jewish Students Barricade in Cooper Union Library as Protesters Chant "Free Palestine," On Day of Protest Across NYC Campuses*, N.Y. JEWISH TIMES (Oct 26, 2023), https://www.jta.org/2023/10/26/ny/jewish-students-barricade-in-cooper-union-library-as-protesters-chant-free-palestine-on-day-of-protest-across-nyc-campuses.

7 Joseph Bouchard, *I Visited a Pro-Palestinian Encampment; They're Not Interested In Peace*, ISRAEL HAYMON (May 27, 2024), https://www.israelhayom.com/opinions/i-visited-a-pro-palestinian-encampment-theyre-not-interested-in-peace/.

8 THE FEDERALIST NO. 78 (Alexander Hamilton).

9 First, came the state bans of "divisive concepts," the goal of which was to prevent indoctrination in critical race theory and other social justice ideologies. *See CRT Forward: Tracking the Attack on Critical Race Theory*," CRT FORWARD (Dec. 20, 2023), https://crtforward.law.ucla.edu/, The intent of such bans was to teach "our children the value of freedom of thought and diversity of ideas" Academic Freedom Alliance, Academic Freedom Alliance Statement on "Divisive Concepts" Policies, (January 6, 2023) (available at, https://academicfreedom.org/wp-content/uploads/2023/01/AFA-Statement-on-Divisive-Concepts-Policies.pdf and enable them "to think for themselves."; Academic Freedom Alliance, *Academic Freedom Alliance Statement on "Divisive Concepts" Policies* (Jan. 6, 2023), https://academicfreedom.org/wp-content/uploads/2023/01/AFA-Statement-on-Divisive-Concepts-Policies.pdf. *See also* Commonwealth of Virginia Office of the Governor, Executive Order No. 1, Jan. 15, 2022, Ending the Use of Inherently Divisive Concepts, Including Critical Race Theory, and Restoring Excellence in K-12 Public Education in the Commonwealth, https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-1-Ending-the-Use-of-Inherently-Divisive-Concepts.pdf.

While laudable goals, the laws' means (i.e., the banning of ideas) undermine the constitutional protections of free speech at public universities and potentially foster a campus culture of fear. Next state legislators, with the same goal of ending indoctrination, notably in Florida, Alabama, and others, began limiting, defunding, or eliminating university DEI offices. *See* Chronicle Staff, *DEI Legislation Tracker*, CHRON. HIGHER EDUC. (2023), https://www.chronicle.com/article/here-are-the-states-where-lawmakers-are-seeking-to-ban-colleges-dei-efforts.

10 Responses (or the lack thereof) led to federal government intervention in the form of congressional hearings, and the resignations of three Ivy League presidents; *see* Steve LeBlank & Collin Binkley, *Harvard President Claudine Gay Resigns Amid Plagiarism Claims, Backlash from Antisemitism Testimony*, ASSOC. PRESS (Jan. 2, 2024), https://apnews.com/article/harvard-president-claudine-gay-resigns-841575b89bcdc062cdf979e647a2539e. The widespread lack of clear university leadership protecting and respecting all students' basic rights impelled the federal Government to intervene. The House

Yet, the responses of university leaders and the resulting legislative backlash are indicative of a larger problem—the failure of many universities to cultivate a campus culture conducive to the pursuit of knowledge and the preservation of our Constitutional Republic.[11] Our institutions of higher learning have abandoned the search for truth to promote the prevailing popular opinion of the day and have failed to promulgate the legally required constitutional practices.[12] University leaders often have not modeled civic literacy or constitutional knowledge, and consequently their curricula lack requirements in American history and U.S. Government. Not only are our Nation's colleges and universities not inculcating basic constitutional and civic knowledge, they also often fail to create a campus community that respects or reflects the requirements of the U.S. Constitution. In other words, the Nation's colleges and universities increasingly fail to protect academic freedom of individuals by not equipping students, faculty, and staff with the skills to practice what John Inazu calls "confident pluralism."[13]

These campus battles are really part of a larger war—the war for an idea that we call the American Proposition.[14] As we have developed the concept, the American

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of Representatives proposed a resolution condemning antisemitism on college campuses, H.R. Res. 927 — 118th *Congress: Condemning antisemitism on university campuses and the testimony of University Presidents in the House Committee ….*" an act that the Foundation for Individual Rights and Free Expression (FIRE) warns smells of speech codes and censorship. *See* Greg Gonzales, *FIRE urges Reps to Vote NO on House Resolution Targeting University Presidents*, FOUND. INDIVIDUAL RTS. & FREE EXPRESSION (Dec. 13, 2023), https://www.thefire.org/news/fire-urges-reps-vote-no-house-resolution-targeting-university-presidents. The nonpartisan Academic Freedom Alliance warns that "American universities are being tested. It is essential that they pass the test by rededicating themselves to their core scholarly missions and acting consistently and in good faith on the principles that preserve free inquiry and open debate." *See* Academic Freedom Alliance, *Statement on Campus Protests Regarding Events in Israel and Gaza* (Nov. 14, 2023), https://academicfreedom.org/wp-content/uploads/2023/11/Academic-Freedom-Alliance-Statement-on-Campus-Protests-regarding-Events-in-Israel-and-Gaza.pdf. In other words, colleges and universities must understand and protect academic freedom.

11 Johns Hopkins University President Ronald Daniels has suggested that universities have a broad obligation to a democratic society. Specifically, institutions must (1) promoted access, mobility, and fairness; (2) educate students to participate in democracy; (3) create knowledge to check power; and (4) encourage dialogue among people with different perspectives, values, backgrounds, and experiences. RONALD J. DANIELS, WHAT UNIVERSITIES OWE DEMOCRACIES (2021). The American Proposition's obligation to promote Academic Freedom and Academic Responsibility relate to the second and fourth objectives. The first and third objectives are consistent with the broader American Proposition.

12 Instead, some faculty, administrators, and students already assume they know answers to life's most difficult questions and lack tolerance for those who fail to recognize the "correct" momentary viewpoint.

13 JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016).

14 *See* Elizabeth Kaufer Busch & William E. Thro, *Aligning Title IX with the American Proposition: The Implications of the Supreme Court's Limitations on Executive Power*, ___ EDUC. L. REP. ___ (forthcoming 2024); William E. Thro, *Education Finance and the American Proposition*, 48 J. EDUC. FIN. 335 (2023); Elizabeth Kaufer Busch & William E. Thro, *Restoring the Constitutionalist Means: Education Reflections on Major Questions Doctrine*, 407 EDUC.L. REP. 387, 393, 407–08 (2023); Elizabeth Kaufer Busch & William E. Thro, *Restoring Title IX's Constitutional Integrity*, 33 MARQ. SPORTS L. REV. 507 (2022) Elizabeth Kaufer Busch & William E. Thro, *Reclaiming the Constitutionalist Creed on Campus: Transforming Academe's Anti-Constitutionalist Culture*, 398 EDUC.L. REP. 565 (2022).

Originally, we used the term "Constitutionalist" to describe the concept that we now call the American Proposition. As we have developed the concept, we have realized that the term Constitutionalist is inadequate to explain the concept and often leads to confusion. Thus, we are using the term

Proposition is simply stated:

> Recognizing all are created equal and endowed by their Creator with unalienable rights, an imperfect We the People can consent to a government that secures our equality and rights, but also controls the flawed humans who govern us.

The fight over the American Proposition is the struggle to keep the Constitutional Republic and for the soul of the Nation. It is conflict between the belief that all are created equal and endowed by the Creator with unalienable rights and the belief that people are defined by their race, sex, and sexual orientation. It is the contest between government being established—by consent—to secure equality and unalienable rights and government imposing a utopian ideological or theological vision. It is the fight between elected representatives compromising to reach a consensus and a bevy of experts imposing policies that would never be adopted through the political process.

This is not a battle over policy differences but a struggle between two different visions of the nature of humanity, the purpose of government, and capabilities of human leaders. Those who agree with the American Proposition ("The Proponents") include both conservatives and progressives.[15] Those who reject the American Proposition ("The Rejectionists") include both the far left and the far right. There are Proponents and Rejectionists on both sides of any debate about tax rates, free trade, social welfare policy, the role of the United States in international conflict, and the need for limits on abortion.

The way to ameliorate our deep divisions is for our universities, particularly public institutions, to embrace and teach the American Proposition.[16] First, all institutions of higher learning, must promote Academic Freedom for the faculty, and for the entire university community. Second, public universities must discharge their Academic Responsibility—teaching civic literacy, educating constitutional knowledge, and promoting "confident pluralism."[17] Put another way, public universities must

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"American Proposition."

15 Although we have used the term "Constitutionalists" in some of our previous works, the term "Proponent" is appropriate to describe those who agree to the establishment of a government that secures the equality and unalienable rights endowed by the Creator while also limiting the flawed humans who govern us.

16 The consequences of failing reassert the American Proposition are dire, as indicated by the January 6, 2020, Capitol riot and the two assassination attempts against Former President Donald J. Trump and death of an innocent bystander during his 2024 campaign for President. Yuval Levin eloquently observes that "beyond the bounds of constitutionalism, there is a realm of violence and pain." Yuval Levin, *The Assassination Attempt and America's Choice*, Free Press (June 18, 2024), https://www.aei.org/op-eds/the-assassination-attempt-and-americas-choice/.Division, violence, and bitterness represent the "only other option" to true constitutionalism, or what we call "the American Proposition." *Id*. One should not be surprised to see that decades of university neglect of constitutional knowledge and action has led to the increasingly dangerous violence on campuses across the country.

17 In addition to teaching civic and constitutional knowledge in the classroom, all persons on campus should model the behavior conducive to a successful constitutional republic, that is, they must learn how to deal with people who have fundamentally different views from one another. The

align themselves with the very constitutional principles that created the first public colleges and universities in the Nation. Their goal was to create educated citizens prepared to be good stewards of the blessings of liberty protected in a constitutional republic.[18]

This article argues that universities must again align themselves with the American Proposition—not only is this a requirement and duty of public colleges and universities, but it is also the first necessary step in restoring the health of our Nation. There are three parts to this argument. Part I presents a more detailed description of the American Proposition. Part II describes why American Proposition mandates Academic Freedom—not only for faculty, but for the *entire* university community and, to some extent, for the institution. Part III explores why the American Proposition imposes Academic Responsibility—an obligation of public institutions to teach civic literacy, educate constitutional knowledge, and to promote Confident Pluralism.

I. DEFINING THE AMERICAN PROPOSITION

As President Biden has observed, "America is an idea—an idea stronger than any army, bigger than any ocean, more powerful than any dictator or tyrant. It is the most powerful idea in the history of the world. …"[19] That idea is the American Proposition—Recognizing all are created equal and endowed by their Creator with unalienable rights, an imperfect We the People can consent to a government that secures our equality and rights, but also controls the flawed humans who govern us.'[20]

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public university must create a culture that teaches campus citizens how to disagree in a constructive and meaningful way, that is, a campus of Academic Freedom and Academic Responsibility. By promoting Confident Pluralism and ensuring students understand the strengths, requirements, and shortcomings of American constitutionalism, comprise the campus community, colleges and universities can once again model Academic Responsibility.

18 Thomas Jefferson, Bill for Establishing a System of Public Education (1817); James Madison, Memorial and Remonstrance Against Religious Assessments (1785); Benjamin Franklin, Proposals Relating to the Education of Youth in Pennsylvania (1747); Abraham Lincoln, The Perpetuation of Our Political Institutions (Lyceum Address) (1838).

19 President Joseph Biden, Statement to the American People (July 24, 2024). Similarly, Thatcher declared, "No other nation has been created so swiftly and successfully. No other nation has been built upon an idea—the idea of liberty. No other nation has so successfully combined people of different races and nations within a single culture." Prime Minister Margaret Thatcher, Speech at the Hoover Institution Lunch, Washington, DC (Mar. 8, 1991). In King's view, this is the "promissory note to which every American was to fall heir." *See* Martin Luther King Jr., I Have a Dream (1963). Americans "were determined to create a new identity" based not on shared history, but on an idea. Thatcher, *supra*. Thus, in Lincoln's words, we created "a nation conceived in liberty and dedicated to the proposition that all . . . are created equal." Abraham Lincoln, Gettysburg Address (1863).

20 The American Proposition is the social and political construct that unites "We the People"—regardless of our faith, race, sex, sexual orientation, disability, class, education, or professional status. It reflects who we were, what we are today, and our dreams of what we can be. It recognizes that "We the People" have profound differences on moral, political, and religious questions, but it seeks "'confident pluralism that conduces to civil peace and advances democratic consensus-building." Christian Legal Soc. v. Martinez, 561 U.S. 661, 733–34 (2010) (Alito, J., joined by Roberts, C.J, Scalia, & Thomas, JJ., dissenting).

The American Proposition, which was foreshadowed on the *Mayflower*,[21] proclaimed at Philadelphia,[22] confirmed at Gettysburg,[23] and reiterated from the Birmingham Jail,[24] defines our national identify.[25]

Acceptance of the American Proposition does not require a particular religious faith or adherence to a particular political party.[26] Indeed, it is neutral on numerous "difficult questions of American social and economic policy" and leaves those issues "for the people and their elected representatives to resolve through the democratic process in the States or Congress."[27] Rather, it simply requires the acceptance of three fundamental premises:

1. "All are created equal and endowed by their creator with certain unalienable rights."[28]

2. Because humans are not angels, it is necessary to establish a government by the consent of the governed. [29]

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21 Mayflower Compact (1620).

22 U.S. Constitution (1787); The Declaration of Independence (U.S. 1776).

23 Lincoln, *supra* note 19.

24 Martin Luther King Jr., Letter from Birmingham Jail (Apr. 16, 1963).

25 The United States is defined not by race, blood, soil, religion, language, or culture, but by "the belief in the principles of equality and freedom this country stands for." Antonin Scalia, *What Makes an American, in* Scalia Speaks: Reflections on Law, Faith, and Life Well Lived 15, 17 (Christopher J. Scalia & Edward Whelan eds., 2017).

26 Two documents directly define the American Proposition—the Declaration of Independence and the U.S. Constitution. The Declaration articulates the underlying philosophy, moral justification, and end goals of America's constitutional republic, while the Constitution provides the roadmap, or necessary means, of attaining the appropriate goals.

27 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring)

28 The Declaration of Independence, *supra* note 22. The first feature of the American Proposition is its vision of human beings, made in the Image of God (or Nature), with inherent dignity. The Declaration recognizes the equal possession of unalienable rights by all humans, asserts their permanent foundations in the "Laws of Nature and Nature's God," and then sets the protection of these rights as the only legitimate end of government. The Declaration does not create rights; rather the rights have a permanent foundation in the "Laws of Nature and Nature's God," the discovery of which precedes the both the Declaration and the U.S. Constitution. The operation of the U.S. Constitution itself is inseparable from these absolute principles of human nature and the equal possession of unalienable rights, which create the need for a government.

29 The Federalist No. 51 (James Madison). The fact that government is needed at all acknowledges also that humans are imperfect but capable of doing good, a recognition that certain things must be beyond the reach of political majorities, and an emphasis on process of making policy rather than the policy itself. It seeks to find a way for all persons of varying races, ethnicities, countries of origin, sexes, or genders to build consensus and live together. In acknowledging the absolute authority of Nature and/or God, the Declaration's principles recognize—and celebrates—our different faiths, perspectives, and life choices. The assertion of human equality and the allusion to the treatment of tyranny requires that we confront those individual differences with tolerance, humility, and patience. The American Proposition requires us to tolerate those who choose to reject it altogether, but the American Proposition's survival demands each generation be taught to embrace it. Centuries after the founding generation consented to its principles, each American can grant contemporary consent to the American Proposition only if educated in its basic principles.

3. Because our leaders are not angels, it is necessary to devise mechanisms to control the government. [30]

To fully understand the American Proposition, it is necessary to explore each premise in some detail.[31]

A. "All Are Created Equal and Endowed by Their Creator with Certain Unalienable Rights"

In declaring their independence from the British Crown, the American colonists proclaimed, "all are created equal and endowed by their creator with certain unalienable rights." Although the Declaration of Independence called this a "self-evident truth,"[32] it reflects both the influence of Enlightenment thinkers like Hobbes, Locke, and Montesquieu and "religious sentiments" of rights "derived to them from the God of Nature."[33] Both lead to the same conclusion—one's existence as a human being means equality with other human beings and the existence of certain natural rights.[34] The American Proposition also recognizes that equality is intimately tied to individual liberty.

1. Individual Equality

Equality acknowledges a basic human dignity. All humans are created in the image of God[35] or by Nature, all are full participants in American life, [36] and cannot be treated as social outcasts.[37] As the "Constitution neither knows nor tolerates classes among citizens. … those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake."[38] "We are just

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30 *Id*. Our Constitution embraces democracy, but neither pure nor direct democracy. It is skeptical of political majorities, embodies the rule of law, but knows that flawed humans will pass flawed, ineffective, and unjust laws that contradict divine law. It allows different States to have different solutions to problems that confront society, but it insists on national uniformity on certain fundamental issues. It emphasizes equal justice under law but believes it is better for ten guilty persons to go free than for one innocent one to be imprisoned. 2 WILLIAM BLACKSTONE, COMMENTARIES *358 The American Proposition requires a judiciary to enforce the limits on government, but it expects judges to apply the words adopted by Us the People and enshrined in the Constitution, not their own personal policy preferences or public opinion.

31 The first premise—equality and liberty—requires the State to respect Individual Equality and Individual Freedom and Limits the Ends of the Government. The second premise—human (imperfect) nature necessitates the establishment of a government to secure our unalienable rights—requires Consent of the Governed and Tacit Consent through education. The third premise—the need to control the government—places limits on both the means and ends of Government and on the actors within government.

32 THE DECLARATION OF INDEPENDENCE, *supra* note 22.

33 John Adams, Letter to Hezekiah Niles (February 13, 1818), https://founders.archives.gov/documents/Adams/99-02-02-6854.

34 JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 4 (1690).

35 Obergefell v. Hodges, 576 U.S. 644, 735 (2015) (Thomas, J., joined by Scalia, J., dissenting),

36 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017).

37 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rts. Comm'n, 138 S. Ct. 1719, 1727 (2018).

38 Romer v. Evans, 517 U.S. 620, 623 (1996).

one race here. It is American."[39] The same sentiment applies to other immutable characteristics—there is only "We the People."

This is equality of the individual, not equality of a particular group. Everyone equally possesses the unalienable rights to life, liberty, and the pursuit of happiness. It is an equality of opportunity (to pursue), not an equality of outcomes. No individual is excluded because of their race, sex, or sexual orientation, but not every race, sex, or sexual orientation will be equally represented in a particular occupation, educational institution, or other segment of society.

2. Individual Freedom

Yet, equality is not fully realized unless there is respect for the alienable rights of individuals to think, believe, and act as they choose. This requires "a willingness to accept genuine difference, including profound moral disagreement."[40] The First Amendment freedoms—no establishment of religion, free exercise of religion, freedom of speech, freedom of press, assembly, and petition—applies universally.[41] As Justice Brandeis observed, the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; … that the greatest menace to freedom is an inert people; that public discussion is a political duty."[42]

B. Because Humans Are Not Angels, It Is Necessary to Establish a Government by the Consent of the Governed

Although Americans of the founding era were familiar with the political philosophy of Locke, they were more familiar with the Christian theology of John Calvin and saw little conflict between the two.[43] Regardless of their faith or lack of faith, they knew Christians believe "all have sinned and fall short of the glory of God"[44] and, since the Fall,[45] human nature was corrupt or totally depraved.[46] Indeed, as Chesterton quipped, the sinful nature of humanity is "the only part of Christian theology which can really be proved."[47]

Of course, the American Proposition does not require or rely on religious faith, but it does assume that humans, either individually or collectively, are at the very least imperfect and therefore can never be completely trusted.[48] Unless restrained in

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39 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J. concurring).

40 Inazu, *supra* note 13, at 87.

41 *Id*. at 16.

42 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring).

43 Mark David Hall, Roger Sherman and the Creation of the American Republic 21, 24 (2013).

44 *Romans* 3:23. The message is reinforced throughout scripture. *See* 1 *Kings* 8:46; *Psalms* 14:3; 1 *John* 1:8.

45 *Genesis* 3:1–7.

46 R. C. Sproul, What Is Reformed Theology: Understanding the Basics 1595 (1997) (Kindle Edition).

47 G. K. Chesterton, Orthodoxy 5 (1908).

48 Marci Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention, in*

some way, the strongest individual or groups will abuse the weakest. The majority will dominate the minority. Our individual rights can never be secure.[49] To constrain human nature and, thus, "secure these rights, governments are instituted."[50] The Creator (God or Nature), not the government, endows us with unalienable rights, but government exists to secure those rights.

1. Governments Must Be Formed by Consent

Government is necessary to secure our individual rights, but government can be formed in many ways. For example, a divine right monarch could impose a government and, thus, secure the rights of the citizens. Yet, imposition of government by a divine right monarch suggests that monarch is somehow superior to ordinary citizens. This notion of superiority for the monarch contradicts the notion the principles that everyone is created equal. [51]

If everyone is created equal, then governments cannot be imposed by force but must derive "their just powers from the consent of the governed."[52] Our Constitution establishes a government and then limits that government,[53] but it is legitimate only because it was by the democratic process.[54] Specifically, "We the People" selected representatives, and those representatives met in special state conventions to ratify the Constitution. [55]

The American concept of consent of the governed predates Locke, the Declaration of Independence, and the Constitution. Confronting the constitutional equivalent of a state of nature,[56] the *Mayflower* passengers applied their Reformed Protestant theology to the situation at hand[57] and formed a "civil body politick."[58] By establishing government with the consent of the governed and by defining the community to include "Separatists" and "Strangers," as well as masters and servants, the signing of the *Mayflower Compact* "was not the actual American founding, but a crucial pre-founding, informing the beginning of the American Republic."[59]

CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293, 295 (Michael W. McConnell et al. eds., 2001).

49 LOCKE, *supra* note 34, at § 123.

50 THE DECLARATION OF INDEPENDENCE, *supra* note 22, ¶ 2.

51 LOCKE, *supra* note 34, at § 95.

52 THE DECLARATION OF INDEPENDENCE, *supra* note 22, ¶ 2.

53 FEDERALIST NO. 51 (James Madison).

54 Nomination of Judge Antonin Scalia to Be Associate Justice of the Supreme Court of the United States, 99th Cong. 89 (1986) (statement of Antonin Scalia).

55 NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 119 (2019).

56 NATHANIEL PHILBRICK, MAYFLOWER: A STORY OF COURAGE, COMMUNITY, AND WAR 41 (2006).

57 STEPHEN TOMKINS, THE JOURNEY TO THE MAYFLOWER: GOD'S OUTLAWS AND THE INVENTION OF FREEDOM 332 (2020).

58 JOHN G. TURNER, THEY KNEW THEY WERE PILGRIMS: PLYMOUTH COLONY AND THE CONTEST FOR AMERICAN LIBERTY 60 (2020).

59 PETER WOOD, 1620: A CRITICAL RESPONSE TO THE 1619 PROJECT 32 (2020).

2. Contemporary Consent

However, consent by the Founding Generation in 1788 is different from consent by contemporary Americans. Consent—at least tacitly—must be reestablished with each generation.[60] As Reagan reminded us, we must pass on the American Proposition to our children. [61]

The Framing Generation understood that if the Republic was to survive, the government must ensure the population was educated to fulfill their civic responsibilities.[62] The Northwest Ordinance, which was enacted before the Constitution was ratified, "forever encouraged" public education as a means of ensuring "good government and the happiness of mankind."[63] The Massachusetts Constitution, written by John Adams, established public schools because it recognizes that "wisdom and knowledge . . . diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties"[64]

The same principles apply today. "America's public schools are the nurseries of democracy" "and must prepare our youth for their future roles in our Republic."[65] "Our representative democracy "only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will."[66] To fulfill that purpose, our public education system must teach the American Proposition.

Teaching the American Proposition begins with providing the full story of America's founding and evolution—both its triumphs and tragedies. It includes the problematic acts of an imperfect People struggling to form a more perfect Union.[67] While the *Mayflower Compact* established government by consent in an era when Europe's monarchs ruled by divine right, slavery already existed in North America.[68] Our Nation took eighty-nine years to move from the Fourth of July to Juneteenth, but Emancipation happened because Union soldiers—of all races—were willing to give "the last full measure of devotion."[69] American soldiers defeated the Nazis and Japan, but our leaders also confined Americans of Japanese descent into

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60 Thomas Jefferson, Letter to "Henry Tompkinson" (Samuel Kercheval) (July 12, 1816), https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002.

61 Ronald Reagan, A Time for Choosing (1964).

62 Derek W. Black, *America's Founders Recognizes the Need for Public Education. Democracy Requires Maintaining That Commitment*, Time (Sept. 22, 2020).

63 Northwest Ordinance art. 4.

64 Mass. Const. ch. V, § 2.

65 Mahanoy Area Sch. Dist. v. B. L. by & through Levy, 141 S. Ct. 2038, 2046 (2021).

66 *Id*.

67 U.S. Const., *supra* note 22, preamble.

68 Wood, *supra* note 59, at 32 (2020).

69 Lincoln, *supra* note 19.

camps.[70] As King reminded us, many Americans are "still languishing in the corners of American society" and find themselves to "be an exile in [their] 'own land.'"[71] Students should be taught our institutions are both imperfect and inspiring—that they fail and they can improve themselves. Students should learn American society has many virtues but far too many vices. Yet, a curriculum cannot lament our Nation's darkest times and disregard our Nation's glory. There should be full truth in history.

C. Because Our Leaders Are Not Angels, It Is Necessary to Devise Mechanisms to Control the Government

Assumptions about the nature of humanity or those who rule are relevant to constitutional design. A polity must decide if human nature is inherently good and virtuous or inherently corrupt and sinful.[72] Put another way, it must decide if it can unconditionally trust human leaders to always do the right thing.

If a society assumes humanity is inherently good and virtuous, then it will elevate the will of the majority while diminishing "the individual's right to freedom from the majority."[73] More broadly, if the government can mold individuals to reach their inherent goodness and virtue, then it is possible to achieve a utopian society.[74] All that is necessary is that government pursue the right policy or philosophy. This belief in the ability of government to perfect humanity is the basis for the French Revolution, Marxism, and Nazism.

Conversely, if a polity assumes humanity is inherently sinful and corrupt, then it will constrain, control, and check the majority and, thus, develop "the conceptual ground for political freedom."[75] If the winners of the last election or the followers of the prevailing faith are constrained from silencing their opponents or punishing those of other faiths, then the political losers and minority religions are protected: Their liberties and equality will endure. When a polity assumes that humanity is innately sinful and corrupt, it follows that because human leaders, like the people they rule, cannot be trusted, the state can never perfect humanity.[76]

Given the influence of Calvinism in late eighteenth-century America,[77] it is not surprising that the Constitution reflects Calvinist ideas.[78] The Framers knew "Man's

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70 Korematsu v. United States, 323 U.S. 214 (1944).

71 King, *supra* note 19.

72 George Weigel, The Cube and the Cathedral: Europe, America, and Politics Without God 78–86 (2005).

73 Steven Breyer, Active Liberty 5 (2005). *See also* William E. Thro, *A Pelagian Vision for Our Augustinian Constitution: A Review of Justice Breyer's Active Liberty*, 32 J. Coll. & U.L. 491 (2006).

74 James R. Rogers, *Lessons for America from Europe's Christian Democracy*, Law & Liberty (July 28, 2020), https://lawliberty.org/lessons-for-america-from-europes-christian-democracy.

75 *Id*.

76 Abraham Kuyper, *Calvinism: Source and Stronghold of Our Constitutional Liberties*, *in* Abraham Kuyper: A Centennial Reader 279, 314 (James D. Bratt ed., 1998).

77 Hall, *supra* note 43, at 12–40.

78 James H. Smylie, *Madison and Witherspoon: Theological Roots of American Political Thought*, 73 Am.

will is corrupt by nature but also capable of doing good. In this paradox are mingled dread, hope, and triumph."[79] Consequently, the American Proposition acknowledges "there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust"[80] but expects "there are other qualities in human nature, which justify a certain portion of esteem and confidence."[81] The American Proposition includes both "a principle of distrust of every person who holds power" and "a hope that a well-designed system could deter the inevitable temptations to abuse power."[82]

The American Proposition makes the Constitution the ultimate authority. [83] In America, it is the Constitution, not a King or Parliament or a Party or a Faith, that is sovereign.[84] While a republic "derives all its powers directly or indirectly from the great body of the people,"[85] the People[86] established the Constitution as superior to ordinary legislation or executive actions.[87] Although ever shifting political winds result in temporary majorities, the Constitution is "untouchable, fundamental law, to be interpreted not by Congress, still less by the President, but by Justices of the Supreme Court."[88] By making the Constitution sovereign, the American Proposition both established and limited the government.[89]

First, the Constitution "withdraws certain subjects from the vicissitudes of political controversy" and "places them beyond the reach of majorities and officials."[90] Indeed, there are "certain specified exceptions to the legislative [and executive] authority" within the constitutional text.[91] Similarly, because the People "split the atom of sovereignty" and created "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it,"[92] both the National Government and the States are prohibited from pursuing certain ends.[93] Because "the federal

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Presbyterians 155 (1995).

79 Marci Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention,* in Christian Perspectives on Legal Thought 293, 294 (Michael W. McConnell et al. eds., 2001).

80 The Federalist No. 55 (James Madison).

81 *Id*.

82 Marci A. Hamilton, *The Framers, Faith, and Tyranny,* 26 Roger Williams U. L. Rev. 495, 500 (2021).

83 Gordon S. Wood, Constitutionalism in the American Revolution 46 (2021).

84 David Starkey, Magna Carta: The Medieval Roots of Modern Politics 1308 (2015) (Kindle Edition) (emphasis original).

85 The Federalist No. 39 (James Madison).

86 Wood, *supra* note 83, at 18–26, 92–95.

87 *Id*. at 48.

88 Starkey, *supra* note 84, at 1312.

89 Wood, *supra* note 83, at 47–52, 92–95.

90 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

91 The Federalist No. 78 (Alexander Hamilton).

92 U.S. Term Limits v. Thornton, 514 U.S.779, 838 (1995) (Kennedy, J., concurring).

93 Although the People, in the exercise of their sovereignty, granted vast power to the

balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom," the Supreme Court has intervened to support the sovereign prerogatives of both the States and the National Government.[94]

In addition to defining the ends of government, the American Proposition mandates the *means* of pursuing those legitimate ends. The Constitution prevents concentrations of power.[95] Indeed, the idea that one person or one governmental institution would exercise legislative, executive, and judicial power is the very definition of tyranny.[96] Ensuring the government utilizes the proper means is "vital to the integrity and maintenance of the system of government ordained by the Constitution."[97]

Yet, mere separation of powers would not provide adequate protections against the abuses of government.[98] "[T]he next and most difficult task is to provide some practical security for each, against the invasion of the others."[99] The people themselves are too inconstant to be trusted to keep "the several departments within their constitutional limits"[100] because humans will naturally seek to aggrandize their own power, no matter what kind or how much power they have been delegated. Instead, each branch of government must be provided adequate weapons of defense to prevent encroachment by the members of the other branches. Typically called "checks and balances," each branch will be allocated the necessary tools by which to exercise their own authority and to control the misdeeds of others, that is, each will be provided with a measure of the other branches' authority to prevent any one branch from usurping the others' power.

The American Proposition must be embraced on public university campuses for these institutions to live up to their missions of pursuing Truth and fitting its students for mature citizenship. Reinstituting the American Proposition on campus requires several prerequisites. First, personal, constitutional, and institutional forms of academic freedom must be institutionalized, taught, and promulgated. Second, Academic Responsibility must be respected to appreciate the extent and limits of academic freedom. Academic Responsibility is only possible if the public university curriculum respects and perpetuates the American Proposition. This can be achieved by requiring students (and ideally faculty and staff) to learn basic civic knowledge and constitutional principles. Finally, public universities must embrace their educational mission in the search for truth by modeling civil discourse, civic

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National Government, the National Government remains one of enumerated, hence limited, powers. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819). Indeed, "that those limits may not be mistaken, or forgotten, the constitution is written." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

94 United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by O'Connor, J., concurring).

95 New York v. United States, 505 U.S. 144, 187 (1992).

96 The Federalist No. 47 (James Madison).

97 Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).

98 1 *Maccabees* 8:1, 14–15 (discussing the advantages of separation of powers in the Roman Republic in second century B.C.).

99 The Federalist No. 48 (James Madison).

100 The Federalist No. 49 (James Madison).

engagement, and Confident Pluralism in all levels of the university. To do this properly requires clear policies of institutional neutrality and robust free speech and expression. These policies require all on campus respect the dignity of all other members and guests of the campus community and learn to tolerate opinions that they find odious or hateful. These skills follow from the constitutional knowledge that all humans are equal and entitled to the same rights and dignity.

II. THE AMERICAN PROPOSITION REQUIRES ACADEMIC FREEDOM

The ultimate purpose of a university is to increase knowledge and search for the Truth,[101] even if today it has become controversial to recognize this fact.[102] Moreover, the purpose of a public university is to fit students with the knowledge and skills necessary to become mature adult citizens who contribute to the Nation and preserve and improve our Constitutional Republic.[103] Truth-seeking is impossible without clearly stated and widely recognized Academic Freedom and Academic Responsibility policies. Of course, these must also be enforced properly by all levels of authority within the university and in all areas of campus life. An education for responsible citizens is impossible without civic and constitutional knowledge.

First, the American Proposition requires all institutions of higher learning to embrace Academic Freedom for faculty and the entire community. If we all are equal in the possession of unalienable rights and if there are proper constitutional and legal controls on those who lead, then, "*all* members of the [university] community [have] the broadest possible latitude to speak, write, listen, challenge, and learn" and "to discuss any problem that presents itself."[104] Every institution must have a "commitment to free expression and free inquiry. All views, beliefs, and perspectives deserve to be articulated free from interference. This commitment underpins every part of [the institution's] mission."[105]

Of course, "the ideas of different members of the University community will often and quite naturally conflict," but institutional officials should not "attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive."[106] Indeed, the public university's chief mission is to assist in the search for truth, and that very goal necessitates engagement with ideas that may seem discordant, uncomfortable, or even offensive.

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101 University of Chicago, *Kalven Committee: Report on the University's Role in Political and Social Action* (1967), https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf).

102 Ryan Quinn, *Robert George's Speech About Free Speech Shouted Down*, Inside Higher Educ. (Sept. 27, 2023), https://www.insidehighered.com/news/students/free-speech/2023/09/27/robert-georges-speech-about-free-speech-shouted-down.

103 Thomas Jefferson, Bill for Establishing a System of Public Education (1817); James Madison, Memorial and Remonstrance Against Religious Assessments (1785); Benjamin Franklin, Proposals Relating to the Education of Youth in Pennsylvania (1747); Abraham Lincoln, The Perpetuation of Our Political Institutions (Lyceum Address) (1838

104 University of Chicago, Statement on the Freedom of Expression (2015).

105 University of Virginia, Statement of the Committee on Free Expression and Free Inquiry (June 7, 2021), https://news.virginia.edu/content/statement-committee-free-expression-and-free-inquiry.

106 University of Chicago, *supra* note 104.

Faculty members must also be able to challenge the priorities of the Nation and of their campus. This means they can criticize the Supreme Court's jurisprudence as unduly *restrictive* [107] or overly *permissive* of racial preferences.[108] Researchers in the academy must be able to challenge administrative policies and to argue any side of policy issues, including whether affirmative action actually hurts those students admitted through such programs[109] or should be expanded to include students from high poverty backgrounds.[110] And though meaningful disagreements must also be civil, "concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some" individuals.[111] In other words, decorum on campus cannot mean the silencing of ideas.

The right of Academic Freedom stems from the First Amendment of the Constitution, which states the government's prohibition from limiting free speech, petition, and press with the intent of protecting everyone's freedom of conscience.[112] While it is obvious that teachers must have Academic Freedom to challenge the thought processes of students, so, too, must administrators, students, and staff members in order to question themselves and others. "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment."[113] "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[114]

While necessary, "fitting academic freedom within the rubric of the first amendment is in many respects an extremely difficult challenge. The term is nowhere mentioned in the text of the first amendment. It is inconceivable that those who debated and ratified the first amendment thought about academic freedom."[115] Consequently, Academic Freedom is a term that is often used, but little explained, by federal courts."[116] In particular, confusion exists as to the exact scope of Academic Freedom.[117]

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107 Randall Kennedy, For Discrimination: Race, Affirmative Action, & The Law (2013).

108 Russell K. Nieli, Wounds That Will Not Heal: Affirmative Action and Our Continuing Racial Divide (2012).

109 Richard Sander & Stuart Taylor Jr., Mismatch: How Affirmative Action Hurts Students Its Intended to Help and Why Universities Won't Admit It (2012).

110 Sheryll Cashin, Place Not Race: A New Vision of Opportunity in America (2014).

111 University of Chicago, *supra* note 104.

112 John Stuart Mill, On Liberty (1859).

113 Keyishian v. Bd. of Regents of Univ. of State of New York., 385 U.S. 589, 603 (1967) (use of lower case for Academic Freedom orginal).

114 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

115 David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 Law & Contemp. Probs. 227, 237 (1990).

116 Urofsky v. Gilmore, 216 F.3d 401, 409 (4th Cir. 2000) (en banc) (lower case for academic freedom is original).

117 *See* Stanley Fish, Versions of Academic Freedom: From Professionalism To Revolution (2014).

A. Constitutional Definition

On the one hand, there is a constitutional definition.[118] On public campuses, Everyone—students, nonfaculty employees, faculty members, and visitors—at have broad First Amendment rights.

In this constitutional sense, Academic Freedom is not limited to the faculty, but extends to students, nonfaculty scientists and researchers, and even administrators. These individuals frequently make significant scholarly contributions. For example, law students—through student written law review notes and case comments—can help to shape the law. At major research institutions, staff researchers often author more papers than their faculty counterparts. Administrators, many of whom had significant scholarly and policy accomplishments before assuming their current roles, continue to publish extensively. Under the constitutional definition, if one is part of the public college or university community, one enjoys Academic Freedom.

B. Professional Definition

On the other hand, there is a professional definition of Academic Freedom.[119] The American Association of University Professors (AAUP) "conceived academic freedom as a professional norm, not a legal one" and "justified academic freedom on the basis of its social utility as a means of advancing the search for truth, rather than its status as a manifestation of First Amendment rights. "[120] Simply put, it was the "professional norms of the academy, which are in turn grounded in custom and usage,"[121] not the Constitution, which provides the substance of the professional definition.[122]

The professional definition of academic freedom is narrower than the constitutional definition. The German notion of academic freedom, which inspired the AAUP, includes both a freedom of faculty to teach as they see fit (*lehrfreiheit*) and a freedom of students to learn (*lernfreiheit*).[123] In this sense, the German notion resembles the constitutional definition of everyone having academic freedom. Surprisingly, when the AAUP first articulated the professional definition of academic freedom in 1915[124] it explicitly dropped the students' freedom to learn (*lernfreiheit*).[125] The organization "has always assumed that student freedom is not

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118 Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex. L. Rev. 1265, 1267 (1988).

119 *Id.* at 1267.

120 *Urofsky*, 216 F.3d at 411.

121 William A. Kaplin et al., The Law of Higher Education 753 (6th ed. 2020).

122 Am. Assoc. of Univ. Professors, Statement of Principles on Academic Freedom and Tenure (1940), https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure.

123 Richard Hofstadter & Walter P. Metzger, The Development of Academic Freedom in the United States 386–91 (1955).

124 Am. Assoc. of Univ. Professors, Declaration of Principles (1915), https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf.

125 Metzger, *supra* note 118, at 1271–72.

an integral part of academic freedom, but is something different—and something less."[126] The AAUP's focus is exclusively on the rights of the faculty members. [127]

C. Academic Freedom of Faculty Is Limited

Because of the differences in scope, the constitutional and professional definitions of academic freedom "are seriously incompatible and probably ultimately irreconcilable."[128] Even so, it is conventional wisdom[129] among public higher education faculty that the constitutional and professional definitions are synonymous.[130] Many faculty members believe "every professor possesses a constitutional right to determine for himself, without the input of the university (and perhaps even contrary to the university's desires), the subjects of his research, writing, and teaching."[131] In short, these faculty members believe they have a special "constitutional right enjoyed by only a limited class of citizens."[132]

The faculty members' conventional wisdom is wrong. The AAUP professional definition is not part of our constitutional fabric. To say otherwise "asks the courts to treat publicly employed academics differently from all other classes of public employees" and "requires the courts to designate scholarly and classroom speech as uniquely valuable, as compared with the job-required speech of non-academic public employees, and even the non-academic speech of academic public employees."[133] Such a result betrays the "the bedrock of all First Amendment protection"—the emphasis "on the prevention of content and viewpoint discrimination, as well as discrimination against particular speakers."[134]

D. The Teaching/Research Exception to *Garcetti*

While the Constitution does not adopt the AAUP professional definition of academic freedom, faculty members' speech in classrooms or in the context of their research may well receive different constitutional scrutiny than the on-the-job speech of public employees.

In *Garcetti*,[135] the Supreme Court declared that a public employee's speech pursuant to their official duties is not constitutionally protected.[136] Still, it is unclear

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126 *Id.* at 1272.

127 Am. Assoc. of Univ. Professors, *supra* note 122.

128 Metzger, *supra* note 118, at 1267.

129 Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 Tex. L. Rev. 1323, 1324 (1988).

130 Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 Miss. L.J. 677, 678 (2014).

131 Urofsky v. Gilmore, 216 F.3d 401, 409–10 (4th Cir. 2000) (en banc).

132 *Id.* at 412.

133 Bauries, *supra* note 130, at 731.

134 *Id.* at 729–30.

135 Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

136 *Id.*

"whether the First Amendment protects faculty from reprisals by their institutions for speech within the duties of their job."[137] *Garcetti* "may not have directly imperiled speech rights, but it may have done something worse—left academics and school teachers in a troubling state of uncertainty about their rights."[138]

Justice Souter, in dissent, expressed "hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties."[139] Yet, the Court explicitly declined to answer the address whether "the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[140]

The Supreme Court's refusal to say whether *Garcetti* applies to a faculty member's academic speech may be an implicit suggestion that *Garcetti* does not apply and can also be viewed as an implicit endorsement of the view that *Garcetti* does not apply to academic speech within the classroom or during research.[141] Conversely, the court's refusal may be an implicit acknowledgment of the differences between faculty members, who have a large amount of autonomy, and public employees who refuse to carry out their supervisors' instructions, which was the situation in *Garcetti*. The Supreme Court itself may have to decide.

Of course, there are important policy reasons for saying *Garcetti* should not apply to academic speech.[142] First, because "democracy and speech, including academic speech, assist one another," faculty with "expertise within their given fields can aid popular representatives in reaching decisions and in shaping an informed response to rapid change."[143] Second, because most private institutions, through contract or policy, extend a large degree of individual academic freedom, faculty members will simply leave if they feel the public institution is overly regulating their activities.[144] Third, if there is no exception to *Garcetti* for teaching and scholarship, then "the academic speech of public university professors is among the *least protected forms of speech*."[145] "[A]cademic speech is indisputably high-value speech, but in the public university workplace, it qualifies for the same protection as indisputably low-value speech—no protection."[146]

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137 J. Peter Byrne, *Neo-Orthodoxy in Academic Freedom*, 88 Tex. L. Rev. 143, 163–64 (2009) (reviewing Matthew W. Finkin & Robert C. Post, For the Common Good: Principles of American Academic Freedom (2009) & Stanley Fish, Save the World on Your Own Time (2008)).

138 Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines: Garcetti v. Ceballos in the Federal Appellate Courts*, 262 Educ. L. Rep. 357, 388 (2011).

139 *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).

140 *Garcetti*, 547 U.S. at 425.

141 Bauries & Schach, *supra* note 138, at 388–89.

142 Urofsky v. Gilmore, 216 F.3d 401, 425 (4th Cir. 2000) (en banc). (Luttig, J., concurring); *Id.* at 434–35 (Wilkinson, J., concurring).

143 *Id.* at 434–35 (Wilkinson, J., concurring)

144 *Id.* at 425 (Luttig, J., concurring).

145 Bauries, *supra* note 130, at 715 (emphasis original).

146 *Id.*

Given the Supreme Court's previous pronouncements about the importance of academic discourse, all of the lower appellate courts to consider the issue have recognized an exception to *Garcetti* for a faculty member's speech in the classroom or in academic research.[147] As the Sixth Circuit explained, "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. The need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings."[148] More specifically, officials in public higher education "cannot force professors to avoid controversial viewpoints altogether in deference to a state-mandated orthodoxy."[149]

While the lower federal appellate courts have universally recognized an exception to *Garcetti* for teaching and academic research, the exact scope of this exception is likely narrow.[150] Faculty members must adhere to "professional norms" in their classroom expression or academic research.[151] For example, astronomy faculty members should not teach their students that the moon is made of green cheese or author research papers defending such a proposition.[152] If faculty members defy these professional norms, they may find that the *Garcetti* exception does not apply.

At the same time, the exception to *Garcetti* does not extend to those aspects of faculty members' responsibilities that do not involve teaching or scholarship. When faculty members perform administrative work, serve on an institutional committee, or represent their institution in a nonacademic setting, the faculty members' expressions logically should receive the same treatment as the speech of any other public employee.[153] Similarly, faculty members, like other employees, must adhere to the institutional policies regarding procurement, use of equipment, and approvals for outside employment.

Even if the teaching and scholarship exception to *Garcetti* applies and a faculty member's expression is private citizen speech, the constitutional analysis does not end. Even if a public employee is speaking as a private citizen, then a court must determine whether the employee's speech involves a matter of public concern.[154] If it does involve a matter of public concern, courts must strike "a balance between

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147 Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021); Buchanan v. Alexander, 919 F.3d 847 (5th Cir. 2019); Demers v. Austin, 746 F.3d 402 (9th Cir. 2014); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011).

148 *Meriwether*, 992 F.3d at 507.

149 *Id.*

150 *Josephson v. Ganzel*, 115 F.4th 771, 784 (6th Cir. 2024) (Professor's remarks at a panel discussion of his area of expertise falls within the *Garcetti* exception.).

151 Robert C. Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State 76 (2012).

152 *Id.* at 76–77.

153 Porter v. Bd. of Trs. of N. Carolina State Univ., 72 F.4th 573, 584, (4th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024).

154 Lane v. Franks, 573 U.S. 228, 241 (2014)

the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[155]

E. Institutional Academic Freedom

1. Nature of Institutional Academic Freedom

Some late twentieth-century judicial decisions suggested there was an "institutional academic freedom."[156] Unlike private institutions, public colleges and universities are still subject to control by the State that created the campuses. Institutional academic freedom assumes either the U.S. Constitution or the State Constitution limits the power of the State Government over a public college or university.

Institutional academic freedom involves the "autonomous decision making by the academy itself."[157] As described by Justice Frankfurter in a concurring opinion, it allows the institution to determine, without interference from outside the academy, who may teach, what may be taught, how it will be taught, and who may study.[158]

The sheer complexity of the academic task demands a degree of institutional autonomy. It is one thing for a legislature or a centralized state agency to define a public university's mission, establish a program in a particular discipline, or mandate that an institution be selective in its admissions. It is something altogether different for a state government to hire faculty members, determine the best approach to teaching a specific subject or sort through the thousands of applications that some institutions receive for admissions. Because educating undergraduate and graduates or pursuing academic inquiry in a variety of fields is fundamentally different from most governmental functions, public higher education requires a greater degree of flexibility and independent discretion.

While there is an obvious practical need for some form of institutional academic freedom against the creating State and while there is language in Supreme Court opinions supporting the concept, "the Court has never invalidated a statute, regulation, or policy because it violates institutional academic freedom."[159] As discussed more fully below, the Supreme Court implicitly rejected the notion of a state public institution having a national constitutional institutional academic freedom against the creating State. At the same time, in some States, the State Constitution or state law may give public colleges and universities a state institutional academic freedom against the creating State.

2. No National Institutional Academic Freedom

State colleges or universities have no *national* constitutional right to institutional academic freedom against the creating State. Indeed, in those instances where the State

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155 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

156 KAPLIN ET AL., *supra* note 121, at 775–79.

157 Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 226 n. 12 (1985).

158 Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring).

159 Urofsky v. Gilmore, 216 F.3d 401, 411–12 (4th Cir. 2000) (en banc).

seeks to regulate a public institution, judicial recognition of a federal constitutional right to institutional academic freedom undermines the principles of democratic accountability. Many, if not most, States have adopted statutes mandating that the public institutions are subject to control by the Governor and/or the state legislature.

Most obviously, the governing boards of the institution of higher education, sometimes called visitors, regents, trustees, or governors, typically are appointed by the Governor with the advice and consent of at least one legislative chamber. These provisions reinforce a basic point: A public institution belongs to the sovereign People of a State, not to the university administration, faculty, alumni, or students. If the sovereign People, through their elected representatives, want to define admissions criteria, the admissions processes, curricula, or tuition levels, then the sovereign People have that right.

The Supreme Court implicitly rejected the notion a federal constitutional right to institutional academic freedom in *Schuette*.[160] In deciding the People of a State could amend their State Constitution to remove the ability of a state university to consider race in the admissions process, Justice Kennedy, announcing the judgment of the Court, observed, "there is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside [state] laws that commit this policy determination to the voters. … Democracy does not presume that some subjects are either too divisive or too profound for public debate."[161]

3. The State Constitution or State Law May Provide State Institutional Academic Freedom

As Justice Scalia, joined by Justice Thomas, noted in *Schutte*, each State has "near-limitless sovereignty … to design its governing structure as it sees fit."[162] A State may choose to create a university or close a university.[163] It may choose to allow state institutional officials to make certain decisions and then abolish or transfer that decision-making authority to others.[164] Therefore, if officials at public colleges or universities possess a state institutional academic freedom against the creating State, it is because the State Constitution or statute grants such rights.

Given the diversity of the Nation, it is not surprising that the States vary widely in whether the State Constitutions provide institutional academic freedom against the creating State. Analyzing the various state constitutional provisions and the judicial decisions and attorney general opinions, one scholar suggested four distinct categories of "constitutional autonomy."[165]

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160 Schutte v. Coalition to Defend Affirmative Action by Any Means Necessary, 572 U.S. 291, 314 (2013).

161 *Id.* at 314 (Kennedy, J., joined by Roberts, C.J., and Alito, J., announcing the judgment of the Court).

162 *Id*. at 327 (Scalia, J., joined by Thomas, J., concurring).

163 *Id.* at 328 (Scalia, J., joined by Thomas, J., concurring).

164 *Id.* at 335–36 (Breyer, J., concurring).

165 Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, 35 J.C. & U.L. 271, 281 (2009).

First, in California, Michigan, and Minnesota, the "state courts have offered relatively well-developed standards for the overall legal framework of constitutional autonomy, and, most significantly, where cases reflect considerable judicial deference to the constitutional autonomy possessed by institutional or system governing boards."[166]

Second, in Idaho, Louisiana, Montana, Nevada, New Mexico, North Dakota, and Oklahoma,[167] there is "favorable judicial treatment of constitutional autonomy but with relatively fewer cases and, even more importantly, with a less well-developed legal framework regarding the contours of constitutional autonomy in the state."[168] "A substantially restricted form of constitutional autonomy may exist in Nebraska and South Dakota."[169]

Third, in Florida, Georgia, and Hawaii,[170] the courts have "not clearly answered whether constitutional autonomy exists as a recognized legal doctrine by state courts."[171]

Finally, in Alabama, Alaska, Arizona, Colorado, Mississippi, Missouri, and Utah,[172] the "courts have either explicitly rejected constitutional autonomy or cast heavy doubt on the potential for its recognition by courts"[173] More specifically, "recognition by courts of constitutional autonomy in Alabama, Alaska, and Mississippi, though not completely settled, appears unlikely."[174] "For Arizona, Colorado, Missouri, and Utah, legal decisions and attorney general opinions indicate that constitutional autonomy does not enjoy judicial recognition."[175]

Of course, in some States there is no indication in the State Constitutions of any sort of constitutional autonomy for public institutions. Nevertheless, the legislature, through the enactment of statutes, may have given officials at public colleges and universities a degree of state institutional academic freedom. For example, the Supreme Court of Kentucky has determined state universities are part of the executive branch,[176] but independent of the Governor's control.[177] Unlike state constitutional provisions, a legislative provision granting autonomy can be repealed at any time. Thus, if a legislative majority is dissatisfied with how college or university officials have exercised this statutory autonomy, the legislature may modify or repeal the statute conferring the autonomy.

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166 s*Id*. at 281–82

167 *Id*. at 311.

168 *Id*. at 281.

169 *Id*. at 311.

170 *Id*.

171 *Id*. at 282.

172 *Id*. at 311.

173 *Id*. at 282.

174 *Id*. at 311.

175 *Id*.

176 Univ. of Kentucky v. Moore, 599 S.W.3d 798 (2019).

177 Beshear *ex rel.* Kentucky v. Bevin *ex rel.* Kentucky, 498 S.W.3d 355 (Ky. 2016).

While there is no national institutional academic freedom, state constitutions may define and mandate it. In addition, while faculty must have academic freedom in their search for truth, this freedom is limited. The constitutional structures mandated by the American Proposition including federalism, which divides national and state authority, as well as an independent federal judiciary with the responsibility of interpreting the scope of our First Amendment freedoms, determine the limits of academic freedom on campus. Thus, the necessary counterpart to Academic Freedom is Academic Responsibility, the necessity of understanding the scope of Academic Responsibility, enforcing its limits appropriately across the entire campus community.

III. THE AMERICAN PROPOSITION REQUIRES ACADEMIC RESPONSIBILITY

With great Academic Freedom comes great Academic Responsibility. But how is this Academic Freedom, however defined, as well as the American Proposition, which is the fountain of Academic Freedom, to be perpetuated? Moreover, how can citizens over two centuries after the ratification of the Constitution meaningfully consent to and promulgate the American Proposition in our time? Thomas Jefferson proposed that the republic must provide publicly funded education whose purpose was to enable the youth to become adult citizens and leaders capable of preserving our constitutional republic.[178] He warned that even under the rule of the People or well-meaning leaders "those entrusted with power have, in time, and by slow operations, perverted [good republics] into tyranny."[179] The only way to prevent this danger is to educate the public in the tenets of the American Proposition.

James Madison says more is needed. The "first duty of Citizens, and one of the noblest characteristics of the late Revolution," he says, is "prudent jealousy" to guard against any "experiment on our liberties."[180] He explains that the "free men of America did not wait till usurped power had strengthened itself. . . . They saw all the consequences in the principle."[181] The duty to uphold, defend, and promote the principles articulated in the Declaration of Independence, however, cannot happen without the requisite civic and constitutional education. While the author of the Declaration insists that these principles must be known by all citizens and promulgated by public institutions, Madison adds that they must also be enforced by the People, that is, by ordinary citizens capable of anticipating problems before they happen. Madison assumes that ordinary citizens will possess prudence, or practical wisdom, and knowledge of principles, that is, the rights and responsibilities of free citizens. While these traits may have characterized many of the Founding era, Lincoln observed them waning in the decades following.[182]

While Academic Freedom fuels the public university's truth-seeking mission, Academic Responsibility ensures that the public university is equipping students

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178 Thomas Jefferson, Bill for Establishing a System of Public Education (1817).

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180 *Id*.

181 *Id*.

182 Abraham Lincoln, The Perpetuation of Our Political Institutions (Lyceum Address) (1838).

with the knowledge and skills to become adult citizens capable of consenting to the Constitution and holding their leaders and themselves accountable. For those "who do not understand the rights protected by the Constitution can neither cherish nor invoke them; those who do not know which party controls the House and Senate may misattribute credit or blame for action or inaction."[183]

The public university has an institutional obligation to (1) teach civic literacy (*how* the government works); (2) educate with constitutional knowledge (*why* our Constitution is structured as it is); and (3) have an institutional responsibility to promote Confident Pluralism (*how* to be a responsible citizen in a diverse Nation).[184]

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183 Annenberg Pub. Pol'y Ctr., Annenberg Constitution Day Civics Survey 2024 (2024), https://www.annenbergpublicpolicycenter.org/most-americans-cant-recall-most-first-amendment-rights/.

184 Administrators, staff, and faculty have a responsibility to comply with the laws of the Nation and the State, both in their policies and in their behavior in their professional capacities. To accomplish this goal, at least five things are needed.

First, Administrators need constitutional knowledge to ensure that their institution complies with the U.S. Constitution and the laws of their state, both of which fulfill their duty as leaders of a public university. Faculty too must understand and comply with the Constitution so that they can appropriately engage in the classroom and help to promote a campus culture that reflects and respects the rule of law and the law of the land.

Ideally, the civic component would inform all university policies, would comprise part of the university's mission, and would occupy a meaningful portion of student requirements. Even better would be for the university to make its civic mission a central rather than peripheral goal. Schools could create majors and minors focusing on civic literacy and constitutional knowledge, or create centers, academic departments, or schools dedicated to this mission. Several universities (Arizona State, Utah Valley State, University of Florida, University of North Carolina, Chapel Hill, Ohio State, and others) are meeting this need by instituting Schools of Civic Thought and Leadership across the country.

Second, with their understanding of the Constitution and state law, faculty and administrators should govern responsibly. Campus handbooks are the social contracts that bind the campus community and should be respected. Faculty handbooks, university handbooks, and student handbooks must include clear processes and guidelines for grievances, conduct violations, and tenure and promotion because even university leaders are imperfect (Premise Three of the American Proposition). These processes must also align with the requirements of the federal and state Constitutions. Handbooks must provide adequate due process and equal protection of all on campus. All campus citizens must know the policies of the institution's handbooks, follow Federal and State law, and comply with them.

Third, the classroom and the university writ large is meant to prepare students for democratic citizenship, not a means of producing compliance. Yet, increasingly politicized presidential declarations and academic courses are becoming "performative," that is, they use their presidential or professorial pulpit to indoctrinate students to the proper social justice theory of the moment or to transform students "into revolutionaries" (Robert Pondiscio & Tracey Schirra, *Restoring Trust in Public Schools*," 61 Nat'l Affs. (2024), https://www.nationalaffairs.com/publications/detail/restoring-trust-in-public-schools). *See* Callie Patteson, *Antifa Teacher Who Wanted to Indoctrinate Students to Reportedly Be Fired*, N.Y. Post ((Sept. 2, 2021), https://nypost.com/2021/09/02/pro-antifa-teacher-gabriel-gipe-reportedly-will-be-fired/). The contemporary transformation of education into indoctrination shortchanges and belittles students. They do not learn "civic acculturation," which means they do not "begin the process of being formed into responsible citizens." Pondiscio & Schirra, *supra*.

All classes, but especially those focusing on civic literacy and constitutional knowledge, should be instructed by individuals trained in these areas and must not aim to indoctrinate students to a particular policy preference of the professor. "Performative teaching is undermining trust in schools." Pondisco & Schirra, *supra*., To fit students with the necessary skills of a good steward of a constitutional republic, professors must allow students to form their own opinions, to challenge others and to be challenged themselves, and learn how to voice them in a respectful way. An indoctrinated followers of professors' opinions does not learn how to think creatively, to problem solve, or to be

A. Teach Civic Literacy

To protect Academic Freedom, our public universities must first cultivate students' civic literacy and constitutional knowledge. Recent surveys, however, indicate that young Americans are often ignorant of the historical facts and enduring lessons of the founding era.[185] We have also failed to inculcate the knowledge of and respect for the constitutional system needed to perpetuate those principles. Our public university campuses, which are microcosms of the Nation, exemplify the problem, which begins at the K–12 level. The National Education Association claims that civic illiteracy is a crisis, as only twenty-five percent of K–12 students reach the "proficient" standard of their NAEP Civics Assessment. Students cannot identify major leaders of the U.S. government (the President of the Senate, the Chief Justice of the Supreme Court),[186] do not know how long they serve,[187] nor can they identify who holds essential powers (such as the authority to declare war or initiate the impeachment process).[188]

The situation continues at institutions of higher learning, with only eighteen percent requiring a course in U.S. history or government.[189] Absent a proper grounding in civics and the Constitution, students exhibit a lack of attachment to the Nation and its institutions, with over half of students willing to "flee the country if the United States were invaded."[190] The civic illiteracy continues after college. One third of adults cannot name the three branches of government,[191] and almost three fourths lack knowledge of the First Amendment protections besides free speech.[192] The lack of civic literacy translates into a culture that fails to understand and often undermines constitutional principles.[193] For example, public colleges and universities' obligation to protect the free speech of students and faculty has not stopped many from the "policing of speech,"[194] suspending of faculty,[195] and threatening students who express ideas or use words that they reject.[196]

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prudently jealous of their rights, both on campus and in society.

185 Nat'l Assessment of Educ. Progress (NAEP), The Nation's Report Card (2022), https://www.nationsreportcard.gov/civics/.

186 Am. Council of Trs. & Alumni, "Losing America's Memory 2.0 A Civic Literacy Assessment of College Students 5 (2024), https://www.goacta.org/wp-content/uploads/2024/08/pdf-acta_civiceducation_07_01_2024_collegepulse.pdf.

187 *Id*. at 6.

188 *Id*. at 9.

189 Am. Council of Trs. & Alumni, What Will They Learn, 2019–2020 14 (2019), https://www.goacta.org/wp-content/uploads/ee/download/What-Will-They-Learn-2019-2020.pdf.

190 Am. Council of Trs. & Alumni, *supra* note 186, at 24.

191 Annenberg Pub. Pol'y Ctr., *supra* note 183.

192 *Id*.

193 Ryan Doefler & Samuel Moye, *The Constitution Is Broken and Should Not Be Relclaimed*, N.Y. Times (Aug. 19, 2022), https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html.

194 Frank Furedi, What's Happened to the University? 92 (2017).

195 Ryan Quinn, Penn *Professor Amy Wax Punished for 'Derogatory' Statements but Won't Lose Job*," Inside Higher Educ. (Sept. 24, 2024), https://www.insidehighered.com/news/faculty-issues/academic-freedom/2024/09/24/penns-amy-wax-punished-statements-wont-lose-job.

196 Found. for Individual Rts., Spotlight Database (2022), https://www.thefire.org/resources/spotlight/.

One reason is the politicized nature of public education today: "American public education has drifted toward an oppositional relationship with its founding purpose of forming citizens, facilitating social cohesion, and transmitting our culture from one generation to the next."[197] Classrooms "have become the latest battleground in our never-ending culture war,"[198] beginning at the K–12 levels. Courses on U.S. history or U.S. government appear as "calculated attempts to advance a range of political aims,"[199] rather than to educate students for responsible citizenship.

George Washington,[200] Thomas Jefferson,[201] Benjamin Rush,[202] Benjamin Franklin,[203] and Abraham Lincoln[204] all recognized civic education as the foundation of a functioning republic. Franklin called it the "surest Foundation of the Happiness both of private Families and of Commonwealths" and a protection against the "mischievous Consequences that would attend a general Ignorance among us."[205] Washington, in his Farewell Address, exhorted Americans to promote "institutions for the general diffusion of knowledge."[206] Lincoln further recommends not only civic literacy, but that such knowledge should also be revered as a "*political religion*."[207]

Civic literacy teaches *what* we are as a Nation and includes the meaning of citizenship rights and responsibilities, historical facts, cultural texts and speeches, and basic facts about the U.S. government. Students should understand the difference between pure democracy and a constitutional republic; the ways in which an individual might engage in the deliberative process of the nation to achieve public goods; and means of participating in addition to voting in federal, state, and local elections. The defining moments of American history—both the triumphs and tragedies—must be included so that students can identify the ways in which the laws, the Constitution, and the Nation have changed over time for better or for worse. In sum, civic literacy includes knowledge of the basic components and features of the American system, such as the structure of government, the limits to that government, and the rights and limits of citizenship, as well as the historical moments that have altered these things over time. The naturalization exam provides a good example of civic literacy.

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197 Pondiscio & Schirra, *supra* note 184.

198 *Id*.

199 *Id*.

200 George Washington, Farewell Address (1796), https://teachingamericanhistory.org/document/farewell-address-4/.

201 Thomas Jefferson, Bill for Establishing a System of Public Education (1817).

202 Benjamin Rush, Of the Mode of Education Proper in a Republic (1798), https://press-pubs.uchicago.edu/founders/documents/v1ch18s30.html.

203 Benjamin Franklin, Proposals Relating to the Education of Youth in Pennsylvania (1747).

204 Abraham Lincoln, The Perpetuation of Our Political Institutions (Lyceum Address) (1838).

205 Benjamin Franklin, Proposals Relating to the Education of Youth in Pennsylvania (1747).

206 George Washington, *supra* note 200.

207 Abraham Lincoln, The Perpetuation of Our Political Institutions (Lyceum Address) (1848).

B. Educate for Constitutional Knowledge

Constitutional knowledge pushes a deeper understanding of the tenets of the American Proposition—the *why* underlying the design, guardrails, limitations, and purpose of our Constitution. It is insufficient for students to learn only historical facts or the names of the three branches of government without a basic understanding of our Constitution as a whole. We use this term "constitutional knowledge" to refer to the understanding of the Constitution's grounding philosophy, including the reasons for our unique constitutional structure. A constitutionally knowledgeable person understands (1) why an imperfect People must consent to the establishment of a government to secure their unalienable equality and rights and (2) why our government and the People must be limited as a well. Constitutional knowledge provides citizens with the knowledge base to be effective watchdogs over elected and appointed leaders at all levels.

Courses in constitutional knowledge must be a valued part of the university curriculum for all students. The faculty and university leaders should also be constitutionally literate themselves to foster a community of Academic Freedom and Responsibility compliant with the American Proposition. Constitutional knowledge enables administrators, faculty, students, and staff to create campus rules that comply with the U.S. Constitution. It helps all on campus understand if actions taken at work by themselves or others are within the legal framework required. Those who lead these institutions must be constitutionally literate to understand and enforce the constitutional requirements of their universities and to create policies consistent with them. They also must ensure that all members of the campus community know those legal requirements and comply to them.

C. Promoting Confident Pluralism

Universities must embrace their educational mission in the search for truth by modeling civil discourse, civic engagement, and Confident Pluralism. Knowing and following constitutional principles is necessary but not sufficient—universities must also ensure their students, faculty, and staff have a minimal awareness of *how* to properly fulfill their constitutional obligations. Because public colleges and universities owe their existence to the mission of cultivating an educated public capable of governing themselves, they must provide a culture that allows individuals to seek the truth, to disagree openly, and to exercise the freedom of conscience. There are two key components to this culture—dignity and tolerance.

If civic literacy and constitutional knowledge are taught on campus, and if Academic Freedom of the entire community is embraced, we must still confront the fact that our imperfect human nature will lead us to disagree. As Madison observed, "As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. If the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests."[208] Creating responsible

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208 THE FEDERALIST NO. 10 (James Madison).

campus citizens, therefore, must "begin by acknowledging the depth of those differences. And our differences are indeed deep: We lack agreement about the purpose of our country, the nature of the common good, and the meaning of human flourishing. These differences affect not only what we think but also how we think and how we see the world. Pluralism, the fact of our differences, is a fact of our world."[209] John Inazu coined the term "Confident Pluralism" to describe the skill set needed by those living in our pluralistic constitutional republic. The confident pluralist respects the dignity of each individual and promotes the toleration of those with whom one may disagree.[210]

A confident pluralist recognizes and respects the equal rights of all human beings, as well as their imperfect nature, which is the first premise of the American Proposition. Dignity and toleration necessarily follow that acknowledgment. First, dignity emerges from accepting human equality in unalienable rights. Second, tolerance follows the appreciation of individuals' "freedom of conscience"[211] along with the recognition of human imperfection, diverse capacities and interests, and sometimes self-interested motivations. Dignity and toleration pave the way for the civil environment in which the university's accumulation of knowledge and fruitful truth-seeking can occur.

1. Dignity of All

First, the Academic Responsibility of our institutions of higher learning is to educate in the meaning of, and model for the entire campus community, the American Proposition's respect for the equal dignity of all humans. All individuals on campus need to be taught to respect one another as beings of the same intrinsic worth as one another. In a Nation where everyone has the "freedom to say almost anything to anyone,"[212] those who speak must recognize all persons "have dignity in their own distinct identity."[213] All members of a college community, whose mission is the search for the truth, must respect the dignity of all in that search.

Dignity is a constitutional assumption. The Fourteenth Amendment codifies the self-evident truth proclaimed by the Declaration of Independence[214] that all are created equal in requiring a recognition of the rights to life, liberty, and the pursuit of happiness of all persons as well as the entitlement of all persons to equal protection under the law. The fact that someone on campus is White or Black, long hair or short hair, male or female, cisgender or nonbinary, gay or straight is completely irrelevant to how public institutions of higher learning treat them. All are equally citizens of the campus community. No one is denied admission, class entry, employment, or any other opportunity, simply because of some immutable aspect of their identity.

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209 John Inazu, *Why I'm Still Confident About "Confident Pluralism*," Christianity Today (August 13, 2018), https://www.christianitytoday.com/ct/2018/august-web-only/john-inazu-why-im-still-confident-about-confident-pluralism.html.

210 *See* Inazu, *supra* note 13.

211 Mill, *supra* note 112.

212 Inazu, *supr*a note 13, at 96.

213 Obergefell v. Hodges, 576 U.S. 644, 660 (2015).

214 The Declaration of Independence, *supra* note 22,¶ 2.

At the same time, while individuals have the right to think what they will and express themselves within the confines of the Freedom of Speech and Expression, the institution should encourage all members of the university community to treat each other as human beings worthy of respect. While the campus may not legally be able to ban an antisemitic comment, it can foster a moral community in which such comments would rarely, if ever, be uttered. Moreover, recognizing dignity as an essential element of Academic Responsibility entails acting when legal hateful speech becomes an illegal threat.

Dignity is and must be reinforced by Due Process, the foundation of any system of justice that seeks a fair outcome. Due Process is ultimately a search for truth, a way of ensuring that the innocent—particularly those who are poor, unpopular, marginalized, opponents of the government, or those who refuse to conform to societal norms—are not punished.[215] In practical terms, this means that when a student, faculty, or staff is accused of misconduct, there is a process that applies equally to all and is consistent with the Constitution. Such an orientation could have prevented much of the campus due process controversies that resulted from Title IX enforcement over the last decade.

Specifically, there must be clear guidelines in the student and faculty handbooks regarding procedures for handling misconduct that must apply equally to all individuals. This includes a presumption of innocence when one is accused of misconduct or a crime, no matter what the crime. As Blackstone noted, it is better for ten guilty persons to go free than for an innocent person to be imprisoned.[216] A false acquittal of a guilty person does not serve justice, but such false acquittals are the price we pay to prevent the false conviction of the innocent. Colleges and universities must affirm the dignity of all within their walls by promulgating appropriate due process measures and campus policies respecting the dignity of each person.

2. Tolerance

The American Proposition, especially the requirements of the First Amendment, demands tolerance, "a willingness to accept genuine difference, including profound moral disagreement."[217] Tolerance necessarily accompanies the appreciation of the equal possession of unalienable rights and individuals' freedom of conscience.

This notion of tolerance rejects most speech codes, requirements of safe spaces, and bans of microaggressions. Tolerance is perfectly consistent with promoting civility and kindness on campus, but also teaches young and older adults to learn to navigate disagreements in a mature fashion in and out of the classroom. Public institutions of higher learning must permit views that some find "deeply unacceptable" or "blasphemously, disastrously, obscenely wrong."[218] As Inazu argues,

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215 See David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants,* 83 J. Crim L. & Criminology 469 (1992).

216 *See* 2 William Blackstone, Commentaries *358 (1765) ("[B]etter that ten guilty persons escape, then that one innocent suffer.").

217 Inazu, *supra* note 13, at 87.

218 Bernard Williams, *Toleration: An Impossible Virtue, in* Toleration: An Elusive Virtue 18 (David Heyd ed., 1998). *See also* Inazu, *supra* note 13, at 87 (quoting the same passage from Williams to make a similar point).

those who come from a religious tradition can and must learn to "live with those we regard as damned."[219] Likewise, those from secular, atheistic, or agnostic backgrounds, members of the LBGTQ+ community, and other intellectual skeptics must coexist with individuals whose religiosity may be irreconcilable or offensive to their own personal beliefs. The only alternative to this freedom of conscience, expression speech, assembly, and press would be censorship of beliefs and ideas. As equal individuals, each of us is permitted to hold private and personal beliefs that others may not share. A tolerant campus community can foster individuals learning "to be steadfast in our personal convictions, while also making room for the cacophony that may ensue when others disagree with us."[220]

Although tolerance—as that word was traditionally understood—is an appropriate application of the American Proposition to campus, larger society has "forgotten what tolerance actually means" and tends to require tolerance only of certain individuals or groups.[221] The contemporary definition of "tolerance" requires positive regard only for marginalized groups.[222] Indeed, there is no tolerance for those who dissent from the orthodoxy on certain untouchable topics such as abortion, climate change, COVID policies, the existence of "systemic racism," the effectiveness of current antipoverty policies, or transgender issues.[223] When presidents issue statements that affirm the orthodoxy of the moment, it appears intolerance of those who do not agree with the orthodoxy of the moment.

The American Proposition requires "true tolerance" that recognizes that intelligent and good people sometimes disagree with one another, for how else is one to learn and grow in their opinions and understanding of the world. As Justice Brandeis observed, "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[224] "Members of the campus community have the right to engage in vigorous political debate and even to articulate extreme political views."[225] Without a degree of toleration, meaningful discussions of important ideas will not happen. Instead, young adults on campus will isolate into their virtual or physical silos of likeminded peers echoing opinions back and forth to one another, rather than learning and maturing intellectually. Further, the mere fact that a discussion makes someone feel "uncomfortable" or even "unsafe" does not justify intolerance. The First Amendment Freedoms—no Establishment of Religion, Free Exercise of Religion, Freedom of Speech, Freedom of Press, Assembly, and Petition—"extend not only to our own interests but also to ideas and groups that we don't like."[226]

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219 Inazu, *supra* note 13, at 5–6.

220 *Id*. at 8.

221 David French, Divided We Fall: America's Secession Threat and How to Restore Our Nation 185 (2020).

222 *Id*.

223 Joseph Epstein, *The Tyranny of the "Tolerant*, Wall St. J. (Oct. 10, 2020), https://www.wsj.com/articles/the-tyranny-of-the-tolerant-11602278220?mod=searchresults&page=1&pos=1.

224 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring)

225 Academic Freedom Alliance, *supra* note 10.

226 Inazu, *supra* note 13, at 16.

Of course, the Freedom of Speech is not absolute, as the Supreme Court has found "new categories of speech that the government can regulate or punish."[227] Administrators, faculty, and students "have no right to try to intimidate or menace other members of the community, violate university policies or state and federal laws, or interfere with the education or lawful activities of other members of the campus community."[228] The resignations of the three Ivy League presidents was in part due to the inability to recognize these limits of Free Speech and Expression. Even so, "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."[229] The Court has refused to recognize categorical exclusions for depictions of animal cruelty[230] and depictions of violence to children,[231] but it has declared that incitement,[232] and true threats are not protected.[233] Moreover, while "there is no categorical 'harassment exception' to the First Amendment's free speech clause,"[234] the Supreme Court held that educational entities can incur monetary liability under Title IX for responding with deliberate indifference to one student's "harassment" of another student.[235]

Tolerance and Dignity go a long way in alleviating the moral dilemmas that university presidents have faced while making public statements on the political disputes of the day. However, these are just words, if they are divorced from the provisions and requirements of the Constitution and the State, or from their own institutional mission. In terms of policy, at least four things should guide universities. Dignity and tolerance should be bolstered by Institutional Neutrality (no more politicized letters by university administrators), a robust free speech policy like the Chicago statement, and an end to efforts to ban "divisive concepts"[236] and mandatory "diversity statements."[237] The Academic Freedom Alliance explains that

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227 Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., joined by Ginsburg, Sotomayor, & Kagan, JJ., concurring).

228 Academic Freedom Alliance, *supra* note 10.

229 Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 791 (2011).

230 United States v. Stevens, 559 U.S. 460, 472 (2010).

231 *Brown*, 564 U.S. at 799.

232 Incitement is limited to advocacy "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) *(per curiam).*

233 The Supreme Court's definition of threat "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343, 359 (2003). To be considered a threat, the speaker must intend to make an actual threat or act with knowledge that the communication will be viewed as a threat. Elonis v. United States, 575 U.S. 723, 740 (2015).

234 Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.).

235 Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 650 (1999). Of course, "non-expressive, physically harassing *conduct* is entirely outside the [scope] of the free speech clause. *Saxe*, 240 F.3d at 206. While drawing the line between speech and conduct can be difficult, [court] precedents have long drawn it, and the line is long familiar to the bar." Nat'l Inst. of Fam. & Life Advocates v. Becerra, 138 S. Ct. 2361, 2373 (2018).

236 Academic Freedom Alliance, *supra* note 9.

237 Academic Freedom Alliance, *Statement on use of Diversity Statements*, (Aug. 22, 2022),

universities should be "neutral and peaceful forum[s] for robust political and social debate. Universities will be distrusted and ultimately weakened if they are perceived to be inconsistent in their adherence to their own stated principles, understood to be willing to sacrifice their own scholarly mission to political causes, or thought unwilling to secure the physical safety of their community members and the integrity of their operations."[238] The collective implication of these four policies, which comply with the U.S. Constitution, would be to advise public university presidents to stop asserting official university positions on the divisive issues of the day and facilitate the civil exchange of ideas so that a path for resolving these controversies may emerge.

CONCLUSION

"America's public schools are the nurseries of democracy."[239] Those who embrace American Proposition are the Nation's best hope for guiding citizens out of their partisan echo chambers into the light of day, where they can begin to see all human beings for what they are—imperfect individuals with equal rights and dignity. When members of the campus community demonstrate the courage to disagree with the prevailing ideologies of the moment instead of silencing them, the collective search for knowledge and truth can be renewed. This true "free exchange" of ideas "must include the protection of unpopular ideas" to "facilitate[e] an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will.[240]

The solution to what ails the Nation must begin at the bottom, with the proper civic and constitutional education of America's youth. A public university that embraces the American Proposition will protect Academic Freedom and ensure Academic Responsibility of all its members to achieve this end. When new generations of citizens understand that the United States is "wide enough" for red states and blue states, urban and rural, the secular and the sacred, the new immigrant and the Tribal Nations, the descendants of slaves and the descendants of pilgrims, People of faith and people of no faith, those who remember Pearl Harbor and those who do not remember 9/11, the critical race theorist and the constitutional originalist, the gay and the straight, the cisgender and the transgender/nonbinary,[241] then a "new birth of freedom"[242] in this Nation can begin. As Dr. King recognized the deep divisions of his day, so, too, must this generation. "Now is the time" [243] for public schools and universities "to make real the promises of democracy; to "rise up and live out the true meaning of [America's] creed: We hold these truths to be self-evident, that all men are created equal."[244]

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https://academicfreedom.org/wp-content/uploads/2022/08/AFA-DEI-Statement-081822.pdf;)

238 Academic Freedom Alliance, *supra* note 10.

239 Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2046 (2021).

240 *Id.* at 2046.

241 Lin-Manuel Miranda, *The World Was Wide Enough* (2015) (penultimate song in the musical *Hamilton* (2015)).

242 Lincoln, *supra* note 19.

243 King, *supra* note 19.

244 *Id*.

VISE GRIPPING ACADEMIC FREEDOM: CONTROLLING THE LEARNING MOVEMENT THAT SUPPORTS MINORITIZED VOICES

JEFFREY C. SUN[*] AND HEATHER A. TURNER[**]

Abstract

This article examines the effects of anti–diversity, equity, and inclusion (DEI) laws to academic freedom within public higher education. Notably, these laws adversely impact faculty autonomy and intellectual diversity. By analyzing the historical and legal foundations of academic freedom, alongside contemporary judicial interpretations, the article situates recent legislative efforts as a metaphorical "vise grip" on the open exchange of ideas critical to higher education. Drawing on foundational court cases and theoretical perspectives, including the Professional and Legal Complement School, the authors highlight the need for robust doctrinal frameworks, namely, the Hazelwood standard, as more fitting to address the societal role of higher education and professors. This analysis underscores the need of safeguarding academic freedom against political encroachments to maintain higher education's role in advancing democratic values, workforce development, and societal progress.

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[*] Jeffrey C. Sun, J.D., Ph.D.: Distinguished University Professor and Associate Dean for Research, Innovation, and Strategic Partnerships at the University of Louisville; Counsel at Manley Burke. M.B.A., Loyola Marymount University, J.D., Mortiz College of Law, The Ohio State University, M.Phil., Ph.D., Graduate School of Arts & Sciences and Teachers College, Columbia University.

[**] Heather A. Turner, Ph.D.: Director of Research and Policy for the SKILLS Collaborative at the University of Louisville. M.A., The University of Delaware, M.A., Ph.D., The University of Louisville.

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INTRODUCTION

Academic freedom, largely understood as "grant[ing] professors autonomy and authority to pursue intellectual issues in their academic domain, engage in their professional work, and speak in the public domain without stifling interference,"[1] is a cornerstone of public higher education.[2] Being able to pursue new inquiries without fears of retribution enables faculty members to advance knowledge and challenge assumptions across disciplines.[3] Yet, the current state of academic freedom is under attack.[4] Recent legislation across the United States, largely referred to as "anti-DEI," goes far beyond addressing programming and resources directly related to diversity, equity, and inclusion initiatives.[5] Rather, observers and members of the higher education community have asserted that this legislation seeks to undermine faculty authority and assert political dominance over the educational domain. These arguments have tended to focus on the proliferation of proposed legislation. A recent report from the American Association of University Professors (AAUP),[6] for example, argues that the over 150 bills introduced since 2021 focused on dismantling DEI represent an orchestrated and multifaceted attack on higher education. Similarly, *PEN America* has documented the jawboning effect of these bills,[7] showing how proposed legislation can affect higher education without being signed into law. These works largely show

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1 Jeffrey C. Sun, *Academic Freedom: Its Historical Development, Current State, and Future Challenges*, *in* American Higher Education in the Twenty-First Century: Social, Political, and Economic Challenges 37, 37 (M. N. Bastedo et al. eds., 5th ed. 2024).

2 Contemporary understandings of academic freedom can be traced to Plato and subsequently the Middle Ages in Europe, yet while these understandings informed a concept of academic freedom that is frequently adopted by both public and private universities, legal protections for academic freedom differ substantially based on whether the university is public or private. Given the legal basis for our article, we focus on public education throughout. We discuss these topics in greater detail in Part I.

3 *1940 Statement of Principles on Academic Freedom and Tenure*, Am. Ass'n of Univ. Professors (1940), https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure.

4 *See, e.g.*, Ryan Quinn, *Many Faculty Say Academic Freedom Is Deteriorating. They're Self-Censoring*, Inside Higher Ed (Nov. 13, 2024), https://www.insidehighered.com/news/faculty-issues/academic-freedom/2024/11/13/many-faculty-say-academic-freedom-deteriorating; Gene Nichol, Political Interference with Academic Freedom and the Free Speech of Public Universities, Am. Ass'n of Univ. Professors (Fall 2019), https://www.aaup.org/article/political-interference-academic-freedom-and-free-speech-public-universities; Danielle McLean, *DEI Attacks Pose Threats to Medical Training, Care*, Center for Public Integrity (Jan. 25, 2024), https://publicintegrity.org/education/academic-freedom/anti-dei-laws-threatens-medical-training-care/; Josh Moody, *Civil Rights Groups Push Back Against Wave of Anti-DEI Bills*, Inside Higher Ed (Mar. 15, 2024), https://www.insidehighered.com/news/diversity/2024/03/15/civil-rights-groups-push-back-against-wave-anti-dei-bills; Center for the Defense of Academic Freedom, *Mission Statement*, Am. Ass'n of Univ. Professors, https://www.aaup.org/programs/academic-freedom/center-defense-academic-freedom (last visited Jan. 7, 2025).

5 Isaac Kamola, *Manufacturing Backlash: Right-Wing Think Tanks and Legislative Attacks on Higher Education, 2021–2023*, (2024), https://www.aaup.org/article/manufacturing-backlash.

6 *Id*.

7 Jeremy C. Young, *Jawboning: When Educational Censors Don't Bother Passing a Law*, PEN America (Oct. 8, 2024), https://pen.org/jawboning-when-educational-censors-dont-bother-passing-a-law.

how proposed legislation represents an attempt to control the learning movement that supports minoritized voices.

Building on this body of literature, in this article we shift focus from proposed legislation as the unit of analysis to enacted laws as the focal unit of analysis in examining the potential and realized effects of these laws on public higher education. Taking that lens, we argue that the legislative anti-DEI movement, which manifests in several different laws, including attacks on tenure, represents a metaphoric vise gripping higher education. This vise-gripping manifests primarily through legislation that strengthens and widens the state's jaw[8] to assert control and apply intense pressure over state university voices and academic freedom. Ultimately, these state actions threaten and crush the openness and diversity of thought that are essential to higher education.[9] To combat this effect, we propose redirecting attention to a preferred academic freedom perspective and adopting an underutilized doctrinal framework of educational speech.

To present the evidence associated with the general thesis, we begin by presenting the established law around academic freedom and offer an analysis of potential academic freedom infringements. More specifically, we open the discussion with an overview of academic freedom's history and the various theories and perspectives that have been used to understand academic freedom's place in the academy. We then turn to the legal precedents for academic freedom, examining foundational cases, legal frameworks, and contemporary circuit decisions. Considering the legal context and case law precedents, we map the relationships between recent anti-DEI legislation and impacts onto academic freedom through an analysis of Florida, a heavily affected state. With the application of such laws to public colleges and universities, this article illuminates the impacts onto professors' academic freedom at these institutions.

I. ACADEMIC FREEDOM ORIGINS AND PERSPECTIVES

A. History of Academic Freedom

The concept of academic freedom predates modern universities by thousands of years and can be traced back to Plato's utopian vision of the academic community.[10] After these beginnings, academic freedom became part of both the increasingly secular and scientific inquiries of the Middle Ages and the rise of the research-based

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8 This legislation provides states with authority to exert control over foundational aspects of higher education—including curriculum, DEI programming, employment, tenure, and governance—despite the state having no expertise in these areas.

9 Although our focus here is on the negative effects of laws introduced primarily by Republican legislators, we acknowledge that partisanship in both parties can restrict academic freedom in public universities. An op-ed from John Hood, for example, highlights partisan bias with the University of North Carolina's Faculty Assembly when it called for an external investigation into policy disputes only when Republicans controlled the state government, but remained silent during previous Democratic leadership. This example illustrates selective scrutiny, which undermines the university's credibility and compromises its public interests. John Hood, *Faculty Lacks Perspectives on Politics*, Carolina J. (Feb. 22, 2017), https://www.carolinajournal.com/opinion/faculty-lacks-perspective-on-politics/.

10 John S. Brubacher & Willis Rudy, Higher Education in Transition: A History of American Colleges and Universities 308 (4th ed. 1997).

German universities in the 1700s and 1800s whose scholars referred to it as *akademische Freiheit*.[11] These German universities influenced the later establishment of universities in the United States: Thus, it is perhaps unsurprising that academic freedom went on to become an institutionalized component of American higher education, beginning with the establishment of the AAUP's 1915 Declaration of Principles on Academic Freedom and Academic Tenure (the Principles)[12] and culminating in the 1940 Statement of Principles on Academic Freedom and Tenure.[13] Yet, despite AAUP's assertion of the importance of academic freedom to the work of the professoriate, critics in the academy pointed out that the Principles were merely suggestions, and universities were not mandated to create, let alone enforce, policies protecting the academic freedom of their faculty. The need for institutional policies to enforce academic freedom led legal scholar William Van Alstyne to refer to it as a "very soft law."[14]

The status of academic freedom as a "very soft law" was brought to the fore in two cases during the 1950s and 1960s that established constitutional recognition of academic freedom for public universities. First, in 1957, not long after the era of McCarthyism, *Sweezy v. New Hampshire* directly connected academic freedom to the First Amendment free speech clause.[15] In this case, Paul Sweezy, who was a Marxist economist, public intellectual, and visiting lecturer at the University of New Hampshire, was investigated by the New Hampshire attorney general regarding his scholarly work and political beliefs. Claiming that these questions violated his academic freedom, Sweezy refused to respond to the questioning and was jailed for contempt. The Supreme Court later ruled in favor of Sweezy with a plurality opinion due to a violation of his First Amendment rights. Speaking of the case, Chief Justice Earl Warren warned that "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die."[16]

Ten years later, *Keyishian v Board of Regents* reaffirmed the protected nature of academic freedom in relation to the First Amendment. In this case, faculty and staff at the State Universities of New York countered state law by refusing to sign loyalty oaths affirming they were not members of the Communist party or subversive groups, claiming that these oaths imposed unconstitutional restrictions on free speech and academic freedom through inhibiting what professors can think, believe, and express. The Supreme Court agreed, explaining that "Our nation is deeply committed to

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11 *Id*. at 174.

12 AAUP, Policy Documents & Reports (11th ed. 2015).

13 *Id*. See also William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review, in* Freedom and Tenure in the Academy 79, 79–154 (William W. Van Alstyne ed., 1993).

14 *Van Alstyne,* supra note 13, at 79.

15 As David Rabban explains, "The First Amendment applies only to state action. Judges have largely rejected efforts to expand the concept of state action the activities of nominally private universities. The First Amendment protection for academic freedom, therefore, applies to legislative and executive actions that affect professors and universities, and to disputes between professors and administrators or trustees at public universities." David M. Rabban, Academic Freedom: From Professional Norm to First Amendment Right 4 (2024).

16 Sweezy v. New Hampshire, 354 U.S. 234 (1957) (plurality).

safeguarding academic freedom which is of transcendent value to all and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[17] The significance of *Keyishian* to academic freedom is twofold. First, it explicitly identified "academic freedom" as a protection necessary for the unique role of professors. Second, it presented a broad educational policy concern that governmental intrusions potentially deprive citizens of their rights, and in the case of universities, substantially alter the conditions of higher education through violations of academic freedom. The outcomes of both *Keyishian* and *Sweezy* have contributed to the theories and perspectives surrounding academic freedom's place within the academy.

B. Theories and Perspectives of Academic Freedom

Academic freedom, as both a legal and professional concept, exists at the intersection of constitutional law, higher education governance, and societal values. Over the decades, legal scholars have developed multiple frameworks to analyze and define academic freedom, each shaped by differing assumptions about the roles of faculty, institutions, and the state. Based on our review of the extant literature, we have categorized the frameworks, which are employed in the literature, into five schools of thought. The differentiation is to emphasize how these scholars, who have written extensively about academic freedom, draw upon distinct sources of authority (e.g., case law, the First Amendment, contracts, policies) and interpretive lenses (e.g., history, law, economics, organizational theory) to shape their views. Specifically, these schools of thought include the Constitutional School, which views academic freedom as a First Amendment right; the Professional and Legal Complement School, which blends constitutional protections with professional norms; and the Socio-Historical, Market Effects, and Critical Theory Schools, which emphasize the contextual and organizational dimensions of academic freedom in varying ways.

This section examines these perspectives, highlighting their unique features, doctrinal applications, and limitations. It sets the stage for understanding how contemporary cases interpret academic freedom through public employee speech principles and why certain perspectives fall short in addressing state-level anti-DEI legislation. This foundation also positions the Professional and Legal Complement School, as articulated by Robert O'Neil and Lee Bollinger, as a particularly effective lens to examine the intersection of higher education and state authority.

1. Constitutional School

In *Keyishian v Board of Regents*, the Court held that academic freedom was "a special concern of the First Amendment,"[18] and the Constitutional School would agree. Scholars comprising this school, such as David Rabban, Peter Byrne, Rebecca Goose Lynch, and Ralph Fuchs, rely on jurisprudence under the First Amendment as shaping academic freedom. For these scholars, it is important to delineate between institutional and individual academic freedom, as the former relates to

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

18 *Id*.

professors' expressions of scholarly expertise and the latter deals with university functions (e.g., hiring, admissions, curriculum).[19] The Supreme Court has agreed with this distinction, noting that "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decision making."[20]

The Constitutional School further emphasizes the differences between academic freedom and free speech, despite both being concerns of the First Amendment. Unlike free speech, academic freedom centers around the special contribution to societal advancement that professors provide through their scholarly expressions, yet "[t]he distinctive meaning of academic freedom is connected to the First Amendment because it fosters two central First Amendment values recognized by courts in a wide range of cases, including in cases arising at universities: the production and dissemination of knowledge, and the contribution of free expression to democratic citizenship."[21]

2. Professional and Legal Complement School

First Amendment doctrine, although giving citizens rights to convey their voices, is not always aligned with our educational mission that fosters debate and dialogue in a more respectful and developmental manner. To bridge this disparity, the Professional and Legal Complement School balances constitutional protections of academic freedom with professional norms and responsibilities. For this group of scholars, such as Robert Post, Matthew Finkin, Robert O'Neil, and Lee Bollinger, the legal aspects of academic freedom are nested within the higher education environment. While a strictly constitutional interpretation of academic freedom might grant professors autonomy in their research pursuits, scholars in the Professional and Legal Complement School argue that disciplinary norms inherently shape the parameters of this freedom. As Robert Post and Matthew Finkin explain, "Academic Freedom is not the freedom to speak or to teach just as one wishes. It is the freedom to pursue the scholarly profession, inside and outside the classroom, according to the norms and standard of that profession."[22] Or, as Post has explained, "If I am supposed to be teaching constitutional law, I can't spend my classroom time talking about auto mechanics."[23] Aside from disciplinary conventions, this school of thought also holds that institutional autonomy is a condition of academic freedom. Robert O'Neil, for example, argues that academic freedom has become a canonical value in American higher education, largely due to institutions seeking to protect, and thus retain, their faculty.[24] Lee Bollinger aligns with O'Neil's views on institutional autonomy, but relies predominantly upon the

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19 David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment,* 53 Law & Contemp. Probs. 227, 300 (1990).

20 Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985).

21 Rabban, *supra* note 15, at 8.

22 Matthew W. Finkin & Robert C. Post, For the Common Good: Principles of American Academic Freedom 149 (2009).

23 Lincoln Caplan, *Academic Freedom and Free Speech: Robert Post Explains How They Differ—And Why It Matters.* Harv. Mag. (September–October, 2024), https://www.harvardmagazine.com/2024/09/harvard-academic-freedom-free-speech.

24 Robert O'Neil, *Academic Freedom as a "Canonical Value,"* 76 Soc. Res.: An Int'l Q. 437, 448–49 (2009).

democratic function as the basis for academic freedom. That is, Bollinger posits that the role of higher education in a democratic society is critical to understanding the special protections afforded through academic freedom.[25]

3. Socio-Historical School

Extending the contextual bounds of academic freedom as understood within the Professional and Legal Complement School, the Socio-Historical School views academic freedom as inherently shaped by environmental factors. Scholars in this school, such as Walter Metzger and Ellen Schrecker, argue that "academic freedom is, of necessity, a flexible concept."[26] In other words, academic freedom does not exist in a vacuum; rather, it is shaped by the realities in which universities operate, including societal, political, and institutional environments. Speaking on how shifting environments can affect academic freedom, Metzger observes that "on such subjects [as academic freedom], the collective expressions of academic groups, especially if they seek improvement on a global scale, seem to pass from birth to eternal rest at the speed with which American foundations finance academic conferences with similar agendas"[27] The effects of shifting forces that shape academic freedom were, Ellen Schrecker argues, evident in the McCarthy era. Recalling incidents from the University of California and the City College of New York system, Schrecker illustrates how many faculty faced institutional retribution for their political beliefs and activities.[28] In California, the Board of Regents went so far as to declare that "membership in the Communist Party is incompatible with membership in the faculty at a State University."[29] More recently, Schrecker argues that the effects of cultural and political shifts have impinged on academic freedom through issues such as "the corporate-style restructuring of the academy" and the "penumbra of the 'war on terror'."[30] In all examples, Schrecker emphasizes the key view of the Socio-Historical School: that academic freedom does not exist in a vacuum.

4. Market Effects School

Like the Socio-Historical School, the Market Effects School believes that external forces shape academic freedom and the protections it provides to faculty. Yet as the name alludes to, those scholars of the Market Effects School specifically see these forces as connected primarily to the market and the ways the academy has shifted to feed into market effects. Sheila Slaughter and Gary Rhoades, for example, discuss the effects of the market on academic freedom in their work on

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25 Lee C. Bollinger, *The Open-Minded Soldier and the University*, 37 L. Quadrangle (formerly L. Quad Notes) art. 9 (1994), https://repository.law.umich.edu/lqnotes/vol37/iss2/9; Lee C. Bollinger, *The Value and Responsibilities of Academic Freedom*, Colum. Mag. (Spring 2005); Lee C. Bollinger, Uninhibited, Robust, and Wide-Open: A Free Press for a New Century (2010); Lee C. Bollinger & Geoffrey R. Stone, Social Media, Freedom of Speech, and the Future of Our Democracy (Lee C. Bollinger & Geoffrey R. Stone, eds. 2022).

26 Ellen Schrecker, *Academic Freedom and the Cold War*, 38 Antioch Rev. 313, 315 (1980).

27 Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 Law & Contemp. Probs. 3, 3 (1990).

28 Schrecker, *supra* note 26, at 313–14.

29 Ellen Schrecker, *Academic Freedom in the Corporate University*, 93 *Radical Teacher* 38, 39 (2012).

30 *Id*.

academic capitalism.[31] They argue that over time, universities have moved away from a model that valued knowledge as a public good to an academic capitalist model in which the focus is on pursing market-like activities to generate revenue from external sources (e.g., grants, patents, university-industry collaborations). In this shift, knowledge becomes a private commodity rather than a public good, and in doing so impedes academic freedom.[32] For example, when professors work as consultants with industry, they may be subject to a variety of restrictions, including nondisclosure agreements, prepublication reviews, and censorship of results. Slaughter and Rhoades highlight one such instance where a faculty member found his research being manipulated by a corporation to "do damage control"[33] so as not to portray the corporation in a bad light before the results were released. Under this model, the freedom of the faculty to create and disseminate knowledge is inhibited through the overlay of market forces.

Echoing this work on academic capitalism, Jennifer Washburn argues[34] that faculty must work collaboratively to combat the eroding forces of commercialism on academic freedom. Citing two instances of conflicts between professors, universities, and pharmaceutical companies that encroached on academic freedom,[35] Washburn argues that the tendency to view academic freedom as an individual rather than professional right[36] has made efforts to combat commercialism ineffective. That is, when academic freedom is conceptualized individually, faculty are pitted against each other as some vie for research funding and others see the need for stronger controls in conflicts of interest. Speaking of the urgency behind this issue, Washburn writes, "The time to act is now. If the university looks and behaves more and more like a for-profit commercial entity—and its commitment to producing and transmitting reliable public knowledge grows increasingly suspect in the public's eye—then the societal justification for academic freedom will simply fall away, as will the public's willingness to finance universities."[37]

5. Critical Theory School

In the final school of thought that we review, scholars such as Stanley Fish and Joan

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31 Sheila Slaughter & Gary Rhoades, Academic Capitalism and the New Economy: Markets, State, and Higher Education (2004).

32 *Id*. at 47.

33 *Id*. at 166.

34 Jennifer Washburn, *Academic Freedom and the Corporate University* (Jan.-Feb. 2011), https://www.aaup.org/article/academic-freedom-and-corporate-university.

35 The two examples deal with prominent professors at Brown University, David Kern and Martin B. Keller.

36 As an individual right, academic freedom enables professors to conduct their work free from interference, as we have discussed. Yet as Washburn argues, this view of academic freedom discounts the collective commitments outlined in AAUP's *1915 Declaration* to uphold standards that enable academic work to positively contribute to society. From a collective view, academic freedom consists not only of an individual's rights, but "is tied to academic custom and practice, and to notions regarding the ideal environment for freedom of thought, inquiry, and teaching." AAUP, *Academic Freedom and the Law* (2023), https://www.aaup.org/sites/default/files/Academic%20Freedom%20Outline%20for%20Website.pdf.

37 Washburn, *supra* note 34.

Wallach Scott highlight the parameters that surround academic freedom, separate from its legal precedents. That is, it "insists on the difference between academic freedom—a protection of faculty rights based on disciplinary competence—and freedom of speech—the right to express one's ideas, however true or false they may be."[38] Like previously discussed schools of thought, those in the Critical Theory School see external forces as shaping academic freedom, but they point more heavily to disciplinary conventions and organizational environments as primary influencing factors. Stanley Fish, for example, has written extensively about the relationship between academic freedom and free speech, and his thoughts on the matter are captured in his book title, *Save the World on Your Own Time*.[39] As the title suggests, Fish argues against academic freedom protecting professors' political views in the classroom, assuming that those views are not connected to the subject matter of the course. Connection to curriculum is key for Fish, as he argues that academic freedom is not the same thing as free speech, but rather the ability of professors to exercise their disciplinary knowledge in their teaching and research without interference from external parties (e.g., legislators, boards of trustees).[40] In this view, academic freedom does not provide faculty the ability to express themselves in ways akin to the First Amendment; rather, the principle's protections are squarely situated within the confines of their professional responsibilities and disciplinary conventions. As Fish explains, "Academic freedom has nothing to do with the expression of ideas. It is not a subset of the general freedom of Americans to say anything they like. Rather, academic freedom is the freedom of academics to study anything they like; the freedom, that is, to subject any body of materials, however unpromising it might seem, to academic interrogation and analysis."[41] The other primary scholar in this area, Joan Wallach Scott, agrees with Fish on the distinction between free speech and academic freedom, noting that the former is not concerned with the quality of the speech while the latter evaluates the quality within disciplinary conventions,[42] yet differs from Fish in the relationship between politics and scholarship. As Scott explains, "Fish adheres to the idea that politics and scholarship are entirely separable entities. But the separation between them is easier in theory than in practice … they are the result of some kind of deeply held political or ethical commitment on the part of the professor. The tension between professorial commitments and academic responsibility is an ongoing one that the principle of academic freedom is meant to adjudicate."[43] In other words, Wallach sees the influence of politics on the decisions that comprise academic work and thus disagrees on the separation between the two. Nonetheless, both scholars affirm the distinction between free speech and academic freedom and hold the importance of disciplinary conventions in understanding faculty protections.

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38 Joan W. Scott, *On Free Speech and Academic Freedom,* 8 J. Acad. Freedom 1 (2017).

39 Stanley Fish, Save the World on your Own Time (2008).

40 *Id*. at 80.

41 *Id*. at 87.

42 Scott, *supra* note 38, at 6.

43 Joan W. Scott, *Knowledge, Power, and Academic Freedom*, 76 Soc. Res. 451, 477 (2009).

C. Article's Perspective

From our perspective, all schools of thought hold merit and shape how we understand academic freedom's protections for faculty. For instance, the Constitutional School derives its authority from foundational case law, including *Keyishian v. Board of Regents*, which identified academic freedom as a "special concern of the First Amendment." Scholars like David Rabban and Peter Byrne emphasize that academic freedom must balance individual and institutional rights, a tension courts have historically acknowledged. However, as later sections of this article will explore, this perspective, along with many others (e.g., Socio-Historical School, Market Effects School, and Critical Theory School), struggles to address the complexities of current legislative intrusions, such as state anti-DEI laws, which frequently blur the line between individual and institutional speech and draw on state control over the academic enterprise, including dictating what anyone within the state says.

While academic freedom is a professional characteristic that we believe should be adopted uniformly across the profession, as this article points out, it is used as an employment and sociolegal feature consistent with First Amendment rights. Although the basis for academic freedom as aligned with the First Amendment offers some legal protections, we contend that academic freedom should be recognized and afforded professional protections beyond the First Amendment. As an application of the law consistently featured under the First Amendment and elucidated through free speech cases in public university settings, this article is intended to examine one protective aspect within the overall system of academic exchanges. Further, the societal recognition of the roles of higher education and college faculty is a critical foundation and inquiry to understand.

With those bases in mind, we recognize one perspective as an informative guide to examine the interactions of the various actors in this setting of studying state anti-DEI legislation in relation to academic freedom, namely, the Professional and Legal Complement School situates academic freedom within the norms and standards of the academic profession. In particular, Bollinger's argument that higher education serves a vital democratic function underscores the societal importance of preserving diverse viewpoints. Similarly, O'Neil's focus on institutional autonomy as a safeguard for faculty rights acknowledges the unique vulnerabilities of public universities in the face of political pressure. This perspective is particularly well suited for analyzing state legislation like Florida's Individual Freedom Act, which is discussed in greater detail in Part III, since it accounts for the dual role of public universities as both state entities and intellectual spaces.

In this article we draw on the works of Bollinger and O'Neil to inform our understanding of academic freedom within the context of recent efforts that seek to dismantle these protections through legislative attacks targeted at DEI programs and practices. More specifically, we draw from Bollinger's work on the role of higher education in a democratic society as well as O'Neil's work on the legal basis for academic freedom to examine the intersection of these views and their implications for the current attacks on academic freedom via state anti-DEI legislation. This approach helps illuminate the real effects of these laws, and moves the dialogue about the effects beyond the proposed legislation to the actual adoption into statutory and regulatory policies.

This part has outlined the key features and limitations of various academic freedom perspectives. In doing so, we highlighted the need for a robust framework that accommodates the focused pressures of state authority onto public universities that is taking place throughout much of the nation. By drawing on Bollinger's democratic rationale and O'Neil's emphasis on institutional autonomy, the Professional and Legal Complement School emerges as the most effective lens for analyzing the "vise gripping" effects of anti-DEI legislation. The following parts will apply these principles, alongside public employee speech doctrine, to demonstrate how state actions undermine academic freedom and erode the foundational principles of higher education.

II. LEGAL STATE OF ACADEMIC FREEDOM

As established, academic freedom is not synonymous with the First Amendment.[44] Nonetheless, the First Amendment serves as the legal source to account for the profession's basis to recognize the unique context warranting certain free speech rights.[45] Because academic freedom, by its nature, involves contested expressions within the academic profession, case law within this realm of free speech, educational speech, and academic autonomy has presented viable, legal frameworks to decide these cases when the contested issue is between the state and speaker involving the postsecondary learning context.

The question of academic freedom, particularly as it intersects with legislative controls, calls for a different exploration from the current literature and judicial decisions. The search for academic freedom's underlying legal frameworks and the judicial doctrines informs the legal and higher education communities about how the concept of academic freedom is perceived, interpreted, and shaped. At its core, academic freedom operates as both a constitutional principle and a professional norm. It crafts both a protection and a responsibility for college faculty so that professors may challenge, propose, and explore new ideas and concepts that help advance people, industries, and communities within society. As we illustrate below in Parts III and IV, it also embodies the tension between state authority and institutional autonomy, which are at the center of these state DEI laws. Accordingly, this section examines these legal frameworks to elucidate how courts navigate the competing interests of faculty rights, institutional governance, and state oversight. By grounding the analysis in First Amendment jurisprudence and contemporary academic freedom theory, this section previews how the discussion will evolve in subsequent sections to critique the rise of anti-DEI legislation as a metaphorical "vise grip" on higher education.

A. Public Employee Speech

The public employee speech framework provides a general analysis to determine

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44 *See supra* note 15.

45 *See, e.g.*, Robert C. Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence (2012); Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 Geo. L.J. 945, 946 (2009); Lee C. Bollinger & Geoffrey R. Stone, The Free Speech Century (2018); David M. Rabban, Academic Freedom: From Professional Norm to First Amendment Right (2024).

when a public employee is speaking as a citizen or in a capacity that allows the state to control speech.[46] Doctrinal formulation around this framework started with *Pickering v. Board of Education*.[47] Through that case, the U.S. Supreme Court established a balancing test between an educator's interest to speak freely as a citizen on matters of public concern and the public employer's interest to promote the efficient performance of the school's services.[48] The case emerged after a school district dismissed one of its teachers, Marvin Pickering, because he wrote an editorial in the local newspaper criticizing the school board's municipal bond proposal.[49] Through that case, the Court acknowledged that public employees enjoy First Amendment rights as citizens and do not abdicate that right simply by serving as public employees.[50] The Court found that Pickering's editorial statements, questioning whether the school district managed past funds appropriately and now needed additional funds, raised a matter of legitimate public concern worthy of protection under the First Amendment.[51] Solidifying further the First Amendment protections, the Court determined that the speech was largely separate from his work activities as a teacher, and his comments did not create any disharmony among his co-workers.[52] Thus, the two-part inquiry, in balance, sided with the public employee's right to free speech.[53]

The framework developed, further and significantly, in a subsequent U.S. Supreme Court case, *Connick v. Myers*.[54] In that case, a public employee reacted to her office transfer by circulating a questionnaire about office policies, procedures, and morale.[55] The Court established its analysis, indicating that when determining whether a public employee's speech falls within the category of a matter of public concern, courts must review the content, form, and context of the expression, and the examination must include the entire record presented before the court.[56] Examining the record as a whole, the Court ruled that the expressions, as a whole, did not qualify as a matter of public concern.[57] There was, however, one survey item, which inquired about whether the public employees working in the district

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46 Jeffrey C. Sun & Neal H. Hutchens, *Faculty Speech and Expression*, *in* Contemporary Issues in Higher Education Law 101, 101–28 (Susan C. Bon et al. eds., 2019); Sun, *supra*, note 1, at 37; Neal H. Hutchens & Frank Fernandez, *Academic Freedom as a Professional, Constitutional, and Human Right*, *in* 38 Higher Education: Handbook of Theory and Research 149 (Laura W. Perna ed., 2023).

47 Pickering v. Bd. of Ed. of Twp. High Sch. Dist., 391 U.S. 563 (1968).

48 *Id.* at 568.

49 *Id.* at 564–67.

50 *Id.* at 568.

51 *Id.* at 571.

52 *Id.* at 574–75.

53 *Id.* at 568 (expressing the Court's need to "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

54 461 U.S. 138 (1983).

55 *Id.* at 141.

56 *Id.* at 147–48.

57 *Id.*

attorney's office ever felt "pressured to work in political campaigns on behalf of office supported candidates," which the Court recognized could have qualified as a matter of public concern, but that one survey item was incidental to the overall expression.[58] When taken as a whole, the Court identified that the employee's expressions dealt with an individual's employment dispute regarding a transfer policy, reflected workplace gripes, and such a dispute reflected a matter of a personal interest, which typically is not also a matter of public concern.[59] It also interfered with the efficient operations of the government office. In other words, the public employee in this instance did not have constitutional protections under protected political speech.[60]

While speech on matters of public concern that did not interfere with efficient government operations qualified as protected speech, the Court in 2006 made a firm statement that public employee speech, which is made pursuant to one's official duties, would generally not be protected under the First Amendment.[61] In *Garcetti v. Ceballos*,[62] Richard Ceballos, a county prosecutor, expressed that an affidavit contained serious misrepresentations and sent a memo to his supervisors regarding these concerns.[63] His memo expressed his recommendation to dismiss a case for its irregularities. After presenting the information, his supervisor, Frank Sundstedt, still decided to move forward with the case.[64] Ceballos spoke publicly about his position regarding the discrepancy in the affidavit.[65] The defense attorney even called Ceballos as a witness for the defense to testify about his findings regarding the search warrant discrepancy.[66] Based on his expressions about the affidavit, Ceballos claimed that he faced retaliatory employment actions.[67] The Court, however, concluded that Ceballos's expressions were based on an employer's commissioned memo and that Ceballos, as a public employee, was not acting on his own accord to make his statements.[68] The Court outlined another layer to the public employee speech framework indicating that when a public employee makes expressions in furtherance of one's job responsibilities,

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58 *Id.* at 149.

59 *Id.* at 153–54.

60 *Id.* at 150–53. This rule holds, even when spoken in private settings about matters of public concern, the Court has offered the same protections to the ruling on public employee speech expressing matters of public concern. *See, e.g.*, Givhan v. W. Line Consolidated Sch. Dist., 439 U.S. 410 (1979); Rankin v. McPherson, 483 U.S. 378 (1987) (where employee expressed her support for the presidential assignation attempt indicating that "if they go for him again, I hope they get him" and employee's role did not serve a "confidential, policymaking, or public contact" or have the effect of interfering with government operations).

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

62 *Id.*

63 *Id.* at 414.

64 *Id.* at 414–15.

65 *Id.* at 415.

66 *Id.*

67 *Id.*

68 *Id.* at 421–23.

that speech is not an employee speaking as a citizen and is not protected as free speech under the First Amendment.[69]

Although the Court carved out public employee speech that is made pursuant to one's official duties as nonprivate speech and not protected under the First Amendment, Justice Kennedy, writing for the majority, noted in dicta that this rule might not apply to academic scholarship and teaching. Kennedy acknowledged that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[70] However, Justice Kennedy circumvented the question about the ruling's application to higher education, expressing that "[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[71] Because this ruling did not offer "a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate,"[72] the decision should be interpreted cautiously as to its application in all settings of higher education, especially when academic freedom—in which professors are expected to draw on their expertise, including to challenge, interrogate, or consider scientific evidence, different perspectives, and other learned details.

In 2014, the U.S. Supreme Court slightly narrowed the *Garcetti* ruling, which made expressions pursuant to official duties not protected under the First Amendment.[73] The Court illustrated, in *Lane v. Franks*, the "quintessential example of citizen speech" during public employee work as qualified as a matter of public concern.[74] In that case, a public employee oversaw a college bridge program and discovered that an elected official was on the payroll, but she had but not been working.[75] Eventually, under the employee's leadership, the college terminated the elected official and the state convicted her of fraud.[76] The public college employee's expression became the central issue when he testified under subpoena about the elected official's fraud. After that testimony, the college terminated the public employee who testified. He argued that he had been retaliated against for that testimony, but the public college countered that he had no free speech rights since the expression was made pursuant to his official duties.[77] The Court

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69 *Id.*

70 *Id.* at 425.

71 *Id.*

72 *Id.* at 424.

73 Lane v. Franks, 573 U.S. 228 (2014).

74 *Id.* at 238.

75 *Id.* at 232.

76 *Id.* at 233.

77 At least one circuit court addressed the constitutionality of a gag policy that restricts public employees from discussing work-related matters. Moonin v. Tice, 868 F.3d 853, 862 (9th Cir. 2017) (finding that an overly restrictive policy preventing all K9 handlers or line employees from communicating with any nondepartmental and nonlaw enforcement entity about a particular program as having a chilling effect on potential protected speech).

disagreed.[78] It ruled that the public employee's expression fell beyond the scope of one's ordinary job duties, and the expression was a matter of public concern. The Court explained, "Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment."[79]

The distinctions between the *Garcetti* and *Lane* cases are seemingly narrow, yet quite significant. As the Justices in the Lane case explained, "*Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment."[80] The focal point of the public employee's role in the speech is important. "The *Garcetti* Court made explicit that its holding did not turn on the fact that the memo at issue 'concerned the subject matter of [the prosecutor's] employment,' because '[t]he First Amendment protects some expressions related to the speaker's job.'"[81] The employment role, information source or applicability to one's employment, and the expression at issue become relevant characteristics to examine.[82] Viewed another way, "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech."[83]

The central issue framing between the two cases shaped the corresponding analysis. The Court framed the "critical question" under *Garcetti* by posing, "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[84] This issue framing is consistent with the analysis of earlier public employee speech cases. To those ends, the Court reminded readers that "our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment."[85] Employment as a public school teacher in *Pickering* did not discount the availability of the information used to fashion the teacher's private expression. As observed in that case, "[t]eachers are … the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."[86] Consistent with that consideration, the Court also

78 *Lane*, 573 U.S. at 239–40.

79 *Id*. at 246–47.

80 *Id.* at 239.

81 *Id.* at 239–40 (citing Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)).

82 *Id.* at 240 (clarifying how "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.").

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.* (citing Pickering v. Bd. of Ed. of Twp. High Sch. Dist., 391 U.S. 563, 572 (1968)).

emphasized its assessment on determining public employees' access to information arising as a matter of public concern, noting from a 2004 case on public employee speech that "public employees 'are uniquely qualified to comment' on 'matters concerning government policies that are of interest to the public at large.'"[87]

The issue framing in *Lane* is helpful to understand within the case context. The Court described the "importance of public employee speech" in this case as "especially evident in the [case] context: a public corruption scandal."[88] Illustrating the significance of the context, the Court explained "'[t]he more than 1000 prosecutions for federal corruption offenses that are brought in a typical year … often depend on evidence about activities that government officials undertook while in office,' those prosecutions often 'require testimony from other government employees.'"[89] Given those considerations, the Court concluded that "[i]t would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim." If employed in that manner, the "rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs."[90] Further, when balancing the government employer's interests, the Court concluded that "the employer's side of the *Pickering* scale is entirely empty: Respondents do not assert, and cannot demonstrate, any government interest that tips the balance in their favor."[91] The public employer might have a counterargument if Lane, as a public employee, had information classified as "sensitive, confidential, or privileged." However, none of these categories applied the details that formulated to the protected expression.[92]

B. Educational Speech

Another framework examined the extent to which public school educators may restrict speech of others such as students. Courts have recognized that the academic setting is a not a public forum for students to freely express themselves, so government regulation of speech is permissible in certain settings.[93] Notably, *Hazelwood v. Kuhlmeier* established the doctrinal rules in this context. In *Hazelwood*, student editors for the school newspaper challenged the school district when the principal deleted two articles that the students had written. One of the articles

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87 *Id.* (citing San Diego v. Roe, 543 U.S. 77, 80 (2004); however, in that case, the issue was whether a police officer's off-duty, non–work-related activities making sexually explicit videos arose to matters of public concern in which he argued for speech as a private citizen, and the Court ruled that no First Amendment speech protections applied).

88 *Id.* (citing Brief for United States as Amicus Curiae at 20, Lane v. Franks, 573 U.S. 228 (2014), No. 13-483).).

89 *Id.*

90 *Id.*

91 *Id.* at 242.

92 *Id.*

93 Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988).

addressed teen pregnancy and the other article divorce, appearing in an issue of the school newspaper.[94] Upon review, the principal determined that these articles were inappropriate for the student audience and ordered the journalism teacher to delete them.[95]

The Supreme Court announced in this case that schools are not required to support student speech that is inconsistent with the school's basic educational mission.[96] Differentiating this context from others, the Court explained that "educators have a responsibility to assure that participants in the school's educational curriculum learn whatever lessons the activities are designed to teach, that readers or listeners are not exposed to material beyond their level of maturity, and that the views of individual speakers are not erroneously attributed to the school."[97] According to the Court, when educators have a legitimate pedagogical purpose, it has authority to restrict speech in the learning environment. Specifically, the Court declared that educators may have rights to editorial "control over the style and content of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns*."[98] Educators are not required to show more such as disruption of the class or interfering with the rights of other students.[99]

Some courts considering faculty speech claims have turned to the *Hazelwood* framework to analyze the extent of college professors' free speech rights.[100]

C. Academic Autonomy

A third framework employed to examine academic freedom has rested within the sphere of academic autonomy. Most significantly, these cases have examined

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94 *Id.* at 262.

95 *Id.* at 263.

96 *Id.* at 266–67.

97 *Id.* at 271.

98 *Id.* at 273 (emphasis added).

99 *Id.* at 289.

100 *Hazelwood*, 484 U.S. 260 (1998); *See, e.g.*, Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991). While a pre-*Garcetti* case, *Bishop* provides an example of a court looking to *Hazelwood*, which dealt with the censorship of a student newspaper by a school administrator, in sorting out a professor's speech rights in a classroom setting and the institution's interests in regulating the instructional environment. In a recent case arising in Florida, a federal district court looked to these standards in granting a preliminary injunction against a state law that, among its stated aims, sought to limit classroom discussion around topics that included critical lines of scholarship, such as critical race theory (CRT). Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d 1218 (N.D. Fla. 2022). In challenging the lawsuit, the Board of Governors of the State University System sought to rely on *Garcetti* for legal authority to control professors' speech in the classroom. In general, controversies related to CRT and the role of diversity, equity, and inclusion have sparked a new round of dialogue and debate over the legal contours of academic freedom for individual faculty at public colleges and universities relative to their teaching and research duties. *See also* Tannous v. Cabrini Univ., 2024 U.S. Dist. LEXIS 81857 (E.D. Pa. May 6, 2024) (applying employee speech analysis to continue professor's state tort claim defense against public university when two community groups accused Palestinian–American professor of allegedly making antisemitic expressions about matters of community concern).

the extent to which colleges maintain students' rights pursuant to the Fourteenth Amendment (i.e., under due process and equal protection clauses).[101] The cases often reference *Keyishian*,[102] with language about academic freedom; however, the references to institutional autonomy reflect the applications of these cases as they did not specifically address individual expressions of faculty speech per se.[103] Instead, they examine issues about public colleges, speaking on behalf of the collective faculty, exercising authority over expressions and behaviors that govern students or prospective students.[104] Thus, the framework inquiry rests on whether academic autonomy that faculty exercise via the college was a permissible exercise of academic freedom.

One line of cases that examined this concept of academic autonomy flowed from the race-conscious admission cases. For instance, *Regents of the University of California v. Bakke* challenged the admissions policy of the Medical School at University of California, Davis.[105] In an effort to increase diversity, a special admissions program was developed to assess applications of individuals from disadvantaged groups. Because the policy maintained a set-aside evaluation process and a predetermined number of reserved slots that were not available to all applicants, it was struck down as unconstitutional. While arguing the case, the university petitioners asserted the need for student diversity in the class. Supporting this goal, Justice Powell asserted a social policy construction about deference to colleges and universities, which includes helping shape the labor market—in this situation, for medical doctors.[106] He agreed that a "diverse student body … clearly is a constitutionally permissible goal for an institution" as it addresses societal needs and it contributes to an "atmosphere of 'speculation, experiment and creation' so essential to the quality of higher education."[107] Discussing the social policy rationale of diversity, Powell

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101 *See, e.g.*, Steve Sanders, *Affirmative Action and Academic Freedom: Why the Supreme Court Should Continue Deferring to Faculty Judgments About the Value of Educational Diversity*, 1 Ind. J.L. & Soc. Equality 50 (2013); Barbara A. Lee, *Judicial Deference to Academic Decisions: Evolution of a Controversial Doctrine*, 47 J.C. & U.L. 93 (2022).

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

103 *See, e.g.*, Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

104 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality); *Horowitz*, 435 U.S. 78; *Ewing*, 474 U.S. 214; Univ. of Pa. v. E.E.O.C., 493 U.S. 182 (1990); Grutter v. Bollinger, 539 U.S. 306 (2003).

105 *Bakke*, 438 U.S. 265.

106 Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity. *Id.* at 312.

107 *Id.* at 311–12. Justice Powell adopted a narrow-enough, social policy argument to further educational goals, which was "widely believed to be promoted by a diverse student body." *Id.* at 312. The Justice does add to his discussion that "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." *Id.* However, his diversity as a compelling interest analysis and actual assertion of the plus-one factor do not rest on a First Amendment interest. In other words, the discussion primarily revolves around a social policy justification outside of the First Amendment.

does not decide the case on First Amendment grounds, but the case recognized, within certain parameters consistent with the Equal Protection Clause, the exercise of the academic decision-making over matters associated with college admissions.

Similarly, the Court held that a public law school's factoring of diversity in evaluating a candidate's file for admissions was constitutional.[108] The case stemmed from an applicant's rejection. With a high GPA and relatively high standardized test scores, the applicant claimed that she was discriminated against based on race when she was denied admission to the University of Michigan Law School. Disagreeing with the petitioner, the Court asserted that the school had a compelling state interest to adopt an admission policy that included diversity as an element to the larger decision-making process. The Court in dicta reiterated the social policy discussion from Justice Powell's *Bakke* opinion.[109] Later, Justice O'Connor, who wrote for the majority, asserted in the opinion's discussion of a compelling state interest that

> Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.[110]

The case at hand, *Grutter v. Bollinger*, is the last of the Court's announcements of "academic freedom."[111] Like many of the past cases, the existence of constitutional academic freedom is acknowledged, but the Supreme Court fails to clearly articulate what it is, when does it apply, and how it applies.[112] Alternatively, even if institutional academic freedom is a recognized constitutional right, there is no basis to interpret institutional academic freedom as an interest warranting greater weight over individual academic freedom.

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108 *Grutter*, 539 U.S. 306.

109 *Id.* at 323–25.

110 *Id.* at 328.

111 More recently, in *Students for Fair Admissions (SFFA) v. Harvard*, 600 U.S. 181 (2024), the U.S. Supreme Court arguably weakened the academic autonomy principle, at least in the context of race-conscious admissions policies. The majority circumscribed academic autonomy as the justification for the race-conscious admissions policies at Harvard and North Carolina. Writing for the majority, Chief Justice Roberts presented that "Justice Powell [in *Bakke*] … turned to the school's last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. That interest, in his view, was "a constitutionally permissible goal for an institution of higher education." *Id.* at 209 (citing Bakke v. Regents of the University of Cal., 438 U.S. at 311–312). Roberts further explained Justice Powell's justification, stating "And that was so because a university was entitled as a matter of academic freedom 'to make its own judgments as to … the selection of its student body.'" *Id.* However, the decision did not fully discount the academic autonomy principle. The decision made clear that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." SFFA v. Harvard, 600 U.S. at 230. This statement demonstrates that academic autonomy, when consistent with constitutional protections such as the Equal Protection Clause, is alive and well.

112 *Bakke*, 438 U.S. at 312.

Generally speaking, courts tend to defer to professional experts, namely academic, over decisions that are academic in nature (e.g., student evaluation on medical school performance) because those decisions fall outside of the court's expertise.[113] For instance, in *Board of Curators of the University of Missouri v. Horowitz*, the U.S. Supreme Court faced the dismissal of a medical student based on her unsatisfactory academic performance in her clinical evaluations.[114] The medical student argued that she was not afforded a formal hearing before the university dismissed her. According to the student, the lack of formal hearing regarding her academic dismissal violated her Fourteenth Amendment due process rights, leading to her assertion that she was deprived of her liberty and property rights.[115] Ruling in favor of the university, the Court concluded that "formal hearings before decisionmaking bodies need not be held in the case of academic dismissals."[116] Under the context of procedural due process, the Court distinguished between disciplinary dismissals, which typically require greater procedural protections, and academic dismissals, which lean on the expertise and judgment of academic professionals.[117] Explaining that reasoning, the Court added, a "school is an academic institution, not a courtroom or administrative hearing room."[118] Simply put, when there is "no showing of arbitrariness or capriciousness," then "[c]ourts are particularly ill-equipped to evaluate academic performance."[119]

Likewise, the U.S. Supreme Court concluded similar constitutional doctrine for academic dismissal challenges based on substantive due process claims. In *Regents of the University of Michigan v. Ewing*, the Court deferred to academic expert evaluations on the disposition of a medical student's academic standing.[120] In that case, the university dismissed a medical student from an accelerated program after he failed a key exam that conditioned his academic progression. The medical student claimed that the university acted arbitrarily when removing him from the program and not giving him another opportunity to take the exam. However, the university evaluated the student's holistic performance, noting that he "failed five of the seven subjects" on the examination and "received the lowest score recorded."[121] In supporting the university, the Court observed that "the faculty's decision was made conscientiously and with careful deliberation based on an evaluation of the entirety of [the student's] academic career."[122] The

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113 Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

114 *Horowitz*, 435 U.S. at 80–81.

115 *Id.* at 80.

116 *Id.* at 88.

117 *Id.* at 87–92. For instance, the Court noted that "[a]cademic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement." *Id.* at 89.

118 *Id.*

119 *Id.* at 92.

120 474 U.S. 214 (1985).

121 *Id.* at 216.

122 *Id.* at 225.

Court directed the opinion emphasizing the role of courts and their deference to academic experts in an area that does not fall within their domain of expertise. Specifically, the Court explain, "[w]hen judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms."[123] In other words, unless academic experts "did not actually exercise professional judgment," the courts provide some degree of academic autonomy over matters within their domain.[124] Of course, as established in the race-conscious admission cases, the other exception would be overriding deference or autonomy when such matters infringe on constitutional rights such as equal protection.[125]

D. Contemporary Circuit Decisions—Academic Freedom Acknowledged

Although multiple frameworks are available, recent cases involving public university professors' academic freedom have gravitated to the public employee speech framework.[126] These cases demonstrate a trend toward limiting individual academic speech and autonomy while emphasizing institutional oversight and control.[127] As the section below describes, the judicial decision-making trends moves beyond university academic freedom, but rather, these cases demonstrate a degree of authority at the state actor level granting the public university the ability to exercise control when the speech is not a matter of public concern.[128]

Within the *Garcetti* doctrine, the contemporary cases involving professors' academic freedom have separated and bounded the analyses between (a) academic freedom cases in which protected speech is recognized by falling outside of one's official duties and (b) academic freedom cases warranting limits to professors' expressions by falling within one's official duties. Put simply, the cases draw heavily on the *Garcetti* analysis of public employee speech, including the implicit carve-out in which Justice Kennedy, writing for the majority, hinted to the distinction that courts would not analyze cases in "same manner to a case involving speech related to scholarship or teaching" at the university level.[129]

Courts have recognized, under the public employee speech doctrine, the dual role of public university professors as government employees and intellectual contributors to societal discourse worthy of protective interests.[130] Accordingly,

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123 *Id.*

124 *Id.*

125 Students for Fair Admissions (SFFA) v. Harvard, 600 U.S. 181 (2024).

126 See text accompanying *infra* notes 129-30, 143-44, 146, 149, 153, 165-67.

127 Sun, *supra* note 1, at 37–67.

128 See discussion, *infra* notes 129-41.

129 Garcetti v. Ceballos, 547 U.S. 410, 425 (2006). *See*, *e.g.*, Adams v. Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011); Demers v. Austin, 746 F.3d 402 (9th Cir. 2014); Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021); Josephson v. Ganzel, 115 F.4th 771 (6th Cir. 2024).

130 *See* Adams v. Univ. of N.C.-Wilmington; Demers v. Austin; Meriwether v. Hartop; and Josephson v. Ganzel.

when college professors express themselves on matters of public concern like other government employees, they are afforded constitutional protections of free speech under the First Amendment. The ability of professors to engage in matters of public concern in the workplace arguably is greater, based on the intellectual role.[131] This protection reflects an inherent appreciation of the democratic value of an open and diverse intellectual environment in which academic voices may critically engage with public issues, even those topics that touch upon university policies.[132] As such, academic freedom does, in certain instances, operate with a special concern within the First Amendment by safeguarding democratic ideals associated with higher learning.

Federal courts have acknowledged that public university professors hold a distinctive position that necessitates greater autonomy to foster intellectual diversity and encourage public debate. For instance, the Fourth Circuit, in *Adams v. University of North Carolina-Wilmington*, upheld protections for a professor's conservative public writings by recognizing academic freedom as a protection that allows faculty to engage in societal critiques.[133] In that case, the University of North Carolina-Wilmington, a public institution, denied Professor Adams his promotion to full professor after he publicly expressed conservative political views both through his published writings and public speeches. Adams claimed that his scholarly expressions criticized liberal ideologies and policies, and those expressions influenced the university's decision to deny his promotion. Drawing on the public employee speech doctrine, the Fourth Circuit ruled that Professor Adams's scholarly writings and speeches fell within matters of public concern, not internal university matters. The court, given this academic freedom categorization, treated the professor's expressions not as his official duties, but rather under his capacity as a private citizen. By emphasizing the public nature of his expression, it reinforced the principle that academic freedom protects faculty members' engagement in broader societal debates.

The Ninth Circuit, in *Demers v. Austin* also extended consideration to academic freedom.[134] However, in that case, the federal circuit court recognized Justice Kennedy's comments, in dicta, on the potential exception to the *Garcetti* doctrine that speech tied to academic scholarship or teaching likely warrants a different application of the law. The court granted that view—different, yet appropriate for the higher education context—based on the special role of higher education in a democratic society deserving the application of the constitutional protection. In that case, a tenured professor at Washington State University distributed a pamphlet, titled "7-Step Plan," that outlined proposed reforms to the university's structure and mission, including the proposed realignment of the university's College of Communications. The professor claimed that university administrators retaliated

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131 *Id.*

132 This view is consistent with Bollinger, *The Open-Minded Soldier and the University*, *supra* note 25; Bollinger, *The Value and Responsibilities of Academic Freedom*, *supra* note 25; Bollinger & Stone, *supra* note 25.

133 640 F.3d 550 (4th Cir. 2011).

134 746 F.3d 402 (9th Cir. 2014).

against him for distributing this pamphlet through several adverse employment actions. Arguing that his speech was protected under the First Amendment as academic speech related to institutional governance and policy reform, the Ninth Circuit agreed. Like the *Adams* case, this federal appellate court reasoned that faculty members, particularly in public universities, occupy a special position in society that must foster debate and discourse as its major contribution to the social system. Again, the court acknowledged the dicta in *Garcetti* that referenced a potential exception for academic scholarship and teaching. Specifically, the court classified the professor's plan as speech arising to a matter of public concern and falling within the professor's private speech setting, not merely internal employment grievances. Simply put, the court's analysis underscored that academic speech related to teaching and scholarship enjoys heightened protections, as it is integral to fostering intellectual diversity and critical engagement in higher education.

The application of professors' academic freedom through categorized private speech has potentially wide reach. *Meriwether v. Hartop* illustrates that extension of safeguarding faculty expression in academic settings to preserve intellectual diversity and debate.[135] In that case, a professor at Shawnee State University refused to address a transgender student by preferred pronouns during classroom discussions. Citing his deeply held religious beliefs and his classroom dynamics, which employed the Socratic method of engagement, the professor used gender specific titles such as Mr. or Ms. However, university policy mandated that professors use students' preferred pronouns to be respectful and inclusive. The professor refused to comply, and, though he offered alternatives, the university administration mandated the preferred pronoun approach and initiated disciplinary actions against the professor for his failure to comply with the preferred pronoun policy.

The Sixth Circuit ruled in favor of the professor. In determining the outcome, the federal appellate court examined the nature of the speech and determined the professor's classroom interactions involved matters of public concern. The court did not apply *Garcetti* doctrine, but rationalized that academic speech, particularly in the classroom, is distinct from speech made pursuant to official job duties. Still relying on the public employee speech analysis, the court weighed the public concern balancing out the university's legitimate goals.

Similarly, in *Josephson v. Ganzel*, a medical professor at a state university claimed that the university retaliated against him because of his protected speech.[136] While serving on a panel at a conservative think tank gathering, the professor conveyed his medical opinion about the treatment of children with gender dysphoria—specifically, his opposition to drugs (presumably hormone treatments), surgical interventions, and gender-affirming care approaches.[137] His statements diverged significantly from perspectives and practices in his academic department; additionally, they countered the university mission of inclusivity, and there were

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135 992 F.3d 492 (6th Cir. 2021).

136 115 F.4th 771 (6th Cir. 2024).

137 *Id.* at 777–80.

questions about his qualifications to speak on the matter.[138] Suffice it to say, his statements drew wide criticism within the medical school.

According to the professor, the state university allegedly retaliated against him following his panel participation.[139] As evidence of adverse actions, the professor identified how the university demoted him from his position as chief of the Division of Child and Adolescent Psychiatry and Psychology, assigned him additional clinical duties, closely monitored his activities, and ultimately chose not to renew his employment contract. He argued that these adverse actions were taken in response to his public remarks, which he claimed were protected under the First Amendment because he spoke as a private citizen on a matter of public concern.

The Sixth Circuit concluded that the professor's panel delivery addressed a matter of public concern, as gender dysphoria treatment represents a contentious societal and medical issue. In addition, the expressions fell outside the scope of his official duties because the event was off-campus; his travel expenses were covered by the sponsoring group; and his remarks were presented as personal views, not reflective of his role as a medical faculty member at the state university. Moreover, the recognized carve-out for academic freedom—as being beyond the *Garcetti* rule that expressions pursuant to official duties do not warrant free speech protections—played into the court's analysis. The court explained that the professor's speech "stemmed from his scholarship and thus related to scholarship or teaching. As such, [the medical professor] engaged in protected speech because it related to core academic functions."[140]

Although the university argued that the professor's remarks created disharmony among colleagues, jeopardized safety for patients, and could harm the school's reputation and accreditation, the court disagreed. It found no concrete evidence in the record that the professor's speech disrupted clinical operations, affected faculty recruitment or retention, or posed actual risks to accreditation. Further, the court examined the interests of both parties, using the *Pickering* balancing test.[141] It found that the professor's interest in addressing a matter of significant public concern outweighed the university's interest in workplace harmony and operational efficiency.

The *Adams*, *Demers*, *Meriwether*, and *Josephson* decisions highlight the judiciary's role in safeguarding academic freedom against institutional retaliation when faculty speech address matters that generate public interest. This application of academic freedom is especially of great interest on those topics that are controversial or politically charged topics. Indeed, these cases reaffirm the principle that the First Amendment's protections extend to public university

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138 *Id.* at 778. The appellate opinion intimated that as a medical professional, the university had concerns about the professor's "inductive reasoning as unscientific and ask how much he's earned as an expert witness over the last 2 years on sexuality issues," *id.* at 780, and his recommended approaches might be "violating the ethical standards for psychiatry." *Id.* at 778.

139 *Id.* at 777.

140 *Id.* at 786.

141 See *supra*, note 47.

faculty engaging in scholarly and public discourse by recognizing the significance of the professoriate in engaging in core academic functions of teaching, including the proposed realignment of an academic unit to redesign learning, and research via public scholarship.

E. Contemporary Circuit Decisions—Academic Freedom Not Acknowledged

As described above, the public employee speech framework did not always align well with inquiries of academic freedom at the university level. Several cases suggest that applications of *Garcetti*[142] constrained academic freedom when courts acceded to the viewpoint that public university faculty spoke pursuant to their official duties. This perspective highlights a major limitation in the judicial interpretation when courts face deciphering the dual role of professors as both educators and public employees: at times, courts conclude the institutional interests outweigh individual rights in certain contexts.

Notably, four federal cases have illustrated this tension in granting public universities authority to regulate professors' speech in situations involving academic governance and university operations that fail to arise to matters of public concern. In *Renken v. Gregory*, the Seventh Circuit ruled that a professor's complaints about the university's grant administration amounted to an internal grievance, not protected speech, as the expressions were related to his official duties.[143] The professor's criticisms about the academic unit's handling of the grant were directly tied to his professional responsibilities as the principal investigator for a large federal grant. They reflected matters related to the professor's official duties, not his personal expressions or matters of public discourse. Given this analysis, the federal appellate court's decision made clear that speech related to internal administrative processes, even when connected to academic activities, does not arise to expressions insulated by academic freedom. The court's ruling in *Renken* reflects a broader trend of courts prioritizing institutional governance over faculty autonomy in managing operational matters.

This line of reasoning continued in *Gorum v. Sessoms*.[144] In that case, the Third Circuit ruled that a professor's service role of advising students on disciplinary matters or his role as a faculty advisor fell outside of his official teaching duties, but not his professional responsibilities.[145] Accordingly, the court, in applying *Garcetti,* concluded that his expressions in aiding the student fell outside the boundaries of First Amendment protections. The *Gorum* opinion illustrates the court's limitations on the professoriate to speak freely and constrains academic freedom when faculty actions intersect with campus service roles. In essence, service roles—though valuable to the campus environment, including professors in engaging in debate and dialogue—have been reduced to job-related conduct that does not warrant academic freedom via free speech protections.

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

143 541 F.3d 769 (7th Cir. 2008).

144 561 F.3d 179 (3d Cir. 2009).

145 *Id.* at 186.

Further chipping away at professors' academic freedom, the line between a shared governance expectation and public employee's execution of tasks pursuant to official duties led to another outcome unsupportive of academic freedom. *Hong v. Grant* involved a professor at a public university who criticized departmental decisions and administrative practices around instructional impacts onto students and resource allocation.[146] After the professor made these remarks, he alleged that he received negative performance reviews and had been excluded from administrative roles in retaliation for his criticisms.[147] Like the cases mentioned earlier, the Ninth Circuit also applied *Garcetti* with a strict construction, concluding that the professor's speech fell within his official duties so his speech did not fall within a protected area.[148] This case built off the series of *Garcetti* appellate decisions within higher education in which courts minimized the professor's roles to those of a generalist government employee and deferred to the university administration's interests, particularly when faculty speech challenged administrative authority, as opposed to teaching and research activities.

The Seventh Circuit faced a similar challenge involving a professor's criticisms about financial and governance matters. In *Abcarian v. McDonald*, a tenured professor of medicine who also served as both Head of the Department of Surgery at the University of Illinois College of Medicine at Chicago and Service Chief of the Department of Surgery of the University of Illinois Medical Center at Chicago, voiced problems with the university handling of risk management matters, faculty recruitment, compensation, and medical malpractice insurance premiums.[149] Rather than treating the expressions as intellectual discourse over academic governance, the federal appellate court applied the *Garcetti* framework to conclude that the professor's speech fell within the scope of his job responsibilities and was not protected under the First Amendment. The court made clear that the professor "was not merely a staff physician with limited authority. He was, among other things, the Service Chief of the Department of Surgery at the University of Illinois Medical Center at Chicago as well as Head of the Department of Surgery at the University of Illinois College of Medicine at Chicago."[150] Given these roles, the court determined that the professor "had significant authority and responsibility over a wide range of issues affecting the surgical departments at both institutions and therefore had a broader responsibility to speak in the course of his employment obligations."[151] Further, the court observed that the professor never "stepped outside his administrative role to speak as a citizen" and his speech never arose to "matters of public concern" that would make it eligible for First Amendment protections.[152] In short, the court classified the professor's critiques as job-related rather than independent academic expression, and the court concluded that no protected speech was at issue.

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146 403 F. App'x 236 (9th Cir. 2010).

147 *Id.* at 237.

148 *Id.*

149 617 F.3d 931 (7th Cir. 2010).

150 *Id.* at 937.

151 *Id.*

152 *Id.*

Broader concerns about professionalism that failed to demonstrate matters of public concern, but touched on teaching and research-related topics, also led to a federal appellate court declining to afford free speech protections.[153] In *Porter v. Board of Trustees*, a tenured professor at a state university alleged that the university retaliated against him based on three instances in which he had protected speech.[154] First, in a department meeting, he questioned the validity of a proposed diversity-related question on student evaluations, which was later cited in a university report labeling him as "bullying."[155] Second, two years later, he sent an email to colleagues criticizing a faculty hiring process with sarcastic commentary, which he alleged led to administrative backlash.[156] Third, he published a blog post titled "ASHE Has Become a Woke Joke,"[157] which criticized an academic association's focus on social justice topics and sparked social media and internal university backlash.[158] According to Porter, his expressions addressed matters of public concern, but the university disagreed, contending these expressions were either pursuant to his job responsibilities or unrelated to the alleged adverse actions and not protected speech.[159]

In line with the principles established in *Garcetti* and *Pickering*, the federal appellate court in this case applied the rule that speech made by public employees pursuant to their official duties is not protected under the First Amendment unless it is a matter of public concern. In this instance, the court concluded that the professor's expression regarding the diversity question in course evaluations was tied to his professional responsibilities and did not raise a public concern.[160] Also, the court in *Porter* distinguished between speech related to scholarship or teaching and unprofessional conduct, in which the latter lacks protection.[161] This reasoning aligns with the court's determination that the professor's internal email, while critical of a colleague, did not constitute protected speech as it neither addressed policy nor furthered academic discourse—it was simply an internal dispute.[162] Lastly, the court relied on the temporal proximity analysis to conclude that the professor's "Woke Joke" blog post lacked a sufficient connection in time to his removal as one of the substantiated bases for his retaliation claim.[163] In short, the temporal connection lacked the professor's showing of a causal link between the

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153 Porter v. Bd. of Trs. of N.C. State Univ., 72 F.4th 573 (4th Cir. 2023).

154 *Id.* at 581.

155 *Id.* at 578.

156 *Id.*

157 Through his blog, the professor lamented changes that he believed were taking place in the Association for the Study of Higher Education (ASHE), and he commented: "I prefer conferences where 1) the attendees and presenters are smarter than me [sic] and 2) I constantly learn new things. That's why I stopped attending ASHE several years ago . . . ." *Id.* at 578–79.

158 *Id.*

159 *Id.* at 581.

160 *Id.* at 583.

161 *Id.*

162 *Id.* at 583–84.

163 *Id.* at 584.

expression and the alleged adverse action.[164]

Also, teaching-related activities have been treated as falling outside the scope of academic freedom and protections of public employee speech when the activity is framed as a procedural, not substantive, task associated with teaching.[165] Specifically, in *Savage v. Gee*, a university librarian who also held a faculty appointment recommended a book that took a polemical stance on issues such as homosexuality and feminism. Faculty and students complained about the book; later, the librarian alleged adverse employment actions, including disciplinary measures, in retaliation for his book recommendation. The librarian asserted that his book recommendation was protected speech, fell within his right of academic freedom to contribute to the intellectual discourse about book recommendations, and was within his purview of academic decisions. The Sixth Circuit disagreed, ruling that book recommendation was part of the librarian's official duties, and thus the speech was not protected under the First Amendment. In the decision, the court did acknowledge the principle of academic freedom; however, it explained that academic freedom, via the protections under the First Amendment, does not extend to administrative activities like selecting library materials. The court framed this activity as a procedural function, which is not the same as engaging in intellectual discourse within teaching and research activities.

In another teaching-related context, a state university administration received multiple student complaints about a tenured professor's language and conduct during a lecture, with the students describing these behaviors and words as offensive or disruptive to the classroom environment. Complaints included accusations that the professor, who was also a department chair, used inappropriate language and incorporated sexual references into class examples. Considering the complaints, the university removed the professor from her role as department chair, citing concerns over her leadership and ability to maintain a productive educational environment. The professor challenged her removal as department chair, claiming that her classroom speech, which was an extension of her teaching methodology, was protected under the First Amendment, yet the university punished her for her alleged protected speech. The Fifth Circuit disagreed, concluding that the professor's language and conduct were part of her official duties as a college professor.[166] It explained that the university had the right to institutional oversight to maintain the university's educational mission, and it was the university's responsibility to ensure a respectful and effective learning environment. Further, the court applied the *Pickering* balancing test to conclude that the university's interest in preventing disruption and maintaining a productive learning environment outweighed the professor's individual speech rights, if she had any.

As with teaching, cases involving research-related matters do not summarily

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164 However, the court did recognize the possible argument that "Woke Joke" blog could be considered protected speech, but the court's ruling is based on the causal link in which the professor failed to demonstrate that the expression "was a 'but for' cause for any alleged adverse employment action." *Id.* at 585.

165 Savage v. Gee, 665 F.3d 732 (6th Cir. 2012).

166 Buchanan v. Alexander, 919 F.3d 847 (5th Cir. 2019).

lead to academic freedom recognition—even when a matter of public concern may be established. In *Heim v. Daniel*,[167] for example, the Second Circuit ruled a public university may prioritize its hiring decisions, "for purposes of scarce tenure-track positions, a particular methodology."[168] In that case, an adjunct professor at a state university alleged that his candidacy for a tenure-track position was rejected because of his economic framework, which aligned with Keynesian economics, while the department's preferred methodology followed a dynamic stochastic general equilibrium modeling.[169] This case essentially raised the issue of whether a public university's decision not to hire a candidate based on methodological preference violates the academic freedom protections under the First Amendment.[170]

Although the court sided with the university, it found that adjunct professor's academic writings on Keynesian economics arose to matters of public concern.[171] The topic lived in broader debates about economic policy and government intervention.[172] Nonetheless, the court also recognized the university's discretion to prioritize specific methodologies in its hiring decisions.[173] It emphasized that such decisions are central to the university's mission of advancing scholarship and fostering collaboration within academic departments.[174] Thus, in balance, the university's interests in "what skills, expertise, and academic perspectives it wishes to prioritize in its hiring and staffing decisions" outweighed the professor's address of a public concern.[175] In other words, the university's decision to favor an economic modeling approach represented a legitimate academic judgment that the university may exercise, and such a decision is not an infringement on free speech.

F. Proposing a Theoretical Perspective and Legal Framework

Recent events underscore the urgent need for a more robust framework for protecting academic freedom. In 2021, the University of Florida blocked three professors from testifying as expert witnesses in a lawsuit challenging a state voting law, raising concerns about political interference in academic freedom.[176]

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167 81 F.4th 212 (2d Cir. 2023).

168 *Id.* at 234.

169 *Id.* at 215–17.

170 *Id.* at 220–21.

171 *Id.* at 229.

172 *Id.* (expressing how "macroeconomists . . . discuss sweeping questions of economic policy, analyze macroeconomic conditions, and debate the government's proper role in shaping those conditions … [addressing] broad 'public purpose,' targeting matters of political, social, and public policy salience").

173 *Id.* at 230 (interests of the university include the ability to "propel a public university's own 'underlying mission'").

174 *Id.* at 231–32 ("interest in prioritizing tenure candidates whose research would facilitate collaborative synergies with other scholars" in the department and "prioritizing the techniques favored by 'the top macro and general field journals, 'where the Department 'expect[s] our faculty to publish'").

175 *Id.* at 215, 234.

176 Patricia Mazzei, *Florida Professors Sue over State's New Voting Rights Law*, N.Y. Times (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/us/florida-professors-voting-rights-lawsuit.html.

In 2022, a special committee from the AAUP conducted an investigation on faculty academic freedom and concluded that the University of North Carolina System leadership had an "outright disregard for principles of academic governance by campus and system leadership" and the state of academic freedom was in peril citing to the "hostile climate for academic freedom across the system."[177] In 2023, a Texas A&M public health professor was suspended after allegedly criticizing Lieutenant Governor Dan Patrick during a lecture.[178] Similarly, in 2024, public universities in Texas faced pressure from state legislators to dismiss staff associated with a diversity, equity, and inclusion (DEI) initiatives.[179] These incidents, along with other instances of state leaders meddling in research decisions and academic teaching, highlight the growing threat to academic freedom posed by political interference. By clinging to the narrow confines of the public employee speech framework, courts risk enabling such encroachments, further chilling academic discourse and undermining the essential role of professors in a democratic society. The Professional and Legal Complement School, with its emphasis on the societal role of professors in the overall social system and the importance of institutional autonomy, offers a more effective framework for resisting such pressures and safeguarding the intellectual vitality of higher education.

To recap, academic freedom is often analyzed through the framework of public employee speech under the First Amendment. This concerning tendency to apply the public employee speech framework to cases involving professors' academic freedom without fully considering the context and societal role of higher education, especially in terms of professors and the learning mission, draws attention to the judiciary's simplification of higher education's role and contribution to social discourse and learning. Developed initially through *Pickering* and expounded further through *Garcetti*, the framework examines whether a professor's speech is protected as a matter of public concern versus when it is deemed part of one's official duties, the latter which does not afford constitutional protection. In addition, the framework balances the professor's right to free speech against the university's interest in maintaining operational efficiency and workplace harmony.

Nonetheless, as this section demonstrates, recent cases illustrate this duality. For instance, in *Adams*, *Demers*, *Meriwether*, and *Josephson*, courts extended First Amendment protections to academic speech by emphasizing its role in fostering public discourse and intellectual diversity. However, cases like *Gorum*, *Renken*, *Hong*, and *Abcarian* reflect the court's limiting of academic freedom when faculty speech is closely tied to administrative or institutional duties, even if the topics are controversial or relate to broader public concerns. Although the cases reveal a judicial trend toward recognizing academic freedom when speech aligns with teaching or scholarship, casting the cases as procedural or administrative significantly narrows speech protections. The implications are noteworthy as courts weigh institutional

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177 American Association of University Professors, *Governance, Academic Freedom, and Institutional Racism in the UNC System* at 35 (2021), https://unc-ch-aaup.org/assets/governance-academic-freedom-and-institutional-racism-in-the-unc-system.pdf.

178 Colleen Flaherty, *Professors Barred from Florida Lawsuit*, Inside Higher Ed (Aug. 16, 2023).

179 Kate McGee, *Layoffs and Upheaval at Texas Universities Spur Fear as Lawmakers Continue DEI Crackdown*, Tex. Trib. (Apr. 19, 2024), https://www.texastribune.org/2024/04/19/texas-colleges-dei-ban.

autonomy and state interests against the broader societal benefits of protecting academic inquiry.

While this framework may be appropriate for certain public employees, it falls short in capturing the distinct nature of academic freedom and the social role of professors in fostering critical thought, dialogue, and analysis. Indeed, writing for the majority in *Garcetti*, Justice Kennedy drew attention, in dicta, to a possible exception for academic speech tied to teaching or scholarship.[180] Nevertheless, this potential carve-out has been applied somewhat inconsistently in cases asserting academic freedom because the Court declined to definitively address the issue.

We must then change the narrative and our understanding—including the assumptions associated with higher education and professors' roles. The Professional and Legal Complement School offers a more appropriate and comprehensive approach to academic freedom that better addresses the social role associated with higher education and professors. As part of a system, in which higher education contributes not only to learning, but also adds to societal needs in terms of workforce development, new knowledge and discoveries, and intellectual discourse and information processing, the Professional and Legal Complement School recognizes the importance of balancing constitutional protections with professional norms and responsibilities. It emphasizes the vital role of professors in advancing knowledge and contributing to public discourse, while also acknowledging the need for institutional autonomy and disciplinary standards. This approach aligns more closely with the societal expectation that professors engage in critical inquiry and contribute to the betterment of society through their teaching and research, which advances O'Neil's concept of academic freedom as a "canonical value" in American higher education.[181] To that end, academic freedom should enable institutions to protect and retain faculty who are essential to fulfilling their educational and societal missions.

In order to examine the balancing of authority and propose a legal framework that views academic freedom as a societal good, the *Hazelwood* framework offers a doctrinally grounded approach to balancing institutional control and individual expression. Although originally developed for secondary education, its principles of educational mission and pedagogical discretion have been applied to higher education.[182] At its core, *Hazelwood* acknowledges the authority of educational

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180 Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

181 Robert O'Neil, *Academic Freedom as a "Canonical Value,"* 76 Soc. Res.: An Int'l Q. 437, 448–49 (2009).

182 Critics of this legal doctrine applying to higher education have argued that *Hazelwood* is ill-suited for this setting. *See, e.g.*, Mark J. Fiore, Note, *Trampling the "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. Pa. L. Rev. 1915, 1917 (2002) (arguing that applying Hazelwood to higher education is "illogical" and undermines the recognition of colleges as "marketplaces of ideas," where freedom of expression and diverse viewpoints are essential to their educational mission); Jessica B. Lyons, Note, *Defining Freedom of the College Press After Hosty v. Carter*, 59 Vand. L. Rev. 1771, 1786–87 (2006) (positing that Hosty should not have applied Hazelwood because it fails to account for the significant differences between high school and college environments, particularly regarding student maturity and the academic mission of universities); Laura Merritt, *How the Hosty Court Muddled First Amendment Protections by Misapplying Hazelwood to University Student Speech*, 33 J.C. & U.L. 473, 474–75 (2007) (contending that the *Hosty* court's flawed forum analysis conflates distinct standards for speech control in high schools versus higher

institutions to regulate speech tied to institutional functions, provided such regulation is "reasonably related to legitimate pedagogical concerns."[183] While PK-12 schools have more leeway in dictating a structured learning environment and overseeing curricular aspects, higher education institutions have justification, too. Universities are designed to function in our society as forums for intellectual exploration and rigorous debate. The key distinction between PK12 education and higher education lies in the broader societal role that universities play in cultivating critical thinking, advancing knowledge, and contributing to democratic discourse. But this societal role calls for justified professional autonomy through academic freedom over learning environments and decisions that are reasonably related to legitimate pedagogical concerns.

Applied to the higher education context, *Hazelwood* stands for deciding whether state restrictions are appropriate for academically centered activities such as teaching and research. Since *Garcetti* left the door open about how to address professors' academic freedom, the doctrinal rules suggest that *Hazelwood* serves as the best available framework. It generally resonates within the higher education context, particularly when state legislatures seek to regulate curriculum and research as illustrated earlier in this section. Playing out the situations framed at the beginning of this section, the *Hazelwood* framework, when interpreted through the lens of the Professional and Legal Complement School, provides a doctrinally grounded method for addressing contemporary threats to academic freedom. Recent events—such as the suspension of a Texas A&M professor for criticizing a public official, the pressure on Texas universities to dismantle DEI programs, and the University of Florida's restriction on faculty testimony—expose the limitations of existing public employee speech doctrine under *Garcetti*. These incidents illustrate how the public employee framework fails to account for the societal role of faculty in higher education as educators, who in addition to their responsibilities for educating college students, also participate in the social role

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education, and that effect created a chilling effect on university student media and misinterpreting the precedent set by *Hazelwood*). Broadly speaking, these critics posit that PK12 education, where institutional control over speech is more pronounced, is where this doctrine should reside and not extended to higher education. These scholars point to cases like *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc).

In *Hosty*, the court extended *Hazelwood* to a university newspaper case. This case, for some scholars, raised concerns about administrative overreach and the erosion of student and faculty autonomy. Critics also contend that *Hazelwood* risks being weaponized to justify censorship rather than to protect academic freedom, particularly when state actors seek to enforce ideological conformity.

We do not summarily disagree with some of these critics. In PK12 education, the relationship between the school administration and student is different, and it calls for more directed oversight of students' learning and school engagement. Nonetheless, the principles from *Hazelwood* are still valuable when considering the interferences of outside actors who are not educational experts or qualified educators. In both cases, whether in PK12 or higher education, the delegated authority to make reasonable rules over speech defaults to the educational authority, not someone who is not qualified—whether it be students or state legislators. That critical distinction is what we see here and argue for the application of *Hazelwood* when instances about the academic enterprise invade an education environment by interfering with the educational experts or qualified educators' exercise of the environment for which they were granted authority—which is academic freedom.

183 Hazelwood v. Kuhlmeier, 484 U.S. 260, at 273 (1988).

of workforce development, new knowledge and discoveries, and intellectual discourse and information processing.

This discussion, especially in terms of using *Hazelwood* as the operative framework, also demonstrates the appropriateness of the Professional and Legal Complement School in addressing the "vise gripping" effects of such laws. Notably, the principles articulated in *Hazelwood* align with the Professional and Legal Complement School, which emphasizes that academic freedom serves not only as an individual right but also as a collective societal imperative. The pedagogical discretion framework in *Hazelwood* can be reframed in higher education to assess whether restrictions on speech and academic practices genuinely further the mission of intellectual growth or impose ideologically driven constraints. This adaptation positions *Hazelwood* as a useful doctrinal framework when evaluating state interference with higher education such as the anti-DEI legislation, which often frames its messaging deceptively as serving educational neutrality but instead undermines the openness and diversity critical to the university's function.

G. Summary

Drawing on Bollinger's democratic rationale and O'Neil's emphasis on institutional autonomy, the next part offers a detailed examination of how judicial interpretations can counteract or exacerbate legislative threats to academic freedom. As the next part illustrates, state authority to dictate what is expressed through public colleges and universities is a current concern. State legislatures are increasingly targeting DEI initiatives by limiting what public higher education may say with respect to teaching, research, and other programmatic offerings involving DEI. Because these laws often limit what professors can teach or research, their actions, as state actors, raise questions about the intersection of academic freedom and state authority. The next part applies the case law to state interventions in higher education. It examines how judicial interpretations of public employee speech frameworks shape the modern legal landscape for academic freedom in the context of anti-DEI laws.

III. ANTI-DEI LEGISLATION

Although much of the early anti-DEI legislation was focused on PK-12 public school curriculum,[184] it has since expanded increasingly into higher education.[185]

184 Mississippi SB 2538, for example, was the first bill introduced at the state level that sought to extend Trump's executive orders to the K12 classroom, with the explicit purpose of intending to "prevent state funding from being used by elementary and secondary schools to teach the 1619 Project curriculum; to provide that elementary and secondary schools that teach the 1619 Project curriculum shall receive reduced Mississippi adequate education program funds by twenty-five percent." S.B. 2538, 2021 Leg., Reg. Sess. (Miss. 2021); *See also* H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022), https://www.flsenate.gov/Session/Bill/2022/1557 and H.B. 1069, 2023 Leg., Reg. Sess. (Fla. 2023), https://legiscan.com/FL/bill/H1069/2023.

185 PEN America, which has been tracking anti-DEI legislation across P20 education for several years, explains that "lawmakers have largely shifted their focus [from race related topics in K12 education] to curricular and governance restrictions—such as bans on diversity, equity, and inclusion (DEI) initiatives at universities—rather than classroom instruction gag orders, in part as a response to successful legal action in two cases in Florida." PEN America, *America's Censored Classrooms* (2023), https://pen.org/report/americas-censored-classrooms-2023/).

The AAUP has argued recently[186] that the growth of this legislation is a systematic effort by well-financed think tanks, such as the Heritage Foundation, the American Legislative Exchange Council (ALEC), and the Center for Renewing America (CRA), to push ideologies that counter those espoused by the resurgence of the Black Lives Matter movement in the early 2020s.[187] The efforts of these groups are evident in the rapid proliferation of legislation in Florida, where seven key anti-DEI bills have been signed into law since 2021 (see Figure 1). The timeline shows each bill, which was eventually enacted into law, identified by its predominant feature, as many of the bills touch on multiple issues within academic freedom. This reflects the comprehensive, or vise-gripping, approach.[188]

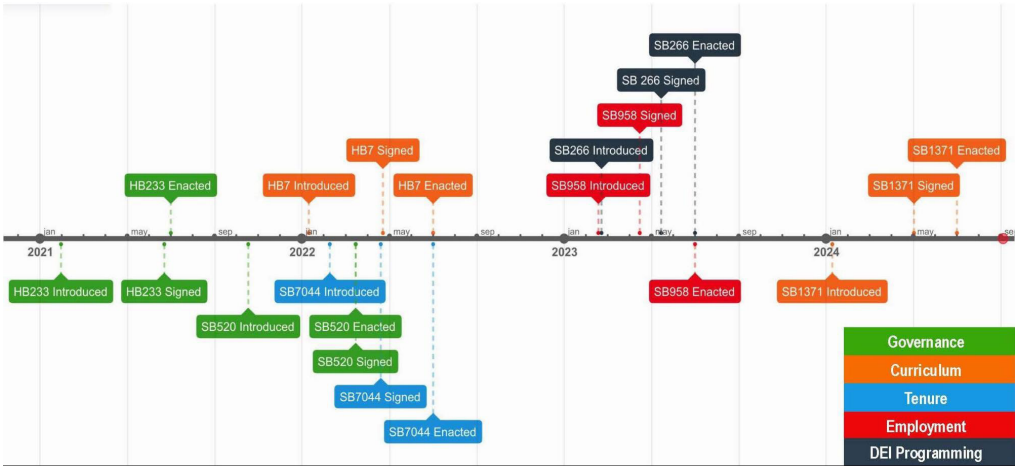

Figure 1: Timeline of Florida Legislation.

Such laws have a vise grip on higher education in Florida and foreshadow potential legislation in other states across the nation. Rather than simply restricting or eliminating DEI programming, as the name "anti-DEI" suggests, these laws seek to strengthen the state's power in controlling public university voices. For example, Florida's Individual Freedom Act (IFA), section 1000.05(4), prohibits university professors from expressing certain viewpoints during classroom instruction.[189]

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186 Gene Nichol, Political Interference with Academic Freedom and the Free Speech of Public Universities, Am. Ass'n of Univ. Professors (Fall 2019), https://www.aaup.org/article/political-interference-academic-freedom-and-free-speech-public-universities

187 AAUP's argument counters the view frequently expressed in the media that views this shift in legislature priorities as being driven by culture wars and political polarization. *See*, *e.g.*, Steven Mintz, *Academic Freedom Under Attack*, Inside Higher Ed (May 18, 2021), https://www.insidehighered.com/blogs/higher-ed-gamma/academic-freedom-under-attack). Yet, as legal scholar Peter Byrne explains, "Since the late 1980s, the academic authority of colleges and universities has been subjected to continuing blasts of criticism. Culture warriors portray decayed institutions where sixties radicals have seized control and terrorize students and the few remaining honest faculty with demands for political conformity or bewilder them with incomprehensible theorizing." J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L., 79, 79, (2004). Given the long-standing nature of these culture wars, we agree with AAUP that they cannot be the root cause of this legislative shift.

188 For example, SB 266 touched on employment, governance, curriculum, and tenure in addition to DEI programming.

189 Fla. Stat. § 1000.05(4) (2024).

Similarly, in Texas, the initial version of SB 17 contained language, now deleted, that would have effectively created a blacklist of university faculty and staff who violated the bill's anti-DEI programming provisions.[190] Both examples contain echoes of the McCarthy era and present substantial threats to the protections of academic freedom.

Ironically, this legislation asserts that states need to prevent faculty from indoctrinating students, while the legislation itself is pushing an ideological agenda and seeking to regulate state employees (i.e., faculty) as the mouthpiece for this viewpoint through controlling curriculum and faculty speech. At the same time, such legislation is creating an atmosphere of suspicion and distrust[191] through weakening tenure protections, dictating hiring practices, and eroding academic governance. This multifaceted approach creates what we refer to as a vise—just as a carpenter's vise exerts pressure and restricts movement on woodworking projects, these laws work in tandem to pressure faculty and restrict their behaviors in ways that align with the legislature's expressed ideology. Taken together, they show concerted efforts to circumvent peer review and undermine expertise through attempts at suppressing faculty voices, weakening tenure, inhibiting academic governance, and rewriting curriculum. In this part, we review the Florida legislation according to the predominant aspect of higher education it targets: curriculum, DEI programming, employment, tenure, and governance.

A. Curriculum

Laws that target curriculum seek to insert control over what can, and more frequently cannot, be taught in the college classroom, and thus inherently also control faculty speech. Florida provides a well-known illustration in Florida Statutes section 1000.05(4), or the IFA, which contains substantive provisions to prohibit instruction that "espouses, promotes, advances, inculcates, or compels such student or employee to believe" concepts related to "race, color, national origin, or sex." These eight concepts[192] contain much of the same language used

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190 Tex. S.B. 17, 88th Leg., R.S. (2023), https://capitol.texas.gov/tlodocs/88R/billtext/pdf/SB00017I.pdf.

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

192 Specifically, these eight concepts are (1) Members of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex. (2) A person, by virtue of his or her race, color, national origin, or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously. (3) A person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex. (4) Members of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex. (5) A person, by virtue of his or her race, color, national origin, or sex, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex. (6) A person, by virtue of his or her race, color, national origin, or sex, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion. (7) A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex. (8) Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, national origin, or sex to

in Trump's Executive Order 13950 when defining divisive concepts. For example, the first component of Trump's definition of divisive concepts states that "one race or sex is inherently superior to another race or sex,"[193] while the Florida IFA's first prohibited concept is "Members of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex."[194] Other pertinent elements of this law include a savings clause that permits instruction on the specified concepts if presented objectively and without endorsement, an exclusive remedy provision limiting liability to the institution, a regulation requiring each university to adopt a policy prohibiting discrimination in training or instruction that promotes or compels belief in the eight specified concepts, and a delegation of authority to designate a final decision-maker.[195]

Language similar to that of the IFA, and thus similar to Trump's executive order, further appears in other Florida legislation such as section1004.04(2)(e)(1) and (2) and section1004.85(2)(a)(6). Both of these also restrict curriculum and specify that instruction must not "distort significant historical events or include a curriculum or instruction that teaches identity politics, violates § 1000.05, or is based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities."[196] These latter two laws deal directly with teacher preparation programs, and these rules highlight the relationship between curricular control at the secondary and postsecondary levels.

While the laws around state exercise of curriculum control at the PK12 level arguably may be justified, these laws also result in regulations that extend this control even further into college curriculum and classroom learning. For instance, in Florida, the State Board of Education exerted this control through removing "Principles of Sociology" from the general education core courses across the Florida College System and replacing it with a course on American history. In the press release for this change, the board explained that "The aim is to provide students with an accurate and factual account of the nation's past, rather than exposing them to radical woke ideologies, which had become commonplace in the now replaced course."[197] The press release did not specify aspects of the sociology course that contained "radical woke ideologies," nor did it address how the change in discipline accomplishes the same learning objectives as the previous course.

Both examples of curricular control illustrate how this legislation is attacking academic freedom through reducing faculty control and questioning their ability to provide a comprehensive education that does not espouse any single ideological

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oppress members of another race, color, national origin, or sex.

193 Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020), https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/.

194 *Id.*

195 *Id*.

196 Fla. Stat. §1004.04(2)(e)(1) and (2) (2024) and Fla. Stat. § 1004.85 (2024).

197 Florida Dep't of Educ., *State Board of Education Passes Rule to Permanently Prohibit DEI in the Florida College System* (Sept. 13, 2023), https://www.fldoe.org/newsroom/latest-news/state-board-of-education-passes-rule-to-permanently-prohibit-dei-in-the-florida-college-system.stml.

agenda. In this way, such laws seek to undermine faculty expertise and enable political appointees to gain control over what is taught in the college classroom.

B. DEI Programming

Similar to curricular control, laws that restrict or prohibit DEI programming at universities show how legislatures are attempting to diminish institutional autonomy. This category covers laws that involve programming associated with DEI, including DEI offices and staff and either mandatory or voluntary DEI training. Other classification systems also include diversity statements and hiring preferences in this category,[198] but we believe that those prohibitions more directly affect employment than they do DEI, and thus we discuss these latter two issues in a subsequent section. Some of these laws seek to control curriculum through concepts derived from the divisive concepts definition. Florida Statutes sections 760.1[199] and 1000.05(4),[200] for example, both specify that their prohibitions apply to training or instruction, thereby affecting both curriculum and DEI training that would happen outside of the classroom.

At times there are also expenditure prohibitions that strengthen the laws restricting DEI. In addition to section1000.05(4), Florida has also passed section 1004.06(2), which states that: "A Florida College System institution, state university, Florida College System institution direct-support organization, or state university direct-support organization may not expend any state or federal funds to promote, support, or maintain any programs or campus activities that: (a) Violates 1000.05; or (b) Advocate for diversity, equity, and inclusion, or promote or engage in political or social activism, as defined by rules of the State Board of Education and regulations of the Board of Governors."[201] Florida is further limiting DEI training through including section1000.05 in the language for section1004.06 and thus preventing state or federal funds to be spent on these trainings. At the same time, state officials are extending section1000.05 to also prohibit spending on DEI programming that may not be classified as instruction or training through the inclusion of rather vague advocacy and promotion language.

Prohibitions against DEI training show how this legislation is attempting to paint higher education as espousing an ideological agenda, rather than adopting practices to promote success among historically disadvantaged populations. It may be considered to undermine the expertise of faculty and staff who develop this programming for students based on best practices in their disciplines. Without such supports, universities risk not meeting the needs of their students; thus, it is ultimately the students who are harmed by such restrictive legislation.

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198 The *Chronicle of Higher Education* groups these types of laws together in their anti-DEI legislation tracker. As of this writing, this tracker shows that eighty-six such bills have been introduced since 2023, and of those fourteen have become law. *See* Chronicle Staff, DEI Legislation Tracker, Chron. Higher. Educ. (Aug 30, 2023), https://www.chronicle.com/article/here-are-the-states-where-lawmakers-are-seeking-to-ban-colleges-dei-efforts.

199 Fla. Stat. § 760.10(8)(a) (2024).

200 Fla. Stat. § 1000.05(4) (2024).

201 Fla. Stat. § 1004.06 (2024).

C. Employment

Just as some laws cover both DEI training and instruction, they may also touch on employment. Florida's section 760.10(8)(a), in addition to prohibiting training or instruction that espouses or promotes ideas related to the divisive concepts definition, also ties these prohibitions to the employment of faculty and staff. The law prohibits "subjecting any individual, as a condition of employment, membership, certification, licensing, credentialing, or passing an examination" to training or instruction that promotes the ideas related to the divisive concepts previously discussed in curriculum and DEI training.[202] Specifying that employees cannot be subject to mandatory DEI training further strengthens the prohibition against DEI ideas and makes it more difficult for institutions to accomplish the goals of DEI training in other ways.

Another law that affects employment prohibits universities from requiring diversity statements from potential employees. Requiring such statements has become a common practice in recent years when hiring new faculty members, as these statements enable hiring committees to understand how the potential faculty member will work with their student populations. However, Florida's section1001.741 prohibits universities from requiring "any statement, pledge, or oath other than to uphold general and federal law, the United States Constitution, and the State Constitution as a part of any admissions, hiring, employment, promotion, tenure, disciplinary, or evaluation process."[203] The breadth of this language to include *any* statement covers not only diversity statements, but also the wide variety of statements that are included in the faculty hiring process such as teaching philosophies, research statements, and administrative philosophies. Further, it specifies that statements may not be included in admissions and thus prevents universities from requiring personal statements from prospective students, which are commonly used to evaluate whether students will be successful at the institution (e.g., when applying to graduate school). In short, this law goes far beyond diversity statements to exert state control over how universities may structure their admissions, hiring, promotions, and disciplinary processes, all of which are key aspects to university operations.

Restricting which statements universities can require from employees and students in varying contexts substantially encroaches on institutional autonomy and thereby exerts state control over faculty behavior. Laws that prevent DEI training from being required as part of employment prevents universities from developing disciplinary policies that might otherwise mandate training for employees who exhibit a lack of respect for colleagues and students who differ from themselves or otherwise demonstrate a need for additional training in related areas. Likewise, any law that dictates what may be required in admissions, hiring, promotions, tenure, and disciplinary procedures reduces autonomy and undermines expertise among faculty and administrators who require these statements to properly evaluate candidates and serve their students and employees.

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202 Florida Stat. § 760.10(8)(a).

203 Fla. Stat. § 1001.741 (2024).

D. Tenure

Tenure is a foundational protection of academic freedom, as it shields faculty from retribution based on their scholarly pursuits. Yet, like ongoing culture wars,[204] legal attacks on tenure have been a long-standing reality in political conflicts with higher education for several decades.[205] Similar motivations seem to appear in recent tenure bills associated with anti-DEI legislation, such as in Florida's section1001.706.[206] This law requires the Board of Governors at public colleges and universities across the state to adopt regulations for post-tenure review of faculty members every five years. While post-tenure review policies are not uncommon, and a recent survey indicated that 67.6% of public institutions maintain some form of a post-tenure review program,[207] the policy becomes more concerning when understood in tandem with other legislation. That is, the vague requirements of section 1001.706 may enable boards of governors to discipline faculty for perceived infringements on other recent laws, such as the Florida IFA. Florida's section 1001.706 further specifies that the post-tenure review regulations must include "improvement plans and consequences for underperformance,"[208] which vaguely connects disciplinary actions to post-tenure reviews perceived as inadequate by the Board. Although this law does not specify that faculty members may be terminated based on these reviews, it also does not specify that they may not. AAUP offers guidance on post-tenure review policies that notes that "the possibility that reviews can result in termination raise concerns about [the policy's] conformance with AAUP standards."[209]

In these ways, post-tenure review policies such as what is seen in section1001.706 undermine institutional autonomy. Forcing boards of governors to create regulations around post-tenure review removes the ability of an individual board to decide the best course of action for its own institution. While the law provides some flexibility in what exactly the policy dictates, its inclusion of vague language around "consequences for underperformance" raises questions about how far the

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204 *See. e.g.*, Gene Nichol, Political Interference with Academic Freedom and the Free Speech of Public Universities, Am. Ass'n of Univ. Professors (Fall 2019), https://www.aaup.org/article/political-interference-academic-freedom-and-free-speech-public-universities.

205 In 1958, the importance of tenure was questioned by the Supreme Court of South Dakota: "The exact meaning and intent of this so-called tenure policy eludes us. Its vaporous objectives, purposes, and procedures are lost in a fog of nebulous verbiage." Worzella v. Board of Regents, 77 S.D. 447, 449 (S.D. 1958). More recently, research examining state-level legislation aimed at eliminating or weakening tenure protections between 2012 and 2022 found that this legislation was directly related to political and social conditions, rather than economic concerns, "suggesting that efforts to undermine faculty tenure reflected underlying mistrust in higher education rather than efforts to cope with financial uncertainty." B.J. Taylor & K. Watts, *Tenure Bans: An Exploratory Study of State Legislation Proposing to Eliminate Faculty Tenure, 2012–2022*, Rev. Higher Educ. 1, 1 (2024).

206 Fla. Stat. § 1001.706 (2024), http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=1000-1099/1001/Sections/1001.706.html.

207 AAUP, *2022 AAUP Survey of Tenure Practices* (May, 2022), https://www.aaup.org/report/2022-aaup-survey-tenure-practices.

208 Fla. Stat. § 1001.706 (2024), http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=1000-1099/1001/Sections/1001.706.html.

209 AAUP, *2022 AAUP Survey of Tenure Practices* (May, 2022), https://www.aaup.org/report/2022-aaup-survey-tenure-practices.

regulations implemented by the boards might go in weakening tenure through these post-tenure reviews every five years.

E. Governance

The final category of legislation that we review encompasses a variety of laws that seek to erode academic governance through reducing institutional autonomy and mandating that institutions create policies that adhere to the desired agenda espoused in much anti-DEI legislation. In some cases, these laws respond to current events. Florida's section 1000.05(8) is a relatively direct response to a rise in campus protests related to the Israeli–Palestinian conflict and requires institutions to implement policies that, among other things, mandate disciplinary actions for those engaged in behavior that is deemed antisemitic.[210] Other laws that impede on academic governance seek to dictate which accreditors universities may use. Florida's section 1008.47[211] requires the Board of Governors to create a list of acceptable accreditors that universities must pick from in the year following reaffirmation or five-year review with their current accreditor. The law provides no guidance on criteria for creating this list, but the language of the bill from which this law was derived may be instructive for helping to understand its intent. Specifically, Florida's Senate Bill 7044[212] prohibited universities from using the same accreditor in consecutive accreditation cycles, which seems like a direct effort to undermine the authority and power of the Southern Association of Colleges and Schools Commission on Colleges, the regional accreditor for southern states, including Florida. This authority has been targeted by politicians such as Trump, who declared that he would fire accrediting agencies because they are "dominated by Marxist maniacs and lunatics,"[213] which again illustrates the degree to which this legislation can be traced to political questioning of the ideology and authority of faculty and administrators.

Attempts to undermine governance can further be seen in legislation focused on "intellectual freedom and viewpoint diversity." In Florida, this legislation has manifested in two laws, sections 1001.03(20) and 1001.706(13), that require public universities to conduct annual surveys of the viewpoints of the college community, including students, faculty, and staff. According to the laws, "'Intellectual freedom and viewpoint diversity' means the exposure of students, faculty, and staff to, and the encouragement of their exploration of, a variety of ideological and political perspectives."[214] On the surface, these laws may appear beneficial to the campus and aligned with DEI objectives, as the latter largely seeks to make sure all students feel accepted for their identities and beliefs. In this way, uncovering the experiences of students with viewpoints that differ from the predominant views

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210 Fla. Stat. § 1000.05 (2024).

211 Fla. Stat. § 1008.47 (2024).

212 S.B. 7044, 2024 Leg., Reg. Sess. (Fla. 2024), https://www.flsenate.gov/Session/Bill/2024/7044.

213 Scott Jaschik, *Trump Vows to Fire Accreditors*, Inside Higher Ed (May 3, 2023), https://www.insidehighered.com/news/quick-takes/2023/05/03/trump-vows-fire-accreditors.

214 Fla. Stat. § 1001.03 (2024) and Fla. Stat. § 1001.706 (2024).

on campus could help faculty and staff establish policies and practices that better include and accept all members of the campus community. However, it does not seem that these surveys are being implemented in ways that advance these goals, and response rates indicate that past distributions have been largely ignored by all community groups (i.e., students, faculty, and staff).[215] Those who did respond tended to dispel notions that campuses were biased toward liberal ideologies or unaccepting of conservative viewpoints.[216] These laws encroach on academic governance through both assessment and personnel policies, again undermining institutional autonomy.

IV. LITIGATION ON THE FLORIDA LAW

The Eleventh Circuit has affirmed the halting of the Florida's "Stop W.O.K.E." Act, which was later renamed the IFA and stands as the legislation in question.[217] In *Pernell v. Florida Board of Governors*, public university professors and students challenged the constitutionality of the law.[218] Specifically, the plaintiffs contested the reach of the law on academic freedom, via the professors' protected speech rights.[219] The plaintiffs argued that the IFA impermissibly prohibited public university professors from endorsing, advancing, or compelling belief in certain concepts related to race and gender, including systemic racism and privilege.[220] As noted earlier, the law had a savings clause, which permitted such expressions when the concepts were presented "objectively" and without endorsement.[221] However, the law also articulated penalties; failure to comply with the law could result in disciplinary actions against professors and funding cuts to universities. The delegation of responsibilities fell on the university to adhere and enforce.

Building off the academic freedom cases, which draw on the *Pickering* and *Garcetti* line of authority, the professors in this case argued that the IFA violated their First Amendment rights by chilling their ability to engage in critical discussions and academic inquiry.[222] Also, the students in this case contended that the law improperly restricted their right to receive information, which stifles the marketplace of ideas essential to higher education. These arguments raised the legal question: Does the IFA's prohibition on the identified classroom speech constitute unconstitutional viewpoint discrimination and violate the First and Fourteenth Amendments' protections of free speech and academic freedom?

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215 Florida Board of Governors, *State University System of Florida Faculty Survey Report*, 5 (Aug. 16, 2022), https://www.flbog.edu/wp-content/uploads/2022/08/SUS_IF-SURVEY_REPORT_DRAFT__2022-08-16.pdf.

216 *Id*. at 6.

217 Pernell v. Fla. Bd. of Governors, Civ. No. No. 22-13992-J, No. 22-13994-J, 2023 WL 2543659, at *1 (Mar. 16, 2023) (denying state's motion to stay injunction pending the appeal, which has the effect of keeping in force the district court decision, so the focus of this section will center on that decision).

218 *Id.*; *see also* Pernell v. Fla. Bd. of Governors, 641 F. Supp. 3d 1218 (N.D. Fla. 2022).

219 *Pernell*, 641 F. Supp. 3d at 1230–33.

220 *Id.* at 1282–83 and n.59.

221 *Id.* at 1231.

222 *Id*. at 1233–35.

As the district court explained, the law in this area is well established. In acknowledging the effects of academic freedom in its application of the First Amendment, the district court examined "the unique role public universities play under the First Amendment and whether the State may permissibly enforce viewpoint-based restrictions on educators' classroom speech."[223] Presenting a crucial caveat, the court said, "To be clear, though, the Supreme Court has never definitively proclaimed that 'academic freedom' is a stand-alone right protected by the First Amendment."[224] Nevertheless, the Eleventh Circuit "still recognized that academic freedom remains an important interest to consider when analyzing university professors' First Amendment claims."[225] To those ends, "the state may not act as though professors or students 'shed their constitutional rights to freedom of speech or expression at the [university] gate.'"[226] Also, drawing on statements from foundational cases, the district court emphasized that the First Amendment does not "tolerate laws that cast a pall of orthodoxy over the classroom."[227]

The State relied heavily on the *Garcetti* case, with its "main argument—that the First Amendment does not protect professors' in-class speech" deemed faulty because, according to the court, the state made the leap of attributing the "the professors' speech to the university's speech via *Garcetti*."[228] Yet, as this article established in Part II, the U.S. Supreme Court in *Garcetti* declined to resolve the limits of government speech "involving speech related to scholarship or teaching," but its note clearly recognized public college professors' work as distinct among typical government employees because professors occupy a special position in society that must foster debate and discourse without fear of retribution or other chilling effects.[229] The district court interpreted the State's arguments as "cast[ing] the Supreme Court's clear constitutional concerns aside," and it suggested that "if *Garcetti* did not apply to curricular speech, it would invite 'judicial intervention' that is 'inconsistent with sound principles of federalism.'"[230] Nonetheless, the interpretation fails to apply the special considerations that professors maintain through academic freedom and the university environment, which tries to foster as an academic marketplace of ideas. Instead, the State's logic would create judicial

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223 *Id.* at 1236.

224 *Id.*

225 *Id.* at 1236–37.

226 *Id.* at 1237 (quoting, with some modifications, from *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021), which draws on *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969)).

227 *Id.* (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

228 *Id.* at 1239.

229 Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

230 Pernell v. Fla. Bd. of Governors, 641 F. Supp. 3d 1218, 1240 (N.D. Fla. 2022). (quoting *Garcetti*, 547 U.S. at 423). The State relied on two circuit court decisions *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477, 479 (7th Cir. 2007) and *Evans-Marshall v. Board of Education of the Tipp City Exempted Village School District*, 624 F.3d 332 (6th Cir. 2010) as the basis to limit teacher academic freedom, consistent with *Garcetti*, at the elementary and high school settings. This court distinguishes between the school-level and college-level learning environments as the *Garcetti* dicta only made reference to placing special consideration of teaching and research at the college level.

intervention into the scholarly and public discourse, which professors are charged to execute.

Given these considerations, to analyze this case, the district court adopted a framework that combined the foundations of public employee speech and education speech, namely, it recognized the limitations of the public employee speech doctrine onto scholarship and teaching, then nested an analysis drawing on *Hazelwood* to examine the legitimate pedagogical interest.[231] The Eleventh Circuit already had precedent in *Bishop v. Aronov* to take this educational speech approach.[232] *Bishop* essentially reaffirmed the application of *Hazelwood* as a doctrinal source to examine the state's authority over college instruction.[233] Although *Bishop* preceded *Garcetti*, the district court in *Pernell* recognized that neither the State nor the courts have produced any persuasive evidence "holding that *Garcetti* applies to university professors' in-class speech such that it amounts to government speech outside the First Amendment's protection."[234] The district court observed "two things [that] are clear."[235] First, "the First Amendment protects university professors' in-class speech, and [second, in the Eleventh Circuit,] *Bishop* remains the binding authority guiding this Court's analysis of Plaintiffs' speech claims."[236]

If the First Amendment protects university professors' in-class speech, how does the Florida law either support or infringe on that right? Among the findings of the case, the district court acknowledged the "State of Florida's blatant viewpoint-based restrictions."[237] The First Amendment prohibits both content and viewpoint-based restrictions on speech absent a showing of strict scrutiny standard. That is, the law and related policies must serve a compelling government interest through narrowly tailored means. In this case, the district court, along with the federal appellate court affirming, unequivocally found the IFA to impose viewpoint-based restrictions on classroom speech. The district court opinion explained: "Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination,'" which is impermissible without meeting the strict scrutiny standard.[238] For instance, at oral argument, the state conceded that affirmative action or race-conscious policies would fall within one of the prohibited expressions included in the law as conveying that "[a] person, by virtue of his or her race, color, national origin, or sex should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion."[239] In other words, discussions around an important social

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231 *Pernell*, 641 F. Supp. 3d at 1243.

232 926 F.2d 1066 (11th Cir. 1991).

233 *Id.* at 1071, 1073–74.

234 641 F. Supp. 3d at 1241.

235 *Id.* at 1243.

236 *Id.*

237 *Id.* at 1272.

238 *Id.* at 1236 (citing Reed v. Town of Gilbert, Ariz., 576 U.S. 155 (2015)).

239 *Id.* at 1233. The excerpt is covered under the IFA. Fla. Stat. § 1000.05(4)(a)(6) (2024). As the

and political topic that has been debated for many years in policy-making circles would be prohibited from discussion in college classrooms.

The state's interference with viewpoint discrimination of professors' speech is different from the state's regulatory authority over curriculum.[240] "With respect to regulating in-class speech consistent with constitutional safeguards, this Court again pauses to distinguish between the State's valid exercise in prescribing a university's curriculum and the State's asserted interest in prohibiting educators from expressing certain viewpoints about the content of that curriculum."[241] The court points to authority in which the "Supreme Court has long recognized that '[a] university's mission is education,' and it 'has never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.'"[242] This discussion clarifies the permissible parameters under the law showing how "universities may generally make content-based decisions as to how best to allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"[243]

Functioning within the guidelines of established First Amendment law, "[b] oth sides recognized this authority of the State to prescribe the content of its universities' curriculum. … Of course[,] the State has a say in which courses are taught at its public universities."[244] Nonetheless, the university's authority over curriculum has some limits. That is, "simply because the State of Florida has great flexibility in setting curriculum, it cannot impose its own orthodoxy of viewpoint about the content it allowed within university classrooms."[245] Even if, as the state asserted, the IFA statute addresses "the pedagogical concern of reducing racism or prohibiting racial discrimination as an extension of federal law under Title IX" and such authority is permissible under the law as an acceptable restriction on

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district court opinion noted, the state, "[w]hen asked directly whether concept six is 'affirmative action by any other name,' defense counsel answered, unequivocally, 'Your Honor, yes.' Thus, Defendants assert the idea of affirmative action is so 'repugnant' that instructors can no longer express approval of affirmative action as an idea worthy of merit during class instruction." *Pernell*, 641 F. Supp. 3d at 1233.

240 Rather than parsing out the various examples and rules around when states may (and may not) dictate curriculum (e.g., States may, without exercising viewpoint discrimination, require public colleges and universities to align their applicable academic program to professional standards), in this article, we focus on the broad applications of academic freedom, paying particular attention to the college teaching and learning context (e.g., with students) and the public engagement setting (e.g., with an audience seeking to learn about an area in the professor's expertise).

241 *Pernell*, 641 F. Supp. 3d . at 1237.

242 *Id.* (quoting Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981)).

243 *Id.* (quoting *Widmar*, 454 U.S. at 278) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)).

244 *Id.* at 1237–38. At the same time, the court noted Justice Stewart's concurrence in *Epperson v. Arkansas*, 393 U.S. 97 (1968), where he wrote, "A State is entirely free, for example, to decide that the only foreign language to be taught in its public school system shall be Spanish. But would a State be constitutionally free to punish a teacher for letting his students know what other languages are also spoken in the world? I think not." *Id.* at 116 (Stewart, J., concurring in result).

245 *Pernell*, 641 F. Supp. 3d at 1273.

content,[246] the court determined that "the restriction the State of Florida imposes upon its public university employees—a viewpoint-discriminatory ban targeting protected in-class speech—is certainly *not* reasonable."[247]

The restrictions on professors' speech have consequences with students, too. Student plaintiffs alleged that the statute's viewpoint-based restrictions on professors' in-class speech unconstitutionally infringed on their right to receive information.[248] Finding for the student plaintiffs in this case, the court agreed. It explained the coextensive rights "from both the *sender's* right to provide it and the *receiver's* own rights under the First Amendment."[249] This recognition is significant because it reaffirms state colleges' basic educational mission to encourage debate and discourse as part of the learning process, which should not be stripped and reduced to viewpoint restrictions.[250]

Further, the court also ruled that the statute was impermissibly vague.[251] According to the court, in order to prevail under the vagueness doctrine, the plaintiff must demonstrate that a speaker seriously wishes to speak and that expression would be affected by the challenged restriction. Yet here, the law is arguably vague as to whether it applies to that speaker, and there is some chance the law will be enforced if violated, subjecting the speaker to a penalty.[252] The court squarely outlined the plaintiffs' showing of vagueness:

The Professor Plaintiffs satisfy these requirements. First, their proposed speech is arguably covered by one or more of the eight concepts in section 1000.05(4)(a) … Second, the so-called savings clause in section 1000.05(4)(b) …, which applies to any instruction or training invoking the eight concepts, is arguably vague. Accordingly, the Professor Plaintiffs have demonstrated an injury with respect to their vagueness claim.

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246 *Id.*

247 *Id.*

248 *Id.* at 1243.

249 *Id.* at 1244 (emphasis in original text).

250 The court uncovered that the state contends the law also applies to guest speakers and illustrated the effects of that application, explaining, "What does this mean in practical terms? Assuming the University of Florida Levin College of Law decided to invite Supreme Court Justice Sonia Sotomayor to speak to a class of law students, she would be unable to offer this poignant reflection about her own lived experience, because it endorses affirmative action: 'I had no need to apologize that the look-wider, search-more affirmative action that Princeton and Yale practiced had opened doors for me. That was its purpose: to create the conditions whereby students from disadvantaged backgrounds could be brought to the starting line of a race many were unaware was even being run. I had been admitted to the Ivy League through a special door, and I had more ground than most to make up before I was competing with my classmates on an equal footing. But I worked relentlessly to reach that point, and distinctions such as the Pyne Prize, Phi Beta Kappa, summa cum laude, and a spot on The Yale Law Journal were not given out like so many pats on the back to encourage mediocre students. These were achievements as real as those of anyone around me.'" Sonia Sotomayor, My Beloved World 191 (2013). Indeed, in praising the affirmative action policy that opened a "special door" for her, Justice Sotomayor has expressed a viewpoint that the state of Florida deems repugnant and has prohibited. Under the IFA, her words would be per se discrimination if she were to utter them as a guest speaker in a law school classroom."

251 *Pernell*, 641 F. Supp. 3d at 1267–68.

252 *Id.*

> The Professor Plaintiffs must also show that their injury resulting from the savings clause's vagueness is fairly traceable to, and redressable by, an order enjoining Defendants from enforcing the IFA. For the same reasons that these Plaintiffs have demonstrated traceability and redressability as to their First Amendment claims, they have also satisfied these requirements as to their vagueness claims. Accordingly, this Court finds that the injuries of Professor Plaintiffs … both are fairly traceable to Defendants … and would be substantially redressed by enjoining them from enforcing the challenged statute.[253]

In other words, the court's ruling on the statute's vagueness reinforces its broader finding against the law's permissibility. By demonstrating the statute's ambiguity in application and the risk of its enforcement against the professor plaintiffs, the court further justified its decision to enjoin the defendants from enforcing the challenged statute.

The *Pernell* case offers lessons worthy of noting. It crystallizes the power tensions between state legislative authority and academic freedom in higher education. While states have the right to speak in the manner they wish to convey through funding and programming, professors have an obligation to speak and to engage in debate and discourse through which the First Amendment principles and the broader societal need for intellectual diversity are supported. The emphasis on the IFA's chilling effect on discourse and the unconstitutional viewpoint discrimination embedded in Florida's law draws lessons, via the *Pernell* case, about how anti-DEI laws seek to reframe public university faculty speech as state-controlled expression. The case validates the foundational protections of academic freedom within the First Amendment, while revealing the inadequacies of existing public employee speech frameworks, such as *Garcetti*, when applied to academic settings. This lesson is significant. The judicial analysis impacts the degree and impact of the vise-gripping effects from these state anti-DEI laws. When safeguarding intellectual autonomy against overreaching state control, such as drawing on the *Hazelwood* doctrine, courts may preserve and protect academic freedom. As such, the *Pernell* case, which relies on *Hazelwood* principles, serves as a legal roadmap for challenging similar legislation in other states.

More specifically, this analysis reinforces the relevance of integrating the *Hazelwood* framework and the Professional and Legal Complement School to address the vise-gripping effects of state legislation. By leveraging these approaches, policy makers, higher education leaders, and allies of higher learning can collectively articulate a comprehensive response to legislative encroachments that restrict teaching, research, and academic governance under the guise of ideological neutrality. Accordingly, the vise-gripping thesis aligns with this adaptation, as it illustrates how state interference, under the guise of promoting neutrality or efficiency, can distort the pedagogical mission of universities. Anti-DEI laws illustrate this effect as proponents of these laws claim to prevent "indoctrination" or wokeness. Yet, the laws in effect impose ideological conformity and restrict faculty from addressing critical social and political issues. By applying *Hazelwood*, courts can evaluate whether such laws

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253 *Id.* at 1267.

genuinely serve pedagogical goals or merely exert pressure to suppress dissenting views. This approach transforms *Hazelwood* from a tool of control into a mechanism for resistance: one that loosens the state's grip on academic freedom. This approach aligns with the Professional and Legal Complement School by reinforcing academic freedom as both a constitutional right and a professional necessity, so the university's role as a marketplace of ideas and a driver of societal progress remains a core contribution to society. Therefore, under this framework, professors are not mere employees, but they adopt the role of intellectual stewards whose work demands, and indeed does, contribute to society in terms of areas such as college students' learning, workforce development, new knowledge and discoveries, and intellectual discourse and information processing.

Indeed, Florida's legislative environment, as dissected in *Pernell*, serves as a cautionary tale and a call to action for faculty, legal scholars, and policy makers to combat these efforts, preserving academic freedom as an essential societal good. Courts can use *Hazelwood's* "legitimate pedagogical concerns" test to scrutinize the intent and impact of anti-DEI laws. For example, laws banning discussions of systemic racism or gender equity must be evaluated for their alignment with the university's mission to prepare students for a diverse and complex society. By revealing the ideological underpinnings of such laws, courts can demonstrate how they undermine rather than advance educational goals. Further, viewpoint discrimination, which likely proceeds this *Hazelwood* inquiry is also incorporated into the analysis. In short, the vise-gripping thesis illustrates how legislative measures cumulatively restrict academic freedom and institutional autonomy. By applying *Hazelwood* and the Professional and Legal Complement School, courts can identify and counteract these pressures, ensuring that universities remain spaces for open inquiry and critical engagement.

V. CONCLUSION

Throughout this article, we have examined the legislative anti-DEI movement through the lens of academic freedom. Part I provided a foundation for understanding how various academic freedom perspectives, particularly the Professional and Legal Complement School, offer a more suitable framework for analyzing the challenges posed by state interventions. This application is especially important to illuminate the roles of actors such as professors, colleges/universities, and state policy makers. Then, Part II applied this framework to doctrinal developments, such as *Pickering*, *Garcetti, Ewing,* and *Hazelwood*. These cases highlighted the varying approaches and the tensions between individual and institutional rights in public universities. Building on these perspectives, Part III revealed the layers of legislative policies intending to restrict academic freedom and to script college learning. The lawmakers' intent was to convey anti-DEI sentiments and dictate what was to be taught and how. Part IV reified the laws into actual claimed harm as seen through the *Pernell* case. That case demonstrated the pernicious effects of Florida's IFA, as a paradigmatic example of how state power constrains academic autonomy and intellectual diversity.

The lessons from *Pernell* extend beyond Florida. They provide a legal blueprint and clear insights for professors, students, and legal advocates in states such as

Indiana,[254] Tennessee,[255] Texas,[256] and Utah,[257] where similar legislative measures have emerged. The legal arguments advanced in Pernell demonstrate the importance of challenging state anti-DEI laws on both constitutional and professional grounds. For instance, emphasizing the chilling effect these laws have on intellectual inquiry can resonate in courts applying public employee speech doctrine under *Garcetti*, or in cases invoking academic freedom's significant status as a societal good under *Hazelwood*. By framing these challenges within a broader commitment to the educational mission of higher education, legal advocates can more effectively combat efforts to politicize academic governance and curriculum.

Moreover, the *Pernell* case highlights the role of courts in protecting not only individual professors' rights, but also establishes the broader concern around institutional autonomy, which is also essential to fostering an open marketplace of ideas. The judicial recognition of academic freedom as integral to democratic society aligns with Bollinger's conception that higher education's role includes cultivating diverse viewpoints and serving society. Certainly, applying these arguments across states will require contextual adjustments to account for differences in legislative language and state-level constitutional provisions. Nonetheless, *Pernell* provides a powerful legal roadmap with persuasive authority and articulated legal strategy for countering anti-DEI legislation and preserving the integrity of academic institutions.

Ultimately, the vise-gripping effect reflects the observed legal phenomenon. The metaphor of the vise grip aptly captures these legislative attacks, which suggest that there are power effects with strengthening and widening the state's jaw to assert control and apply intense pressure over state university voices and academic freedom. The type of law, regulatory schema, penalties, and even plaintiffs (when they exist) explain the vise-gripping measures. Thus, the vise-gripping thesis not only suggests that anti-DEI laws narrow the scope of permissible discourse, but they also exert broader pressure on institutional structures through tenure restrictions, curricular mandates, and governance reforms, creating greater state "jaw power." These combined effects constrict the intellectual vitality of higher education, which in turn undermines its capacity to advance knowledge and foster critical thinking. We also wish to note that the vise-gripping thesis extends beyond metaphorically capturing the strength of these enacted anti-DEI laws—it could invite further exploration of other legislative and regulatory actions that threaten academic freedom and institutional autonomy. For instance, this thesis may illustrate the academic freedom hinderances in applications to state funding restrictions, environmental policy priorities, industry partnership influences, and other ideological debates. By situating such debates within a well-aligned legal and theoretical framework, scholars and advocates will be better equipped to defend the openness and diversity essential to the mission of higher education.

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254 *See*, *e.g.*, Ind. Code §§ 21-38-10-1, 21-39.5-2-1, 21-39.5-5-5, 21-39-8-12 (2024).

255 *See*, *e.g.*, Tenn. Code § 49-7-1906 (2024).

256 *See*, *e.g.*, Tex. Educ. Code § 51.3525 (2024).

257 *See*, *e.g.*, Utah Code Ann. § 53B-1-118 (2024).

TALKING ABOUT FREE SPEECH ON CAMPUS: LEGAL STANDARDS AND BEYOND

NEAL H. HUTCHENS AND BRANDI HEPHNER LABANC***

Abstract

Colleges and universities continue to wrestle with often vexing challenges involving free speech. We contend in this article that rather than solely focusing on legal and campus rules related to free speech, institutional leaders need to look beyond the "rules"and help lead holistic approaches for multiple stakeholders to wrestle with free speech issues on campus. While arguing for an approach not singularly focused on legal standards, given the importance of legal rules, especially the First Amendment in the context of public higher education, the article reviews some of the basic legal standards that govern free speech at colleges and universities. This overview may be especially useful for non-attorneys working in a range of positions at colleges and universities. Shifting from a focus on legal standards, the article also offers suggestions for ways colleges and universities can better prepare members of the campus community and other stakeholders to engage with and better understand issues connected to free speech. An overarching goal of the article is to help institutional leaders design their own blueprint for making issues surrounding free speech an institutional priority that is holistically tackled across the campus community and in various contexts, including curricular and co-curricular settings for students.

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* Professor, J.D., Ph.D., Department of Educational Policy Studies and Evaluation, University of Kentucky.

** Vice President for Student Enrollment, Engagement and Services, E.D., Old Dominion University.

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INTRODUCTION

Colleges and universities continue to wrestle with often vexing challenges involving free speech, including incidents of campus protest and unrest. Events arose at multiple campuses across the nation in fall 2023 and through spring 2024 following attacks on Israel and its subsequent military response.[1] These protests instigated a new chapter in ongoing debate and discourse over how colleges and universities should uphold free speech rights alongside other compelling institutional values and legal obligations, like nondiscrimination protections under federal civil rights laws. Controversy over institutional responses to free speech incidents arising from the events of fall 2023 and after even contributed to the downfall of several university presidents.[2]

The stakes remain high for college and university officials to craft policies and implement strategies that uphold free speech rights while also fostering campus environments actively welcoming of all campus members. Rather than limit themselves to solely focusing on speech requirements, for instance those mandated by the First Amendment, institutional leaders need to look beyond the "rules" and help lead holistic approaches for multiple stakeholders—including faculty and staff members and students.[3] For students, initiatives need to encompass the curricular and co-curricular realms. Efforts also need to consider other constituents, including alumni and parents of students. This article considers ways to integrate and deepen educational efforts around campus rules dealing with free speech alongside broader institutional endeavors to foster educational spaces dealing with free speech and related topics, such as civic discourse or building skills to more productively engage in disagreement.

We argue for an approach that goes beyond a singular focus on legal standards, but legal rules are relevant for free speech rights in higher education, especially for public institutions in relation to their First Amendment responsibilities. For this

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1 *See* David Swanson & Rich McKay, *Pro-Palestinian Protestors at UCLA Tussle with Israel Supporters*, Reuters (Apr. 29, 2024), https://www.reuters.com/world/us/pro-palestinian-protests-keep-roiling-us-college-campuses-2024-04-28/; and Anna Betts, *A Timeline of How the Israel-Hamas War Has Roiled College Campuses*, N.Y. Times (Dec. 12, 2023), https://www.nytimes.com/2023/12/12/us/campus-unrest-israel-gaza-antisemitism.html. NPR has a collection of its coverage of campus protests in fall 2023 and spring 2024. *Special Series: Campus Protests over the Gaza War*, NPR, https://www.npr.org/series/1248184956/campus-protests-over-the-gaza-war.

2 Mandy Taheri, *Full List of College Presidents Who Have Resigned Amid Campus Protests*, Newsweek (Aug. 15, 2024), https://www.newsweek.com/full-list-college-presidents-who-have-resigned-amid-campus-protests-1939822; Associated Press, *A look at College Presidents Who Have Resigned Under Pressure over Their Handling of Gaza Protests* (Aug. 15, 2024), https://apnews.com/article/college-president-resign-shafik-magill-gay-59fe4e1ea31c92f6f180a33a02b336e3.

3 The article expands on a project undertaken by us to develop a learning resource dealing with social media and free speech that was sponsored by the University of California National Center for Free Speech and Civic Engagement. Neal H. Hutchens & Brandi Hephner LaBanc, Social Media: The Real Campus Speech Zone (2023), https://freespeechcenter.universityofcalifornia.edu/fellows-22-23/social-media-the-real-campus-speech-zone/.

reason, Part I of the article reviews some of the basic legal standards that govern free speech at colleges and universities. This overview may be especially useful for non-attorneys working in a range of positions at colleges and universities, like faculty roles or ones in student affairs, that intersect with free speech issues. Attorneys new to working in higher education may also find the section beneficial. We have purposely tried to avoid too much "legalese" or overly nuanced or technical discussion to lay out basic legal standards relevant to free speech on campus. Along with legal standards related to free speech under the First Amendment, this part of the article considers how the intersections of other legal standards, Title VI or Title IX for instance, can come into play when colleges and universities respond to free speech issues on campus.

Among the legal standards covered in Part I, we provide an overview of speech rights for college and university employees, particularly those afforded under the First Amendment. Special attention is given to the speech rights of faculty members in their teaching and research capacities. As covered in this part of the article, it is important, both from the perspective of crafting sound institutional policies and in terms of educational and outreach efforts, for institutional actors and other stakeholders, such as trustees, to hold clear understandings of the speech rights afforded to institutional employees. For college and university faculty and staff members, an understanding of their speech rights, or lack of rights in particular instances, helps empower them to make better informed decisions regarding their work-related speech and when speaking as a private citizen.

Shifting from a focus on legal standards and speech rights, Part II offers suggestions for ways colleges and universities can better prepare members of the campus community and other stakeholders to engage with and better understand issues of speech and expression. The overarching goal of this part of the article is to help institutional leaders design their own blueprint for making issues surrounding free speech an institutional priority that is holistically tackled across the campus community and in various contexts, including curricular and co-curricular settings for students.

An underlying rationale for the approach taken in the article is that free speech issues should not exist in legal or professional vacuums that are siloed away in the general counsel's office or in specific units in the student affairs division. While legal standards are often an essential part of considerations of free speech, legal rules are only one part of a nuanced campus system when it comes to matters of free expression and open inquiry. This is precisely why universities across the country have been investigated by the U.S. Department of Education and have received public scrutiny in recent months.[4] Free speech and closely related topics, like issues connected to civic engagement, are deeply tied to multiple facets of campus life and go far beyond an understanding of legal rules surrounding free speech. This part of the article is constructed on the premise that campus communities, and, ultimately, society benefit from a campus-wide investment in and engagement with free speech and related topics, in particular issues of access and belonging.

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4 *See, e.g.*, Zach Montague, *Campus Protest Investigations Hang over Schools as New Academic Year Begins*, N.Y. Times (Oct. 5, 2024), https://www.nytimes.com/2024/10/05/us/politics/college-campus-protests-investigations.html.

I. THE LAW OF CAMPUS SPEECH: THE FIRST AMENDMENT, OTHER LEGAL STANDARDS

This part of the article gives an overview of some key legal standards related to free speech in public colleges and universities. For public higher education, the First Amendment serves as an important source for the speech and expressive rights of members of the campus community—students, staff members, and faculty members—and those external to the institution seeking to engage in speech in either physical campus locations or virtual ones, notably social media sites.[5] Unlike their public peers, private colleges and universities are not subject to First Amendment standards in regulating speech on campus. Under what is called the "state action" doctrine, the First Amendment only applies to governmental actors, which includes public colleges and universities, but not private ones.[6] Only in very specific circumstances—when they are considered acting for or under the direction of the government—is it possible for First Amendment speech rules to apply to private (nongovernmental) actors specifically a private college or university.[7] As legal standards besides the First Amendment can impact speech rights on campus, we start out with an overview of some of the other legal sources that potentially implicate speech rights.

A. Legal Standards Besides the First Amendment

While the First Amendment is often paramount in considering speech rights in public higher education, other important legal standards, for instance, state campus speech laws,[8] speech rights grounded in contract,[9] or laws dealing with employee collective bargaining rights,[10] potentially affect the authority of both public and private colleges and universities to regulate speech on campus, including that of students, faculty members, and staff members.

A growing list of states have passed laws that deal with free speech at public colleges and universities and complement the First Amendment rights of individuals affiliated with institutions, such as students.[11] States are not able to enact legislation

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5 William A. Kaplin et al., The Law of Higher Education: Essentials for Legal and Administrative Practice 338–39, 702–03 (7th ed. 2024).

6 *Id*. at 28.

7 *Id.*

8 John R. Vile, *Campus Free Speech Protection Laws* (Oct. 21, 2024, and updated Oct. 31, 2024), Free Speech Center at Middle Tennessee State University, https://firstamendment.mtsu.edu/article/campus-free-speech-protection-laws/ (reporting at least twenty-three have adopted some form of campus speech laws).

9 *See generally* Philip Lee, *A Contract Theory of Academic Freedom*, 59 St. Louis U. L.J. 461 (2015).

10 *See generally* Kate Andrias, *Speaking Collectively: The First Amendment, the Public Sector, and the Right to Bargain and Strike*, Knight First Amendment Inst. at Columbia Univ. (Oct. 11, 2024), https://knightcolumbia.org/content/speaking-collectively-the-first-amendment-the-public-sector-and-the-right-to-bargain-and-strike; Charlotte Garden, *Was It Something I Said? Legal Protections for Employee Speech*, Econ. Pol'y Inst. (May 5, 2022), https://www.epi.org/unequalpower/publications/free-speech-in-the-workplace/.

11 *See generally* Vile, *supra* note 8. For an example of a specific state law, see, for example,

that overrides the free speech requirements of the First Amendment, but they are permitted to pass laws granting protections that are coextensive with or greater than those granted under the First Amendment.[12] For instance, many of the states that have enacted campus speech laws mandate that, at least to students, open campus areas constitute a type of open forum for speech and protest.[13] As covered in Part I.B.1, courts routinely look to forum analysis in determining the extent of speech rights on a campus. These state laws have focused on public colleges and universities, but at least one state, California, has a law that applies to students at nonreligiously focused private colleges and universities.[14] Under this law, referred to as the Leonard Law, students at secular private colleges and universities are afforded the same free speech rights as possessed by their student counterparts at public institutions through the First Amendment.[15]

Civil rights laws provide another important statutory domain where colleges and universities may regulate speech that falls outside the purview of First Amendment protection. Laws prohibiting discrimination, including Title VI (prohibits discrimination based on race),[16] Title VII (prohibits discrimination in employment),[17] or Title IX (prohibits discrimination based on sex),[18] apply to both public and private colleges and universities. In the case of public institutions, these laws provide an important basis, one permitted under the First Amendment, to take action against speech that meets legal definitions of harassment or discrimination. As an example of how these standards may intersect with speech, Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin. Conduct that violates Title VII standards could implicate speech, for instance, when harassing jokes or comments about an individual's religion or sex cross over into discriminatory actions that violate the law by creating a hostile work environment.[19] The exact legal line as to when speech becomes harassing conduct under applicable civil rights laws can be subject to legal controversy, but courts have interpreted the authority of higher education employers, including public ones in relation to the First Amendment, to take action against speech that violates civil rights law such as Title VII or Title IX.[20]

Jeremy Bauer-Wolf, *Georgia Passes Law Banishing Free Speech Zones*, Higher Ed Dive (Apr. 5, 2022, and updated May 4, 2022), https://www.highereddive.com/news/georgia-legislature-passes-bill-banishing-free-speech-zones/621605/.

12 KAPLIN ET AL., *supra* note 5, at 702–03.

13 *See generally* Vile, *supra* note 8.

14 CAL. EDUC. CODE § 94367 (West, Westlaw through 2024 Reg. Legis. Sess.).

15 For more on the Leonard Law, see generally Taylor J. Barker, *Expressive Association Claims for Private Universities*, 76 STAN. L. REV. 1787 (2024).

16 Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7.

17 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e17.

18 Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688.

19 For an illustrative case, see *Okonowsky v. Garland*, 109 F.4th 1166, 1181 (9th Cir. 2024), where a federal appeals court decided that a coworker's social media posts could be considered as part of the totality of circumstances in assessing an employee's Title VII hostile work environment claim.

20 For a recent work examining tensions between discrimination law and free speech in higher education, see Brian Soucek, *Speech First, Equality Last*, 55 Ariz. St. L.J. 681, 681 (2023).

Part of a holistic approach to free speech issues on campus, one in which college and university attorneys have a key role to play, is to help multiple constituencies—including students, employees, and governing board members—understand the distinctions between speech that is protected and when speech may become harassing or discriminatory in nature so as to violate applicable civil rights laws or other legal standards. In carrying out this role, it is vital for institutional counsel to be able to partner with other campus offices and groups in efforts to respond to new or evolving challenges. For instance, a touchpoint of controversy following the fall 2023 and spring 2024 unrest at many institutions dealt with when speech or expressive activity crossed over into violating Title VI by engaging in the harassment of Jewish students or Muslim students.[21] Well-publicized incidents and controversies led the Biden administration to direct multiple federal agencies to issue guidance clarifying that civil rights laws, specifically Title VI, apply to antisemitic and Islamophobic discrimination.[22]

The 2024/25 academic year, at least so far, has proven quieter in terms of campus unrest than the previous one, but the events in fall 2023 and into 2024 show that tensions involving speech and campus unrest can unexpectedly arise and quickly escalate.[23] As such, higher education institutions need to be nimble in terms of existing campus communication and working group systems to address speech issues when they arise. Ongoing assessment of policy and practice is also warranted in terms of legal soundness and institutional fidelity to free speech commitments and other campus values, particularly ones related to belonging and inclusivity. Such reviews of policy and practice also pertain to newly established standards. For instance, even as many colleges and universities have put new rules in place in response to events from fall 2023 and after, critiques have arisen that some of these standards are too heavy-handed in terms of restricting free speech.[24] These criticisms highlight the need for ongoing and dynamic institutional engagement with issues and legal requirements that implicate campus free speech, including the status of campus speech policies and standards.

Besides civil rights legal standards, another example of laws potentially impacting speech are ones dealing with collective bargaining rights. Private colleges and universities fall under the purview of the National Labor Relations Act (NLRA).[25] Under the NLRA, speech activities related to collective bargaining

21 *See* Montague, *supra* note 4.

22 Statements and Releases, White House, *Fact Sheet: Biden-Harris Administration Takes Landmark Step to Counter Antisemitism* (Sept. 28, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/28/fact-sheet-biden-harris-administration-takes-landmark-step-to-counter-antisemitism/.

23 Amy Rock, *Which Colleges Have Had Protests This Fall?*, Campus Safety Mag. (Oct. 24, 2024), https://www.campussafetymagazine.com/insights/which-colleges-have-had-pro-palestine-protests-this-fall/163158/.

24 *See, e.g.*, Isabelle Taft, *How Universities Cracked Down on Pro-Palestinian Activism*, N.Y. Times (Nov. 25, 2024, https://www.nytimes.com/2024/11/25/us/university-crackdowns-protests-israel-hamas-war.html.

25 Kaplin et al., *supra* note 5, at 148. For more on collective bargaining in higher education, see Andrea Clemons, *Analyzing the Upward Trend in Academic Unionization: Drivers and Influences*, 15 J. Collective Bargaining Acad. 1 (Mar. 2024), https://thekeep.eiu.edu/cgi/viewcontent.cgi?article=

are eligible for legal protection as a protected labor activity.[26] For public colleges and universities, issues of collective bargaining are subject to state law standards.[27] These laws may also provide legal protection to speech connected to collective bargaining activities.[28] As unionizing efforts have been an area of growing activity at multiple colleges and universities, collective bargaining laws represent another area where legal counsel can help educate the campus community and partner with other campus units about how these laws may have important connections to speech. In the campus unrest that occurred at multiple institutions in the 2023/24 academic year, an area of legal contention centered on whether certain protest actions were protected under collective bargaining agreements, indicative of how intersections between free speech and other laws besides the First Amendment can arise, including in unexpected ways.[29]

Laws connected to partisan political activity may also implicate the exercise of speech rights on campus. For instance, multiple states have laws in place that prohibit the use of governmental resources at public agencies, including public colleges and universities, from use in partisan political activities, like elections.[30] As covered in Part I.B.3, faculty and staff members possess substantial First Amendment rights to support political causes and advocate for candidates or positions in their private citizen capacities. However, the First Amendment does not prohibit public institutions or states from disallowing employees from using institutional resources, for example employee email accounts or list-servs, to engage in partisan activity.

Whistleblower laws provide another example of how a legal standard outside the First Amendment may implicate speech rights in higher education. Under

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1922&context=jcba.

26 *See* Employee Rights, Nat'l Lab. Rels. Bd., https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employee-rights (last visited Dec. 23, 2024).

27 KAPLIN ET AL., *supra* note 5, at 148.

28 Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2338 (2021). *See also* Michael Mauer, *Protecting Academic Freedom through Collective Bargaining: An AAUP Perspective*, 14 J. COLLECTIVE BARGAINING ACAD. 1 (Mar. 2023), https://thekeep.eiu.edu/cgi/viewcontent.cgi?article=1884&context=jcba.

29 Jonathan Wolfe, *University of California Workers Authorize Union to Call for Strike Over Protest Crackdowns*, N.Y. TIMES (May 15, 2024), https://www.nytimes.com/2024/05/15/us/university-of-california-strike-authorization-palestinian-protest.html; Josh Eidelson, *Harvard Gaza Protest Response Violated Labor Law, UAW Claims*, BLOOMBERG L. (May 15, 2024), https://news.bloomberglaw.com/daily-labor-report/harvard-gaza-protest-response-violated-us-labor-law-uaw-claims; Ethan Schenker, *Student Unions Say Pro-Palestine protests Are Protected Under Labor Law. Brown Isn't So Sure*, BROWN DAILY HERALD (Oct. 17, 2024), https://www.browndailyherald.com/article/2024/10/student-unions-say-pro-palestine-protests-are-protected-under-labor-law-brown-isnt-so-sure.

30 For examples of state laws that prohibit such partisan activity, see N.C. GEN. STAT. ANN. § 126-13 (West, Westlaw through 2024 Reg. Legis. Session); OR. REV. STAT. ANN. § 260.432 (West, Westlaw through 2024 Reg. Legis. Session); Wis. Stat. Ann. § 11.1207 (West, Westlaw through 2023 Act 272, published Apr. 10, 2024). A federal law, known as the Hatch Act, places limits on political activity by many federal employees and also applies to some state and local employees working in programs financed primarily through the federal government, though it does not apply to individuals employed in educational or research institutions. For more on the Hatch Act, see Whitney K. Novak, *The Hatch Act: A Primer*, CON. RSCH. SERV. (Apr. 20, 202), https://sgp.fas.org/crs/misc/IF11512.pdf.

federal and state laws providing whistleblower protections, employees or others, such as students, engaged in whistleblower activities are legally protected from retaliation for the good faith reporting of potential wrongdoing or misconduct.[31] For example, individuals with a "reasonable belief" who report fraud or misconduct in connection to federal grants or contracts are eligible for whistleblower protection.[32] To give another example, Title IX protects individuals who have reported a potential violation of the law from retaliation.[33] Distinct from whistleblower protections but connected to instances that may uncover legal wrongdoing, the U.S. Supreme Court has held that public employees may be protected from retaliation by their employer for giving testimony in a legal proceeding.[34] As covered in Part I.B.3, public employees often lack First Amendment protection for their job-related speech, but in *Lane v. Franks*, the Supreme Court ruled that a public college administrator could not be retaliated against for providing lawful testimony in a court proceeding for compelled testimony.[35]

The examples covered in this section highlight how legal standards beyond the First Amendment should be considered by colleges and universities when crafting policies related to free speech and in educational efforts. College and university legal counsel are key actors in ensuring that institutional policy and practice are attuned to the requirements of these other legal standards that may affect legal protections for speech in addition to First Amendment considerations.

B. The First Amendment and Campus Speech

While other legal rules can play a legally meaningful role in terms of impacting speech rights in higher education and encompass both public and private higher education, the First Amendment serves as the legal lodestar for speech rights at public colleges and universities. We now turn to free speech and the First Amendment. The U.S. Supreme Court has firmly established the role of the First Amendment in upholding speech rights in public higher education.[36] As noted, private colleges and universities are not subject to First Amendment standards when it comes to

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31 *See generally* Melissa Scheeren & Keri B. Stophel, *Compilation of Federal Whistleblower Protection Statutes*, Con. Rsch. Serv (updated Apr. 25, 2024), https://crsreports.congress.gov/product/pdf/R/R46979; Jonathan P. West & James S. Bowman, *Whistleblowing Policies in American States: A Nationwide Analysis*, 50 Am. Rev. Pub. Admin. 119 (2020), https://doi.org/10.1177/0275074019885629.

32 *See, e.g., Whistleblower Rights and Protections*, U.S. Dept. Just. Off. Inspector Gen., https://oig.justice.gov/hotline/whistleblower-protection (last visited Dec. 20, 2024).

33 *See, e.g., Civil Rights Protections Against Retaliation: A Resource for School Communities*, U.S. Dep't Educ. Off. Civ. Rts., https://www.ed.gov/media/document/ocr-retaliation-resource-2024 (last visited Dec. 20, 2024).

34 Lane v. Franks, 573 U.S. 228 (2014) (holding that a public employee was protected by the First Amendment for providing truthful testimony in a legal proceeding in response to a court subpoena).

35 *Id*. at 242.

36 *See, e.g*., Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of L. v. Martinez, 561 U.S. 661 (2010); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Widmar v. Vincent, 454 U.S. 263 (1981); Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667 (1973) (per curium); Healy v. James, 408 U.S. 169 (1972).

regulating speech and expressive activities on campus.[37] In contrast, their public college and university counterparts must be closely attuned to First Amendment legal standards. This section covers some of the key First Amendment areas impacting speech rights at public colleges and universities, including the importance of forum analysis, First Amendment exceptions to free speech rights, and the speech rights available to faculty and staff members.

1. Forum Analysis and Campus Free Speech

In analyzing free speech issues arising on public college and university campuses, courts often turn to what is known as forum analysis.[38] The kind or type of "forum" —either physical or virtual—in which speech occurs is often important in how courts analyze the speech rights available and the extent to which a public college or university can regulate speech and expression in a specific setting.[39] The distinctions between the various types of forums that are recognized by courts as existing on campus can be muddled at times,[40] but, in general, courts have recognized forum categories that include the traditional public forum, the designated public forum, and the limited public forum.[41] Some spaces on campus, like a classroom during instructional time, office spaces for employees, or a theater space during a performance, do not constitute a type of open speech forum for members of the campus community or the public and highlight instances where institutional authority to regulate speech is typically at its highest.[42] Multiple types of forums exist on campus, including in relation to open campus areas outside buildings or other facilities.

With speech forums, it is important to distinguish between individuals or groups speaking in their own, private capacities versus when institutions, through designated individuals, are considered by courts to be the speaker. Institutional speech is a form of what is known as governmental speech, where courts view the speech as that of the institution and not of an individual or group in a private capacity.[43] In contrast, courts often turn to forum analysis when the speech is attributed to the individuals engaged in speech, for instance students, and not to the governmental entity, including a public college or university. Calls for a public higher education institution to censor or silence a speaker often conflate the concept of when the institution speaks versus when private speech occurs in a forum associated with a public college or university

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37 *See supra* text accompanying notes 6–7.

38 For more on the use by courts of forum analysis in higher education, see generally Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481 (2005); Patricia A. Brady & Tomas L. Stafford, *Some Funny Things Happened When We Got to the Forum: Student Fees and Student Organizations After Southworth*, 35 J.C. & U.L. 99 (2008).

39 KAPLIN ET AL., *supra* note 5, at 705–07. For an illustrative forum case in higher education, see *Gerlich v. Leath*, 861 F.3d 697, 700 (8th Cir. 2017), where a federal appeals court ruled that a university created a limited public forum through a program that allowed officially recognized student groups to use the university's trademarks on merchandise.

40 *See* KAPLIN ET AL., *supra* note 5, at 707, 712–13.

41 *Id*. at 706.

42 *Id*. at 726.

43 Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

and is, in fact, the speech of private citizens and not the institution. A recent issue considered by colleges and universities, including public ones, is when to use the institutional voice to weigh in on specific issues.[44] Institutional leaders and governing boards need to determine under what circumstances the institutional voice should be used, with recent calls advanced that colleges and universities should remain silent on many or most issues subject to controversy or disagreement.[45]

The type of forum at issue has important relevance for the available speech rights. Some places, public parks and sidewalks as examples, have been designated by courts as traditional public forums and as locations that by long-standing tradition are recognized as spaces for free speech and expression.[46] The government may also take action to create open forums that, for First Amendment purposes, are the same as a traditional public forum, resulting in what is called a designated public forum.[47] In a traditional or designated public forum, a speech-based regulation is allowed under the First Amendment only if the government can show that it is "narrowly tailored to serve a compelling governmental interest."[48] As pointed out, some state laws direct public higher education institutions to treat open campus areas as a designated forum generally available for speech, at least for students.[49]

For a traditional or designated public forum, distinct from regulations focused on the content of the speech, the government may put in place content-neutral rules related to time, place, and manner that are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication.[50] Under these standards, a public college or university, for instance, may put in place rules that prohibit the use of sound amplification devices, except when approved, to prevent disruptions to the learning environment or other institutional functions.[51] As another example, institutional regulations may prohibit the blocking of sidewalks or other walkways or throughways to ensure

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44 See, for example, the University of Michigan's Board of Regents approval of a new policy on institutional neutrality that "adopt[s] a heavy presumption against institutional statements on political and social issues that are not directly connected to internal university functions." University of Michigan, *Regents Vote to Approve Institutional Neutrality*, Univ. Rec. (Oct. 17, 2024), https://record.umich.edu/articles/regents-vote-to-approve-institutional-neutrality/.

45 Ryan Quinn, *What's Behind the Push for 'Institutional Neutrality'?*, Inside Higher Ed (Oct. 10, 2024), https://www.insidehighered.com/news/faculty-issues/academic-freedom/2024/10/10/whats-behind-push-institutional-neutrality; Lilah Burke, *Why Colleges Are Turning to Institutional Neutrality*, Higher Ed Dive (Dec. 3, 2024), https://www.highereddive.com/news/why-colleges-adopt-institutional-neutrality/734284/.

46 *Pleasant Grove City, Utah*, 555 U.S. at 469 ("This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks, which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions'.") (citations omitted)).

47 *Id.* at 470.

48 *Id.* at 469.

49 *See generally* Vile, *supra* note 8.

50 Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989).

51 *Id*. at. 798–99.

that individuals are not impeded in traveling on campus.[52] Or, activities may be limited to certain hours, for instance not allowing speech or protest in campus areas after a certain time in the evening or before a certain time in the morning.[53] Of late, largely in a response to campus protests and unrest following events of fall 2023 and after, a number of institutions have updated campus speech rules to prohibit encampments or the wearing of facial coverings during protests.[54]

Courts, as noted, have also recognized the existence of what is often called the limited public forum.[55] In this type of forum, which may be reserved for certain individuals, like students, or to particular topics, a public college or university is able to impose rules that are reasonable in relation to the purposes of the forum and that are not based on discriminating on the views of particular speakers.[56] For instance, many public colleges and universities make various resources available to officially registered or recognized student organizations as a way to support students in their interests and activities.[57] In doing so, a public college or university may exclude nonstudent groups or student groups without official institutional recognition from participation in a forum that is only open to recognized student organizations.[58] However, regulations imposed on eligible student organizations as part of participation in the forum must be reasonable in relation to the purposes of the forum.[59] Institutional officials also may not engage in viewpoint discrimination in the treatment of student groups.[60] For example, a college or university could not favor campus Democrats over campus Republicans, or vice versa, based on the views of the respective organizations, as this would result in viewpoint discrimination. To give another example, some campuses have large rocks that students paint or expression walls that have been decorated with words or images. An institution may choose to apply a reservation process to these activities—like a posting policy that defines who can post, where posting can occur, and when a posting must be removed. It cannot, however, approve only messages that institutional officials view favorably.

With campus forums, it is relevant to note that spaces may exist as multiple types of forums depending on their use. For example, a classroom space during instructional time is not a type of open forum.[61] If that same classroom is made available for a meeting space for registered student organizations during noninstructional

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52 Langhauser, *supra* note 38, at 502.

53 *Id*. at 501.

54 *See* Taft, *supra* note 24.

55 *See generally* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

56 Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000).

57 Kaplin et al., *supra* note 5, at 749.

58 *Id*. at 743.

59 *See Id*.

60 *See Id*. at 744. *See generally Bd. of Regents of Univ. of Wis. Sys.*, 529 U.S. 217.

61 *See*, *e.g.*, Smith v. Tarrant Cnty. Coll. Dist., 694 F. Supp. 2d 610, 615 (N.D. Tex. 2010); Pompeo v. Bd. of Regents of Univ. of N.M., 58 F. Supp. 3d 1187, 1189 (D.N.M. 2014) (citing Axson-Flynn v. Johnson, 356 F.3d 1277, 1285 (10th Cir. 2004)).

times, then it constitutes a type of forum in terms of availability for student use, and access to the space must comport with First Amendment standards. Additionally, as noted, a forum can exist in both physical and virtual forms. In terms of a virtual forum, for example, public colleges and universities can create forums using social media pages that are open for public comments. In creating such forums, an institution may opt to focus on a specific topic (a type of limited public forum) and is able to delete off-topic comments, but it could violate First Amendment standards for deleting or blocking comments based only on the views expressed on topic.

An understanding of forum types is often key to charting the speech protections available to individuals and groups formally affiliated with the institution and to unaffiliated individuals and groups seeking access to campus spaces, both physical and virtual, for speech or protest activities. Especially in forums designated or traditionally recognized as open for speech and expression, courts may recognize substantial First Amendment protections for speakers. While First Amendment speech protections are often expansive, there are important limits to freedom of speech, and the next section considers several categories of speech that courts have concluded are ineligible for First Amendment protection.

2. First Amendment Speech Exceptions. And What About "Hate Speech"?

The First Amendment provides broad protections for free speech, but these are not absolute. As covered, speech that rises to conduct that violates civil rights laws, for instance Title IX or Title VI, is not protected free speech under the First Amendment.[62] The U.S. Supreme Court has also recognized several types of speech that are not protected under the First Amendment, including speech that constitutes incitement to imminent lawless action,[63] is categorized as a true threat,[64] rises to the level of what are known as fighting words,[65] meets legal definitions of obscenity,[66] is defamatory in nature,[67] is made to further a criminal act,[68] or constitutes the giving of false testimony in a court proceeding (perjury).[69] Intellectual property standards may also allow institutions to regulate speech, with a common example controlling institutional trademarks or copyrighted material.[70] Overviews of incitement, true threats, fighting words, and defamation are covered in this section, as they are categories of speech

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62 *See supra* Part I.A.

63 *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942); Virginia v. Black, 538 U.S. 343, 359 (2003).

64 Watts v. United States, 394 U.S. 705, 707–08 (1969).

65 Cohen v. California, 403 U.S. 15, 20 (1971).

66 United States v. Williams, 553 U.S. 285, 288 (2008). For standards to determine when material is considered obscene, see, for example, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and *Miller v. California*, 413 U.S. 15, 24 (1973).

67 Gertz v. Robert Welch, Inc., 419 U.S. 323, 340–42 (1974).

68 *See, e.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1, 13 (2010); Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003).

69 United States v. Alvarez, 567 U.S. 709, 720 (2012) (discussing that perjury not protected by the First Amendment).

70 *See generally* Jacob Rooksby, The Branding of the American Mind: How Universities Capture, Manage, and Monetize Intellectual Property and Why It Matters (2016).

falling outside First Amendment protection often salient in institutional regulation of speech on campus.

Incitement to imminent lawless action is a category of speech the U.S. Supreme Court has recognized as unprotected by the First Amendment,[71] but speech that meets this exception is very narrow. Speech qualifying under this exception is aimed at actually producing immediate unlawful action and is likely to incite or to produce such unlawful activity.[72] Advocacy of unlawful action at some unspecified point in the future is likely to be protected under the First Amendment. In *Hess v. Indiana*, for example, the U.S. Supreme Court ruled that speech by a professor during a protest stating "We'll take the fucking street later" or "We'll take the fucking street again" was protected speech.[73] The incitement to imminent lawless action category of unprotected speech is, thus, restricted to very specific circumstances. Public colleges and universities should be careful to recognize the narrow standards under which the incitement exception is available. Speech or protest that looks to future activity or events, cannot be established as intending to induce imminent lawless action, or is not likely to result in unlawful activity could likely qualify for First Amendment protection in an open forum for speech.

True threats represent another category of speech not protected under the First Amendment.[74] In *Counterman v. Colorado*, the U.S. Supreme Court held that establishing a true threat requires that an individual actually intended harm with their speech or spoke recklessly without regard to whether the speech could be viewed as threatening.[75] That is, the Court put in place a subjective test as part of a true threat assessment, which requires that an individual intended to make a threat or that the individual showed recklessness or "consciously disregarded a substantial risk that his communications would be viewed as threatening violence."[76] With this standard, the Supreme Court rejected using only an objective test—that is, whether an ordinary, reasonable person familiar with the context of the speech would conclude that it was intended as a threat—for establishing a true threat. It is important to keep in mind that when a potential threat is present, even if later established not to exist, public colleges and universities are permitted to take appropriate action to protect the safety of individuals, such as temporarily prohibiting someone from campus, to determine whether an actionable threat exists.

The fighting words doctrine refers to speech directed at individuals that is likely to result in violence from those against whom the speech is directed. In *Chaplinsky v. New Hampshire*, the U.S. Supreme Court upheld the conviction of an individual who was reported to have stated to a government official, "'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents

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71 *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

72 *Brandenburg*, 396 U.S. at 447.

73 414 U.S. 105, 107 (1973).

74 *See* Watts v. United States, 394 U.S. 705 (1969); Virginia v. Black, 538 U.S. 343, 360 (2003).

75 600 U.S. 66 (2023).

76 *Id*. at 69.

of Fascists.'"[77] Since *Chaplinsky* was decided, the Supreme Court has narrowed the concept of fighting words that can be excluded from First Amendment protection. In *Texas v. Johnson*, where the Court held that the burning of the U.S. flag as a form of protest was protected expression, described fighting words as a "direct personal insult or an invitation to exchange fisticuffs."[78] While *Chaplinsky* and the fighting words doctrine have not been explicitly overruled, decisions like *Texas v. Johnson* cast doubt over the continued applicability of the fighting words doctrine as a basis to restrict speech.[79] Additionally, even in the context of fighting words, the Supreme Court—in striking down a city ordinance that made it illegal to place a burning cross or swastikas in locations intended to provoke "anger, alarm, or resentment" —declared that the government could not engage in viewpoint discrimination even when regulating a speech category generally unprotected by the First Amendment.[80] At a minimum, the fighting words doctrine represents a very narrow exclusion as to First Amendment speech protections.

In considering legally permissible reasons to limit speech, it is also important to point out that the potential negative or disruptive reaction of an audience to a speaker is not a sufficient basis to censor speech. The idea of the "Heckler's Veto" refers to the notion of government imposing restrictions on a speaker because of concerns over how the speech will be received by listeners.[81] Courts have held that such a heckler's veto is not a permissible reason to prohibit or stop speech and certainly that a heckler's veto is at odds with the aims of the First Amendment to protect free speech and expression.[82]

Defamation represents another type of speech that falls outside First Amendment protection. As a civil wrong, defamation standards are subject to the specific requirements of the state law under which the defamation claims are brought.[83] Defamatory speech occurs when someone writes or says something to others that is presented as fact when the individual knows or should have known the information is untrue.[84] The target of these statements may then establish through legal action that the false statements have resulted in harm, for example damage to one's reputation.[85]

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77 315 U.S. 568, 569 (1942).

78 491 U.S. 397, 409 (1989).

79 For more on the status of fighting words, see, for example, Mark P. Strasser, *Those Are Fighting Words, Aren't They? On Adding Injury to Insult*, 71 Case W. Res. L. Rev. 249 (2020).

80 R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

81 Kaplin et al., *supra* note 5, at 715.

82 *See*, *e.g.*, Rock for Life-UMBC v. Hrabowski, 411 F. App'x 541, 554 (4th Cir. 2010) ("In the abstract, at least, the impermissibility of a heckler's veto is clearly established by First Amendment jurisprudence.").

83 For more on defamation claims in higher education, see generally Adam Jacob Wolkoff, *A Privilege to Speak Without Fear: Defamation Claims in Higher Education*, 46 J.C. & U.L. 121 (2022).

84 For an example of a defamation case arising in higher education and how libel and slander are defined under state law, see *Stiner v. University of Delaware*, 243 F. Supp. 2d 106, 115 (D. Del. 2003) ("Defamation in Delaware consists of the twin torts of libel and slander; in the shortest terms, libel is written defamation, and slander is oral defamation."). *See* Kaplin et al., *supra* note 5, at 127–28.

85 *See*, *e.g.*, *Stiner*, 243 F. Supp. 2d at 115.

The U.S. Supreme Court has placed important limits on when defamation standards should be blunted by the First Amendment, namely, when the defamatory speech at issue is directed at what is termed a public figure,[86] which encompasses elected officials, celebrities, or someone well-known to the public, an individual suing for defamation must establish that the statements were made with "actual malice."[87] At a college or university, some positions, such as institutional leaders or coaches in high-profile sports, may likely qualify as public figures, and professors and other administrators could as well.[88] Another limitation on defamation is that sometimes speech may be viewed as a form of privileged communication, comments made during legislative proceedings as an example, so as not to be subject to a defamation claim unless meeting a higher standard like actual malice.[89] Among the defenses to a defamation claim is the response that the statements are true.[90]

The term "hate speech" is routinely used to identify speech that is negatively directed at individuals or groups, often based on characteristics like race or ethnicity, religion, or sexual orientation.[91] While a term often used in higher education, it is important to note that courts have not recognized "hate speech" as a general category of speech excluded from First Amendment protection.[92] We in no way seek to dismiss or downplay the real emotional and psychological harm that vile or hateful speech may cause to individuals, but it is important for college and university officials to recognize that hate speech, as an umbrella term, does not constitute a category of speech excluded from First Amendment protection.

Even if derogatory or hateful speech is legally protected, we do not suggest that institutions are without options to address the harmful effects of such speech. The emphasis on education and engagement taken up in Part II are important areas where institutions can help foster thoughtfulness and empathy in speech by

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86 Wolkoff, *supra* note 83, at 133.

87 New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

88 Wolkoff, *supra* note 83, at 133 ("Courts have considered a variety of university officials and community members to be 'public officials' or 'public figures' who cannot recover without showing 'actual malice' in the making of the statement regarding that plaintiff's official conduct.").

89 *Id*. at 142 ("While courts have generally declined to grant postsecondary institutions and members of the college and university community absolute privilege from defamation claims, they more often afford a 'qualified,' 'conditional,' or 'common interest' privilege to communications among people who have some interest or duty in sharing that information amongst themselves.").

90 *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) ("It is true that in defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense."). *See also* Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237 (2014) (considering the importance of truth as a defense to a defamation claim).

91 KAPLIN ET AL., *supra* note 5, at 727–28.

92 *Id*. at 729–37. *See also* Richard Delgado & Jean Stefancic, *Retheorizing Actions for Targeted Hate Speech: A Comment on Professor Brown*, 9 Ala. C.R. & C.L. L. Rev. 169, 178 (2018) (noting how courts have almost uniformly struck down college speech codes to such an extent that "the judicial system and campus administrators [seemingly] operated in different universes").

individuals on campus. Additionally, while there have been calls for institutional neutrality on controversial matters, college and university officials can express an institutional voice to counter hateful speech that merits more than silence or neutrality. Public higher education officials should adhere to First Amendment requirements for protecting speech, even for speech they find objectionable, but educational and engagement initiatives provide opportunities for individuals and groups within the institution to make more informed and thoughtful choices about what they say and how they speak, including how speech can negatively impact others on campus and beyond.

3. The First Amendment and Speech by Staff Members, Faculty Members

Speech and expression by faculty or staff members may raise questions about the speech rights of employees in their professional or private citizen capacities and of institutional authority to regulate employee speech in either of these contexts. In the case of faculty members in public higher education, as covered more later in this section, alongside general free speech protections available to all public employees, their speech may implicate questions related to possible First Amendment protection for academic freedom, specifically in the areas of teaching and research.[93] For employees at private colleges and universities, which are nongovernmental actors, their speech rights are not protected by the First Amendment.[94] Apart from the First Amendment, other legal sources already mentioned, collective bargaining laws or union contracts for example, may provide legal protection for employee speech that extends to private colleges and universities.[95] Legal standards may also encompass employees in both private and public higher education, like barring retaliation against individuals for reporting potential discrimination under civil rights laws that include Title VI and Title IX.[96] While the First Amendment provides the dominant legal framework for establishing employee speech rights at public colleges and universities, other legal standards should not be overlooked for employees in public higher education in addition to those at private colleges and universities.

For public higher education employees, an issue often of First Amendment significance is whether an individual is speaking in their employee capacity or as a private citizen.[97] If a public employee engages in speech as a private citizen and not as part of carrying out their job duties, then their speech is potentially eligible for First Amendment protection relative to their employer's authority to regulate the speech.[98] When a public employee speaks as a private citizen, courts conduct an inquiry to determine if the speech deals with what is known as a matter of public

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93 For an overview of the general First Amendment issues at stake, see KAPLIN ET AL., *supra* note 5, at 365–404.

94 *Id*. at 342.

95 *See supra* Part I.A

96 *See supra* Part I.A.

97 Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) ("So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.").

98 *Id*.

concern.[99] If the speech meets this threshold, courts then engage in a balancing test to determine if the public employer can offer a sufficient justification, such as the need to ensure efficient business operations, to override First Amendment protection for the speech and make it subject to the employer's authority.[100]

Unlike speaking as a private citizen, when a public employee speaks as part of carrying out their official employment duties, the U.S. Supreme Court has greatly restricted public employee speech rights in such circumstances. In *Garcetti v. Ceballos*, the Court ruled that when public employees speak as part of carrying out their official employment duties, then they are not entitled to First Amendment protection for such job-related speech.[101] This standard means, for instance, that a staff member at a public higher education institution does not receive First Amendment protection for speech made in carrying out their official job duties.[102] They may have other legal protections available for such speech, like whistleblower laws, but are not protected by the First Amendment.[103] Part of educational efforts for college and universities potentially entails helping employees distinguish between their private citizen speech and their speech made in an employee capacity.

For faculty members at public colleges and universities, there is legal uncertainty over whether the *Garcetti* standard applies to their speech made in carrying out official job duties, specifically in the classroom and in research.[104] Some federal courts have recognized an exception for faculty speech to the general *Garcetti* standard that public employees do not receive First Amendment protection for speech made in carrying out employment duties.[105] In *Garcetti*, the justices joining in the majority acknowledged a point made in a dissenting opinion by Justice David Souter that the decision could potentially impinge First Amendment protection for academic freedom that had seemingly received acceptance in prior Supreme Court decisions.[106] While recognizing that Justice Souter raised a potentially salient issue, the majority

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99 *Id*.

100 *Id*. at 418.

101 *Id.* at 42 ("We hold that when 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.").

102 See, e.g., Alves v. Bd. of Regents of the Univ. Sys. of Ga., 804 F.3d 1149, 1165 (11th Cir. 2015) (holding that a memorandum raising concerns about a supervisor written by staff members at a university counseling center constituted speech made pursuant to official duties and did not qualify for First Amendment protection).

103 *See generally* Scheeren & Stophel, *supra* note 31; West & Bowman, *supra* note 31.

104 KAPLIN ET AL., *supra* note 5, at 349–50.

105 Meriwether v. Hartop, 992 F.3d 492, 505 (6th Cir. 2021) (noting how, along with the U.S. Court of Appeals for the Sixth Circuit, that three other federal circuits (the Fourth, Fifth, and Ninth) had recognized faculty speech related to teaching and scholarship eligible for First Amendment protection despite *Garcetti*).

106 547 U.S. at 425 ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

stated that questions over First Amendment protection for faculty speech were not at issue in the case.[107]

After *Garcetti* was decided and questions arose over if its application to faculty speech in public higher education, legal decisions over First Amendment protection for faculty speech in public higher education have lacked uniformity.[108] Yet, a trend in federal courts of appeals decisions is judicial support for First Amendment speech protection for the professionally based speech by faculty members at public colleges and universities, at least when connected to teaching or research.[109] Some courts and commentators have referred to this as an "academic freedom exception" to the *Garcetti* standard.[110] In identifying the exception, courts have turned to the concept of public concern to ground protection for some types of faculty speech in relation to academic freedom considerations.[111] In *Meriwether v. Hartop*, for example, a federal appeals court ruled that a professor's decision to refrain from using a student's identified pronouns constituted protected speech.[112] The professor had a practice of using formal titles for students in class discussions but argued that using a student's identified pronouns conflicted with the professor's religious beliefs.[113] The court, along with backing the professor's decision as grounded in pedagogical practice, stated that the issue of pronouns and gender identity constituted topics of public concern.[114]

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107 *Id*.

108 *See* KAPLIN ET AL., *supra* note 5, at 365–68, 381–88, 401–04.

109 *See Meriwether*, 992 F.3d at 505 ("In reaffirming this conclusion, we join three of our sister circuits: the Fourth, Fifth, and Ninth. In *Adams v. Trustees of the University of North Carolina–Wilmington*, the Fourth Circuit held that *Garcetti* left open the question whether professors retained academic-freedom rights under the First Amendment. It concluded that the rule announced in *Garcetti* does not apply 'in the academic context of a public university.' The Fifth Circuit has also held that the speech of public university professors is constitutionally protected, reasoning that 'academic freedom is a special concern of the First Amendment.' Likewise, the Ninth Circuit [in *Demers v. Austin*] has recognized that 'if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.' Thus, it held that '*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor.'") (citations omitted)).

110 *Id*. at 507 (6th Cir. 2021) (stating "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").

111 *See, e.g.*, Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014) (concluding that pamphlet authored by professor on ideas for how to structure a college of communication addressed a matter of public concern).

112 992 F.3d at 509 ("Because Meriwether was speaking on a matter of public concern, we apply *Pickering* balancing to determine whether the university violated his First Amendment rights. This test requires us 'to arrive at a balance between the interests of the [professor], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' Here, that balance favors Meriwether.") (citations omitted)).

113 *Id*. at 499.

114 *Id*. at 509 ("In short, when Meriwether waded into the pronoun debate, he waded into a matter of public concern.").

In a later decision coming from the same federal circuit that issued the M*eriwether v. Hartop* opinion, the court ruled that a professor's speech, centered on opposition to evolving standards of care for transgender individuals, received First Amendment protection.[115] In the case, Allan Josephson, a psychiatrist and faculty member at the University of Louisville's School of Medicine, claimed that he was demoted and later had his employment contract ended based on comments critical of emerging care standards for children identified as having gender dysphoria delivered as part of a panel hosted by the Heritage Foundation, a conservative thinktank.[116] The appeals court noted that the thinktank paid all the faculty member's trip expenses and that organizers made it clear that panelists spoke in their individual capacities and not on behalf of their institutions.[117] As a result of the negative reaction from work colleagues and others to Josephson's views, he was asked to resign from an administrative position at the school of medicine, which he agreed to do.[118] Eventually, the school also moved not to renew Josephson's employment contract.[119] In the ensuing lawsuit, Josephson claimed institutional officials retaliated against him for protected speech through these employment actions.[120]

In upholding a lower court ruling in favor of Josephson, the appeals court, looking to principles of *Garcetti*, stated that he spoke in a private citizen capacity and not as part of carrying out his official duties.[121] The court further concluded that Josephson had addressed a topic of public concern in relation to the comments shared as part of the Heritage Foundation panel.[122] Additionally, the appeals court rejected arguments that Josephson's comments had unduly interfered with the operations of the medical school as a justifiable reason for the university to take employment action against him.[123] While classifying Josephson's speech as made in a private citizen capacity and not as part of carrying out official employment duties, the court emphasized as well the academic freedom considerations present in the case for teaching and scholarship.[124] The court noted that the comments made as part of the Heritage Foundation panel directly dealt with the areas in which Josephson "taught and wrote about as a child-psychiatry expert. Put differently, Josephson's speech stemmed from his scholarship and thus related to scholarship or teaching. As such, Josephson engaged in protected speech because it related to core academic functions"[125] The court stated that even if the speech at issue were viewed as part of Josephson's official employment duties, "that would not alter

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115 Josephson v. Ganzel, 115 F.4th 771, 785–86 (6th Cir. 2024).

116 *Id*. at 777.

117 *Id*. at 778.

118 *Id*. at 780.

119 *Id*. at 781.

120 *Id*. at 782.

121 *Id*. at 784.

122 *Id*.

123 *Id*. at 784–85.

124 *Id*. at 786.

125 *Id*.

our conclusion that he engaged in protected speech at that event."[126]

In the *Josephson* case and in *Meriwether v. Hartop*, some individuals may conclude that the faculty speech at issue is objectionable and should not have received First Amendment protection. For this article, rather than weighing whether the institutional justifications should have overridden First Amendment speech protections in these specific instances, our focus is on the courts' overarching legal determination that faculty speech, at least when tied to teaching or research, is potentially entitled to First Amendment protection on academic freedom grounds, *Garcetti* notwithstanding.

First Amendment protection for faculty speech has also come into play in litigation in Florida in challenges brought by faculty members and students to a state law that, among its provisions, forbids teaching about topics related to critical race theory or related lines of critical scholarship and other topics related to diversity.[127] In legal action against the state law, a lower federal court described the law as "positively dystopian" and ruled that the challengers to the law had established strong First Amendment arguments to challenge the speech restrictions in the legislation.[128]

Notably, the lower federal court hearing the challenge to Florida's law falls under the jurisdiction of a federal appeals court—the U.S. Court of Appeals for the Eleventh Circuit—that has not yet decided if an academic freedom exception exists under *Garcetti*.[129] Given this situation, in considering Florida's law, the court turned to a prior decision from the Eleventh Circuit dealing with institutional authority over curricular-related speech that was decided before *Garcetti*.[130] In deciding that case, which dealt with whether a faculty member impermissibly incorporated his religious beliefs into class discussions and when holding voluntary class meetings,[131] the Eleventh Circuit looked to the U.S. Supreme Court's decision in *Hazelwood School District v. Kuhlmeier.*[132] In the *Hazelwood* case, the Court ruled that a principal could censor articles appearing in a school newspaper on the basis that the articles fell under the domain of school-sponsored speech.[133]

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126 *Id.*

127 For more on this litigation and the Florida law at issue, see Neal Hutchens & Vanessa Miller, *Florida's Stop Woke Act: A Wake-Up Call for Faculty Academic Freedom*, 48 J.C. & U.L. 35 (2023).

128 Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp. 3d at 1230 (N.D. Fla. 2022). The litigation was still on appeal at the time of publication of this article. The U.S. Court of Appeals for the Eleventh Circuit did deny a motion to stay the preliminary injunction during the appeal. Pernell v. Fla. Bd. of Governors of State Univ., No. 22-13992-J, 2023 WL 2543659, at *1 (11th Cir. Mar. 16, 2023).

129 *Pernell*, 641 F. Supp. 3d at 1243 (stating "the Eleventh Circuit has not yet reversed itself, en banc, and the Supreme Court explicitly declined to extend its employee-speech analysis in *Garcetti* to 'speech related to scholarship or teaching.' In short, two things are clear: (1) the First Amendment protects university professors' in-class speech and (2) *Bishop* [*v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991)] remains the binding authority guiding this Court's analysis of Plaintiffs' speech claims.").

130 Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991).

131 *Id*. at 1068.

132 484 U.S. 260 (1988).

133 *Id*. at 273 (1988) (holding "that educators do not offend the First Amendment by exercising

Looking to the prior decision from the Eleventh Circuit and to *Hazelwood*, the district court hearing the legal challenge to Florida's law stated that the restrictions imposed on curricular-related speech in the law had to reflect a legitimate rationale by state officials.[134] Applying this standard, the court granted a preliminary injunction to halt enforcement of Florida's law in the classroom.[135] While basing limits on Florida's authority over restricting classroom speech on *Hazelwood* and the prior decision from the Eleventh Circuit, the court looked to academic freedom principles as providing an important justification for recognizing First Amendment speech rights for professors in the classroom.[136] At the time of the publication of this article, the litigation is pending before the U.S. Court of Appeals for the Eleventh Circuit, which did refuse to stay the preliminary injunction while the appeal is pending.[137]

The litigation in Florida highlights the unsettled nature of what legal basis or framework courts should follow in evaluating potential First Amendment protections for faculty speech in public higher education related to teaching and research and possibly other duties, notably participation in shared governance or administrative tasks. Besides the public employee speech cases or precedent like *Hazelwood School District*, multiple commentators have urged courts to delineate First Amendment protections for academic freedom based on previous U.S. Supreme Court decisions that indicated academic freedom constituted a "special concern" of the First Amendment.[138]

This earlier line of academic freedom cases arose as part of the judiciary responding to governmental overreach in efforts to crack down on perceived communist threats during the period often referred to as the McCarthy era and

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editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns").

134 *Pernell*, 641 F. Supp. 3d at 1243 (stating how "the Eleventh Circuit struck a "somewhat amorphous" balancing test, drawing from the Supreme Court's analysis in *Hazelwood*. Ultimately, the balance involves "a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech.") (citations omitted)).

135 *Id.* at 1287.

136 *Id.* at 1277.

137 Pernell v. Fla. Bd. of Governors of State Univ., No. 22-13992-J, 2023 WL 2543659 (11th Cir. Mar. 16, 2023).

138 The literature on constitutional protections for academic freedom is voluminous. Here are some sample works: Robert Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State (2012); David M. Rabban, Academic Freedom: From Professional Norm to First Amendment Right (2024); Henry Reichman, The Future of Academic Freedom (2019); 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 (1990); J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 Yale L.J. 251 (1989); Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 Geo. L.J. 945 (2008); J. Peter Byrne, *The Threat to Constitutional Academic Freedom*. 31 J.C. & U.L. 79 (2004); Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*. 36 J.C. & U.L. 145 (2009); Lawrence Wright, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791 (2010).

also known as the Red Scare.[139] First in dissenting opinions,[140] next in concurring opinions,[141] and finally in a majority opinion,[142] the Supreme Court would endorse the idea that the First Amendment has a role in protecting free inquiry and academic freedom in educational environments. In *Keyishian v. Board of Regents of the University of the State of New York*, the Court offered seemingly strong support of the constitutional need to protect academic freedom.[143] Despite rousing rhetoric in cases such as *Keyishian* and *Sweezy v. New Hampshire*,[144] the Supreme Court has not developed a clear line of precedent building on its academic freedom cases to define how academic freedom rights should operate under the First Amendment, for individual faculty members and in terms of any institutional rights.[145]

The lack of a specific legal framework from the Supreme Court to define First Amendment protection for faculty members' academic freedom rights in public higher education is one reason that courts routinely turned to other lines of precedent, particularly the public employee speech cases.[146] These standards provided workable, if often imperfect, standards for courts to decide legal disputes dealing with faculty speech in public higher education and claims involving academic freedom. The *Garcetti* decision opened a new legal chapter, one still in the drafting stage, in debates over the extent of legal protections for faculty members in public higher education for their speech related to teaching and research and potentially other job-based speech. Until the Supreme Court decides to provide clarity, ambiguity and debate over First Amendment protections for faculty speech in public higher education will persist.

Even as First Amendment legal debates over the First Amendment and faculty speech and academic freedom continue, there are other important legal standards that potentially provide legal protection for faculty speech, especially in the context of academic freedom. For instance, one area of potential legal protection for employee speech, including that connected to academic freedom, is from collective bargaining

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139 *See generally* Ellen Schrecker, No Ivory Tower: McCarthyism and the Universities (1986).

140 Adler v. Bd. of Educ. of City of New York, 342 U.S. 485, 509 (1952) (Douglas, J., dissenting) (arguing that the law threatened to turn schools into a system of surveillance and inhibit the educational process, including so as "to raise havoc with academic freedom").

141 Wieman v. Updegraff, 344 U.S. 183, 196 (1952) Frankfurter, J., concurring ("To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion."). Sweezy v. New Hampshire, 354 U.S. 234, 263 (Frankfurter, J., concurring). Looking to a statement by South African scholars, Justice Frankfurter wrote of the four essential freedoms that a university should possess to determine "'on academic grounds who may teach, what may be taught, what may be taught, how it shall be taught, and who may be admitted to study."

142 Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967). (declaring academic freedom a "special concern" of the First Amendment").

143 *Id*.

144 354 U.S. at 263 (Frankfurter, J., concurring).

145 *See generally supra* note 138.

146 Hutchens, *supra* note 138, at 154.

agreements.[147] Or, decades before courts took up First Amendment protection for faculty speech, colleges and universities, both public and private, looked to academic freedom as a professional employment condition, one safeguarded through tenure.[148]

The development of academic freedom as a professional norm in higher education was led by the American Association of University Professors (AAUP).[149] Building on statements issued in 1915 and 1925, the AAUP, joined by other higher education associations, issued the 1940 Statement of Principles on Academic Freedom and Tenure, which remains an important expression of academic freedom standards.[150] Higher education institutions throughout the nation have adopted the 1940 statement or some variation of it.[151] Tenure, representing a special type of contract, was envisioned as a key mechanism to protect the economic security of faculty members, and by extension, their exercise of academic freedom.[152] While tenure faces constant scrutiny—including questions over its usefulness in actually upholding academic freedom—and now applies to only a minority of faculty members in higher education,[153] the vast majority of colleges and universities attest that they continue to adhere to principles of academic freedom as a cornerstone of institutional mission and operations, even if often imperfectly realized in action.[154]

A relevant engagement question for college and university communities is to consider to what extent meaningful academic freedom protections are present at their institutions. Along with tenure-stream faculty members, scrutiny is warranted if faculty members in nontenure-stream positions are effectively able to exercise their academic freedom. In the contemporary college or university, there are also often employees not classified in a faculty position but who may teach courses or engage in research. In carrying out roles that are inherently connected to the academic mission, for instance teaching, and that should fall under the academic freedom umbrella, an important topic for institutions is the adequacy of academic freedom or open inquiry protections for these employees. Take, for instance, a student affairs professional who may also teach courses as part of their job duties. Student affairs professionals often work as at-will employees, which results in limited employment protections compared to faculty members in tenure-stream positions. Given the latitude or discretion that college and university employers possess

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147 *See generally* Karen Halverson Cross, *Faculty Handbook as Contract*, 45 Cardozo L. Rev. 789 (2024).

148 Neal H. Hutchens & Frank Fernandez, *Academic Freedom as a Professional, Constitutional, and Human Right*, *in* Handbook of Theory and Research. Higher Education: Handbook of Theory and Research (Volume 38) 5–19 (Laura W. Perna ed., 2023), https://doi.org/10.1007/978-3-031-06696-2_2.

149 *Id*. at 10–17.

150 *Id*.

151 *Id*. at 13–17.

152 *Id*. at 12–17.

153 *Id*. at 19–22.

154 Keith E. Whittington, *Academic Freedom and the Mission of the University*, 59 Hous. L. Rev. (2022), https://houstonlawreview.org/article/35603-academic-freedom-and-the-mission-of-the-university ("Academic freedom has been widely accepted as the ideal that ought to govern the operation of American universities, but it has not always been realized in practice. Like the related principle of free speech, academic freedom is much easier to endorse in the abstract than to implement on the ground.").

over the continuing employment status of many employees, whether in faculty or staff positions, institutions have an opportunity and a responsibility to craft appropriate speech protections for employees in carrying out their professional duties. In doing so, a challenge for college and university leaders is to operationalize academic freedom protections or safeguards for professional speech by all members of the campus community as more than simply a dash of rhetorical flourish in institutional mission statements.

As addressed in Part II, just as colleges and universities need to engage in learning opportunities around student speech, including the freedom of inquiry that students should possess in the classroom with their learning, there exists a need for continual assessment and learning around the ways in which open inquiry and academic freedom are made a part of institutional practice and culture. To that end, what exactly are the academic freedom standards, policies, and guiding principles recognized by a college or university? What kind of faculty speech do these standards apply to, particularly in teaching, research, and service? And what about staff members and needed levels of professional autonomy, including through speech protections, for them to carry out their vital roles professional? Moving beyond legal rules, in the part that follows, we take up issues of education and engagement around issues of free speech in connection to these questions and alongside more general considerations of free speech on campus.

II: EDUCATIONAL ENGAGEMENT AND FREE SPEECH

Legal standards form an important piece of informing how colleges and universities respond to issues involving speech, but legal compliance is only part of what should go into how colleges and universities engage free speech issues. Increasingly, higher education actors have recognized the need for educational and training efforts that go beyond legal standards and view issues of free speech and related concepts, civil discourse as an example, as foundational parts of institutional educational and outreach efforts.[155] Additionally, such outreach endeavors need to involve more than students and should also encompass faculty members, staff members, senior leadership, governing board members, and other stakeholders, like alumni and parents of students. In this second part of the article, we offer suggestions, including in specific operational areas, of where higher education institutions can integrate issues related to free speech that go beyond rules or legal standards and push for broader and deeper engagement on issues connected to free speech. Rather than intended as prescriptive, our suggestions offer themes or points for institutional actors to consider in seeking to build holistic and institution-wide efforts related to free speech.

While rules are far from the only relevant point for the type of broader engagement around free speech we endorse, an important starting point in these efforts relates to educating members of the campus community as to institutional standards and policies connected to free speech. The kind of overview of legal standards provided in the earlier part of this article may prove useful in these

155 Anemona Hartocollis, *To Dial Down Campus Tensions, Colleges Teach the Art of Conversation*, N.Y. Times (Dec. 14, 2024, and updated Dec. 16, 2024), https://www.nytimes.com/2024/12/14/us/college-campuses-gaza-conversations.html.

endeavors, especially in connection to employee engagement. In terms of campus speech rules, we also recommend that campus speech policies are easily accessible to members of the campus community and to external groups and individuals. Campus leaders may choose to have online sites specifically focused on free speech, or that use an overarching term, for example civil discourse or engagement, that provides easy access to rules and other resources and that also make clear how issues of free speech constitute a key point of institutional emphasis. No matter the form, educational and engagement initiatives can also emphasize how other compelling campus values, particularly ones related to access and belonging or diversity and inclusion, are supported and prioritized alongside ones connected to free speech. At a minimum, it is important to make clear how the free speech "rules of the road" operate on campus, but we suggest that many colleges and universities can and should do much more in their educational and engagement efforts connected to free speech.

A. Education and Engagement with Employees

Campus leaders who aim to elevate issues related to free speech should, alongside students, prioritize education and engagement opportunities for staff and faculty members. Alongside value for institutional employees, such an approach can also help foster holistic campus responses to student educational and training initiatives. As an initial point, campuses should take stock of existing educational and outreach efforts with faculty and staff members regarding relevant institutional standards and practices connected to free speech. Beyond one-way trainings, engagement efforts can provide venues for deeper reflection on free speech topics and how support of free speech intersects with other institutional values and standards, like connections to nondiscrimination principles and belonging and inclusion.

Some of the employee constituencies and points at which trainings or educational opportunities exist include the following:

- new employee onboarding
- programing for senior leadership, deans, directors, department chairs that is both for individuals new to roles and continued professional development
- employees responsible for conduct / behavioral review and / or adjudication (e.g., human resource intervention, professional standard reviews, etc.)
- employees responsible for campus-based social media accounts
- employees responsible for admissions or hiring
- employees responsible for event space or planning programmatic efforts
- employees who serve on response or resource teams (e.g., threat assessment, bias incident response, etc.)

Along with reviewing the legal basics of free speech and relevant institutional standards, these learning opportunities provide a chance for deeper engagement on free speech and connected topics, such as civic engagement and issues of access and belonging. For instance, programming could provide the opportunity to examine the intersections and potential conflicts between free speech and

impacts on inclusion and belonging on campus, specifically the effects of what is commonly termed hate speech or challenges related to chilling speech. These kinds of sessions present the opportunity to also examine how conflicts can be navigated in ways that still allow discourse and free speech to proceed. Among the topics for coverage, educational offerings can help employees envision and be better prepared to navigate incidents in the early moments and know how to effectively communicate possible incidents to appropriate campus leadership or support offices. Sessions can offer exercises or scenarios for faculty and staff members to work through in determining best institutional responses to challenges involving free speech incidents. Such programming can also provide a space to think about connections between curricular and co-curricular spaces. It additionally can foster the building of teams or partnerships that cut across different institutional units.

Along with seeking expert advice and materials external to the institution, college and university leaders should not neglect to draw on the expertise of staff and faculty members on campus, a strategy that may also boost overall engagement and help tailor sessions to events and needs that have specifically arisen at that particular institution. Engagement and educational programming for faculty and staff members related to free speech should aim to avoid only providing a cursory examination of legal standards or institutional rules without opportunities for more in-depth considerations across campus of free speech and connected themes.

Free speech and related topics are often complicated—*very complicated*. Much of the complication is not necessarily tied to legal analysis of free speech standards but, instead, how to effectively communicate campus polices and rules and accompanying rationales for "why" the standards are in place. Dialogue and learning opportunities provide intellectual spaces for faculty and staff members to pose questions about what policies and practices the institution should have in place, which recognizes the dynamic and evolving nature of free speech issues. Besides providing venues to prioritize free speech, discourse can also wrestle with the difficult challenges that often arise from free speech. If college and university leaders desire their institutions to exist as vibrant places for free speech and connected themes, such as ones related to civic dialogue and access and belonging, then careful attention needs to be given to faculty and staff members and their learning and reflection on these issues.

B. Education and Engagement with Students

As part of outreach and educational planning focused on the campus workforce, one component could focus on asking faculty and staff members to work together on how to situate free speech educational opportunities for students and others within their daily work. Campuses too often are in a position of reacting to free speech incidents versus building a culture that understands free speech and how it intersects with multiple campus values, like access and belonging or issues connected to social justice. An ideal way to get "upstream" on this state of affairs is to pursue explicit dialogue about how a campus culture can be defined, built, and continually reinforced as a place where individual perspectives are welcomed and differing perspectives are anticipated and respectfully negotiated. This approach will come with tension, and campus constituents will have to understand that it is a key part of the intersectionality and integration of free speech and other campus values.

It is important to think about the work of building campus competence and culture as everyone's job. Many campuses have relied on specific units—often student affairs—to lead the education and response efforts related to free speech. By compartmentalizing these responsibilities and work, campuses are at risk of placing these endeavors primarily on staff members that often work without tenure or other labor protections. The work of building institution-wide approaches and understandings around free speech for the student community requires contributions from faculty and staff members throughout campus and includes both curricular and co-curricular units. Suggestions about the need to educate students on free speech may often point toward new-student orientation or first-year experience as the avenue of sharing information. The challenge with this approach lies in its effectiveness if not conceived of as an initial start to ongoing educational and engagement offerings throughout a student's academic career at the institution. Additionally, the sheer amount of information shared during orientation (often occurring before students have experienced life on campus) can be overwhelming and almost always needs to be reexplained or redistributed to students and families alike at other points.

Sharing information at orientation is important and a key element in the continuum of educational opportunities available to students. But, learning about an institution's commitment to free speech and open inquiry on an admissions tour and again at orientation is just the beginning. Students need to more fully understand how this information applies to them, how it will challenge them, and how they can balance their sense of self and convictions with expectations of respect and inclusion situated within the campus community. To do this deeper work, campuses and their students can benefit from reengaging this conversation in the various contexts in which students exist on campus, in both curricular and co-curricular settings.

In sum, it is vital for university leadership and the campus community to think more broadly when it comes to educational outreach to students. There are several potential touchpoints that institutions could look to for targeted engagement on free speech issues with students and/or their families:

- Consider providing a widely available and shared position statement on free speech and efforts to promote civic dialogue and access and belonging, along with making pertinent policies and standards easily accessible for members of the campus community and beyond. Clearly stating and widely sharing institutional standards around free speech and access and belonging provides an opportunity to convey institutional values and expectation even before students are enrolled. It also provides parents of students the opportunity to become acclimated to institutional free speech standards, which are likely to differ markedly from those followed at their child's secondary education institution.
- Weave issues of free speech along simultaneous campus commitments to access and belonging into campus tours.
- Maintain a visible university website on free speech that includes a university statement on free speech and academic freedom, expectations related to balancing free speech and access and belonging, educational materials for department use, and information on campus resources.

- Launch specific communication campaigns about speech on campus.
- Provide educational opportunities for undergraduate and graduate student government leaders and members.
- Offer educational opportunities for all members of student organizations.
- Provide educational opportunities for student-athletes.
- Include educational and engagement points for campus tour guides, orientation leaders, and university ambassadors related to issues of free speech and institutional commitments to access and belonging.
- Integrate and emphasize free speech issues in curricular programs, which can include highlighting existing opportunities along with the creation of new ones.
- Explore ways to capitalize on the expertise of librarians in curricular or co-curricular educational opportunities, included on topics related to free speech like mis- and dis-information.
- Integrate and emphasize free speech issues in co-curricular programing and opportunities, including in residence life.

As institutions consider ways to integrate educational and engagement opportunities for their student communities, they may benefit from learning about efforts at other colleges and universities. To give one example, American University has launched its "Civic Life" initiative, which is described by the institution as "[r]ooted in the ethos of inquiry and a commitment to free expression and civil discourse, … [and] offers more than an opportunity to learn facts. It allows you to practice the character traits needed for dialogue and deliberation."[156] The initiative offers a component to engage in dialogue across differences and also incorporates existing university efforts in the area of civic dialogue.[157]

There are also national-level groups and initiatives, some housed in higher education institutions, that may be useful to institutions seeking to prioritize free speech, including in the context of connections to other overarching themes such as civic dialogue and access and belonging. For instance, the Campus Free Expression Project, which had been launched and housed since 2019 in the Bipartisan Policy Center, is now a part of the Council of Independent Colleges.[158] The University of California National Center on Free Speech and Civic Engagement has supports scholarship and projects related to free speech in higher education.[159] Georgetown University has "The Free Speech Project," which tracks free speech incidents and also makes learning modules available.[160] As another example, NASPA: Student Affairs

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156 *The Civic Life: An American University Experience*, Am. Univ., https://www.american.edu/the-civic-life/ (last visited Dec. 20, 2024).

157 *Id*.

158 *CIC Welcomes the Campus Free Expression Project*, Council Indep. Colls., https://cic.edu/news/cic-welcomes-the-campus-free-expression-project/ ((last visited Dec. 20, 2024).

159 Univ. Cal Nat'l Ctr for Free Speech & Civ. Engagement, https://freespeechcenter.universityofcalifornia.edu (last visited Dec. 20, 2024).

160 *The Free Speech Project*, Geo. Univ., http://freespeechproject.georgetown.edu (last visited

Administrators in Higher Education has also produced resources dealing with free speech.[161] Other groups, like PEN America,[162] the Foundation for Individual Rights and Expression,[163] the American Civil Liberties Union,[164] and the American Association of University Professors,[165] are also potential sources of information. The #ListenFirst Coalition is a multiorganizational effort that seeks to promote increased community and to challenge polarization.[166] And BridgeUSA[167] or Toastmasters[168] are examples of organizations that can help student students build their dialogue and debate skills.

The initiatives and organizations mentioned here are not meant to be exhaustive but illustrative of the variety of resources and points of contact to support campus efforts connected to free speech alongside expertise already existing on campus. Importantly, individuals or their institutions do not have to endorse or support particular views of these groups on free speech matters, but these examples show that an array of resources is available to colleges and universities in designing holistic campus blueprints related to free speech.

C. Other Stakeholders and Deciding When to Use the Institutional Voice

Alongside core educational and engagement opportunities with students and employees, outreach to other stakeholders—board members, alumni, parents of students, and elected officials—should not be overlooked. When a controversial speech incident occurs, institutional leaders will likely hear from their extended campus constituents. These moments may be more easily navigated if colleges and universities have previously developed and widely disseminated information about the ways the institution manages free speech on campus in terms of policies and practices. Proactive outreach also provides an educational opportunity for a college or university to articulate to external audiences along with internal ones the value and importance that the institution places on free speech and its commitment to other values, for instance commitments to an inclusive campus environment.

In these outreach efforts, which may help colleges and universities shape the narrative surrounding free speech at their institution, it is important to ensure that actions match with rhetoric. Institutions need to demonstrate fidelity in the day-to-day ways in which policies and practices are carried out and ensure that all

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Dec. 20, 2024).

161 *See, e.g.*, *Free Speech and the Inclusive Campus: How Do We Foster the Campus Community We Want?*, NASPA (May 22, 2020), https://naspa.org/report/free-speech-and-the-inclusive-campus-how-do-we-foster-the-campus-community-we-want.

162 PEN America, https://pen.org (last visited Dec. 20, 2024).

163 FIRE, https://www.thefire.org (last visited Dec. 20, 2024).

164 ACLU, https://www.aclu.org (last visited Dec. 20, 2024).

165 AAUP, https://www.aaup.org (last visited Dec. 20, 2024).

166 #ListenFirst Coalition, https://www.listenfirstproject.org/listen-first-coalition (last visited Dec. 20, 2024).

167 BridgeUSA, https://www.bridgeusa.org (last visited Dec. 20, 2024).

168 Toastmasters Int'l, https://www.toastmasters.org (last visited Dec. 20, 2024).

speakers are afforded treatment that is not tied to whether specific institutional actors favor or disfavor their messages or based on pressure from external groups and individuals to act in ways not in alignment with legal standards or institutional rules and values.

Distinct from even-handed treatment of individuals and groups under relevant free speech policies and standards, college and university officials should establish standards for when institutional leaders will weigh in on specific speech issues that have arisen on campus or elsewhere. Even as institutions evaluate a situation in terms of using institutional voice and avoid a rush to judgment in specific situations, it is important to have preemptively considered the individuals or offices that should be brought into conversations to help guide responses and communication on campus and beyond. Offices involved in response and communication efforts can vary depending on the circumstances, but units that often need to be included are communications; the general counsel's office; academic affairs; student affairs; diversity and inclusion; and, possibly, police/public safety. These units are also often found at the incident response team table, so integrating communications into such teams can be an efficient model.

Calls exist for institutions to take a neutral stance on "controversial" matters,[169] with adherents of this position often looking to the Kalven Report that was issued in 1967 by the University of Chicago.[170] Critiques of institutional neutrality have also been offered.[171] An important decision for college and university leaders is to determine under what circumstances the institution will use its institutional voice to take a position on specific issues. In recent years, some campuses have developed statement protocols to provide clarity regarding when their leaders will and will not issue institutional statements.[172]

In using the institutional voice, leaders should be mindful of the consequences of the messages intended for communication, including the attention that could be brought to individuals associated with the institution like faculty members, staff members, and students. While it is often important to provide updates to the campus community and external audiences when negative or controversial incidents take place, it is imperative that institutions adhere to their own campus

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169 *See*, *e.g.*, Quinn, *supra* note 45; Daniel Diermeier, *The Need for Institutional Neutrality at Universities,* Forbes (Dec. 20, 2023), https://www.forbes.com/sites/danieldiermeier/2023/12/20/the-need-for-institutional-neutrality-at-universities/.

170 *Kalven Committee: Report on the University's Role in Political and Social Action*, Univ. Chi. (Nov. 1, 1967), https://provost.uchicago.edu/reports/report-universitys-role-political-and-social-action.

171 John Warner, *About That 'Institutional Neutrality,'* Inside Higher Ed (Nov. 15, 2024), https://www.insidehighered.com/opinion/blogs/just-visiting/2024/11/15/institutional-neutrality-isnt-what-i-thought-it-was; Jennifer Ruth, *The Uses and Abuses of the Kalven Report*, Chron. Higher Educ. (Oct. 14, 2023), https://www.chronicle.com/article/the-uses-and-abuses-of-the-kalven-report; Michael T. Nietzel, *The Kalven Report and the Limits of University Neutrality*, Forbes (Dec. 26, 2023, and updated Dec.14, 2024), https://www.forbes.com/sites/michaeltnietzel/2023/12/26/the-kalven-report-and-the-limits-of-university-neutrality/.

172 *See* Jessica Blake, *Debating the 'Art' of Institutional Statements*, Inside Higher Ed (Nov. 22, 2023), https://www.insidehighered.com/news/governance/executive-leadership/2023/11/22/college-presidents-discuss-art-institutional.

policies and relevant legal standards in how they respond to high-profile events.

Education and engagement activities that include constituencies in addition to core campus groups can play a meaningful part in how colleges and universities establish expectations for the ways an institution manages and responds to free speech issues. Such engagement also provides a way for colleges and universities to share broadly how they are endeavoring to model commitments to free speech and civic dialogue while also promoting access and belonging as institutional values. These efforts can also help stakeholders, alumni for example, to serve as important voices and allies when a free speech challenge arises on campus. As part of engagement with external stakeholders, colleges and universities should also establish the circumstances for when the institution will use or not use the institutional voice to respond to issues occurring on campus or elsewhere.

III. CONCLUSION

Colleges and universities need to have well-designed speech policies and practices in place, but rules are only one part of a holistic campus plan for issues connected to free speech. In a time of increasing societal polarization, colleges and universities can serve as exemplars for how to deal with the promise and challenges of free speech. Along with curricular and co-curricular opportunities for students, faculty and staff members are key actors in establishing a vibrant campus free speech ecosystem. Rather than a single unit, such as student affairs, free speech and related issues merit attention and engagement across campus. Besides the immediate members of the campus community, education and engagement should extend to additional stakeholders, with governing board members, alumni, and parents of students often notable stakeholders. Importantly, rather than assuming that free speech exists in a static state, education and engagement must reflect a willingness to navigate the dynamic and often contested nature of free speech on campus.