Reminiscent of the Little Rock Nine and Ruby Bridges: Present Day Racially Offensive Comments That Create a Hostile Educational Environment

DAVID A. GREEN*

> "Education . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free." – Frederick Douglass[1]

INTRODUCTION

Dr. William Anderson is a full professor at Anystate University, within the University's College of Arts & Sciences, Liberal Arts and Humanities Department, and has been at the University for over 20 years. While Dr. Anderson has always made controversial comments and has not been popular with students of color, during the last five years, he has been extremely bold, spouting borderline racist statements. He created a blog for his students to read following the death of George Floyd, where he made statements such as "black folks would not have trouble with the police, if they only cooperated and followed the police officer's directive." He further stated that the major problem involving white police officers interacting with the African American community is that "many of these black kids don't have any home training."

After the COVID-19 pandemic hit, which he only refers to on his blog and in class as the "China virus," Dr. Anderson recommended that the country revisit the idea of "concentration camps." During his philosophy class, he required freshmen students to write a paper on how American slavery was a benefit to the "primitive" African tribes. During the spring of 2021, students of all races demanded that actions be taken against Dr. Anderson, specifically that he be terminated. There were numerous protests, marches, letter writing campaigns and a threatened sit-in. Dr. Anderson takes the position that his actions are protected by both the First Amendment

*Professor of Law, North Carolina Central University School of Law; LL.M., Temple University School of Law; J.D., Georgetown University Law Center; B.A., Georgetown University. Professor Green is grateful to Marwan Rashed for his comments and feedback. Professor Green is also grateful to Nigia Hunt '23, Nehemias Hernandez-Lopez '23, and Anthony Lopez '24 for their research assistance.

[1] Charlotte Mostertz, Comment, *Teach Your Children Well: Historical Memory of The Civil War and Reconstruction, Public Education, and Equal Protection*, 22 UNIV. PA. J. CONST. L. 589, 623 (2020) (quoting Frederick Douglass, The Blessings of Liberty and Education (Sept. 3, 1894), *in* 5 THE FREDERICK DOUGLASS PAPERS. SERIES ONE, SPEECHES, DEBATES, AND INTERVIEWS, 616, 623 (John W. Blassingame & John R. McKivigan eds. 1992)).

and academic freedom. The University seeks to terminate its relationship with Dr. Anderson and wants to avoid any litigation.[2]

As the political tension in the country intensifies, it seems that the country is going back in time. This tension is highlighted in the school setting, particularly in the university systems. The proliferation of racially implicated incidents across American universities is reminiscent of the opposition to the efforts to integrate public schools and the pictures of Elizabeth Ekford and Ruby Bridges. The picture of Elizabeth Ekford, taken in 1957, captures Ms. Ekford, as part of the Little Rock Nine, desegregating Little Rock High School in Arkansas as white citizens yelled racial epithets at her. The poignant picture of Ruby Bridges captures the little girl at the tender age of six entering an elementary school in New Orleans surrounded by United States Marshalls. While students may also feel unwelcome due to their gender, sexual orientation, disability, religion, national origins, and political affiliation, this article will address how some students of color, particularly African American students, feel unsafe and often attacked by their own professors.[3] The hypothetical above involving Dr. Anderson is designed to reflect the present-day environment and demonstrate that it has the same impact as the environment of the late 1950s and early 1960s, when African American students were overtly told that they were not welcome in schools.

Part II of this article will provide a historical overview of the opposition to educational integration and the hostility faced by African American students. Part III will discuss the concept of academic freedom and a review of Supreme Court decisions involving academic freedom in the context of the First Amendment. Moreover, this section will discuss the lower courts' application of academic freedom and the uncertainty of the law as it relates to First Amendment rights in the educational setting. Part IV of the article will discuss the present-day climate, the tension between academic freedom and a hostile education environment and the attack on critical race theory jurisprudence. Finally, Part V will recommend that university systems, including accrediting bodies, take the lead in directly providing guidance to ensure a welcoming educational environment for all faculty and students.

---

[2] This is a fictitious hypothetical from Professor Green's spring 2022 Employment Discrimination seminar. The fact pattern is based on different recent incidents occurring around the country. After the students completed an intra-office memorandum based on their research, they had to provide an opinion letter to the University counsel. The students concluded that it was best that the University negotiate a buyout with Dr. Anderson based on his due process rights to a hearing and the need to resolve the matter as soon as possible. This fact pattern was also the basis of a discussion during the National Bar Association's Annual Mid-Year Conference and Gertrude Rush Awards Gala in April 2023.

[3] Racism targeted against African Americans and individuals of African descent has generated national attention and led to the "Black Lives Matter" movement. *See generally* BARBARA RANSBY, MAKING ALL BLACK LIVES MATTER: REIMAGINING FREEDOM IN THE 21ST CENTURY (2018) (outlining the scope and geology of the Black Lives Matter movement). Black Lives Matter began with a social media hashtag, #BlackLivesMatter, after the acquittal of George Zimmerman in the shooting death of Trayvon Martin in 2012. *Id.* The movement grew nationally in 2014 after the deaths of Michael Brown in Missouri and Eric Garner in New York. *Id.* at 47

I. HISTORICAL FLASHBACK TO THE OPPOSITION TO EDUCATIONAL INTEGRATION

As this country began its efforts to integrate education, African American children were clearly not welcomed with open arms in to the previously all white schools.[4] The images of Elizabeth Eckford, part of the Little Rock Nine, and Ruby Bridges, in New Orleans, captured the country in turmoil, as integration was met with hostility from white Americans who vehemently opposed having their children educated alongside African American children.[5] White citizens chanted, "Two, four, six, eight—we don't want to integrate" as the African American children walked to the previously all-white schools.[6] While the United States Supreme Court in *Brown v. Board of Education* decided that "separate but equal" was unconstitutional,[7] the images of Elizabeth Eckford and Ruby Bridges forever captured that not all Americans agreed.[8] The message was clear: African American children were not welcome in educational settings with white students.[9]

---

[4] Paul Finkelman, *The Long Road to Dignity: The Wrong of Segregation and What the Civil Rights Act of 1964 Had to Change,* 74 LA. L. REV. 1039, 1081, 1090 (2014).

[5] SHELLEY TOUGAS, LITTLE ROCK GIRL 1957: HOW A PHOTOGRAPH CHANGED THE FIGHT FOR INTEGRATION 4 (2012); RUBY BRIDGES, THROUGH MY EYES 14 (1999).

[6] TOUGAS, *supra* note 5, at 4.

[7] Brown v. Bd. of Educ., 347 U.S 483, 495 (1954). In 1954, African American children, through their legal representatives, challenged the "separate but equal" doctrine and sought admission to the public schools of their community on a nonsegregated basis. *Id.* at 487. The children were denied admission to schools attended by white children under laws requiring or permitting segregation according to race. *Id.* at 487–88. Because they contended that the segregation deprived the children of the equal protection of the laws under the Fourteenth Amendment, the children requested that the United States Supreme Court overturn the "separate but equal" doctrine announced by the Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537, 547–48 (1896). *Brown*, 347 U.S. at 488. The United States Supreme Court, in an opinion written by Chief Justice Earl Warren, held that segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities, in contravention of the Equal Protection Clause of the Fourteenth Amendment. *Brown*, 347 U.S. at 495.

The named plaintiff, the father of Linda Brown, who lived in a mixed-race neighborhood, began the challenge in 1950, when Linda was ready to begin the third grade. Paul E. Wilson, *The Genesis of* Brown v. Board of Education, 6 KAN. J. L. & PUB. POL'Y 7, 10, 11 (1996); *see also* Nicole Love, Note, Parents Involved in Community Schools v. Seattle School District No. 1*: The Application of Strict Scrutiny to Race-Conscious Student Assignment Policies in K–12 Public Schools*, 29 B.C. THIRD WORLD L.J. 115, 117–18 (2009). While the children of their white and other non-Black neighbors attended Sumner Elementary School ("Sumner"), about seven blocks from the Brown residence, Linda attended the all-Black school, Monroe Elementary School ("Monroe"), located twenty-one blocks from her home. Wilson, *supra* note 7, at 10–11. Linda and the other black students had to travel a dangerous path through a railroad crossing and heavy traffic to get to Monroe. *Id.* at 11. As the school year began, Oliver Brown, Linda's father, was concerned about his daughter's safety and comfort, the inconvenience of her daily trip to and from Monroe, and the quality of the educational opportunity afforded her by the Topeka school district. *Id.* On the day classes were to begin, Mr. Brown decided to challenge the segregation in Topeka. *Id.* Principal Frank Wilson, who had been warned that the local NAACP would challenge the separation policy, was waiting for the encounter with Mr. Brown and denied Mr. Brown's request to admit Linda to the Sumner school due to her race. *Id.* at 10, 11.

[8] *See* TOUGAS, *supra* note 5, at 5, 6, 8, 9 (using photographs of Elizabeth Eckford and Ruby Bridges). *See also* BRIDGES *supra* note 5 (using photographs of protestors, police officers, and federal marshals).

[9] *See* TOUGAS, *supra* note 5. *See also* BRIDGES *supra* note 5.

On September 4, 1957, the Little Rock Nine[10] were scheduled to integrate Little Rock Central High School in Little Rock, Arkansas.[11] Elizabeth Eckford arrived alone to enter the high school, but she was turned away by the Arkansas National Guard.[12] As she attempted to enter the school, the hatred that she encountered was captured in an image for history and for the world to witness.[13] As Elizabeth Eckford attempted to enter the school, this infamous day of conflict was captured by the reporters and photographers who were present.[14]

> *"Go back to where you came from!" a woman shouted at her. Elizabeth had felt a moment of hope when she noticed soldiers with rifles near the school's entrance. She guessed that the soldiers' job was to make sure she and the eight other students entered the school safely. Elizabeth guessed wrong. As she approached the door, the soldiers, who were in the Arkansas National Guard, crossed their rifles and blocked her path. On the orders of Arkansas' governor, Orval Faubus, they wouldn't allow her to enter the building. Her legs started shaking. The crowd continued to yell. "Go home! Whites have rights too!" She looked for a calm adult, someone who would make her feel safe. She noticed a woman with a kind face, but the woman lunged forward and spit on her.*[15]

The incidents of the day made it clear that integration was not going to be easy and that some white citizens were not going to give up without a fight.

On November 14, 1960, Ruby Bridges, six years old and alone, integrated William Frantz Public School in New Orleans, Louisiana.[16] The historic event is captured in a poignant picture of Ruby Bridges being surrounded by four United States Marshals. Ruby Bridges has reflected on that day, stating:[17]

---

[10] The Little Rock Nine comprised of Thelma Mothershed, Minnijean Brown, Elizabeth Eckford, Gloria Ray, Ernest Green, Melba Pattillo, Terrance Roberts, Carlotta Walls, and Jefferson Thomas. TOUGAS, *supra* note 5, at 48–49.

[11] *Id.* at 4.

[12] *Id.* at 4–5. Daisy Bates, president of the Arkansas chapter of the National Association for the Advancement of Colored People (NAACP), had planned for the students to walk to the school with black and white ministers in order to ensure that the students felt safe, but Elizabeth Eckford's family never got a call about the plan because they did not have a telephone. *Id.* at 10. The Arkansas National Guard turned all the children away. *Id.* at 9.

[13] *Id.* at 6. "Photographer Will Counts [of the local newspaper, the *Arkansas Democrat*] said when he 'saw Hazel Bryan's contorted face in the camera's viewfinder, I knew that I have released the shutter at an important moment.'" TOUGAS, *supra* note 5, at 6. With "her face twisted with rage," Hazel Bryan screamed, "'Go home, n[*****]!' . . . 'Go back to Africa!'" *Id.*

[14] *Id.* at 4–10.

[15] *Id.* at 4–5 (emphasis added); Finkelman, *supra* note 4, at 1089.

[16] BRIDGES, *supra* note 5, at 14.

[17] *Id.*

> *My mother took special care getting me ready for school. When somebody knocked on my door that morning, my mother expected to see people from the NAACP. Instead, she saw four serious-looking white men, dressed in suits and wearing armbands. They were U.S. federal marshals. They had come to drive us to school and stay with us all day. I learned they were carrying guns. I remember climbing into the back seat of the marshal's car with my mother, but I don't remember feeling frightened. William Frantz Public School was only five blocks away, so one of the marshals in the front seat told my mother right away what we should do when we got there. "Let us get out of the car first," the marshal said. "Then you'll get out, and the four of us will surround you and your daughter. We'll walk you to the door together. Just walk straight ahead, and don't look back." . . . As we walked through the crowd, I didn't see any faces. I guess that's because I wasn't very tall and I was surrounded by the marshals. People yelled and threw things. I could see the school building, and it looked bigger and nicer than my old school. When we climbed the high steps to the front door, there were policemen in uniforms at the top. The policemen at the door and the crowd behind us made me think that this was an important place. It must be college, I thought to myself.*[18]

Ruby Bridges entered into a segregated school and entered into the history books as this event garnered national attention.[19]

II. THE CONCEPT OF ACADEMIC FREEDOM AND THE SUPREME COURT REVIEW

A. Creation of Academic Freedom

As far back as the debates involving Socrates, Plato and Aristotle, it was accepted that the pursuit of higher education can only effectively occur if there is academic freedom.[20] The American Association of University

---

[18] *Id.* at 15–16 (emphasis added).

[19] Finkelman, *supra* note 4, at 1089 ("In 1960, Ruby Bridges's historic and courageous walk to that school—protected from a hate-filled crowd by federal marshals—made national headlines. The facts surrounding the marshals escorting Bridges to the school later inspired Norman Rockwell's famous painting, 'The Problem We All Live With,' which appeared in *Look Magazine* and was seen by millions of Americans.").

[20] Jason M. Shepard & Kathleen B. Culver, *Culture Wars on Campus: Academic Freedom, the First Amendment, and Partisan Outrage in Polarized Times*, 55 SAN DIEGO L. REV. 87, 119 (2018).

Professors (AAUP)[21] has led the effort to define and defend academic freedom.[22] With its original declaration in 1915, the AAUP provided that:

> a university has three core purposes: "to promote inquiry and advance the sum of human knowledge; to provide general instruction to students; and to develop experts of various branches of public service." As such, "[a]cademic freedom in this sense comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action."[23]

Consistent with the goal of professors, the professor should be allowed to discuss controversial matters, but should:

> set forth justly, without suppression or innuendo, the divergent opinions of other investigators; he should cause his students to become familiar with the best published expressions of the great historic types of doctrine upon the questions at issue; and he should, above all, remember that 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.[24]

"In 1940, the AAUP issued a Statement of Principles of Academic Freedom and Tenure," which provided that "[t]eachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to the subject."[25] With this statement, it was accepted that academic freedom was a right within the university system.

---

[21] *Mission*, AM. ASS'N OF UNIV. PROFESSORS, https://www.aaup.org/about/mission-1 (last visited Feb. 13, 2024) ("The mission of the American Association of University Professors (AAUP) is to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, postdoctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good. Founded in 1915, the AAUP has helped to shape American higher education by developing the standards and procedures that maintain quality in education and academic freedom in this country's colleges and universities.").

[22] Shepard & Culver, *supra* note 20, at 119.

[23] *Id.* at 120 (citing John K. Wilson, *AAUP's 1915 Declaration of Principles: Conservative and Radical, Visionary and Myopic*, 7 AAUP J. ACAD. FREEDOM, 2016, at 1, https://www.aaup.org/sites/default/files/Wilson_1.pdf).

[24] *Id.* at 120 (quoting Wilson, *supra* note 23, at 4–5).

[25] *Id.* at 121.

B. *Supreme Court Review of Academic Freedom in the Context of the First Amendment*

In 1957, the United States Supreme Court recognized the doctrine of academic freedom in the context of the First Amendment in *Sweezy v. New Hampshire*.[26] Professor Paul Sweezy, a college professor at the University of New Hampshire, was investigated for alleged involvement in subversive groups such as the Communist Party.[27] As part of the investigation, the New Hampshire Attorney General asked Professor Sweezy questions about his coverage of material in the classroom as it related to his potential beliefs in communism and socialism.[28] Professor Sweezy declined to answer the questions, and when the Attorney General filed a petition in state court to order Professor Sweezy to respond, Professor Sweezy maintained his refusal and was held in contempt and committed to jail.[29] In a plurality opinion, Chief Justice Warren concluded "that there unquestionably was an invasion of [Professor Sweezy's] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."[30] He noted:

> 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.[31]

---

[26] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion).

[27] *Id.* at 243–44.

[28] *Id.* (The Attorney General asked: "'What was the subject of your lecture?' 'Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?' 'Did you advocate Marxism at that time?' 'Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?' 'Did you in this last lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialism?'").

[29] *Id.* at 244–45.

[30] *Id.* at 250.

[31] *Id.; see also Sweezy*, 354 U.S. at 261 (Frankfurter, J., concurring) ("When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate.").

In reversing the contempt judgment, the Supreme Court made clear that academic freedom protects professors from the state overreaching into matters in the classroom.[32]

Ten years after *Sweezy*, the Supreme Court reaffirmed its support for academic freedom in *Keyishian v. Board of Regents*.[33] The New York State University system established a plan to ensure that there were no appointments or retention of "subversive" persons in state employment.[34] Professor Keyishian and several of his colleagues each refused to sign "a certificate that he was not a Communist, and that if he had ever been a Communist, he had communicated that fact to the President of the State University of New York."[35] The Supreme Court found the New York law impermissibly overbroad and in violation of the First Amendment.[36] Justice Brennan, writing for the majority, held that:

> [o]ur 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. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[37]

The Supreme Court weighed the State's attempts to address concerns of subversion and communism but placed a premium on academic freedom.[38]

A year after *Keyishian*, the Supreme Court announced a balancing test for considering the free speech rights of teachers outside of the classroom.[39] In *Pickering v. Board of Education*, the Supreme Court rejected the argument that teachers relinquish their free speech rights as a condition of employment.[40] In *Pickering*, the Board of Education dismissed Marvin L.

---

[32] *Id.* at 250 (majority opinion).

[33] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[34] *Id.* at 591–92.

[35] *Id.* at 592.

[36] *Id.* at 609.

[37] *Id.* at 603 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

[38] *Id.* at 589–90. *But see Keyishian*, 385 U.S. at 624 (Clark, J., dissenting) (quoting Adler v. Bd. of Educ., 342 U.S. 485, 493 (1952) ("A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society cannot be doubted.")).

[39] Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 563–64 (1968).

[40] *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

Pickering, an Illinois high school teacher, for sending a letter to a local newspaper in which he criticized the Board's handling of past proposals to raise new revenue for the schools.[41] The Board determined that his letter was "detrimental to the efficient operation and administration of the schools of the district" and therefore warranted his dismissal.[42] The Supreme Court unequivocally rejected the Board's contention that "even comments on matters of public concern that are substantially correct . . . may furnish grounds for dismissal if they are sufficiently critical in tone. . . ."[43] While reversing the dismissal of Mr. Pickering, Justice Marshall, writing for the Court, noted that "[t]he 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 employees."[44] Without providing a bright line test, the Court provided analytical factors a court should use when adjudicating a teacher's speech.[45]

In 1983, in addressing the public employee case of *Connick v. Myers*, the Supreme Court relied upon the *Pickering* principles and provided further guidance regarding a public employee's free speech rights and the government's legitimate interest in efficient operations.[46] *Connick* involved the District Attorney in New Orleans, Harry Connick, and his decision to terminate Assistant District Attorney Sheila Myers after she opposed his decision to transfer her and circulated an office questionnaire regarding office morale and pressure to work in political campaigns.[47] Mr. Connick informed Ms. Myers that she was creating a "mini-insurrection" and that her distribution of the questionnaire was an act of insubordination.[48] The Court concluded that "[t]he limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment."[49] The Court "caution[ed] that a stronger showing [of workplace disruption] may be necessary if the employee's speech more substantially involved matters of public concern.[50]

---

numerous prior decisions of this Court.") (first citing Wieman v. Updegraff, 344 U.S. 183 (1952); then citing *Shelton*, 364 U.S. at 479; and then citing *Keyishian*, 385 U.S. at 589).

[41] *Id.* at 564.

[42] *Id.* at 564–65.

[43] *Id.* at 570.

[44] *Id*. at 568.

[45] *Pickering*, 391 U.S. at 569–73; *see also* Shepard & Culver, *supra* note 20, at 128 (summarizing the *Pickering* analytical factors as: "whether (1) [a] close working relationship existed between the educator and the people whom he criticized; (2) [t]he speech addressed a matter of public concern; (3) [t]he speech had a detrimental impact on the administration of the education system; (4) [t]he educator's performance of his daily duties was impeded; [and] (5) [t]he educator spoke as a public employee or a private citizen.").

[46] Connick v. Myers, 461 U.S. 138, 150 (1983).

[47] *Id.* at 140–41.

[48] *Id.* at 141.

[49] *Id.* at 154.

[50] *Id.* at 152.

As a result of these two Supreme Court decisions, courts use the *Pickering-Connick* two-part test in deciding whether speech by a public employee is constitutionally protected.[51] While public employees, including public teachers, still maintain a right to discuss matters of public concern, even this protected speech is not protected above an employer's efficiency interests.[52] In *Connick*, the Supreme Court revisited the balancing test established in *Pickering* and determined that a court must make two inquiries when determining whether a public employee's speech is protected by the First Amendment.[53] The threshold question is whether the speech touched on a "matter[] of public concern."[54] To qualify as such, the speech or expression must relate to a "matter of political, social, or other concern to the community."[55] Next, a balance should be struck between the employee's interests, as a citizen, in commenting on matters of public concern and the employer's interests in promoting efficiency.[56] Finally, the Court determined that the employer bears the burden of proving substantial interference with office operations.[57]

In 2006, the Supreme Court strengthened a public employer's ability to regulate the workplace despite First Amendment implications in *Garcetti v. Ceballos*.[58] Richard Ceballos, a district attorney in California, was demoted and transferred after he wrote a memorandum to his supervisors, criticizing certain practices by the sheriff's department.[59] Ceballos subsequently sued his supervisors, arguing that they had retaliated against him for writing the memorandum and had violated his First Amendment right to free speech.[60] After a district court dismissed Ceballos' claim, ruling that his memorandum was not protected speech because it was written as part of his employment duties, the Ninth Circuit overturned the decision, ruling that First Amendment protections did apply.[61] On appeal, the Supreme Court reversed and held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their

---

[51] Donna Prokop, Note, *Controversial Teacher Speech: Striking a Balance Between First Amendment Rights and Educational Interest*, 66 S. CAL. L. REV. 2533, 2544 (1993).

[52] *Connick*, 461 U.S. at 140; *see* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968).

[53] *Connick*, 461 U.S. at 140.

[54] *Id.*

[55] *Id.* at 146.

[56] *Id.* at 140.

[57] *Id.* at 149–50.

[58] Garcetti v. Ceballos, 547 U.S. 410, 425–26 (2006). In dissent, joined by Justices Ginsburg and Stevens, Justice Souter raised concerns over the majority's deference to the employer. *Id.* at 428 ("I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work. But I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.").

[59] *Id.* at 413–14 (majority opinion).

[60] *Id.* at 415.

[61] *Id.*

communications from employer discipline."[62] The Court reasoned that public employers must have the ability to restrict the speech of their employees in order for public institutions to operate efficiently and effectively.[63]

Although *Garcetti* does not directly address higher education, the implications of the Supreme Court's decision affect academia.[64] In his dissent, Justice Souter raised a concern over the overreaching impact of *Garcetti* into higher education:

> [t]his ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and 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."[65]

In response, Justice Kennedy, writing for the majority stated:

> Justice SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.[66]

The Supreme Court's decision in *Garcetti* did not provide clear guidance in the public education setting.

Courts have not uniformly accepted that *Garcetti* applies to public education;[67] to the extent that it is discussed, courts have separated out acts

---

[62] *Id.* at 421.

[63] *Garcetti*, 547 U.S. at 421–23.

[64] *See id.* at 438–39 (Souter, J., dissenting).

[65] *Id.* at 438 (quoting Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.")).

[66] *Id.* at 425 (majority opinion).

[67] Shepard & Culver, *supra* note 20, at 131 ("Since the decision, lower courts have split on whether, or how, to apply *Garcetti* to First Amendment claims from university faculty. Two Circuits have explicitly ruled that *Garcetti* does not apply to academic speech—a category described as a '*Garcetti*' exception—the Ninth and Fourth Circuits. Three other Circuits, the Third, Sixth, and Seventh, have applied *Garcetti* to conclude that faculty speech related to official duties is not immune from discipline based on the First Amendment.").

by the faculty member related to scholarship and teaching from other actions by the teacher.[68] Consistent with the reservation raised in the *Garcetti* case, courts have not applied those principles to actions by faculty members involving scholarship and teaching.[69] In *Garcetti,* the Supreme Court chose not to decide whether the principles articulated in that case apply to scholarship or teaching in the academic arena.[70] The Fourth Circuit noted:

> [t]he Supreme Court in *Garcetti* held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." The Court explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching. Thus, we continue to apply the *Pickering–Connick* standard . . . to this appeal.[71]

The lack of clarity in *Garcetti*'s application in the academic setting leaves unclear the extent of the protection afforded faculty members asserting a First Amendment right.

While the Supreme Court has acknowledged that a public educator has academic freedom, the Court has only done so in the context of the First Amendment, and the Court has not acknowledged academic freedom as a separate constitutional right.[72] Standing alone, the courts have not provided a clear definition of academic freedom.[73] The Fourth Circuit, in litigation

---

[68] *See* Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014) ("*Garcetti* does not apply to 'speech related to scholarship or teaching.'"); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 564 (4th Cir. 2011) ("Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment."); Gorum v. Sessoms, 561 F.3d 179, 186 (3d Cir. 2009) (holding that if a faculty member's "actions so clearly were not 'speech related to scholarship or teaching,' . . . [then] such a determination [would] not 'imperil First Amendment protection of academic freedom in public colleges and universities'"); Savage v. Gee, 665 F.3d 732, 739 (6th Cir. 2012) (holding that the faculty member's "speech as a committee member commenting on a book recommendation was not related to classroom instruction and was only loosely, if at all, related to academic scholarship . . . [and therefore] does not fall within the realm of speech that might fall outside of *Garcetti*'s reach.").

[69] *See, e.g.*, *Demers*, 746 F.3d at 406.

[70] *Garcetti*, 547 U.S. at 425.

[71] Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694 n.11 (4th Cir. 2007).

[72] *See* Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000); *see also* Amy H. Candido, Comment, *A Right to Talk Dirty?: Academic Freedom Values and Sexual Harassment in the University Classroom,* 4 U. CHI. L. SCH. ROUNDTABLE 85, 86–88 (1997) ("Although the boundaries of the Supreme Court's academic freedom doctrine remain uncharted, and the text of the First Amendment does not mention academic freedom, courts have been clear that academic freedom is 'entitled to some measure of constitutional protection.'").

[73] *Urofsky*, 216 F.3d at 410 ("'Academic freedom' is a term that is often used, but little explained, by federal courts.") (citing W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 302 (1998) ("[C]ourts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom.")); *see also* J. Peter Byrne,

involving professors employed by various public colleges and universities in Virginia challenging the constitutionality of a Virginia law restricting state employees from accessing sexually explicit material on computers that are owned or leased by the state that the professors, concluded that individual professors do not have a constitutional right to academic freedom.[74] The Fourth Circuit noted that "[i]t is true, of course, that homage has been paid to the ideal of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment . . . [but] . . . the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom."[75] The scope of the concept of academic freedom remains unclear, but the Supreme Court has established that academic freedom is entitled to some constitutional protection.[76]

The application of the doctrine of academic freedom is further blurred because of the Court's reluctance to get involved in academic decisions.[77] The Supreme Court has noted:

> [i]f a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,"[78] far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking."[79]

Academic Freedom: A "Special Concern of the First Amendment," 99 YALE L.J. 251, 253 (1989) ("Lacking definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles.").

[74] *Urofsky*, 216 F.3d at 411–12.

[75] *Id.* (citing Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226, 227 n.12 (1985) (In a university student's lawsuit against the regents of a state university challenging the constitutionality of his dismissal from a six-year program of study culminating in an undergraduate degree and medical degree, the Court, in dismissing the lawsuit, acknowledged its "concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom."; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312–13 (1978) (opinion of Powell, J.) (In a case where a white male applicant challenged the state medical school's affirmative action policy, the Court held that the special admissions program was illegal, but race may be one of a number of factors considered by school in passing on applications. The Court further noted "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body; *see also*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250, 261–63 (1957) (citing the plurality opinion and Justice Frankfurter's concurring opinion)). *Cf.* Minnesota State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 287–88 (1984) (stating that the Court has not recognized a First Amendment right of faculty to participate in academic policymaking)).

[76] Candido, *supra* note 72, at 87–88.

[77] *Ewing*, 474 U.S. at 226.

[78] *Id.* (quoting Bishop v. Wood, 426 U.S. 341, 349 (1976)).

[79] *Id.* (quoting Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978)).

The Supreme Court has determined that great deference should be afforded to an educational institution when it undertakes a review of an academic determination.[80] The Court has further noted that a reviewing court may not overturn an academic decision "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[81] The Court rightfully defers to the educational institution in balancing the best course of action.

III. PRESENT DAY DEBATE BETWEEN ACADEMIC FREEDOM VERSUS HOSTILE EDUCATIONAL ENVIRONMENT.

While the tension between academic freedom and protecting a welcoming educational environment is not new,[82] the election of Donald Trump to the presidency in 2016 during high profile racial incidents involving the death of African American victims has heightened that tension.[83] Faculty, administrators, and students felt challenged and unwelcomed by Trump's rhetoric, while those who supported his views felt "marginalized" due to their support of Trump.[84] Moreover, with the advent of the Black Lives Matter movement[85] and public protest, such as Colin

[80] *Id.* at 225 ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment.").

[81] *Id. Cf.* Mawakana v. Bd. of Trs. of Univ. of the D.C., 926 F.3d 859, 865 n.4 (D.C. Cir. 2019) (while determining that the University is not entitled to special deference in Title VII cases, the D.C. Circuit noted that "[s]ome cases simply apply the same Title VII standard to faculty members as to other discrimination plaintiffs; others discuss *Ewing* and the concept of academic freedom, expressing solicitude for academic institutions' faculty employment decisions" (citations omitted)).

[82] *See* ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM & THE UNIVERSITIES (1986) (recounting how the anti-Communist fervor during the 1950s affected the nation's colleges and universities and how hundreds of professors had to decide whether to cooperate with investigations accusing them of "un-American" activities or lose their jobs); *see also* Prokop, *supra* note 51, at 2534–36 (1993) (discussing the publicized cases involving two professors at City College of the City University of New York, Michael Levin and Leonard Jeffries, Jr. Levin "wrote a letter in 1987 to the *New York Times* in which he argued that shop owners should be allowed to bar [B]lack patrons from their stores if it would reduce 'the risk of murder for white store owners' by '[B]lack criminals.'" In subsequent publications, he "denounced affirmative action programs, arguing that they are doomed to failure because 'on average, [B]lacks are significantly less intelligent than [W]hites.'" Meanwhile, "Jeffries accused Jews of putting together 'a financial system of destruction of [B]lack people,'" and he "lectured in his classes that people of European ancestry, whom he called the 'ice people,' are fundamentally materialistic, greedy, and intent on domination, while people of African descent, whom he called the 'sun people,' are essentially humanistic and communal. Jeffries also declared that AIDS was created as part of a conspiracy by Whites to destroy Blacks.").

[83] *See* Shepard & Culver, *supra* note 20, at 89 ("The election of Donald J. Trump as President of the United States in November 2016 created yet more controversies in which campuses across the country wrestled with the necessary free expression push-and-pull between rights and responsibilities. At a time when many people felt the nation was more politically divided than it had been in their lifetimes, administrators, faculty, and students faced a gamut of challenging questions, ranging from feelings of insecurity among those who felt targeted by Trump's rhetoric to the reactions among those who felt marginalized because of their support for him.").

[84] *Id.*

[85] RANSBY, *supra* note 3, at 29.

Kaepernick's decision to kneel during the playing of the National Anthem,[86] there is a greater need for public discourse on racial issues. While colleges campuses have long been a place where the debate over freedom of expression has taken place, the manner of the debate and whether restrictions should be placed upon the discussion is a debate within itself.[87] To no surprise, recent surveys of college students showed that the views on freedom of expression varied based on race, gender, and political affiliation,[88] with students of color, particularly African American students, feeling unsafe and unprotected by offensive speech and therefore supporting restrictions, whereas white students do not feel the same need for protection.[89] Accordingly, present-day tension between academic freedom, freedom of speech, and the need for a welcoming educational environment has created additional challenges.

During the last few years, there has been outrage over comments and actions of faculty members at universities, which has begged the question as to the line between academic freedom and racially offensive comments. There was outrage in North Carolina when a professor of criminology tweeted that people who wear masks look like "fools" and referred to the Governor of North Carolina, Roy Cooper, as a "fascist" in his handling of the COVID-19 pandemic.[90] The professor further stated, "[t]his evening I ate pizza and drank beer with six guys at a six seat table top. I almost felt like a free man who was not living in the slave state of North Carolina."[91] The professor, a white male, added, "Massa Cooper, let my people go!"[92] There was additional outrage in Chicago, Illinois when a civil procedure

---

[86] Cindy Boren, *A Timeline of Colin Kaepernick's Protests Against Police Brutality, Four Years After They Began*, WASH. POST (Aug. 26, 2020), https://www.washingtonpost.com/sports/2020/06/01/colin-kaepernick-kneeling-history/ (Kaepernick stated, "I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color. To me, this is bigger than football, and it would be selfish on my part to look the other way. There are bodies in the street and people getting paid leave and getting away with murder."); *see also* Kurt Streeter, *Kneeling, Fiercely Debated in the N.F.L., Resonates in Protests,* N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/06/05/sports/football/george-floyd-kaepernick-kneeling-nfl-protests.html.

[87] *E.g.*, SEAN STEVENS & ANNE SCHWICHTENBERG, FOUND. FOR INDIVIDUAL RTS. IN EDUC., COLLEGE FREE SPEECH RANKINGS: WHAT'S THE CLIMATE FOR FREE SPEECH ON AMERICA'S COLLEGE CAMPUSES? (2021), https://www.thefire.org/research-learn/2021-college-free-speech-rankings; *see also* JOHN S. & JAMES L. KNIGHT FOUND. & GALLUP, THE FIRST AMENDMENT ON CAMPUS 2020 REPORT: COLLEGE STUDENTS' VIEWS OF FREE EXPRESSION (2020), https://knightfoundation.org/wp-content/uploads/2020/05/First-Amendment-on-Campus-2020.pdf [hereinafter JOHN S. & JAMES L. KNIGHT FOUND. & GALLUP 2020]; JOHN S. & JAMES L. KNIGHT FOUND. & IPSOS, COLLEGE STUDENT VIEWS ON FREE EXPRESSION AND CAMPUS SPEECH 2022: A LOOK AT KEY TRENDS IN STUDENT SPEECH VIEWS SINCE 2016 (2022), https://knightfoundation.org/reports/college-student-views-on-free-expression-and-campus-speech-2022/ [hereinafter JOHN S. & JAMES L. KNIGHT FOUND. & GALLUP 2022].

[88] JOHN S. & JAMES L. KNIGHT FOUND. & GALLUP 2022, *supra* note 87, at 2.

[89] *Id.* at 2, 20 fig.17.

[90] Jordan Culver, *A North Carolina Professor Who Sparked Outrage with His Tweets Still Has His Job. Why? It's Called the First Amendment*, USA TODAY (June 11, 2020, 12:22 PM), https://www.usatoday.com/story/news/nation/2020/06/10/first-amendment-north-carolina-wilmington-professor-tweets/3173332001/.

[91] *Id.*

[92] *Id.*

professor included an employment discrimination question testing the concept of work product on a final examination chose to use the "b word" and the "n word," without spelling the words out, in referencing an African American woman.[93] Further, an administrator sought to sanction a law professor at Penn State for "racist, sexist, xenophobic, and homophobic actions and statements."[94] The professor made "inflammatory and derogatory public comments," such as that the United States would be "better off with fewer Asians and less Asian immigration," and said to a Black faculty colleague that it is "rational to be afraid of Black men in elevators."[95] The tension between academic freedom and racially offensive comments is further exemplified by a decision to relieve a tenured professor at San Diego State University (SDSU) of his teaching duties in race and critical thinking after he made racially charged comments in class lectures, which received both support and criticism.[96] SDSU's Associated Students supported the decision, while the Foundation for the Individual Rights in Education (FIRE)[97] slammed it.[98] There continues to be a conflict over the lines between academic freedom and hostile educational environment.

As the tension between academic freedom and hostile education environment mounts, there is a movement afoot to ban critical race theory,[99] which further hampers diversity and inclusion in education.[100] The murder

---

[93] Erick Johnson, *Exam Question Stirs Outrage at John Marshall Law School*, THE CRUSADER (Feb. 20, 2021, 3:11 PM), https://chicagocrusader.com/exam-question-stirs-outrage-at-john-marshall-law-school/.

[94] Chanel Hill, *Penn Law Professor Faces Evaluation by Peers for 'Racist Speech*,*'* PA. CAP.-STAR (July 19, 2022, 2:01 PM), https://www.penncapital-star.com/blog/penn-law-professor-faces-evaluation-by-peers-for-racist-speech/.

[95] *Id.*

[96] Gary Robbins, *SDSU Slammed, Supported for Reassigning Teacher who Used Racial Epithets in Lectures*, SAN DIEGO UNION-TRIB. (Mar. 9, 2022, 4:45 PM), https://www.sandiegouniontribune.com/news/education/story/2022-03-09/san-diego-state-university-teacher-racial-epithets.

[97] *Id.* FIRE asserts that it acts on behalf of people who the organization believes "were the victims of illiberal policies and double standards." *Id.*

[98] *Id.*

[99] Vanessa Miller, Frank Fernandez & Neal H. Hutchens, *The Race to Ban Race: Legal and Critical Arguments Against State Legislation to Ban Critical Race Theory in Higher Education*, 88 MO. L. REV. 61, 66–67 (2023) ("Critical race theory is an academic legal framework based on the premise that race and racism are central in the formation of American law and society. It rose to prominence in the 1970s and 1980s based on the work of legal scholars who became disillusioned with the unfulfilled social, political, and economic promises of the Civil Rights Movement. CRT scholars hold that stark racial disparities persist in the United States despite decades of civil rights legislation because racism is embedded into the systems and traditions of American society, which maintain and enforce racial hierarchies that produce disparities. CRT scholarship does not hold a canonical set of principles or methodologies but does generally seek to examine the relationship between law and race and challenges the ways in which race is constructed and represented in American legal culture.").

[100] RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 17:34.30 (2d ed. 2023) (noting that "[a]mong the byproducts of America's polarized politics and culture wars has been a movement to ban the teaching of 'Critical Race Theory' from the nation's schools, colleges, and universities"); *see also* Joshua Gutzmann, Essay, *Fighting Orthodoxy: Challenging Critical Race Theory Bans and Supporting Critical Thinking in Schools*, 106 MINN. L. REV. HEADNOTES 333, 333–34 (2022) (noting that "Fox News mentioned critical race theory (CRT) more than 1,900 times from April to mid-July of 2021, marking CRT as a new focus of Republicans and conservative donors and sparking a

of George Floyd not only brought protest due to the mistreatment of African American citizens, but also provoked activism from conservative legislators and citizens who did not want to address racial tension.[101] One form of response was the conservative activist movement to ban critical race theory, which quickly won the support of Donald Trump.[102] These decisions to eliminate critical race theory from the classroom are another message to African American students that they are not welcome and that their presence and history are not valued.[103] While the objective of critical race theory is to address the continued presence of racism in the American justice system, the ban on critical theory works to suppress the issues and fails to address racism.[104] Like racially offensive comments, the decision to ban critical race theory creates a hostile educational environment.

The country is at a crossroads of the debate between academic freedom and a hostile educational environment. As noted above with the viewpoints of the SDSU Associated Students and FIRE, this tension will not easily go away, and there are no simple solutions to the conflict. As the country confronts a political divide on major issues[105] and a new makeup of the Supreme Court,[106] this tension will last for a long time. The universities continue to be venues for constant debates. The university system must take

---

movement to ban teaching of the theory in schools. Nine states have already passed legislation intended to ban the teaching of CRT, and nineteen states are considering similar legislation."); Maria Ignacia Araya, Comment, *Censorship of the Marketplace of Ideas: Why Critical Race Theory Bans in Public Schools Violate the First and Fourteenth Amendments*, 47 NOVA L. REV. 31, 31 (2022) (noting that "[c]ritical race theory has reemerged under the national spotlight in the last two years"); Ebony McKeever, *Who Turned Out the Lights?: How Critical Race Theory Bans Keep People in the Dark,* 15 WASH. U. JURIS. REV. 111, 139 (2022) (arguing that "[b]ans on critical race theory are undeniably both a product of racism *and* an instance of contrived ignorance being weaponized by state legislatures"); Miller, Fernandez, & Hutchens, *supra* note 99, at 63 ("Conservative government officials across the country are supporting state education laws and policies that could alter the nature of higher education in some states. The laws and policies attempt to ban institutions from teaching critical race theory ('CRT'), an academic framework that scholars use to examine the relationship between law and race, and more broadly seek to prohibit the teaching of ideas that include the premise that racism and sexism are pervasive in our society.").

[101] Miller, Fernandez, & Hutchens, *supra* note 99, at 69–81.

[102] *Id.* at 69–73 (noting that while the murder of George Floyd and the ensuing protests received national attention, a White conservative activist called on then-President Donald Trump to ban teaching critical race theory).

[103] Nicquel Terry Ellis & Eva McKend, *Black Parents Say Movement to Ban Critical Race Theory is Ruining Their Children's Education*, CNN (Dec. 2, 2021, 4:51 PM) https://www.cnn.com/2021/12/02/us/black-parents-and-critical-race-theory/index.html (an African American mother of a second grader lamented regarding the ban on critical race theory that "[t]his is a way for them to stop, or try to prevent the schools from actually teaching, and practicing, equity, diversity and inclusion across the schools. . . . I hear a lot of White mothers say they think their child is too young to learn about racism. You know what, my child's not too young to experience it.").

[104] Miller, Fernandez, & Hutchens, *supra* note 99, at 95–102.

[105] *See generally* Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689 (2015) (The author notes that "[p]olitical polarization has become a major focus in contemporary discussions on congressional activity and governance." She further notes that "[t]he tone of these discussions has grown increasingly grim, as many political scientists argue that a constitutional system of divided and shared powers hardens current levels of partisan warfare into legislative gridlock.").

[106] Adam Liptak, *A Transformative Term at the Most Conservative Supreme Court in Nearly a Century*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html.

the lead in striking this balance, with a process that includes faculty, student governance, and accrediting bodies.

CONCLUSION

The Supreme Court was correct in deferring to the public school systems in addressing issues of academic freedom and regulating the actives of faculty and students in an educational setting.[107] Public university systems must take the lead in establishing reform and regulating activities on campus in order to rightfully protect academic freedom, while concurrently ensuring that the educational environment is not hostile and that all faculty and students feel welcomed. Constituents of faculty governance must ensure that tenure and promotion procedures provide clear criteria for acceptable and unacceptable behavior. In addition, accrediting bodies—like the ABA, whose standards are presently lacking in clarity—must revise their standards to provide clearer directives on measuring appropriate behavior by faculty.[108] These bodies should be guided by the standards established in sexual harassment employment discrimination cases, where the Supreme Court provided a two-prong objective and subjective standard on when a claim is actionable.[109] Similar to the Supreme Court standard, internal review of faculty behavior should be based on an objectively reasonable standard and a subjective standard based on the effect on the offended person. The tension between academic freedom and racially offensive comments must be addressed, and the shared governance process within the educational setting must take the lead in reform. A reviewing court should only intervene and overturn an academic decision if "it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[110] The time to take action is now.

---

[107] *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985).

[108] Am. Bar Ass'n, *ABA Standards and Rules of Procedure for Approval of Law Schools 2022–2023*, 13–15 (Erin Winters ed., 2022), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the bar/standards/2022-2023/22-23-standard-ch2.pdf.

[109] *See, e.g.*, Harris v. Forklift Sys., 510 U.S. 17, 21–22 (1993) ("This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor*, 'mere utterance of an . . . epithet which engenders offensive feelings in an employee,' . . . does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.") (citations omitted); Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) ("So, in *Harris,* we explained that in order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.") (citing *Harris,* 510 U.S. at 21–22).

[110] *Ewing,* 474 U.S. at 225.