

FLORIDA'S STOP WOKE ACT: A WAKE-UP CALL FOR FACULTY ACADEMIC FREEDOM

NEAL HUTCHENS AND VANESSA MILLER*

ABSTRACT

In multiple states, legislation has been proposed or enacted to suppress ideas associated with critical race theory (CRT) and related lines of critical scholarship in schools and, in some proposals, in colleges and universities. These state endeavors can be traced to efforts to emulate Executive Orders 13950 and 13958 issued during the Donald Trump presidential administration, which Joseph Biden rescinded the day he was elected. Among the objections to these state legislative efforts include calls that they constitute an impermissible infringement on the First Amendment academic freedom rights of public higher education faculty. With a particular focus on what is widely referred to as Florida's Stop WOKE Act, this article examines how anti-CRT legislative initiatives that extend to public colleges and universities potentially violate the First Amendment academic freedom rights of individual faculty.

The authors contend that public higher education faculty professional speech made in carrying out employment duties connected to teaching, research, or shared governance should be eligible for First Amendment protection. The U.S. Supreme Court has held that public employee speech made in carrying out employment duties does not constitute First Amendment protected speech. But the Court has yet to address whether faculty speech in public higher education that implicates academic freedom concerns is exempted from these standards. In this article, the authors propose that the academic freedom statements adopted by public higher education institutions and systems provide a strong justification to provide First Amendment protection to faculty academic speech, such as that related to teaching and research. Additionally, the authors suggest that courts could use a public concern analysis tailored to higher education contexts to evaluate the interests of faculty and institutions in deciding cases that involve the academic speech of public higher education faculty.

* Neal H. Hutchens, J.D., Ph.D., is Professor in the Department of Educational Policy Studies and Evaluation at the University of Kentucky.

Vanessa Miller, J.D., Ph.D., is Postdoctoral Associate at the Race and Crime Center for Justice at the University of Florida Frederic G. Levin College of Law. The authors wish to thank Jeffrey Sun and Frank Fernandez for reviewing earlier drafts of this article.

TABLE OF CONTENTS

INTRODUCTION	37
I. THE ATTACK ON CRITICAL RACE THEORY	38
A. THE HISTORICAL ROOTS OF CRITICAL RACE THEORY	40
1. <i>Legal Realism and Critical Legal Studies</i>	41
B. DEVELOPMENT OF CRITICAL RACE THEORY	44
II. DISAGREEMENT OVER FIRST AMENDMENT FACULTY ACADEMIC FREEDOM.	47
III. “POSITIVELY DYSTOPIAN”—FLORIDA’S STOP WOKE ACT	56
IV. THE <i>GARCETTI</i> STANDARD AND WHEN A PROFESSOR’S JOB DUTY IS TO SPEAK INDEPENDENTLY	59
A. INSTITUTIONAL ACADEMIC FREEDOM STATEMENTS, SCOPE OF EMPLOYMENT, AND THE FIRST AMENDMENT.	61
B. AN IMPORTANT STIPULATION: TAILORING PUBLIC CONCERN TO ACADEMIC SPEECH CONTEXTS	67
V. CONCLUSION	68

INTRODUCTION

In what has been characterized as the “Ed Scare,”¹ multiple state-level proposals have been advanced—with these initiatives characterized as “educational gag orders” by one national free expression advocacy organization—to suppress certain ideas and views in schools and in higher education.² These state endeavors can be traced to efforts to emulate executive orders issued during the Donald Trump presidential administration,³ which were rescinded after the election of Joseph Biden.⁴ State legislative initiatives have now become the focus of efforts to censor critical race theory (CRT) or related lines of critical inquiry or thought in educational settings, including, in some proposals, at public colleges and universities.⁵ Among the objections to these legislative efforts include calls that they constitute an impermissible infringement on the First Amendment academic freedom rights of public higher education faculty. With a particular focus on Florida’s House Bill 7 (HB 7) Individual Freedom Act, more widely referred to as the Stop “Wrongs to Our Kids and Employees” Act (Stop WOKE Act),⁶ this article examines how anti-CRT legislative initiatives that encompass public colleges and universities potentially violate the First Amendment academic freedom rights of individual faculty. In Florida, the issue of potential infringement on constitutionally protected academic freedom has been squarely raised in litigation over the Stop WOKE Act. In defense of the legislation, the Florida Board of Governors of the State University System argued in a lawsuit challenging the Stop WOKE Act’s application to higher education that faculty

1 Jonathan Friedman, *Goodbye Red Scare, Hello Ed Scare*, Inside Higher Ed (Feb. 24, 2022), <https://www.insidehighered.com/views/2022/02/24/higher-ed-must-act-against-educational-gag-orders-opinion>. Friedman compares recent attempts to suppress ideas in schools and colleges, including in libraries, to efforts during the McCarthy period to root out supposed communist influences in American life. See Part III for consideration of U.S. Supreme Court opinions raising academic freedom concerns during this era.

2 In November 2022, PEN America’s tracker of these efforts reported that proposals had been introduced in forty-one states and that nineteen laws had been passed in fifteen states. PEN America, Index of Educational Gag Orders, <https://pen.org/issue/educational-censorship/> (last visited Dec. 1, 2022).

3 Exec. Order No. 13950, 85 Fed. Reg. 66083 (Sept. 22, 2020) (prohibiting trainings conducted by federal contractors that promote “divisive concepts”); Exec. Order No. 13958, 85 Fed. Reg. 70951 (Nov. 2, 2020) (establishing 1776 Commission, which issued the “1776 Report” that sought to promote a patriotic interpretation of U.S. history and opposed efforts such as the 1619 Project, which places race and slavery as central to understandings of American history). See The President’s Advisory 1776 Commission (Jan. 2021), *The 1776 Report*, <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf>.

4 Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

5 See PEN America’s Index of Educational Gag Orders, *supra* note 2.

6 The legislation passed by the Florida legislature as House Bill 7 is named the Individual Freedom Act, but the legislation includes several of the provisions advanced by Florida Governor Ron DeSantis in the Stop WOKE Act bill, which is a name that continues to be commonly used to refer to the law enacted. See *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No.: 4:22-cv-304-MW/MAF, *2 n.2 (N.D. Fla. Nov. 11, 2022) (order granting in part and denying in part motions for preliminary injunction). We will refer to the law as the Stop WOKE Act since that name is commonly used.

classroom speech is governmental speech for First Amendment purposes.⁷ In doing so, the Board of Governors rejected the position that professors in public higher education possess individual constitutional academic freedom rights relative to their classroom speech.

Anti-CRT provisions, such as the Stop WOKE Act, and related legislation that seek to regulate faculty *academic speech*⁸—the term we use for professor speech made in carrying out professional employment duties in teaching, research, and shared governance—highlight ongoing legal ambiguity and debate over First Amendment protection for faculty academic freedom in public higher education.⁹

In Part I of the article, we present a general overview of the development of CRT and its scholarly roots, which makes clear how anti-CRT provisions, such as Florida's Stop WOKE Act, are based on an uninformed and distorted interpretation of CRT that aims to subvert a firmly established area of scholarly discourse in higher education. The article then moves to consideration of how Florida's Stop WOKE Act and related proposals encroach on the constitutional academic freedom rights of professors in public higher education. Part II of the article provides an outline of the emergence of the concept of constitutional academic freedom and of how the public employee speech standards have come to provide a framework commonly used by courts to evaluate faculty speech claims raising academic freedom concerns. Consideration of a preliminary injunction granted to block enforcement of Florida's Stop WOKE Act as to higher education serves as the focus for Part III of the article. In Part IV of the article, we contend that courts, as part of engaging in the public employee speech analysis, should take into account when a public higher education employer defines the job duties of professors to encompass independent speech in carrying out their teaching, research, and shared governance duties. Such an approach, one guided by pragmatic recognition of how constitutional academic freedom claims by professors have largely been subsumed under the public employee speech framework, provides a basis for courts to recognize First Amendment protection for public higher education faculty when engaging in academic speech. In conclusion, in Part V of the article, we summarize the positions advanced in the article supportive of judicial recognition of First Amendment protection for faculty academic speech in public higher education.

I. THE ATTACK ON "CRITICAL RACE THEORY"

On July 1, 2022, Florida's House Bill 7, commonly referred to as the "Stop Wrongs to Our Kids and Employees Act" (Stop WOKE Act), went into effect.¹⁰

7 Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22-cv-304-MW/MAF, *19 (N.D. Fla. Sept. 22, 2022) (defendants' response in opposition to plaintiffs' motion for preliminary injunction).

8 We adopt the term "academic speech" used by Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *Geo. L.J.* 945, 994 (2009). Academic speech refers to faculty speech made by professors in carrying out their employment duties in the context of teaching, research, or "faculty governance matters." *Id.* at 985–86.

9 For an overview of the legislative efforts to ban CRT in public institutions of higher education, see Vanessa Miller et al., *The Race to Ban Race: Legal and Critical Arguments Against State Legislation to Ban Critical Race Theory in Higher Education*, 88 *Missouri L. Rev.* (forthcoming 2023).

10 As covered *supra* note 6, the enacted legislation is formally named the Individual Freedom

Florida Governor Ron DeSantis said the law stood against the “state sanctioned racism” embedded in the teachings of “critical race theory” found in schools, universities, and workplaces.¹¹ He touted the law as a prioritization of education in the face of indoctrination and discrimination.¹² With the Stop WOKE Act, Florida became the tenth state to pass legislation prohibiting faculty members at public institutions of higher education from teaching so-called “divisive concepts” found in CRT.¹³ By the time the Stop WOKE Act became law, public discourse surrounding “critical race theory” was widespread. News media outlets,¹⁴ social media platforms,¹⁵ local newspapers,¹⁶ city council meetings,¹⁷ and school board meetings¹⁸ placed “critical race theory” at the center of public attention.

However, the “critical race theory” on display in media accounts and from certain pundits and elected officials¹⁹ was not the decades-old, well regarded legal academic theory that interrogates the legal system’s relationship to race.²⁰ It was a fictionalized boogeyman conjured to undermine social and racial justice activism. This fabricated account of “critical race theory” provided government officials with the justification to introduce and pass indeterminate anti-CRT legislation, including as applied to public institutions of higher education.

Act, but the law is commonly referred to as the Stop WOKE Act. This article uses quotation marks to differentiate between the “critical race theory” used and attacked by conservative politicians and the critical race theory developed by academics within the academic setting.

11 See, e.g., News Release, Office of Ron DeSantis 46th Governor of Florida, Governor Ron DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/>.

12 See, e.g., News Release, Office of Ron DeSantis 46th Governor of Florida, Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination (April 22, 2022), <https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/>.

13 See generally Miller et al., *supra* note 9.

14 Sam Dorman, *What Is Critical Race Theory?*, Fox News (May 14, 2021), <https://www.foxnews.com/us/what-is-critical-race-theory>.

15 Peter Suci, *Critical Race Theory Debated on Social Media—It Could Decide Virginia Gubernatorial Election*, Forbes (Nov. 2, 2021), <https://www.forbes.com/sites/petersuci/2021/11/02/critical-race-theory-debated-on-social-media-it-could-decide-virginia-gubernatorial-election/?sh=20a6c9f57986>.

16 Jeremy I. Levitt, *Before Attacking Critical Race Theory, Learn What It’s About*, Orlando Sentinel (July 29, 2021), <https://www.orlandosentinel.com/opinion/guest-commentary/os-op-critical-race-theory-define-understand-20210729-hwdcf3tiujdajpuzew5j65wyhy-story.html>.

17 Tom Fitzgerald, *Anne Arundel County Council to Debate Critical Race Theory at Monday Night Meeting*, Fox5 News (Oct. 18, 2021), <https://www.fox5dc.com/news/anne-arundel-county-council-to-debate-critical-race-theory-at-monday-night-meeting>.

18 Katie Reilly, *Culture Wars Could Be Coming to a School Near You*, TIME (Mar. 23, 2022), <https://time.com/6159177/school-board-elections-covid-19-critical-race-theory/>.

19 See, e.g., Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, New Yorker (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>.

20 For a foundational understanding of critical race theory scholarship, see Kimberle Crenshaw et al., *The Key Writings that Formed the Movement* (1995), and Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (2017).

Anti-CRT laws villainize “critical race theory” without reflecting upon its actual tenets. The laws attack and suppress concepts that CRT touches upon, such as white supremacy and colorblindness, as a tactic to hold the entire theory politically hostage. In doing so, any discussion—whether critical or not—of race and racism becomes classified as a byproduct of “critical race theory” and therefore prohibited. Additionally, anti-CRT laws have been written to provide little guidance or clarity on what is actually prohibited or how it is prohibited.²¹ The laws’ ambiguity gives latitude to state officials to police speech and determine the parameters of what speech does or does not count as “critical race theory.”

In seeking to mandate acceptable views in public colleges and universities and to prohibit other viewpoints, the narratives advanced in anti-CRT laws raise important academic freedom concerns, including ones related to potential First Amendment academic freedom protections for faculty academic speech. Before turning directly to considerations of constitutional academic freedom for professors’ academic speech, in this part we contextualize and situate CRT as a strand of scholarly inquiry, one with deep roots in legal scholarship, that is well established in academe. The overview provided in this part helps to bring into sharp focus the significant threats to academic freedom posed by the Stop WOKE Act and similar laws.

A. THE HISTORICAL ROOTS OF CRITICAL RACE THEORY

A recent wave of legal scholarship has examined the concerns and critiqued the deficiencies of anti-CRT laws.²² For example, scholars have argued the anti-CRT laws are modern-day iterations of antiliteracy laws adopted during slavery,²³ racial backlash bills that have thrust a distorted narrative of CRT into law and the public discourse,²⁴ political manipulations meant to threaten the traditional norms of higher education as a social institution for teaching and scholarship,²⁵ and offensive to First Amendment doctrine.²⁶ An important component of the recent scholarly criticism of anti-CRT laws is the laws’ disregard for the theoretical foundations of CRT and its application in educational institutions.²⁷ This includes the historical development of CRT and its emergence from critical legal studies (CLS) as well as how

21 See Katheryn Russell Brown, “The STOP Woke Act:” HB 7, Race, and Florida’s 21st Century Anti-Literacy Campaign, NYU Rev. L. & Soc. Change (forthcoming 2023) (discussing the ambiguity of Florida’s HB 7 as applied in legal education).

22 See generally Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 Wm. & Mary J. Race, Gender & Soc. Just. 61 (2021); Jonathan Feingold, *Reclaiming CRT: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. Rev. 723 (2022); Brown, *supra* note 21; Miller et al., *supra* note 9.

23 See generally Brown, *supra* note 21.

24 See generally Feingold, *supra* note 22.

25 See generally Miller et al., *supra* note 9.

26 Meriam Mossad, *Silence or Discrimination: Is the Ban on Critical Race Theory a Violation of Teachers’ Free Speech or Does It Discriminate Against Students?*, U. Balt. L. Rev. (Jan. 28, 2022), <https://ubaltlawreview.com/2022/01/28/silence-or-discrimination-is-the-ban-on-critical-race-theory-a-violation-of-teachers-free-speech-or-does-it-discriminate-against-students/>.

27 Gloria Ladson-Billings & William F. Tate, *Toward a Critical Race Theory of Education*, 97 Tchrs. Coll. Rec. 47 (1995).

critical philosophies of race and philosophies of law understand how race—a socially constructed concept—has real impacts in the administration of law and justice.

CRT developed from the CLS movement in the 1970s and 1980s.²⁸ CRT leaned on CLS to center the creation and distribution of power in the law and critically reflect on the racialized operation of the legal system.²⁹ CLS borrowed from the social sciences to critique the relationship of law to society and focused on the role that law plays in “maintaining the status quo and stymieing efforts to effect fundamental change” for marginalized groups.³⁰ Anti-CRT legislative efforts, such as Florida’s Stop WOKE Act, provide a textbook example of the type of law to which a critical studies framework can be applied to examine and better understand the potential impacts and motivations behind such anti-CRT laws.

1. *Legal Realism and Critical Legal Studies*

The relationship between law and the social sciences is cradled in the conceptual framing of the law itself. Whether the law can or should interact with the social world is determined by the purposes and objectives of the law.³¹ A legal system premised on a systemic pattern of predictions, such as legal precedent, is characteristically opposed to relying on extralegal facts as sources of authority.³² However, whether a legal system controlled and operated by persons living in a social world can in fact operate on systematic patterns remains challenged. Accordingly, CLS offers, even demands, a critical reflection of the operation of the legal system.

CLS’s critical reflection of the legal system was not novel; it held historical roots in another intellectual movement—the American legal realist movement. CLS can trace its origins back to the early 1920s and 1930s when legal realism entered American jurisprudence. At the time, legal realism shook the foundation of the American legal system. Legal realism directly opposed classical, formalistic theories of law that governed much of American legal thinking.³³ As a normative theory, formalism posits there is an underlying, logical application of legal principles to a particular case.³⁴ For formalists, legal rules and principles are readily available for application and, most importantly, are removed from individualistic interpretations from judges.

Legal realism, however, critically assessed the *method* of interpretation and application of the law in the judiciary.³⁵ Legal realists challenged the view that the law operates

28 For a comprehensive overview of the critical legal studies movement, see Guyora Binder, *Critical Legal Studies*, in *A companion to philosophy of law and legal theory* (2010); Roberto M. Unger, *The critical legal studies movement* (Dennis Patterson ed., 1986).

29 See generally Crenshaw et al., *supra* note 20; Delgado & Stefancic, *supra* note 20; Victor Ray, *On Critical Race Theory: Why it Matters and Why You Should Care* (2022).

30 Allan C. Hutchinson, *Critical Legal Studies* (1989).

31 Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 *Legal Theory* 111 (2010).

32 John Henry Schlegel, *American legal realism and empirical social science* (1995).

33 John Monahan & W. Laurens Walker, *Social science in law: Cases and materials* (9th ed. 2017).

34 See generally Leiter, *supra* note 31.

35 See generally Schlegel, *supra* note 32.

as a systematic or predictive method because judges have personal biases or attitudes that shape the way they view or interpret the law.³⁶ Legal realists claim that a judge's personal attitudes about the law do not exist independently from the law. This is not to say judges *cannot* separate their beliefs or views about the law from its application but that judges are influenced by their ideas and values in the law.³⁷ Legal realism altered how jurists and scholars understood the function of the law by questioning the determinacy of legal rules. Legal realism supported the proposition that law is neither determinate nor objective.³⁸ It challenged the formalist view that judges systematically apply the law by deducing legal conclusions from a set of concise legal rules.³⁹ Instead, legal realism claims that judges decide cases on nonlegal considerations embedded in specific ideological reflections.⁴⁰

Justice Oliver Wendell Holmes effectively laid the philosophical foundation for a realist, nonformalistic interdisciplinary approach to the law when he wrote *The Common Law* in 1881. Holmes famously wrote that “the life of the law has not been logic: it has been experience.”⁴¹ Unpersuaded by formalistic approaches to the interpretation and application of law, he instead supported a “rational study of law” that considers history, statistics, and economics.⁴² He insisted on a “realist” legal philosophy that emphasized the *judges* who apply the law and not the *method* that applies it. For Holmes, this approach was more suitable for a modern and evolving society.⁴³

Furthering Justice Holmes's beliefs, Louis D. Brandeis, prior to joining the Supreme Court, incorporated social science research into his legal briefs in the early 1900s to highlight the shifting needs of society.⁴⁴ Brandeis believed the social sciences could provide the “broad knowledge of present-day problems essential to the administration of justice.”⁴⁵ He argued that the law is incapable of addressing societal problems by itself, and judges should be knowledgeable of the economic and social developments that occur outside of the law.⁴⁶ Thus, Brandeis encouraged judges to consider and utilize empirical evidence if applicable to the legal question at hand.⁴⁷ Like many other legal realists, truth no longer resided inside law schools but in the economics department across the way.⁴⁸

36 Michael S. Green, *Legal Realism as Theory of Law*, 46 Wm. & Mary L. Rev. 1915 (2005).

37 Oliver Wendell Holmes, Jr., *The Common Law* (1881).

38 Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Pa. L. Rev. 549 (1993).

39 *See generally* Leiter, *supra* note 31.

40 Green, *supra* note 36.

41 Holmes, Jr., *supra* note 37.

42 *Id.*

43 Neil Duxbury, *The Birth of Legal Realism and the Myth of Justice Holmes*, 20 Anglo-Am. L. Rev. 81 (1991).

44 Monahan & Walker, *supra* note 33.

45 Alpheus T. Matson, *Mr. Justice Brandeis: A Student of Social and Economic Science*, 79 U. Pa. L. Rev. 665, 674 (1931).

46 *Id.*

47 *Id.*

48 James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685 (1985).

Contemporary iterations of legal realism are not only found in the CLS movement but the new legal realism movement of the early 2000s.⁴⁹ Both movements are rooted in the principles of legal liberation and transformation that seek to usher in a more just American society.⁵⁰ Embedded in the movements are tenets of critical theory: unraveling “the ideology of legal institutions” and questioning conventional methods of the law.⁵¹ As progressive sociolegal approaches to the law, demystifying and decoding legal doctrine is central to the advancement of social liberation and transformation.⁵² Here, the relationship between law and society becomes relevant and central to jurisprudential scholarship.

Critical legal scholars and new legal realists hold legal realist views that are antithetical to formalist theories of law. They reject legal methodology that ignores societal dynamics.⁵³ Moreover, they supplement their approach with extralegal sources like social science research. The turn to social science research is due, in part, to the rise of the social sciences in the early twentieth century, and, in other part, to obtain an understanding of societal dynamics.⁵⁴ In particular, the CLS movement turns a critical eye toward the language of the law.⁵⁵ It seeks to “decode and delegitimize the existing language and its underlying structures” while analyzing “the alternative societal arrangements” that will guide society towards justice and equity.⁵⁶ The legal system operates a common language through the use of doctrinal method. This form of legal methodology disseminates authority within the law and ultimately legitimizes the system.⁵⁷ Seemingly objective and apolitical legal language is then used to justify the legal rules necessary to a doctrinal method of adjudication.⁵⁸ However, CLS questions the plausibility of an objective or apolitical legal system.⁵⁹ It suggests that the law is inherently subjective and, taking from American legal realism, the vested power in the judge to apply law according to personal ideology is only presented under the guise of objectivity.⁶⁰

Roberto Mangabeira Unger, a central figure in the CLS movement, helped disrupt the tenets of objectiveness in legal methodology. He proposed a radical critique of legal

49 Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 *Stan. L. Rev.* 623 (1984).

50 Andrew W. Haines, *The Critical Legal Studies Movement and Racism: Useful Analytics and Guides for Social Action or an Irrelevant Modern Legal Scepticism and Solipsism?* 13 *Wm. Mitchell L. Rev.* 685 (1987).

51 Frank W. Munger & Carroll Seron, *Critical Legal Studies Versus Critical Legal Theory: A Comment on Method*, 6 *Law & Pol’y* 257, 257 (1984).

52 Haines, *supra* note 50, at 257.

53 *See generally* New legal realism Volume I: Translating law-and-society for today’s legal practice (Elizabeth Mertz et al. eds., 2016).

54 *See generally* Scott Gordon, *The history and philosophy of social science* (1993).

55 *See generally* Haines, *supra* note 50.

56 *Id.* at 700.

57 Munger & Seron, *supra* note 51, at 257.

58 *See generally* Unger, *supra* note 28.

59 *Id.*

60 *See generally* New legal realism Volume I, *supra* note 53.

methodology and legal analysis that not only viewed the law as indeterminate but as something that cannot universally resolve disputes of legal consequence.⁶¹ Unger describes legal doctrine or legal analysis as a conceptual practice that combines two characteristics: (1) the ability to work from an institutionally defined tradition and (2) the claim to speak authoritatively within this tradition. For Unger, the creation and application of law diverge both in method and in justification. It is in the method and justification of the law that Unger is critical of the language and power required to structure and apply the law.

The CLS movement began at a time in American legal thought when critical theories began to center the voices of minoritized communities. Critical legal theory places an obligation on jurists and scholars to confront legal issues of social importance⁶² while recognizing those with the power to make issues important or not. For example, structures of power exist in society that create and maintain hierarchies based on race, sex, sexual orientation, or wealth.⁶³ For many critical legal scholars, social hierarchies are reinforced in the law and must be critically assessed.⁶⁴ By highlighting the effect of law, critical legal scholarship centered the relationship of law and society that informs the very ways critical scholars, particularly critical race scholars, analyze Florida's Stop WOKE Act.

The analytical framework and theoretical development of CRT is crucial to understanding CRT's connection to issues of academic freedom. In particular, CRT's history anchors it into a long line of legal history that has ancestors in Oliver Wendell Holmes and Louis Brandeis. Jurists and legal scholars may not agree with the tenets of CRT because it challenges the standard in American jurisprudence, but CRT's development is not unlike other academic theories and frameworks. Just as classical formalism espouses one way to approach the law and legal system, so, too, does CRT present a way to interpret and analyze the law. CRT is a well-grounded theory, central to many disciplines with scholarly expertise that is imperative to the flourishing intellectual life of the academy. Importantly, laws that forbid CRT are not only prohibiting (what is believed to be) CRT but prohibiting the process that generates revolutionary theories about the world around us.⁶⁵

B. DEVELOPMENT OF CRITICAL RACE THEORY

Anti-CRT laws claim to prohibit educational institutions from teaching divisive concepts embedded within CRT. Under Florida's Stop WOKE Act, divisive concepts include teaching that

61 Hugh Collins, *Roberto Unger and the Critical Legal Studies Movement*, 14 J.L. & Soc'y 387 (1984).

62 See generally Monahan & Walker, *supra* note 33; Munger & Seron, *supra* note 51.

63 See generally Binder, *supra* note 28.

64 For a broad understanding of how critical legal scholars use critical legal studies, see Monahan & Walker, *supra* note 33, and Binder, *supra* note 28.

65 Examples of revolutionary theories that changed the course of history include Isaac Newton's theory of gravity, Aristotle's logic, Charles Darwin's theory of human evolution, the Big Bang Theory, Svante Arrhenius's observations about atmospheric carbon dioxide levels that led to global warming, or Machiavellian politics.

An individual, by virtue of his or her race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously. [...] An individual, by virtue of his or her race, color, sex, or national origin, 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, sex, or national origin. [...] An individual, 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 individual played no part, committed in the past by other members of the same race, color, sex, or national origin. [...] 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, sex, or national origin to oppress members of another race, color, sex, or national origin.⁶⁶

However, the concepts described in Florida's law neither come from nor developed from CRT. They do not align with the rich history of CRT scholarship or expertise embedded within legal realism, CLS, or critical theory. Instead, the Stop WOKE Act targets concepts that CRT uses in its analytical framework to investigate and expose the prevalence of race and racism in American society. The targeted concepts in the law are standalone concepts that critical scholars use to explain and describe hierarchies of power and privilege in American social and political institutions such as education, health care, law, and employment.⁶⁷

Despite Florida's depiction, CRT is not a race-based training module or fixed list of directives. CRT is an established theoretical framework with a rich lineage of scholarship in the academy that explores the deep implications of race in American history. It is an interdisciplinary approach to answer questions about race by analyzing epistemic foundations of racism in American history.⁶⁸ Specifically, CRT "faces America's brutal racial history, recognizes the parts of that history that remain unchanged, and works toward changing the rest."⁶⁹ CRT has deep-seated roots in significant intellectual movements—legal realism and CLS—that fundamentally shaped legal thought and is anchored in the scholarly work of the professoriate. Eminent scholars center their work in CRT and continue to develop the applicability of CRT in several academic disciplines. Such past and current scholars include Derrick Bell, Kimberle Crenshaw, Richard Delgado, Alan Freeman, Cheryl Harris, Charles R. Lawrence III, Mari Matsuda, Jean Stefancic, Tara J. Yosso, and Patricia J. Williams.

CRT first emerged in the legal academy in the 1970s and 1980s as a way to explain why the civil rights movement failed to improve the living conditions for Black and other racially marginalized communities in the United States despite

66 H.R. 7, 124th Leg. Reg. Sess. (Fla. 2022).

67 Specifically, the law targets concepts such as implicit bias and anti-Black racism, accountability, neutrality, affirmative action policies and initiatives, white privilege, and color-evasiveness.

68 See generally Kimberle Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 Conn. L. Rev. 1253 (2011).

69 See generally Ray, *supra* note 29.

advancements in racial justice and liberation.⁷⁰ Derrick Bell, widely considered the legal pioneer of CRT, challenged conventional legal strategies meant to achieve racial justice by developing critical legal theories that took into consideration the importance of race in American life. Bell and other law-based critical race scholars were central in uncovering the long-lasting impact of slavery, segregation, and exclusionary measures on Black Americans. They explained how laws and policies, despite legal mandates and assurances of antidiscrimination, permit institutionalized racism to permeate American institutions.⁷¹ In the 1990s and 2000s, CRT expanded beyond legal scholarship into several other disciplines. Scholars in education, political science, sociology, ethnic studies, American studies, and criminology began to incorporate the themes and tenets of CRT in their work.

Critical race scholars examine how racism is weaved into concepts that often describe the substantive and procedural components of the American legal system such as “neutral” or “traditional.”⁷² They argue these foundational legal doctrines exist to substantiate dominant experiences.⁷³ Most notably, critical race scholars examine how “neutrality” and “color-evasiveness”⁷⁴ are not disassociated from the social and political realities of racially marginalized communities. Color-evasive frameworks posit the law should be interpreted without regard to race because the effects of historical racism no longer exist.⁷⁵ It asserts that American society has moved past its history of racial discrimination and racially marginalized communities have the same opportunities and advantages as White Americans do.⁷⁶

Color-evasive proponents believe equality and equal opportunity function in a neutral manner, where race is reduced to an arbitrary societal factor that has no bearing on social, legal, political, or economic outcomes.⁷⁷ However, the lived experiences of racially marginalized persons would suggest otherwise. Because the notion that racism is common is central to CRT, the everyday lived experiences

70 *Id.*

71 Importantly, the *critical* in CRT emphasizes the importance of critical thinking skills related to understanding the social, legal, and political dynamics of American institutions. It is not about criticism of those institutions. Generally, CRT as a whole is not concerned with criticizing the power structures in American society because it already recognizes the existence of a severe imbalance of power. Instead, CRT seeks to interrogate the power dynamics and find solutions to correct them.

72 See generally LaWanda W. Ward, *Radical Affirmative Action: A Call to Address Hegemonic Racialized Themes in U.S. Higher Education Race-Conscious Admissions Legal Discourse*, 34 *Int'l J. Qualitative Stud. in Educ.* 315 (2020).

73 *Id.*

74 We use the term “color-evasive” here instead of “color-blind” to refrain from using ableist language and to identify the intentional and willful ignorance of the acknowledgment of race and racism. See Subini Ancy Annamma et al., *Conceptualizing Color-Evasiveness: Using Dis/ability Critical Race Theory to Expand a Color-Blind Racial Ideology in Education and Society*, 20 *Race Ethnicity & Educ.* 147 (2015). However, we recognize that notable critical race scholar Eduardo Bonilla-Silva uses the term “color-blind” in his work. See Eduardo Bonilla-Silva, *Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America* (5th ed. 2018).

75 See generally Bonilla-Silva, *supra* note 74.

76 *Id.*

77 See generally Uma M. Jayakumar, *The Shaping of Postcollege Colorblind Orientation among Whites: Residential Segregation and Campus Diversity Experiences*, 85 *Harv. Educ. Rev.* 609 (2015).

of racially marginalized communities help communicate the prevalence of racism. Critical race theorists lean on the power of stories to engage in meaningful discussions about the ways people view race. These stories, often contrary to dominant groups and their interests, are referred to as “counterstories.”⁷⁸ Counterstories help create and contextualize the narrative of those often ignored as a way to expose assumptions and misconceptions about the humanity of others. They challenge the dominant discourse on race, racism, and privilege. However, counterstories are not a direct response to majoritarian stories. Importantly, counterstories also exist to strengthen and validate the traditions, histories, and knowledge of racially marginalized communities as a form of survival.⁷⁹ Thus, rather than the simplistic and incorrect narratives of CRT advanced in the Stop WOKE Act and similar laws, CRT and related lines of critical inquiry represent strongly established areas of scholarship in higher education. Efforts to squash CRT in public higher education classrooms (and beyond) represent a stark threat to academic freedom, including in relation to the academic speech of individual faculty.

II. DISAGREEMENT OVER FIRST AMENDMENT FACULTY ACADEMIC FREEDOM

The Stop WOKE Act and its attack on CRT and related critical lines of inquiry that are firmly established traditions of scholarship in higher education raise important academic freedom considerations, including questions over public higher education faculty academic freedom rights under the First Amendment. Before turning to litigation directly involving the Stop WOKE Act, we first sketch out the status of constitutional academic freedom for professors in public higher education. Debates and uncertainty over constitutional protection for academic freedom are long running.⁸⁰ Within the contested terrain of constitutional academic freedom, a key issue pertains to whether individual scholars in public higher education possess First Amendment academic freedom rights that could serve to limit the reach of anti-CRT provisions such as Florida’s Stop WOKE Act. Or,

78 For counterstorytelling and critical counternarratives, see Delgado & Stefancic, *supra* note 20; Tara J. Yosso, *Critical Race Counterstories Along the Chicana/Chicano Educational Pipeline* (2005); Daniel G. Solorzano & Tara J. Yosso, *Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research*, 8 *Qualitative Inquiry* 23 (2002)

79 See generally Solorzano & Yosso, *supra* note 78.

80 For a sampling of authors noting the ambiguity and lack of agreement on constitutional academic freedom, see Lawrence Rosenthal, *Does the First Amendment Protect Academic Freedom*, 46 *J.C. & U.L.* 223, 225 (2022) (“The constitutional status of academic freedom . . . is a matter of some dispute.”); Robert C. Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* 62 (2012) (“At present . . . the doctrine of academic freedom stands in a state of shocking disarray and incoherence.”); J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 *J.C. & U.L.* 79, 79 (2004) (“The interpretation of academic freedom as a constitutional right in judicial opinions remains frustratingly uncertain and paradoxical.”); Erica Goldberg & Kelly Sarabyn, *Measuring A “Degree of Deference”: Institutional Academic Freedom in A Post-Grutter World*, 51 *Santa Clara L. Rev.* 217, 217 (2011) (“Academic freedom, as a constitutional right, has long suffered from a lack of consensus over its scope and application. Although academic freedom is generally conceptualized as insulating certain aspects of the academy from government intrusion, the courts are as divided as scholars on the issue of who may invoke the right, and in what circumstances.”); Nathan A. Adams, IV, *Resolving Enmity Between Academic Freedom and Institutional Autonomy*, 46 *J.C. & U.L.* 1, 3 (2022) (“Academic freedom is a constitutional doctrine in shambles.”).

instead, does academic freedom, if a viable constitutional doctrine at all, only exist as a right to be exercised at the institutional level so that individual faculty could not lodge a legal challenge on First Amendment academic freedom grounds to laws like the Stop WOKE Act?⁸¹

Current disarray and disagreement over First Amendment academic freedom reveals a legal doctrine that has failed to live up to the lofty promise of the well-known declaration from the U.S. Supreme Court in *Keyishian v. Board of Regents of the University of the State of New York* describing academic freedom as a “special concern” of the First Amendment.⁸² Prior to *Keyishian*, the Court had rendered a series of decisions in the context of the McCarthy era⁸³ in which principles of academic freedom were mentioned in concurring⁸⁴ and dissenting Supreme Court opinions.⁸⁵ In *Adler v. Board of Education*, for instance, the Supreme Court considered the legality of a New York law, known as the Feinberg Law, that prohibited employment in public educational settings by individuals determined to hold current or past membership in groups deemed subversive.⁸⁶ A majority of the Court upheld the law as permissible,⁸⁷ but, in a dissenting opinion, Justice William O. Douglas argued that the law threatened to turn schools into a system of surveillance and inhibit the educational process, including so as “to raise havoc with academic freedom.”⁸⁸

81 For more on institutional academic freedom, including whether, if constitutionally recognized, it exists as a right exclusive to institutions or one shared with individual faculty, see generally Areen, *supra* note 8; Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 Yale L.J. 251 (1989); David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 Law & Contemp. Probs. 227 (1990); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 U.C.L.A. L. Rev. 1497 (2007); Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded upon the First Amendment*, 30 Hamline L. Rev. 1 (2007); Matthew Finkin, *On “Institutional” Academic Freedom*, 61 Tex. L. Rev. 817 (1983); Adams, *supra* note 80; Goldberg & Sarabyn, *supra* note 80.

82 385 U.S. 589, 603 (1967).

83 During the McCarthy period that arose following World War II, with these years also referred to as the Second Red Scare to differentiate them from the First Red Scare during and subsequent to World War I, efforts were made by government officials during the Cold War to root out supposed infiltration by communist forces into American society and institutions. Many individuals, including in colleges and universities, were often unfairly targeted and harassed and could face sanctions that included loss of employment. For more on McCarthyism and higher education, see generally Ellen Schrecker, *No Ivory Tower: McCarthyism and the Universities* (1986).

84 See *Wieman v. Updegraff*, 344 U.S. 183, 194 (1952) (Frankfurter, J., concurring); *Sweezy v. N.H.*, 354 U.S. 234, 255 (1957) (Frankfurter, J., concurring).

85 See *Adler v. Bd. of Educ. of City of New York*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting). As Lawrence Wright relates in *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 842 (2010), the first mention of academic freedom in a court opinion in the United States occurred in *Kay v. Board of Higher Education of the City of New York*, 18 N.Y.S.2d 821 (1940). The case centered on the revocation of a faculty appointment for philosopher Bertrand Russell to the City College of New York. As Wright relates, in ordering the rescission of the employment offer, the judge offered a “semi-contemptuous aside” to arguments made in an amicus brief in the case that principles of academic freedom should have allowed the college to appoint Russell to the position. *Wright, supra* at 842 n.5.

86 342 U.S. at 487–89.

87 *Id.* at 497.

88 *Id.* at 509.

In the same year that *Adler* was decided, the Supreme Court in *Wieman v. Updegraff*⁸⁹ struck down a state loyalty oath provision that permitted the punishment of public employees even for “innocent”⁹⁰ membership in impermissible organizations where individuals had “joined a proscribed organization unaware of its activities and purposes.”⁹¹ Justice Felix Frankfurter in a concurring opinion in the case offered the following view regarding the roles of teachers in a democratic society:

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State government.⁹²

In another well-known academic freedom case, *Sweezy v. New Hampshire*,⁹³ the Supreme Court considered the permissibility of holding Paul Sweezy, a Marxian economist, in criminal contempt for refusing to answer questions from the New Hampshire attorney general’s office, including providing information about lectures that Sweezy had given at the University of New Hampshire.⁹⁴ In its majority opinion, the Supreme Court invalidated the exercise of contempt powers against Sweezy on Fourteenth Amendment due process grounds.⁹⁵ In a concurring opinion, Justice Felix Frankfurter warned against “governmental intervention in the intellectual life of a university”⁹⁶ and urged the necessity of noninterference by government in the intellectual freedom in colleges and universities:

Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and

89 344 U.S. 183 (1952).

90 *Id.* at 189.

91 *Id.* at 190.

92 *Id.* at 196–97.

93 354 U.S. 234 (1957).

94 *Id.* at 245–46.

95 *Id.* at 255.

96 *Id.* at 262.

speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.⁹⁷

Looking to a statement by South African scholars, Justice Frankfurter also wrote of the four essential freedoms that a university should possess to determine ““on academic grounds who may teach, what may be taught, what may be taught, how it shall be taught, and who may be admitted to study.””⁹⁸

In *Keyishian*,⁹⁹ arguably the legal apex for constitutional academic freedom, the Supreme Court, again considering the provision at issue in *Adler*, struck down the law.¹⁰⁰ In doing so, the Court's majority, in an often repeated refrain, referred to academic freedom as a “special concern” of the First Amendment.¹⁰¹ In later cases, the Supreme Court has periodically referenced the importance of academic freedom, such as among the justifications to allow race-conscious admissions in higher education.¹⁰² The Court, however, has failed to delineate clear legal standards for constitutional academic freedom, though it has noted seeming tensions with academic freedom along its institutional and individual faculty dimensions.¹⁰³ Faced with the constitutional academic freedom road not fully taken by the Supreme Court, lower courts have turned to other lines of precedent in cases raising constitutional academic freedom considerations, including claims by individual faculty. For instance, in cases with a curricular dimension, some courts have turned to cases involving student classroom speech, notably *Hazelwood School District v. Kuhlmeir*,¹⁰⁴ to set out the parameters of faculty speech rights in relation to institutional authority to regulate faculty speech in curricular contexts.¹⁰⁵

97 *Id.* at 261–63.

98 *Id.* at 263.

99 *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589 (1967).

100 *Id.* at 593.

101 *Id.* at 603.

102 *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003) (noting with approval in upholding race-conscious admissions in higher education the reliance on academic freedom principles in Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)).

103 *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (“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 by the academy itself . . .” (citations omitted)).

104 484 U.S. 260 (1988). *See* Part III for more on *Hazelwood*'s use in the litigation involving the Stop WOKE Act.

105 *See, for example, Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), which is covered more in Parts III and IV.

The dominant approach taken by courts to adjudicate faculty speech claims that implicate constitutional academic freedom has been to look to the public employee speech cases.¹⁰⁶ In one notable case, *Urofsky v. Gilmore*,¹⁰⁷ a federal appeals court considered a challenge to a Virginia law that prohibited state workers from accessing sexually explicit materials on state computers.¹⁰⁸ A group of faculty members challenged the law as a violation of their First Amendment academic freedom rights. Rejecting this argument, the appeals court, following an *en banc* hearing, concluded that public college faculty did not possess any additional First Amendment speech rights than those of any other governmental employers.¹⁰⁹ According to the court, if academic freedom exists at all as a constitutional doctrine, then it attaches at the institutional level and not to individual faculty members.¹¹⁰ In contrast, other courts have viewed the public employee speech standards as potentially protective of faculty speech that raises academic freedom concerns.¹¹¹

While an imperfect match for collegiate settings¹¹² and resulting in outcomes where institutions have generally prevailed over faculty litigants,¹¹³ the public employee speech standards have provided one approach to provide First Amendment protection for faculty speech raising academic freedom concerns at public colleges and universities. Under the public employee speech standards,

106 See Michael H. LeRoy, *How Courts View Academic Freedom*, 41 J.C. & U.L. 1, 14 (2016) (“Speech rights for professors merged with the Court’s growing regulation of speech for public employees. Over the next 40 years, the law did little to distinguish between the expressive elements for the occupation of professor, on the one hand, and high school teacher, hospital nurse, and assistant state’s attorney, on the other. The result is a one-size-fits-all First Amendment jurisprudence.”).

107 216 F.3d 401 (4th Cir. 2000) (en banc).

108 *Id.* at 404.

109 *Id.* at 409–15.

110 *Id.* at 415.

111 See, e.g., *Schilcher v. Univ. of Ark.*, 387 F.3d 959, 965 (8th Cir. 2004) (determining that professor’s speech on perceived deficiencies in Middle East studies program dealt with issues of public concern); *Kurtz v. Vickrey*, 855 F.2d 723 (11th Cir. 1988) (holding that professor’s speech on university’s finances dealt with matter of public concern); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001) (concluding instructor’s use of offensive terms in teaching dealt with issues of public concern, though the employer college’s interest in regulating the speech outweighed the instructor’s interest in making the speech). See also *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001) (concluding that professor’s in-class speech containing vulgarities not protected speech but out-of-class speech about sexual harassment where complaining student not identified dealt with matters of public concern where employee’s interests outweighed those of employer institution).

112 See, e.g., Areen, *supra* note 8, at 975 (stating “neither the *Pickering* balancing test nor the *Connick* public concern test seems particularly suited to the nature of the academic workplace”); LeRoy, *supra* note 106, at 14 (noting generic application of public employee speech standards to faculty); Post, *supra* note 80, at 84 (describing the public concern test as “entirely misplaced in an academic inquiry”); Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 818 (2010) (stating “academic freedom is diminished when faculty members are categorized *first* as state employees and only secondarily as specially entitled professionals. When we define academic freedom as a *constitutional* right, we dilute it—on the simplest level by disqualifying faculty members at private institutions from its protection, and on another level by treating professors like public school custodians.”).

113 See generally LeRoy, *supra* note 106.

with the decisions in *Pickering v. Board of Education*¹¹⁴ and *Connick v. Myers*¹¹⁵ serving as key precedents, courts evaluate whether the speech at issue deals with an issue of *public concern*.¹¹⁶ If so, the speech is potentially eligible for First Amendment protection.¹¹⁷ Courts then engage in a balancing test to determine whether, despite the speech having addressed a matter of public concern, countervailing justifications, such as the need for efficient business operations, suffice for the public employer to regulate or restrict the speech.¹¹⁸ The arrangement of using the *Pickering-Connick* framework to evaluate public higher education faculty speech claims raising academic freedom concerns fell into doubt, however, with the Supreme Court's decision in *Garcetti v. Ceballos*,¹¹⁹ a case dealing with whether a Los Angeles deputy district attorney's First Amendment rights were violated based on communications by him that doubted the veracity of representations made in an affidavit used to obtain a search warrant.¹²⁰

In *Garcetti*, the Supreme Court created a new layer of inquiry in the public employee speech analysis. If a public employee engages in speech as part of carrying out their official employment duties, then the speech is ineligible for First Amendment protection.¹²¹ In a dissenting opinion, Justice David Souter raised the issue of whether this requirement impinged on faculty academic freedom protections under the First Amendment.¹²² Writing for the majority, Justice Anthony Kennedy stated that Souter raised a potentially salient matter but one not at stake in the *Garcetti* case.¹²³ The Supreme Court offered some clarification about what

114 391 U.S. 563 (1968).

115 461 U.S. 138 (1983).

116 See *Lane v. Franks*, 573 U.S. 228 (2014). In *Lane*, Justice Sotomayor's opinion for a unanimous Supreme Court summarized the "framework" provided by *Pickering* to analyze public employee speech claims. *Id.* at 236. *Pickering*, wrote Justice Sotomayor, articulated a balancing test where courts evaluate the interests of the public employee in a private citizen capacity to comment upon an issue of public concern versus the interests of the public employer to regulate the speech in carrying out its public service functions and achieving efficiency in operations. *Id.* at 236–37.

117 The issue of whether the speech in question involves matters of public concern is a threshold inquiry into whether the speech is potentially eligible for First Amendment protection. In *Connick v. Myers*, 461 U.S. 138 (1983), the Supreme Court provided important clarification regarding First Amendment protection as to when a public employer's speech only addresses matters of personal interests as opposed to raising issues of public concern:

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 138.

118 *Lane*, 573 U.S. at 236–37.

119 547 U.S. 410 (2006).

120 *Id.* at 414–15.

121 *Id.* at 421 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

122 *Id.* at 438.

123 *Id.* at 425.

activities fall under the official employment duty umbrella in *Lane v. Franks*¹²⁴ in holding that activities falling outside the “scope of ordinary job responsibilities” were not exempt from First Amendment speech protection. In *Lane*, a community college administrator had given truthful court testimony compelled by a subpoena.¹²⁵ The case does little to clarify, however, about faculty speech under *Garcetti* because many of the types of professorial speech that would be at issue, such as teaching, publishing research, or participation in shared governance, clearly constitute ordinary job duties for faculty members.

Since *Garcetti* was decided, courts have taken divergent stances on whether some type of academic freedom exception exists under the *Pickering-Connick-Garcetti* public employee speech standards. Some courts have applied the *Garcetti* standards to multiple types of faculty speech.¹²⁶ Yet, other courts, including several federal appeals courts, have ruled that faculty speech raising academic freedom concerns and made in carrying out employment duties is eligible for First Amendment protection despite *Garcetti*.¹²⁷

For federal appeals courts that have recognized an academic freedom exception under *Garcetti*, a key approach has been to fall back on the *Pickering-Connick*¹²⁸ analysis of whether the speech at issue deals with a matter of public concern and, if so, whether the employer institution can assert a sufficient justification to censor or discipline the faculty member for the speech.¹²⁹ In *Demers v. Austin*, for instance,

124 573 U.S. at 238.

125 *Id.* at 233, 238.

126 *See, e.g.,* *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (holding that professorial speech dealing with research grant administration constituted official duties within the scope of *Garcetti*); *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009) (deciding that professor’s speech offering support of student in disciplinary hearing and in withdrawing invitation to appear at a fraternity prayer breakfast to a university’s president occurred within the context of official duties); *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff’d*, 403 F. App’x 236 (9th Cir. 2010) (concluding that comments made in the context of promotion and tenure committee made pursuant to official duties and subject to *Garcetti* standards); *Huang v. Rector and Visitors of Univ. of Va.*, 896 F. Supp. 2d 524 (W.D. Va. 2012) (determining that researcher’s speech about alleged fraudulent allocations of effort in grant-funded research constituted employee speech ineligible for First Amendment protection).

127 *See, e.g.,* *Demers v. Austin*, 746 F.3d 402 (2014) (holding professor’s speech on plan to reform curriculum protected under First Amendment); *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011) (holding that professor’s inclusion of writings into promotion dossier, which were undoubtedly protected speech prior to their submission, did not lose First Amendment protection under *Garcetti* when included in the dossier); *Kerr v. Hurd*, 694 F. Supp. 2d 817 (S.D. Ohio 2010) (holding that *Garcetti* did not apply to in-class speech by a faculty member specializing in obstetrics and gynecology who offered views on certain delivery methods).

128 *See, e.g.,* *Demers*, 746 F.3d at 410–12; *Adams*, 640 F.3d at 563.

129 *See, e.g.,* *Adams*, 640 F.3d 550 (4th Cir. 2011). In *Adams*, the court considered claims whether materials submitted for consideration for promotion to full professor by Adams were excluded from First Amendment protection based on *Garcetti*. *Id.* at 561. The court rejected the argument that the speech lost First Amendment protection when offered for promotion versus when Adams initially engaged in the speech in a private citizen capacity, where it was undoubtedly subject to protection. *Id.* at 561–62. Additionally, the court stated that *Garcetti* did not extend to the type of academic speech at issue in the case:

Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public

the U.S. Court of Appeals for the Ninth Circuit considered whether a professor's pamphlet that offered a plan to reorganize the school of communications at Washington State University qualified as protected speech under the First Amendment despite *Garcetti*.¹³⁰ The appellate court agreed with the district court that the pamphlet fell within the scope of the faculty member's official duties.¹³¹ Considering *Garcetti*, the court declared that the facts in *Demers* presented "the kind of case that worried Justice Souter."¹³² Concluding that teaching and academic writing constitute a "special concern of the First Amendment,"¹³³ the court held that teaching and academic writing fall outside the purview of *Garcetti*.¹³⁴

The court in *Demers* then turned to the other factors of the public employee speech framework to evaluate the faculty speech under consideration.¹³⁵ Notably, the court called for the calibration of the *Pickering* factors as applied to educational settings.¹³⁶ As to public concern, the court noted the need for nuance in applying the concept in an academic environment:

The nature and strength of the public interest in academic speech will often be difficult to assess. For example, a long-running debate in university English departments concerns the literary "canon" that should have pride of place in the department's curriculum. This debate may seem trivial to some. But those who conclude that the composition of the canon is a relatively trivial matter do not take into account the importance to our culture not only of the study of literature, but also of the choice of the literature to be studied. Analogous examples could readily be drawn from philosophy, history, biology, physics, or other disciplines. Recognizing our limitations as judges, we should hesitate before concluding that academic disagreements about what may appear to be esoteric topics are mere squabbles over jobs, turf, or ego.¹³⁷

The court also expressed the need for caution and subtlety in educational contexts in applying the balancing test under *Pickering* as to whether otherwise protected speech could still be regulated by the employer.¹³⁸ In the case of university professors, the

speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment.

Id. at 564.

130 746 F.3d at 406–07 (9th Cir. 2014). The professor also claimed that he suffered retaliation for a work-in-progress book, but the court concluded that the professor had provided insufficient information regarding the work or alleged retaliation to support a First Amendment claim concerning the book project. *Id.* at 414.

131 *Id.* at 409.

132 *Id.* at 411.

133 *Id.* (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)).

134 *Id.* at 412.

135 *Id.*

136 *Id.*

137 *Id.* at 413.

138 *Id.*

court noted the permissibility, for instance, of content-based judgments in educational decision-making, such as in relation to the quality of written materials submitted by a faculty member in the promotion or tenure process.¹³⁹

In *Meriwether v. Hartop*,¹⁴⁰ the U.S. Court of Appeals for the Sixth Circuit added to the federal appellate courts that have repudiated application of *Garcetti* to faculty speech made in carrying out employment duties. Reversing a federal district court, the Sixth Circuit ruled that *Garcetti* did not bar a professor's free speech claims centered on the faculty member's refusal to use a student's preferred pronouns during class meetings.¹⁴¹ The court relied on *Sweezy* and *Keyishian* for the proposition that "the First Amendment protects the free-speech rights of professors when they are teaching."¹⁴² According to the court in *Meriwether*,

[O]ur court has rejected as "totally unpersuasive" "the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction." *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001). And we have recognized that "a professor's rights to academic freedom and freedom of expression are paramount in the academic setting." *Bonnell v. Lorenzo*, 241 F.3d 800, 823 (6th Cir. 2001); see *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1188–89 (6th Cir. 1995). Simply put, professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.¹⁴³

The court also pointed out that three other federal circuits—the Fourth, Fifth, and Ninth—had rendered rulings that recognized an exception to *Garcetti* for faculty academic speech.¹⁴⁴

The *Meriwether* case is likely to cause concern in some quarters, even for those otherwise supportive of faculty speech rights under the First Amendment, as the

139 *Id.* The court in *Demers* also seemingly viewed the *Garcetti* exception as potentially applicable to elementary and secondary teachers in noting that status as an elementary or secondary teacher versus as a college faculty member was a relevant part of the balancing test. *Id.*

140 992 F.3d 492 (6th Cir. 2021).

141 *Id.* at 504.

142 The court also looked to cases most closely associated with student free speech, *Healy v. James*, 408 U.S. 169 (1972), and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), as Supreme Court cases supportive of free speech rights in the domain of academic freedom connected to professors' teaching. *Meriwether*, 992 F.3d at 505.

143 *Meriwether*, 992 F.3d at 505 (footnote omitted).

144 Alongside the *Demers* case (Ninth Circuit), which is covered previously in this part, and *Adams v. Trustees of University of North Carolina-Wilmington* (Fourth Circuit), *supra* note 129, the court also cited the decision in *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019). In *Buchanan*, the U.S. Court of Appeals for the Fifth Circuit held that a professor's "use of profanity and discussion of her sex life and the sex lives of her students was not related to the subject matter or purpose of training Pre-K-Third grade teachers" and did not constitute speech addressing issues of public concern. *Id.* at 853. However, the court, looking to *Keyishian*, described academic freedom as a "special concern of the First Amendment" and characterized "classroom discussion" as a "protected activity." *Id.* (citing *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967), and *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) (holding a secondary teacher's classroom speech constituted protected activity under the First Amendment)).

case centered on use of a student's preferred pronouns.¹⁴⁵ For purposes of this article, however, the focal point is the court's determination, in alignment with several other federal appeals court decisions, that faculty classroom speech is excluded from the *Garcetti* standards and entitled to First Amendment protection. Other courts, even if upholding First Amendment academic freedom protections for public higher education faculty, could interpret the balancing process undertaken by the court in *Meriwether* as flawed in relation to how refusal to use an individual's preferred gender pronouns can impact students. When focusing on the general standard used in *Meriwether*, the case shows significant judicial support for an academic freedom exception to *Garcetti*.

As covered in the overview presented in this part, cases that include *Demers*, *Adams*, and *Meriwether* indicate that legal debates over First Amendment protection for the academic speech of individual faculty in public higher education are far from resolved. As wrangling and uncertainty over individual constitutional academic freedom continues, Florida's Stop WOKE Act squarely places the issue of First Amendment academic freedom protection for public higher education faculty under judicial scrutiny. Turning to litigation over the Stop WOKE Act, the next part in the article considers the preliminary injunction granted to stop application of the law to Florida's public colleges and universities.

III. "POSITIVELY DYSTOPIAN"—FLORIDA'S STOP WOKE ACT

Florida's Stop WOKE Act prohibits teaching CRT in all public schools and colleges and universities, ultimately regulating how these institutions address race and gender. The law bans faculty from providing "training or instruction that espouses, promotes, advances, inculcates, or compels" any student or employee to believe specific concepts.¹⁴⁶ Such concepts include contending members of one race or ethnic group are inherently racist and should feel guilt or anguish for wrongs committed by other members of the same race or ethnicity. The Florida Governor contends the law protects civil rights in employment and education by protecting persons in the state from "discrimination and woke indoctrination."¹⁴⁷

Besides public education, the law also extended coverage to private businesses. Less than seven weeks after the law went into effect, Chief U.S. District Judge Mark E. Walker of the Northern District of Florida blocked Florida from enforcing the act

145 We contend, for instance, that the court in *Meriwether* failed to engage in a sufficient balancing of the interests at stake. Specifically, we would argue that the court failed to give appropriate consideration to the harm caused to the student while overinflating the interests of the faculty member. Nonetheless, the outcome of the *Pickering* balancing of the interests at stake stands as a distinct issue from whether a professor's classroom speech is exempt from *Garcetti* on academic freedom grounds so as to trigger the balancing analysis. See Inara Scott et al., *First Do No Harm: Revisiting Meriwether v. Hartop and Academic Freedom in Higher Education*, 71 Am. U. L. Rev. 977 (2022), for an alternative approach to balancing the factors at stake in *Meriwether*, but with the authors still supportive of constitutional academic freedom rights for individual faculty.

146 H.R. 7, 124th Leg. Reg. Sess. (Fla. 2022).

147 See e.g., News Release, Office of Ron DeSantis 46th Governor of Florida, Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination (Apr. 22, 2022), <https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/>.

on private companies for violating the First Amendment. Honeyfund, a honeymoon registry company, and Collective Concepts, a workplace diversity consultancy, filed suit to block enforcement of the Stop WOKE Act for unconstitutionally restricting their freedom of speech. In his decision, Judge Walker characterized the Stop WOKE Act as applied to private businesses as turning the First Amendment “upside down.”¹⁴⁸ Specifically, he held the challenged provision of the law is “a naked viewpoint-based regulation on speech that does not pass strict scrutiny.”¹⁴⁹

In relation to education, a lawsuit was brought on behalf of Florida faculty members and students arguing the Stop Woke ACT violated their First and Fourteenth Amendment rights in its application to public higher education.¹⁵⁰ In its response to these claims, the Florida Board of Governors, seeking to place faculty classroom speech under the *Garcetti* umbrella, argued in a court filing that “in-class instruction offered by state-employed educators is ... pure government speech, not the speech of the educators themselves.”¹⁵¹ As to academic freedom, the Board of Governors looked to *Urofsky* to support the position that any judicial recognition of constitutional academic freedom for public colleges and universities accrues to institutions and not to individual faculty.¹⁵² In granting a preliminary injunction to block the law as applied to higher education teaching contexts, the district court issued a withering opinion against the Stop WOKE Act.

The court compared the actions in Florida to the dystopian events in George Orwell’s novel *1984*.¹⁵³ It described the Board of Governors’ position, which it characterized as asserting that professors possessed academic freedom “so long as they express those viewpoints of which the State approves,” as “positively dystopian.”¹⁵⁴ The court listed various ways in which the law restrained classroom speech and discriminated on the basis of viewpoint, such as prohibiting an instructor or guest speaker from expressing support of affirmative action.¹⁵⁵ According to the court, under the law, U.S. Supreme Court Justice Sonia Sotomayor would be prohibited in Florida classrooms from offering reflections of her personal experiences that were supportive of affirmative action.¹⁵⁶

While stating that the Supreme Court “has never definitively proclaimed that ‘academic freedom’ is a stand-alone right protected by the First Amendment,” and noting Eleventh Circuit precedent declining to recognize individual academic

148 *Honeyfund.com, Inc. v. DeSantis*, No. 4:22-cv227-MW/MAF at *2, (N.D. Fla. Aug. 18, 2022).

149 *Id.*

150 *See Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, Case No. 4:22-cv-304 (N.D. Fla. Aug. 18, 2022).

151 *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No. 4:22-cv-304-MW/MAF, *19 (N.D. Fla. Sept. 22, 2022) (defendants’ response in opposition to plaintiffs’ motion for preliminary injunction).

152 *Id.* at *25. For more on *Urofsky*, see Part II.

153 *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No.: 4:22-cv-304-MW/MAF, *1 (N.D. Fla. Nov. 11, 2022) (order granting in part and denying in part motions for preliminary injunction).

154 *Id.* at *2.

155 *Id.* at *9. In contrast, according to the court, views antagonistic to affirmative action would appear permissible under the Stop WOKE Act.

156 *Id.* at *10.

freedom as an “independent constitutional right,” the court offered that “academic freedom remains an important interest to consider when analyzing university professors’ First Amendment claims.”¹⁵⁷ The court acknowledged the substantial authority of Florida to “prescribe the content of its universities’ curriculum” but also pointed out this authority was not boundless.¹⁵⁸ In alignment with this stance, the court refused to approve *Garcetti* as a basis to strip faculty members of any First Amendment speech protections in the classroom, stating, “To the extent Defendants urge this Court to determine that university professors’ in-class speech is always pure government speech, the weight of binding authority requires this Court to decline the invitation.”¹⁵⁹ The court differentiated the state’s content-based rights to determine curriculum from an “unfettered discretion” to impose viewpoint-based restrictions on professors’ being able to express views on the curriculum.¹⁶⁰

Looking to Eleventh Circuit precedent, the court turned to the *Bishop v. Aronov* decision,¹⁶¹ which applied standards from *Hazelwood*, to evaluate the faculty speech claims in opposition to the Stop WOKE Act.¹⁶² Concluding that seven of the plaintiff professors in the case satisfied standing requirements,¹⁶³ the court—and making clear that it was not using *Garcetti* or the public employee speech rules—applied the standards from *Bishop* to assess the plaintiffs’ speech claims.¹⁶⁴ The court identified three factors to weigh under *Bishop*: (1) the context of the speech at issue; (2) the interests of public university employers to regulate employee speech, specifically in relation to class- and curricular-related matters; and (3) “the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment.”¹⁶⁵ In weighing these factors, the court found it important that the Stop WOKE Act worked as an “*ante hoc* deterrent that ‘chills potential speech before it happens,’ and ‘gives rise to far more serious concerns than any single supervisory decision.’”¹⁶⁶ While recognizing substantial authority of the state to determine

157 *Id.* at *15–16.

158 *Id.* at *18.

159 *Id.* at *25.

160 *Id.* at *27.

161 926 F.2d 1066 (11th Cir. 1991). The case dealt with a public university professor who made references to his religious beliefs in class and also held “voluntary” class session to consider topics covered in an exercise physiology course from a religious perspective. *Id.* at 1068–69.

162 *Pernell*, No.: 4:22-cv-304-MW/MAF, at *30 (order granting in part and denying in part motions for preliminary injunction). The court also concluded that the *Bishop* framework applied to the students’ speech claims. *Id.*

163 *Id.* at *53. The court determined that an emeritus professor who offered a Black history bus tour had not established that the tour constituted instruction or training so as to fall under the purview of the act. *Id.* at 54. The court also concluded that one of the two student plaintiffs did not satisfy standing requirements. *Id.* at *79.

164 *Id.* at *87. While not using *Garcetti*, the court still took a balancing approach using the factors from *Bishop*.

165 *Id.* at *90 (citing and quoting *Bishop*, 926 F.2d at 1074–75).

166 *Id.* at *93 (quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995), a case in which the Supreme Court struck down a prohibition from all government employees being able to accept honoraria as impermissible under the First Amendment).

curricular matters, the court, under *Bishop's* second prong, concluded that Florida failed to provide a meaningful justification to impose viewpoint restrictions on faculty (and students) in areas covered under the law.¹⁶⁷ Additionally, the court determined that the academic freedom considerations in the case were those of the "highest order."¹⁶⁸ The court described the law as "antithetical to academic freedom and has cast a leaden pall of orthodoxy over Florida's state universities."¹⁶⁹ Under these factors, the court granted a preliminary injunction in favor of the professor and student plaintiffs who had satisfied standing requirements.¹⁷⁰

The Stop WOKE Act, conjuring images of governmental action during the McCarthy period, and indicative of the current Ed Scare,¹⁷¹ pointedly highlights the issue of whether public higher education faculty possess any First Amendment academic freedom rights in carrying out their professional duties such as in teaching, research, or participation in shared governance. The arguments made by the Florida Board of Governors in defense of the Stop WOKE Act raise exactly the type of scenario Justice Souter called attention to in *Garcetti*, where a state government has attempted to treat public higher education faculty speech as wholly under its control, with faculty merely serving as hired mouthpieces for governmental speech.¹⁷² Keeping in mind the academic freedom stakes at issue in Florida and in relation to other anti-CRT legislation generally, the article now shifts to suggestions for how courts might address or reconcile some of the key arguments that have been made against recognizing First Amendment protection for faculty academic speech in public higher education despite *Garcetti*.

IV. THE *GARCETTI* STANDARD AND WHEN A PROFESSOR'S JOB DUTY IS TO SPEAK INDEPENDENTLY

The public employee speech cases, as noted earlier in the article,¹⁷³ are not a perfect match for academic freedom considerations, as they were not initially developed to deal with the nuances of faculty academic speech in higher education. Unlike general First Amendment speech protections, which are not subject to stringent quality control measures for speech to receive constitutional protection,¹⁷⁴ academic

167 *Id.* at *104.

168 *Id.* at *105.

169 *Id.* at *106.

170 *Id.* at *107. The court also agreed that the statute was deficient on vagueness grounds. *Id.* at 108.

171 *See generally* Friedman, *supra* note 1.

172 In *Mayer v. Monroe County Community School Corporation*, 474 F.3d 477, 479 (7th Cir. 2007), a case that dealt with applying *Garcetti* to the classroom speech of a secondary teacher, the court stated that a school does not "regulate" teacher speech but instead "hires" the speech that the school system wants from teachers based on the approved curriculum. The arguments advanced by the Florida Board of Governors characterize faculty classroom speech in higher education in a similar manner, arguing that professors are merely the suppliers (i.e., the mouthpieces) of approved governmental curricular messages.

173 *See supra* note 112.

174 Post, *supra* note 80, at 28 ("The fundamental First Amendment doctrine of content neutrality is meant to prevent the state from cutting off persons from access to processes of public opinion formation on the basis of what they intend to say. The doctrine advances the goal of democratic

decisions regularly entail making judgments about the quality of speech, such as in the tenure review process in relation to the quality of professor's scholarship and teaching or in making evaluations of student work.¹⁷⁵ Yet, as covered in Part III, the public employee speech standards have emerged as a dominant doctrinal area used by courts to evaluate faculty First Amendment speech claims, including ones that implicate academic freedom considerations. Given this state of affairs, the authors contend that continued reliance on the public employee speech standards, if properly adjusted to a higher education context, provide a workable approach for courts to follow in adjudicating faculty academic freedom claims under the First Amendment. Specifically, we argue that faculty *academic speech*¹⁷⁶ made in carrying out employment duties connected to teaching, research, or "academic governance speech"¹⁷⁷ should be exempt from *Garcetti* and eligible for First Amendment protection.¹⁷⁸ To provide meaningful opportunity for First Amendment protection for faculty academic speech under this proposed framework, courts could adopt a similar approach taken by the Ninth Circuit in *Demers v. Austin*¹⁷⁹ and tailor the concept of public concern to a higher education environment. Further, we assert that the academic freedom policies and standards adopted by public colleges and universities provide one compelling justification to negate application of *Garcetti* to faculty academic speech in public higher education,¹⁸⁰ an issue we tackle first in this part.

legitimation by ensuring that public opinion remains open to the subjective engagement of all, even of the idiosyncratic and eccentric. Fools and savants are equally entitled to address the public.").

175 In arguing for "democratic competence" as a basis for constitutional protection of academic freedom," as opposed to a marketplace of ideas rationale that undergirds most other First Amendment speech protections, Post, *supra* note 80, at 62, notes how "[u]niversities are essential institutions for the creation of disciplinary knowledge, and such knowledge is produced by discriminating between good and bad ideas." Post is critical of using the public employee speech standards to evaluate faculty speech implicating academic freedom.

176 As noted, we adopt the term *academic speech* used by Areen, *supra* note 8, at 994, to refer to faculty speech made in the course of carrying out employment duties in the areas of teaching, research, or "faculty governance matters."

177 *Id.* at 985. In addition to faculty speech related to teaching and research, Areen argues for First Amendment protection of faculty speech in higher education made as part of participation in shared governance, a position that we endorse.

178 The position taken in this article has similarities to the framework advocated by Areen, *supra* note 8, but we offer a different position on the "public concern" standard, which Areen argues should not apply to what she terms academic speech. *Id.* at 994. Areen, instead, advocates that academic speech should be subject to the "the same sort of reasonable time, place, and manner limitations that may be used to limit citizen speech under the First Amendment." Rather than any strong disagreement with the standard offered by Areen, a key reason for our suggestion for courts to use a modified public concern test for academic speech comes from a practical recognition that courts have largely looked to the public employee speech standards in assessing faculty First Amendment speech claims that implicate academic freedom considerations. Additionally, faculty speech made in a private citizen capacity, including that raising academic freedom concerns, would still be subject to a public concern analysis by a court. *See, e.g., Austin v. Univ. of Fla. Bd. of Trustees*, 580 F. Supp. 3d 1137, 1169 (N.D. Fla. 2022) (appeal filed) (granting preliminary injunction against university policy that governed when faculty could provide expert witness testimony in a private citizen capacity, with the court noting that the permissibility of faculty being able to provide such testimony, which involved their areas of scholarly expertise, raised academic freedom concerns relevant to the public concern analysis).

179 For more on the *Demers* case, see Part II.

180 In a 2009 article, one of the authors previously raised the issue of how institutional academic

A. *INSTITUTIONAL ACADEMIC FREEDOM STATEMENTS,
SCOPE OF EMPLOYMENT, AND THE FIRST AMENDMENT*

One of the arguments against judicial recognition for First Amendment protection for faculty academic speech is that doing so would result in an inconsistency where public college faculty members possess constitutional rights not held by other public employees.¹⁸¹ However, an important point about the nature of the working relationship between a faculty employee and their public higher education employer is overlooked in taking this position, namely, there is a failure to take into account how other public employers do not, unlike public colleges and universities, define the employment parameters—the scope of job duties—in the same way as they are delineated for public college and university faculty. That is, public colleges and universities define the employment duties of their professors to serve as independent voices and actors—rather than institutional mouthpieces—in relation to their academic speech and in carrying out their teaching, research, and shared governance duties. We take the stance that the role of institutions in defining faculty as independent voices in carrying out their academic speech is crucial for construing faculty academic speech claims under the First Amendment when using the public employee speech framework. Thus, we contend one avenue to alleviate the current legal impasse over the constitutional speech rights of faculty members in a way consistent with cases such as *Garcetti* is to recognize that a public college or university employer can recognize that its faculty are expected—are hired—to function as independent voices in carrying out the scope of their professional employment duties.

Reliance on institutional academic freedom statements or policies provides a strong rationale to blunt arguments that public higher education faculty are receiving unwarranted First Amendment treatment for their job-related speech compared to other public employees. Instead of an academic freedom exception, we are, rather, arguing for a modest, reasonable elaboration of the *Garcetti* standards

freedom policies or standards should affect application of *Garcetti* to faculty speech. Developments in case law, such as in *Demers v. Austin*, support the growing viability of this position as a basis, at least as one justification, to exclude faculty academic speech from *Garcetti*. See Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J.C. & U.L. 145, 177 (2009) (“It seems reasonable ... for courts to consider how institutional policies and standards should impact the speech claims of faculty members.”).

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

An individual First Amendment right to academic freedom violates the neutrality principle [of the First Amendment] in two ways. First, it asks the courts to treat publicly employed academics differently from all other classes of public employees. Second, because of this difference in the treatment of speakers, individual academic freedom inherently also requires the courts to designate scholarly and classroom speech as uniquely valuable, as compared with the job-required speech of non-academic public employees, and even the non-academic speech of academic public employees. If the *Demers* court is correct, in other words, then academic speech occupies a more protected niche in the First Amendment’s superstructure than all other public employee speech uttered pursuant to official duties, and public employees who happen to be academics therefore enjoy greater First Amendment protection than other public employees. This, of course, would be the opposite of government neutrality.

Id. at 731.

based on how the majority of public higher education institutions have defined faculty employment as premised upon independent academic speech when professors carry out their employment duties in the realms of teaching, research, and shared governance. For instance, the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure¹⁸² is widely accepted in higher education, with many colleges and universities adopting some form of the statement, including in faculty handbooks or contracts, in their official institutional policies and standards.¹⁸³

In addition to any role in defining the contractual relationship that professors have with their employer institutions, the academic freedom standards and policies adopted by public colleges and universities should also be relevant to analyzing the employment duties of public higher education faculty for First Amendment purposes. Nothing in the *Garcetti* opinion or in the public employee speech standards prohibits a public employer from defining employment duties to assign a responsibility of the employee to engage in independent speech that is representative of the views of the individual employer and not the employee. Other public employers—or at least the overwhelming majority, such as with, say, a state agency in charge of motor vehicles—do not design employee job duties as premised on independent speech by employees for the successful functioning of the public agency. But public colleges and universities absolutely have created, and, in fact, insist and depend upon, such independent roles for their faculty.¹⁸⁴

In adjusting the *Garcetti* standards to take into account how public higher education faculty have job duties that are designed on the basis of independent academic speech, there are other speech examples in higher education that are instructive by comparison. For instance, public colleges and universities maintain fora, both virtual and physical, for student speech, including those supported by student mandatory fees, that are distinct from fora that other governmental agencies would establish for their clients. With such student fora, the Supreme Court has imposed First Amendment requirements, such as viewpoint neutrality,

182 American Association of University Professors, Policy Documents and Reports 13, 14 (11th ed. 2015).

183 A 2020 AAUP report stated that seventy-three percent of higher education institutions with a tenure system base their academic freedom policy on the 1940 Statement and that almost half of these institutions directly cite the AAUP as “source for their policy.” AAUP, *Policies on Academic Freedom, Dismissal for Cause, Financial Exigency, and Program Discontinuance 4* (2020), <https://www.aaup.org/file/PoliciesonAcademicFreedom.pdf>. For a list of scholarly and educational organizations that have endorsed the 1940 Statement, see AAUP, *Endorsers of the 1940 Statement*, <https://www.aaup.org/endorsers-1940-statement> (last visited Dec. 1, 2022).

184 Areen, *supra* note 8, looks to the work of Post, *supra* note 80, to distinguish between the roles of “government as employer” versus “government as educator:”

In typical public workplaces, the government is understandably concerned with efficiency and employee morale. Universities need to be efficient as well, of course, but their primary goals are research and teaching, not the delivery of services to the general public. Debate that might be viewed as disruptive in other public agencies is an accepted, and even necessary, part of the production of new knowledge and its dissemination in classrooms. So, too, employee criticism that might seem insubordinate in other public agencies may be a necessary part of fulfilling the governance responsibilities of a faculty member in a college or university.

Areen, *supra* note 8, at 990–91 (footnotes omitted).

for how universities treat student access to these fora and to attendant benefits such as funding.¹⁸⁵ Here, we do not argue that colleges and universities have created some type of limited forum when it comes to faculty speech. Rather, courts, in applying forum analysis principles, have taken into account the unique environment of a public college or university for First Amendment purposes. For instance, in one particularly instructive case, the Supreme Court in *Board of Regents of the University of Wisconsin System v. Southworth* held that public colleges and universities could use student fees to support the speech and expression of officially recognized student groups as long as such fees were distributed in a viewpoint neutral manner.¹⁸⁶

In *Southworth*, objecting students contended that they were being compelled to support speech with which they disagreed through the use of mandatory student fees.¹⁸⁷ In upholding the permissibility of using mandatory student fees to support student organizations, the Supreme Court in *Southworth* rejected a rule for the First Amendment that it had applied in other contexts involving professional associations.¹⁸⁸ In those cases, the Court had held that mandatory fees paid by members were limited to activities that were germane to the core purposes of the organization; otherwise, such activities had to be funded on a voluntary basis and members had to have the opportunity to opt out.¹⁸⁹ Noting the difficulty of defining germaneness in the context of these organizations, in terms of attempting to operationalize the concept in a higher education context, the Court stated, “If it is difficult to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas.”¹⁹⁰ The Court approved the use of a mandatory fee system as in alignment with the institution’s mission to promote the independent sharing of ideas by students:

The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious,

185 See, e.g., *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 230 (2000) (requiring viewpoint neutrality in how a public university distributed funds collected from mandatory student fees to student organizations receiving official university recognition).

186 *Id.*

187 *Id.* at 220.

188 See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). In *Abood*, the Supreme Court limited the collection of mandatory union dues to those issues germane to a union’s collective bargaining duties. In *Keller*, the Supreme Court held that mandatory bar dues could not be used to finance political or ideological activities that were objectionable to members. The overturning of *Abood* in *Janus v. American Federation of State, County, & Municipal Employees, Council, 31*, 138 S. Ct. 2448 (2018), does not undercut the Court’s analysis in *Southworth*. In fact, the rejection of *Abood* reinforces the stance taken in *Southworth* that First Amendment standards should be calibrated in a way that comports with the specialized context of a public higher education environment. We argue that a similar logic should be applied to the public employee speech standards and the professional speech of faculty, especially when institutional academic freedom statements are considered.

189 *Abood*, 431 U.S. at 235–36; *Keller*, 496 U.S. at 14.

190 *Southworth*, 529 U.S. at 232.

scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.¹⁹¹

For our purposes in this article, it is perhaps also relevant to note that the Court in *Southworth* did not characterize the fees program for recognized student associations as a type of forum. Instead, the Court determined that the “public forum cases are instructive here by close analogy.”¹⁹² The *Southworth* decision shows how the Supreme Court has been willing to adjust or to calibrate First Amendment standards in a manner appropriate to the unique aspects of a public higher education environment as compared to other public entities or agencies. As such, we assert that institutional academic freedom standards and policies can and should be an integral part of the analysis when courts apply the public employee speech standards to the academic speech of college and university faculty.

To provide an illustration at the institutional level, among its policies, the University of Florida, one of the public universities covered by the Stop WOKE Act, maintains an “Academic Freedom and Responsibility” regulation.¹⁹³ The policy provides, in part, that

The University believes academic freedom and responsibility are essential to the full development of a true university and apply to teaching, research, and creativity. In the development of knowledge, research endeavors, and creative activities, the faculty and student body must be free to cultivate a spirit of inquiry and scholarly criticism and to examine ideas in an atmosphere of freedom and confidence. The faculty must be free to engage in scholarly and creative activity and publish the results in a manner consistent with professional obligations. A similar atmosphere is required for university teaching. Consistent with the exercise of academic responsibility, a teacher must have freedom in the classroom in discussing academic subjects selecting instructional materials and determining grades. The university student must likewise have the opportunity to study a full spectrum of ideas, opinions, and beliefs, so that the student may acquire maturity for analysis and judgment. Objective and skillful exposition of such matters is the duty of every instructor.¹⁹⁴

191 *Id.* at 233. The majority stated that a university did have the option of establishing a voluntary system in which students could receive refunds for speech that they did not support.

192 *Id.* at 218.

193 University of Florida Academic Affairs Regulations, *UF-7.018: Academic Freedom and Responsibility*, <https://regulations.ufl.edu/wp-content/uploads/2012/09/7018.pdf> (last visited Dec. 1, 2022).

194 *Id.* Language elsewhere in the policy dealing with responsibility and academic freedom also has important implications for the argument to use academic freedom policies in the public employee speech analysis in calling for professors to be “forthright and honest in the pursuit and communication of scientific and scholarly knowledge.” *Id.* Such language suggests an employment duty on the part of faculty members to adhere to sound academic standards in the pursuit of knowledge and in imparting such knowledge in their teaching and research. A faculty member acting merely as a conduit for the speech of their public university employer could not carry out this duty, such as with the Stop WOKE Act, which is so deficient in its understanding of CRT and critical

A cursory review of this portion of the policy shows that it is in complete contradiction to the dictates of the Stop WOKE Act. Adhering to the requirements of the Stop WOKE Act and having a faculty member acting as the mouthpiece of the university conflicts with the clear directive of the University of Florida in its academic freedom policy for its faculty members to be “free”¹⁹⁵ to engage in independent research and creative activities and in their teaching.

Academic freedom policies and standards such as those adopted by the University of Florida provide a compelling basis for courts to adjust the *Garcetti* standard to the needs of a public college or university when it comes to faculty academic speech. While such policies or standards may also be incorporated into faculty contracts, doing so does not preclude courts from taking institutional academic freedom policies or standards into account for First Amendment purposes. In the case of the University of Florida, the standard has been adopted as a general, stand-alone regulation related to the academic affairs of the institution. As pointed out, other public employers do not adopt academic freedom statements intended to apply to the speech and job duties that clearly fall within the scope of employment. However, when a public employer college or university has elected to design their faculty members’ employment duties to encompass independent speech (i.e., to require academic freedom as a necessary condition of carrying out employment tasks), then such action should trigger First Amendment consequences and influence application of the public employee speech standards.

The position taken in this article could spark some concern that it would allow a public college or university unrestrained authority to revoke its recognition of academic freedom to faculty members. In considering this potential worry, we argue that a public college or university should not be able to rely on *Garcetti* as a legal backdoor to strip faculty of their academic freedom and then be recognized as a legitimate university so as to reap the benefits of such status. If a public higher education institution or system wants to take the legal position that the academic speech of its faculty is controlled by *Garcetti*, then the institution or system should have to accept the overall consequences for what adopting such a legal stance means. For example, accrediting bodies have adopted standards around academic freedom and shared governance.¹⁹⁶ If an institution wants to advance the legal

lines of inquiry as to be bereft of academic integrity. See Part I for an assessment of such academic shortcomings in the Stop WOKE Act.

195 University of Florida Academic Affairs Regulations, *UF-7.018: Academic Freedom and Responsibility*, <https://regulations.ufl.edu/wp-content/uploads/2012/09/7018.pdf> (last visited Dec. 1, 2022).

196 The Southern Association of Colleges and Schools-Commission on Colleges (SACSCOC), for instance, serves as the institutional accreditor for the University of Florida. SACSCOC, *The Principles of Accreditation: Foundations for Quality Enhancement* (6th ed. 2017), <https://sacscoc.org/app/uploads/2019/08/2018PrinciplesOfAccreditation.pdf>. Under the SACSCOC accreditation standards, institutions are required to implement “appropriate policies and procedures for protecting academic freedom.” *Id.* at 17. Florida has enacted legislation requiring its public colleges and universities to switch accreditors for each new accreditation period, a move that critics was believed motivated, at least in part, on inquiries from SACSCOC over a presidential search at Florida State University and efforts at the University of Florida to stop faculty members from offering expert testimony in litigation that challenged restrictions on voting in Florida. See Natalie Schwartz, *Florida Passes Bill Pushing Accreditor Changes, Post-Tenure Review*, Higher Ed Dive (Mar. 10, 2022), <https://www.highereddive.com/>

argument that faculty speech related to teaching, research, or shared governance is subject to complete institutional control under *Garcetti*, then such a stance should serve as a strong indicator that the institution has decided to disavow a key criterion that is required for it to be eligible for accreditation. Similarly, there should also be consequences for external research funding opportunities, which are premised on the notion of scholarly integrity and independence in the research process.¹⁹⁷ The topic of constitutional academic freedom that accrues at the institutional level is beyond the scope of this article,¹⁹⁸ but scholars supportive of institutionally based academic freedom have stated the need for colleges and universities to operate within accepted academic norms to receive judicial recognition of such a right.¹⁹⁹ In

news/florida-passes-bill-pushing-accreditor-changes-post-tenure-review/620220/; Emma Whitford, *Florida Could Make Switching Accreditors Mandatory*, Inside Higher Ed (Feb. 11, 2022), <https://www.insidehighered.com/news/2022/02/11/florida-bill-would-require-colleges-change-accreditors>.

197 See, e.g., National Institutes of Health, *Principles of Disseminating Research Tools: Ensure Academic Freedom and Publication*, <https://sharing.nih.gov/other-sharing-policies/research-tools-policy> (last visited Dec. 1, 2022) (“Institutions that receive NIH research funding have an obligation to preserve research freedom, safeguard appropriate authorship, and ensure timely disclosure of their scientists’ research findings. Recipients are expected to avoid signing agreements that unduly limit the freedom of investigators to collaborate and publish, or that automatically grant co-authorship or copyright to the provider of a material.”).

198 For example, there are questions over whether a public college or university institution or system would be able to assert a constitutional academic freedom claim against another state entity, such as an executive branch agency or the legislature, as compared to asserting such a right against the federal government. See, e.g., William E. Thro, *Follow the Truth Wherever It May Lead: The Supreme Court’s Truths and Myths of Academic Freedom*, 45 U. Dayton L. Rev. 261, 282 (2020):

[W]ith respect to the creating state, a state university has no institutional academic freedom. State governments routinely determine the mission of an institution, what degree programs are offered, whether admissions will be highly competitive, competitive, or open, and the portion of students from the creating state. In *Schuette v. Coalition to Defend Affirmative Action*, the Supreme Court held that the people of a state could amend their state constitution to remove the ability of a state university to consider race in the admissions process. Although the issue of institutional academic freedom was not raised explicitly, the net effect of the Court’s decision seems to foreclose the notion that a public institution has a federal constitutional right against the state that creates the institution. Indeed, as Justice Scalia, joined by Justice Thomas, noted, the states have almost unlimited discretion to define the role of political subdivisions, state agencies, and state universities. This sovereign discretion includes the ability to remove decision-making authority from the institution and transfer to the people or another branch of government.

Id. (footnotes omitted).

199 See, e.g., Horwitz, *supra* note 81. Horwitz contends that universities, including public ones, should be “entitled to substantial deference, to a degree that indeed approaches immunity, to the extent that they are making genuinely academic decisions.” Using Michigan as example to explain this position, and describing alignment with the views of J. Peter Byrne on the issue of constitutional protection for institutional academic freedom, Horwitz states,

We might understand Byrne’s argument, and mine, in these terms. The people of the State of Michigan are entitled to rid themselves of the University of Michigan and other state universities altogether if they so choose. And they may well be free to vote to alter the nature and mission of those universities so deeply that we would no longer recognize them as First Amendment institutions entitled to autonomy as universities. To take an extreme example, if the people voted to replace a university’s usual functions and turn the whole campus into a branch of the state Department of Motor Vehicles, replacing classrooms and teachers with lineups, eye charts, and petty bureaucrats processing applications for drivers’ licenses, it would matter little for purposes of that site’s constitutional status that it happened still to have the words “University of Michigan” engraved on its gates. So long as the people have chosen to maintain the University

essence, if a public higher education system or institution wants to gain the benefits of *Garcetti* when it comes to total control of faculty academic speech, then these same systems or institutions should, in relinquishing a commitment to academic freedom, also forego the benefits that come with status as an authentic public higher education institution. The risk of losing such attendant benefits would place an important check on institutions or systems before making a wholesale repudiation of faculty academic freedom and claiming complete control over professorial speech under *Garcetti*.

We maintain that courts should hold public higher education systems or institutions accountable for their own commitments to academic freedom when it comes to analyzing First Amendment rights for faculty academic speech. An “academic freedom exception” to the *Garcetti* standard can be interpreted as not really an “exception” at all but, instead, a common-sense elaboration of the public employee speech framework, one based on institutional or system actions that define faculty employment duties as premised on independence in academic speech as a necessary condition for professors to carry out their official job duties in the areas of teaching, research, and shared governance.

B. AN IMPORTANT STIPULATION: TAILORING PUBLIC CONCERN TO ACADEMIC SPEECH CONTEXTS

Building on the idea of using institutional academic freedom standards as a basis to negate use of *Garcetti* in the academic speech arena, we further suggest that courts should turn to the *Pickering* framework to assess First Amendment claims involving faculty academic speech. In offering this position, we follow something of a practical strategy in acknowledging that courts have already consistently turned to the public employee speech standards in adjudicating faculty speech claims raising issues related to academic freedom.

Under the *Pickering* (or *Pickering-Connick*) framework, which is covered more in Part III of this article, courts deciding claims involving faculty academic speech would first consider if the academic speech at issue addressed a matter of public concern. If so, then the speech would receive First Amendment protection absent a sufficient justification on the part of the public employer college or university to regulate the speech. Under the approach we advocate, a brief, but essential, point is required on the need to tailor the concept of public concern to academic speech and higher education. That is, courts need to calibrate the concept of public concern in ways that are appropriate to college and university settings. This type of calibration was exactly the approach taken by the Ninth Circuit in *Demers v.*

of Michigan as a university, however, they must stand by the bargain. At least as long as it is to retain its constitutional value as a First Amendment institution, we should treat even a public university as an entity that retains the full set of institutionally oriented rights and privileges that mark it as a university. Thus, as shocking as the outcome may be, an institutional approach to the university would support Byrne’s argument that a state that voluntarily maintains a public university is not free to intrude upon its affairs in ways that fundamentally interfere with the university’s status as a self-governing institution.

Id. at 1550–51.

Austin,²⁰⁰ which indicates the feasibility of tailoring the *Pickering* framework to academic speech.

The strategy suggested in this article does not vest either faculty members or institutions with unbridled authority when it comes to academic speech. When faced with a claim based on academic speech, courts, as part of the public concern analysis and subsequent balancing test, could, as pointed out, account for the specific context and circumstances where the professorial speech took place. For example, a professor's speech in a classroom implicates considerations, such as institutional authority over curricular matters and academic standards, that may not be present in other settings, such as the presentation of research findings at an academic conference. Or, in a classroom setting, the institution has legitimate interests in ensuring that a learning environment is provided that is conducive to covering the content intended and approved for the course and to meet other criteria such as ones related to institutional or program accreditation. While looking to *Hazelwood* instead of the public employee speech cases, such a balancing approach was taken by the court in *Bishop*²⁰¹—a case decided prior to *Garcetti*—and, as covered in Part III, subsequently guided the approach followed by the court in granting a preliminary injunction against Florida's Stop WOKE Act as to higher education.²⁰²

In sum, courts have already engaged in a balancing of interests in deciding academic faculty speech cases, with the public employee speech framework relied upon most often. In our view, tailoring the public concern concept to the nuances of the higher education environment provides a workable approach for courts to continue using a framework that they have consistently employed in resolving faculty speech cases that implicate academic freedom concerns.

V. CONCLUSION

Florida's Stop WOKE Act casts a cloud over academic freedom in the Sunshine State. Rather than the simplistic and incorrect caricatures conveyed by supporters of anti-CRT legislation, CRT and related areas of inquiry are firmly established scholarly domains in higher education. Anti-CRT laws like the Stop WOKE Act undermine the academic speech of faculty who use CRT and related lines of scholarship in their teaching. If courts recognize the authority to limit and censor academic speech related to CRT under laws like the Stop WOKE Act, then, by implication, any scholarly domain in public colleges and universities could be subject to such restriction and censorship. This article has focused on anti-CRT

200 For more on *Demers*, see Part II.

201 In relation to the balancing aspect, the Eleventh Circuit in *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) held that a university had not acted inappropriately in restricting a professor from making in-class comments about his religious beliefs or scheduling voluntary class meetings with students outside of regular class meetings to provide a Christian perspective on the subjects taught in the class.

202 As covered in Part III, the court declined to look to the public employee speech standards as it concluded that it was bound by the Eleventh Circuit's precedent in *Bishop*, *supra* note 201, to look to *Hazelwood School District v. Kuhlmeir*, 484 U.S. 260 (1988) to assess the permissibility of the Stop WOKE Act as to higher education.

legislation, but it is worthwhile to stress that First Amendment protection for the academic speech of public higher education faculty cannot function as a one-way street in terms of safeguarding academic speech on only one end of the sociopolitical spectrum. Constitutional protection for faculty academic freedom must serve to safeguard professors' academic speech across the political continuum.

In defining the employment duties of faculty members to encompass independent academic speech as requisite to professors' carrying out their job functions, institutional or system academic freedom policies or standards should place such academic speech beyond the purview of *Garcetti*. Instead, the academic speech of public higher education faculty should be eligible for First Amendment protection. Given the consistent reliance by courts on the public employee speech standards to evaluate faculty speech claims with an academic freedom dimension, we take a pragmatic stance in suggesting continued use of these standards. But, for this approach to result in any meaningful protection for academic speech, we add the important stipulation that courts must calibrate or tailor the public concern analysis in a way appropriate for a higher education environment. In short, when public higher education institutions or systems hold out academic freedom standards and policies as sincere expressions of a commitment to academic freedom, then such standards and policies should have First Amendment consequences for faculty academic speech rights.