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

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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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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]

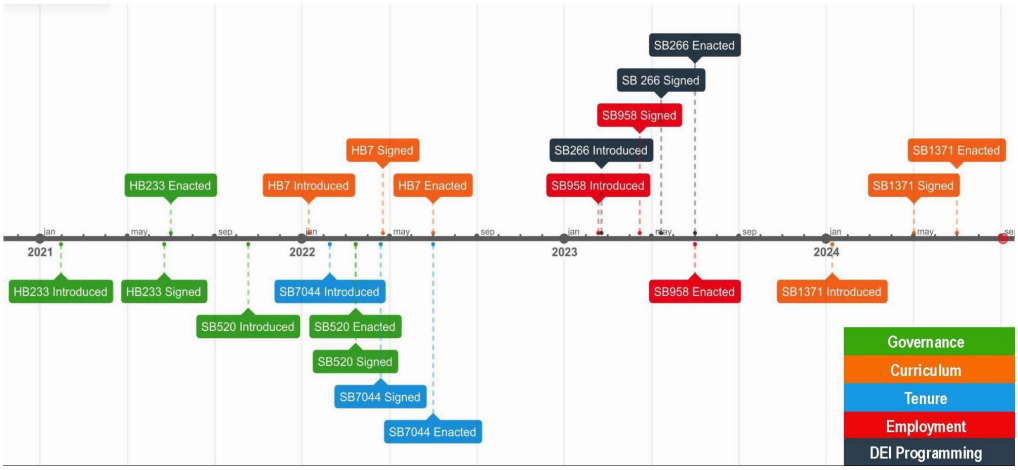

Figure 1: Timeline of Florida Legislation.

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).