

PROFESSORIAL SPEECH, THE FIRST AMENDMENT, AND LEGISLATIVE RESTRICTIONS ON CLASSROOM DISCUSSIONS

*Keith E. Whittington**

Academic freedom enjoys an uncertain status in American constitutional law under the First Amendment. It is particularly unclear how the First Amendment applies when it comes to professorial speech in the classroom. This lack of clarity has grave implications in the current political environment. There is now an unprecedented wave of legislative proposals aimed at curtailing teaching and discussing controversial topics relating to race and gender in state-university classrooms, and the constitutionality of such measures will soon need to be resolved.

This Article sets out a new argument for protecting from legislative interference the way faculty at state universities teach their courses. Building on existing First Amendment jurisprudence regarding academic freedom and government-employee speech, the Article lays out the constitutional infirmities with anti-Critical Race Theory proposals and clarifies the scope of an individual constitutional liberty in the context of professorial speech.

TABLE OF CONTENTS

INTRODUCTION.....	464
I. THE CULTURE WAR AND ANTI-CRITICAL RACE THEORY LEGISLATION	467
II. THE COLD WAR AND ANTI-SUBVERSIVE LEGISLATION	477
III. THE FIRST AMENDMENT AND ACADEMIC FREEDOM	482
IV. <i>PICKERING, GARCETTI</i> , AND ACADEMIC FREEDOM	492
V. GOVERNMENT SPEECH AND PRIVATE SPEECH IN STATE UNIVERSITIES	513

* William Nelson Cromwell Professor of Politics, Princeton University; visiting fellow, Hoover Institution. My thanks for the helpful comments from Donald Downs, Matthew Finkin, Howard Gillman, Frank Michelman, Robert Post, David Rabban, and Timothy Zick.

CONCLUSION	522
------------------	-----

INTRODUCTION

We are in the midst of an unprecedented legislative assault on traditional commitments to academic freedom in state universities. Despite the robust protections for controversial speech that the Supreme Court has built up under the First Amendment over the past century, the constitutional status of professorial classroom speech remains unclear. This Article brings clarity to that problem. It demonstrates that the so-called anti-Critical Race Theory ("anti-CRT") bills impermissibly burden constitutionally protected speech. They cannot be reconciled with core principles of the First Amendment.

If the state governments were to attempt to prohibit ordinary citizens engaged in their private speech activities from endorsing, advocating, or promoting the same substantive ideas identified in the anti-CRT bills, it seems evident that courts would regard them as unconstitutional under current First Amendment doctrine. The anti-CRT bills are, on their face, regulations of speech based on the content of that speech. As the US Supreme Court has pointed out, a long line of modern jurisprudence has emphasized that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹ As a result, "[c]ontent-based regulations are presumptively invalid."² Moreover, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."³ The First Amendment, "subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."⁴

Promoting divisive concepts does not fall within one of the "narrow and well-understood exceptions" to First Amendment protections, nor can the suppression of such speech be expected to overcome their presumptive invalidity.⁵ Endorsing the belief that one race is "inherently superior" to another or that members of some groups should receive "adverse treatment" in society⁶ might be contrary to current American constitutional commitments and public values, but it is constitutionally protected political expression.⁷

1. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

2. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

3. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

4. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

5. *Id.*

6. See *infra* notes 42–43 and accompanying text.

7. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not

Although one might think that “social justice ideology poses a grave threat to America and to the American way of life,” “teaches students to hate everything that makes America great,” and “divides America by race,”⁸ no court is likely to accept that a ban on the expression of some political ideas “is justified by a compelling government interest and is narrowly drawn to serve that interest.”⁹

The more difficult question is whether professors in a classroom at a state university can claim similar First Amendment protection. If a state were to prohibit the expression of such ideas by a private citizen in a public park, it would clearly be unconstitutional. The state has far greater leeway, however, in regulating the speech of government employees when they are performing their job responsibilities.¹⁰ When subjecting students to the tenets of Critical Race Theory in the classroom of a state university, for example, are professors “speaking as citizens for First Amendment purposes” or are they subject to “employer discipline” if the state government objects to such classroom speech?¹¹

This Article argues that professorial classroom speech should be regarded as constitutionally protected under the First Amendment. As a consequence, state legislatures are subject to significant constitutional limitations in attempting to suppress such speech.¹² Common provisions of anti-CRT bills now being considered by state legislatures across the country are unconstitutional.¹³ A federal judge

prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *id.* at 418 (“The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas.”).

8. H.R. Con. Res. 12, 66th Leg., 1st Reg. Sess. (Idaho 2021).

9. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011).

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

11. *Id.* at 421.

12. I do not address in this Article possible due process concerns arising from the vagueness of these proposals. Such concerns are real given how many of these bills are drafted, but at least in theory statutory language could be improved to mitigate such problems. The First Amendment problem would remain no matter how well drafted the bills might be.

13. For purposes of this Article, I focus on the individual academic freedom of university professors. I lay aside alternative arguments that might be grounded in what is sometimes called “institutional academic freedom” (generally understood as the freedom of the educational institution to pursue its mission free from governmental interference) or in state constitutional provisions securing some measure of independence to state universities. On institutional academic freedom, see Matthew W. Finkin, *On “Institutional” Academic Freedom*, 61 TEX. L. REV. 817 (1983); Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987); J. Peter 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);

pointed out some time ago, “To suggest that the First Amendment, as a matter of law, is never implicated when a professor speaks in class, is fantastic.”¹⁴ Anti-CRT policies raise novel constitutional problems because they pose the most aggressive legislative threat to academic freedom in decades, but it would be fantastic to believe that established First Amendment principles would not extend to prohibiting such policies.

Even a fairly modest approach to recognizing a First Amendment interest in academic freedom should be sufficient to establish the constitutional defects with the current legislative proposals. William Van Alstyne once contended, “[A]cademic freedom is a special subset of First Amendment freedoms.”¹⁵ Academic freedom is not a freestanding commitment but rather protects the “peculiar character and function of the university scholar.”¹⁶ It is the particular function of a university as a domain of free inquiry that necessitates protections for academic freedom.¹⁷ Given the kind of modern universities that have been constituted in the United States, courts have recognized that the academic speech that takes place there implicates important First Amendment values. As even Chief Justice William Rehnquist noted, “the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere” is constitutionally limited.¹⁸ By attempting to suppress university classroom speech about disfavored ideas—and more particularly, disfavored viewpoints about contentious social issues—state policymakers are impinging on First Amendment values that courts can and should protect.

Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J. COLL. & UNIV. L. 35 (2002). On university autonomy under state constitutional provisions, see Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 7 J.L. & EDUC. 177 (1978); Caitlin M. Scully, Note, *Autonomy and Accountability: The University of California and the State Constitution*, 38 HASTINGS L.J. 927 (1987); Karen Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J. COLL. & UNIV. L. 149 (2005); Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, 35 J. COLL. & UNIV. L. 271 (2009).

14. *Scallet v. Rosenblum*, 911 F. Supp. 999, 1013–14 (W.D. Va. 1996).

15. William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, 404 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 143 (1972).

16. *Id.* at 142.

17. See Robert C. Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, in *THE FREE SPEECH CENTURY* 106, 121 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

18. *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

In Part I, I review the current legislative efforts to restrict speech about race in higher education. This review will reveal the scope of the problem and the common speech restrictions now being contemplated by state officials. In Part II, I briefly survey an earlier legislative effort to restrict professorial speech. The concerted effort to stamp out “radical” and “subversive” ideas on college campuses in the mid-twentieth century helped create the First Amendment jurisprudence on academic freedom. In Part III, I outline the relationship between the First Amendment and principles of academic freedom with a particular focus on elaborating how best to think about constitutional protections for professorial classroom speech. In Part IV, I examine what the US Supreme Court has said about government-employee speech and how it relates to academic freedom. The Court has left unclear the scope of constitutional academic-freedom protections in that context, and I argue that the principles that have been articulated by the justices over time are best resolved by more clearly recognizing robust constitutional protections in this context. In doing so, I will clarify the extent to which professorial speech ought to be constitutionally protected from legislative interference in three distinct but important contexts: classroom speech, scholarly speech, and purely private speech. In Part V, I examine the Court’s jurisprudence on distinguishing between governmental and private speech in spaces where the government is heavily involved, like a state-university campus. I argue that professorial classroom speech should not be understood to be a form of government speech that can be properly regulated by government officials.

I. THE CULTURE WAR AND ANTI-CRITICAL RACE THEORY LEGISLATION

With remarkable speed, policymakers across the country have focused their attention on what are sometimes characterized as “divisive concepts.”¹⁹ President Donald Trump got the ball rolling when he issued an executive order at the beginning of the 2020 electoral campaign season seeking to root out “divisive concepts” in the federal government.²⁰ His executive order identified a list of concepts, including such claims as that the “United States is fundamentally racist” and that “any individual should feel discomfort, guilt, anguish, or any form of psychological distress on account of his or her race or sex,” that should be purged from federal employee training.²¹ Soon, Republican legislators across the country

19. Sarah Schwartz, *Map: Where Critical Race Theory is Under Attack*, EDWEEK (Feb. 3, 2023), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06>.

20. Exec. Order No. 13950, 3 C.F.R. § 433 (2021).

21. *Id.* at § 436.

were rushing to introduce bills that were similarly aimed at divisive concepts in state government.²² Unlike Trump's executive order, however, many of these state-level bills were aimed at educational institutions. The first wave of bills generally focused on primary and secondary schools.²³ An emerging wave has taken greater aim at higher education.²⁴

22. Char Adams, *How Trump Ignited the Fight over Critical Race Theory in Schools*, NBC NEWS (May 10, 2021, 6:05 AM), <https://www.nbcnews.com/news/nbcblk/how-trump-ignited-fight-over-critical-race-theory-schools-n1266701>.

23. Peter Greene, *Teacher Anti-CRT Bills Coast to Coast: A State by State Guide*, FORBES (Feb. 16, 2022, 2:00 PM), <https://www.forbes.com/sites/petergreene/2022/02/16/teacher-anti-crt-bills-coast-to-coast-a-state-by-state-guide/>; Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 21, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/>. This Article brackets the policy and constitutional questions surrounding the anti-CRT bills aimed at primary and secondary education, where arguably the government's role as a speaker is much stronger and the teacher's First Amendment interests in the classroom are much weaker. I contend that, for First Amendment purposes, professorial speech at the university level should be distinguished from teacher speech at the primary and secondary school level and that analogizing university classrooms to secondary school classrooms is largely inapt. Universities are importantly sites of free inquiry on the boundaries of human knowledge. Fulfilling such a mission of advancing knowledge requires greater freedom for exploring controversial ideas. Universities are not about socializing children into a community's values but about challenging adults to think about difficult ideas. Both state universities and public schools have an educational mission, but the nature of that mission is quite different. *See, e.g.*, *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007) ("[T]he school system does not 'regulate' teachers' speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary. A teacher hired to lead a social-studies class can't use it as a platform for a revisionist perspective that Benedict Arnold wasn't really a traitor, when the approved program calls him one."); *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 371 (4th Cir. 1998) ("Someone must fix the curriculum of any school, public or private. In the case of a public school, in our opinion, it is far better public policy, absent a valid statutory directive on the subject, that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum."); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989) ("Although, the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula.").

24. Wyatt Myskow, *Legislation to Limit Critical Race Theory at Colleges Has Reached Fever Pitch*, CHRON. HIGHER EDUC. (June 8, 2022), <https://www.chronicle.com/article/legislation-to-limit-critical-race-theory-at-colleges-has-reached-fever-pitch>.

These bills have become more popularly known as anti-CRT legislation. In a strict academic sense, Critical Race Theory is a body of literature that has emphasized the routine prevalence of racism, often subtle and institutionalized, in contemporary American society.²⁵ In a legal context, that work has emphasized the inadequacy of the civil rights efforts of the mid-twentieth century and the need for a transformation of civil rights thinking and law.²⁶ Although Critical Race Theory may have gotten its start in the law schools, it has had an enormous impact in the field of education as well.²⁷ Developing an “analogous” mode of analysis, this literature has emphasized the importance of racism and capitalism as the drivers of educational inequities.²⁸ A self-consciously activist literature, it has sought to train teachers to uproot “normative whiteness” and “a system of achievement premised on competition.”²⁹ Such scholarly enterprises might have been little known outside their immediate environments, but they gained new prominence in the wake of the Black Lives Matters protests during the summer of 2020. In particular, Christopher Rufo of the Manhattan Institute, a conservative think tank, is generally credited with giving the term political salience.³⁰ Rufo called attention to the growing popularity of employee training, including in government agencies, aimed at ferreting out “whiteness.”³¹ Infamously, Rufo laid out his rhetorical strategy in public via Twitter: “The goal is to have the public read something crazy in the newspaper and immediately think ‘critical

25. See, e.g., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995); Richard Delgado & Jean Stefancic, *CRITICAL RACE THEORY: AN INTRODUCTION* 3 (3d ed. 2017).

26. See, e.g., Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); MARI J. MATSUDA ET AL., *WORDS THAT WOUND* (1993).

27. See, e.g., *HANDBOOK OF CRITICAL RACE THEORY IN EDUCATION* (2d ed. Marvin Lynn & Adrienne D. Dixson eds. 2022).

28. Gloria Ladson-Billings & William F. Tate IV, *Toward a Critical Race Theory of Education*, 97 TCHRS. COLL. REC. 47, 47 (1995).

29. Adrienne D. Dixson & Celia Rousseau Anderson, *Where are We? Critical Race Theory in Education 20 Years Later*, 93 PEABODY J. OF EDUC. 121, 122 (2018).

30. Christopher F. Rufo, “White Fragility” Comes to Washington, CITY J. (July 18, 2020), <https://www.city-journal.org/white-fragility-comes-to-washington>.

31. Adam Harris, *The GOP’s ‘Critical Race Theory’ Obsession*, ATL. (May 7, 2021), <https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828/>; Laura Meckler & Josh Dawsey, *Republicans, Spurred by an Unlikely Figure, See Political Promise in Targeting Critical Race Theory*, WASH. POST (June 21, 2021, 6:22 PM), <https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/>.

race theory.”³² The plan seems to have worked. Lots of things were soon lumped under the label, and “critical race theory” became a catch-all, if dimly understood, way for conservatives to describe racial ideas and arguments that they did not like. As a result, the anti-CRT proposals have only a loose connection to the academic literature known as Critical Race Theory. This development generates confusion and obfuscation but has little substantive consequence.³³ For purposes of this Article, “critical race theory” can be understood to have implicit scare quotes as it refers to this political debate rather than to the scholarly literature. The policies in play would be no better or worse from an academic-freedom perspective if they were aimed more accurately at a particular scholarly movement or literature.

Of more immediate significance, the attack on Critical Race Theory quickly moved beyond employee training sessions to the school curriculum. President Trump’s divisive-concepts executive order served as a model for state and local policymaking activity in subsequent months.³⁴ Arizona prohibited state agencies from making use of employee training that “presents any form of blame or judgment on the basis of race, ethnicity, or sex.”³⁵ Georgia adopted the Protect Students First Act, which prohibited “classroom instruction” that “advocate[s] for divisive concepts.” Among those divisive concepts are the claims that individuals should feel anguish or guilt “by virtue of his or her race” and that “recognition and appreciation of character traits such as a hard work ethic are racist.”³⁶ North Dakota required that the public-school curriculum be “factual” and “objective” and “not include instruction relating to critical race theory.”³⁷ South Carolina included a budget rider on “partisanship curriculum” that prohibited curricula, textbooks, or instructional materials that “serve to inculcate” various disfavored

32. Christopher F. Rufo (@realchrisrufo), TWITTER (Mar. 15, 2021, 3:17 PM), <https://twitter.com/realchrisrufo/status/1371541044592996352?lang=en>.

33. Some legislative proposals are substantively affected by the confusion to the extent that they are vague about exactly what speech is being banned, but most of the proposals do not attempt to ban “critical race theory” as such but instead delineate a set of more specific ideas that should not be discussed. Many of the proposals still have vagueness problems, but not as a result of confusion of the meaning of “critical race theory.” On the lack of clarity in the anti-CRT bills, see Keith Whittington, *The Trouble with Banning Critical Race Theory*, AREO (June 16, 2021), <https://areomagazine.com/2021/06/16/the-trouble-with-banning-critical-race-theory/>.

34. JONATHAN FRIEDMAN & JAMES TAGER, EDUCATIONAL GAG ORDERS 25–26 (2022); Whittington, *supra* note 33.

35. H.B. 2906, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

36. H.B. 1084, 2022 Leg., Reg. Sess. (Ga. 2022).

37. H.B. 1508, 67th Leg., Spec. Sess. (N.D. 2021).

concepts.³⁸ Texas adopted a civics training program that included a prohibited list of divisive concepts.³⁹

With the ink barely dry on policies focused on primary and secondary education, legislators began to advance similar bills focused on higher education. A small number have passed into law, but many more are in the pipeline. The various proposals have many commonalities, but they are not all the same. Some examples will indicate the challenges posed by such legislation. The common theme is that they all burden professorial speech in the classroom by restricting the topics and perspectives that a professor may discuss or advance while performing his or her instructional duties.

Perhaps the most high-profile of the bills signed into law is Florida's so-called "Stop WOKE Act," or House Bill 7. Passed with great fanfare at the behest of the governor's office, Florida Republican Governor Ron DeSantis declared that "we will not let the far-left woke agenda take over our schools" and that "there is no place for indoctrination" in the state.⁴⁰ A key feature of the law echoes other divisive-concepts proposals. It declares it to be prohibited "discrimination on the basis of race" for any student in the state to be exposed to "training or instruction that espouses, promotes, advances, inculcates, or compels such student . . . to believe any" of a list of concepts, including that members of one race are "morally superior" to members of another; that a person's "status" is "either privileged or oppressed" as a result of their race or sex; that a person "should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion;" or that "such virtues as merit, excellence, hard work, fairness, objectivity, and racial colorblindness are racist or sexist."⁴¹ The discussion of such concepts is not prohibited so long as they are "part of a larger course of training or instruction" and such instruction "is given in an objective manner without endorsement of the concepts."⁴² By prohibiting university instruction that "espouses," "promotes," "advances," or offers with "endorsement" such concepts, the state restricts ordinary academic discourse in a range of disciplines and hampers the ability of

38. H.B. 4100, 124th Gen. Assemb., Reg. Sess. (S.C. 2022).

39. S.B. 3, 87th Leg., Reg. Sess. (Tex. 2021).

40. John Kennedy, *DeSantis' 'Stop WOKE Act' Faces Court Test as Universities Become Targets. At Issue: Free Speech*, FLA. TIMES-UNION (June 19, 2022, 6:05 PM), <https://www.jacksonville.com/story/news/politics/2022/06/16/desantis-florida-stop-woke-act-challenged-universities-free-speech/7630033001/>.

41. H.B. 7, 2022 Leg., Reg. Sess. (Fla. 2022); FLA. STAT. § 1000.05(4)(a) (2022).

42. FLA. STAT. § 1000.05(4)(b) (2022).

professors to construct ordinary political and policy arguments relating to a variety of disputed issues involving race and sex.⁴³

The Idaho anti-CRT statute makes direct reference to “tenets . . . often found in ‘critical race theory’” in its new legislation on “dignity and nondiscrimination in public education.”⁴⁴ Because the legislature regards such concepts as likely to “exacerbate and inflame divisions,” it prohibits any “public institution of higher education” from directing or compelling students “to personally affirm, adopt, or adhere to” a list of tenets, including that a race or sex is inherently superior to another, that individuals should be adversely treated on the basis of such characteristics, or that individuals are “inherently responsible” for actions committed in the past by other individuals who share such characteristics.⁴⁵ This legislation has a far narrower scope than other versions of divisive-concepts bills since it does not prohibit mere advocacy or promotion of such ideas by instructors but only compelling students to “personally affirm” them.⁴⁶

Other proposals that have been advanced in the Idaho legislature but not yet adopted into law are more sweeping. A House concurrent resolution declared that “universities should eliminate courses . . . that are infused with social justice ideology” and threatened future cuts in state funding to universities that failed to do so.⁴⁷ House Bill 352 takes a broader approach to banning divisive concepts from university classrooms. It would prohibit a list of “racist or sexist concept[s]” and bar professors at public universities from “teach[ing],” “advocat[ing], or “encourage[ing] the adoption” of such concepts “while instructing students.”⁴⁸ Universities would be further barred from hosting speakers who advocate such positions or

43. The Stop WOKE Act has been enjoined by a federal district court. *Novoa v. Diaz*, No. 4:22-cv-00324-MW/MAF (N.D. Fla. 2022) (Court Listener).

44. IDAHO CODE § 33-138(2) (2021).

45. IDAHO CODE § 33-138(3)(a) (2021).

46. What counts as “personally affirming” a tenet of critical race theory might still create mischief in an educational setting, however. Compelled speech is constitutionally disfavored. As Justice Robert Jackson noted in the flag-salute case, it is not “open to public authorities to compel [an individual] to utter what is not in his mind.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). It is clear that what concerned the Court was compelling a certain “attitude of mind” and forcing individuals to “confess by word or act their faith” in government prescribed orthodoxies. *Id.* at 633, 642. But it is also familiar that in an educational context students might well be asked to express “words without belief” in the context of a debate or an examination in ways that do not look like the kind of “prescribed ceremony” at stake in the flag-salute context. *Id.* at 633. If the statute is read narrowly to apply to forced expressions of belief comparable to reciting the Pledge of Allegiance, then it would avoid such pitfalls and reaffirm the constitutional right that students already possess to be free from compelled speech.

47. H.R. 12, 66th Leg., 1st Reg. Sess. (Idaho 2021).

48. H.B. 352, 66th Leg., 1st Reg. Sess. (Idaho 2021).

requiring students to read any “learning material” that espouses such views.⁴⁹ With such proposals on the loose, university officials became proactive in trying to avoid enflaming legislative passions.⁵⁰

The Iowa legislature adopted a new law restricting diversity training in state and local government, including institutions of higher education.⁵¹ Mandatory “staff or student training” may not “teach” or “advocate” a number of disfavored views, but the law includes a qualification that its requirements should not be read to “inhibit or violate the first amendment rights of students or faculty, or undermine a public institution of higher education’s duty to protect to the fullest degree intellectual freedom and free expression.”⁵² South Dakota⁵³ and Tennessee⁵⁴ adopted similar measures.

Other legislative proposals that have not yet become law are less circumspect. Some directly single out specific texts to be banished from the classroom. The “1619 Project” was sponsored by the *New York Times* and won a Pulitzer Prize for a series of essays on the history of race and slavery in the United States.⁵⁵ The Project, which tried to resituate the true American founding as the date in which African slaves arrived in North America, has spurred extended scholarly and political controversy over its historical claims, thematic narrative, and normative aspirations.⁵⁶ House Bill 222 in Iowa would cut funds for any public universities that utilized any material from

49. *Id.*

50. Kevin Richert, *Analysis: By Staying Silent, the State Board Loses the Education Narrative*, IDAHO ED NEWS (Apr. 22, 2021), <https://www.idahoednews.org/top-news/analysis-by-staying-silent-the-state-board-loses-the-education-narrative/>; Betsy Russell, *The ‘Social Justice’ Debate in Higher Ed, from ‘Equity’ to Cannibalism*, IDAHO PRESS (Jan. 25, 2022), https://www.idahopress.com/eyeonboise/the-social-justice-debate-in-higher-ed-from-equity-to-cannibalism/article_727a169b-26ea-5b5e-9ce7-a752db6f1f71.html; Colleen Flaherty, *Ethics and Diversity Course on Hold*, INSIDE HIGHER ED (Mar. 18, 2021), <https://www.insidehighered.com/news/2021/03/18/boise-state-suspends-diversity-course-1300-students>.

51. H.B. 802, 2021 Leg. (Iowa 2021).

52. *Id.*

53. H.B. 1012, 97th Leg., Reg. Sess. (S.D. 2022).

54. H.B. 2670, 112th Gen. Assemb. (Tenn. 2022).

55. Nikole Hannah-Jones, *Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>.

56. David Waldstreicher, *The Hidden Stakes of the 1619 Controversy*, BOS. REV. (Jan. 24, 2020), <https://bostonreview.net/articles/david-waldstreicher-hidden-stakes-1619-controversy/>; William Hogeland, *The Historians are Fighting*, SLATE (Oct. 30, 2021, 5:59 AM), <https://slate.com/news-and-politics/2021/10/1619-project-historians-controversy-gordon-wood-woody-holton.html>.

the “1619 Project” in its curriculum.⁵⁷ The Iowa bill is one of several legislative proposals in multiple states aimed at banning the 1619 Project from public school or public university classrooms.⁵⁸ Measures introduced in Oklahoma and Missouri would cut state funds to any universities using the materials.⁵⁹ A separate Missouri bill would have imposed similar financial penalties on any state university that adopted a “curriculum implementing critical race theory” or taught “components of critical race theory as part of any curriculum, course syllabus, or instruction in any course or program of study.”⁶⁰ A New York bill would have prohibited requiring college students to “study the 1619 Project” or taking a course that “teaches individuals to feel discomfort . . . due to the individual’s race or religion.”⁶¹

Others would bring the divisive-concepts bans into college-level teaching. A bill introduced in Alabama directed that no university professor shall “teach” anything on a list of divisive concepts.⁶² A bill in Arkansas would have barred university professors from “promot[ing]” “social justice” or “division between” races, genders, social classes, or political groups.⁶³ A bill in Kentucky with the straightforward title of “an act relating to prohibited instruction” would have mandated that no student “be subjected to any classroom instruction or discussion” or “textbooks and instructional materials” that promote a divisive concept.⁶⁴ A similar measure in South Carolina would have likewise freed college students from “ideological coercion and indoctrination” by banning delineated “discriminatory concepts” from any “instruction, presentations, discussions, or counseling.”⁶⁵ The “Teaching Racial and Universal Equality (TRUE) Act” in Mississippi would have prohibited including “divisive concepts as part of a course of instruction or in a curriculum or instructional program” at a state university.⁶⁶ Its list of divisive concepts was a bit more expansive than most, including on the list of prohibited ideas

57. H.B. 222, 2021 Leg. (Iowa 2021).

58. Sarah Schwartz, *Lawmakers Push to Ban “1619 Project” from Schools*, EDUC. WEEK (Feb. 3, 2021), <https://www.edweek.org/teaching-learning/lawmakers-push-to-ban-1619-project-from-schools/2021/02>; Barbara Rodriguez, *Republican State Lawmakers Want to Punish Schools that Teach the 1619 Project*, USA TODAY (Feb. 10, 2021, 11:39 AM), <https://www.usatoday.com/story/news/education/2021/02/10/slavery-and-history-states-threaten-funding-schools-teach-1619-project/4454195001/>.

59. H.B. 2988, 58th Leg., 2d Sess. (Okla. 2022); H.B. 952, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

60. H.B. 1634, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2021).

61. A.B. 8253, 2021 Leg., Reg. Sess. (N.Y. 2021).

62. H.B. 9, 2021 Leg., Reg. Sess. (Ala. 2022).

63. H.B. 1218, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

64. H.B. 18, 2022 Leg., Reg. Sess. (Ky. 2022).

65. H.B. 4605, 2021 Gen. Assemb., 124th Sess. (S.C. 2021).

66. H.B. 437, 2022 Leg., Reg. Sess. (Miss. 2022).

that “capitalism” or “free markets” “are racist and sexist or oppress a given race or sex” and ideas that promote “the violent overthrow of the United States government.”⁶⁷ A New Hampshire bill would have simply extended its divisive-concepts law that applied to state employee training⁶⁸ to include university classroom instruction.⁶⁹ Pennsylvania would have prohibited professors from “teach[ing]” or “advocat[ing]” a divisive concept “while instructing students.”⁷⁰

To date, legislative proposals relating to divisive concepts in higher education have focused on training sessions and classroom instruction. They have proposed regulating college curricula, banning instructional materials, and curtailing classroom discussions. We are still in the early stages of the anti-CRT movement, however. It is not hard to imagine state government officials setting their sights on other expression of such disfavored ideas by state-university professors in other contexts. In addition to classroom speech, professors routinely speak in two other contexts that traditional academic-freedom policies and principles have also tried to protect.⁷¹ Scholarly speech in the form of presentations in scholarly venues and publication of scholarly research might not directly involve students, but it can certainly develop and promote the same disfavored ideas targeted by the current divisive-concepts proposals. It would not be hard to imagine policymakers attempting to likewise suppress scholarship that might be characterized as “racist.”⁷² Professors also engage in private speech, or what in the academic-freedom context is characterized as “extramural speech.”⁷³ It is not at all obvious that politicians concerned with divisive and dangerous ideas being promoted by state-university professors will limit their attention to what those professors say in the classroom.⁷⁴

67. *Id.*

68. H.B. 544, 2021 Gen. Ct., Reg. Sess. (N.H. 2021).

69. H.B. 1313, 2022 Gen. Ct., Reg. Sess. (N.H. 2022).

70. H.B. 1532, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021).

71. See *infra* text accompanying notes 113–14.

72. Indeed, such proposals are already on the table but with a different political valence. Many of my colleagues at Princeton University have urged the university to carve out an exception from academic-freedom protections for “racist” scholarship. Only modest tinkering would be needed to make such proposals serve the goals of the politicians currently advancing bills aimed at “discriminatory concepts.” Keith Whittington, *Chipping Away at Academic Freedom*, REAL CLEAR POL. (Aug. 23, 2020), https://www.realclearpolitics.com/articles/2020/08/23/chipping_away_at_academic_freedom_144012.html.

73. Keith E. Whittington, *Academic Freedom and the Scope of Protections for Extramural Speech*, 105 ACADEME 20, 22 (2019).

74. In fact, the extramural speech of professors frequently generates political controversy, though these efforts to sanction faculty for unpopular things that they have said in public are more often ad hoc than systematic. See, e.g., Keith E. Whittington, *Protecting Extramural Speech*, ACADEME BLOG (Feb. 15, 2019),

A trustee at a state university in Florida recently complained that they should be more involved in faculty tenure decisions and would need more information in order to make such decisions.⁷⁵ Governor-appointed board members needed to know about a professor's "viewpoints, about his research, about his political affiliations or potential donations."⁷⁶ The powerful lieutenant governor of Texas has called for new legislation specifying that "teaching Critical Race Theory" would be a "cause for a tenured professor to be dismissed," while seeking to shift faculty to annual "tenure reviews" in order to remain employed.⁷⁷ If professors spouting "nonsense" is a good reason for government officials to get rid of them, it seems unlikely that the only nonsense that will matter is that being expressed in the classroom.⁷⁸

Problematic bills get introduced into state legislatures all the time. Given the number of state legislators in the country, it is not hard to engage in an exercise of "nutpicking" to feed worries about ill-conceived legislative proposals with little chance of adoption or influence. Unfortunately, there is more substantial cause for concern regarding the anti-CRT bills. The first wave of divisive-concepts bills already yielded some legislative success, and their advocates have only just started to turn their attention to higher education. The volume and prominence of legislative proposals looking to restrict what can be included in the curriculum of state universities cannot be easily dismissed as political longshots. Universities have already begun to react to the new political environment by seeking to curtail

<https://academeblog.org/2019/02/15/protecting-extramural-speech/>; Keith E. Whittington, *Extramural Speech at Auburn*, VOLOKH CONSPIRACY (Aug. 3, 2020, 9:52 PM), <https://reason.com/volokh/2020/08/03/extramural-speech-at-auburn/>; Keith E. Whittington, *Controversial Researcher Driven from Campus at Old Dominion University*, VOLOKH CONSPIRACY (Dec. 1, 2021, 11:10 AM), <https://reason.com/volokh/2021/12/01/controversial-researcher-driven-from-campus-at-old-dominion-university/>; Keith E. Whittington, *A State Attorney General Demands that a Professor be Held "Accountable" for a Tweet*, VOLOKH CONSPIRACY (Dec. 11, 2021, 12:52 PM), <https://reason.com/volokh/2021/12/11/a-state-attorney-general-demands-that-a-professor-be-held-accountable-for-a-tweet/>.

75. Colleen Flaherty, *Having Their Say—and Then Some*, INSIDE HIGHER ED (May 17, 2021), <https://www.insidehighered.com/news/2021/05/17/trustees-florida-atlantic-want-play-role-faculty-tenure-process>.

76. *Id.*

77. Lt. Gov. Dan Patrick, *State of Texas, Statement on Plans for Higher Education and Tenure*, LIEUTENANT GOV. TEX. (Feb. 18, 2022), <https://www.ltgov.texas.gov/2022/02/18/lt-gov-dan-patrick-statement-on-plans-for-higher-education-and-tenure/>.

78. Kate McGee, *Lt. Gov. Dan Patrick Proposes Ending University Tenure to Combat Critical Race Theory Teachings*, TEX. TRIB. (Feb. 18, 2022, 12:00 PM), <https://www.texastribune.org/2022/02/18/dan-patrick-texas-tenure-critical-race-theory/>.

programmatic and instructional activities that might incense state politicians.⁷⁹ While it is certainly too early to predict what form restrictions might take, it is not too early to begin to grapple with the constitutional issues that such proposals raise. The possibility of legislative restrictions on state-university classroom teaching has moved from the world of idle hypotheticals to the political mainstream.⁸⁰

II. THE COLD WAR AND ANTI-SUBVERSIVE LEGISLATION

The current political assault on state universities is perhaps the most substantial since the early days of the Cold War. It remains to be seen whether the current political efforts will be as consequential as those of the mid-twentieth century, but political interest in speech activities on college campuses is higher now than it has been in decades. The search for “subversives” in the postwar period sought to suppress radical ideas in public and private institutions of higher education.⁸¹ The current wave of anti-CRT legislation has similar goals. The anti-subversive legislation of the Cold War era spurred the Supreme Court to begin to constitutionalize academic-freedom principles.⁸² The anti-CRT legislation could prod the Court to push those developments further.

79. See, e.g., Mike Schneider, *Florida Professors Cite Fear of State Politicians on Campus*, AP (Dec. 7, 2021), <https://apnews.com/article/coronavirus-pandemic-health-education-florida-censorship-3eb326e17c91077ae1fe7d5b45f1df89>; *Frequently Asked Questions: Iowa House File 802*, IOWA STATE UNIV. (Aug. 5, 2021), <https://www.provost.iastate.edu/policies/iowa-house-file-802---requirements-related-to-racism-and-sexism-trainings>.

80. It should be noted that this Article focuses on legislative restrictions on classroom teaching in universities, but the current threat to academic freedom in public universities is broader. Significant alteration in the tenure system has been proposed in several states and politically appointed boards of trustees in public university systems have toyed with the idea of becoming more interventionist in the academic affairs of the universities they oversee. Keith E. Whittington, *The Intellectual Freedom that Made Public Colleges Great is Under Threat*, WASH. POST (Dec. 15, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/12/15/academic-freedom-crt-public-universities/>. Private universities are facing their own academic-freedom challenges as well. Keith E. Whittington, *Free Speech is Under Threat on College Campuses. Here's How to Fight Back*, NAT. REV. (Mar. 18, 2021, 6:30 AM), <https://www.nationalreview.com/2021/03/free-speech-is-under-threat-on-college-campuses-heres-how-to-fight-back/>.

81. See generally Ellen Schrecker, *Academic Freedom and the Cold War*, 38 ANTIOCH REV. 313, 318–22 (1980).

82. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 236–38 (1957) (plurality opinion). “We believe that there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.” *Id.* at 250 (opinion of Warren, C.J.).

The original impetus for the anti-subversive push predated the Cold War. The Bolshevik Revolution in Russia and World War I generated their own demands for ensuring that subversive ideas did not get a foothold in the United States.⁸³ New York took the lead, with a particular focus on rooting subversives out of public schools.⁸⁴ The laws were not without controversy. Democratic Governor Alfred E. Smith denounced one such bill, saying, "It deprives teachers of their right to freedom of thought, it limits the teaching staff of the public schools to those only who lack the courage of mind to exercise their legal right to just criticism of existing institutions."⁸⁵ Of another that sought to create a licensing system for private schools, he wrote, "[I]t strikes at the very foundation of one of the most cardinal institutions of our nation—the fundamental right of the people to enjoy full liberty in the domain of idea and speech."⁸⁶ "It is," he thought, "unthinkable that in a representative democracy there should be delegated to any body of men the absolute power to prohibit the teaching of any subject of which it may disapprove."⁸⁷ Nonetheless, just a few years later the American Civil Liberties Union reported that "[m]ore laws interfering with the school curriculum have been passed [since World War I] than in all the years preceding."⁸⁸

While the current anti-CRT bills have taken direct aim at university instruction, the anti-subversive efforts of the Cold War period were generally less direct. Loyalty oaths became a condition for employment not only for teachers but for state employees of all sorts, including professors at state universities.⁸⁹ New York eventually barred individuals "from any office or position in the service of the state" including "in a state normal school or college, or any other state educational institution" who "willfully and deliberately advocates, advises or teaches the doctrine that the government of the United States . . . should be overthrown or overturned by force, violence or any unlawful means" or becomes "a member of any society or group of persons which teaches or

83. PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 133–34, 177–78 (1979). On the transition in free speech doctrine, see MARK A. GRABER, *TRANSFORMING FREE SPEECH* 165–84 (1991); DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 175–76 (1997).

84. See generally LAWRENCE H. CHAMBERLAIN, *LOYALTY AND LEGISLATIVE ACTION* (1951).

85. ALFRED E. SMITH, 2 *PUBLIC PAPERS OF ALFRED E. SMITH, GOVERNOR* 369 (1921).

86. *Id.*

87. *Id.* at 370.

88. AM. C.L. UNION, *THE GAG ON TEACHING* 4 (1931). See also, M.J. HEALE, *MCCARTHY'S AMERICANS: RED SCARE POLITICS IN STATE AND NATION, 1935–1965*, 30–33 (1998) ("By 1953 the great majority of states were using loyalty oaths of some kind.").

89. HEALE, *supra* note 88, at 30–31.

advocates" such a doctrine.⁹⁰ The notorious Feinberg Law directed the state's board of regents to adopt rules to identify and remove such teachers and create a list of prohibited subversive organizations.⁹¹ As a New York court said in upholding the law, "We are not so naive as to accept as gospel the argument that a teacher who believes in the destruction of our form of Government will not affect his students."⁹² The state had a particular interest in the thoughts of those who would be molding "the childish mind."⁹³

The fate of young schoolchildren might have been of particular interest to legislators in the postwar period, but the intellectual environment of college students did not escape their attention.⁹⁴ University professors were widely required to attest that they had not belonged to subversive organizations like the Communist Party.⁹⁵ Texas went so far as to require that authors of school textbooks attest that they had not been a member of a movement that had been "designated as totalitarian, fascist, communist or subversive" or that advocated "acts of force or violence to deny others their rights" or sought to "alter the form of Government of the United States by unconstitutional means."⁹⁶ Refusing to testify in an un-American affairs investigation was specified as grounds for dismissal from a faculty position.⁹⁷ State-university officials, like the president of Ohio

90. N.Y. Laws 1939, c. 547, as amended N.Y. Laws 1940, c. 564. *See* *Adler v. Bd. of Educ.*, 342 U.S. 485, 486 n.1 (1952) (citing the statute).

91. N.Y. Laws 1949, c. 360. *See Adler*, 342 U.S. at 487 n.2 (citing statute).

92. *L'Hommedieu v. Bd. of Regents*, 95 N.Y.S.2d 443, 453 (N.Y. App. Div. 1950).

93. *Id.*

94. The appointment of famed British philosopher Bertrand Russell to a position at City College was overturned by a state court as appalling and unlawful in part because the taxpayers of New York "are not spending that money nor was the money appropriated for the purpose of employing teachers who are not of good moral character," and "Mr. Russell has taught in his books immoral and salacious doctrines" relating to premarital sex. *Kay v. Bd. of Higher Educ.*, 18 N.Y.S.2d 821, 826-27 (N.Y. Civ. Ct. 1940).

95. *See generally* ELLEN W. SCHRECKER, *NO IVORY TOWER* (1986); *see also* JANE SANDERS, *COLD WAR ON THE CAMPUS* 153-54 (1979).

96. H.B. 21, 53d Leg., Reg. Sess. (1953) (requiring an oath or affirmation of Texas educators). The state attorney general instructed the board of education that the provision was unconstitutional and should not be implemented. Att'y Gen. of Tex., Opinion No. M-417 on Whether the State Board of Education May Require a Loyalty Oath (June 11, 1969). The state's requirement that professors sign a loyalty oath as a condition of employment had recently been struck down in federal court. *Gilmore v. James*, 274 F. Supp. 75, 79-80, 92-93 (N.D. Tex. 1967), *affirmed sub nom.* *James v. Gilmore*, 389 U.S. 572 (1968) (per curiam). "While such membership may furnish a basis for further inquiry into an applicant's present or past activities, it does not itself constitute a threat to the state." *Gilmore*, 274 F. Supp. at 92.

97. MARJORIE HEINS, *PRIESTS OF OUR DEMOCRACY* 130-150 (2013). New York's Section 903 was struck down in *Slochower v. Bd. of Higher Educ.*, 350 U.S.

State University, declared that refusal to cooperate with anti-Communism investigations was "gross insubordination" and "conduct clearly inimical to the best interests of the university," which created "serious doubt as to [a professor's] fitness for the position" and justified the stripping of tenure and termination of employment.⁹⁸ A New York court concluded that "the assertion of the privilege against self-incrimination is equivalent to a resignation."⁹⁹ States like Arkansas required professors to divulge the organizations with which they had been associated.¹⁰⁰ States like North Carolina banned speakers who had advocated the overthrow of the American government from college campuses.¹⁰¹

The fear of tenured radicals was not limited to state universities by any means. When Dwight Eisenhower left Columbia University to move to the White House after a brief stint as its president, he delivered a farewell address to a crowd of faculty and students. He confessed that before arriving at Columbia he "heard of this constant rumor and black suspicion that our universities were cut and honeycombed with subversion."¹⁰² He agreed to accept that job only if the university would rid itself of anyone adhering to "any kind of traitorous doctrine."¹⁰³ In "a war of great ideologies," "no man flying a war plane . . . can possibly be more important than the teacher."¹⁰⁴ Fortunately, in his short stay he had not found a Communist "behind every brick on the campus," but he expected the campus to remain vigilant after he had left.¹⁰⁵ As pressure built on universities to dispel this "black suspicion," Yale University president Charles Seymour

551 (1956). "We do not decide whether a claim under the 'privileges or immunities' clause was raised below, since we conclude the summary dismissal of [the] appellant in the circumstances of this case violates due process of law." *Id.* at 555 (citing U.S. CONST. amend. XIV, § 1).

98. *Investigation of Communist Activities in the Los Angeles Area—Part 2: Hearings Before the Comm. on Un-American Activities*, 83d Cong. 520 (1953). See also ERVING E. BEAUREGARD, *HISTORY OF ACADEMIC FREEDOM IN OHIO* 93 (1988).

99. *Daniman v. Bd. of Educ.*, 119 N.E.2d 373, 377 (N.Y. 1954).

100. JEFF WOODS, *BLACK STRUGGLE, RED SCARE* 70–77 (2004). Arkansas's Act 10 was struck down in *Shelton v. Tucker*, 364 U.S. 479 (1960). "The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." *Id.* at 490 (reversing the judgments below).

101. WILLIAM J. BILLINGSLEY, *COMMUNISTS ON CAMPUS* 1–21 (1999). North Carolina's speaker ban was struck down in *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968). See *id.* at 499 ("When the statutes and regulations in question are applied to the unbroken line of Supreme Court decisions . . . the conclusion is inescapable that they run afoul of constitutional principles.").

102. William R. Conklin, *Eisenhower Says Farewell to Columbia University*, N.Y. TIMES, Jan. 17, 1953, at A1.

103. *Id.*

104. *Id.*

105. *Id.*

declared, "There will be no witch-hunts at Yale because there will be no witches. We do not intend to hire Communists."¹⁰⁶ The American Association of Universities tried to walk a fine line in a 1953 statement. On the one hand, it insisted that "the scholar's mission requires the study and examination of unpopular ideas, of ideas considered abhorrent and even dangerous."¹⁰⁷ The scholar "has no obligation to be silent in the face of popular disapproval," and the teacher has the responsibility and right "to express his own critical opinion and the reasons for holding it," limited only by "the requirements of citizenship, of professional competence and good taste."¹⁰⁸ At the same time, those appointed to a university faculty have "the affirmative obligation of being diligent and loyal in citizenship" and a particular obligation to reject the Communist Party principles including "the fomenting of world-wide revolution as a step to seizing power; the use of falsehood and deceit as normal means of persuasion; [and] thought control—the dictation of doctrines which must be accepted and taught by all party members."¹⁰⁹

Why bother targeting hard-to-monitor classroom speech when it was possible to use a broader brush and remove instructors for their extramural expression and activity? At least initially, state governments understood themselves to have a free hand to purge subversives from the ranks of the faculty and did not need to worry over what those subversives were actually doing in the classroom. In 1952, for example, the Supreme Court upheld the Feinberg Law in *Adler v. Board of Education of the City of New York*.¹¹⁰ Justice Sherman Minton wrote for the Court that "the state has a vital concern" with those employed in its educational institutions and has the right to "maintain the integrity of the schools as a part of ordered society."¹¹¹ The state had the power "to protect the schools from pollution and thereby to defend its own existence," and individuals

106. Quoted in SCHRECKER, *supra* note 95, at 111. While Eisenhower and others thought that in the midst of a great war of ideologies universities should not employ the enemies of freedom, many others simply concluded that Communists were different. To the extent that the "fundamental doctrines of the Communist Party deny to its members that freedom to think and speak independently which is the basis of University policy," as a dean at the University of Michigan put it, committed Communists were necessarily unfit to be scholars. *Id.* at 110.

107. Ass'n Am. Univs., *The Rights and Responsibilities of Universities and their Faculties*, 1 UNIV. BULL. [Cal.] 161 (Mar. 24, 1953).

108. *Id.* at 162–63.

109. *Id.* at 167.

110. 342 U.S. 485 (1952).

111. *Id.* at 493 (1952). Irving Adler was a public high school math teacher, labor union leader, and a longtime member of the Communist Party. He had declined to answer the required question about his organizational affiliations. Ralph Blumenthal, *When Suspicion of Teachers Ran Unchecked*, N.Y. TIMES (June 15, 2009), <https://www.nytimes.com/2009/06/16/nyregion/16teachers.html>.

had a right to choose between their freedom to advocate radical doctrines and the privilege of government employment.¹¹² Minton's view would soon fall out of favor as the Court confronted the application of anti-subversive policies in higher education and as the Court became more civil libertarian.

III. THE FIRST AMENDMENT AND ACADEMIC FREEDOM

Academic freedom in the United States was first and primarily a matter of contract, custom, and norms. The American Association of University Professors ("AAUP") organized in the early twentieth century to advocate for greater recognition of and protection for principles of academic freedom in the United States.¹¹³ Most significantly, the AAUP and the American Association of Universities agreed to a joint Statement of Principles on Academic Freedom and Tenure in 1940.¹¹⁴ The 1940 Statement identified three basic principles of academic freedom and reduced them into language that could be, and was, widely adopted as university policy governing employment relations with faculty. Specifically, the AAUP's principles of academic freedom called for freedom of research, freedom of teaching, and freedom of speech. First, professors should be free to conduct and publish research without interference or censorship from their university employers.¹¹⁵ Second, professors should be free from administrative interference with classroom discussions, subject to the condition that such classroom speech should be germane to the subject matter of the class and professionally competent.¹¹⁶ Third, professors should be free to "speak or write as citizens" in intramural and extramural contexts without fear of institutional reprisal.¹¹⁷ Tenure provides procedural protections to help effectuate those principles by making it difficult for universities to terminate faculty without cause.¹¹⁸

It was only after the articulation and general acceptance of those doctrines that the Supreme Court began to suggest their relevance to American constitutional law. The Cold War put the strength of the commitment of American higher education to academic-freedom

112. *Adler*, 342 U.S. at 493.

113. See MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD 29–52 (2009); HENRY REICHMAN, UNDERSTANDING ACADEMIC FREEDOM 20–25 (2021).

114. AM. ASS'N OF UNIV. PROFESSORS, STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940) [hereinafter STATEMENT OF PRINCIPLES], <https://www.aaup.org/file/1940%20Statement.pdf>.

115. *Id.* at 14; FINKIN & POST, *supra* note 113, at 53–78; REICHMAN, *supra* note 113, at 26–53.

116. STATEMENT OF PRINCIPLES, *supra* note 114, at 14; FINKIN & POST, *supra* note 113, at 79–112; REICHMAN, *supra* note 113, at 54–82.

117. STATEMENT OF PRINCIPLES, *supra* note 114, at 14; FINKIN & POST, *supra* note 113, at 127–48; REICHMAN, *supra* note 113, at 83–114.

118. STATEMENT OF PRINCIPLES, *supra* note 114, at 15.

principles to the test. By the postwar period, American universities had largely adopted the position that tenure-line faculty could not be treated as at-will employees and dismissed whenever they became politically inconvenient, as they had been at the beginning of the twentieth century.¹¹⁹ Those academic-freedom principles were not simply rolled back in the context of the Cold War, but there was substantial pressure to find a way of accommodating them to the needs of the anti-subversive drive.¹²⁰ Under myriad circumstances, expressing subversive ideas could be characterized as a sufficient cause to merit removal.¹²¹ The emerging system of contracts and custom was overridden by statute and administrative activism. At least in the context of state universities, the Court began to bolster contracts and custom with the First Amendment.

A precondition for that specific development was the more general flowering of First Amendment doctrine in the early twentieth century.¹²² By the time of the Cold War, the Court had already made it clear that radical political ideas were not in and of themselves beyond the protection of the First Amendment.¹²³ In doing so they had also reframed the ethos of the First Amendment itself. Justice Oliver Wendell Holmes did more than try to expand the margins of free speech protections when he argued that

[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.¹²⁴

Holmes posited a new “theory of our Constitution” that was grounded in making space for “opinions that we loathe” and

119. Robert P. Ludlum, *Academic Freedom and Tenure: A History*, 10 ANTIOCH REV. 3, 13–14, 18 (1950); MATTHEW J. HERTZOG, PROTECTIONS OF TENURE AND ACADEMIC FREEDOM IN THE UNITED STATES 23–82 (2017).

120. Schrecker, *supra* note 81, at 15–20.

121. *Id.* at 15–20, 25–26.

122. See generally William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990).

123. See *Herndon v. Lowery*, 301 U.S. 242, 259–261 (1937).

124. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

countering ideas only with argument and persuasion.¹²⁵ Similarly, as he put it a few years later, "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."¹²⁶ Or, "if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."¹²⁷ For this new vision of the Constitution, "it cannot show lack of attachment to the principles of the Constitution that [a citizen] thinks that it can be improved."¹²⁸ Justice Louis Brandeis added, "Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary."¹²⁹ Such views initially expressed in dissent over time found their way into the Court's majority.¹³⁰

The vision of the Constitution advanced by Holmes and Brandeis still put some speech outside the bounds of constitutional protection; however, it not only brought far more speech under the umbrella of the First Amendment but also placed the contestation over ideas at the heart of the American constitutional project. The state could rule out violent action, but it could not rule out the possibility of radical political change. If the First Amendment enshrined the belief that the ideas we hate have to be overcome through argument rather than coercion, then it was a repudiation of the American constitutional experiment for the state to attempt to suppress disfavored ideas. The very "theory of our Constitution" is that ideas we think are true must be put through the crucible of criticism, and that ideas we hate must be allowed to have their say.¹³¹ As Justice Frank Murphy emphasized in a different First Amendment setting, "It is our proud achievement to have demonstrated that unity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity of opinion through the fullest possible measure of freedom of conscience and thought."¹³² Justice Robert Jackson kicked an important leg out from under the state's authority to stifle dissent in schools in the flag salute case,

125. *Id.*

126. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

127. *United States v. Schwimmer*, 279 U.S. 644, 654–655 (1929) (Holmes, J., dissenting).

128. *Id.* at 654.

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

130. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

131. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

132. *Martin v. City of Struthers*, 319 U.S. 141, 150 (1943) (Murphy, J., concurring).

declaring, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹³³ The very "purpose of the First Amendment" is to protect "from all official control" "the sphere of intellect and spirit."¹³⁴ The "principle of free thought" is at the center of the highest of constitutional ideals.¹³⁵ The tolerance of free speech did not just set outer bounds on the imperative of maintaining public order. Protecting free speech was the constitutional imperative itself.

If freedom of thought is a core constitutional value, then impinging on academic freedom could readily be seen as a betrayal of the constitutional enterprise. Across the 1950s and into the 1960s, the Court began to give constitutional recognition to principles of academic freedom. When Minton wrote for the Court upholding the *Feinberg Law*, former Yale Law professor Justice William O. Douglas wrote a dissent giving academic freedom a toehold in the First Amendment.¹³⁶ He began necessarily with the problem of government-employee speech. Minton relied on the traditional assumption famously captured in an early Holmesian quip, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."¹³⁷ Douglas, joined by Justice Hugo Black, by contrast could not "find in our constitutional scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression."¹³⁸

Douglas quickly turned his attention to the implications of anti-subversive measures operating in schools and emphasized how they would necessarily encroach on the intellectual freedom that schools should be fostering. The intrinsic problem of "guilt by association" raised by the requirement of identifying current and past membership in potentially subversive groups "is certain to raise havoc with academic freedom."¹³⁹ Fearing being enmeshed in such investigations "when the witch hunt is on," those subjected to such requirements "will tend to shrink from any association that stirs controversy" and as a result "freedom of expression will be stifled."¹⁴⁰ More directly, "the law inevitably turns the school system into a spying project."¹⁴¹ With students and parents becoming "informers,"

133. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

134. *Id.*

135. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929).

136. *Adler v. Bd. of Educ.*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting).

137. *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (1892).

138. *Adler*, 342 U.S. at 508 (Douglas, J., dissenting).

139. *Id.* at 508-09.

140. *Id.* at 509.

141. *Id.*

"it is a system which searches for hidden meanings in a teacher's utterances."¹⁴² Where "teachers are under constant surveillance," "[t]here can be no real academic freedom."¹⁴³ Where every utterance could become grounds for political reprisal, "[s]upineness and dogmatism take the place of inquiry."¹⁴⁴ Such laws force teachers into mouthing "the orthodox view," "the conventional thought," and to avoid any "adventurous thinking."¹⁴⁵ "A deadening dogma takes the place of free inquiry."¹⁴⁶ Justice Hugo Black wrote separately without using the term "academic freedom," but similarly emphasized that "these laws rest on the belief that government should supervise and limit the flow of ideas into the minds of men."¹⁴⁷ The First Amendment was designed to prevent "a transient majority" from being able "to select the ideas people can think about."¹⁴⁸

The Court's majority reached a different conclusion than it had in *Adler* when confronted with an Oklahoma statute that it thought swept more broadly than the Feinberg Law. Dismissing government employees who had no specific knowledge of the subversive purposes of the organizations that they had joined "offends due process."¹⁴⁹ This time former Harvard law professor Justice Felix Frankfurter wrote separately for himself and Douglas in laying out specific concerns with how such laws affected teachers.¹⁵⁰ The case from Oklahoma involved not secondary school teachers but members of the faculty and staff at the Oklahoma Agricultural and Mechanical College (now Oklahoma State University).¹⁵¹ Frankfurter did not use the specific term "academic freedom," but he thought "in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation."¹⁵² Teachers were, Frankfurter warned, "the priests of our democracy" who "must be exemplars of open-mindedness and free inquiry."¹⁵³ They "must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding

142. *Id.* at 510.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 497 (Black, J., dissenting).

148. *Id.*

149. *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952).

150. Frankfurter had dissented in *Adler*, but there he had thought the case was not yet ripe for a constitutional argument. *Adler*, 342 U.S. at 497-98 (Frankfurter, J., dissenting).

151. *Wieman*, 344 U.S. at 185.

152. *Id.* at 195 (Frankfurter, J., concurring).

153. *Id.* at 196.

and wisdom.”¹⁵⁴ He concluded with an extended quote from Robert Hutchins, the former dean of Yale Law School and influential president of the University of Chicago, that began,

[A] university is a place that is established and will function for the benefit of society, provided it is a center of independent thought. It is a center of independent thought and criticism that is created in the interest of the progress of society, and the one reason that we know that every totalitarian government must fail is that no totalitarian government is prepared to face the consequences of creating free universities.¹⁵⁵

The quote was drawn from testimony that Hutchins had recently given before a House committee investigating tax-exempt foundations, where he was grilled in part about allegations of subversive activities at the University of Chicago.¹⁵⁶ Hutchins contended that the Communists were best met by Americans maintaining and developing “the basic sources of our strength,” namely “the western tradition of freedom, freedom of thought, freedom of discussion, and freedom of association.”¹⁵⁷ As a university president, Hutchins thought he had an obligation to take “immediate action” if any member of the faculty “had been engaged in subversive activity,” but mere membership in questionable organizations or interest in “the study of Marxism” did not disqualify someone from being a member in good standing of the scholarly community.¹⁵⁸

The Court soon had another opportunity to consider the impact of anti-subversive measures on the academic activities of universities. The attorney general of New Hampshire launched an investigation of Paul Sweezy, a Marxist economist who had left a lecturer position at Harvard University to found the socialist journal *Monthly Review*.¹⁵⁹ In 1954, Sweezy gave a guest lecture in an undergraduate class at the University of New Hampshire.¹⁶⁰ Sweezy refused to answer questions about the lecture as he had refused to answer questions about his other activities and was held in contempt.¹⁶¹ Writing for the Court, Chief Justice Earl Warren observed, “We believe that there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and free expression—areas in which the

154. *Id.*

155. *Id.* at 197.

156. *Tax-Exempt Foundations: Hearings Before the Select Comm. to Investigate Tax-Exempt Foundations & Comparable Organizations*, 82d Cong. 291 (1952).

157. *Id.*

158. *Id.* at 292–93.

159. *Sweezy v. New Hampshire*, 354 U.S. 234, 258 (1957) (Frankfurter, J., concurring).

160. *Id.* at 243 (majority opinion).

161. *Id.* at 259 (Frankfurter, J., concurring).

government should be extremely reticent to tread.”¹⁶² He then elaborated,

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.¹⁶³

The state supreme court had admitted as much but thought the state's interest justified the imposition on *Sweezy's* liberty.¹⁶⁴ The Warren Court disagreed, “We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields.”¹⁶⁵ But the Court ultimately chose instead to reverse the state courts on the inadequacy of the legislature's authorization of such an intrusive investigation.¹⁶⁶ Frankfurter, joined by Justice John Marshall Harlan, thought the majority's alternative grounds were in fact more intrusive to state authority.¹⁶⁷

Frankfurter preferred instead to rest the case solely on the academic-freedom question. The state's justification was inadequate to overcome the “grave harm resulting from governmental intrusion into the intellectual life of a university.”¹⁶⁸ The intellectual life of a university “must be left as unfettered as possible” and intrusions upon it could be justified only “for reasons that are exigent and obviously compelling.”¹⁶⁹ Frankfurter thought obvious

162. *Id.* at 250 (majority opinion).

163. *Id.*

164. *Id.* at 249–50.

165. *Id.* at 251.

166. *Id.* (“But we do not need to reach such fundamental questions of state power to decide this case There was nothing to connect the questioning of petitioner with this fundamental interest of the State.”). This was not an uncommon strategy for the Warren Court. See KEITH E. WHITTINGTON, *REPUGNANT LAWS* 221 (2019).

167. *Sweezy*, 354 U.S. at 257 (Frankfurter, J., concurring) (“[W]hether the Attorney General of New Hampshire acted within the scope of the authority given him by the state legislature is a matter for the decision of the courts of that State.”).

168. *Id.* at 261.

169. *Id.* at 262.

the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.¹⁷⁰

Frankfurter again concluded with a lengthy quote, in this case from a statement on open universities in South Africa:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.¹⁷¹

In *Shelton v. Tucker*,¹⁷² the Court struck down an Arkansas statute that required teachers at public educational institutions, including universities, to file an annual affidavit listing all of their organizational affiliations.¹⁷³ When the Arkansas legislature adopted Act 10 in 1958, the NAACP was as much a concern as the Communist Party.¹⁷⁴ The Court recognized (as it had in *Adler*) that the state had the right "to investigate the competence and fitness of those whom it hires to teach in its schools,"¹⁷⁵ but also noted (as it had in *Sweezy*) that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."¹⁷⁶ Ultimately, the majority thought the state's inquiry was too sweeping and indiscriminate.¹⁷⁷ Notably, Frankfurter now found himself in dissent. Although heedful of the danger of "crude intrusions by the state into the atmosphere of creative freedom in which alone the spirit and mind of a teacher can fruitfully function," he thought that academic freedom "in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers."¹⁷⁸ He did not think the record had yet established that the

170. *Id.*

171. *Id.* at 263. (Frankfurter, J., concurring) (quoting CONF. OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN & THE UNIV. OF THE WITWATERSRAND, *THE OPEN UNIVERSITIES IN SOUTH AFRICA* 11–12 (1957)). The statement was the product of a conference organized to protest the imposition of racial apartheid to the heretofore color-blind universities.

172. 364 U.S. 479 (1960).

173. *Id.* at 480, 490.

174. JOY ANN-WILLIAMSON-LOTT, *JIM CROW CAMPUS: HIGHER EDUCATION AND THE STRUGGLE FOR A NEW SOUTHERN SOCIAL ORDER* 60–68 (2018); WOODS, *supra* note 100, at 70–77.

175. *Shelton*, 364 U.S. at 485.

176. *Id.* at 487.

177. *Id.* at 490.

178. *Id.* at 490, 496.

state was using Act 10 "to further a scheme of terminating the employment of teachers solely because of their membership in unpopular organizations."¹⁷⁹ As long as the state was just asking questions, Frankfurter was not prepared to intervene.¹⁸⁰

Near the end of the Warren Court, the justices had an opportunity to revisit the Feinberg Law and in doing so consolidate the developments in the Court's thinking since *Adler* had been decided fifteen years before. In *Keyishian v. Board of Regents*,¹⁸¹ members of the faculty in the State University of New York system had refused to sign certificates saying that they had never been Communists.¹⁸² Writing for the Court, Justice William Brennan observed that "pertinent constitutional doctrines have since rejected the premises upon which that conclusion [in *Adler*] rested."¹⁸³ The Court now thought the law was fatally vague and overbroad. "The crucial consideration is that no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts."¹⁸⁴ "Does the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?"¹⁸⁵ "[D]oes the prohibition of distribution of matter 'containing' the doctrine [of the forceful overthrow of the existing government] bar histories of the evolution of Marxist doctrine or tracing the background of the French, American, or Russian revolutions?"¹⁸⁶

The inevitable effect of the law was to interfere with constitutionally protected academic freedom.

It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in "those who believe the written law means what it says." *Baggett v. Bullitt*, 377 U.S. 360, 374 (1964). The result must be to stifle "that free play of the spirit which all teachers ought especially to cultivate and practice . . ." That probability is enhanced by the provisions requiring an annual review of every teacher to determine whether any utterance or act of his, inside the classroom or out, came within the sanctions of the laws.¹⁸⁷

179. *Id.* at 496.

180. Frankfurter was understating the impact that Act 10 had already had on university campuses in the state. See WOODS, *supra* note 100, at 75-78.

181. 385 U.S. 589 (1967).

182. *Id.* at 592.

183. *Id.* at 595.

184. *Id.* at 599.

185. *Id.* at 600.

186. *Id.* at 600-01.

187. *Id.* at 601-02.

Citing the cases since *Adler*, Brennan gave firm recognition of a constitutionalized academic freedom.

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.¹⁸⁸

Laws that trench on that freedom must be drawn with a “narrow specificity” that the anti-subversive laws lacked.¹⁸⁹ “The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.”¹⁹⁰

After *Keyishian*, a First Amendment interest in an individualized academic freedom seemed firmly established, if not entirely clear in its implications. Academic freedom was now recognized as “a special concern of the First Amendment,”¹⁹¹ if not exactly a right comparable to classic First Amendment rules.¹⁹² In the next term, the Court struck down an anti-evolution statute with Justice Abe Fortas noting, “It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees.”¹⁹³ The Cold War (and eventually in the South the Jim Crow)¹⁹⁴ wave of anti-subversive measures by state legislatures had forced the Court to confront efforts to suppress professorial speech. In doing so, they recognized that universities are what Paul Horwitz has called “First Amendment institutions”¹⁹⁵ and what Jonathan Rauch has called “reality-based communities”¹⁹⁶ because of their central role in generating, investigating, and promulgating ideas. Suppressing ideas in a university context poses a particular threat to the values that the First Amendment enshrines.

188. *Id.* at 603.

189. *Id.* at 604 (quoting Brennan’s own majority opinion in *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

190. *Keyishian*, 385 U.S. at 604.

191. *Id.* at 603.

192. *POST*, *supra* note 17, at 112–14.

193. *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) (citing *Keyishian*, 385 U.S. at 605–06).

194. A year after the Court struck down Arkansas’s Act 10 in *Shelton*, the historian C. Vann Woodward reported that “academic freedom is still taking a beating in the lower South.” C. Vann Woodward, *The Unreported Crisis in the Southern Colleges*, *HARPER’S MAG.*, Oct. 1, 1962, at 82.

195. PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013).

196. JONATHAN RAUCH, *THE CONSTITUTION OF KNOWLEDGE: A DEFENSE OF TRUTH* 100–02 (2021).

IV. *PICKERING*, *GARCETTI*, AND ACADEMIC FREEDOM

University professors may be the “priests of our democracy” with which the First Amendment has a particular concern, but when they work at state universities, they are still government employees.¹⁹⁷ The Court has not clearly resolved the tension inherent in that framework. As government employees, professors can be disciplined or penalized for their conduct, including in some cases for their speech acts.¹⁹⁸

What then are the limits to when university officials acting as agents of the state can sanction members of the faculty for their speech, and what are the implications for the anti-CRT policies? In this Part, I offer an approach to reconciling constitutional protections for academic freedom with governmental supervision of its employees. In doing so I extend the principles that the Court has laid out regarding the First Amendment and government-employee speech in the particular context of a university setting.

The Court established a balancing test for assessing when governmental interests can override the First Amendment interests of a government employee in *Pickering v. Board of Education*.¹⁹⁹ Pointing to the academic-freedom cases arising out of the McCarthy era, *Pickering* recognized that government employees had First Amendment rights that governments as employers had to respect but also identified circumstances in which those rights could nonetheless be overridden.²⁰⁰ *Pickering* arose in the context of a public-school teacher engaging in extramural speech, where we might think that First Amendment interests are particularly high. Marvin Pickering had written a letter to the editor that was published in a local newspaper in which he criticized a proposed school bond issuance that was supported by school administrators and the board of education.²⁰¹ He was fired for writing the letter.²⁰² As the Court noted, “The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its

197. *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952).

198. Moreover, professors as employees are routinely evaluated in part on the content, or quality, of their professorial speech.

199. 391 U.S. 563 (1968).

200. *Id.* at 568 (“To the extent that the Illinois Supreme Court’s opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.”).

201. *Id.* at 566.

202. *Id.*

employees.”²⁰³ The First Amendment rights of government employees are not only not absolute but necessarily more circumscribed than the speech of a private citizen.

The *Pickering* Court identified both the circumstances in which employee speech is entitled to First Amendment protection and the conditions under which an employee can be sanctioned for such speech. Government-employee speech is entitled to First Amendment consideration when the employee, “as a citizen,” is “commenting upon matters of public concern.”²⁰⁴ Even so, the government employer can sanction an employee for such speech if, in this case, it could demonstrate that the teacher’s speech “impeded the teacher’s proper performance of his daily duties in the classroom”²⁰⁵ or “interfered with the regular operation of the schools generally.”²⁰⁶ The government must have an interest in suppressing the employee’s speech that is particular to the employment context and distinguishable from the government’s general interest in suppressing such speech if it had come from an ordinary citizen.²⁰⁷ Similarly and in a separate case, the Court concluded that a professor at a state university could not be dismissed specifically because he had provided testimony to a legislative committee that was critical of the board of regents.²⁰⁸

In *Connick v. Myers*,²⁰⁹ the Court further elaborated on the conditions in which government-employee speech is protected.²¹⁰ *Connick* arose in the context of a district attorney’s office rather than a school and internal speech within the office about office policies.²¹¹ There, the Court emphasized “the common-sense realization that government offices could not function if every employment decision became a constitutional matter.”²¹² The employee’s constitutional interest is at its highest when the government “s[ees] to suppress the rights of public employees to participate in public affairs,” as it had done in the anti-subversive cases.²¹³ By contrast, “when employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community,” no substantial First Amendment interests arise that might hinder a governmental employer from sanctioning an employee for such speech.²¹⁴ When an employee speaks “upon matters only of personal

203. *Id.* at 568.

204. *Id.* at 568.

205. *Id.* at 572–73.

206. *Id.* at 573.

207. *Id.*

208. *Perry v. Sindermann*, 408 U.S. 593, 598 (1972).

209. 461 U.S. 138 (1983).

210. *Id.* at 138.

211. *Id.* at 141.

212. *Id.* at 143.

213. *Id.* at 144–45.

214. *Id.* at 146.

interest" or "internal office affairs," the courts should not intervene.²¹⁵ The First Amendment does not "constitutionalize the employee grievance."²¹⁶ The "content, form, and context of a given statement" helps determine whether it "addresses a matter of public concern."²¹⁷ The *Connick* Court also elaborated on the government's interest in addressing "the disruption of the office and the destruction of working relationships" that stem from an employee's speech, but warned that "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern."²¹⁸

The *Pickering* balancing test was significantly modified in *Garcetti v. Ceballos*,²¹⁹ which has particular significance to the context of the anti-CRT policies.²²⁰ Like *Connick*, *Garcetti* involved internal communications in a district attorney's office.²²¹ The key issue in *Garcetti* was whether those internal communications, there a memo regarding the disposition of a case being handled by the office, passed the initial threshold of the *Pickering* test and involved speech in which the employee had a First Amendment interest.²²² Unlike *Connick*, the memo in *Garcetti* did not deal with a matter of only "personal interest" but rather with the substantive public business with which the office routinely dealt.²²³ Although the memo in question addressed matters of public interest, the Court concluded that the deputy district attorney was not speaking "as a citizen" in writing the memo to his superiors.²²⁴ Unlike *Pickering*'s letter to the editor or the speech suppressed in the anti-subversive cases, the internal office memo was not promoting an "informed, vibrant dialogue in a democratic society."²²⁵ The *Garcetti* Court accepted that some "speech within the office" can receive constitutional protection, as can "some expressions related to the speaker's job."²²⁶ But the Court thought the distinguishing feature of the deputy district attorney's memo was that it was "made pursuant to his duties."²²⁷ He was speaking "as a prosecutor" in writing the memo, not as a citizen, and the memo "owes its existence to a public employee's professional responsibilities."²²⁸ It was speech "commissioned or created" by the

215. *Id.* at 147, 149.

216. *Id.* at 154.

217. *Id.* at 147-48.

218. *Id.* at 152.

219. 547 U.S. 410 (2006).

220. *Id.* at 410.

221. *Id.* at 413.

222. *Id.* at 415.

223. *Connick*, 461 U.S. at 147.

224. *Garcetti*, 547 U.S. at 422.

225. *Id.* at 419.

226. *Id.* at 420-21.

227. *Id.* at 421.

228. *Id.*

employer.²²⁹ He was performing “the tasks he was paid to perform.”²³⁰ Even if the content of the memo addressed a matter of public concern, it was outside the scope of First Amendment protection because it was made “pursuant to official responsibilities.”²³¹ *Garcetti* thus added to the threshold question in evaluating government-employee speech. To receive greater constitutional protection, the employee must not only be speaking about a matter of public concern but must also be speaking in their private capacity as a citizen.

On its face, *Garcetti* is debilitating to many academic-freedom claims in state universities, but the Court added an important proviso.²³² In dissent, Justice David Souter highlighted the potential implications and added, “I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to . . . official duties.’”²³³ In response, Justice Anthony Kennedy, writing for the Court, added that academic-freedom cases might be different and “[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”²³⁴ The proviso should be taken seriously most obviously because it explicitly refrains from calling into question the “additional constitutional interests” in “academic scholarship or classroom instruction.”²³⁵ Moreover, Kennedy elsewhere had pointed to the importance of the anti-subversive cases in establishing the critical principle that the danger of the state chilling “individual thought and expression” was “especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophical tradition.”²³⁶

A critical question, therefore, is how *Pickering* and *Garcetti* should be applied to legislative regulation of academic speech in state

229. *Id.* at 422.

230. *Id.*

231. *Id.* at 424.

232. The Court’s opinion has nonetheless created confusion about how to think about the professional speech of professors. A recent district court opinion, for example, remarked that had a professor’s speech been “made as part of his official duties, rather than as a citizen, *Garcetti* would dictate dismissal of his retaliation claim But it is undisputed that Hiers’s speech was not part of his official duties, so *Garcetti* does not apply here.” *Hiers v. Bd. of Regents*, No. 4:20-CV-321-SDJ, slip op at 6 n.2 (E.D. Tex. Mar. 11, 2022). But the academic-freedom proviso seems specifically meant to preclude such a result.

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

234. *Id.* at 425.

235. *Id.*

236. *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 835 (1995).

universities.²³⁷ Such regulations would force courts to confront precisely the question that the *Garcetti* Court bracketed. Professorial speech in the classroom is certainly an example of speech made pursuant to the professor's official responsibilities and as part of a task that a professor is paid to perform. When speaking in class, a professor is speaking as a professor, that is, as a government employee, not as a citizen.²³⁸ The substantive content of classroom speech might well be, and generally is, about matters of public concern, but *Garcetti*, at least without its reservation regarding academic freedom, tells us that is not enough to give government-employee speech constitutional protection.

How then should *Pickering* and *Garcetti* be understood in the context of classroom speech? I argue that academic speech should be understood to be an exception to the *Garcetti* framework. *Garcetti* can only be reconciled with *Keyishian* if we understand that the particular kind of speech that professors are employed to engage in as part of their job responsibilities is speech that is of "special concern to the First Amendment."²³⁹ By engaging in speech *as a professor*, these particular government employees are engaging in speech that is sheltered by the First Amendment, even though that is not true in the case of other government employees speaking in their role as employees. In order to create a workable doctrine regarding classroom speech, however, it is important to understand both the reasons why this form of speech as an employee should receive

237. I use "academic speech" here to refer broadly to professorial speech on academic matters, whether in the context of classroom instruction, scholarly research, or scholarly programming on and off campus. All such speech can readily be understood as pursuant to a professor's professional duties, unlike the expression of private opinions in an extramural context. The anti-CRT proposals thus far have focused particularly on classroom speech (whether oral discussion or classroom materials), but it is not hard to imagine those restrictions being extended to other academic contexts and the core academic-freedom questions would be the same whether dealing with scholarship or teaching.

238. It should be noted that the third component of "academic freedom" laid out by the AAUP is when professors speak "as a citizen" in extramural or intramural settings. See STATEMENT OF PRINCIPLES, *supra* note 114, at 14. This is perhaps more properly understood as falling within a general commitment to freedom of speech rather than a specific theory of academic freedom as such. When speaking "as a citizen" about matters of general public concern, professors are no differently situated than other government employees. It is when speaking "as a professor" that the specific constitutional protections for academic freedom have particular significance. See Van Alstyne, *supra* note 15, at 142; J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 258 (1989); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 229 (1990); Keith E. Whittington, *What Can Professors Say in Public? Extramural Speech and the First Amendment*, 73 CASE W. RES. L. REV. (forthcoming 2023).

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

protection and how that protection can be appropriately delimited in a way that is consistent with the Court's concerns in both *Garcetti* and *Keyishian*.

We should begin with why classroom speech is not like a disposition memorandum. Politicians tried to suppress professorial expression of radical ideas in the mid-twentieth century, like divisive ideas about race and gender today, precisely because such ideas speak to matters of public concern and are politically disfavored. The attempt to suppress them is not motivated by such ordinary concerns as ensuring that universities operate efficiently but rather by broad political motivations regarding what ideas politicians believe are most compatible with a good society. The desire to censor such ideas on campus is the same as the desire to censor such ideas in the public sphere more broadly. This was particularly evident in the case of the anti-subversive legislation, when regulations of professorial speech were of a piece with regulations of speech more generally. As the Court's First Amendment jurisprudence gradually made it clear that radical ideas as expressed by ordinary citizens were constitutionally beyond the reach of politicians, the effort to suppress such speech by government employees lingered until the Court began to pare back those efforts as well. In the early twenty-first century, it is clear that "Critical Race Theory" or "divisive concepts" could not be erased from the public sphere by government decree. As a consequence, politicians have generally²⁴⁰ focused more narrowly on domains where they think they might have more constitutional leeway—government agencies,²⁴¹ public schools,²⁴² public libraries,²⁴³ and perhaps state universities.²⁴⁴ The government's interest in censoring speech about divisive concepts in higher education raises all the familiar concerns with censorship broadly that the Court has systematically rejected since the early years of the twentieth century. Suppressing divisive concepts in higher education does not look like the normal work of an employer managing the workplace but instead raises Hugo Black's specter of "a transient majority" trying "to select the ideas people can think about."²⁴⁵ The state's interest in suppressing a professor's speech in this context is "not significantly greater than its interest in limiting a similar contribution by any

240. There are some exceptions. See, e.g., Hannah Natanson, *Va. Republicans Seek to Limit Sale of 2 Books in Barnes & Noble for "Obscenity,"* WASH. POST (May 20, 2022, 6:58 PM), <https://www.washingtonpost.com/education/2022/05/20/gender-queer-barnes-and-noble/>.

241. See, e.g., H.B. 2906, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

242. See, e.g., H.B. 2898, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

243. See, e.g., H.B. 2721, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018).

244. See, e.g., H.B. 1012, 97th Leg., Reg. Sess. (S.D. 2022).

245. *Adler v. Bd. of Educ.*, 342 U.S. 485, 497 (1952) (Black, J., dissenting).

member of the general public.”²⁴⁶ Rather than reinforcing the logic of *Connick* and *Garcetti* of avoiding the constitutionalization of workplace grievances, allowing Critical Race Theory bans to stand in higher education would be anomalous within modern First Amendment jurisprudence.

Protecting academic speech from the undue influence of politicians is close to the heart of why the Court responded to the anti-subversive legislation by recognizing a constitutional interest in academic freedom in the first place. It was not because professors had unusually interesting things to say when opining in public about matters far distant from their scholarly expertise that the justices in the mid-twentieth century took a particular interest in universities. It was the need to protect free inquiry in scholarship and the classroom that the *Keyishian* Court concluded that “[o]ur Nation is deeply committed to safeguarding academic freedom.”²⁴⁷ It is because of teaching and scholarship that the university was a “center of independent thought.”²⁴⁸ It is in the context of teaching and scholarship that Douglas worried about “a deadening dogma” taking the “place of free inquiry.”²⁴⁹ The “intellectual life of a university” is centrally focused on its academic endeavors.²⁵⁰ In laying down constitutional protections for academic freedom, the justices returned again and again to the importance of free inquiry in the classroom.²⁵¹ Most obviously, the important *Sweezy* case was centered in part on a political investigation of the content of a lecture to a college class, an area in which the Court thought the “government should be extremely reticent to tread.”²⁵² Universities do many things, but at the heart of a university’s mission is the effort to advance, preserve, and communicate knowledge.²⁵³ Fulfilling that valuable mission requires freedom of thought.²⁵⁴

Academic speech is by design communicative to a broad audience. That is not to say that it is necessarily accessible to or of interest to a mass audience. Most academic speech is highly specialized and is fortunate if it attracts the attention of even a specialized audience. But it is central to the academic enterprise to disseminate knowledge

246. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968).

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

248. *Wieman v. Updegraff*, 344 U.S. 183, 197 (1952).

249. *Adler*, 342 U.S. at 510 (Douglas, J., dissenting).

250. *Sweezy v. New Hampshire*, 354 U.S. 234, 261 (1957).

251. *See Keyishian*, 385 U.S. at 603 (warning of a “pall of orthodoxy over the classroom”); *Sweezy*, 354 U.S. at 250 (“Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”).

252. *Sweezy*, 354 U.S. at 250.

253. *See generally* KEITH E. WHITTINGTON, *SPEAK FREELY* (2018).

254. *Id.* *See also* Keith E. Whittington, *Academic Freedom and the Mission of the University*, 59 HOUS. L. REV. 821, 822 (2022).

to others.²⁵⁵ Teachers in the classroom are seeking to impart knowledge to a body of students. Scholars producing research have a responsibility to share the fruits of their research with others, whether those others are expert scholars or members of the mass public. Academic speech is concerned not only with advancing and preserving knowledge but also with disseminating it. Distinctively academic speech is done in public and before an audience in a way that is quite distant from a lawyer writing a memo for his supervisor and in a way that distinguishes it from the kind of “expressions made at work” that could be found in most governmental or nongovernmental offices.²⁵⁶ The Court in *Garcetti* noted that whether speech took place in public or in the office is not “dispositive” for the question of whether it is protected by the First Amendment, but the more speech resembles speech in public the more credibly it is the type that merits First Amendment protection.²⁵⁷

The Court in *Connick* clarified that constitutional protections for government-employee speech depended on the “content, form, and context of a given statement.”²⁵⁸ The content of academic speech is

255. How broad or narrow the audience for a particular example of professorial speech should not be a salient factor in determining whether the content of that speech involves a matter of public concern under *Pickering*. In the context of scholarly communication, matters of public concern are probably most analogous to the Court’s approach to obscenity and whether a given expression has “serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). Esoteric literary criticism or technical scientific analysis has comparable constitutional value for academic-freedom purposes as applied ethics. From the perspective of *Keyishian*, it would be equally alarming if the state attempted to suppress frequentist statistical analyses because it favored Bayesianism, even though most members of the general public have no familiarity with either school of thought. *Cf. Heim v. Daniel*, No. 1:18-CV-836, slip op. at 14 (N.D.N.Y. May 10, 2022) (“Heim’s academic writings about Keynesian economic concepts, which concern complex statistical modeling intended for consumption by a relatively narrow audience, do not qualify as speech on matters of ‘public concern.’”).

256. *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006).

257. *Id.* Certainly, there are examples of speech that are part of a professor’s job responsibilities that do more closely resemble the kind of speech at issue in *Connick* and *Garcetti*. Like other employees, professors write memoranda, reports, performance evaluations, and the like, and such speech that is comparable to generic employee speech is traditionally understood to fall outside the scope of even contractual academic-freedom protections. While there are border cases of various sort, generally speaking the more professorial speech resembles the kind of speech that is routinely found in nonacademic workspaces the less the justification for treating it as academic speech that is special under the First Amendment. *See, e.g., Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) (holding that a faculty member’s pamphlet on the future organization of the communications school at a state university is a matter of public concern under *Pickering*).

258. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

generally a matter of public concern, but *Connick* and *Garcetti* tell us that is not sufficient. Academic speech also has a form and context, however, that places it closer to traditional public speech.

Recognizing academic speech as constitutionally protected is not without challenges. In particular, the courts should still want to avoid being drawn into what are essentially workplace grievances, even when those grievances involve academic speech. The central concern of the academic-freedom cases culminating in *Keyishian* and of *Pickering* balancing of government-employee speech is to insulate academic speech from outside political influence. It is the political imposition of dogma and orthodoxy that is of constitutional concern. Courts have, quite reasonably, taken a highly deferential approach to claims that reduce to disagreements about the scholarly merits of faculty hiring and promotion cases, for example.²⁵⁹ It would be an error to adopt a constitutional standard that invites judicial oversight of how such internal academic affairs are resolved.

In the context of a state university, academic speech by professors made "pursuant to . . . official duties" should be understood to be constitutionally protected.²⁶⁰ For most government employees, *Garcetti* holds the opposite, that employee speech loses constitutional protection precisely because it has been specifically commissioned by a governmental employer. But professors are employed to perform an unusual and specific role, a role that is close to the constitutional enterprise. They are employed, in part, to produce and disseminate the kind of ideas that are of public interest and that the First Amendment is understood to safeguard.²⁶¹ Recognizing that

259. See, e.g., *Allworth v. Howard Univ.*, 890 A.2d 194, 202 (D.C. 2006) (giving "deference to the discretion exercised by university officials" in a university context); *Brown v. Trs. of Bos. Univ.*, 891 F.2d 337, 346 (1st Cir. 1989) ("courts must take special care to preserve the University's autonomy in making lawful tenure decisions"); *Keddie v. Pa. State Univ.*, 412 F. Supp. 1264, 1270 (M.D. Pa. 1976) ("The courts will not serve as a Super-Tenure Review Committee."); *McGill v. Regents of Univ. of Cal.*, 52 Cal. Rptr. 2d 466,, 471-73 (1996) (adopting an arbitrary and capricious standard for judging a denial of tenure in a public university); *Craine v. Trinity Coll.*, 791 A.2d 518, 536 (Conn. 2002) ("A court must be careful not to substitute its judgment improperly for the academic judgment of the school.");

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

261. This is a contingent fact about American universities. It is conceivable that a state could radically restructure the mission of a state university such that its faculty were not engaged in free inquiry but were instead expected to propagate governmentally approved messages. Under such circumstances, academic freedom would be sharply curtailed, and professors would be more analogous to public school teachers. The First Amendment values associated with modern American universities are a function of their traditional institutional mission. To the extent that states have currently and historically committed public universities to such a mission, then First Amendment implications follow from those commitments.

government-employee speech crosses that threshold does not end the judicial inquiry. A court would still need to consider how to balance the First Amendment interest against the government employer's legitimate interests in managing the workplace.²⁶²

Academic speech that professors are "paid to perform" comes with its own limits.²⁶³ Professors are paid to perform constitutionally protected speech, but not all professorial speech is what universities have commissioned. Such speech might better be regarded as private speech and not academic speech at all. That is, some things professors say while "on the job" and in the workplace are not examples of them speaking as a professor but of them speaking as a private citizen.

When professors are engaging in academic speech in the context of scholarship or teaching, the First Amendment interest in protecting such speech is particularly high. The question then becomes what legitimate interests the state has in regulating such speech and how weighty those interests are. There are circumstances in which the state has recognizable interests in managing classroom speech. The university can set the curriculum and can expect that professorial speech in the classroom will be both germane to that curriculum and professionally competent. When, however, professorial speech in the classroom is both germane and professionally competent, the state's legitimate interest in sanctioning professors for such speech is quite low. Viewpoint-based discrimination by state officials far removed from the disciplinary authorities best situated to assess academic speech should be especially suspect.

Traditional principles of academic freedom are understood to be qualified, not absolute.²⁶⁴ In the particular context of classroom speech, faculty speech is delimited by requirements of germaneness and professional competence. The AAUP's Statement of Principles nods to the germaneness condition by noting that teachers "should be careful not to introduce into their teaching controversial matter which has no relation to their subject."²⁶⁵ A teacher in a classroom has a captive audience of students, which creates a responsibility on the part of the teacher not to abuse that captive audience with

262. Traditional *Pickering* balancing as it has been applied by the courts is not sufficiently sensitive to the unique concerns of the academic context. For more detail of how *Pickering* balancing should be performed when professors are speaking outside the scope of their employment duties, see Keith E. Whittington, *What Can Professors Say in Public? Extramural Speech and the First Amendment*, 73 WAKE FOREST L. REV. (forthcoming 2023). The considerations discussed there are applicable to the context of speech within the scope of their employment duties as well.

263. *Garcetti*, 547 U.S. at 422.

264. See Whittington, *supra* note 254, at 829.

265. STATEMENT OF PRINCIPLES, *supra* note 114, at 14.

irrelevant remarks. Teachers are given a privileged platform in a classroom for a particular purpose. From the student's perspective, their time is not to be frittered away with speech that is irrelevant to the educational purpose of the class. From the university's perspective, the professional duty that a teacher is to perform is to instruct students in the subject matter of the class. Teachers who spend their time in the classroom doing something else are not performing their professional duty and as a consequence can be reasonably sanctioned by the university for that malfeasance.

Courts have found the germaneness standard useful for assessing how much protection classroom speech should receive, and they have had to make similar judgments in adjudicating other types of legal claims. In *Kracunas v. Iona College*,²⁶⁶ for example, the Second Circuit Court of Appeals emphasized that "conduct that is shown to be harassment (as opposed to teaching)" could appropriately be sanctioned.²⁶⁷ Although the college raised academic-freedom concerns that might arise from administrative monitoring of how professors interact with students as they perform their duties, the court thought that, at least in this case, both university officials and judges could assess evidence of whether professorial conduct "was done in good faith as a part of his teaching, . . . [or could] reasonably be seen as appropriate to further a pedagogical purpose."²⁶⁸ In another sexual harassment case involving "classroom language," the Sixth Circuit made use of the university's own harassment policy which recognized that "speech in the classroom which is germane to course content is not subject to this policy."²⁶⁹ The "unique context" of "a classroom where a college professor is speaking to a captive audience of students" both raised the threat of professors abusing their positions to harass their students and served as a "unique milieu . . . where debate and the clash of viewpoints are encouraged—if not necessary—to spur intellectual growth."²⁷⁰ Where classroom speech "was found to serve the purpose of advancing viewpoints, however repugnant," or "had as their purpose influencing or informing public debate," then it merited substantial constitutional protection.²⁷¹ The governmental employer's interest in regulating professorial classroom speech that is not "germane to the course

266. 119 F.3d 80 (2d Cir. 1997).

267. *Id.* at 88.

268. *Id.* The court recognized that there will be cases in which "the line between pedagogy and harassment will be difficult to draw," and "the use of these legitimate teaching methods" should not be thrown aside as universities and courts try to weed out sexual harassment. *Id.* at 88 n.5.

269. *Bonnell v. Lorenzo*, 241 F.3d 800, 818 n.10 (6th Cir. 2001).

270. *Id.* at 820–21. *See also*, *Martin v. Parrish*, 805 F.2d 583, 586 (5th Cir. 1986) (classroom profanity "constituted a deliberate, superfluous attack on a 'captive audience' with no academic purpose or justification").

271. *Bonnell*, 241 F.3d at 820.

content” is much higher.²⁷² “[G]ratuitous in-class” speech is of a different constitutional nature than speech that was a legitimate part of “an academic discussion.”²⁷³

It should be noted that one circuit court has recently suggested that germaneness to course content should not be deemed relevant to determining what professorial classroom speech is constitutionally protected. A panel of the Sixth Circuit resolved a case involving a public university’s pronoun policy as applied to a professor’s classroom speech.²⁷⁴ In doing so, the court rejected the claim that there was no “academic-freedom exception to *Garcetti*” and that governmental employers had a free hand to regulate professorial classroom speech.²⁷⁵ The court thought the thrust of the Supreme Court’s decisions growing out of the anti-subversive controversies had established that “a professor’s in-class speech to his students is anything but speech by an ordinary government employee.”²⁷⁶ The “need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings.”²⁷⁷ The court was emphatic that

public universities do not have a license to act as classroom thought police. They cannot force professors to avoid controversial viewpoints altogether in deference to a state-mandated orthodoxy. Otherwise, our public universities could transform the next generation of leaders into “closed-circuit recipients of only that which the State chooses to communicate.”²⁷⁸

So far, so good.

At one point, however, the court characterized that academic-freedom exception as covering “all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not.”²⁷⁹ It is not clear that the court thought the germaneness issue was relevant to resolving the case before it, and the court never explicitly referred to germaneness beyond this brief mention. The court specifically noted that “some classroom speech falls outside the [*Garcetti* academic-freedom] exception,”

272. *Id.* at 819.

273. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001).

274. *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021). The state university adopted a policy requiring that university officials, including professors, refer to students by their “preferred pronoun[s]” reflecting the students’ “self-asserted gender identity.” *Id.* at 498.

275. *Id.* at 506.

276. *Id.* at 507.

277. *Id.*

278. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)).

279. *Id.*

including “non-ideological ministerial” speech that professors might be called upon to make in the classroom.²⁸⁰ Moreover, the court was also concerned with arguing that the instructor’s selection of pronouns to be used in the classroom conveyed a salient “message.”²⁸¹ This particular case involved a philosophy professor teaching courses on political philosophy, ethics, and the history of Christian thought, and the university’s directives extended to restricting the professor from stating his views on the pronoun policy in his course syllabus.²⁸² The court also thought that the professor’s speech had not “inhibited his duties in the classroom.”²⁸³ The court’s extension of the academic-freedom exception to classroom speech whether or not “that speech is germane” is not clearly rooted in the broader jurisprudence regarding academic freedom, was not specifically explained or justified by the court, and may not have been necessary to resolving this particular case.²⁸⁴

Casting aside a germaneness requirement risks tying the hands of university officials to address problems with how professors treat their captive audience and even with whether they are performing their core duties, which do not primarily include sharing with students in class the professor’s “core religious and philosophical beliefs.”²⁸⁵ Such a move should not be necessary to resolving the main issues associated with the recent anti-CRT policies either, since in many cases they would implicate classroom speech that *is* germane to the subject matter of the course. Whether university officials, or state legislatures, could reasonably take action against professors who unnecessarily introduce into their classes controversial content that is not germane to their subject matter can be put off to another day.²⁸⁶

A second condition on professorial speech in the classroom is that it be professionally competent. The professional duty of the instructor in the classroom is to provide professionally competent instruction. That is the type of speech professors are commissioned to perform, and it is the type of speech both students and university officials can

280. *Id.*

281. *Id.* at 508.

282. *Id.* at 498, 500.

283. *Id.* at 511. It is not obvious that the court’s judgment about the application of those principles to the facts of this case is fully justified. The university employer’s interest in how professors address students in the classroom is relatively strong.

284. *Id.* at 507. The court briefly noted that this pronoun policy also raised issues of “compelled speech on a matter of public concern,” but did not rely on it. *Id.* at 510. Policies that compel professors to say things in the classroom that they do not believe raise distinct constitutional problems, but such problems are generally not immediately relevant to the anti-CRT context.

285. *Id.* at 509.

286. That is to say, there may be important constitutional differences between critical race theory being discussed in a chemistry class and in an African American studies class.

reasonably expect to receive. It is entailed within the scope of academic freedom that a professor might introduce students to radical, marginal, or not widely accepted ideas, but an instructor has a responsibility to ensure that students recognize the context of those ideas and how they fit within the broader body of knowledge. A professor who routinely presented to students as mainstream and correct ideas that are in fact roundly rejected by experts in the field or a professor who routinely conveys a false understanding of what the state of knowledge within a field of study might be is not conducting themselves in a professionally competent manner. Academic freedom has value to the extent that it protects professionally competent speech. If it instead becomes a mechanism for shielding instructors peddling proverbial snake oil to their students, then it serves no social function. A civil engineering professor who teaches students in such a way that bridges that they built would fall down rather than stay upright is not protected by academic freedom. Universities could reasonably sanction professors for indulging in such classroom speech without raising constitutional concerns.²⁸⁷

Professional competence both conditions and underwrites protections for academic freedom. The founding statement of the AAUP, the 1915 Declaration of Principles, called for greater security of tenure in order to give scholars and teachers the independence necessary to engage in free inquiry without fear of reprisal for reaching unpopular or inconvenient conclusions.²⁸⁸ The AAUP recognized, however, that “there are no rights without corresponding duties.”²⁸⁹ It is only those “who carry on their work in the temper of the scientific inquirer who may justly assert this claim” to freedom of teaching.²⁹⁰ A professor who seeks to indoctrinate rather than teach cannot legitimately hide behind a claim of a freedom to teach. In the words of that 1915 Declaration, “his business is not to provide his students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently.”²⁹¹ A professor who fails in that task should not be sheltered from discipline, and

287. For doubts about constitutionalizing individual academic freedom because of the problem of judges assessing the quality of scholarly work, see generally Lawrence Rosenthal, *Does the First Amendment Protect Academic Freedom?*, 46 J. COLL. & UNIV. L. 223 (2021).

288. AM. ASS'N OF UNIV. PROFESSORS, DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 300 (1915) [hereinafter DECLARATION OF PRINCIPLES], <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>.

289. *Id.* at 298.

290. *Id.*

291. *Id.*

[i]f this profession should prove itself unwilling to purge its ranks of the incompetent and the unworthy, or to prevent the freedom which it claims in the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship, it is certain that the task will be performed by others.²⁹²

In responding to the anti-subversive push of the McCarthy era, the AAUP laid out what should qualify as good cause to terminate a member of the faculty. "Action against a faculty member cannot rightly be taken on grounds that limit his freedom as an individual, as a member of the academic community, or as a teacher and scholar."²⁹³ Terminating a professor merely for engaging in politically unpopular speech, whether in the classroom or in scholarship, is hardly consistent with such an aspiration. Removal from the faculty merely for being a member of the Communist Party, for example, would violate those principles.²⁹⁴ "Removal can be justified only on the ground, established by evidence, of unfitness to teach because of incompetence, lack of scholarly objectivity or integrity, serious misuse of the classroom or of academic prestige, gross personal misconduct, or conscious participation in conspiracy against the government."²⁹⁵ Professionally competent speech merits protection, even if it is unpopular or controversial. Professionally incompetent speech merits sanction, even if it is popular or conformist.

As Robert Post has highlighted, professional competence is not only a standard that the individual faculty member must meet but one that the profession must enforce. It is also a standard that government officials cannot appropriately abrogate. "[W]e should expect," he notes, "to see First Amendment coverage triggered whenever government seeks by . . . legislation to disrupt the communication of accurate expert knowledge."²⁹⁶ He observes that courts have rebuffed legislation that requires, for example, medical providers "to give untruthful, misleading and irrelevant information to patients."²⁹⁷ Such governmental requirements that professional speech be incompetent so as to better satisfy political sensibilities implicates First Amendment rights.²⁹⁸ As one court noted, "the State cannot compel an individual simply to speak the State's ideological message," though it can reasonably require professionals to convey

292. *Id.*

293. Am. Ass'n of Univ. Professors, *Academic Freedom and Tenure in the Quest for National Security*, 42 AM. ASS'N UNIV. PROFESSORS BULL. 49, 57 (1956).

294. *Id.* at 58.

295. *Id.*

296. ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 48 (Yale Univ. Press 2012).

297. *Id.*

298. *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1048 (D. Neb. 2010).

“truthful” and “relevant” information.²⁹⁹ The Supreme Court has recently pointed out that, “[a]s with other kinds of speech, regulating the content of professionals’ speech ‘pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.’”³⁰⁰ Whether the state compels a professional to communicate information that the professional community believes is untrue or prohibits a professional from communicating information that the professional community believes is true, the result is that the state is substituting its own ideological commitments for the free pursuit of truth by the relevant experts. For the state to require professorial speech in the classroom to be incompetent, whether by omission or commission, it would vitiate the value that academic freedom under the First Amendment is intended to provide to society.

Professorial classroom speech that is neither germane to the class nor professionally competent is deserving of little constitutional protection. Note, however, that such speech might still be on matters of public concern. A chemistry professor who spends his class time talking about the presidential election or a medical professor who instructs his class that vaccines cause autism might well be engaging in speech that in other circumstances would be entitled to robust constitutional protection. A professor who indulges in such speech on their private blog on their own time would enjoy some presumptive protection under *Pickering*.³⁰¹

We can imagine four separate scenarios of professorial speech in a state university to clarify how *Pickering*, *Garcetti*, and the constitutionalized protection for academic freedom referenced in *Keyishian* would interact. The examples demonstrate how the three cases can be reconciled to simultaneously protect free inquiry into controversial ideas in a university setting and the efficient functioning of a university as a particular kind of state agency.

299. *Planned Parenthood Minn., N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008).

300. *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (alteration in original) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

301. Private extramural speech that is professionally incompetent might well raise questions about professional fitness for an academic position. The AAUP emphasizes that extramural speech should not be the sole basis for determining that a professor is professionally unfit, but it might well lead a university to, for example, take a closer look at that faculty member’s scholarship and classroom speech, to ensure that it is professionally competent. AM. ASS’N OF UNIV. PROFESSORS, *Committee A Statement on Extramural Utterances*, in *POLICY DOCUMENTS AND REPORTS* 31, 31 (Johns Hopkins Univ. Press 11th ed. 2015) (“Extramural utterances rarely bear upon the faculty member’s fitness for continuing service. Moreover, a final decision should take into account the faculty member’s entire record as a teacher and scholar.”).

Scenario 1: A law school professor teaching a class on race and American law conducts a classroom discussion of core ideas associated with the scholarly literature on Critical Race Theory and in the process distributes class materials and advocates ideas that run afoul of legislative proposals curtailing the introduction of divisive concepts into university classes.

Such classroom speech would fall squarely within the domain of speech made pursuant to official duties. But for an academic-freedom exception, *Garcetti* would allow government officials to suppress such speech. A proper academic freedom-exception, however, would recognize such speech as robustly protected under *Keyishian*. The anti-CRT bills would be a viewpoint-discriminatory interference with constitutionally protected speech, which should weigh heavily in favor of the professor. Indeed, the anti-CRT bills look like precisely the kind of prior restraint through “sweeping statutory impediment to speech” that the Court has said is particularly disfavored even within a government employment context.³⁰²

If a court were to engage in a balancing exercise as suggested by the *Pickering* framework, the government would have a heavy burden to bear in demonstrating that a statutory prior restraint on the expression of certain viewpoints in a university classroom is justified. The professor in this scenario is engaging in professionally competent speech appropriate to the subject matter of the course. By attempting to restrain professors from engaging in such speech, the state legislature would not simply be attempting to specify the curriculum of the university. It would be attempting to legislate what can be said when teaching that curriculum. The state sanctions teaching certain course content, but here it also demands an orthodoxy on how that content is understood. Professors are free to discuss controversies regarding race, but only if they toe the legislature’s line on how those controversies are to be viewed. It is precisely such an imposition of orthodoxy in higher education that the Court regarded as repugnant to the Constitution.

Scenario 2: A law school professor teaching a class on contracts regularly spends large portions of the class time discussing recent political events and hosting guest lecturers to advocate for the professor’s pet political causes.

Such classroom speech is not made *pursuant* to official duties since no professor is employed for the purpose of sharing political opinions with a captive audience of students to the exclusion of the course material that students are supposed to be learning. It does, however, take advantage of the privileged access to the student’s time that a professor has as a consequence of his state employment. Lecturing to students was “within the scope of an employee’s

302. *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 467 (1995).

duties,”³⁰³ but lecturing to students about his personal political beliefs was not.

The content of such private speech does involve “commenting upon matters of public concern,” however, and *Pickering* would suggest that it would be necessary “to arrive at a balance between the interests of the teacher, as a citizen, . . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”³⁰⁴ However, the timing and circumstances of such speech weighs heavily in favor of the state as an employer restricting it. *Pickering* itself emphasized that a letter to the editor of a newspaper could not “be presumed to have in any way . . . impeded the teacher’s proper performance of his daily duties.”³⁰⁵ Departing from assigned duties in order to engage in private political speech, on the other hand, implicates the need of the public employer to “be able to control the operations of its workplace.”³⁰⁶ A state-university employer has a strong interest in preventing a professor from imposing on a captive audience of students speech “with no academic purpose or justification.”³⁰⁷ A germaneness test for professorial classroom speech distinguishes between the kind of speech that is properly protected by the First Amendment concerns raised in *Keyishian* and the kind of speech that interferes with the delivery of the public services that the state has an interest in maintaining.

Scenario 3: A political science professor teaching a class on campaigns and elections in American politics dedicates the semester to expounding on his belief that Italian defense firms use satellites to change American vote tallies, that Venezuela manipulates American voting machines, and that North Korea smuggles into American ballot boxes counterfeit paper ballots produced in China.

Unlike the private speech at issue in Scenario 2, the classroom speech in this situation is indeed pursuant to the professor’s duties. The professor is commissioned to lecture to students about how elections operate in the United States, and that is what the professor

303. *Lane v. Franks*, 573 U.S. 228, 240 (2014).

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

305. *Id.* at 572.

306. *Helget v. City of Hays*, 844 F.3d 1216, 1221 (10th Cir. 2017) (citing *Pickering*, 391 U.S. at 568). *See also* *Miller v. Clinton Cnty.*, 544 F.3d 542, 547 (3d Cir. 2008) (“public employers are still employers, and they therefore have the same concern for efficiency and the need to review and evaluate employees as any other employer in order to ensure that the actions of employees do not interfere with the performance of public functions.”) (citing *Rankin v. McPherson*, 483 U.S. 378, 383–89 (1987)); *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 987 (3d Cir. 2014) (“the Supreme Court also aptly recognizes the government’s countervailing interest—as an employer—in maintaining control over their employees’ words and actions for the proper performance of the workplace”) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 418–19 (2006)).

307. *Martin v. Parrish*, 805 F.2d 583, 586 (5th Cir. 1986).

is doing. The trouble is that the professor is performing those duties in an incompetent fashion by conveying to students ideas that are roundly rejected within the relevant expert community and conveying them as if they enjoyed scholarly validity.

The state's interest in excluding such speech from the classroom is just as real, even though it bears a closer relationship to the kind of speech the academic-freedom cases are concerned with protecting. Even when government-employee speech merits First Amendment protection, the government still has an "employer's legitimate interest[] in its mission."³⁰⁸ The core mission of the university is truth-seeking, which it advances by nurturing a scholarly community capable of building up expert knowledge through a process of inquiry governed by disciplinary norms and ways of testing and evaluating claims.³⁰⁹ Both the field of accepted knowledge and the modes of proceeding in advancing knowledge are subject to change within a vibrant scholarly enterprise. Ideas that were once accepted get rejected over time. Modes of inquiry that were once taken seriously get discarded as unreliable. Academia gives a great deal of leeway to individual scholars to test those boundaries on the assumption that fields of scholarly inquiry should always hold themselves open to legitimate challenge. But there are still limits, and a great deal of scholarly activity is expended in evaluating the quality of research and of scholars and making determinations about what to embrace and what to reject.

Scholarly assessments of the substantive quality of scholarly writing and teaching have always been accepted as consistent with academic-freedom principles. A key consideration is who is making such an assessment. The AAUP has long emphasized that academic freedom is endangered if such judgments are made by nonscholars, whether legislators or boards of trustees.³¹⁰ Even when fellow scholars are making such judgments, we might still worry that scholarly assessments can become a mere pretext for exercising power for inappropriate ends, whether racial or sexual discrimination or political hostility. Academic-freedom principles do not exclude the need for such basic judgments of whether to confer a scholarly degree on a student or whether to employ or promote a potential member of the faculty.

308. *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 994 (9th Cir. 2007). See also *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) ("the government employer's right to protect its own legitimate interests in performing its mission").

309. WHITTINGTON, *supra* note 253, at 7.

310. DECLARATION OF PRINCIPLES, *supra* note 288, at 294 ("[T]he proper fulfillment of the work of the professoriate requires that our universities shall be so free that no fair-minded person shall find any excuse for even a suspicion that the utterances of university teachers are shaped or restricted by the judgment, not of professional scholars, but of inexperienced and possibly not wholly disinterested persons outside of their ranks.").

In the specific context of government-employee speech, courts have likewise recognized that the need to make such judgments weigh in the balance on the side of governmental interests. When engaged in a *Pickering* balancing of interests, courts have noted that even constitutionally protected employee speech might “reflect upon the employee’s competence to perform his or her job.”³¹¹ Government employers are “entirely justified” in “evaluating the soundness” of employees’ speech when that speech is relevant to their job functions.³¹² Determining whether an employee displays “a lack of professional competence” is an unavoidable aspect of the government acting in its role as an employer, and that need does not evaporate when the speech in question occurs in a classroom setting or has First Amendment relevance.³¹³ “[C]lassroom performance” is within the scope of an employer’s interest.³¹⁴ Even given robust First Amendment protection for academic freedom, state universities retain the ability to dismiss the historian of twentieth-century European history who insists on instructing his students that the Holocaust is a myth or the astronomer who requires his students to learn that the sun revolves around the earth.³¹⁵

Scenario 4: A group of professors eating lunch in a faculty lounge on campus get into a spirited discussion about the role of race in American society in which one loudly proclaims the truth of ideas banned by legislation aimed at excluding divisive concepts from higher education. A portion of the conversation is recorded by a passing student and posted on social media, resulting in demands from state political leaders that the professor be fired.

Such a case falls neatly within a traditional *Pickering* framework. Although the speech at issue here takes place on the job site rather than in an extramural context, the speech is clearly private and not part of the ordinary duties of a professor. The professor in this context is acting as a citizen, not as a government employee. Moreover, the speech relates to matters of public concern, and thus passes the threshold question of whether they are entitled to constitutional consideration.

The question then becomes whether the state *as an employer* has a sufficiently weighty countervailing interest in restricting such speech. Private remarks in ordinary workplace conversations diminish the state’s interest in regulating such speech unless it

311. *Koch v. Hutchinson*, 847 F.2d 1436, 1442 (10th Cir. 1988).

312. *Egger v. Phillips*, 710 F.2d 292, 317 (7th Cir. 1983).

313. *Id.* at 318.

314. *Wren v. Spurlock*, 798 F.2d 1313, 1318 (10th Cir. 1986).

315. On academic-freedom principles and professional incompetence, see Brian G. Brooks, *Adequate Cause for Dismissal: The Missing Element in Academic Freedom*, 22 J. COLL. & UNIV. L. 331, 331–32 (1995); David M. Rabban, *The Regrettable Underenforcement of Incompetence as Cause to Dismiss Tenured Faculty*, 91 IND. L.J. 39, 42 (2015).

directly “interfered with the efficient functioning of the office.”³¹⁶ The faculty lounge is recognized as a place “where professors regularly talk about political and social issues with one another” and where the state employer’s interest in regulating the content of the ideas expressed is quite limited.³¹⁷ The fact that the speech was to a small audience and “in-house” might be “considered in determining whether the speech addressed a matter of public concern,” but it does not in itself heighten the state’s legitimate interest in punishing such speech.³¹⁸

Pickering is most helpful in thinking about government-employee speech that does not involve the employee’s duties as an employee. When a professor is speaking “as a citizen,” whether outside the workplace or even in the workplace, then the *Pickering* framework usefully identifies the considerations at play when governmental employers attempt to sanction such speech.³¹⁹ It is less helpful, however, in identifying when speech should be protected or what considerations ought to be relevant to the employer’s actions when a professor is performing his or her duties as a professor. *Garcetti* establishes that government employees outside the educational context have few First Amendment rights when performing their duties but provides little guidance for the educational context. *Garcetti* raises, but does not answer, the question of how the courts should address First Amendment claims raised by professorial speech that is pursuant to their official duties.

When grappling with the anti-subversive legislation of the mid-twentieth century, the Court came to appreciate the extent to which the speech that professors routinely engage in as part of their academic duties, in both their scholarly activities and in the classroom, is central to the First Amendment. The Court cannot now allow state legislatures to restrict the set of ideas professors are allowed to discuss in the classroom or the viewpoint that professors adopt relative to those ideas without repudiating those hard-won lessons.

While most government employees enjoy their greatest constitutional protection when speaking in their private capacity *as citizens*, as the Court recognized in *Pickering*, university professors are distinctive in requiring constitutional protection for their speech *as government employees*. To effectuate the insight that academic freedom is of “a special concern to the First Amendment,”³²⁰ the Court would need to insulate classroom speech from legislative intrusions that serve a primary purpose of attempting to control what ideas are

316. *Rankin v. McPherson*, 483 U.S. 378, 389 (1987).

317. *Hiers v. Bd. of Regents*, No. 4:20-CV-321-SDJ, slip op at 25 (E.D. Tex. Mar. 11, 2022).

318. *Davis v. W. Cmty. Hosp.*, 755 F.2d 455, 461 (5th Cir. 1985).

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

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

discussed and taken seriously in the public sphere. The fact that some professors are government employees does not eliminate their First Amendment interest in being able to teach students ideas that may be controversial and out of favor with incumbent government officials but that are germane to their classes and within the realm of professional competence. The state has no distinctive interest *as an employer* in sanctioning such controversial but germane and professionally competent speech.³²¹ When state officials take steps to suppress such speech, they are doing so not in their role as employers but in their role as regulators. And relative to the government *as regulators*, the Court has emphasized that the First Amendment interest in developing, expressing, and deliberating on controversial ideas is exceedingly strong.

V. GOVERNMENT SPEECH AND PRIVATE SPEECH IN STATE UNIVERSITIES

A second possibility for upholding anti-CRT policies is by characterizing the speech of professors in classrooms at state university as a form of government speech. The “Government’s own speech . . . is exempt from First Amendment scrutiny.”³²² When the government speaks with its own voice, it necessarily must make decisions based on the content and viewpoint of the substantive issues on which it chooses to speak. The government may legitimately favor some ideas and express disapproval of others when the government is engaged in its own speech. The First Amendment prevents the government from suppressing or disadvantaging disfavored ideas, but “it does not regulate government speech.”³²³ The government can participate in the marketplace of ideas and advocate on behalf of its own favored ideas. It just cannot dictate to the citizenry that it must embrace the government’s favored ideas or prevent the citizenry from hearing competing perspectives.

It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects. . . . And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (and, in a democracy, our) favored point of view by achieving it directly (having government-employed artists paint pictures, for example, or government-employed doctors perform abortions); or by advocating it officially (establishing an Office of Art Appreciation, for

321. At least this is true given the current mission of American universities to preserve, advance, and disseminate knowledge. If the university had a different mission, then the state’s interest as an employer in suppressing such speech might likewise change.

322. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005).

323. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

example, or an Office of Voluntary Population Control); or by giving money to others who achieve or advocate it (funding private art classes, for example, or Planned Parenthood). None of this has anything to do with abridging anyone's speech.³²⁴

The curriculum of a public school might readily be understood to be an example of such government speech. The government creates the public school, determines the curriculum, chooses the textbooks, and employs the teachers. When those teachers teach the curriculum in the classroom, they might not be speaking for themselves but are instead speaking on behalf of the government.³²⁵ Teachers might be the mere mouthpieces of the government, and if so then the government necessarily has the right to determine what that mouthpiece will say. When government speech is at stake, the government might give positive direction so that certain ideas are expressed on its behalf, or it might set negative limits so that certain ideas are forbidden to be expressed on its behalf. Even as the Court recognized a First Amendment interest in resisting compelled speech in the flag salute case, it admitted that "the State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country.'"³²⁶

California, for example, not only imposes requirements regarding public school curriculum, such as the directive that "instruction in the social sciences shall include . . . a study of the role and contributions" of myriad groups to the development of the state and the nation "with particular emphasis on portraying the role of these groups in contemporary society."³²⁷ It also prohibits some ideas from being included within the public school curriculum, such as the directive that no school board may "adopt any instructional materials for use in the schools" that include "[a]ny matter reflecting adversely upon persons on the basis of race or ethnicity, gender, religion, disability, nationality, or sexual orientation" or "[a]ny sectarian or denominational doctrine or propaganda contrary to law."³²⁸ Through

324. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment).

325. *See infra* notes 328–30.

326. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting)).

327. CAL. EDUC. CODE § 51204.5 (West 2012). The Texas anti-CRT bill aimed at primary and secondary schools also included a directive to the State Board of Education to adopt a social studies curriculum that included specific topics and texts. H.B. 3979, 87th Leg. (Tex. 2021). The preexisting state code already included substantial detail on what knowledge social studies in public schools should cover. 19 TEX. ADMIN. CODE § 113 (2022).

328. CAL. EDUC. CODE § 60044 (West 2013). *See also* Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 568 n.11 (1980).

the apparatus of the public school system “the state commands powerful machinery to prescribe and to instill basic values in politics, nationalism, and other matters of opinion.”³²⁹

Giving the government free rein to convey its own messages nonetheless creates some First Amendment complications. The state may advance its “official view as to proper appreciation of history, state pride, and individualism,” for example, in any number of ways, but it cannot dragoon a private individual into becoming “the courier for such [a] message.”³³⁰ Given the expansive scope of the modern government, however, it is not always obvious how to disentangle government speech from private speech. There is a particular risk that the government might use the government-speech doctrine “as a cover for censorship”³³¹ or a “subterfuge for favoring certain private speakers over others based on viewpoint.”³³² It thus becomes particularly important to determine “whether the government is actually expressing its own views or the real speaker is a private party and the government is surreptitiously engaged in the ‘regulation of private speech.’”³³³

The academic-freedom exception to government-employee speech explored in Part IV complicates an easy resolution of the government speech problem. It is easier to distinguish between private speakers and government speakers when considering speech by government employees than when considering private speakers making use of government property. When a government employee engages in speech pursuant to their official duties and speaks as an employee, there is at least a *prima facie* expectation that the employee is speaking on behalf of the government. Government-employee speech and government speech are largely reconciled by *Garcetti*’s emphasis on the employee’s official responsibilities, but the academic-freedom exception leaves that reconciliation incomplete in the educational context. More work needs to be done to tie these threads together.

The critical inquiry is, as Justice Alito has reminded us, determining “whether the government is *speaking* instead of regulating private expression.”³³⁴ Professorial speech is recognizably *private speech* within the frameworks the Court has provided for separating government speech from private speech. The anti-CRT policies are therefore best understood as efforts to regulate private expression rather than as efforts to direct government speech. Moreover, characterizing professorial speech as private speech rather

329. Shiffrin, *supra* note 328, at 568.

330. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

331. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1595–96 (2022) (Alito, J., concurring).

332. *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009).

333. *Shurtleff*, 142 S. Ct. at 1596 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009)).

334. *Id.* at 1595.

than government speech is essential to realizing the aspirations of the academic-freedom cases arising out of the Cold War.

The Court has not settled on a single approach to identifying government speech. Justice Breyer has characterized the Court's efforts in this regard as one of conducting "a holistic inquiry."³³⁵ Justice Alito has characterized the Court's approach as "a fact-bound totality-of-the-circumstances inquiry."³³⁶ In canvassing the factors that the Court has found relevant to marking out government speech, the analysis is not unambiguous but there are good reasons for thinking that professorial speech is best considered to be private expression.

In some recent cases, the Court has emphasized three main factors in identifying government speech: whether the history of the medium of expression "long [has] communicated messages from the" government,³³⁷ whether the medium is "often closely identified in the public mind with the government,"³³⁸ and whether the government maintains "direct control over the messages conveyed" through the medium.³³⁹ These factors cut against treating professorial speech at state universities as a form of government speech.³⁴⁰

State universities are agencies of the state and professors at those universities are government employees, but state universities have not generally been understood as vehicles for communicating messages from the government. State universities have instead generally been understood to be peculiar institutions within the state government that operate with a high degree of autonomy from state political leaders. The state maintains oversight, generally through a politically appointed board of regents, but does not attempt to direct its institutions of higher education. State officials do not specify the textbooks or detail the curriculum to be taught in universities. If state-university professors were engaged in government speech when in the classroom, then we would expect government officials to comprehensively direct what it is that professors say. Instead, state officials have contented themselves to intervene only to prohibit the discussion of certain ideas in the classroom, which looks far less like

335. *Id.* at 1589.

336. *Id.* at 1596.

337. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 211 (2015). *See also Summum*, 555 U.S. at 470; *Shurtleff*, 142 S. Ct. at 1590.

338. *Summum*, 555 U.S. at 472. *See also Walker*, 576 U.S. at 212; *Shurtleff*, 142 S. Ct. at 1591.

339. *Walker*, 576 U.S. at 213. *See also Summum*, 555 U.S. at 470; *Shurtleff*, 142 S. Ct. at 1592.

340. In evaluating whether a high school football coach's prayer was government speech, the Court largely relied on the government-employee speech cases to determine whether the prayer was delivered pursuant to the coach's duties as a government employee. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423–25 (2022). As outlined in Part IV, that analysis would be inadequate for thinking about the particular circumstances of professorial speech.

using classroom lectures as vehicles for communicating messages from the government and far more like the government censoring ideas that it does not like.

Some state constitutions enshrine an element of independence for their universities. The California Constitution of 1879, for example, specifies that the University of California "shall constitute a public trust . . . subject only to such legislative control as may be necessary to insure . . . compliance with the terms of the endowments."³⁴¹ The University of California was to be "entirely independent of all political or sectarian influence."³⁴² The launch of some state universities emphasized their political independence. The great education reformer James Angell began his term as president of the University of Michigan in 1871 by emphasizing that "the University cannot do its work with the highest success unless it have [sic] a certain degree of independence and self-control."³⁴³ The university should be "catholic and unsectarian,"³⁴⁴ and the faculty should never be required to mouth "the shibboleths of sect or party."³⁴⁵ Andrew Sloan Draper took the reins of the University of Illinois by declaring that public universities "must exhibit catholicity of spirit; it must tolerate all creeds; it must inspire all schools."³⁴⁶ Andrew Dickson White at Cornell proclaimed, "[N]o professor, officer or student shall ever be accepted or rejected on account of any religious or political views which he may or may not hold."³⁴⁷ State universities have historically been held out as independent institutions that were explicitly not represented as conduits for government speech.

State universities were created to advance a public purpose but not to express a governmental message. They were understood to be useful for training well-educated citizens and for generating useful knowledge in the arts and sciences. Charles Van Hise at the University of Wisconsin voiced the aspiration of many in declaring, "The practical man of all practical men is he who, with his face toward truth, follows wherever it may lead."³⁴⁸ It was hoped that the unleashing of that scholarly spirit to follow the truth wherever it might lead would allow the university and its faculty "to be benefactors, not only of the state, but of the entire earth; for a new truth, a new principle, is not the property of any state, but instantly belongs to the world."³⁴⁹ State universities could only accomplish

341. CAL. CONST. art. IX, § 9 (1879).

342. *Id.*

343. JAMES BURRILL ANGELL, *SELECTED ADDRESSES* 30 (1912).

344. *Id.* at 29.

345. *Id.* at 31.

346. ANDREW S. DRAPER, *AMERICAN EDUCATION* 197 (1909).

347. *THE CORNELL UNIVERSITY REGISTER*, 1869-70 21 (1870).

348. *THE JUBILEE OF THE UNIVERSITY OF WISCONSIN* 123 (1905).

349. *Id.*

their purpose if they were not restricted to repeating popular orthodoxies and if they were insulated from the expectation of being a mere mouthpiece of incumbent politicians.

There is no question that state universities are associated in the public mind with the state itself, but it seems much more dubious that the public identifies professorial speech with the state government. Indeed, a common complaint about state universities and state-university professors is how divorced they are from the attitudes and perspectives of the ordinary citizens of the state. Unlike a monument on public land or a slogan emblazoned on a "government ID,"³⁵⁰ professorial speech is not a static message presumptively endorsed by a government. Professors are far more likely to be seen as individuals, or as part of a distinctive professorial class, than as avatars of the governments that happen to employ them. When conservatives complain about "tenured radicals"³⁵¹ or populists complain about "pointy-headed intellectuals,"³⁵² they are emphasizing the gap between the professoriate and the government and community they serve.

Professorial speech is not "effectively controlled" by the government.³⁵³ What an individual professor might say in the classroom or in his or her scholarly research certainly is not "set out . . . from beginning to end" by the government.³⁵⁴ Professorial speech is not "selected" by the government "for the purpose of presenting the image of the [government] that it wishes to project to all" who might hear it.³⁵⁵ Professors themselves are not even directly selected by "government decisionmakers" in any traditional sense but are rather selected by their faculty peers to occupy their positions.³⁵⁶ Although content-based judgments are made to assess the quality of their work, they are not the kind of content-based factors that are designed to align professorial speech with governmental preferences. Scholars are chosen to advance knowledge within their discipline and not to rehearse "the shibboleths of sect or party."³⁵⁷ Once professors are appointed to their positions, government officials do not "exercise editorial control" over the content of their classroom or scholarly speech.³⁵⁸ To the extent that there are gatekeepers to the publication of scholarly research, it is a network of scholarly peers hailing from

350. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 212 (2015).

351. ROGER KIMBALL, *TENURED RADICALS* (1990).

352. Norman C. Miller, *A Place in the Sun: George Wallace Faces Crucial Test in Florida – On Favorable Ground*, WALL ST. J., Feb. 9, 1972, at 1.

353. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005).

354. *Id.*

355. *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009).

356. *Id.* at 472.

357. ANGELL, *supra* note 343, at 31.

358. *Summum*, 555 U.S. at 472.

across the country and the globe and who likely have no connection whatsoever to the state government that might employ the author of the work. In appointing professors to the faculty of state universities, even university officials largely cede control over the content of professorial speech to the individual professor and to the larger scholarly community.

In short, professorial speech in state universities shows none of the expected characteristics of government speech. Classroom lectures in state universities have not traditionally been understood to communicate messages from the government. University professors are not associated in the public mind with the government. The government does not exercise direct control over the content of classroom lectures. This is not a situation in which “the government established the message; maintained control of its content; and controlled its dissemination to the public.”³⁵⁹

Professorial speech likewise does not meet the looser analysis favored by Justice Alito for identifying government speech. The government exercises even less control over professorial speech than it does over trademark registration, for example. There is no examiner of professorial speech who is attempting to “inquire whether any viewpoint conveyed by [that speech] is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other” professors employed at the university.³⁶⁰ Given the diversity of scholarly views of professors, if professorial speech is government speech, then the government “is babbling prodigiously and incoherently.”³⁶¹ Justice Alito’s thought experiment in the specialty license plate case asked whether a reasonable observer could see myriad college football teams promoted on specialty license plates and “assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns’ opponents?”³⁶²

Justice Alito has identified what he considers “the minimum conditions” for identifying speech as government speech and that is that the “government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech.”³⁶³ “Government speech is thus the purposeful communication of a governmentally determined message by a person exercising a power to speak for a government.”³⁶⁴ But no one thinks that a state-

359. *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 282 (4th Cir. 2008).

360. *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017).

361. *Id.*

362. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 222 (2015).

363. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1598 (2022) (Alito, J., concurring).

364. *Id.*

university professor is “a person with the power to determine what messages the government will communicate.”³⁶⁵ To take but a single example, nobody believes that when Sandy Levinson, the W. St. John Garwood and W. St. John Garwood, Jr. Centennial Professor at the University of Texas School of Law, deigns to speak in class about *Marbury v. Madison*,³⁶⁶ that his views on that case are shared even by other members of the law school faculty or the Garwood family, let alone by Governor Greg Abbott or Attorney General Ken Paxton.³⁶⁷ Levinson is neither authorized to nor understood to be communicating “a governmentally determined message” when speaking in class at a state university.³⁶⁸ He is employed to provide his idiosyncratic scholarly expertise, not to be a spokesman for the state of Texas. His classroom speech does not “amount to government speech attributable” to the Texas government.³⁶⁹

Recognizing that a professor’s speech in a classroom “represent[s] his own private speech”³⁷⁰ and not government speech is ultimately necessary to preserving the logic and goals of the Court’s academic-freedom jurisprudence. The stated purpose of protecting academic freedom under the First Amendment is to prevent “laws that cast a pall of orthodoxy over the classroom.”³⁷¹ If classroom speech is best understood as government speech, then the entire point would be to impose orthodoxy. Students might not have to accept that orthodoxy as true, but professors would be obliged to convey it. If professors are paid strictly to toe the company line when speaking to students, it would have “an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice.”³⁷² The academic-freedom cases defend the possibility that professors in their classrooms will dissent from the government’s own policies, principles, and values. Indeed, at the heart of the academic-freedom cases was whether professors could advocate that the US government itself be dissolved. There is no sense in which Paul Sweezy’s lecture to the students in a class at the University of New Hampshire could be regarded as government speech. For the Court to uphold the right of Sweezy and others like him to teach the truth as he understood it in state-university classrooms, that speech had to be understood as private speech subject to First Amendment protection. And it had to

365. *Id.*

366. 1 Cranch 137 (1803); see Sanford Levinson & Jack M. Balkin, *What Are the Facts of Marbury v. Madison?*, 20 CONST. COMMENT. 255 (2003).

367. On Levinson’s reluctance to teach *Marbury*, see Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn’t Either*, 38 WAKE FOREST L. REV. 553 (2003).

368. *Shurtleff*, 142 S. Ct. at 1598.

369. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2424 (2022).

370. *Id.* at 2425.

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

372. *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952).

be understood as private speech subject to First Amendment protection even when expressed by a state-university professor acting pursuant to his official duties as an instructor in a classroom.

That is not to say that there may be no government speech on state-university campuses.³⁷³ The government might require, for example, that an official governmental statement be included in course syllabi or distributed to university students, comparable to the “ministerial” speech that university officials sometimes require of faculty.³⁷⁴ The government might specially authorize particular programming or even particular classes and course materials in which professors might choose to participate. In that way, government officials might supplement the regular academic offerings of the university and exercise greater editorial control over that specific subset of academic activities in a manner that made it clear that the course content was in fact government speech.³⁷⁵

373. I set aside the question of the implications for academic freedom for professorial speech if a state were to resolve to comprehensively direct the university curriculum as it does the primary and secondary school curriculum. No state has sought to treat higher education as it does secondary education, or to say of a university board of trustees what can be said of a local school board, that “[o]nly the school board has ultimate responsibility for what goes on in the classroom, legitimately giving it a say over what teachers may (or may not) teach in the classroom.” *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 340 (6th Cir. 2010). Whether the First Amendment creates an impassable obstacle to a state attempting to exercise such control over a university is a distinguishable question from whether a state can attempt to impose discrete constraints on professorial speech given the kinds of universities that they have established. For skepticism that even primary and secondary schools should be understood as pure instruments of government speech, see MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* 215–18 (1983).

374. *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021). It is not obvious that ministerial speech must also be “non-ideological” in order to be consistent with First Amendment protections for academic freedom. A professor cannot be compelled to endorse ideological statements or express them as her own without running afoul of the protections outlined in *Barnette*. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). But if, for example, a state university required a professor to convey the state’s own ideologically freighted message in a manner that made clear that the message came from the state and not from the professor, then it is not apparent that the professor’s First Amendment rights have been infringed. Even if it is permissible for a university to require a professor to include the government’s message in the form of a specified land acknowledgement or diversity statement in a course syllabus, it is surely not permissible for a university to compel a professor to present such a message as if it were the professor’s own or to refrain from supplementing the government’s message with an alternative viewpoint on that topic. On the value of a transparency requirement for government speech, see HELEN NORTON, *THE GOVERNMENT’S SPEECH AND THE CONSTITUTION* 43–49 (2019).

375. Such an academic unit might be modeled on pontifical faculty accredited by the Holy See at the Catholic University of America. Professors in the school of theology are expected to adhere to Church teachings, but professors in the

In short, the government might, consistent with academic freedom, *add* government speech to the intellectual life of a state university, so long as it does so in a manner that does not restrain or crowd out the freedom of members of the faculty to express countervailing ideas in the course of their teaching and scholarship. It cannot, however, displace private professorial speech with government speech or use government speech as a cover for censoring private professorial speech.³⁷⁶ To borrow from a different line of First Amendment doctrine, in adding government speech to a university environment, the state must “leave open ample alternative channels” for communicating the private professorial speech protected by academic freedom.³⁷⁷

CONCLUSION

Relative to both government-employee speech doctrine and government-speech doctrine, “academic freedom is . . . a special subset of First Amendment freedoms,” as William Van Alstyne once argued.³⁷⁸ If academic freedom—specifically the freedom of state-university professors to teach and to engage in scholarship without interference from government officials—is worth protecting, and the Supreme Court has held that it is,³⁷⁹ then it cannot be subsumed under common categories of speech within First Amendment jurisprudence. The fact that professors express views that the politicians dislike in the classroom and in their scholarship does not put them outside the reach of the First Amendment. Professorial speech has limits and exceeding those limits can properly result in a professor being sanctioned for something that he or she has said, but those limits are not determined by whether politicians find the ideas expressed to be offensive, disturbing, or even dangerous.

The anti-CRT policies, such as Florida’s Stop WOKE Act, prohibit university instruction that “espouses, promotes [or] advances”

department of philosophy enjoy the usual degree of academic freedom to depart from Church teachings. 1 THE CATHOLIC UNIVERSITY OF AMERICA FACULTY HANDBOOK 15 (2017), https://policies.catholic.edu/_media/docs/facultyhandbooki_2018.pdf.

376. See also *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1599 (2022) (“So government speech in the literal sense is not exempt from First Amendment attack if it uses a means that restricts private expression in a way that ‘abridges’ the freedom of speech, as is the case with compelled speech. Were it otherwise, virtually every government action that regulates private speech would, paradoxically, qualify as government speech unregulated by the First Amendment. Naked censorship of a speaker based on viewpoint, for example, might well constitute ‘expression’ in the thin sense that it conveys the government’s disapproval of the speaker’s message. But plainly that kind of action cannot fall beyond the reach of the First Amendment.”).

377. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

378. Van Alstyne, *supra* note 15, at 143.

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

specific concepts.³⁸⁰ The policies denounce the idea that a person is privileged in American society due to his race or sex or that a person should receive adverse treatment because of past actions by members of his race.³⁸¹ The state might believe that such ideas are wrongheaded, but espousing them is common in contemporary political and scholarly debates. Such policies allow professors to present one side of debates over affirmative action, for example, but forbid them from advancing the other side. If state universities are to remain institutions of higher learning in which controversial ideas can be explored, contested, and examined, government officials cannot exclude some viewpoints as heretical.

The current wave of anti-CRT policies could pose the biggest threat of governmental interference with academic freedom in American universities since the McCarthy era. Fortunately, the Court developed a forceful commitment to recognizing academic freedom as being protected by the First Amendment as a result of that earlier wave of legislative interventions into the intellectual life of universities. Unfortunately, the Court has not clarified the scope of this academic-freedom principle under the First Amendment, nor has it reconciled that earlier jurisprudence with later case law relating to government-employee speech and government speech. The courts will be forced to grapple with how these various strands of doctrine should be woven together. It is possible to weave them together, but doing so reveals the constitutional infirmities of common anti-CRT proposals being advanced in the states.

The Supreme Court has invited confusion by noting but not fleshing out an academic-freedom exception to ordinary government-employee speech doctrine. It is possible to flesh out that exception in a way that coheres with the Court's various doctrinal commitments, but it will require reaffirming that professorial speech is "a special concern of the First Amendment."³⁸² When state government officials attempt to restrict what ideas can be taught in the classrooms of public universities, they do real damage not only to the intellectual life of those universities but also to the public discourse of the country. The First Amendment is grounded in the fundamental commitment to the view that ideas should be freely discussed and that they cannot be rejected or embraced as a result of government *diktat*. In the mid-twentieth century, the government sought to prevent the spread on college campuses of what it regarded as dangerous ideas by dismissing any professor who might adhere to them, discuss them, or teach them. The Court rejected the stifling hand of censorship then. The tools of censorship being wielded by the government today are different, but the ultimate goal is the same. Government officials do

380. FLA. STAT. § 1000.05 (2021).

381. FLA. STAT. § 760.10(8)(a)(5) (2022).

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

not want professors at state universities to discuss ideas with which those government officials, and perhaps even popular democratic majorities, disagree. The First Amendment bars them from having their way.