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Clay Calvert
University of Florida

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Expert Testimony by Public University Faculty: Exposing Doctrinal Deficiencies of Academic Freedom as a Legal Right and Proposing a Solution Within the Public-Employee Speech Doctrine

CLAY CALVERT*

When the University of Florida ("UF") prohibited three professors in 2021 from serving as expert witnesses in a lawsuit filed against the State of Florida, the decision sparked a national debate about academic freedom and free speech at public universities. The professors also sued UF in federal court in Austin v. University of Florida Board of Trustees alleging a violation of their First Amendment rights. This Article asserts that the constitutional doctrine of academic freedom is sadly deficient for resolving such lawsuits. The Article explains, instead, that the public-employee speech doctrine provides the appropriate framework for analyzing cases filed by public university professors who are barred from testifying as experts in litigation where the state affiliated with the professors' university is a defendant. The Article avers, however, that this should not render irrelevant the constitutional value of academic freedom when courts examine such cases under the public-employee speech doctrine. Indeed, the Article contends that academic freedom should be treated as a substantial interest that must be balanced

* Professor of Law, Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida in Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. The views and arguments expressed in this Article are those of its author, not the University of Florida, its board of trustees, or its administration.

against a university's rationale for blocking expert-witness testimony. Importing academic freedom into the public-employee speech framework in this manner serves what former Yale Law School Dean Robert Post aptly calls "the value of democratic competence."

INTRODUCTION

The University of Florida ("UF") garnered extensive negative publicity in late 2021 after banning—due to alleged conflict-of-interest concerns—three political science professors from testifying as expert witnesses in litigation against the State of Florida.[1] To wit, *The New York Times* deemed UF's prohibition "an extraordinary limit on speech that raises questions of academic freedom and First Amendment rights."[2] Similarly, *The Washington Post* characterized

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[1] The underlying litigation in which the professors sought to testify challenges the constitutionality of various facets of a new Florida statute affecting voters' rights. *See* Class Action Complaint for Injunctive and Declaratory Relief at 75, Fla. Rising Together v. Leed, No. 4:21-cv-00201 (N.D. Fla. May 17, 2021) ("The Secure Drop Box Restriction, the Vote-By-Mail Application Restriction, and the Line Warming Restriction violate the Fourteenth Amendment to the United States Constitution because they were purposefully enacted and operate to deny, abridge, or suppress the right to vote of otherwise eligible voters on account of race or color."). The University of Florida initially explained that it denied the requests of Professors Daniel Smith, Michael McDonald, and Sharon Austin because they were "undertak[ing] outside paid work thatis adverse to the university's interests as a state of Florida institution." Press Release, Univ. of Fla., University Statement on Academic Freedom and Free Speech (Oct. 30, 2021), http://statements.ufl.edu/statements/2021/october/university-statement-on-academic-freedom-and- free-speech.html. Following intense criticism, UF changed its stance and permitted the professors to testify, with UF President Kent Fuchs stating that he had:

> asked UF's Conflicts of Interest Office to reverse the decisions on recent requests by UF employees to serve as expert witnesses in litigation in which the state of Florida is a partyand to approve the requests regardless of personal compensation, assuming the activity ison their own time without using university resources.

Press Release, Kent Fuchs, President, Univ. of Fla., Message from President Fuchs—Outside Activities By UF Employees Involving Litigation in Which the State of Florida Is a Party (Nov. 5, 2021), http://statements.ufl.edu/statements/2021/november/message-from-president-fuchs---outside-activities-by-uf-employees-involving-litigation-in-which-the-state-of-florida-is-a-party---.html; *see* Michael Wines, *University of Florida Reverses Course to Allow Professors to Testify Against State*, N.Y. TIMES (Nov. 5, 2021), https://www.nytimes.com/2021/11/05/us/voting-rights-florida-professors-testify.html ("Acceding to a storm of protest, the University of Florida abandoned efforts . . . to keep three political science professors from testifying in a voting-rights lawsuit against the administration of Gov. Ron DeSantis.").

[2] Michael Wines, *Florida Bars State Professors From Testifying in Voting Rights Case*, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/11/05/

the restriction as prompting "sharp concerns about academic freedom and free speech."[3] *The Wall Street Journal*, in turn, reported that Democratic lawmakers from the Sunshine State, as well as professors nationwide, wrote to UF President Kent Fuchs "voicing concern over academic freedom and free-speech rights."[4] Indeed, when the aggrieved professorial trio sued UF in federal court in November 2021 in *Austin v. University of Florida Board of Trustees*, their complaint rebuked the institution for violating "foundational principles of academic freedom and free speech."[5]

What is striking about all four quotations above, as well as a letter from two members of the U.S. House of Representatives

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us/voting-rights-florida-professors-testify.html. The First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly 100 years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties applicable for governing the actions of state and local government entities and officials. Gitlow v. New York, 268 U.S. 652, 666 (1925).

[3] Andrew Jeong, *University of Florida Bars Faculty Members From Testifying in Voting Rights Lawsuit AgainstDeSantis Administration*, WASH. POST (Oct. 30, 2021, 4:25 AM), https://www.washingtonpost.com/nation/2021/10/30/florida-voting-rights-desantis-lawsuit/.

[4] Jennifer Calfas, *University of Florida Professors Allege School Leaders Violated First Amendment Rights*, WALL ST. J. (Nov. 5, 2021, 9:46 PM), https://www.wsj.com/articles/university-of-florida-professors-allege-school-leaders-violated-first-amendment-rights-11636163208.

[5] Complaint at 2, Austin v. Univ. of Fla. Bd. of Trs., 2022 WL 195612 (N.D. Fla. Jan. 21, 2022) (No. 1:21-CV-00184). An amended complaint in *Austin* was filed shortly later, adding three more plaintiffs, one of whom—Jeffrey Goldhagen, a professor of pediatrics—also alleged being denied the right to testify as an expert witness, but in a different lawsuit challenging an executive order by Florida Governor Ron DeSantis banning mask mandates in public schools. *See* Amended Complaint at 12–14, Austin v. Univ. of Fla. Bd. of Trs., 2022 WL 195612 (N.D. Fla. Jan. 21, 2022) (No. 1:21-CV-00184). The other two plaintiffs added to the amended complaint, Teresa J. Reid and Kenneth B. Nunn, are professors at UF's Levin College of Law. *Id.* at 4–5. They contended that UF prevented them from listing their institutional affiliation with UF when they signed on to a friend-of-the-court brief in a lawsuit challenging a state statute that "requires Florida citizens who have completed their sentence for felony convictions to pay any financial obligations included in their sentence before they can exercise their right to vote." *Id.* at 8. This Article focuses solely on expert testimony by public university professors in lawsuits in which a university's home state is a defendant and a state statute or constitutional provision is being challenged.

launching a Congressional investigation into the matter in November 2021, is how closely they connect academic freedom with free speech, as if they were twin interests.[6] Indeed, the U.S. Supreme Court has suggested that academic freedom implicitly resides in the First Amendment as a matter of "special concern."[7]

This Article, however, asserts in Part I that academic freedom as a constitutional right—although it can be viewed alternatively as a professional norm[8]—is doctrinally deficient for resolving in-court fights over whether a public university may lawfully bar its professors from testifying as experts in cases where the state affiliated with

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[6] *See* Letter from H. Comm. on Oversight and Reform, 117th Cong., to Dr. Wesley Kent Fuchs, President, Univ. of Fla., at 2 (Nov. 18, 2021), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2021-11-18.JR%20DWS%20to%20Fuchs-UF%20re%20Academic%20Freedoms.pdf ("We are . . . concerned that, possibly due to pressure from trustees, politicians, or others, UF has adopted and enforced a conflicts policy that undermines the academic and free speech values that are essential to American higher education.").

[7] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978). Dean Rodney Smolla points out that this phrasing by Justice Lewis Powell in *Bakke* of academic freedom being a matter of "special concern" to the First Amendment is not the same thing as identifying it as a distinct constitutional right. *See* Rodney A. Smolla, Fisher v. University of Texas: *Who Put the Holes in "Holistic"?*, 9 DUKE J. CONST. L. & PUB. POL'Y 31, 55 (2013) ("Powell did not actually say, of course, that academic freedom was a freestanding constitutional right guaranteed in the First Amendment, with distinct content and meaning, different from the rights of freedom of speech or freedom of assembly that actually *are* enumerated in the First Amendment.").

[8] WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION: STUDENT VERSION 288 (5th ed. 2014). ("The professional concept of academic freedom finds its expression in the professional norms of the academy, which are in turn grounded in academic custom and usage. The most recognized and most generally applicable professional norms are those promulgated by the American Association of University Professors."); *see* Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461, 481 (2005) (asserting that professional academic freedom involves "the understanding of academic freedom that exists outside the courts," while constitutional academic freedom pertains to "the constitutional understanding of academic freedom as a First Amendment value"); Sara E. Gross Methner, *A Catholic University Approach to Campus Speech: Using Constitutional Academic Freedom to Hold the Tension of Free Speech, Inclusive Diversity, and University Identity*, 15 U. ST. THOMAS L.J. 358, 372 (2019) (noting that "academic freedom developed as a professional norm of academia and not as a legal right"). A discussion of professional academic freedom is beyond the scope of this Article.

that university is a defendant.[9] The Article then explains in Part II that the Supreme Court's more firmly established public-employee speech doctrine provides the appropriate framework for analyzing such lawsuits.[10] That conclusion is somewhat unremarkable, of course, because public university professors are government employees.[11]

Applying the public-employee speech doctrine, however, should not render nugatory the constitutional value of academic freedom when courts examine expert-witness testimony lawsuits. Instead, Part III avers that academic freedom should be factored into the public-employee speech doctrine analysis as a substantial interest that must be balanced against a public university's rationale for blocking faculty from testifying.[12] Importing academic freedom into this analysis as a substantial interest, Part III contends what former Yale Law School Dean Robert Post calls "the value of democratic competence."[13] Finally, the Article concludes in Part IV by calling on courts to meld academic freedom into the public-employee speech doctrine in this manner in future cases, such as *Austin v. University of Florida Board of Trustees*.[14]

I. DOCTRINAL PROBLEMS PLAGUING ACADEMIC FREEDOM WHEN ANALYZING EXPERT-WITNESS LAWSUITS

Publicly framing a battle against a ban on professorial expert-witness testimony as a righteous fight for academic freedom may be a winning formula in the court of public opinion, but academic freedom provides a decidedly inadequate legal doctrine for prevailing in a court of law.[15] The author of this Article arrived at that conclusion

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[9] *See infra* Part I.

[10] *See infra* Part II.

[11] *See* Buchanan v. Alexander, 919 F.3d 847, 853 (5th Cir. 2019) ("Public university professors are public employees.").

[12] *See infra* Part III.

[13] ROBERT C. POST, DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 62 (2012).

[14] *See infra* Conclusion.

[15] Publicly framing the battle as about saving academic freedom may prove successful for professors in the court of public opinion because, as Professor Frederick Schauer points out, "most American academics believe that academic freedom is important, that there is a right to it, and that the right to academic freedom

while conducting research as a member of a seven-person task force appointed by UF President Kent Fuchs in November 2021 to "make a recommendation . . . on how UF should respond when employees request approval to serve as expert witnesses in litigation in which their employer, the state of Florida, is a party."[16]

Why is the constitutional doctrine of academic freedom ill-suited for resolving lawsuits such as *Austin* over conflict-of-interest bans on expert testimony by public university professors? There are multiple reasons. First, scholars overwhelmingly agree that academic freedom, as a legal right and doctrine, is both weak and muddled.[17] For example, the abovementioned Robert Post explains that "the doctrine of academic freedom stands in a state of shocking disarray and incoherence."[18] Similarly, Professor Aziz Huq asserts that it has "scant analytic heft"[19] and that "the Supreme Court's record on academic freedom is thin."[20] Dean Donald Weidner once rather wryly wrote that while "many assume that academic freedom is based in law, no one is quite sure what that law is."[21] Finally, as

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has constitutional status." Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 907 (2006); *see also* Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. COMMC'N 51, 52 (1993) ("To frame is to *select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation* for the item described.").

[16] *See* Press Release, Kent Fuchs, President, Univ. of Fla., Message from President Fuchs—Outside Activities By UF Employees Involving Litigation In Which the State of Florida Is a Party (Nov. 5, 2021), https://statements.ufl.edu/statements/2021/november/message-from-president-fuchs---outside-activities-by-uf-employees-involving-litigation-in-which-the-state-of-florida-is-a-party---html (listing author Clay Calvert as a member of the task force and setting for the task force's charge). The task force's recommendation was submitted on November 21, 2021, to Fuchs and can be found online. *See* TASK FORCE ON OUTSIDE ACTIVITIES, FINAL REPORT 1 (Nov. 21, 2021), https://fora.aa.ufl.edu/docs/147/Final%20Report.pdf (Univ. of Fla.).

[17] *See infra* notes 18–22 and accompanying text (providing examples of scholars' views illustrating this point).

[18] POST, *supra* note 13, at 62.

[19] Aziz Huq, *Easterbrook on Academic Freedom*, 77 U. CHI. L. REV. 1055, 1055 (2010).

[20] *Id.* at 1057.

[21] Donald J. Weidner, *Bureaucracy and Distrust: Academic Freedom and the Obligation to Earn It*, 32 J. L. & EDUC. 445, 445 (2003).

Professor Alan Chen crisply encapsulates the situation, "the Supreme Court sporadically has made compelling statements about the importance of academic freedom, yet, it has been either unable or unwilling to develop a coherent framework for assessing the scope of constitutional academic freedom rights."[22] In short, the constitutional doctrine of academic freedom is inchoate, even chaotic.

Beyond such doctrinal disorganization, a second problem for public university professors seeking to rely on a legal right of academic freedom is that at least two federal appellate courts—the Fourth and Sixth Circuits—have held that academic freedom is not an individual professor's right, but rather is an institutional right possessed by a college or university in its decision making.[23] Put slightly differently by one commentator, the Fourth Circuit's 2000 decision in *Urofsky v. Gilmore*[24] "essentially says that state university professors have no greater academic freedom rights under the First Amendment than any other state employees."[25]

Academic freedom, when conceptualized as an unenumerated institutional right emanating from the First Amendment, centers on what Justice Lewis Powell once called"[t]he freedom of a university to make its own judgments as to education."[26] More recently, in citing Justice Powell's observation, Justice Sandra Day O'Connor equated this institutional right with "a constitutional dimension,

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[22] Alan K. Chen, *Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 959 (2006).

[23] *See* Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) ("to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by the terms of the Act"); Johnson-Kurek v. Abu-Absi, 423 F.3d 590, 593 (6th Cir. 2005) (quoting approvingly the Fourth Circuit's holding in *Urofsky*).

[24] *See Urofsky*, 216 F.3d 401.

[25] Donald J. Weidner, *Thoughts on Academic Freedom:* Urofsky *and Beyond*, 33 U. TOL. L. REV. 257, 257 (2001).

[26] *Bakke*, 438 U.S. at 312. Justice Powell located this interest as flowing from the First Amendment, rather than being a standalone right. He wrote, "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Id.* at 312 (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

grounded in the First Amendment, of educational autonomy."[27] When academic freedom is viewed as an institutional right, it suggests that courts should afford deference to decisions made by colleges and universities regarding matters such as what is taught and how it is taught.[28]

Another doctrinal roadblock further compounds problems for public university professors who invoke academic freedom as an individual constitutional right when seeking to testify as experts in litigation against their home states.[29] Professor Michael Park recently wrote that "[the U.S. Supreme] Court has never recognized a First Amendment right of academic freedom reserved for the professoriate. Public university faculty must confront the hard reality that 'freedom' that comes with 'academic freedom' is perhaps more a professional norm than a special constitutional privilege."[30] In other words, not only have two federal appellate courts explicitly concluded that an individual constitutional right of academic freedom does not exist, but the nation's highest court has never expressly acknowledged its existence.[31]

Additionally, when the Supreme Court has spoken about the importance of individual academic freedom, it has focused on the value of protecting on-campus expression in the classroom, not on

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[27] Grutter v. Bollinger, 539 U.S. 306, 329 (2003). *See also* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214,226 n.12 (1985) (asserting that academic freedom thrives "on autonomous decision making by the academy itself").

[28] *See* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 237 (2000) (Souter, J., concurring) ("Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach."); *see also* Patrick M. Garry, *When Legislatures Become the Ally of Academic Freedom: The First State Intellectual Diversity Statute and Its Effect onAcademic Freedom*, 71 S. C. L. REV. 175, 195 (2019) ("[S]ome have suggested that perhaps academic freedom should be viewed as a form of judicial deference given to academic institutions. Under this view, courts are commanded to give deference to the decisions of academic institutions regarding the academic mission and operation of those institutions").

[29] *See* Michael K. Park, *A Matter of Public Concern: The Case for Academic Freedom Rights of Public University Faculty*, 26 COMMC'N L. & POL'Y 32, 33 (2021).

[30] *Id.* at 51; *see also* Schauer, *supra* note 15, at 910 ("thestock of Supreme Court cases provides little support for a distinct individual right to academic freedom").

[31] *See* Park, *supra* note 29, at 51; *supra* notes 23–25 and accompanying text.

privileging expert testimony by professors in courtrooms.[32] For instance, in its 1967 decision in *Keyishian v. Board of Regents of the State University of New York*, the Court opined that academic freedom is "a special concern ofthe First Amendment, which does not tolerate laws that cast a pall of orthodoxy *over theclassroom*."[33] It added there that "*[t]he classroom* is peculiarly the 'marketplace of ideas,'"[34] and the goal, in turn, is to expose the nation's future leaders to a "robust exchange of ideas."[35] In brief, *Keyishian* casts academic freedom as a classroom-centric value.

A decade earlier, the Court asserted in *Sweezy v. New Hampshire* that "[t]o impose any strait jacket upon the intellectual leaders *in* our colleges and universities would imperil the future of our Nation."[36] Emphasis is added above by this Article's author to the geographic-specific word "in" because the Court could have—but did not—opine that imposing a strait jacket upon the intellectual leaders *of* such universities would imperil the country's future. In other words, "in" more closely cabins the scope of the Court's assertion than "of" would have; the semantics matter here.

In 1970, when "reaffirming this Nation's dedication to safeguarding academic freedom,"[37] the Court in *Healy v. James* pushed out the geographic boundaries of this freedom slightly beyond the classroom, remarking that "[t]he college classroom *with its surrounding environs* is peculiarly the 'marketplace of ideas.'"[38] In sum, to the extent that the Supreme Court has intimated that faculty possess a constitutional right of academic freedom when speaking, it is as an on-campus right planted within the sphere of a university.[39] While the Court in cases such *Sweezy* and *Keyishian* certainly

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[32] *See* Park, *supra* note 29, at 34.

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

[34] *Id.* (emphasis added); *see* Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in FirstAmendment Law*, 24 COMMC'N L. & POL'Y 437 (2019) (addressing the marketplace of ideas metaphor in First Amendment jurisprudence).

[35] *Keyishian*, 385 U.S. at 603.

[36] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (emphasis added).

[37] Healy v. James, 408 U.S. 169, 180–81 (1972).

[38] *Id.* at 180 (emphasis added) (quoting *Keyishian*, 385 U.S. at 603).

[39] Rust v. Sullivan, 500 U.S. 173, 200 (1991) ("[T]he 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* by means of

praises academic freedom, Professor Scott Bauries points out that the Court "has never used the concept of individual academic freedom in the First Amendment context as more than rhetorical makeweight."[40] In brief, relying on a constitutional right of academic freedom simply is insufficient, at least standing alone, to protect professors in expert-witness testimony cases such as *Austin*.[41]

II. HOW THE PUBLIC-EMPLOYEE SPEECH DOCTRINE GOVERNS EXPERT-WITNESS LAWSUITS

Rather than being controlled by nebulous legal conceptions of constitutional academic freedom,[42] lawsuits such as *Austin* over blocking expert testimony by public university faculty as an alleged conflict of interest are better dictated by well-established First Amendment principles of public-employee speech rights.[43] Those rules were fashioned by the U.S. Supreme Court in the cases of *Pickering v. Board of Education*,[44] *Connick v. Myers*,[45] *Garcetti v. Ceballos*,[46] and *Lane v. Franks*.[47] Indeed, the public-employee speech test created by the Court in *Pickering* and *Connick* was applied by the U.S. Court of Appeals for the Fifth Circuit nearly twenty-five

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conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines . . . .") (emphasis added). Presumably this right of academic freedom when teaching extends in the Zoom era to off-campus, online classrooms, even thoughsuch virtual venues are not physically situated on campus. However, that issue is beyond the scope of this Article.

[40] Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677, 678–79 (2014).

[41] *See* Park, *supra* note 29, at 38.

[42] *See* Aurora Temple Barnes, *Guns and Academic Freedom*, 53 GONZ. L. REV. 45, 49 (2017) (addressing "the nebulous world of academic freedom," and pointing out that "[t]he Supreme Court has never decided a case on the grounds of academic freedom alone. The Court created this doctrine through fervent rhetoricand expounding ideals within the dicta of cases decided on other grounds.").

[43] *See* Frank D. LoMonte, *Putting the 'Public' Back into Public Employment: A Roadmap for Challenging Prior Restraints That Prohibit Government Employees from Speaking to the News Media*, 68 U. KAN. L. REV. 1, 7 (2019)(describing the public-employee speech doctrine framework that the Court began to fashion in *Pickering v. Board of Education*, 391 U.S. 563 (1968) as "enduring").

[44] Pickering v. Board of Education, 391 U.S. 563 (1968).

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

[46] Garcetti v. Ceballos, 547 U.S. 410 (2006).

[47] Lane v. Franks, 573 U.S. 228 (2014).

years ago in the only federal appellate court decision to squarely address this issue, *Hoover v. Morales*.[48]

In *Hoover*, the State of Texas asserted "that an inherent conflict of interest is created by state employees acting as or being retained as consultants or expert witnesses for the opposition in litigation against the State."[49] The Fifth Circuit derided Texas's interest "in preventing state employees from speaking in a manner contrary to the State's interests" as "amorphous" and insufficient to pass First Amendment review under the *Pickering/Connick* framework.[50] Despite the lawsuit having been filed by several professors and the Texas Faculty Association, the Fifth Circuit never once used the term "academic freedom" and never referenced any key Supreme Court academic-freedom rulings such as *Keyishian* and *Sweezy*.[51] Simply put, *Hoover* was not resolved as an academic freedom case, but as a public-employee speech dispute.[52] The Fifth Circuit left open the possibility that a less broad and more carefully crafted policy targeting expert witness testimony by public university faculty members might be permissible under the First Amendment.[53]

So, how might the *Pickering-Connick* test work today in professorial expert-witness testimony cases such as *Austin v. University of Florida Board of Trustees*? First, the test affords qualified First Amendment protection to public employees when they speak as private citizens about matters of public concern.[54] The threshold

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[48] Hoover v. Morales, 164 F.3d 221 (5th Cir. 1998); *see* Robert R. Kuehn, *A Normative Analysis of the Rights and Duties of Law Professors to Speak Out*, 55 S. C. L. REV. 253, 262 (2004) (noting that the Fifth Circuit in *Hoover* "applied the *Pickering* test").

[49] *Hoover*, 164 F.3d at 226.

[50] *Id.*

[51] *See id.* at 224 ("[the lawsuit was filed by] [c]ertain professors, who have been retained or havevolunteered on a pro bono basis to testify in various litigation against the State, and the Texas Faculty Association"). *See supra* notes 33–40 and accompanying text (addressing *Keyishian* and *Sweezy*).

[52] *See id.* at 227.

[53] *See Hoover*, 164 F.3d at 227 ("[T]here may be occasions when the State's interest in efficient delivery of public services will be hindered by a state employee acting as an expert witness or consultant . . . . Our opinion does not foreclose consideration of rules and regulations aimed at limiting expert testimony of faculty members or other state employees which adhere to our FirstAmendment jurisprudence.").

[54] Garcetti v. Ceballos, 547 U.S. 410, 417–20 (2006).

question therefore is whether a public university professor who delivers expert-witness testimony is speaking as a private citizen.[55] In *Garcetti*, the Court explained that when "public employees make statements pursuant to their official duties," they are not speaking as private citizens.[56] Put differently, if public employees are speaking pursuant to their official job duties, then the First Amendment's Free Speech Clause does not protect them against punishment by their government employer.[57] However, because speaking as an expert witness in a lawsuit almost certainly is *not* among the official job duties of public university professors, they are speaking as private citizens when they testify as experts in such matters and thus may have First Amendment rights.[58] Indeed, the Supreme Court concluded in the public-employee speech case of *Lane v. Franks* that "[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes."[59]

The second question then becomes whether the subject matter of the lawsuit about which they are testifying is a matter of public concern. The Court today broadly defines matters of public concern to encompass speech that "can 'be fairly considered as relating to any

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[55] *See id.*at 418 ("The first [inquiry] requires determining whether the employee spoke as a citizen on a matter of public concern.").

[56] *Id.* at 421. This aspect of *Garcetti* has been criticized. *See* John E. Rumel, *Public Employee Speech: Answering the Unanswered and Related Questions in* Lane v. Franks, 34 HOFSTRA LAB. & EMP. L. J. 243, 245 (2017) ("*Garcetti* improperly focused on the public employee's role and duties rather thanthe content of the speech").

[57] *See* Caroline Mala Corbin, *Government Employee Religion*, 49 ARIZ. ST. L. J. 1193, 1198 (2017) ("Government employee speech that is made fulfilling one's job responsibilities is not protected by theFree Speech Clause. This limit was announced in 2006 by *Garcetti v. Ceballos*.").

[58] Although the determination of whether a public employee is speaking pursuant to his or her official jobduties is made on a case-by-case basis, this Article's author is unaware of any public university professor whose official job duties require providing expert testimony in lawsuits. *See* Lincoln v. Maketa, 880 F.3d 533, 538 (10th Cir. 2018) (noting that because "[n]o bright-line rule governs when employees are speakingas part of their official duties," courts must "conduct a practical inquiry on a case-by-case basis").

[59] Lane v. Franks, 573 U.S. 228, 238 (2014) ("[s]worn testimony in judicial proceedings isa quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears anobligation, to the court and society at large, to tell the truth.").

matter of political, social, or other concern to the community' . . . or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[60] Three factors—the content, form, and context of the speech—are used when making this determination, with no single factor controlling.[61] A lawsuit challenging the constitutionality of a state statute affecting a civil right—the right to vote is the subject of the underlying lawsuit in which the three UF professors were initially barred from testifying—certainly seems to be a matter of public concern under the definition and factors above.[62] Of course, not all lawsuits filed by public employees such as the professorial plaintiffs in *Austin* involve speech about matters of public concern.[63] However, a case such as *Austin*, which pivots on testimony challenging the constitutionality of a state law, rather than expert testimony in a case centering on remedying a personal grievance, clearly focuses on a matter of public concern.[64]

In situations such as *Austin* where public employees are speaking (or seek to speak) in their private capacity about matters of public concern, the employees' First Amendment rights may be vitiated under the *Pickering-Connick* framework only when the "restrictions . . . are necessary for their employers to operate efficiently

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[60] Snyder v. Phelps, 562 U.S. 443, 453 (2011) (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).

[61] *Id.* at 453–54.

[62] *See supra* note 1 (describing the subject matter of the underlying lawsuit in which the three UF professors sought to testify); *see also* Adams v. Trs. of Univ. of N. Carolina-Wilmington, 640 F.3d 550, 565(4th Cir. 2011) (holding that speech about "civil rights" is a matter of public concern).

[63] *Compare* Ruotolo v. City of New York, 514 F.3d 184, 189–90 (2d Cir. 2008) (holding that a lawsuit filed "to redress . . . personal grievances" did not involve "speech on a matter of public concern," and adding that "[a] generalized public interest in the fair or proper treatment of public employees is not enough" to turn a lawsuit into one involving speech about a matter of public concern), *with* Bachus v. Schenectady City Sch. Dist., 09-CV-0843, 2011 U.S. Dist. LEXIS 13444, at *24 (N.D.N.Y. Feb. 10, 2011) ("[W]hen a complaint concerns general problems in the work place, such as harassment or discrimination, it is a matter of public concern, regardless of whether the complainant is motivated by a personal grievance.").

[64] *Cf.* Oscar Renda Contracting, Inc. v. City of Lubbock, 463 F.3d 378, 383 (5th Cir. 2006) ("If the lawsuit is only a matter of personal interest to the employee, it is not considered a matter of public concern.").

and effectively."[65] In other words, when public university professors speak in a private-citizen capacity as expert witnesses in lawsuits pivoting on matters of public concern, they possess First Amendment speech rights, but those rights are not absolute.[66] They must be balanced against their university's interest in efficiently delivering its services to the public.[67] As the Court wrote in *Connick*, "[t]he *Pickering* balance [methodology]requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."[68] The next Part argues that academic freedom, viewed as a constitutional value, should play an important role within the balancing-of-interests analysis in cases such as *Austin*.

III. INJECTING ACADEMIC FREEDOM INTO THE *PICKERING-CONNICK* FRAMEWORK AS A SUBSTANTIAL INTEREST

The balancing facet of the *Pickering-Connick* test is where academic freedom should have a significant impact in expert-witness testimony scenarios such as that which sparked the 2021 lawsuit in *Austin*.[69] Rather than representing a distinct legal right or doctrine, however, academic freedom is better conceptualized within the *Pickering-Connick* balancing methodology as what the Supreme Court in *Garcetti* called "a constitutional value."[70] That constitutional value, as proposed here and as operationalized in expert-witness testimony scenarios, is founded upon two interests: 1) a professor's individual-level interest in self-realization when speaking to judges during litigation about their area of expertise, and 2) a collective-level public interest in receiving knowledge from a professorial expert on a matter of public concern.

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[65] Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).

[66] *See, e.g., id.* at 422 ("The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with the right to perform their jobs however they see fit.").

[67] *See* Lane v. Franks, 573 U.S. 228, 237 (2014) (describing the "balancing [of] the employee's interest in such speech againstthe government's efficiency interest").

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

[69] *See infra* Part III (elaborating on this argument).

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

The first of these interests taps into Professor Thomas Emerson's observation more than a half-century ago that "freedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realization of his character and potentialities as a human being."[71] Of particular importance when it comes to expert-witness testimony, Emerson stressed that "man in his capacity as a member of society has a right to share in the common decisions that affect him."[72] When public university professors testify as experts in lawsuits involving matters of public concern, they are participating in the democratic process by sharing their knowledge on topics that will affect both them and their communities, such as the voters' rights that are at issue in the underlying litigation giving rise to *Austin*.[73] This self-realization interest benefits society at large.[74] As Justice Louis Brandeis famously wrote ninety-five years ago, the nation's founders "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth[.]"[75]

The second interest noted above is a collective-level public interest in receiving knowledge from a professorial expert on a matter of public concern.[76] This interest embraces what Robert Post calls a key "justification for the constitutional principle of academic freedom."[77] It is "our democracy's need for the creation and distribution of expert knowledge"[78] and the need to "safeguard the disciplinary standards by which expert knowledge is recognized and produced."[79] The dissemination of expert knowledge facilitates what Post calls "democratic competence."[80] If a faculty member's expert-

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71 THOMAS I. EMERSON, THE SYSTEM OF FREE EXPRESSION 6 (1970).

72 *See id.*

73 Emerson stressed that such participation is another fundamental value of free speech. *See id.* at 7 ("[F]reedom of expression is essential to provide for participation in decision making by allmembers of society.").

74 *See id.* at 7–8.

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

76 *See generally* Robert Post, *Why Bother with Academic Freedom?*, 9 FIU L. REV. 9 (2013) (proposing that expert knowledge is itself valuable to society, "regardless of whether it involves a matter of public concern").

77 *Id.* at 14.

78 *Id.*

79 *Id.* at 15.

80 *See* POST, *supra* note 13, at 61–62.

witness testimony is grounded in their peer-reviewed research that is published within their discipline, then this interest seems particularly strong in permitting them to testify.[81] To wit, the Supreme Court in the 2014 public-employee speech case of *Lane v. Franks* stressed that the public has an interest in receiving speech from informed public employees.[82]

Testimony by public university professors in lawsuits challenging the constitutionality of state laws seemingly enhances the decision-making skills of judges.[83] It does so by providing them with expert knowledge regarding the issue on which they must rule.[84] Judges, of course, may freely reject expert knowledge conveyed by professors; that is their prerogative.[85] Yet, the judges' decisions inevitably will affect democracy in cases such as that underlying the dispute in *Austin* where the right to vote hangs in the balance.[86] When judges wield the power of judicial review to strike down laws for violating the U.S. Constitution, the interest in making available to them expert knowledge conveyed by professors seemingly is paramount.[87]

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[81] *Id.* at 77 ("the First Amendment value at stake in academic freedom of research and publication is democratic competence. The value encompasses *both* the ongoing health of universities as institutions that promote the grown of disciplinary knowledge *and* the capacity of individual scholars to promote and disseminate the results of disciplinary inquiry.").

[82] *See* Lane v. Franks, 573 U.S. 228, 236 (2014) ("'The interest at stake is as much the public's interest inreceiving informed opinion as it is the employee's own right to disseminate it.'") (quoting City of San Diego v. Roe, 543 U.S. 77, 82 (2004)).

[83] *See* Marcello Gabaordi, *How Judges Can Think: The Use of Expert's Knowledge as Proof in Civil Proceedings*, 18 GLOB. JURIST 1, 23 (2018) ("[T]he judge largely adapts its conclusion on scientific or technical issues to the expert's opinion.").

[84] *See id.* at 2 ("[W]hen the judge is called upon to consider a question of fact involving a certain amount of *technical or scientific* complexity, . . . the expert's opinion need generally to be heard.").

[85] *See id.* at 23 ("It is certainly true that the judge may potentially disregard the expert's opinion.").

[86] *Cf.* Burson v. Freeman, 504 U.S. 191, 198 (1992) (noting the "particularly difficult" First Amendment issues involving "the right to engage in political discourse with the right to vote—a right at the heart of our democracy").

[87] *See* POST, *supra* note 13, at 79 ("The justification for deference [to faculty] is that courts are not well equipped to second-guess the exercise of professional

The chain of logic that this Article propounds here optimally unspools as follows: Academic expertise, when conveyed via professorial testimony, facilitates judicial competence. This, in turn, facilitates wise decisions that affect a democratic society and its citizens, thereby serving the collective-level public interest. Wise judicial opinions therefore represent the public manifestation of democratic competence that can flow from a professor's testimony.

Post asserts that "[t]he value of democratic competence is undermined whenever the state acts to interrupt the communication of disciplinary knowledge that might inform the creation of public opinion."[88] This sentiment translates rather neatly, with minor reordering and word substitutions, to cases such as *Austin* as: When a public university (i.e., the state) bars its professors from communicating as expert witnesses their disciplinary knowledge that might inform the creation of judicial opinion, this interruption of communication undermines the value of democratic competence.[89]

In sum, two interests underlying professorial expert-witness testimony—self-realization and democratic competence—meld together, giving rise to the constitutional value of academic freedom in cases such as *Austin*.[90] This constitutional value should be afforded substantial weight in favor of expert testimony by courts in the *Pickering-Connick* framework when balanced against a public university's interest in efficiently and effectively providing its pedagogical and research services to the public.[91] Put slightly differently, the constitutional value of academic freedom in expert-witness testimony cases is founded on two interests—*a right to speak* (a professor's right of self-realization as a speaker) and *a right to receive speech* (a right of judges to receive knowledge to help them reach wise and informed decisions affecting matters of public concern)—that should be weighed heavily within the traditional First

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scholarly standards that advance the constitutional value of democratic competence in the context of university scholarship.").

[88] *Id.* at 61.

[89] *See* Complaint at 7–10, Austin v. Univ. of Fla. Bd. of Trs., 2022 WL 195612 (N.D. Fla. Jan. 21, 2022) (No. 1:21-CV-00184).

[90] *See supra* notes 71–89 and accompanying text.

[91] *See supra* notes 67–69 and accompanying text (discussing the *Pickering-Connick* balancing test in expert-witness testimony cases).

Amendment analysis of public-employee speech rights.[92] Academic freedom as a constitutional value, albeit not a constitutional right, thus should play an important role as a substantial interest tilting in favor of professorial expert-witness testimony within the extant public-employee speech doctrine.

CONCLUSION

This Article argues that the constitutional doctrine of academic freedom, in its present nebulous state, is inadequate for resolving lawsuits filed by public university professors who are barred from testifying as experts in litigation where the state affiliated with their university is a defendant. The Article contends, however, that academic freedom, when viewed as a constitutional *value* rather than as a constitutional *right*, should play a critical role when deciding such cases under the better-established public-employee speech doctrine. Injecting the constitutional value of academic freedom into the *Pickering-Connick* balancing methodology[93] as a substantial interest supporting the right to testify acknowledges that public university professors serve a vital function in fostering both judicial and democratic competence. Courts in future cases, such as *Austin v. University of Florida Board of Trustees*,[94] should embrace this approach to better balance the interests at stake.

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[92] The U.S. Supreme Court has recognized an unenumerated right to receive speech. *See* Kleindienst v.Mandel, 408 U.S. 753, 762–63 (1972) ("It is now well established that the Constitution protects the right to receive information and ideas.") (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

[93] *See supra* Part III.

[94] No. 1:21-CV-00184, 2022 WL 195612 (N.D. Fla. Jan. 21, 2022).