



# PROTECTIONS FOR SPEECH AND TENURE OF HIGHER EDUCATION EMPLOYEES

March 15, 2025

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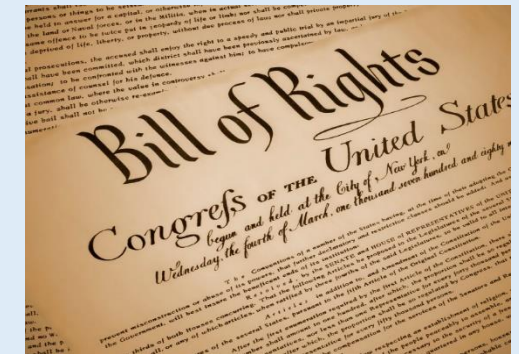
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# AGENDA

- Current threats to speech & association
- Academic freedom principles in higher education
- Advocacy for more protection
- Constitutional Protections for speech & association
- Pursuing retaliation claims on behalf of faculty
- States' War on HE tenure



# 2025 Federal Assault on Speech Rights



- Executive Orders

- *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*
- *Ending Radical and Wasteful Government DEI Programs and Preferencing*
- *Eradicating Anti-Christian Bias*
- *Additional Measures to Combat Anti-Semitism*

- Temporary Pause of Agency Grant, Loan, and Other Financial Assistance Programs

⇒ Review of grant programs to block aid connected with diversity, equity and inclusion initiatives & research

\* Use of ED Office of Civil Rights to target institutions with DEI initiatives or LGBTQ+ - related policies deemed to cause harassment or discrimination

# Litigation Challenging Anti-DEI EO'S



- Suit filed by Democracy Forward on behalf of National Ass'n of Diversity Officers in Higher Education, AAUP, ROC United, Baltimore
  - Feb. 21 decision granted preliminary injunction against 2 EO's: *Ending Illegal Discrimination and Ending Radical and Wasteful Government DEI Programs*
    - Termination of contracts
    - Certification of no "illegal" DEI programs
    - Enforcement threat
  - Injunction based on
    - First Amendment's protection of freedom of expression
    - Due process clause prohibiting vagueness
- => No enforcement against plaintiffs or similarly situated organizations





# Recent State Assaults on Faculty/Staff Speech Rights



- Florida's Stop WOKE Act
  - banned professors from expressing disfavored viewpoints in university classrooms while permitting unfettered expression of the opposite viewpoints => violated 1<sup>st</sup> Amendment
- Florida's [Senate Bill 266](#)
  - prevents use of state or federal dollars for DEI
  - core general-education courses can't teach "identity politics" or "distort significant historical events"
- Florida's SB 1372/HB 1291
  - Prohibits teacher preparation programs from distorting "significant historical events or include a curriculum or instruction that teaches identity politics violates [HB 7], or is based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities."
- Alabama's [Senate Bill 129](#)
  - No funds to compel assent to any divisive concept (as defined: systemic racism concepts)
  - bars public colleges from sponsoring DEI programs or having DEI offices
- Arizona SB 1472
  - NO public monies to promote, support or maintain DEI or to engage in political or social activism
- Idaho HB 377
  - Bars "direct[ing] or otherwise compel[ing] students to personally affirm, adopt, or adhere" to "critical race theory" tenets
- Mississippi SB 2113
  - Bars compelling students to affirm or adopt certain ideas related to race, sex, or other characteristics, nor make "a distinction or classification of students based on account of race"
- North Dakota SB 2247 & South Dakota HB 1012
  - Cannot compel students or employees to endorse or oppose certain concepts related to race, sex, religion, creed, nonviolent political affiliation, social class, or class of people.
  - Colleges may not ask any student or faculty member about their ideological or political viewpoint.
- Tennessee HB 2670
  - Bans certain ideas related to race and sex in any "seminars, workshops, trainings, and orientations."
- Texas [HB 1/SB 17](#)
  - No public funds for design, implementation, or administration of diversity, equity, & inclusion practices or programs that do not comply with Texas Constitution
- West Virginia's [recent](#) executive order
  - *prohibits* faculty from sharing any material that promotes or encourages certain DEI-related views, but *permits* criticism of those views

PEN Oct. 2024 Report: <https://pen.org/report/americas-censored-classrooms-2024/>

# Examples of Anticipatory Shutdowns of DEI Programs

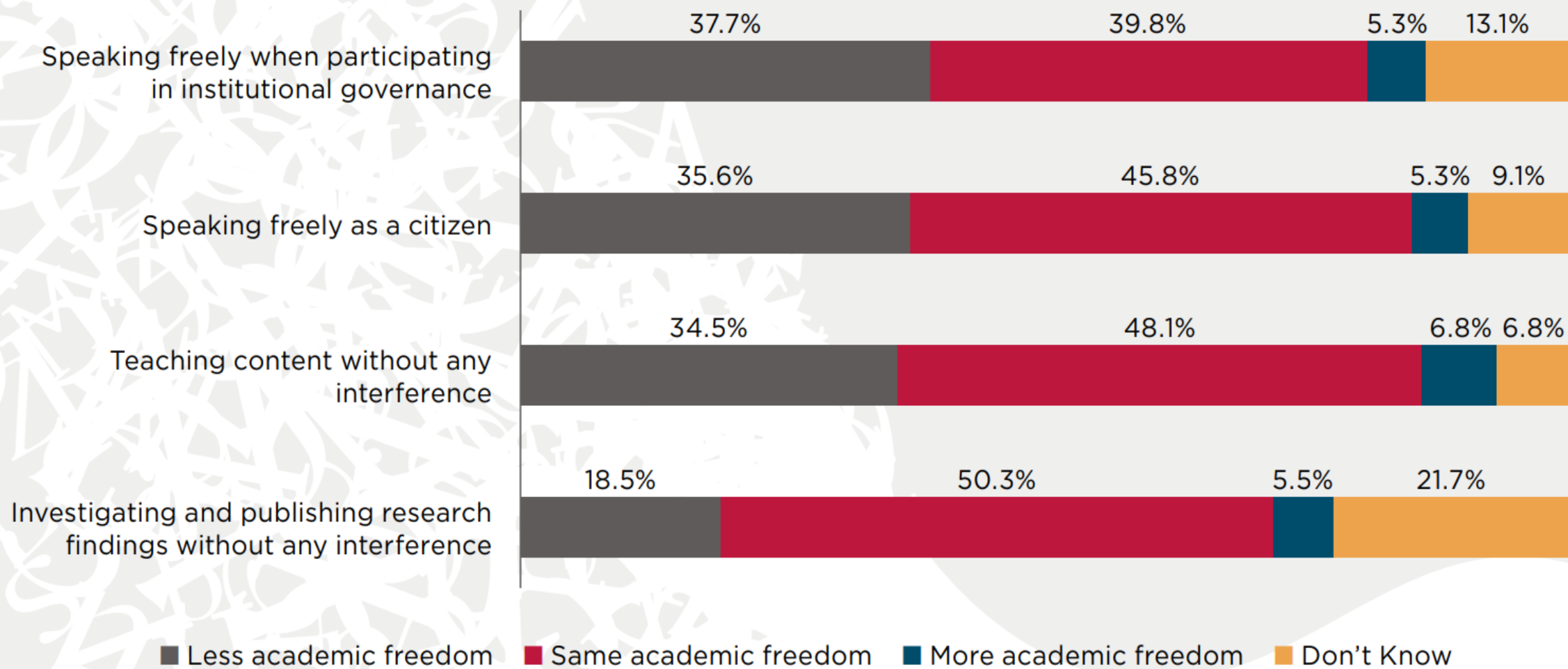
- Ivy Tech Community College
  - “Sunsetting” Office of Diversity, Equity, and Belonging,” beginning March 12, 2025
  - will guarantee the continuation of tutoring, emergency aid, student advising, disability services and other wrap-around services to all students.
- Indiana University School of Medicine
  - canceled its LGBTQ+ Health Care Conference in Jan. 2025
- Loyola Marymount
  - Part of conference on environmental justice canceled in Feb. 2025
- University of Miami
  - removed all websites related to DEI programs or resources
  - Student petition demanded that administration publicly acknowledge removal of DEI resources, physically reinstate DEI resources on campus
- Southern Methodist University & Stanford University
  - website pages related to the Office of Diversity and Inclusion (ODI) taken down in Jan./Feb. 2025

# Why Protect Academic Freedom?

- Supreme Court in 1967:
- First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom....The classroom is peculiarly the ‘marketplace of ideas.’”
- AAUP statement in 1940:
- College and university teachers are citizens ... When they speak or write as citizens, they should be free from institutional censorship or discipline
- Later: decisions concerning quality of scholarship and teaching are to be made by reference to standards of academic profession
- Recent Appellate Court decision:
- Without these protections “a university would wield alarming power to compel ideological conformity.”



**Figure 8: Compared with six or seven years ago (or since starting at your institution), is there less, more, or about the same degree of academic freedom for faculty at your institution with respect to the following?**





# Less Protection than you might think...

- Limits on speech protection
  - Constitution only applies to public employers
  - University or College's ability to control delivery of education services
  - Speech/association part of job duties
  - Any legitimate reason

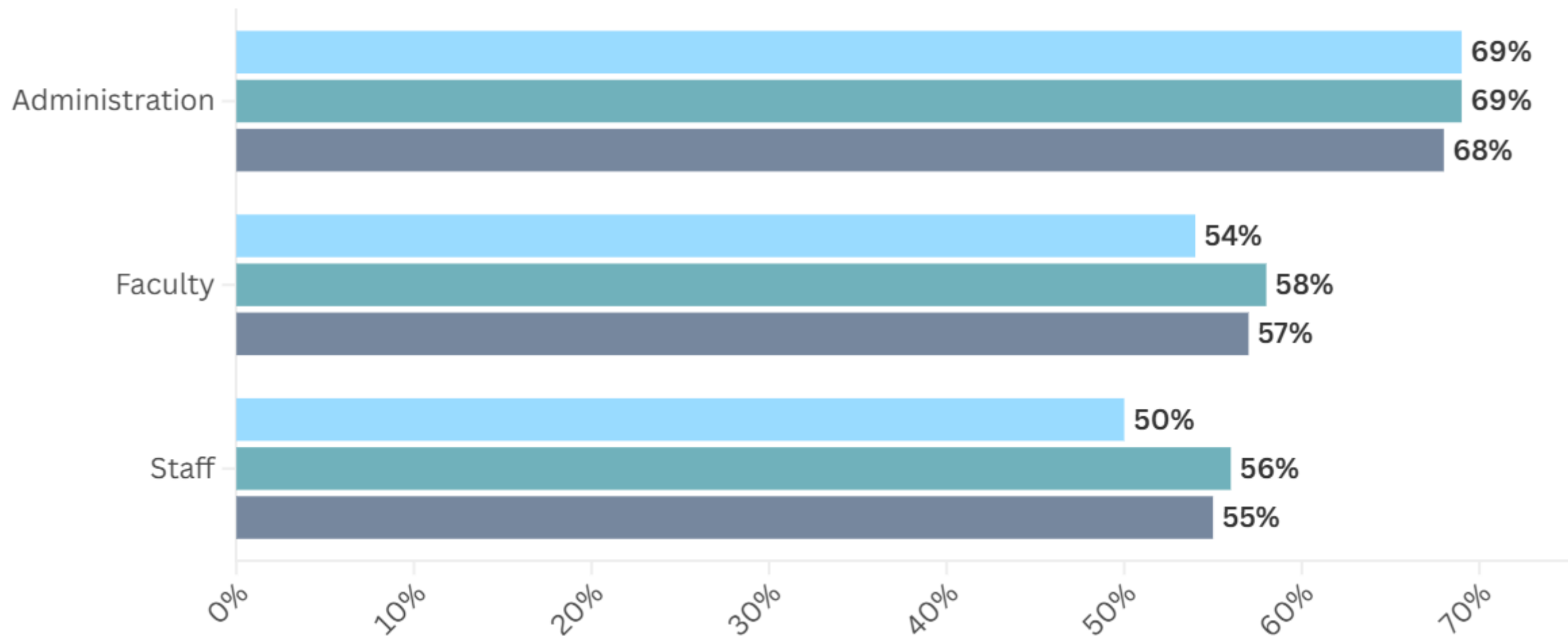
=> Need for bargaining/advocacy to address these limits



## People at this institution can freely express their ideas and opinions.

Percent responding "agree" or "strongly agree"

2-year public 4-year private nonprofit 4-year public



# Advocacy for More Protection



- Bargain/advocate for specific categories of protected speech and association:
  - 1) instructional speech including curriculum selection and delivery of instruction
  - 2) research and evaluation speech and associated activities
  - 3) extramural speech and association
    - regardless of relationship to university activities
  - 4) other speech and association aimed at broader world
- Protection for [at least some] speech included in job duties
  - E.g., participation on tenure committee or work group
  - May need to allow greater control of more administrative speech
- Bargain/advocate for freedom to raise issues in variety of platforms
  - Outside of “proper channels”
  - Protection against retaliation for using “proper channels”



# Take Advantage of Free Speech Zones

- Recent legislation in at least 20 states protects free speech rights of students AND faculty
- Institutions required to create “free speech zones” on campuses
- Free speech zones treated as public forum => greater protection for speech there
- Some legislation also supports “learning environment that exposes students to and encourages exploration of a variety of ideological and political perspectives.”
  - S.D. H.B. 1087



# First Amendment Protections

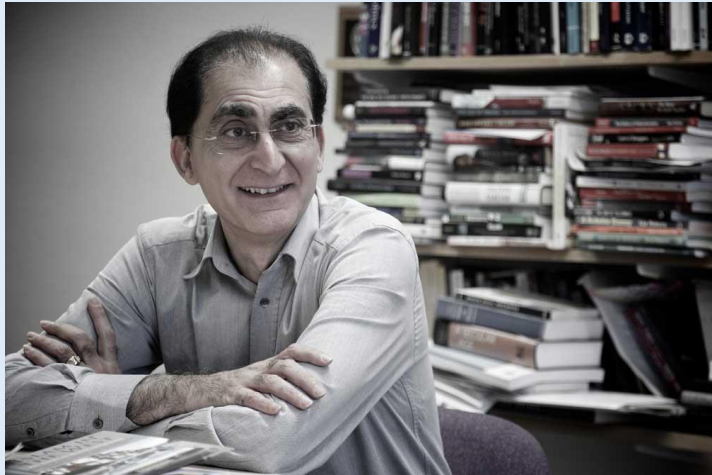


- Adverse actions based on speech/association by institution
  - E.g. Denial of tenure, opportunity blocked by policy, lack of credit for research
- Negative action by government
  - E.g., revocation or denial of grant, denial of funding
- Chilling of speech: self-censorship based on credible threat
  - E.g., cancelling DEI-related events, threat of investigation of educator
- Compelled speech based on fear of punishment
  - E.g., requiring professor to speak government message
- Interference with institution's speech rights
  - E.g. denial of funds based on DEI programming





# What kinds of speech by faculty or staff should be protected?



# What Speech is Protected by 1<sup>st</sup> Amendment?



- speaking on a matter of **public concern**
- as a **private citizen**
- IF speaker's interests aren't outweighed by public employer's interests in regulating that speech



- ⇒ Defense to individual adverse actions vs members
- ⇒ Grounds to enjoin broader restrictions on speech by institution or legislation

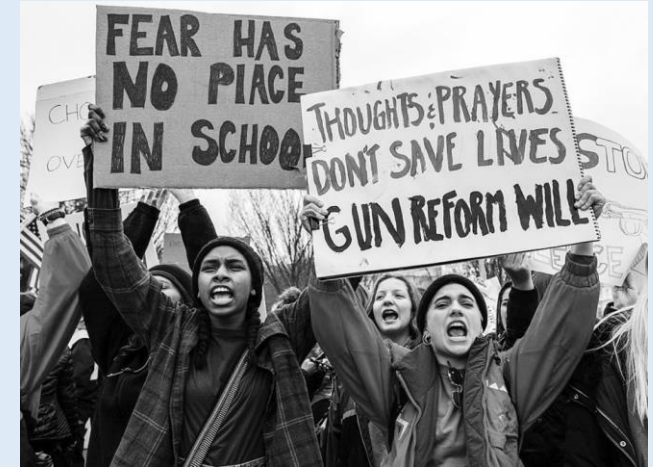




# What's a matter of public concern?



- Relationship to academic freedom or publicly discussed issue  
=> more likely to be public
    - Racism in society, LGBTQ+ rights, gun control, other government policies
    - Case e.g.: comments about student misconduct and discipline at school board meeting, at request of the teacher's union
  - NOT individual grievances or university policy/administrative decisions
    - E.g., faculty member's criticism of training about how to address racial inequality in classroom or mode of instruction
  - Delivery to public (vs internal) => more likely to be public concern
    - Case E.g., Use of racial epithet in law school exam NOT public concern
- => Using "proper channels" may lead to less protection of speech



# When is faculty member speaking as a **private citizen** = protected?



- Generally: speech intended to enhance effective advocacy of their own views or to pursue their lawful private interests
  - Broader in HE than K-12
  - Based on need for the free exchange of ideas in the college classroom
- Speech found to be **unprotected** if spoken as public employee rather than as private citizen.
  - raised concerns about grant funds or budgets when job duties included oversight of grant funds
  - faculty member assisted student in disciplinary proceeding
- Speech found to be **protected** when faculty ...
  - reported gender discrimination
  - refused to change scores in evaluating faculty member for tenure
  - published on conservative, Christian topics outside classroom



# NEA Case Example



- Florida law: “employee or contractor of a public K12 educational institution may not provide to a student his or her preferred personal title or pronouns if such preferred personal title or pronouns do not correspond to his or her sex.”
- Katie Wood, a transgender teacher in Florida, asked for use of female pronouns, “Ms.”  
⇒ Faced discipline for not using “Mr.”

⇒ District granted motion for preliminary injunction against school

- NEA argued that **when referring to herself, Ms. Wood speaks as a private citizen**
  - not as the mouthpiece of the state
- Florida’s broader pattern of marginalizing LGBTQ+ students and educators harms quality of public education





# When do institution's interests outweigh speaker's rights?



- Interest related to university's mission
  - “skills, expertise, and academic perspectives” prioritized in hiring & staffing decisions
- Impairment of ability to fulfill duties
  - E.g., “alternative” land acknowledgement statement in syllabus => upset among students
- Controlling public criticism of institution or another faculty member
  - protect “marketplace of ideas” for all students
  - prevent harassment of criticized faculty member
  - “Collegiality”



# How to Show that Speaker's Interests Outweigh Institution's Reasons?



- Speaker's interests are strong
  - In classroom or scholarship: "rights to academic freedom and freedom of expression are paramount."

VS

- Institution's specific interest
- Examples where speech interests prevailed
  - University of Florida unable to justify policy controlling faculty members' freedom to testify as expert witnesses
    - potential "reactions of political actors" NOT justification
  - Biology professor protected in saying "I hope they all get it and die" (laughing) re: people at mass rally without observing safety precautions
    - Part of class discussion on responses to pandemic
    - Lack of evidence that comment impaired her ability to teach



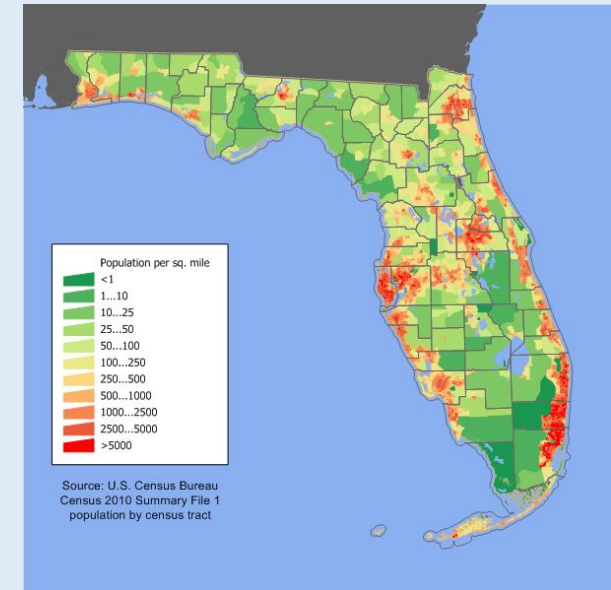
# More Justification Required for Restrictions based on Content



- Numerous EO's & state restrictions focus on content of speech
    - E.g. as applied: NSF flagging grants based on language indicating “broadening participation” or “discriminatory programs including illegal DEI.”
- ⇒ Presumptively invalid
- ⇒ Must be narrowly tailored to serve a compelling state interest

## Examples of invalid content-based restrictions

- Florida's legislation imposed an “orthodoxy of viewpoint” university curriculum
- No compelling interest to ban Florida DEI training
  - Even if participants perceived training as “hostile speech”
- No reason to deny funding to certain student groups
  - No financial burdens on certain speakers based on content expression
- Narrower Alternative: ban indoctrination of or coerced acceptance of ideas by students



# Advocating for Educators Who Speak Out



- **To Prove Retaliation based on Speech:**
- Was an adverse action taken OR was speaker harassed?
- Was protected speech the “but for” cause of the adverse action?
- Did institution offer a legitimate reason for the adverse action?
- Was the reason just a pretext for retaliation?





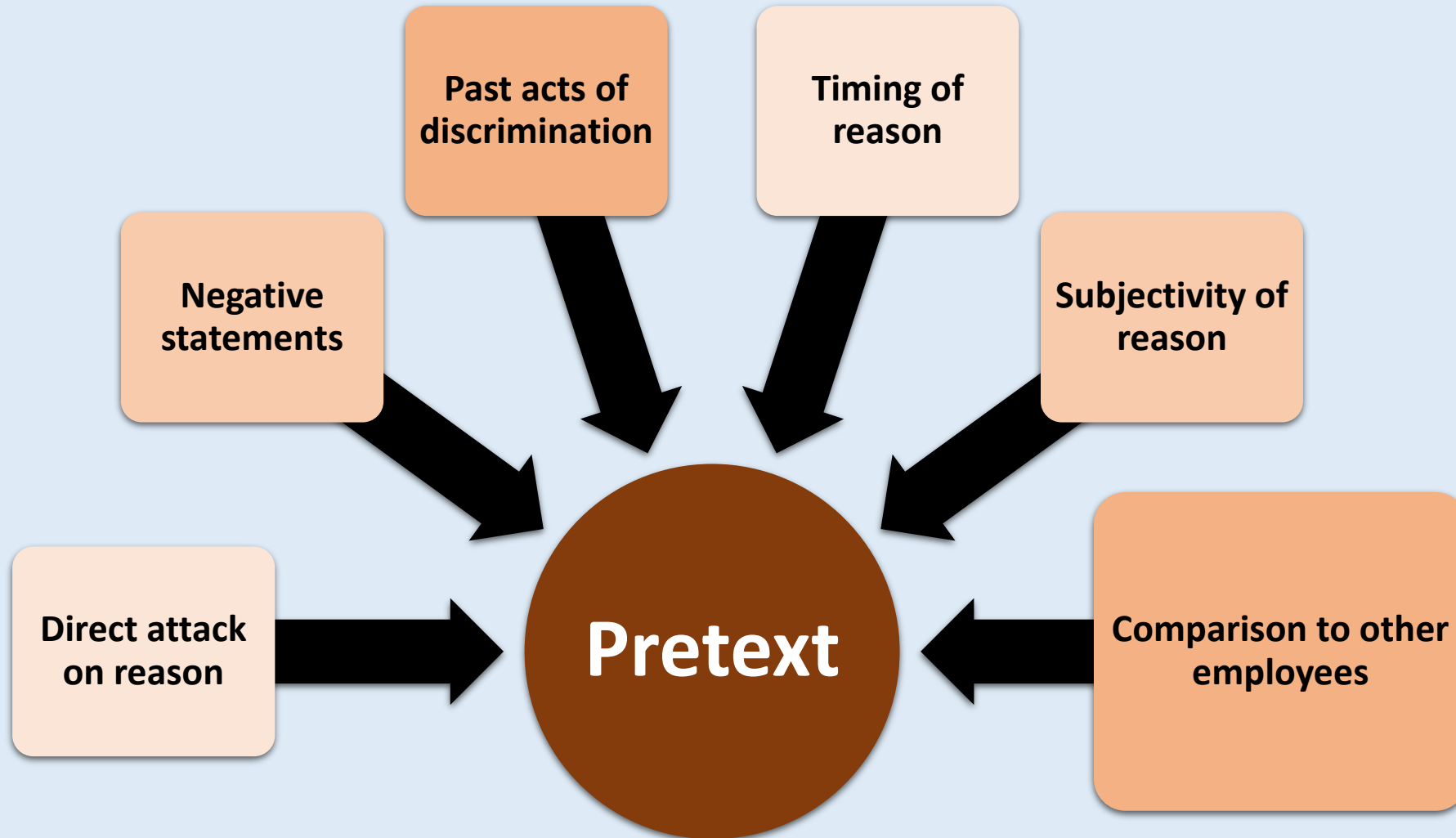
# What's an adverse action?

- Reasonably likely to deter employee(s) from engaging in protected speech
  - Delays in expected salary increases
  - Denial of faculty privileges
  - Negative performance evaluation with consequences
  - Denial or addition of teaching responsibilities
- Supreme Court expansion to include effect on job title, hours, salary, benefits, prestige or standing
  - Adverse if “significant, serious, substantial”
  - Includes transfer to less advantageous position
- Constructive discharge: resigned because of hostile environment that no reasonable employee would be expected to tolerate





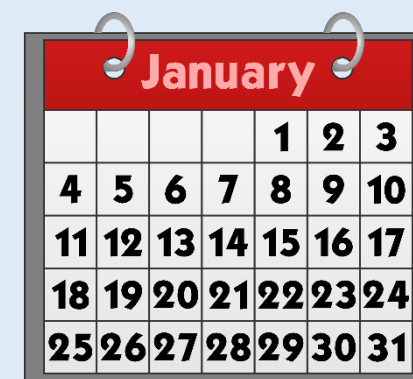
# How Educator Can Show that Reason for Adverse Action is Pretext for Retaliation



# How to Be Successful in Showing Pretext



- “Legitimate reason” not supported
  - Performance met objective standards
  - Delay in investigating or criticizing
  - Continued need for services
  - Similarly situated colleagues treated more favorably
- Timing between speech & adverse action
  - The closer the better
  - Change in attitude about faculty member’s performance
  - No initiation of action before speech
- Institution’s failure to follow own processes or procedures
- Disagreement among multiple decision makers



# Advocacy to Address Retaliation

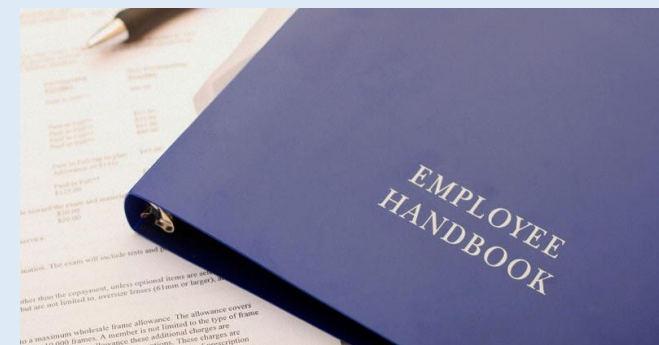


- Document eligibility for benefit or opportunity
- Document any negative reaction to speech
  - date(s), context, who, where
- Maintain timeline
- Complain early about harassment or adverse action
- Gather information about treatment of similarly situated employees
  - Negative => shows pattern
  - Positive => shows disparity



# Bargaining/Advocacy to Support Pretext Argument

- Get access to information about decisions regarding similarly-situated faculty
- Ensure recording of & access to any communications or records of meetings where any adverse action is discussed.
- Clear procedures to be followed in making decisions about tenure, post-tenure review, or contract renewal
- Clear policies on criteria and information to be considered in making decisions about salary and faculty privileges
  - teaching load, sabbatical leave, research funding, assignment of TAs, service load



# SPEECH EXERCISE



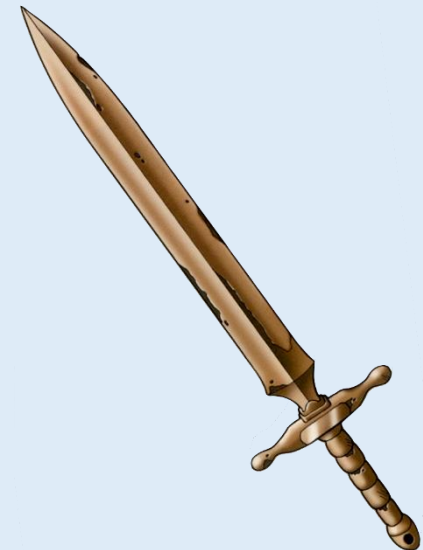
- Professor of 20 years with tenure was suspended after posting in private blog
  - criticized encounter between graduate instructor and a student
- Instructor had listed issues on the board, including “gay rights,” then “airily said that ‘everybody agrees on this, and there is no need to discuss it.’ ” One of the students approached Instructor after class and said that the issue of gay rights should have been open for discussion. Instructor replied that “some opinions are not appropriate, such as racist opinions, sexist opinions,” that “you don't have a right in this class to make homophobic comments,” that she would “take offense” if a student opposed women serving in certain roles, that a homosexual individual would take similar offense if a student opposed gay marriage, and that “[i]n this class, homophobic comments, racist comments, will not be tolerated.”
- Professor’s blog commented that Instructor employed “a tactic typical among liberals now,” namely that “[o]pinions with which they disagree are not merely wrong, and are not to be argued against on their merits, but are deemed ‘offensive’ and need to be shut up.”
- Grad instructor filed complaint with university against Professor
- Contract allowed suspension for cause
- Definition of “academic freedom” as it appears in the University's Faculty Handbook:
  - Academic freedom is prized as essential to the University and to its living growth as a university. Professorial academic freedom is grounded on competence and integrity. A faculty member is a citizen, a member of a learned profession, and an officer of an educational institution. When they speak or write as a citizen, they should be free from institutional censorship or discipline, but their special position in the civil community imposes special obligations. Faculty should remember that the public may judge their profession and institution by their utterances. Hence, they should at all times be accurate, exercise appropriate restraint, show respect for the opinions of others, and make every effort to indicate that they are not an institutional spokesperson.
- Would/should Professor’s speech in blog be protected under 1<sup>st</sup> Amendment?
- Would/should he be protected against discipline under cause requirement in contract?



# Legislative War on HE Tenure



- AAUP: “systematic effort to dictate and enforce conformity with a narrow and reactionary political and ideological agenda throughout the state’s higher education system.”
- Effects on educators in states reducing tenure protections
  - 2/3 of HE instructors would not recommend their state as a desirable place to work
  - 1/3 plan to interview for jobs in other states in coming year
  - 1/3 do not plan to remain in academia long term
  - E.g., at least 40 professors have left New College in Florida
- 2024 Study on tenure bills
  - 5 times more likely in Republican-controlled states
  - Reflections of political & social divisions, not harsh budgetary realities
  - More likely in states where fewer adults have bachelors degrees



# Expansion of Required Post Tenure Review



- Florida 5 year review of tenured higher education faculty must address
  - accomplishments and productivity
  - assigned duties in research, teaching and service
  - performance metrics, evaluations and ratings=> Removal with appeal to University President [not peers]
  - Challenge filed by 3 Fla. professors in July 2024 based on Constitutional rights
  - 2d suit filed by FEA in Aug. 2024 challenging denial of arbitration
- Indiana 5 year post-tenure review allows discharge for failure to meet 1 or more criteria:
  - Helping foster culture of free inquiry, free expression, and intellectual diversity
  - Introducing students to scholarly works from variety of political or ideological frameworks
  - Refraining from subjecting students to views and opinions concerning matters not related to faculty member's academic discipline or instruction
  - Challenged in August 2024 suit by Purdue faculty, dismissed without prejudice based on lack of standing absent enforcement



# Expansion of Required Post Tenure Review (cont'd)



- Utah post tenure review every 5 years
- Grounds for discharge allowed include:
  - teaching, research, service
  - annual performance reviews
  - serious misconduct or legal misconduct substantially related to performance of duties
  - compliance with institution's policies regarding responsibilities and ethical obligations of faculty members
  - serious violations of board or institution rules
  - inability or unwillingness to meet institutional expectations
  - failure to meet remediation plan for underperformance
- \* Appeal process ending with President



# Expansion of Grounds for Post-Tenure Removal



- Wisconsin & N. Carolina policies: 5 year review
- Texas SB 18: comprehensive evaluation every 6 years  
=> removal based on “incompetency, neglect of duty, or other good cause.”
- Texas grounds for discharge of tenured faculty include
  - conduct involving moral turpitude that adversely affects institution or faculty performance
  - violation of laws or university system or institution policies substantially related to performance of faculty member’s duties
  - unprofessional conduct that adversely affects institution or faculty member’s performance of duties or meeting of responsibilities

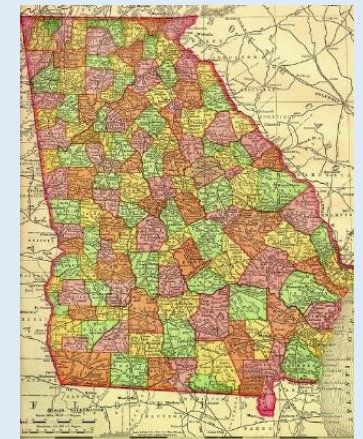




# Policy Changes Expanding Grounds for Post-Tenure Removal

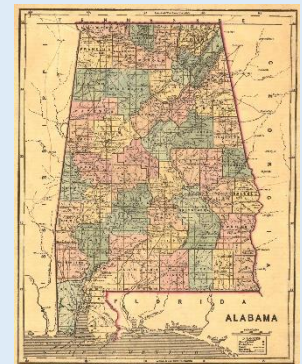
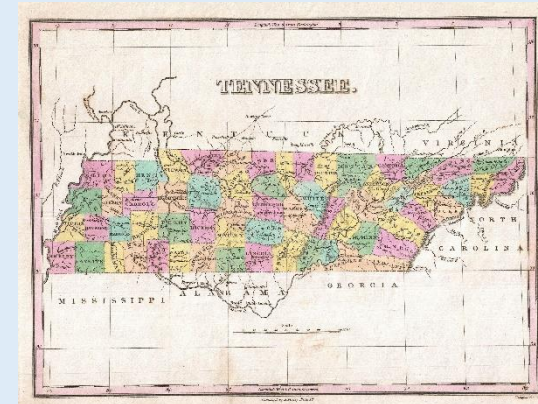


- Arkansas 2019 policy revisions allow removal of tenured faculty for various grounds including
  - unethical conduct
  - incompetence or mental incapacity that prevents faculty member from fulfilling job responsibilities
  - violation of University policy, or state or federal law, substantially related to performance of faculty responsibilities or fitness to serve University
- Georgia: failure of 2 annual reviews => removal without dismissal hearing
  - evaluation of instruction, student success activities, research/scholarship, and service
  - faculty evaluations by students focusing on “improvement of teaching effectiveness & student learning”
  - must include feedback from faculty member’s department chair and committee of faculty colleagues



# Impact of DEI-Related Restrictions

- Florida Anti-WOKE statute prohibits
  - “teaching certain topics or presenting information in specified ways”
  - any curriculum based on theories that “systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities.”
- \* Enforcement enjoined under 1<sup>st</sup> Amendment & Due Process Clause, appeal pending
- **Tennessee:** judicial deference to university removal decisions
  - Can extend to 2022 & 2023 legislation regulating DEI-related activities of faculty
    - bans teaching of “divisive concepts,” including “material that criticizes the myth that America was founded as a free, law-abiding, and divinely-ordained country” as well as “race or sex scapegoating” and “race or sex stereotyping.”
- **Alabama:** HE institution can discipline or discharge anyone who knowingly violates SB 129: prohibiting compelling assent to any divisive concepts



# Bills Introduced in 2025



- Arkansas [House Bill 1512](#)
  - Post tenure review including immediate for cause review based on “professional incompetence,” failure to perform duties or complete professional development, violation of laws or policy, unprofessional conduct, any other cause in institution’s review policy
- [Kansas House Bill 2348](#)
  - tenure shall be discretionary and conditional
  - tenure can be at any time revoked, limited, altered or otherwise modified by the awarding institution or by the state board of regents
- [Ohio Senate Bill 1](#)
  - requires annual performance review & post-tenure review based on “does not meet performance” evaluation in 2/3 years => censure, remedial training or far-cause termination
  - allows for immediate and for cause post-tenure review at any time for faculty member with “documented and sustained record of significant underperformance”
    - Not based on expression of academic freedom
  - prevents unions from collectively bargaining over post-tenure review and layoff policies.
- [North Dakota House Bill 1437](#)
  - bans tenure for any faculty member hired after July 1, 2026, at 2 year institutions
- [Texas House Bill 1830](#)
  - Boards of Regents would be allowed to establish alternative system of tiered employment status, including annual performance evaluation for all faculty



# Advocacy to Protect Tenure



- Ensure recording of & access to any communications or records of meetings where any tenure-related issue is discussed
- Clear procedures to be followed in making decisions about tenure, post-tenure review, or contract renewal
  - Including peer input
  - Following due process principles including notice, opportunity to review & rebut evidence, be heard by neutral decision-maker
- Input on process and content of improvement plans prior to removal
- Clear policies on criteria and information to be considered in making decisions
  - Input & clarity on
    - performance metrics
    - institution's policies as basis for removal
  - Clarity on statutory grounds for removal
    - "free inquiry, free expression, and intellectual diversity" in Indiana
    - "moral turpitude" in Texas or "unethical" in Arkansas
- Litigation if faculty are affected by
  - Lack of due process or vagueness
  - Speech limitations; e.g., teaching "divisive concepts"







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See NEA OGC Guidance on  
Speech & Association Rights  
for Higher Education Faculty  
(July 2024) &  
First Amendment  
Protections for Educators in  
Response to Anti - DEI EO's  
(March 2025)

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