

# **Academic Freedom and Public-Employee Speech Rights**

**Institute for Academic Leadership**

**Department Chairs Workshop**

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# Roadmap

- **Different Conceptions of Academic Freedom**
- **Flaws with Academic Freedom as a Legal Right**
- **Public-Employee Speech Rights**
- **Three Recent Academic Freedom Cases**

# Academic Freedom

**Professional v. Legal  
Norm Right**

**AAUP Statements**

**Judicial Opinions**



“the freedom of a **teacher or researcher** in higher education to **investigate** and **discuss** the issues in his or her academic field, and to **teach** or **publish** findings **without interference** from political figures, boards of trustees, donors, or other entities.”

# More from the AAUP

“Academic freedom . . . protects the right of a faculty member to speak freely when participating in **institutional governance**, as well as to speak freely as **a citizen.**”

# AAUP's 1940 Statement of Principles on Academic Freedom

“Teachers 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 their subject.**”

# Legal Perspectives on Academic Freedom

- **Rhetorically Rich, Doctrinally Deficient**
- **First Amendment Right *or* Value?**
- **Institutional Right *or* Individual Right?**

# Rhetorically Rich

Two aging “*subversive persons*” and  
“*loyalty oath*” cases involving  
Profs. Paul Sweezy (Marxist  
economist) & Harry Keyishian  
(English professor)





**Paul Sweezy (L, facing camera)  
& Harry Keyishian (R)**

## *Sweezy v. New Hampshire* (1957)

**“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.”**

# *Sweezy v. New Hampshire* (1957)

**“To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”**

# Justice Frankfurter's Concurrence

Four essential freedoms of a university are to determine for itself on academic grounds:

- 1) *who may teach;*
- 2) *what may be taught;*
- 3) *how it shall be taught; and*
- 4) *who may be admitted to study.*

# Good News & Bad News

- + Provides basis for **institutional right** of academic freedom
- Merely a concurring opinion
- Only quoting from a statement from a conference of scholars in South Africa in 1957

# *Keyishian v. Bd. of Regents*

(1967)

“Our Nation is deeply committed to safeguarding **academic freedom**, which is of **transcendent value** to all of us and not merely to the teachers concerned.”

# *Keyishian*

“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.”

Robert C. Post  
Former Dean, Yale Law School

*“At present . . . the doctrine of  
academic freedom stands in a state of  
shocking disarray and incoherence.”*



# Two Strands of Legal Doctrines

## I. Academic Freedom

- “special concern” of the First Amendment
- “constitutional value” + “transcendent value”
- “restrained judicial review” of decisions

## II. Freedom of Speech

- Public Institution v. Private Institution
- Professors & Public-Employee Speech Rights
- Speaking Inside the Classroom
- Speaking Outside the Classroom

# **Public-Employee Speech Rights: *Pickering/Connick/Garcetti* Issues**

- 1. Speaking as a:  
Private Citizen *or* Pursuant to Job Duties?\***
  - 2. Speaking about a matter of:  
Private Concern *or* Public Concern?**
  - 3. Balance Interests Depending on Answers to 1 & 2**
- \*Academic Freedom Exception to No. 1?**

# Private Citizen / Public Concern

## When A Public Employee Is Most Protected

“So long as employees are **speaking as citizens** about **matters of public concern**, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.” *Garcetti v. Ceballos* (2006)

# Matters of Public Concern

- Speech that can “be **fairly considered** as relating to any matter of political, social, or **other concern** to the community”
- OR**
- is “subject of **legitimate news interest**; that is, a subject of general interest and of value and concern to the public.”

# *Garcetti v. Ceballos* (2006)

## Bad News:

“[W]hen 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.”

# *Garcetti*

**“Restricting speech that owes its existence to a public employee’s **professional responsibilities** does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”**

*Garcetti*

**BUT the Good News for Profs:**

**The Court said it was NOT addressing how  
this principle applies in higher education  
in the context of teaching and scholarship.**

# *Garcetti*

“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.”



# *Garcetti*

“We need not . . . decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship OR teaching.”

# *What Have Lower Courts Said After Garcetti?*

**Good News for Profs:** Four federal appellate courts have held that *Garcetti's* rule does **NOT** apply to **classroom teaching** and **academic writing** at **public universities** (4th, 5th, 6th & 9th Circuits). Professors possess **qualified** First Amendment speech rights in these two specific contexts. Amounts to an **academic freedom exception** to *Garcetti*.

# Three Academic Freedom Cases

1. *Pernell v. Lamb*  
(f.k.a. *Pernell v. Fla. Bd. of Governors*)
2. *Porter v. Board of Trustees North Carolina State University*
3. *Meriwether v. Hartop*

*Academic Freedom &  
The Stop WOKE Act  
(a.k.a. Individual Freedom Act)*

*Pernell v. Florida Bd. of Governors*  
(N.D. Fla. Nov. 2022)

**Judge Mark Walker bars enforcement  
of the statute as it applies to  
university professors.**

# Chief Judge Mark Walker

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- Northern Dist. Fla.
- Tallahassee
- Obama Nominee
- UF BA, 1989
- UF Law, 1992



# *Stop WOKE Act*

- Lists eight supposed concepts or tenets of Critical Race Theory
- **Example:** “A person, by virtue of his or her race, color, national origin, or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.”

# *What Stop WOKE Allows*

Discussion of the eight concepts “as part of a **larger course** of training or **instruction**, provided such training or instruction is given in an **objective** manner **without endorsement** of the concepts.”

# *What Stop WOKE Forbids*

**“instruction that espouses,  
promotes, advances, inculcates, or  
compels such student . . . to believe  
any of the . . . concepts.”**



# *What Judge Walker Wrote About Academic Freedom*

- “To be clear . . . the Supreme Court has never definitively proclaimed that ‘academic freedom’ is a **stand-alone right** protected by the First Amendment.”
- “But the Eleventh Circuit still recognize[s] that academic freedom remains **an important interest** to consider when analyzing **university professors’ First Amendment claims.**”

# *Florida's Argument*

- When public university professors speak in the classroom, they do not possess any First Amendment rights because they are paid to deliver the government's curriculum.
- A professor's classroom speech thus amounts to the **government's own speech**, not the prof's.

# *Judge Walker's Reasoning in Blocking Enforcement*

Distinguishes between a state  
controlling the **content** of the  
university curriculum (**permissible**)

**vs.**

a state banning certain **viewpoints**  
**about** that content (**impermissible**)

# *Judge Walker on Garcetti*

- “the Supreme Court expressly **declined** to ‘decide whether [its public-employee speech] analysis . . . would apply in the same manner to a case involving **speech related to scholarship or teaching.**”

# *Judge Walker on Garcetti*

- “Defendants have identified no case, nor has this Court identified any authority—binding or persuasive—holding that *Garcetti* applies to university professors’ **in-class speech** such that it amounts to government speech outside the First Amendment’s protection.”

# *Judge Walker's Case-by-Case Balancing Approach*

**Balanced university professors' First  
Amendment right of in-class speech and  
their interest in academic freedom “with  
the university's special interests in  
enforcing some limitations on that speech.”**

# *Students' Right to Receive Speech*

Judge Walker recognized the implied (or unenumerated) First Amendment **right to receive speech** when considering the interests of the student-plaintiffs that must be factored into the analysis.

# *Judge Walker's Conclusion*

The State of Florida engages in “**blatant viewpoint-based restrictions** on protected speech,” and “the context of these cases weighs against the State of Florida’s interest in prohibiting university employees from expressing certain viewpoints.”



# *Judge Walker's Conclusion*

“Defendants try to dress up the State of Florida’s interest as a public employer and educator as prohibiting discrimination in university classrooms, but this does not give Defendants a safe harbor in which to enforce viewpoint-based restrictions targeting protected speech.”

# *Judge Walker's Conclusion*

“Plaintiffs’ free speech claims present **an interest in academic freedom of the highest degree**.

Professor Plaintiffs are not attempting to alter the permitted curriculum. Instead, they seek to prevent the State of Florida from imposing its **orthodoxy of viewpoint** about that curriculum in university classrooms across the state.”

# *Judge Walker's Conclusion*

**Stop WOKE Act is unconstitutional.**

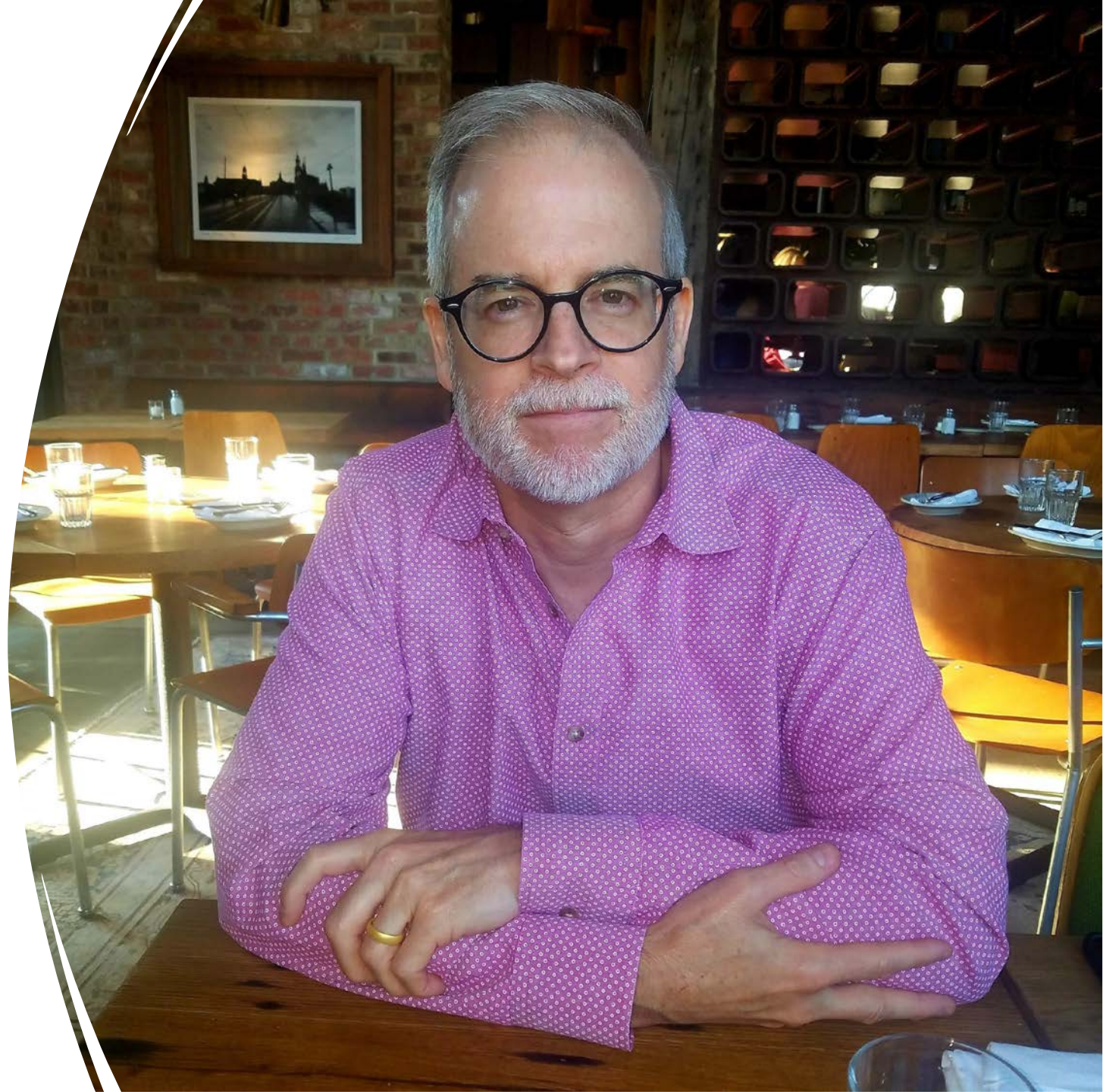
**It allows the state to engage in viewpoint-based discrimination against professors' speech regarding 8 tenets of CRT.**

**Prof. Stephen Porter:  
College of Education  
North Carolina State**

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## **First Amendment Retaliation Claim**

**Removed from his  
home program in  
higher ed. after three  
speech-based events**



# *Porter v. Bd. Tr. N.C. State Univ.*

- **July 2023 Decision**
- **U.S. Court of Appeals for the 4th Circuit**
- **2–1 Ruling Against Prof. Stephen Porter**
- **Majority Dismisses His First Amend. Claims  
For Failure to State a Claim (pre-discovery)**
- **Involves a Public-Employee Speech Analysis**

# Gist of Porter's Claim

**Removed from home program because he criticized higher ed's increasing emphasis on "social justice" and "highly dogmatic" view of DEI while abandoning "rigorous methodological analysis."**

# Three Speech Incidents

- **Department Meeting** (Spring 2016)
- **Email to Colleagues** (April 2018)
- **Personal Blog Post** (Sept. 2018)

# 1. Department Meeting

## Survey Question Incident

- Proposal to add a **diversity question** to student course evaluations
- Porter questions colleague who proposed it about the **question's validity and reliability**



# Department Meeting

**Porter thought that “in response to social pressure, the department was rushing to include a question that had not been properly designed” and would not yield useful information.**

# Department Meeting

- Porter's comments reported to NC State's Office for Institutional Equity & Diversity
- OIED issues a report labeling Porter a "bully"
- Dept head emails Porter re: his "bullying," places her email in his personnel file

## **2. Email to Colleagues**

### **Inside Higher Ed Article Incident**

**Porter emails a link to an article criticizing another faculty member in his department re: conducting a faculty search.**

# Article Headline

## Questions About Job Candidate's Past

Anonymous faculty members at NC State object to candidate for professorship who was ousted from a prior position at Ohio State over financial misconduct and other concerns.

# Part of the Article

In March, faculty members at North Carolina State and elsewhere began to agitate -- quietly, denying immediate interview requests -- at the news that Strayhorn was being considered for a professorship on that campus. In so doing, they circulated an internal email from Alyssa N. Rockenbach, professor of higher education, announcing that Strayhorn was one of three candidates for an open associate professorship in the College of Education and would soon be speaking on campus.

# Porter's Email to Colleagues:

*“Did you all see this? . . . This kind of  
publicity will make sure we rocket to  
number 1 in the rankings. Keep up the  
good work, Alyssa!”*

# Email to Colleagues

Porter thought Alyssa Rockenbach “cut corners” in “vetting” the candidate because she wanted “to hire a Black scholar whose work focused on racial issues.”

# 3. Personal Blog Post

## Woke Joke Blog Post Incident

*“ASHE Has Become a Woke Joke”*

Association for the Study of Higher Education



# Personal Blog Post

**Email contended that an ASHE conference's focus shifted from general post-secondary research to social justice.**

# Personal Blog Post

*“I prefer conferences where 1) the attendees and presenters are smarter than me and 2) I constantly learn new things. That’s why I stopped attending ASHE several years ago.”*

# Personal Blog Post

- **Immediate stir online**
- **ASHE president addressed it in her conference keynote**

# Personal Blog Post

- **Zoom Faculty Meeting 5 Weeks Later**
- **Called by Department Head**
- **Meeting Ostensibly About Hiring a New Prof**
- **But Dept Head Shifted Focus to Porter**
- **Suggested He Leave Higher Ed Prog. Area**

# Porter's Comment at Meeting

*“Give me a fucking break folks. I was the one who said [the new professor] should come. And now I’m the bad guy because I don’t want to leave Higher Ed for a non-existent program area.”*

# Fallout

- **Dept Head Letter: Chastises Porter's Profanity**
- **Dept Head Second Letter (Nov. 2018):  
Criticizes Porter's Lack of "Collegiality"**
- **Second Letter: Promises to Remove Porter  
from HEPA Unless He "Repair[ed] the  
Relationships Among Faculty."**

# Fallout

- **Dept Head Email (Nov. 2018):**

**Wanted Porter to participate in a  
“community conversation about  
ASHE” blog post.**

# Fallout

- **Dept Head met with Porter in Feb. 2019, expressed frustration that Porter had not proactively addressed student and faculty concerns about what happened at ASHE.**
- **Dept Head removed Porter from his program area in July 2019**



# Fallout

- **Almost totally excluded from prior Ph.D.-related activities.**
- **Recruiting new doctoral advisees became nearly impossible.**
- **Tenure jeopardized because advising doctoral candidates is a key job description.**

# **The Lawsuit**

## **First Amendment Retaliation Claim**

**Porter suffered adverse job consequences  
for exercising protected speech rights.**

# Court's Analysis

Both the majority (two Obama nominees) and the dissent (a Trump nominee) applied a **public-employee speech analysis**, accounting for *Garcetti's* possible “academic freedom” exception for speech relating to scholarship and teaching. They reached **opposite conclusions**.

# Public-Employee Speech Framework (a Mini Review!)

1. Was Porter speaking as a:

**Private Citizen *or* Pursuant to Job Duties?\***

2. Was Porter speaking about a matter of:

**Private Concern *or* Public Concern?**

3. Balance Interests Depending on Answers to 1 & 2

**\*Academic Freedom Exception to No. 1?**

# Majority's Analysis

## Dept Meeting & Email to Colleagues:

- **NOT protected by First Amendment**
- **Made pursuant to job duties: “wholly internal communications”**
- ***Garcetti* exception doesn't apply because NOT products of Porter's teaching or scholarship**

# Majority's Analysis

Email Linking to Article + Sarcastic Comment

“it was an **unprofessional attack** on one of [Porter's] colleagues, sent only to other faculty members within the Department. And it plainly was unrelated to [Porter's] teaching or scholarship.”

# Majority's Analysis

## Personal Blog Post: ASHE "Woke Joke"

- Assumes for sake of argument that it is protected speech (i.e., private capacity about a matter of public concern)
- BUT Porter fails to show his post was causally connected to his removal from home program

# Majority's Analysis

- **Temporal Proximity Lacking:** 10 months between post and removal from Higher Ed Program Area is too much time to prove cause.
- **Post was NOT the “But For” Cause of Removal:** Was removed for “ongoing lack of collegiality,” citing Porter’s being labeled a “bully” by Office for Institutional Equity & Diversity



# Dissent's Analysis

All Three Incidents  
Involved Protected Speech

“Porter was . . . speaking as **a citizen on a matter of public concern**. And—based on his complaint’s allegations—it is **plausible** that the University retaliated against him because of it.”

# Dissement's Analysis

## Woke Joke Blog Post

**“Writing a post in your own time, on your personal blog, is speaking as a citizen rather than pursuant to your official duties as an employee.”**

# Dissement's Analysis

## Woke Joke Blog Post

“[T]he blog post’s subject was doubtless a **matter of public concern**. After all, Porter alleged that the blog post **generated controversy** on Twitter, at the conference that it criticized, and at the University itself.”

# Dissement's Analysis

**Faculty Meeting Comments  
Re: Diversity Survey Question**

**Dissenting judge considers “whether the speech at issue is itself ordinarily within the scope of an employee’s duties.”**

# Dissement's Analysis

## Faculty Meeting Comments Re: Diversity Survey Question

“Reading Porter’s complaint in the light most favorable to him—as we are required to do at this stage—it is *plausible* that he had **no official responsibility to lodge his objection**. . . [H]e was speaking as a citizen, not as an employee.”

# Dissement's Analysis

## Faculty Meeting Comments Re: Diversity Survey Question

“Unquestionably there has been a growing, and wide-ranging, **public debate** about how colleges ought to emphasize **diversity, equity, and inclusion.**”

# Dissement's Analysis

Email to Colleagues:

Inside Higher Ed Article + Sarcasm

“[T]here are **no grounds** to think that he had a **duty** to send this email; the very notion strains credulity. So, as with the faculty-meeting comment, he sent his email in his **capacity as a citizen, not as an employee.**”

# Dissement's Analysis

Email to Colleagues:

Inside Higher Ed Article + Sarcasm

“[T]he very fact that the topic of Porter’s speech was the **subject of a news article** may alone render it a **matter of public concern**—after all, what media company would publish a news article about something that wasn’t newsworthy?”



# Dissement's Analysis

**Email to Colleagues:  
Inside Higher Ed Article + Sarcasm**

**“[N]ews that the University almost hired someone who faced these serious allegations would alone interest the public.”**

# Dissent's Analysis

- So . . . Dissent concludes **all three statements** were made in a **private citizen** capacity about matters of **public concern**.
- Then addresses **causation**: whether Porter had pled facts indicating he was removed from his program **because of** his protected speech.

# Dissement's Analysis

Porter “**easily satisfies** the causation requirement, since—according to his complaint—[his Dept Head] explicitly mentioned both his faculty-meeting comment and his faculty-hiring email **in her November letter** threatening to remove him.”

# Dissement's Analysis

“But for his blog post, [the Dept Head] would not have asked Porter to hold a ‘community conversation,’ and but for his hesitation to do so, she would not have removed him from his program area. That’s **but-for cause**, even with the blog post standing alone.”

# Dissent's Analysis

## Dissent Moves on to the Balancing-of-Interests Phase of the Analysis

Porter's First Amendment interest in speaking out (and the public's interest in hearing his views) vs. NC State's interest in efficiently and effectively providing its services to the public.

# Dissement's Analysis

## Rules for Porter's Interests at this Early Stage

- “[D]ispute and disagreement are integral, not antithetical, to a university’s mission”
- “[O]ccasional discord or even outright hostility among a few professors does not itself establish a strong governmental interest.”

# Disseent's Analysis

“[T]he university setting forms the stage on which we perform this balancing. And, at the university, the **scales are tipped in favor of more speech**: ‘Our Nation is deeply committed to safeguarding academic freedom.’” (*Keyishian v. Bd. of Reg.*, 1967)

**Reaction  
of the  
Foundation  
for Individ.  
Rights and  
Expression  
(FIRE)**

In hit to academic freedom, Fourth Circuit holds public universities can punish faculty for ‘lack of collegiality’

The troubling decision says faculty speech about institutional governance doesn’t get First Amendment protection, giving public universities broad power to oust faculty whistleblowers, dissenters.



*Meriwether v. Hartop*  
(6th Cir. 2021)

- **Professor at Shawnee State Univ. in Ohio who refuses to follow university policy requiring professors to address students by their preferred pronouns.**

# *Nicholas Meriwether*



## Nicholas Meriwether

**Title:** Professor

**Area:** Philosophy

**Office Location:** MAS 407

**Phone:** (740) 351-3447

[nmeriwether@shawnee.edu](mailto:nmeriwether@shawnee.edu)

# *Meriwether's Claim*

**First Amendment *right not to speak***  
**claim in the classroom (a right *not to be***  
***compelled by the government* to speak**  
**personally disagreeable messages).**

# **Similar Right Not to Speak Claim: *303 Creative v. Elenis***

**Supreme Court ruled 6-3 in June 2023 that the First Amendment right against government-compelled expression protected Lorie Smith from having to create a wedding website for a same-sex couple (in the face of an anti-discrimination public accommodations law).**

# Threshold Issue

**Because Meriwether is teaching a class pursuant to his official job duties, the threshold issue becomes “whether the rule announced in *Garcetti* bars Meriwether’s free-speech claim. It does not.”**

# *Unanimous Ruling for Meriwether*

- **3–0 Ruling**
- **2 Trump Nominees to 6th Circuit**
- **1 Bush (43) Nominee to 6th Circuit**

**Opinion by Judge Amul Thapar (Trump's first federal appellate court nominee and second judicial nominee after Neil Gorsuch)**

# *Unanimous Decision in Favor of Meriwether*

**“Simply put, professors at public universities retain First Amendment protections, at least when engaged in core academic functions, such as teaching and scholarship.”**

# *Meriwether Opinion*

**“If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity.”**



# *Meriwether Opinion*

So . . . the Sixth Circuit recognizes *Garcetti's* “academic freedom” exception from the general rule that public-employees have no First Amendment speech rights when speaking pursuant to their official job duties.

# *Meriwether Opinion*

The next question then became whether the speech in question was about a matter of **private or public concern.**

# *Meriwether Opinion*

“The use of gender-specific titles and pronouns has produced a **passionate political and social debate**. All this points to one conclusion: Pronouns can and do convey a powerful message implicating a sensitive **topic of public concern**.”

# *Meriwether Opinion*

*“In short, when Meriwether waded into the pronoun debate, he waded into a matter of public concern.”*

# *Meriwether Opinion*

**Moving to the balancing-of-the-interests**

**step of the public-employee speech**

**analysis, the Sixth Circuit concluded the**

**“balance favors Meriwether.”**

# *Meriwether's Interests*

The “**robust tradition**” of **academic freedom** “alone offers a strong reason to protect Professor Meriwether’s speech.”

# *Meriwether's Interests*

“The First Amendment interests are **especially strong** here because

Meriwether's speech also relates to his **core religious and philosophical beliefs.**”

# *Shawnee State's Interests*

- **“comparatively weak”**
- **It had rejected Meriwether's proposed compromise of calling on student by her last name only**



# *Shawnee State's Interests*

**“no suggestion that Meriwether’s speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits.”**

# Conclusion

**“In sum, ‘the Founders of this Nation . . . 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.’ Shawnee State allegedly flouted that core principle of the First Amendment. . . . we hold that the university violated Meriwether’s free-speech rights.”**

EDUCATION

# A university pays \$400K to professor who refused to use a student's pronouns

April 20, 2022 · 5:30 AM ET



Jonathan Franklin

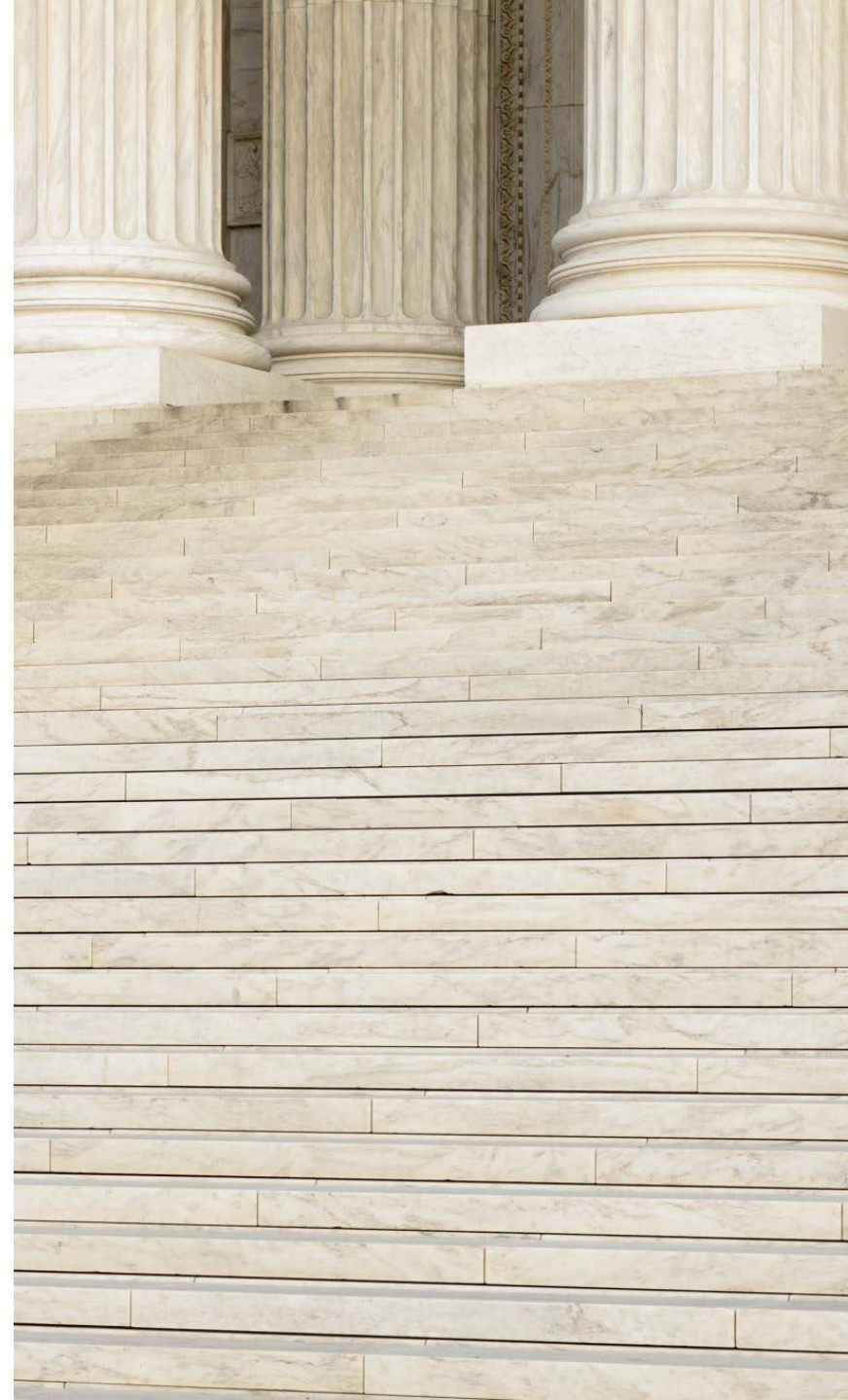


Shawnee State University in southern Ohio has agreed to pay philosophy professor Nick Meriwether \$400,000 after disciplining him for not using a transgender student's pronouns.

*Alliance Defending Freedom*

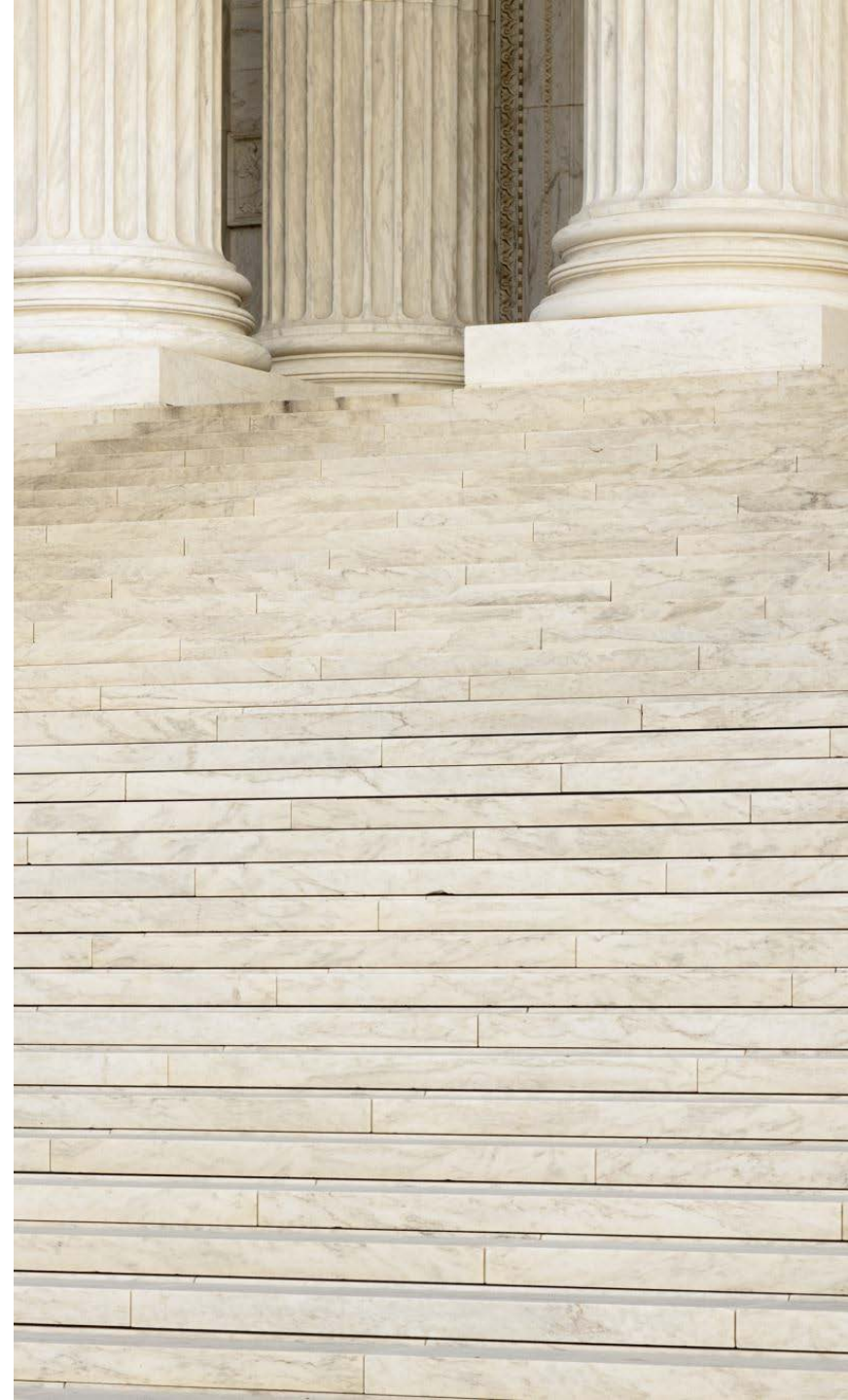
# A Penultimate Question

**Had the two  
Obama nominees  
who ruled  
against Stephen  
Porter in his case  
against NC State  
also been the  
judges who  
heard Nicholas  
Meriwether's  
case against  
Shawnee State,  
would the  
outcome have  
been different for  
Meriwether?**



# A Final Question

**Had the three Republican nominees who ruled in favor of Nicholas Meriwether against Shawnee State also been the judges who heard Stephen Porter's case against NC State, would the outcome have been different for Porter?**



**Thank You**

# Clay Calvert

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