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Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities

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Table of Contents

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I. Introduction

Picture the following scenario: Professor X informs her public university administrator of her decision to disseminate research results on the controversial subject of socialized medicine. The university administrator subsequently blocks Professor X's publication based on the administrator's belief that (1) Professor X's position is politically unpalatable and (2) the publication of such research results would adversely affect the university's interests. Most would agree that the administrator's action is impermissible because it violates the First Amendment[1] academic freedom[2] rights of the state university professor.[3]

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1. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The Supreme Court determined that the First Amendment also limits the powers of the states in *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

2. Federal courts often use, but do not explain, the term "academic freedom." *See* W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 302 (1998) ("[C]ourts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom."); *see also* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 253 (1989)

Now imagine that another member of a state university faculty, Professor Y, wishes to access sexually explicit materials on a state-owned computer to research sexual themes in various topics such as art, literature, history, and law. Furthermore, suppose that a state statute requires Professor Y to receive prior written approval from his university administrator to access this sexually explicit material. The administrator refuses to allow Professor Y to research sexually explicit material on the Internet because of the administrator's belief that (1) the position held by Professor Y is politically unpalatable and (2) the publication of such research results would adversely affect the interests of the university. Like the example of Professor X, one would assume that the statutory permission requirement inherently violates Professor Y's First

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("Lacking in definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles.").

However, there has been much scholarly literature discussing and defining academic freedom. Professor Rabban has stated that Professor Lovejoy wrote "what is probably the most influential short definition of academic freedom":

> Academic freedom is the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials in the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.

David Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1408 n.11 (1988) (quoting Lovejoy, *Academic Freedom*, in 1 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 384, 384 (1930)). For other useful short definitions of academic freedom, see Fritz Machlup, *On Some Misconceptions Concerning Academic Freedom, reprinted in* ACADEMIC FREEDOM AND TENURE 177, 178 (L. Joughin ed., Univ. of Tex. Press 1967) (defining academic freedom); William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty, in* THE CONCEPT OF ACADEMIC FREEDOM, 59, 71 (E. Pincoffs ed., 1972) (same). This Note will discuss both the professional and constitutional definitions of academic freedom. *See infra* Parts II-III.

3. This Note focuses on academic freedom in public colleges and universities. However, if a court were to find a sufficient level of governmental support to constitute "state action," the First Amendment could apply in a private institutional setting. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725-26 (1961) (holding that privately owned restaurant located within public parking garage was involved sufficiently with state authority to bring its racially discriminatory actions within proscription of Fourteenth Amendment). To date, courts have not found that governmental support of private colleges or universities constitutes state action. *See* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1291-92 n.72 (1988) (noting that "[a]s far as academic freedom is concerned, a private university will be bound by whatever its own rules, contractual agreements, and good sense may dictate, but not by what the Constitution decrees"); *see also* Richard H. Hiers, *Academic Freedom in Public Colleges and Universities: O Say, Does That Star-Spangled Banner Yet Wave?*, 40 WAYNE L. REV. 1, 2 n.2 (1993) (stating that courts have not found that governmental support of private colleges or universities constitutes state action).

Amendment rights of academic freedom; it impermissibly restricts Y's freedom of research and inquiry.[4] According to the United States Court of Appeals for the Fourth Circuit, however, that assumption is wrong.[5]

In *Urofsky v. Gilmore*,[6] the United States Court of Appeals for the Fourth Circuit recently upheld a 1996 Virginia statute that prohibits any state employee from using Virginia-owned computer equipment to access or store sexually explicit content unless the employee first obtains written permission from a supervisor to access the prohibited material.[7] Six professors at Virginia public institutions challenged the constitutionality of the statute alleging that it interfered with their academic freedom to conduct research and to teach.[8] The professors, who teach on subjects such as AIDS, human sexuality,

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4. *See* Van Alstyne, *supra* note 2, at 71 (defining academic freedom). Professor Van Alstyne defined academic freedom as follows:

> "[A]cademic freedom" is characterized by a personal liberty to pursue the investigation, research, teaching, and publication of any subject as a matter of professional interest without vocational jeopardy or threat of other sanction, save only upon adequate demonstration of an inexcusable breach of professional ethics in the exercise of that freedom. Specifically, that which sets academic freedom apart as a distinct freedom is its vocational claim of special and limited accountability in respect to all academically related pursuits of the teacher-scholar: An accountability not to any institutional or societal standard of economic benefit, acceptable interest, right thinking, or socially constructive theory, but solely upon a fiduciary standard of professional integrity. To condition the employment or personal freedom of the teacher-scholar upon the institutional or societal approval of his academic investigations or utterances, or to qualify either even by the immediate impact of his professional endeavors upon the economic well-being or good will of the very institution that employs him, is to abridge his academic freedom.

Id.; *see also infra* Part VI.B.2 (explaining that statutory permission requirement at issue in *Urofsky v. Gilmore* violated academic freedom by imposing impermissible prior restraint on scholarly research, writing, and dissemination on Internet).

5. *See* Urofsky v. Gilmore, 216 F.3d 401, 416 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001) (upholding Virginia statute that censors freedom of inquiry and research of state-employed university professors on Internet); *see also infra* Part VI.A (asserting that Virginia statute violated academic freedom of university professors by censoring academic research, writing, and communications).

6. 216 F.3d 401 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001).

7. *See* Urofsky v. Gilmore, 216 F.3d 401, 415-16 (4th. Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001) (upholding Virginia statute restricting state employees from accessing sexually explicit material on computers owned or leased by state). The court concluded that the challenged statute did not infringe upon First Amendment rights of state employees in general and that the statute did not infringe on the academic freedom rights of university faculty. *Id.* at 416; *see also infra* notes 215-307 and accompanying text (discussing *Urofsky* in depth).

8. *Urofsky*, 216 F.3d at 405-06. The plaintiffs named in *Urofsky v. Gilmore* now must choose between seeking university permission to conduct on-line research or self-censoring their Net surfing activity. *See* Courtney Macavinta, *Virginia Cracks Down on Sexual Conduct*, *at* http://www.CNET.com:News/Entertainment&Media/Story (Feb. 11, 1999) (discussing *Urofsky* case). For example, plaintiff Terry Meyers feared he could get in trouble for his study

popular culture, and poetry, also claimed that the prior permission requirement restricted their academic freedom because it imposed an impermissible prior restraint.[9] They argued that the Virginia Act permitted the state to restrict the inquiry and knowledge of Virginia state university professors and reduced the independence of those professors by placing a substantial veto power in the hands of university administrators.[10]

Generally, courts have been willing to offer significant free speech protection to professors under the theory of academic freedom.[11] Academic free-

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of a nineteenth century poet named Algernon Charles Swinburne. *Id.* Meyers, professor and chair of the English Department at the College of William and Mary, said Swinburne's work was too provocative to slip by the Virginia law. *Id.* Meyers stated, "It's a very scary decision, and it strikes at the heart of First Amendment rights on the Net and academic freedom . . . . I now have to ask permission from my dean to read online poems that I specialize in." *Id.*

A supervisor told Paul Smith, a professor of English and cultural studies at George Mason University, to remove five nude pictures from a Web Site that accompanies his course. *Id.* Ironically, the photos were part of an assignment on censorship for his popular culture course examining the media's descriptions of gender and sexuality. *Id.* They fell under the state's definition of "sexually explicit." *Id.*

Melvin L. Urofsky, the lead plaintiff in the district court, alleged that he had declined to assign an online research project on indecency law because he feared he would be unable to verify his students' work without violating the Act. *Urofsky*, 216 F.3d at 409 n.9. Plaintiffs Dana Heller, Bernard H. Levin, and Bryan J. Delaney maintained that they were hesitant to continue their Internet research on various aspects of human sexuality. *Id.*

9. *See* Brief of Amici Curiae American Association of University Professors and the Thomas Jefferson Center for the Protection of Free Expression at 16-19, Urofsky v. Gilmore, 69 U.S.L.W. 3259 (U.S. Jan. 8, 2001) (No. 00-466) [hereinafter AAUP *Urofsky* Amicus Brief] (arguing that Virginia law discriminates based on sexually explicit content and imposes impermissible prior restraint); Petition for Writ of *Certiorari* at 21-25, Urofsky v. Gilmore, 69 U.S.L.W. 3259 (U.S. Jan. 8, 2001) (No. 00-466) [hereinafter *Urofsky* Brief for Petitioner] (asserting that both prior restraint licensing requirement and public disclosure provision chill academic discourse and other bona fide research about sexuality).

10. Professor Rabban summarizes the traditional conception of academic freedom as follows:

> Classic discussions of academic freedom stress the freedom of the professor to investigate, teach, and publish, subject only to scholarly standards and professional ethics. Other restrictions on the choice of research or on the expression of scholarly views, whatever their source, violate academic freedom. The social functions performed by professors justify this broad freedom. Critical inquiry and dissemination of research by university professors is essential to the advancement of knowledge. Professors cannot perform these vital roles if others intimidate or punish them for expressing their scholarly judgments, which may often challenge or enrage those who hold prevailing conventional views. The roles of professors are also undermined by suspicions that nonprofessional considerations have influenced their judgments.

Rabban, *supra* note 2, at 1408-09 (1988) (citations omitted).

11. *See generally* William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review, reprinted in* FREEDOM AND TENURE IN THE ACADEMY 79, 79-154 (William W. Van Alstyne ed., 1993) (tracing usage of term "academic freedom" in Supreme Court).

dom includes the freedom of individual professors to teach, research, and publish opinions on issues of public concern.[12] However, the Fourth Circuit spurned any individual claim of academic freedom in *Urofsky*.[13] Judge Wilkins, writing for the majority, claimed that "[t]he Supreme Court, to the extent it has constitutionalized a right to academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs."[14] In a concurring opinion, Judge Luttig emphatically stated that "there is no constitutional right of free inquiry unique to professors or to any other public employee . . . the First Amendment protects the rights of all public employees equally."[15] Finally, while Judge Wilkinson extolled the virtues of academic inquiry and curiosity, he also concurred in the judgment because "the limited restrictions in th[e] Act are administered within the traditional structure of university governance."[16]

Thus, instead of deciding the case by focusing on the individual professor's academic freedom to research and to disseminate ideas, the *Urofsky* court analyzed the professor's speech as a mere subset of speech by "public employees."[17] The Fourth Circuit applied the public employee analysis that the Supreme Court developed in *Pickering v. Board of Education*,[18] *Connick v. Myers*,[19] *Waters v. Churchill*,[20] and *United States v. National Treasury Employees Union*.[21] That analysis requires a court to balance the free speech rights of public employees against the government's interest as employer to prevent disruption in the efficient delivery of public services.[22] The majority

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12. *See* Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure, reprinted in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 11, at 8 (dividing academic freedom into the following three parts: freedom to investigate, freedom to teach, and freedom to publish, subject only to scholarly standards and professional ethics).

13. *See* Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000) (en banc), *cert denied*, 531 U.S. 1070 (2001) (rejecting "individual" academic freedom).

14. *Id.*

15. *Id.* at 425 (Luttig, J., concurring).

16. *Id.* at 434 (Wilkinson, C.J., concurring); *see also id.* at 428 (Wilkinson, C.J., concurring) (stating that "[a]cademic inquiry is necessary to informed political debate" and that "[a]cademic curiosity is critical to useful social discoveries"). Chief Judge Wilkinson also noted that "[b]y restricting Internet access, a state thus restricts academic inquiry at what may become its single and most fruitful source." *Id.*

17. *Id.* at 415 (concluding that "because the Act does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors").

18. 391 U.S. 563 (1968).

19. 461 U.S. 138 (1983).

20. 511 U.S. 661 (1994).

21. 513 U.S. 454 (1995).

22. *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995) (modifying *Pickering-Connick* balancing test); Waters v. Churchill, 511 U.S. 661 (1994) (plurality

concluded that because the Act did not infringe the constitutional rights of public employees in general, it also did not violate the academic freedom of professors.[23]

This Note argues that the majority and concurring opinions of *Urofsky* erred by applying the *Pickering-Connick* balancing test to the speech of public university professors.[24] The *Pickering-Connick* balancing test pertains to the speech of public employees that has the potential to disrupt the efficient administration of government.[25] In contrast, academic freedom is a concept relevant to an entirely different species or subset of speech: research, inquiry, and expression of thought that contributes to the realm of human knowledge and insight.[26] This Note argues that the First Amendment protects the type of academic speech involved in *Urofsky* under the rubric of academic freedom.[27] To engage in critical inquiry, professors need some degree of independence from their university employers, and universities need some degree of independence from the state.[28] As noted by one commentator, "the search for truth requires that scholars receive the protection of academic freedom in posing

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opinion) (adding new procedural requirement to *Pickering-Connick* balancing test); Connick v. Meyers, 461 U.S. 138 (1983) (refining *Pickering* balancing test); Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (establishing balancing test for public employee's speech); *see also* Urofsky v. Gilmore, 216 F.3d 401, 406 (4th Cir. 2000) (en banc), *cert denied*, 531 U.S. 1070 (2001) (quoting *Connick*). *Urofsky* construes the *Pickering-Connick* balancing test as follows:

> A determination of whether a restriction imposed on public employee's speech violates the First Amendment requires 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees'.

Id.

23. *Urofsky*, 216 F.3d at 415.

24. *See infra* Part VI (demonstrating flaws in Fourth Circuit's analysis in *Urofsky*). There is no issue in *Urofsky* of academic freedom rights at the elementary or secondary school level, at which teachers generally do not engage in independent research and writing. *Urofsky*, 216 F.3d at 409 n.8. Nor is there any issue regarding professors' control over curriculum content. *Id.*

25. *See supra* note 22 and accompanying text (discussing *Pickering* line of cases as applied to public employee speech); *see also infra* Part IV (analyzing Supreme Court public employee free speech cases in detail).

26. *See infra* Parts II-III (describing development of professional and constitutional definitions of "academic freedom").

27. *See infra* Part VI.B (arguing that scholarly research, writing, publication, and speech on any matter of professional concern deserves pure First Amendment protection rather than consideration as factor in *Pickering* balancing test).

28. *See generally* David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment, reprinted in* Freedom and Tenure in the Academy, *supra* note 11, at 229-301 (discussing "tension" between individual and institutional academic freedom).

new, controversial, or unpopular ideas in their teaching and research."[29] Thus, this Note asserts that the Fourth Circuit's approval of a licensing scheme that singles out and chills research and writing on "sexually explicit" subjects violates academic freedom by discriminating based on content and by constituting an impermissible prior restraint.[30]

Part II of this Note chronicles the historical background of the academic freedom concept.[31] Part II.A briefly describes how the German university system provided the basis for the American conceptualization of academic freedom.[32] Part II.B discusses the professional definition of academic freedom.[33] Part III examines the constitutional definition of academic freedom.[34] Part IV tracks the evolution of the Supreme Court's analysis of the relationship between the First Amendment and public employee speech in the workplace.[35] Part V fully develops the facts of the *Urofsky* case.[36] Part VI.A emphasizes that constitutional academic freedom protects the freedom of research, writing, inquiry, and publication of individual professors.[37] Part VI.B critiques the Fourth Circuit's misguided reliance on the *Pickering*-

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29. Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom,"* 45 STAN. L. REV. 1835, 1836 (1993). Professor Olivas emphasized that traditional academic freedom has been incorporated into constitutional interpretations of First Amendment penumbral rights as "protecting the freedoms of inquiry, thought, and choice of what to teach." *Id.* In *Griswold v. Connecticut*, Justice Douglas interpreted the First Amendment penumbral rights as following:

> The association of the people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice – whether public or private or parochial – is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights . . . . [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach – indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure.

Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) (citations omitted).

30. *See infra* Part VI.B (arguing that Virginia Act is unconstitutional as content-based discrimination and prior restraint).

31. *See infra* Part II (discussing historical and professional development of academic freedom).

32. *See infra* Part II.A (describing historical background of academic freedom).

33. *See infra* Part II.B (explaining professional definition of academic freedom).

34. *See infra* Part III (discussing constitutional definitions of academic freedom).

35. *See infra* Part IV (examining public employee speech cases and their application to academic setting).

36. *See infra* Part V (setting forth facts of *Urofsky v. Gilmore*).

37. *See infra* Part VI.A (emphasizing constitutional recognition of academic freedom).

Connick balancing test and demonstrates why scholarly speech deserves full First Amendment protection under the doctrine of academic freedom.[38] Part VI.C illustrates how the Fourth Circuit's approval of the Virginia statute's licensing scheme contravenes the Supreme Court's First Amendment rulings as an impermissible content-based discrimination and as an impermissable prior restraint.[39] Part VII discusses the impact of the Fourth Circuit's decision in *Urofsky* on the free inquiry and dissemination rights of public university professors and concludes that the value of free and independent academic speech to both teachers and society merits its full protection under the First Amendment.[40]

II. The History of Academic Freedom

Commentators have noted that "[a]cademic freedom, a concept often used to defend a variety of speech and conduct that occurs on our nation's campuses, is poorly understood and ill-defined."[41] Thus, a brief overview of the history of the concept of academic freedom in the United States is a necessary preface for this Note's analysis. Academic freedom encompasses a professor's freedom to teach, freedom to research, and freedom to publish opinions on issues of public concern.[42] Academic freedom is rooted in Eur-

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38. *See infra* Part VI.B (finding that Fourth Circuit misapplied *Pickering-Connick* balancing test to academic speech and concluding that restrictions on academic speech should be subject to strict scrutiny).

39. *See infra* Part VI.C (analyzing Fourth Circuit's holding as content-based restriction and impermissible prior restraint).

40. *See infra* Part VII (summarizing issues and recommendations and providing conclusion).

41. Olivas, *supra* note 29, at 1835; *see* Byrne, *supra* note 2, at 253 (noting reluctance of courts to define academic freedom); Stuller, *supra* note 2, at 302 (commenting on unwillingness of courts to give "analytical shape to the rhetoric of academic freedom"). In contrast, Professor Metzger stated that although "[a] sizeable literature of legal commentary asserts that the Supreme Court constitutionalized academic freedom without adequately defining it," he believes:

> [I]t can be shown that the Supreme Court Justices knew what they meant by academic freedom when they introduced it, and that [the] inaugural definition- though imperfectly communicated to the lower courts and subsequently overlaid with a different definition by the Court itself- was never disavowed, but continued to influence Court opinions until a decade ago as a subsurface guide, and since then more overtly.

Metzger, *supra* note 3, at 1290-91.

42. *See* Metzger, *supra* note 12, at 8-9 (dividing academic freedom into three-part definition). However, Professor Metzger recognized that some scholars divide academic freedom into the following two parts: freedom to teach and freedom to perform research. *Id.* at 9 n.8 (citing Stephen R. Goldstein, *Academic Freedom: Its Meaning and Underlying Premises in the American Experience*, 11 ISRAEL L. REV. 52 (1976); Van Alstyne, *supra* note 2, at 71). Thus, Professor Metzger stated:

opean traditions and in our society's recognition that "institutions of higher education are conducted for the common good . . . which depends upon the free search for truth and its free exposition."[43]

A. The German View of Academic Freedom

Prior to the late nineteenth century, Americans did not consider institutions of higher education as centers of research and scholarship.[44] Rather, the role of these institutions of higher education was to pass received wisdom on to the next generation.[45] In the late nineteenth century, the German notion of academic freedom consisted generally of the following three concepts: *Lehrfreiheit*, *Lernfreiheit*, and *Freiheit der Wissenschaft*.[46] *Lehrfreiheit*, or freedom to teach, embodied the notion that professors should be free to conduct research and to publish findings without fear or reproof from the church or state.[47] *Lehrfreiheit* also included the authority of the individual professor to determine the content of courses and lectures.[48] *Lernfreiheit*

> And though most . . . divide academic freedom . . . into three main parts, some insist that good logic would divide it into only two (freedom to teach and freedom to do research, arguably the only professionally relevant freedoms, with citizen or extramural freedom ceded to the large neighboring country of ordinary civil liberties), and a few would divide it into four (the three that go with the faculty's roles plus one attached to the students' status) or even five (all of the four individual academic freedoms, along with institutional academic freedom, also known as institutional autonomy).

Id. (footnotes omitted); *see also* Harry F. Tepker, Jr. & Joseph Harroz, Jr., *On Balancing Scales, Kaleidoscopes, and the Blurred Limits of Academic Freedom*, 50 OKLA. L. REV. 1, 2 n.4 (1997) (discussing division of academic freedom into parts).

43. AM. ASS'N. OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, *reprinted in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 11, at 407-09 app. B [hereinafter 1940 STATEMENT]; *see infra* Part II.A (discussing how German principles of *Lehrfreiheit* and *Lernfreiheit* influenced more formal academic freedom principles and jurisprudence in United States); *see also* Metzger, *supra* note 3, at 1267-85 (discussing influence of German academic system on "generically American, profession-centered, multifaceted definition of academic freedom"); Metzger, *supra* note 12, at 14-15 (describing European roots of American definition of academic freedom); Rabban, *supra* note 28, at 232-35 (analyzing theory of academic freedom in American Association of University Professors' 1915 Declaration of Principles).

44. *See* Byrne, *supra* note 2, at 267-69 (noting that prior to Civil War, goal of higher education was to train young men in religious piety and mental discipline as preparation for clergy and other gentlemanly professions, such as law and medicine).

45. *See id.* (noting that America developed "unique" sense of academic freedom because its colleges began with corporate structure governed by outside boards of non-academics).

46. *See* Metzger, *supra* note 3, at 1267-85 (analyzing American adaptation of German concept of academic freedom).

47. *See id.* at 1269-75 (discussing German principle of "*Lehrfreiheit*").

48. *See id.* at 1269 (noting that *Lehrfreiheit* allowed professors to "decide on the content of their lectures and to publish the findings of their research without seeking prior ministerial

encompassed the right of students to determine the course of their studies for themselves.[49] Finally, *Freiheit der Wissenschaft* conceptualized the notion of academic self-government – the university's right, under the direction of its senior professors organized into separate faculties and a common senate, to control its internal affairs.[50]

The American tradition of academic freedom evolved from this German theory.[51] Between 1870 and 1900, many American college graduates migrated to German universities for advanced instruction and returned persuaded that the Germans' concept of academic freedom should be mirrored in the United States.[52] However, the American definition of academic freedom was more focused than its German precursor in that the American theory centered almost exclusively on the freedom of the individual teacher and researcher.[53]

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or ecclesiastical approval or fearing state or church reproof; it protected the restiveness of academic intellect from the obedience norms of hierarchy").

49. *See id.* at 1270 (stating that *Lernfreiheit* "amounted to a disclaimer by the university of any control over the students' course of study . . . [and] also absolved the university of any responsibility for students' private conduct, provided they kept the peace and paid their bills").

50. *See id.* (classifying *Freiheit der Wissenschaft* as "the university's right, under the direction of its senior professors organized into separate faculties and a common senate, to control its internal affairs" or as "[a]cademic self-government").

51. *See id.* at 1271 (recognizing that "[a]bout half the members of the [AAUP] committee were alumni of German universities, and those who had gone elsewhere did not have to be reminded of where the concept of academic freedom, in its most imposing form, had originated"). Professor Metzger then stated the following:

> No member of this scholarly generation could write about academic freedom and ignore [the] memorable gift from Deutschtum. Certainly the members of the [AAUP] committee did not. To forge a serviceable tool for a profession caught up in a clash between its own heightened self-esteem and resilient social disrespect, they would brandish the venerable heirloom where they could and alter it only where they felt they must.

Id.

52. *See* Metzger, *supra* note 3, at 1269 (stating that many American college graduates returned from Germany "convinced that the Germans' concept of academic freedom held the key to their cynosure achievements and should be transplanted onto American soil").

53. *See generally* Rebecca S. Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 TEX. L. REV. 1363, 1364 n.6 (1988) (discussing traditional American conception of academic freedom); Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 821 (1983) (arguing that academic freedom supports claims to autonomy by academic institutions only when institutional autonomy furthers individual freedom of teaching and inquiry within institution); Walter P. Metzger, *Academic Freedom and Scientific Freedom*, DAEDALUS, Spring 1978, at 93, 94-95 (discussing American admiration of academic freedom in nineteenth-century German universities); Mark Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 834, 848, 851 (1987) (identifying the following three distinct faces of academic freedom: Personal autonomy of individual scholars, limits on government restrictions on expression within schools, and autonomy of academic institutions).

Significantly, the American definition of academic freedom does not encompass the principle of *Lernfreiheit* (student freedom). *See* Metzger, *supra* note 3, at 1273 (stating that

B. The AAUP's Professional Definition of Academic Freedom

The American Association of University Professors' (AAUP) 1915 Declaration of Principles (1915 Declaration) set forth the classic statement of the American conception of academic freedom.[54] This statement limited the concept of academic freedom to the academic freedom of the individual professor, thereby adapting the German concept of academic freedom to the American context.[55] The 1915 Declaration defined academic freedom as comprising the following three elements: "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action."[56] It recognized the social benefits of academic freedom in universities by stressing that a true university is an "intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world."[57]

The 1915 Declaration identified the greatest threat to academic freedom as being oppression of individual professors by internal university administrators and governing boards.[58] The 1915 Declaration stressed that society

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organized profession "would always assume that academic freedom meant freedom for the academic, never permissibly less and seldom deservedly more").

54. AM. ASS'N. OF UNIV. PROFESSORS, GENERAL REPORT ON THE COMMITTEE ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915), *reprinted in* FREEDOM AND TENURE IN THE ACADEMY, *supra* note 11, at 393-06 app. A [hereinafter 1915 DECLARATION]. The AAUP issued the 1915 Declaration in response to the widespread dismissal of faculty members by administrators and trustees who disagreed with the expression of professors, including professors teaching Darwinism and speaking out for free silver. *See* WALTER P. METZGER, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY 145-47 (1955) (commenting on violations of academic freedom in 1890s).

55. *See* 1915 DECLARATION, *supra* note 54, at 393 (stating that "the freedom which is the subject of this report is that of the teacher"); *see also* Walter P. Metzger, *The German Contribution to the American Theory of Academic Freedom*, *in* THE AMERICAN CONCEPT OF ACADEMIC FREEDOM 23-24 (Walter P. Metzger ed., 1977) (finding that American theorists focused almost exclusively on freedom of individual teacher and researchers); Rabban, *supra* note 28, at 232 (recognizing that 1915 Declaration "limited itself to the academic freedom of the professor, while recognizing that student academic freedom had been a major component of the German tradition").

56. 1915 DECLARATION, *supra* note 54, at 393. Significantly, the 1915 Declaration emphasized that academic freedom of inquiry and research "is almost everywhere so safeguarded that the dangers of its infringement are slight." *Id.* Ironically, in *Urofsky v. Gilmore*, the freedom of inquiry and research is the aspect of academic freedom that the Fourth Circuit suppressed. *See infra* notes 308-22 and accompanying text (analyzing *Urofsky*).

57. *See* 1915 DECLARATION, *supra* note 54, at 397-99.

58. *Id.* at 394-95; *see also* Eisenberg, *supra* note 53, at 1364-71 (discussing traditional American concept of academic freedom); Metzger, *supra* note 3, at 1266 (defining two types of academic freedom: professional academic freedom and constitutional academic freedom).

should regard professors as appointees rather than as employees because professors, like judges, must remain independent of their nominal employers to perform their professional functions.[59] The responsibility of the university professor is primarily to the public; thus, the proper fulfillment of the work of the professorate required freedom from institutional imprimaturs.[60] Accordingly, under a newly created "professional-centered" definition of academic freedom, the AAUP protected the individual professor rather than the university in its institutional capacity.[61]

Although the 1915 Declaration focused primarily on the threat that university trustees posed to academic freedom, it also recognized that legislatures could endanger academic freedom.[62] The 1915 Declaration noted that legislators might attempt to control the academic inquiry of professors by conditioning the receipt of funds upon political considerations.[63] Thus, the 1915 Declaration reemphasized that the university should be an "inviolable refuge from . . . tyranny."[64]

The AAUP, together with the Association of American Colleges and Universities, also authored the joint 1940 Statement of Principles on Academic Freedom and Tenure (1940 Statement), which codified the academic freedom of research and teaching by faculty.[65] The 1940 Statement declared:

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59. 1915 DECLARATION, *supra* note 54, at 397; *see also* Rabban, *supra* note 28, at 233 (commenting that both professors and judges must remain independent of their nominal employers to perform their professional functions).

60. *See* 1915 DECLARATION, *supra* note 54, at 397 (recognizing professors' obligation to public). Specifically, the 1915 Declaration stated the following:

> The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession; and while, with respect to certain external conditions of his own vocation, he accepts a responsibility to the authorities of the institution in which he serves, in the essentials of his professional activity his duty is to the wider public to which the institution itself is morally amenable.

Id.

61. *See* Rabban, *supra* note 28, at 232 (stating that 1915 Declaration "limited itself to the academic freedom of the professor, while recognizing that student academic freedom had been a major component of the German tradition").

62. *See id.* at 233 (noting that 1915 Declaration "focused primarily on boards of trustees, the acknowledged source of power in universities"). Professor Metzger makes clear that the drafters of the 1915 Declaration decided not to challenge lay control of universities. Metzger, *supra* note 3, at 1276-78. The drafters accepted that "'outside' was ensconsed within." *Id.* at 1277.

63. 1915 DECLARATION, *supra* note 54, at 400.

64. *Id.*

65. 1940 STATEMENT, *supra* note 43, at 407-09. The AAUP defined academic freedom as encompassing three primary facets:

> (a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of . . . other academic duties; but research for pecun-

"freedom in research is fundamental to the advancement of truth."[66] Accordingly, the 1940 Statement treated academic freedom as the individual freedom of university professors.[67] One hundred and seventy-two professional organizations and learned societies have endorsed the 1940 Statement, and hundreds of universities have incorporated it into their college bylaws, faculty contracts, faculty handbooks, and collective bargaining agreements.[68]

The 1915 Declaration and the 1940 Statement endure as hallmarks of academic freedom and the norm of academic practice in the United States.[69] However, the AAUP's professional definition of academic freedom is an example of what Professor William J. Van Alstyne calls "soft law."[70] It is the AAUP that polices the 1940 Statement rather than the courts.[71] The universi-

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> iary return should be based upon an understanding with the authorities of the institution. (b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment. (c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

Id. at 407-08.

66. *Id.* at 407.

67. *Id.* at 405 (noting that academic freedom applies to both teaching and research of individual professors).

68. *See* Amy H. Candido, *A Right to Talk Dirty?: Academic Freedom Values and Sexual Harassment in the University Classroom*, 4 U. CHI. L. SCH. ROUNDTABLE 85, 86-87 (1997) (stating that 1940 Statement is observed widely through its adoption into bylaws, faculty contracts, and collective bargaining agreements).

69. *See* Metzger, *supra* note 12, at 77 (stating that if it does endure, 1940 Statement will do so "because it serves the enduring interests of the academic profession and the academic enterprise"); *see also* Rabban, *supra* note 28, at 232 (recognizing that "[t]he AAUP's 1915 Declaration of Principles, the first comprehensive analysis of academic freedom in the United States, remains the foundation for the nonlegal understanding of academic freedom within the academic world").

70. *See* Van Alstyne, *supra* note 11, at 80 (noting that "[i]n comparison with the soft law of the 1940 Statement, the first amendment is hard law indeed"). Professor Van Alstyne classifies the 1940 Statement as an example of "very soft law," while the First Amendment, with its general protection of free speech, is a "fixed constitutional provision, even if limited to acts of government . . . [which] is at the opposite end of the legal order from the precatory law of the AAUP." *Id.* at 79-80.

71. *See id.* at 79 (commenting that 1940 Statement is "soft law" because it is "policed principally by Committee A of the AAUP and by publication of AAUP's ad hoc committee investigation case reports in the AAUP's professional journal").

ties must incorporate the 1940 Statement in their official policies for the 1940 Statement to have legal effect.[72] Therefore, the theory of academic freedom needed a basis in "hard law," such as the First Amendment of the United States Constitution.[73]

III. Academic Freedom in the United States Supreme Court

The term "academic freedom" did not achieve widespread judicial usage until the 1950s and 1960s.[74] The courts first paid attention to the concept of academic freedom as a response to government investigations of alleged communist conspiracies.[75] In the so-called "glory years"[76] of academic freedom during the 1950s and 1960s, the Supreme Court identified academic freedom as "a special concern of the First Amendment."[77] Yet, somewhat problematically, the Court has never seized the opportunity to explain systematically the theory behind its incorporation of academic freedom into the First Amendment.[78] Consequently, appellate courts have found it difficult to resolve "the tension between the individual and institutional components of academic freedom."[79]

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72. *See id.* at 80 (stating that "[the] 1940 Statement generally requires affirmative institutional action of some sort to carry its provision into legal effect," as when university adopts it and makes it part of faculty's contractual guarantee). Examples of affirmative institutional action are "incorporation by reference into college or university bylaws, into letters of faculty appointment, or collective bargaining agreements." *Id.*

73. *See id.* (affirming that Bill of Rights, including First Amendment, is "part of our fundamental law" and that "its protections are enforceable in every court in United States").

74. *See* Metzger, *supra* note 3, at 1285 (noting "curious exception" of *Kay v. Board of Higher Education*, 18 N.Y.S.2d 821, 829 (N.Y. Sup. Ct. 1940), which recognized constitutionally protected academic freedom by stating that academic freedom was "the freedom to do good and not to teach evil").

75. *See* Rabban, *supra* note 28, at 235, 237 (noting that "term 'academic freedom' first attracted constitutional attention during the 1950s, in connection with the more general response by Supreme Court to government investigations of alleged communist conspiracies").

76. *See* Hiers, *supra* note 3, at 6-12 (discussing "glory years" of academic freedom).

77. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967). For a full discussion of *Keyishian*, see *infra* notes 109-15 and accompanying text.

78. *See* Rabban, *supra* note 28, at 230 (commenting that although Supreme Court has glorified academic freedom in "hyperbolic rhetoric," it has produced "only scant, and often ambiguous, analytic content"). Professor Byrne presents the fullest discussion of the relationship between the AAUP definition and the constitutional definition of academic freedom. Byrne, *supra* note 2, at 251. Professor Metzger provides a comprehensive taxonomy of these two definitions while explaining how they differ rather than how they relate. Metzger, *supra* note 3, at 1265.

79. Rabban, *supra* note 28, at 230. "Some commentators, [such as Professor Byrne and Professor Metzger,] have maintained that the courts . . . seem to be defining constitutional academic freedom exclusively in institutional terms." *See id.* (refuting analysis of both Professors Byrne and Metzger). Professor Rabban convincingly states that while "courts may have

Nevertheless, the Supreme Court consistently has recognized that the First Amendment protects the academic freedom of individual professors.[80] Additionally, the Court has extended the First Amendment right of academic freedom to institutions.[81] Recognition of institutional academic freedom, however, does not support the additional conclusion that the Court has rejected a constitutional right of individual professors to academic freedom.[82] Thus, this Part chronicles the Supreme Court's approval of academic freedom as a "special concern of the First Amendment."[83]

A. The Beginning of Judicial Recognition of Constitutional Academic Freedom

The term "academic freedom" first appeared in a dissent by Justice Douglas, a former academician, in a 1952 case, *Adler v. Board of Education*.[84]

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been presented with more institutional claims than individual claims of academic freedom . . . they have also recognized that the first amendment protects individual academic freedom." *Id.*

80. *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion) (stating that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation"); *infra* notes 102-08 and accompanying text (discussing *Sweezy*); *see also Keyishian*, 385 U.S. at 603 (noting that "academic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned"); *infra* notes 109-19 and accompanying text (discussing *Keyishian*).

81. *See* Regents Univ. of Michigan v. Ewing, 474 U.S. 214 (1985) (recognizing institutional academic freedom); *infra* text accompanying notes 123-29 (analyzing *Ewing*).

82. Rabban, *supra* note 28, at 230. Assertions of academic freedom under the First Amendment tend to arise in one of the following three ways: "claims of professors against faculty colleagues, administrators, or trustees; claims of professors against the state; and claims of universities against the state." *Id.* at 231. Occasionally, these claims may conflict. *Id.* As William A. Kaplin and Barbara A. Lee explain:

> Constitutional principles of academic freedom have developed in two stages, each occupying a distinct time period and including distinct types of cases. The earlier cases of the 1950s and 1960s focused on faculty and institutional freedom from external (political) intrusion. These cases pitted the faculty and the institution against the state. Since the early 1970s, however, academic freedom cases have focused primarily on faculty freedom from institutional intrusion. In these later cases, faculty academic freedom has collided with the institutional academic freedom.

WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 301 (1995).

83. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); *see infra* Part III (discussing evolution of "academic freedom" in Supreme Court).

84. *See* Adler v. Bd. of Educ., 342 U.S. 485, 509 (1952) (Douglas, J. dissenting) (using term "academic freedom"). In *Adler*, the Supreme Court considered the constitutionality of the New York Feinberg Law, a statute that provided for the disqualification and removal from civil service and public employment of any person advocating, advising, or teaching governmental overthrow by force, violence, or unlawful means. *Id.* at 486-91. A group of public schoolteachers claimed that the Feinberg Law constituted an abridgment of the freedoms of speech and assembly of persons employed or seeking employment in the New York public schools. *Id.* at 491-92. The *Adler* Court sustained the statute from facial attack by relying on the right-

In *Adler*, a group of New York public schoolteachers claimed that the Feinberg Law violated their First Amendment rights.[85] The state statute provided for the disqualification and removal from public employment of any "subversive persons" who had made treasonable or seditious statements.[86] The *Adler* majority used the now discredited right-privilege distinction to sustain the statute from facial attack: "If [teachers] do not choose to work on such terms [as those in New York limiting First Amendment rights], they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."[87]

Although the *Adler* majority concluded that the statute did not violate the First Amendment rights of the teachers, Justice Douglas, in his dissenting opinion, conceptualized a theory of academic freedom that a majority of the Court later accepted.[88] Douglas found fault with the Feinberg Law because the statute intimidated teachers.[89] He declared that "[t]here can be no real

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privilege distinction. *Id.* at 491-95. The Court did not consider government employment to be a constitutional "right" because state employees remained at liberty to retain their beliefs and associations and go elsewhere. *Id.* at 492.

85. *Id.* at 491-92.

86. N.Y. EDUC. LAW § 3022 (McKinney 1981).

87. *Id.* at 492 (citations omitted). Fifteen years later, the right-privilege distinction no longer held weight with the Court, and *Adler* substantially was overruled by *Keyishian*, 385 U.S. at 605-06 ("[C]onstitutional doctrine which has emerged since [*Adler*] has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct governmental action . . . . [T]hat theory was expressly rejected in a series of decisions following *Adler*.") (citations omitted); *see infra* discussion at notes 109-19 and accompanying text (discussing *Keyishian*).

The Supreme Court only repudiated the right-privilege distinction after decades of confusing discussion. *See* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1462-64 (1968). In a 1926 economic due process case, the Court held that states may not take away constitutional rights "under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." *See* Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 593-94 (1926) (striking down state law requiring transportation company to perform as common carrier). In other cases, the Court has struck down governmental policies requiring waiver or surrender of rights as a precondition to governmental benefits. *See, e.g.*, Bd. of Regents v. Roth, 408 U.S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."); Goldberg v. Kelley, 397 U.S. 254, 262 (1970) (stating that "the constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and a 'right'").

88. *Adler*, 342 U.S. at 508-11 (Douglas, J., dissenting); *see Keyishian*, 385 U.S. at 609-10 (holding Feinberg Law unconstitutional); *infra* notes 109-19 and accompanying text (discussing *Keyishian*). In *Keyishian*, Justice Brennan, speaking for a bare majority, found that the Feinberg Law imperiled academic freedom. *Keyishian*, 385 U.S. at 603.

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

academic freedom in [an] environment" of exclusion and teacher fear.[90] Significantly, Justice Douglas's dissent identified academic freedom as a subset of the First Amendment freedom.[91] Justice Douglas stated that "the Constitution guarantees freedom of thought and expression to everyone in our society.... [N]one needs it more than the teacher."[92]

In the same term as *Adler*, Justice Felix Frankfurter, another former academician, provided a concurring opinion that identified academic freedom, although not by name, as a subset of the First Amendment.[93] In *Wieman v. Updegraff*,[94] the Court held unconstitutional an Oklahoma statute requiring public employees to take a loyalty oath stating that they had not associated with specific organizations.[95] In his concurring opinion, Justice Frankfurter emphasized that although the Fourteenth Amendment[96] protects all persons, no matter what their calling, "in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of

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90. *Id.* (Douglas, J., dissenting). Justice Douglas also argued that the "system of spying and surveillance . . . cannot go hand in hand with academic freedom." *Id.* at 510-11 (Douglas, J., dissenting).

91. *See* Van Alstyne, *supra* note 11, at 107 (noting importance of Justice Douglas's use of academic freedom as distinct, identified subset of constitutional First Amendment concern).

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

93. *See* Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (recognizing concept of academic freedom as subset of First Amendment); *see also* Van Alstyne, *supra* note 11, at 107-09 (providing in-depth analysis of *Wieman*).

94. 344 U.S. 183 (1952).

95. *See Wieman*, 344 U.S. at 191 (distinguishing *Adler* by claiming that, unlike Feinberg Law, statute in question excluded persons from state employment based solely on membership in organization, regardless of any knowledge of organization's purpose). The *Wieman* Court reviewed a state statute requiring compliance with a broad disclaimer oath as a condition of public employment. *Id.* at 184-91. The statute permitted the elimination from public employment any person affiliated with any listed subversive organization, whether or not the disqualified person was aware of whatever it was that made the organization subversive when he or she joined. *Id.* at 186-87. The *Wieman* Court concluded that the "indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." *Id.* at 191. Thus, the *Wieman* Court held the statute unconstitutional under the Due Process Clause of the Fourteenth Amendment. *Id.* at 190-91.

96. Standing alone, the First Amendment is not addressed to the states. However, in 1931, the Supreme Court incorporated the full Free Speech and Free Press Clause into the Due Process Clause of the Fourteenth Amendment to hold invalid a state law. *See* Near v. Minnesota, 283 U.S. 697, 722-23 (1931) (incorporating provisions of First Amendment into Fourteenth Amendment); *see also* DeJonge v. Oregon, 299 U.S. 353, 364 (1937) (same). Since 1931, the Supreme Court has treated the Fourteenth and First Amendments as "framing parallel, binding restrictions on the national and state governments, although neither by itself applies to private entities not operating as agencies of the state." Van Alstyne, *supra* note 11, at 80 n.3.

those amendments vividly in operation."[97] Thus, the concept of academic freedom, although not the actual term, initially emerged into Supreme Court jurisprudence through dissenting and concurring opinions.[98] It is clear, however, that the conceptualization of academic freedom as a subset of the First Amendment began primarily with an emphasis on the rights of individual teachers.

B. Majority Approval of Academic Freedom

A majority of the Supreme Court has recognized that the First Amendment protects the academic freedom of state-employed professors.[99] Furthermore, the Court extended these holdings to institutions as a complimentary layer of protection for academic speech.[100] Therefore, the academic research, writing, and publication of individual professors merits full First Amendment protection under the doctrine of academic freedom.[101]

1. The Bedrock Cases

A majority of the Court finally recognized academic freedom as a constitutional matter in 1957, in *Sweezy v. New Hampshire*.[102] The Supreme Court

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97. *Wieman*, 344 U.S. at 195 (Frankfurter, J., concurring). Justice Frankfurter also stated that teachers "must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma." *Id.* at 196 (Frankfurter, J., concurring).

98. *See supra* notes 84-97 and accompanying text (tracing usage of academic freedom doctrine in Supreme Court jurisprudence).

99. *See infra* Part III.B.1 (discussing Supreme Court's recognition of "individual" academic freedom).

100. *See infra* Part III.B.2 (analyzing Supreme Court's more recent protection of "institutional" academic freedom).

101. *See infra* Part VI.A-B (concluding that academic research, writing, and publication on Internet deserves full First Amendment protection under strict scrutiny standard rather than under lowered scrutiny under Supreme Court's public employee free speech analysis).

102. 354 U.S. 234 (1957) (plurality opinion). Justice Frankfurter, joined by Justice Harlan, concurred with the plurality's holding. *Id.* at 255-67 (Frankfurter, J., concurring). Justice Frankfurter did not refer explicitly to "academic freedom," but he did at several points agree with the plurality's position. *Id.* (Frankfurter, J., concurring). For example, Justice Frankfurter stated the following:

> The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized [ways of] dealing . . . with interpenetrating aspects of holistic perplexities. For society's good – if understanding be an essential need of society – inquires into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstained from intrusion into this activity of freedom, in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

reversed the conviction of Paul Sweezy, a member of the University of New Hampshire faculty, for refusing to answer the Attorney General's questions about his associations with the Progressive Party and about the content of a lecture he had given at the university.[103] The Court held that "there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression – areas in which government should be extremely reticent to tread."[104]

Chief Justice Warren's plurality opinion in *Sweezy* contains the Court's fullest discussion of academic freedom:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an

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Id. at 261-62 (Frankfurter, J., concurring). Justice Frankfurter emphasized "the dependence of free society on free universities," adding, "[t]his means the exclusion of governmental intervention in the intellectual life of a university." *Id.* at 262 (Frankfurter, J., concurring). He then stated that "[i]t matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor." *Id.* (Frankfurter, J., concurring). Thus, although Justice Frankfurter did not explicitly use the term "academic freedom," a majority of the Court clearly shared the opinion that academic freedom was essential to American society. *See* Richard H. Hiers, *New Restrictions on Academic Free Speech: Jeffries v. Harleston II*, 22 J.C. & U.L. 217, 222-23 (1995) (stating that "even though a majority of the *Sweezy* Court could not agree on common language, a majority shared the belief that academic freedom was essential for the proper functioning and future of American society").

103. Sweezy v. New Hampshire, 354 U.S. 234, 240-44, 248-49 (1957) (plurality opinion). In *Sweezy*, the Supreme Court considered whether political investigation by the New Hampshire legislature deprived the defendant, Paul Sweezy, of due process of law under the Fourteenth Amendment. *Id.* at 235. *Sweezy* arose from an investigation of "subversive activities" by the New Hampshire Attorney General. *Id.* at 238. Sweezy, the target of the investigation, refused to answer certain questions regarding a guest lecture he had given at the University of New Hampshire. *Id.* His refusal to answer these and other questions ultimately resulted in his incarceration for contempt. *Id.* at 244-45. On *certiorari* review of the decision of the New Hampshire Supreme Court affirming the decision, a plurality of four justices indicated that the action of the state unquestionably infringed on Sweezy's liberties in the areas of academic freedom and political expression. *Id.* at 250. However, the plurality opinion moved away from the discussion of First Amendment concerns of free speech and academic freedom to hold that there was insufficient evidence in the record to sustain the claim that the legislature directed the use of its legislative power in the appointment of the Attorney General to act as a committee for the legislature. *Id.* at 251-54. Consequently, the plurality concluded that because the Attorney General lacked the authority to investigate Sweezy, the conviction violated the due process requirements of the Fourteenth Amendment. *Id.* at 254-55.

104. *Id.* at 250.

> atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[105]

The passionate language in this paragraph extols the virtues of academic freedom by recognizing the importance to society of individual scholarship.[106] The plurality condemned the New Hampshire Supreme Court for finding that the governmental interest in self-preservation outweighed the deprivation of constitutional rights of the individual.[107] Chief Justice Warren declared that there is no circumstance in which the state interest could justify infringement of individual rights in the field of academic freedom.[108]

Ten years after *Sweezy*, the Court declared in *Keyishian v. Board of Regents*[109] that academic freedom is a "special concern of the First Amendment."[110] The *Keyishian* Court struck down the New York Feinberg Law, previously upheld in *Adler*, as constitutionally infirm.[111] The Court found that the statute had a "stifling effect on the academic mind [by] curtailing freedom of association" in violation of the First Amendment.[112] Writing for the majority, Justice Brennan described academic freedom as "a transcendent value to all of us and not merely to the teachers concerned" and characterized the classroom as a marketplace of ideas.[113] He observed that the future of the

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105. *Id.*

106. *See* Rabban, *supra* note 28, at 239 (recognizing Court's identification of two distinct social benefits of academic freedom). Professor Rabban noted that Justice Frankfurter's concurrence in *Sweezy* recognized that "[c]ritical inquiry within universities is essential to the preservation of a democratic society and, as a somewhat independent matter, promotes discoveries and understanding necessary for civilization." *Id.*

107. *Sweezy*, 354 U.S. at 251.

108. *Id.* at 253-55.

109. 385 U.S. 589 (1967).

110. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967). In *Keyishian*, the Supreme Court reconsidered the constitutionality of the Feinberg Law, which *Adler* had upheld fifteen years earlier. *Id.* at 593-95. Noting the pertinent constitutional doctrines that had arisen in the interim, and the absence of any claim of vagueness in *Adler*, the *Keyishian* Court decided that *Adler* was no longer controlling. *Id.* at 595. The *Keyishian* Court ruled that the complex law was unconstitutionally vague and struck down the Feinberg Law on its face on substantive First Amendment grounds. *Id.* at 600-04.

111. *See id.* at 609-10 (holding law invalid as applied to those in public education). The Feinberg Law is the same package of laws that the Court upheld against a challenge by schoolteachers in *Adler*. *See supra* notes 84-92 and accompanying text (discussing *Adler*).

112. *Keyishian*, 385 U.S. at 607. According to Professor Van Alstyne, Justice Brennan "placed the protection of academic freedom within the *core* of First Amendment concerns and not at its margins." Van Alstyne, *supra* note 11, at 114.

113. *Keyishian*, 385 U.S. at 603. Justice Brennan stated the following:

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

country "depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[114] Furthermore, Justice Brennan emphasized that the government may regulate the area of First Amendment freedoms only with narrow specificity.[115] Thus, the Supreme Court clearly linked the concept of academic freedom to the First Amendment.

These early cases recognized that the protection of individual academic inquiry and scholarship is at the core of academic freedom.[116] The *Keyishian* Court connected the concept of academic freedom to the Free Speech Clause of the First Amendment and to the Due Process Clause of the Fourteenth Amendment.[117] Furthermore, the Court's opinions extolled academic freedom as an "essentiality" or "transcendent value" to society as a whole, whether threatened from outside political interference or from inside oppression on the part of administrators or faculty colleagues.[118] Thus, the Supreme Court

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> freedom is therefore a *special concern of the First Amendment*, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. *The classroom is peculiarly the 'marketplace of ideas.'* The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.

Id. at 603 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960); United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)) (emphasis added).

114. *Id.*

115. *See id.* at 604 (noting that "[b]ecause First Amendment freedoms need breathing space to survive, government may only regulate in the area with narrow specificity").

116. *See id.* at 603 (indicating focus is individual interest in academic freedom). In holding that government inquiry into the contents of a university lecture "unquestionably was an invasion of [the lecturer's] liberties in the areas of academic freedom and political expression," the Court in *Sweezy* recognized both academic freedom and political expression as individual First Amendment rights. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion); *see supra* notes 102-08 and accompanying text (discussing *Sweezy*). In emphasizing the impact of the mandatory state law on teachers in *Keyishian*, the Court indicated its focus on individual interests in academic freedom. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); *see supra* notes 109-15 and accompanying text (discussing *Keyishian*).

117. *See Keyishian*, 385 U.S. at 603 (recognizing academic freedom as special concern of First Amendment); *see also* Van Alstyne, *supra* note 11, at 112 (stating that "distinct principles of academic freedom were linked directly to the protections of the first and fourteenth amendments").

118. *See supra* notes 101, 106, 113 and accompanying text (discussing Supreme Court's recognition of academic freedom as valuable societal interest); *see also* Hiers, *supra* note 102, at 225-26 (noting that Supreme Court's major academic freedom cases implicitly recognized value of academic freedom, "whether threatened from outside political interference, or from inside arbitrary or intentional retaliation on the part of administrators or faculty colleagues").

emphasized the social importance of independent and critical inquiry in the search for truth at universities.[119]

The Supreme Court has treated academic freedom as an institutional right of universities, as well as an individual right of professors.[120] In the last decade, the Supreme Court's decisions concerning academic freedom have protected the university itself from government interference in the performance of fundamental educational functions.[121] Because universities function through the ideas and scholarship of faculty members, individual and institutional independence often are intertwined and political intrusion may threaten both.[122]

2. Interplay Between Individual and Institutional Academic Freedom

The Court first explicitly acknowledged the existence of institutional academic freedom in *Regents of University of Michigan v. Ewing*.[123] At issue was a former student's due process challenge to his expulsion from a special medical degree program.[124] In *Ewing*, the Court observed that "[a]cademic

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119. *See* Rabban, *supra* note 2, at 1405 (stating that "[t]raditional conceptions of academic freedom emphasize that faculty autonomy in research, teaching, and publication is essential to the search for knowledge"); *see also* Rabban, *supra* note 28, at 240 (maintaining that Supreme Court realized "that the search for truth, in universities as well as in society generally, is never complete and requires free debate about competing ideas that precludes any imposition of ideological orthodoxy").

120. *See* Rabban, *supra* note 28, at 229 (stating that "constitutional definition [of academic freedom] emphasized the protection of the "entire university community against state intervention"); *see also infra* Part III.B.2 (discussing institutional academic freedom). This First Amendment right inures in the university's "corporate capacity." *See* Byrne, *supra* note 2, at 311-39 (analyzing constitutional academic freedom and protection of institutional autonomy). "Significantly, the AAUP's first Supreme Court brief on the subject of academic freedom stressed that university autonomy from the state is a necessary condition for the academic freedom of professors." Rabban, *supra* note 28, at 229 (citing AAUP's Brief as Amicus Curiae, Barenblatt v. United States, 360 U.S. 109 (1959)).

121. *See* Byrne, *supra* note 2, at 311 (defining "institutional" academic freedom).

122. *Id.* at 312.

123. 474 U.S. 214 (1985). With respect to substantive academic judgments within universities, the Court declared the following:

> When judges are asked to review the substance of a genuinely academic decision . . . they may not override it unless it is a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment . . . . Added to our concern for lack of standards is a *reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment."*

Id. at 225-26 (citations omitted) (emphasis added).

124. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 215-16 (1985) (considering dismissal of student from medical degree program). In *Ewing*, the Supreme Court considered the decision of medical school faculty and administrators to dismiss a student from a combined

freedom thrives *not only* on the independent and uninhibited exchange of ideas among teachers and students, *but also, and somewhat inconsistently*, on autonomous decisionmaking by the academy itself."[125] On behalf of this proposition, the majority opinion cited *Regents of the University of California v. Bakke*.[126] In *Bakke*, Justice Powell quoted Justice Frankfurter's concurring opinion in *Sweezy* that referred to "the four essential freedoms" of a university.[127] These four freedoms were the freedom of the university "to determine

undergraduate degree and medical degree program. *Id.* at 215-28. The student's dismissal occurred after he failed a required standardized examination with the lowest score ever recorded. *Id.* at 215-16. The *Ewing* Court determined that judges should not review the decisions of academic authorities regarding academic dismissals other than to insure that appropriate officials exercised professional judgment regarding the dismissal. *Id.* at 226. Thus, the *Ewing* Court held that the University did not violate the student's substantive due process rights. *Id.* at 227-28. For an in-depth analysis of *Ewing*, see Steven D. Milam & Rebecca D. Marshall, *Impact of* Regents of the University of Michigan v. Ewing *on Academic Dismissal from Graduate and Professional Schools*, 13 J.C. & U.L. 335 (1987).

125. *Ewing*, 474 U.S. at 226 n.12 (citations omitted) (emphasis added) (commenting on interplay of individual and institutional academic freedom); *see also* Piarowski v. Ill. Cmty. Coll., 759 F.2d 625, 629 (7th. Cir. 1985) (stating that academic freedom denotes both "freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case").

126. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (holding University of California Medical School's admissions plan unconstitutional). In *Bakke*, the Supreme Court considered the validity of a medical school's admission program that set aside sixteen of one hundred available spots in the school's incoming class specifically for minority students. *Id.* at 269-77. The *Bakke* court invalidated the school's special admissions program but allowed the university to take race into account as a factor in its future admissions decisions. *Id.* at 319-20.

Justice Powell, who announced the opinion of the Court, emphasized our "national commitment" to safeguarding freedoms within university communities, and restated the following crucial language from *Keyishian*:

> Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Id. at 312 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)) (internal quotations omitted). Significantly, Justice Powell did not "choose between the institutional definition of [academic freedom] he put forward and the individual definition he continued to accept." Metzger, *supra* note 3, at 1310-11 (analyzing *Bakke*). Professor Metzger noted, "Arguing that a university permitted to select a diverse student body would be advancing the Constitution's delight in the 'robust exchange of ideas,' Powell implied that the two definitions of academic freedom were inherently in accord, or at least easily reconcilable." *Id.* at 1311 (quoting *Bakke*, 438 U.S. at 312-13).

127. *Ewing*, 474 U.S. at 226 n.12 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)); *see* Univ. of Pa. v. EEOC., 493 U.S. 182, 197-202 (1990)

for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[128]

Thus, in *Ewing*, the Supreme Court recognized that academic freedom encompasses the right of universities to act free from judicial interference with academic decisions.[129] Since then, some scholars, as well as the Fourth Circuit, have opined that constitutional academic freedom extends only to institutions as an institutional right of self-governance in academic affairs.[130] However, the Court's recent focus on institutional academic freedom does not lead to the conclusion that constitutional protection for academic freedom should not still extend to individual professors against trustees, administrators, and faculty peers.[131] More accurately, the Supreme Court's recognition of

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(providing example of recent Supreme Court decision involving institutional academic freedom). The *University of Pennsylvania* case involved a denial of tenure to Associate Professor Rosalie Tung despite favorable recommendations by the majority of her faculty colleagues. *University of Pennsylvania*, 493 U.S. at 185. "Professor Tung filed charges with the EEOC alleging that the school discriminated against her on the basis of race, sex, and national origin, in violation of Title VII." *Id.* Pursuant to its investigation of Tung's charges, the EEOC requested relevant tenure review files by subpoena, which the district court ordered and the Third Circuit affirmed. *Id.* at 186-87. The university appealed to the Supreme Court, asserting "a First Amendment right of 'academic freedom' against wholesale disclosure of the contested documents." *Id.* at 188. In a unanimous decision written by Justice Blackmun, the Court found the University's academic freedom claim "misplaced" and affirmed the enforcement of the district court's subpoena. *Id.* at 197-02. Although the opinion did not specifically address the University's claim that it enjoyed First Amendment academic freedom rights, the Court did quote *Ewing* to the effect that courts "should show great respect for the faculty's professional judgment." *Id.* at 199 (quoting *Ewing*, 474 U.S. at 225).

128. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

129. *See Ewing*, 474 U.S. at 226 n.12 (recognizing institutional academic freedom); *see also* Rabban, *supra* note 28, at 256-80 (detailing development of institutional academic freedom under First Amendment).

130. *See* Byrne, *supra* note 2, at 255, 257, 313 (arguing that courts are not equipped to enforce traditional claims of academic freedom by professors against university decision-makers); Metzger, *supra* note 3, at 1267, 1322 (concluding that professional and constitutional definitions of academic freedom are "seriously incompatible and probably irreconcilable"). According to these commentators, the traditional nonlegal conception of academic freedom as a right of individual faculty members, identified by the 1915 Declaration and widely accepted in the scholarly world, lacks constitutional protection. *Id.* Similarly, in *Urofsky v. Gilmore*, a majority of the Fourth Circuit claimed that the Supreme Court recognized only institutional academic freedom. Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001).

131. *See* Rabban, *supra* note 28, at 270 (asserting that academic freedom as right of individual faculty members has constitutional protection). Professor Rabban argues that the Supreme Court has "clearly recognized [constitutional academic freedom] as an unenumerated first amendment right with both individual and institutional components that can be in tension with each other." *Id.* at 300.

Various lower court cases have addressed directly the tension between institutional and academic freedom while adjudicating disputes between individual faculty members and univer-

institutional academic freedom acts as a complementary layer of protection for academic speech.[132]

C. Summary

The cases considered thus far suggest that the doctrine of academic freedom is grounded firmly on constitutional premises and that individual academic freedom continues to enjoy favored status under the First Amendment.[133] The Supreme Court recognized First Amendment academic freedom as protecting academic speech – or more specifically, the professor's freedom "to inquire, to study and to evaluate, to gain new maturity and understanding."[134] Nevertheless, in a more recent line of cases unrelated to academic freedom per se, the Court has restricted the free speech rights of public employees, in some instances including teachers.[135] However, these restric-

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sities. *See, e.g.*, Piarowski v. Ill. Cmty. Coll., 759 F.2d 625, 629-30 (7th Cir. 1985) (assuming that university administration could not completely forbid chair of art department from displaying his stained-glass windows on campus); Cooper v. Ross, 472 F. Supp. 802, 812-13 (E.D. Ark. 1979) (involving dismissal of Marxist professor). In *Cooper*, a federal district judge identified "a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university administration, and the academic freedom of the university to be free of government, including judicial, interference." *Cooper*, 472 F. Supp. at 813. In *Piarowski*, Judge Posner observed that academic freedom is used, "[T]o denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case." *Piarowski*, 759 F.2d at 629.

132. *See* Rabban, *supra* note 28, at 300 (stating that "[a]lthough the meaning of constitutional academic freedom remains ambiguous, the Supreme Court has clearly recognized it as an unenumerated first amendment right with both individual and institutional components that can be in tension with each other"). Professor Rabban also insightfully comments:

> Individual and institutional academic freedom provide protection for professors and universities against the state. But when a professor asks a court to adjudicate a claim that a university violated his constitutional or contractual academic freedom, the university may respond that judicial resolution of the professor's claim would constitute state intervention in university affairs and thereby infringe the university's own academic freedom.

Id. Professor Rabban believes that "while it makes sense to derive institutional academic freedom from the same value of independent critical inquiry that underlies individual academic freedom . . . it perverts the first amendment and the concept of a bill of rights to subordinate individual academic freedom to broad institutional autonomy from judicial review." *Id.* For example, "legal cases and reports of AAUP investigating committees provide ample evidence that, even if the 'dark age of faculty dependence' has ended . . . university violations of faculty academic freedom continue to occur." *Id.* at 284.

133. *See supra* notes 74-132 and accompanying text (analyzing doctrine of academic freedom).

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

135. *See infra* Part IV (chronicling Supreme Court public employee free speech jurisprudence).

tions have not explicitly overturned the Court's classic academic freedom decisions. Instead, decisions such as *Sweezy*, *Keyishian*, and *Ewing* remain good law.[136] It remains unclear how the Court's commitment to the doctrine of academic freedom that it once described as being "of transcendent value to all of us" will survive in light of its recent curtailment of public employees' freedom of speech.[137]

IV. The Public Employee Free Speech Cases

Although academic freedom was constitutionalized as a "special concern of the First Amendment" in the 1950s, the Supreme Court did not deal specifically with First Amendment speech rights of public employees until 1968.[138] In subsequent years, the Court developed two distinct lines of cases: one protecting academic freedom in public colleges and universities and the other involving the speech rights of public school teachers and public employees in other work contexts.[139] Significantly, the Supreme Court has not yet ruled on whether the severely restrictive standards developed in the public employee cases also apply to academic free speech.

Public employees traditionally had no free speech rights.[140] Former Massachusetts Supreme Court Justice Holmes's 1892 pronouncement about a policeman's rights reflects the traditional view: "[H]e may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[141] The Supreme Court retreated from this broad position in 1968, but in subsequent cases, it has narrowly delimited government employees' free speech rights.[142] In deciding these cases, the Court has focused on the nature

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136. *See supra* Part III.B (describing Supreme Court's identification of academic freedom as unenumerated First Amendment right).

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

138. *See supra* Part III.A-B (discussing Supreme Court's recognition of academic freedom as "special concern" of First Amendment); *see also infra* note 145 and accompanying text (detailing facts of *Pickering v. Board of Education*, 391 U.S. 563 (1968)).

139. *See generally* Hiers, *supra* note 102, at 217 (1995) (reviewing academic freedom and public employment decisions of Supreme Court).

140. *See* Van Alstyne, *supra* note 11, at 83 (explaining that employers were not constitutionally restrained from requiring, as condition of public employment, that employee suspend his freedom of speech, as long as employee had notice of condition prior to accepting employment).

141. McAuliff v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892). The Supreme Court supported Justice Homes' view as expressed in *Adler v. Board of Education*, 342 U.S. 485, 492 (1952): "[Teachers] have no right to work for the State in the school system on their own terms . . . . If they do not choose to work on [the system's] terms, they are at liberty to retain their beliefs and associations and go elsewhere." *See supra* Part III.A (discussing *Adler*).

142. *See infra* Part IV.A (discussing Supreme Court decisions concerning free speech rights of government employees). *See generally* Hiers, *supra* note 3, at 21 (detailing Supreme

of the speech in question and not on the nature of the job performed by the employee in question.[143]

A. Supreme Court Decisions

1. The Pickering Balancing Test

In *Pickering v. Board of Education*,[144] the Supreme Court held for the first time that public employees do not forsake their First Amendment rights as a condition of government employment.[145] The local school board dismissed Marvin Pickering, a high school teacher, for writing a letter to a local newspaper that criticized the way the board and school administrators handled school revenue bond proposals.[146] Before firing him, the board granted Pickering a hearing in which it ultimately found that Pickering's published statements unjustly questioned the motives, responsibility, and competence of both the board and the school administration.[147] The board also found that Pickering's statements were "disruptive of faculty discipline," and generated "controversy, conflict and dissension among teachers, administrators, the Board of Education, and the residents of the district."[148]

Without mentioning academic freedom per se, the Court cited *Wieman* and *Keyishian* to state that teachers may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."[149] However, Justice Marshall, writing for the

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Court case law that "so limits the prospects for vindicating the speech rights of government employees as to justify classifying such rights as endangered species").

143. *See infra* Part IV.A (detailing Supreme Court jurisprudence concerning public employee free speech).

144. 391 U.S. 563 (1968).

145. Pickering v. Bd. of Educ., 391 U.S. 563, 563 (1968). In *Pickering*, a public school teacher sued the school district, claiming that his dismissal for writing a letter to a local newspaper criticizing a bond proposal and tax increase to raise school revenue violated his right to free speech under the First and Fourteenth Amendments. *Id.* at 564-65. The school system claimed that the information in Pickering's letter was erroneous and that Pickering's letter was detrimental to the efficient operation and administration of the schools in the district. *Id.* at 564-67. The Court declared that the test to determine whether the free speech rights of a public employee will be protected hinges on the balance between the public employee's First Amendment interests in speech and the government's interest in efficiency. *Id.* at 568. The *Pickering* Court held that a public employee's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. *Id.* at 574. Thus, the *Pickering* Court concluded that Pickering's dismissal violated the First and Fourteenth Amendments. *Id.* at 575.

146. *Id.* at 564.

147. *Id.* at 567.

148. *Id.*

149. *Id.* at 568; *see supra* notes 93-98, 109-19 and accompanying text (discussing *Wieman* and *Keyishian*).

majority, also noted, "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of its citizenry in general."[150] He then set out the Pickering "balancing formula":

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[151]

Although the Court refused to establish a specific standard by which to measure all speech by public employees, the Court did discuss general lines of analysis to determine the controlling interests.[152] In examining the contents of Pickering's letter, the Court found that the statements in no way were directed toward any person with whom Pickering would come into contact in the course of his daily work.[153] The Court also stated that the statements presented no question of maintaining either discipline by immediate superiors or harmony among coworkers.[154]

The school board argued that although Pickering's comments involved matters of public concern, the letter could offer a basis for dismissal on the grounds that the comments were critical.[155] The Court rejected that argument even though the Court noted that a few of Pickering's statements were false.[156] Instead, the Court declared that the statements deserved protection because there was no evidence of either disruption in the day-to-day operations of the school or the potential to cause conflict among the members of the board,

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150. *Pickering*, 391 U.S. at 568.

151. *Id.*

152. *Id.* at 569.

153. *Id.* at 569-70.

154. *Id.* at 569-74. The Court stated that Pickering's letter dealt with "the question whether a school system requires additional funds." *Id.* at 571. This, the Court said, was a "matter of legitimate public concern" because as to this question, "free and open debate is vital to informed decision-making by the electorate." *Id.* at 571-72. Subsequent to finding that the subject matter of Pickering's public communication was related only marginally to his employment, the Court concluded that "it is necessary to regard the teacher as the member of the general public he seeks to be." *Id.* at 574.

155. *Pickering*, 391 U.S. at 569-72.

156. *Id.* at 573. *Pickering* encompassed an additional element in that Pickering's letter contained allegedly false charges. *Id.* at 566. Because of this, at least part of the Court's ruling in favor of Pickering was tied to an application of the libel standard of *New York Times Co. v. Sullivan*. *See id.* at 574 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)). The *New York Times* Court held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard of their falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

teachers, administrators, or residents of the district.[157] Because Pickering's speech did not constitute workplace disruption, the Court concluded that the school board's interest in limiting the teacher's opportunities to contribute to public debate was not significantly greater than its interest in limiting a similar contribution by any member of the general public.[158]

Although the public employee in *Pickering* was a teacher, the Court found his employment status was only "tangentially and insubstantially" involved in the subject matter of his communication.[159] Thus, *Pickering* had nothing to do with the doctrine of academic freedom and everything to do with the regulation of disruptive public employee speech generally.[160] The Supreme Court left academic freedom in the sense of freedom of scholarly inquiry untouched.

2. *The* Connick *Two-Step Analysis*

In *Connick v. Myers*,[161] the Supreme Court considered the issue of whether *Pickering* protected a public employee from being discharged for speech concerning internal office affairs. Sheila Myers, an assistant district attorney, brought an action against her superior, district attorney Harry Connick, claiming that he wrongfully terminated her due to her exercise of free speech rights.[162] After Connick arranged to transfer her to a different section of crim-

157. Pickering v. Bd. of Educ., 391 U.S. 563, 572-73 (1968). The *Pickering* Court distinguished between two fundamentally different public employee speech cases by stating the following:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of schools generally.

Id. In a footnote, the Court also noted that *Pickering* did not present a situation in which "a teacher's public statements are so without foundation as to call into question his fitness to perform his duties in the classroom." *Id.* at 573 n.5. In such a case, the Court indicated that the statements would "merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal." *Id.*

158. *Id.* at 574.

159. *Id.* The Court also indicated that "statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors." *Id.*

160. *See id.* (distinguishing between public employee speech commenting on matter of public concern that is disruptive and public employee speech commenting on matter of public concern that is non-disruptive).

161. 461 U.S.138 (1983).

162. Connick v. Myers, 461 U.S. 138, 141 (1983). In *Connick*, the Supreme Court considered the issue of whether *Pickering* protected a public employee from being discharged

inal court, Myers expressed her opposition to the transfer and then circulated a questionnaire among fellow assistant attorneys to ascertain their views.[163] Shortly thereafter, Connick fired Myers for her insubordination and for her refusal to accept the transfer.[164] The district court held that the First Amendment protected Myers's questionnaire and that her firing was illegal under *Pickering* because Myers's speech was on "matters of public concern."[165]

After an analysis of *Pickering* and a variety of other cases involving public employee speech, the Supreme Court upheld the district attorney's actions.[166] The majority concluded that the assistant prosecutor's speech was not on a matter of public concern and that, consequently, it was "unnecessary for us to scrutinize the reasons for her discharge."[167] The holding specifically established that as a threshold manner, public employee speech must be of public concern or relate to a political, social, or community concern to qualify for First Amendment protection.[168] Furthermore, the Court asserted that federal courts are not the proper places to "review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[169]

Aside from reinforcing the public employer's right to maintain discipline and efficiency in the workplace, the Court expressed its desire to refrain from turning personnel matters into constitutional issues, saying "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."[170] The Court applied the *Pickering* balancing test to the portion of the questionnaire that related to a matter of

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for speech concerning internal office affairs. *Id.* at 140. Myers, an assistant district attorney, was scheduled for a transfer to a different section of the criminal court. *Id.* Myers expressed her opposition to the transfer to her supervisors and circulated a questionnaire concerning the offer transfer policy and other office policies. *Id.* at 140-41. The *Connick* Court established that as a threshold matter, public employee speech must be of a public concern or relate to any political, social, or community concern to qualify for First Amendment protection. *Id.* at 146. The *Connick* Court further explained that courts must look to the form, content, and context of a statement to determine whether the speech addresses matters of public concern or personal interest. *Id.* at 147-48. The *Connick* Court concluded that the state's interest outweighed Myers's interest in her speech because her speech threatened to interfere with the efficient operation of the workplace. *Id.* at 150-54. Therefore, the *Connick* Court upheld the firing of Myers for the reasonable belief that the speech would disrupt the office, undermine the employer's authority, and destroy close working relationships. *Id.* at 154.

163. *Id.*

164. *Id.*

165. *See id.* at 142 (describing district court's holding).

166. *Id.* at 153-54.

167. *Id.* at 146.

168. *Id.*

169. *Id.* at 147.

170. *Id.* at 149.

public concern.[171] It then weighed Myers's interest in her speech against the State's interest in preventing potentially disruptive speech.[172] The Court found that the district attorney was justified in firing Myers because the State's interest outweighed Myers's interest in her speech, as her speech threatened to interfere with the efficient operation of the workplace.[173] The Court also recognized that while the primary purpose of the First Amendment is the full protection of speech on issues of public concern, this right must be balanced with the practical reality involved in operating a government office.[174]

Connick modified the *Pickering* balancing test in two important ways. First, the Court stated that as a threshold matter, the speech in question must be on a matter of public concern.[175] If the speech is not on a matter of public concern, a court is not required to balance the competing interests.[176] Second, a court must balance the interest a public employee has in her speech against the employer's interest in preventing actual or potential disruption in the workplace.[177] At the core of the public concern inquiry are questions of "content, form, and context."[178] Thus, although status and job-relatedness are often factors to be applied in the balancing test, they are not conclusive.[179]

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171. *See id.* at 150-54 (applying *Pickering* balancing test). The question that the Court found related to a matter of public concern was the question that asked whether the attorneys in the office "ever felt pressured to work in political campaigns on behalf of office supported candidates." *Id.* at 149.

172. *See id.* at 152 ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.").

173. *Id.* at 153-54.

174. *Id.* at 154.

175. *Id.* at 146.

176. *See id.* (setting out two-part test).

177. *See id.* at 152 (cautioning that "a stronger showing [by the employer] may be necessary if the employee's speech more substantially involved matters of public concern"). In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Supreme Court seemed to draw back from its position in *Connick* that potential disruption was sufficient to outweigh a public employee's free speech interest. In *Rankin*, a data entry clerk, McPherson heard about an attempt on the President's life and commented, "If they go for him again, I hope they get him." *Id.* at 380-81. McPherson's supervisor fired her for the remark. *Id.* at 381-82.

After finding that McPherson's speech addressed a matter of public concern, the Court found no evidence that her comments actually interfered with or disrupted the workplace. *Id.* at 388-89. The Court held that the employer's interest in firing McPherson did not exceed McPherson's First Amendment rights. *Id.* at 392. In contrast to *Connick*, *Rankin* seemed to require a showing of actual disruption to agency operations rather than abstract showings of threatened disruption to discipline, authority, or working relationships. *See* Hiers, *supra* note 102, at 241-42 (comparing *Connick* to *Rankin*).

178. Connick v. Myers, 461 U.S. 138, 147-48 (1983).

179. *See, e.g.*, Arvinger v. Mayor of Baltimore, 862 F.2d 75, 79 (4th Cir. 1988) (stating that "[a]lthough the *Connick* court did not elaborate on the relative weight to be accorded these

3. Waters v. Churchill: *Another Level*

In 1994, in *Waters v. Churchill*,[180] the United States Supreme Court again dealt with public employee speech in the workplace.[181] In an attempt to protect against the employer's ability to avoid constitutional scrutiny by a mere invocation of "disruption," a plurality of the Court created a new procedural requirement to the *Pickering-Connick* balancing test.[182] The plurality held

three factors, this court has held that 'content, subject-matter, is always the central aspect'") (quoting Jackson v. Bair, 851 F.2d 714, 720 (4th Cir. 1988)); Piver v. Pender County Bd. of Educ., 835 F.2d 1076, 1080 (4th Cir. 1987) (finding that role of speaker does not control public concern analysis); Berger v. Battaglia, 779 F.2d 992, 999 (4th Cir. 1985) (focusing on public importance of speech).

180. 511 U.S. 661 (1994) (plurality opinion).

181. Waters v. Churchill, 511 U.S. 661 (1994) (plurality opinion). In *Waters*, the Supreme Court confronted a situation in which a nurse had been discharged from a government hospital for her speech to another nurse on a certain day. *Id.* at 664-66. Several persons working at the hospital reported conflicting stories concerning the nature of the discharged nurse's speech. *Id.* The Court of Appeals held that the government only could fire the employee for her speech if her speech, in fact, was such that it was not protected by the First Amendment. *Id.* at 667-68. The Supreme Court, by a seven to two vote but without a majority opinion, overruled the Court of Appeals, but remanded for further findings on whether the employee actually was fired because of disruptive statements or because of nondisruptive statements. *Id.* at 680-82. Justice O'Connor, writing for the plurality, suggested no fixed set of procedures that the government must follow in determining the facts concerning an employee's speech before discharging the employee. *Id.* at 672-74. However, the *Waters* Court required the government employer to act "reasonably" in attempting to determine the facts concerning an employee's speech before the government fired the employee for that speech. *Id.* at 677-78. Thus, the *Waters* Court stated that under the Free Speech Clause of the First Amendment, a public employer who reasonably believes a third-party report that an employee engaged in constitutionally unprotected speech may punish the employee in reliance on that report, even if it turns out that the employee's actual remarks were constitutionally protected. *Id.* at 678-79.

182. *See id.* at 677 (stating that employer decision-making will not be "unduly burdened" by having courts look to facts as employer reasonably found them to be). Some commentators heralded *Waters* as a boon to employees because it set up the first procedural safeguard for an employee's right to free speech. *See, e.g.*, D. Keith Fortner, Note, *Public Employers Must Conduct a Reasonable Investigation to Determine if an Employee's Speech is Protected Before Discharging the Employee Based Upon the Speech*, 18 U. ARK. LITTLE ROCK L. J. 463, 467-77 (1996) (expressing cautious optimism regarding *Water's* procedural rights); Keith L. Sachs, Comment, Waters v. Churchill: *Personal Grievance or Protected Speech, Only a Reasonable Investigation Can Tell – The Termination of At-Will Government Employees*, 30 NEW ENG. L. REV. 779, 781 (1996) (describing *Water's* "safeguard"). The *Waters* Court itself suggested this interpretation: "A speaker is more protected if she has two opportunities to be vindicated – first by the employer's investigation and then by the jury – than just one." *Waters*, 511 U.S. at 570 (plurality opinion). *But see* Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 128 (1995) ("*Waters v. Churchill* adds little or nothing to the First Amendment protection of at-will public employees."); Rachel E. Fugate, *Choppy Waters are Forecast for Academic Free Speech*, 26 FLA. ST. U. L. REV. 187, 208 (1998) ("*Waters* severely limited public employee free speech doctrine by replacing a genuine balancing approach with a standard that allows an employer itself to determine if speech is protected.").

that before a public employee can be discharged for unprotected speech, the employer must undertake a reasonable investigation to evaluate the content of the speech.[183]

Waters involved the termination of a nurse, Cheryl Churchill, from a public hospital for her negative comments regarding the hospital's administration and practices.[184] Churchill's employer contended that her comments were disruptive.[185] However, Churchill alleged that the conversation involved only nondisruptive statements about hospital policy with which she disagreed.[186] Churchill sued in federal district court under 42 U.S.C. § 1983, alleging that in firing her, defendants violated her First Amendment right to free speech.[187]

In district court, the hospital won a partial grant of summary judgment.[188] The district court held that regardless of which version of Churchill's comments was correct, the speech was not about a matter of public concern and therefore was not protected.[189] The Court of Appeals for the Seventh Circuit reversed the district court, holding that Churchill's version of her comments did qualify as speech on a matter of public concern and thus was protected under *Connick*.[190]

The Supreme Court vacated the judgment of the Seventh Circuit and remanded the case to determine whether Churchill's dismissal was due to her statements or to some other reason.[191] Justice O'Connor, writing for the plurality, began by stating that the government as employer has broader powers in censoring speech than does the government as sovereign in restricting the speech of everyday citizens.[192] The Court found that this additional power derives from the interest the government as employer has in carrying out an assigned task both effectively and efficiently.[193] Thus, the "government's interest in achieving its goals as effectively and as efficiently as

183. *Waters*, 511 U.S. at 677-78 (plurality opinion).

184. *Id.* at 664-66 (plurality opinion). Churchill received a negative evaluation from her supervisors that indicated that Churchill "promote[d] an unpleasant atmosphere and hinders constructive communication and cooperation." *Id.* at 665 (plurality opinion) (internal citation omitted).

185. *Id.* at 665-66 (plurality opinion).

186. *See id.* at 667 (plurality opinion) (noting that Seventh Circuit found that Churchill's speech was not disruptive).

187. Churchill v. Waters, 731 F. Supp. 311, 312 (C.D. Ill. 1990).

188. *Id.* at 321-22.

189. *Id.*

190. Waters v. Churchill, 977 F.2d 1114, 1129 (7th Cir. 1992).

191. Waters v. Churchill, 511 U.S. 661, 682 (1994) (plurality opinion).

192. *Id.* at 671.

193. *Id.*

possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant interest when it acts as employer."[194]

However, the Court placed the burden on the public employer to conduct a reasonable investigation to determine whether the employee's speech meets the *Pickering-Connick* test and is therefore entitled to First Amendment protection.[195] The Court stated that for the employer's actions to be considered reasonable, the employer must have acted in good faith, but good faith alone is not sufficient.[196] Thus, the Court concluded that a reasonable fact-finder could have found that Churchill was fired not because of her disruptive comments to other employees, but because of her nondisruptive criticism of her employer.[197] In light of these reservations regarding the hospital's true motive, the Court remanded the case for a determination of which of Churchill's statements were actually the basis for her dismissal.[198]

4. NTEU

The Supreme Court again examined the relationship between public employee speech and the speaker's employment duties in *United States v. National Treasury Employees Union* [hereinafter *NTEU*].[199] In *NTEU*, gov-

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194. *Id.* at 675. The Court also acknowledged that the employer's reliance on hearsay, personal knowledge of the employee, credibility of the witness, and other factors that the judicial process ignores, may sometimes be the most effective way for the employer "to avoid further recurrences of improper and disruptive conduct." *Id.* at 676.

195. *Id.* at 677.

196. *Id.* The plurality announced, "[i]t is necessary that the decisionmaker reach its conclusion about what was said in good faith, rather than as a pretext; but it does not follow that good faith is sufficient." *Id.* The Court added, "[o]nly procedures outside the range of what a reasonable manager would use may be condemned as unreasonable." *Id.* at 678.

197. *Id.* at 681-82. The Court referred to Churchill's previous criticisms of the cross-training policy, management's sensitivity to the criticisms, and hostilities directed at Churchill as other possible motivating factors for her dismissal. *Id.*

198. *Id.* at 682.

199. United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995). In *NTEU*, the Supreme Court considered a challenge by two unions and several career civil servants to invalidate § 501(b) of the Ethics in Government Act, 5 U.S.C. app. § 501(b) (1988), which broadly prevented federal employees from accepting any compensation for making speeches or writing articles, even if the subject of the speech or article had no connection with the employee's official duties. *Id.* at 457-62. The *NTEU* Court observed that the statute represented a wholesale deterrent to a broad category of expression by a massive number of potential speakers, and therefore gave rise to far more serious concerns than could any single supervisory decision, such as the one at issue in *Pickering*. *Id.* at 468. Hence, the *NTEU* Court concluded that the "Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government." *Id.* (internal citation omitted). In addition, the *NTEU* Court observed that a blanket burden on the

ernment employees brought suit because the Ethics in Government Act prohibited them from accepting honorariums for public speaking engagements unrelated to their jobs.[200] The Court viewed the employees as citizens whose expressive activity fell within the protected category of citizen comment rather than within the category of employee comment on matters related to personal status in the workplace.[201] The Court also determined that the government's burden was especially great because the Ethics in Government Act[202] established a prospective deterrent "to a broad category of expression by a massive number of potential speakers."[203]

In addition, the Court recognized a difference between "adverse action taken in response to actual speech" and an up-front restriction like that found in the Act which "chills potential speech before it happens."[204] Justice Stevens's majority opinion noted that the prospective restrictions on public employee speech impact heavily "on the public's right to read and hear what the employees would otherwise have written and said."[205] The Court found that the public's interest in receiving the speech of government employees must, however, be weighed against the government's interest in a challenged restriction.[206] Thus, the Court modified the *Pickering* test in favor of public

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speech of nearly 1.7 million federal employees requires a much stronger justification than one of administrative convenience. *Id.* at 474. The *NTEU* Court concluded that the speculative benefits of the honoraria ban were not sufficient to justify its crudely crafted burden on the federal employees' freedom to engage in expressive activity. *Id.* at 477. Thus, the *NTEU* Court held that the honoraria ban violated the First Amendment as applied to the employees who were party to the action. *Id.* at 477-78. In light of the Supreme Court's obligation to avoid judicial legislation and its inability to identify correctly the exact terms of any nexus requirement that Congress would have adopted in a more limited honoraria ban, the *NTEU* Court refused to modify the remedy by crafting a nexus requirement for the honoraria ban. *Id.* at 478-79.

200. *See id.* at 459 (challenging constitutionality of Ethics in Government Act). Congress passed the Ethics in Government Act in 1989. *Id.* Among other provisions, the Act denied employees of the executive branch honoraria or other compensation when giving speeches. *Id.* For instance, one of the plaintiffs was a postal worker who occasionally gave lectures pertaining to the Quaker religion. *Id.* at 461. Another plaintiff was employed as an engineer, yet gave lectures on black history. *Id.*

201. *Id.* at 466.

202. 5 U.S.C. app. § 504 (1988 ed., Supp. V).

203. *NTEU*, 513 U.S. at 467. The *NTEU* Court recognized that such a restriction "gives rise to far more serious concerns than could any single supervisory decision." *Id.* at 468.

204. *Id.* at 468 (citing Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931)).

205. *Id.* at 470 (citing Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976)). The Court then observed that while it has no way to measure the true cost of the burden on the public's right to read and hear what the employees would have written and said, it "cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne." *Id.*

206. *Id.* at 470-73.

employees by stating that when the government broadly restricts public employee speech, it has the burden of establishing that "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."[207] Applying this test, the Court concluded that the restriction imposed an unconstitutional burden on the free speech rights of federal employees.[208]

B. Summary

From *Pickering* and its progeny, the Supreme Court has synthesized a multi-faceted test for lower courts to apply to public employee free speech cases involving disciplinary actions taken against individual employees. First, a court must determine if an employee's speech relates to a matter of public concern.[209] If it does, a court must then balance the interests of the employee, as a citizen speaking on matters of public concern, with the interests of the government, as an employer efficiently performing public services through its employees.[210] This balancing test applies equally to speech within and outside the workplace.[211] However, when a case involves regulations proscribing a broad category of speech by a large number of potential speakers, the government must show that the interests of the potential audience's present and future expression outweigh that expression's necessary impact on the actual operation of the government.[212]

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207. *Id.* at 468 (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 571 (1968)).

208. *Id.*

209. *See* Connick v. Myers, 461 U.S. 138, 146 (stating that, as threshold matter, speech in question must be on matter of public concern). In other words, speech of public employees on matters of merely private concern such as personal employment grievances is unprotected. *Id.* at 147-49. Speech involves a matter of public concern when it affects a social, political, or other interest of a community. *Id.* at 146. To determine whether speech involves a matter of public concern, a court must examine the content, context, and form of the speech at issue in light of the entire record. *Id.* at 147-48.

210. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). Furthermore, before a public employee can be discharged for unprotected speech, the employer also must undertake a reasonable investigation to evaluate the content of the speech. *See* Waters v. Churchill, 511 U.S. 661, 667-73 (1994) (plurality opinion) (adding procedural requirement to *Pickering-Connick* test).

211. Rankin v. McPherson, 483 U.S. 378, 383 (1987) (finding that *Pickering-Connick* balancing test applies to employee's on-the-job statements).

212. *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 468 (1995) (stating that government's burden is greater with respect to statutory restrictions on expression than with respect to isolated disciplinary action).

V. *Public Employee Speech Cases Applied in an Academic Setting:* Urofsky v. Gilmore

The Supreme Court has recognized academic freedom as a special concern of the First Amendment.[213] The Court also has provided standards to clarify the permissible scope of public speech by all government employees.[214] Nevertheless, the Court has never defined precisely the relationship between the protection of academic freedom and the regulation of public employee speech.

The confusion wrought by *Pickering* and its progeny is best illustrated by an examination of the Fourth Circuit's recent decision in *Urofsky v. Gilmore*.[215] In *Urofsky*, the Fourth Circuit found that the *Pickering-Connick* balancing test provided the appropriate standard for determining whether a professor's Internet research, writing, and communications deserved First Amendment protection.[216] A professor is not a typical public employee, however, and courts should not apply the synthesized public employee doctrine to the academic speech of public university professors.[217]

A. *The Factual History*

On July 1, 1996, a Virginia statute that restricted state employees' access to constitutionally protected speech became effective.[218] The Virginia law, entitled "Restrictions on State Employee Access to Information Infrastructure," made it a criminal offense for any state employee to use state-owned or state-leased computer equipment "to access, download, print or store any

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213. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (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."); *see also supra* Part III.B (discussing Supreme Court's recognition of doctrine of "academic freedom").

214. *See supra* Part IV.A (chronicling Supreme Court public employee free speech jurisprudence).

215. 216 F.3d 401 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001).

216. *See* Urofsky v. Gilmore, 216 F.3d at 406-09 (applying *Pickering-Connick* balancing test to speech protected under doctrine of academic freedom); *see also infra* notes 218-353 and accompanying text (discussing *Urofsky*).

217. *See infra* Part VI (discussing inapplicability of *Pickering-Connick* balancing test to speech protected under doctrine of academic freedom).

218. *See* VA. CODE ANN. § 8.1-805 (Michie Supp. 1998), *amended by* § 8.1-805 (Michie Supp. 1999), *recodified at* § 2.2-2827 (2001) ("Restrictions on State Employee Access to Information Infrastructure"). The Virginia General Assembly passed the Restrictions on State Employees Access to Information Infrastructure Act in 1996. In 1999, however, the Assembly amended the Act to reflect changes in the definition of "sexually explicit content." *See infra* note 221 (describing Assembly's changes in response to *Urofsky* lawsuit). In 2001, the Assembly renumbered all of Virginia's statutes, thereby recodifying the Act at § 2.2-2827 (2001).

information infrastructure files or services having sexually explicit content" without first obtaining written approval.[219] Under the Act, only the heads of state agencies could give this approval "to the extent required in conjunction with a bona fide, agency-approved research project or other agency approved undertaking."[220] The Act defined "sexually explicit content" to include any description or visual representation of "a lewd exhibition of nudity . . . sexual excitement, [or] sexual conduct," and it defined "information infrastructure" so broadly as to encompass all "telecommunications, cable, and computer networks," including "the Internet, the World Wide Web, Usernet, bulletin board systems, on-line systems, and telephone networks."[221]

The *Urofsky* plaintiffs, a group of professors at Virginia state colleges and universities, challenged the constitutionality of these restrictions, alleging that it interfered with their academic freedom to research and teach.[222] The lead plaintiff, Melvin Urofsky, claimed that the Act prohibited him from publishing an Internet site containing materials on gender roles and sexuality.[223] Urofsky also asserted that the Act precluded him from assigning certain projects on indecency law to his students, due to his inability to check their work for fear that doing so would cause him to violate the Act.[224] A second plaintiff, Paul Smith, similarly claimed that the Act interfered with his research and teaching, and thereby violated his First Amendment rights.[225] In

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219. VA. CODE ANN. § 8.1-805 (Michie Supp. 1998), *amended by* § 8.1-805 (Michie Supp. 1999), *recodified at* § 2.2827B (2001). The Act only exempted employees of the Department of State Police from this prohibition. *Id.* § 8.1-804 (Michie Supp. 1998).

220. *Id.* § 8.1-805 (Michie Supp. 1998).

221. *Id.* § 2.1-804 (Michie Supp. 1998) (defining "sexually explicit" and "information infrastructure" when *Urofsky* district court ruled and when panel of Fourth Circuit initially considered *Urofsky* appeal). However, following the *Urofsky* panel decision, the Virginia General Assembly amended the definition of "sexually explicit content" to add the following italicized language:

> *content having as a dominant theme (i) lascivious description of or (ii) any lascivious* picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, coprophilia, urophilia, or fetishism.

Id. § 2.1-804 (Michie Supp. 1999), *recodified at* § 2.2-2827 (2001) (emphasis added).

222. *See* Urofksy v. Allen, 995 F. Supp. 634, 635 (E.D. Va. 1998) (stating that plaintiffs alleged that Act unconstitutionally interfered with their research and teaching).

223. *Id.*

224. *Id.*

225. *See id.* (stating that Smith's website containing material on gender roles and sexuality was censored as result of Act). Additionally, Terry Meyers was concerned about his ability to access the Commonwealth's own database of sexually explicit poetry to continue his studies on the "fleshy school" of Victorian poets; Dana Heller stopped using the Internet to continue her research on lesbian and gay studies; and Bernard H. Levin and Bryan J. Delaney were reluctant to continue their psychological research on human sexual experience. *Id.*

response, the state argued that the Act's restrictions were necessary to maintain efficiency in the public workplace and to prevent the creation of sexually-hostile work environments.[226]

B. *The District Court's Analysis of* Urofsky

In *Urofsky*, the federal district court struck down the Virginia Act as an unconstitutional abridgment of First Amendment rights.[227] The district court based its analysis of the free speech issue on the *Pickering-Connick* balancing test because "[w]hen government employees speak out on matters of public concern their speech is entitled to First Amendment protection."[228] The court presumed that the plaintiffs' speech addressed matters of public concern because the plaintiffs' research related to issues that could benefit the public.[229]

The court found that the Act imposed a prospective deterrent "to a broad category of expression by a massive number of potential speakers" because it stifled "inquiry and debate by academics in the fields of art, literature, medicine, psychology, anthropology, and law."[230] The court also recognized the right of the public to "receive and benefit from the speech of state employees on matters within their areas of expertise."[231] Applying the constitutional balancing test that the Supreme Court prescribed in *NTEU* for broad prior restraints on public employee speech and noting that strict scrutiny is usually required when a speech restriction discriminates on the basis of content, the court concluded that Virginia's justifications for the Act did not outweigh the

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226. *Id.* at 639.

227. *See* Urofsky v. Allen, 995 F. Supp. 634, 643 (E.D. Va. 1998) (invalidating Act for violating First and Fourteenth Amendments).

228. *Id.* at 636 (citing Pickering v. Bd. of Educ., 391 U.S. 563, 569-72 (1968)). The court also cited *Connick v. Myers* for the proposition that "speech of public employees on matters of merely private concern such as personal employment grievances is unprotected." *Id.* (citing Connick v. Myers, 461 U.S. 138, 147-49 (1983)).

229. *Id.* The court noted that, as in *NTEU*, the statute at issue impacted heavily "on the public's right to read and hear what the employees would otherwise have written and said." *Id.* at 638 (quoting United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 470 (1995)).

230. *Id.* at 638 (quoting United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 467 (1997)).

231. *Id.* (citing United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 480 (1995); Sanjour v. EPA, 56 F.3d 85, 94 (D.C. Cir. 1995)). The court then explained, "Our precedents have focused 'not only on the role of the First Amendment in fostering individual self-expression but also on the role in affording the public access to discussion, debate, and the dissemination of information and ideas.'" *Id.* (quoting Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982) (internal quotations omitted)). The court also stated that by targeting the use of computers, the Act necessarily restricted the use of the Internet – "arguably the most powerful tool for sharing information ever developed." *Id.* (citing Reno v. ACLU, 521 U.S. 844, 852 (1997)). In *Reno*, the Supreme Court noted that "[i]t is no exaggeration to conclude that the content of the Internet is as diverse as human thought." Reno v. ACLU, 521 U.S. 844, 852 (1997).

interests of thousands of state employees and the public in expression on sexually explicit topics.[232]

The district court noted that the Act was not narrowly tailored to the Commonwealth's asserted interests in promoting workplace efficiency and avoiding hostile work environment claims.[233] The court found that the Act ignored the "limitless variety of disruptive computer activities unrelated to viewing sexually explicit material"[234] and targeted only a "single medium, electronic communication."[235] The court also observed that the "lack of fit" between the government's interest and the sweep of its restrictions cast "'serious doubt' on the government's asserted need for the Act."[236]

Furthermore, the court found that the licensing scheme – which granted unbridled discretion to administrators – lacked clear criteria, mandated public-disclosure, invited arbitrary enforcement, and chilled the free exercise of speech rights.[237] In particular, the court determined that the public records

232. *Urofsky*, 993 F. Supp. at 643; *see* Urofsky Brief for Petitioner, *supra* note 9, at 6 n.4 (stating that State's asserted concerns about workplace efficiency and prevention of sexually hostile work environment were "not articulated by the legislature at the time of Act's passage, but by the Commonwealth's attorneys during the litigation"). The Commonwealth relied on *DiMeglio v. Haines*, 45 F.3d 790, 805 (4th Cir. 1995) and *Boring v. Buncombe County Board of Education*, 136 F.3d 364, 368-69 (4th Cir. 1998) (en banc) to support its position that state employee computer use is not protected speech under the First Amendment because the employees act in their capacities as government employees rather than as public citizens. *Urofsky*, 216 F.3d at 636. The district court did not find this argument persuasive because it noted that *DiMeglio*, *Boring*, and *Pickering* all focused on whether "after-the-fact" discipline of a public employee by a government employer violated the employee's First Amendment free speech rights. *Id.* at 636-37. The court recognized that those cases did not involve a "content-based prior restraint affecting thousands of government employees." *Id.* at 638.

233. *See Urofsky*, 995 F. Supp. at 638-40 (finding Act fatally over-inclusive and under-inclusive).

234. *Id.* at 640. The court listed "accessing online video games, news services, stock quotes and financial information, chat rooms, and shopping sites" as examples of disruptive computer activities unrelated to viewing sexually explicit material. *Id.* The Act also did not address the sending and receiving of e-mail on non-work-related topics. *Id.* Moreover, the court found it strange that Virginia state police were exempt from the Act. *Id.* (citing Va. Code Ann. § 2.1-804) (Michie Supp. 1998). The Commonwealth "did not explain why state police were less susceptible to the temptations posed by sexually explicit material than doctors, social workers, academics, lawyers and other state employees who are subject to the Act." *Id.*

235. *Id.* The court noted that the Act ignored verbal and printed material, which might create a sexually hostile environment. *Id.*

236. *Id.* at 639 (citations omitted). Moreover, the court found that the harms asserted by the State appeared to be addressed adequately by "existing content-neutral enforcement mechanisms," which further undercut the State's asserted justifications of the statute. *Id.* at 639-40 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992) ("The existence of adequate content-neutral alternatives thus 'undercut[s] significantly' any defense of such a statute" (quoting Boos v. Barry, 485 U.S. 312, 329 (1988)))).

237. *Id.* at 641-42 (citing City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 763 (1988)). The court also cited *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940): "It is not merely

provision was "a not-so-veiled threat to the agency head who approves such speech."[238] Moreover, the court stated that given the Act's strict qualifications and the absence of clear criteria under which a department head may determine what is "required" and "bona fide," the Act placed unbridled discretion in the hands of state administrators.[239] Consequently, the district court found that the prior approval provision weighed heavily against the Commonwealth in the *Pickering-NTEU* balancing test.[240]

Finally, the district court noted that the state employees were already subject to content-neutral policies and statutes that addressed the Commonwealth's legitimate concerns.[241] Given the over-inclusiveness and under-inclusiveness of the Act and the existence of content-neutral alternatives, the Act did not constitute a "reasonable response" to the Commonwealth's legitimate interests under the *Pickering-NTEU* balancing test.[242] Thus, the district court granted summary judgment to the plaintiffs and invalidated the Act in its entirety for violating the First and Fourteenth Amendments.[243]

C. *The Opinions of the Court of Appeals for the Fourth Circuit*

1. *The Three Judge Panel*

On appeal by the Commonwealth, a three-judge panel reversed the district court and upheld the Act without any constitutional scrutiny.[244] Two

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the sporadic abuse of power by the censor but the pervasive threat in its very existence that constitutes the danger to freedom of discussion." *Id.*

238. *Id.* at 641. Specifically, the Virginia Act provides that agency approvals of sexually explicit speech "shall be available to the public under the provisions of the Virginia Freedom of Information Act." VA. CODE ANN. § 2.1-805 (Michie Supp. 1999), *recodified at* § 2.2-2827B (2001).

239. *Urofsky*, 995 F. Supp. at 641.

240. *Id.* at 643.

241. *Id.* The district court also indicated that the Commonwealth's burden increased under the *Pickering-NTEU* balancing test because the Act impermissibly discriminated against sexually explicit content. *Id.* The court stated, "[u]nderlying this principle is the recognition that content based burdens on speech raise the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 637 (quoting Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 106, 116 (1991)).

242. *Id.* at 643. Although the court recognized that workplace efficiency and avoidance of hostile work environment claims were important government interests, the court found that the Act failed to advance those interests in a "direct and material way." *Id.* Thus, the court concluded that the Commonwealth failed to satisfy the "heavy burden" required of it under the *Pickering-NTEU* balancing test. *Id.*

243. *Id.* at 643-44.

244. Urofsky v. Gilmore, 167 F.3d 191, 196 (4th Cir. 1999). Originally, the plaintiffs named George Allen, then Governor of Virginia, as the defendant. *See* Urofsky v. Allen, 995 F.Supp. 634, 635 (E.D.Va. 1998). Subsequently, James S. Gilmore, III was elected Governor

of the three judges determined that there was no First Amendment protection for state university professors in relation to their work-related research, writing, or other communications.[245] The panel's decision relied on the proposition that the state, as an employer, "undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of the citizenry as a whole."[246]

Judge Wilkins analyzed the *Pickering-Connick* line of cases to determine whether the state employees' right to access sexually explicit content on the state-owned computers was speech involving a matter of public concern.[247] He recognized that speech involves a matter of public concern when it affects a social or political interest of the community.[248] Nevertheless, an inquiry into whether a matter is of public concern "does not involve a determination of how interesting or important the subject of an employee's speech is."[249] Rather, the most important question for analysis is whether the speech at issue was "made primarily in the [employee's] role as citizen or primarily in his role as employee."[250]

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and was substituted as a party. *See* Urofsky v. Gilmore, 167 F.3d 191, 193 n.1 (substituting defendant Gilmore for defendant Allen). For "ease of reference," the panel referred to Gilmore as "the Commonwealth." *Id.*

245. *See id.* at 196 (holding that Act did not infringe upon First Amendment rights of state employees).

246. *Id.* at 194 (citing Waters v. Churchill, 511 U.S. 661, 671-72 (1994) (plurality opinion) (recognizing "that government as employer . . . has far broader powers than does government as sovereign"); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (explaining "that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general")).

247. *See id.* at 194-96 (discussing *Pickering-Connick* line of cases pertaining to public employee speech). The panel characterized its threshold inquiry as whether the Act regulated "speech by employees of the Commonwealth in their capacity as citizens upon matters of public concern." *Id.* at 195 (citing Connick v. Myers, 461 U.S. 138, 146 (1983)). The panel pointed out that there was no dispute concerning whether "speech" was at issue because First Amendment protection of expression "encompasses the right to access information." *Id.* at 195 n.5 (citing Kleindienst v. Mandel, 408 U.S. 573, 762 (1972); Stanley v. Georgia, 394 U.S. 557, 563 (1969)).

248. *Id.* at 195 (citing *Connick*, 461 U.S. at 146). To determine whether speech involves a matter of public concern, the court examined the "content, context, and form of the speech at issue in light of the entire record." *Id.* (citing *Connick*, 461 U.S. at 147-48).

249. *Id.* (citing Terrell v. Univ. of Tex. Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986)).

250. *Urofsky*, 167 F.3d at 196 (quoting *Terrell*, 792 F.2d at 1362). At this point in the opinion, the panel also cited *Boring v. Buncombe County Board of Education*, which held that the discharge of a high school drama teacher as a result of her selection of a high school play was not violative of the First Amendment because the choice of play did not involve a matter of public concern, as the choice was made by the teacher in her capacity as a teacher in a matter dealing with curriculum. Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 364-69 (4th Cir. 1998) (en banc); *see also infra* notes 254-57 and accompanying text (discussing inapplicability of *Boring*).

Judge Wilkins's opinion then characterized the essence of the plaintiffs' claim as an assertion that plaintiffs were entitled to access sexually explicit material in their capacity as state employees.[251] This expansion of the issue made it easy for him to conclude that because the plaintiffs only asserted an "infringement on the manner in which they perform their work as state employees, they [could not] demonstrate that the speech to which they claim[ed] entitlement would be made in their capacity as citizens speaking on matters of public concern."[252] Because the Act regulated the speech of individuals speaking in their capacity as government employees and thus did not touch on a matter of public concern, the panel concluded that "the speech [could] be restricted consistent with the First Amendment."[253]

The third member of the panel, Judge Hamilton, concurred separately. He agreed with the result of the case but could not join in the analysis because he believed that *Boring v. Buncombe County Board of Education*,[254] a case involving curriculum choice by a high school teacher, dictated the majority's result.[255] Significantly, in *Boring*, Judge Hamilton dissented.[256] Judge Hamil-

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251. *Urofsky*, 167 F.3d at 196.

252. *Id.*

253. *Id.*

254. 136 F.3d 364 (4th Cir. 1998) (en banc).

255. Boring v. Buncome County Bd. of Educ., 136 F.3d 364, 368-69 (4th. Cir. 1998) (en banc). In *Boring*, the court ruled that Boring, a high school drama teacher, did not have a First Amendment right to select and direct the play *Independence* as part of her curriculum. *Id.* at 370. The play concerned a "dysfunctional, single-parent family – a divorced mother and three daughters; one a lesbian, another pregnant with an illegitimate child." *Id.* at 366. Although *Independence* won seventeen awards at a regional competition, a parent complained about its content, and the school's principle subsequently banned its performance. *Id.* at 366-67. The majority concluded that the school administrative authorities, not the teacher, has the "right to fix the curriculum." *Id.* at 370; *but see infra* notes 289-93 and accompanying text (describing Chief Judge Wilkinson's persuasive distinction between facts of *Boring* and facts of *Urofsky*).

256. *See id.* at 374-75 (Hamilton, J., dissenting) (joining Judge Motz's "persuasive dissenting opinion"). Judge Motz stated that in her view, "the *Connick* framework does not provide a workable formula for analyzing whether the First Amendment protects a teacher's in-class speech [because] [n]either element of the *Connick* balancing test provides much assistance in assessing whether this speech is entitled to constitutional protection." *Id.* at 378 (Motz, J., dissenting). Judge Motz recognized that the public concern element articulated in *Connick* "fails to account adequately for the unique character of a teacher's in-class speech." *Id.* (Motz, J., dissenting). Judge Motz then stated the following:

> When a teacher steps into the classroom she assumes a position of extraordinary public trust and confidence: she is charged with educating our youth. Her speech is neither ordinary employee workplace speech nor common public debate. Any attempt to force it into either of these categories ignores the essence of teaching – to educate, to enlighten, to inspire – and the importance of free speech to this most critical endeavor. As the Supreme Court proclaimed more than forty years ago:

ton stated that if he were "[l]eft to [his] own devices," he "would hold that the [p]laintiffs' speech in this case is entitled to some measure of First Amendment protection, thus triggering application of the *Connick/Pickering* balancing test."[257]

2. *The En Banc Decision*

a. *Majority Opinion*

Although petitioners obtained rehearing en banc, a majority of the Fourth Circuit again reversed the district court in an 8-4 split decision.[258] Judge Wilkins, writing for six of twelve judges, restated the panel majority's position by denying state employees, including university teachers and scholars, First Amendment protection in connection with their work.[259] For the major-

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> "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

Id. (Motz, J., dissenting) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion)). Judge Motz also observed that even if the *Connick* test did apply, the speech in question was "obviously" of public concern. *Id.* (Motz, J., dissenting). For a more general discussion of academic freedom and in-class speech, see, e.g., William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213 (1999) (discussing relationship between academic freedom, First Amendment, and "communicating the curriculum"); Ramone C. Salomone, *Free Speech and School Governance in the Wake of* Hazelwood, 26 GA. L. REV. 253 (1992) (examining impact of *Hazelwood*); Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 TENN. L. REV. 597 (1999) (analyzing whether teaching lesson is constitutionally protected speech when focus is on teachers' profane or sex-related speech).

On its face, *Boring* easily can be distinguished from *Urofsky*. *See infra* note 289-93 and accompanying text (discussing part of Chief Judge Wilkinson's concurring opinion that distinguished facts of *Urofsky* from facts of *Boring*). Academic freedom is arguably more relevant in the university than in the context of secondary education. *See id.* Thus, the analysis behind Judge Motz's dissent in *Boring* supports the theory that the Fourth Circuit misapplied the *Pickering-Connick* balancing test to the academic inquiry and research at issue in *Urofsky*. *See infra* Part VI.B (advocating removal of academic speech from *Pickering-Connick* test).

257. *Urofsky*, 167 F.3d at 197.

258. Urofsky v. Gilmore, 216 F.3d 401, 416 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001). After the panel decision, the legislature narrowed the Act's definition of "sexually explicit content" to expression "having as a dominant theme" any "lascivious description or depiction of sexual conduct or sexual excitement." VA. CODE ANN. § 2.1-804 (Michie Supp. 1999), *recodified at* § 2.2-2827 (2001). However, the Commonwealth's revision to the Act does not change the analysis. *Urofsky*, 216 F.3d at 438-39 (Murnaghan, J., dissenting). Many works of public import could be classified as lascivious, such as "the works of Toni Morrison and many themes found in Victorian poetry[,] . . . material researched online by one of the plaintiffs[,] . . . [and] e-mail discussions . . . ." *Id.* (Murnaghan, J., dissenting).

259. *See Urofsky*, 216 F.3d at 415 (concluding that because Act does not infringe constitutional rights of public employees in general, it also does not violate rights of professors).

ity, the critical issue was whether the Act restricted speech by state employees in their capacity as citizens speaking on matters of public concern.[260]

Judge Wilkins relied on the Supreme Court's public employee free speech precedents of *Pickering, Connick, Waters,* and *NTEU* to establish a distinction between the state employees' speech in their capacity as citizens upon matters of public concern and in their professional speech.[261] Judge Wilkins emphasized that the state constitutionally could control professional speech because "to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties . . . ."[262] The majority then rejected the plaintiffs' First Amendment claim because the speech at issue was made in the employees' role as employees.[263]

Specifically, Judge Wilkins analogized the restrictions on speech by public employees in their capacity as employees to restrictions on government-funded speech.[264] He cited *Rust v. Sullivan*[265] for its proposition that in the situation of government-funded speech, the government is "entitled to control the content of the speech because it has, in a meaningful sense, 'purchased' the speech at issue through a grant of funding or payment of a salary."[266] Judge Wilkins then equated government-funded speech with all

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260. *See id.* at 406 (noting that threshold inquiry is "whether the Act regulates speech by state employees in their capacity as citizens or as citizens upon matters of public concern"). "The majority's interpretation of the 'public concern' doctrine makes the role of the speaker dispositive of the analysis." *Id.* at 435 (Murnaghan, J., dissenting).

261. *See id.* at 406-09 (analyzing *Pickering* and its progeny as cases in which main focus is on capacity of speaker).

262. *Id.* at 409. Judge Wilkins noted that "[i]f a public employee's speech made in his capacity as a private citizen does not touch upon matter of public concern, the state, as employer, may regulate it without infringing any First Amendment protection." *Id.* at 406 (citing *Connick*, 461 U.S. 138, 146 (1983); Holland v. Rimmer, 25 F.3d 1251, 1254-55 & n.11 (4th Cir. 1994)).

263. *Id.* at 408. Significantly, Judge Wilkins cited a Fifth Circuit case for the proposition that an inquiry into whether a matter is of public concern "does not involve a determination of how interesting or important the subject of an employee's speech is." *Id.* at 407 (citing Terrell v. Univ. of Tex. Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1987)). Additionally, Judge Wilkins asserted that the location of the speech is irrelevant. *Id.* This is followed by an odd juxtaposition of the *DiMeglio* and *Connick* holdings, so that whether the employee makes the speech as an employee or as a private citizen determines "whether [the] speech touches upon a matter of public concern." *Id.*

264. *Urofsky*, 216 F.3d at 408 n.6.

265. 500 U.S. 173 (1991). In *Rust*, the Court rejected an argument that regulations prohibiting abortion counseling in a federally funded project violated the First Amendment rights of the staff of clinics accepting federal funds. Rust v. Sullivan, 500 U.S. 173, 198-99 (1991). The Court reasoned that "[t]he employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority." *Id.* at 199.

266. *Urofsky*, 216 F.3d at 408 n.6.

public employee speech.[267] In his view, the insistence that a public employee is entitled to First Amendment protection for speech made in the course of his employment duties "creates a fundamental and unnecessary schism between government-employee speech cases and government funding cases."[268]

The *Urofsky* plaintiffs' claimed that even if the Act was valid as to the majority of state employees, it violated the First Amendment scholarly rights of professors at state colleges and universities.[269] In response, the majority distinguished *Keyishian* and *Sweezy* – both of which recognized academic freedom as a "special concern" of the First Amendment – on the ground that those cases actually did not set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom.[270] Moreover, the majority said, "to the extent it has constitutionalized a right of academic freedom at all, the Supreme Court appears to have recognized only an institutional right of self-governance in academic affairs."[271] The Fourth Circuit

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267. *Id.*

268. *Id.* Judge Wilkins believed that under the analysis of Judge Wilkinson and Judge Murnaghan, a public employee would possess a First Amendment right to challenge his employer's directions regarding, "for example, the preparation and con-tent [sic] of a report, while the same directions issued with respect to a report prepared pursuant to a grant of funding would not be subject to a First Amendment challenge." *Id.* Judge Wilkins stated that Judge Wilkinson and Judge Murnaghan failed to recognize the importance of the role of the speaker in determining whether speech by a public employee is entitled to First Amendment protection. *Id.* at 408.

269. *See id.* at 409-10.

270. *See id.* at 412 (citing *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 287 (1984), for proposition that Supreme Court has not recognized First Amendment right of faculty to participate in academic policymaking). The majority found that to the extent that *Whitehill*, *Shelton*, and *Wieman* may have held that a publicly employed teacher could not be disciplined for exercise of First Amendment rights as a private citizen, "that holding has been subsumed by later cases extending the same protection to all public employees." *Id.* at 414. But see discussion *supra* Parts III-IV for opposing interpretation of interrelation between doctrine of academic freedom and public employee speech cases.

271. *Urofsky*, 216 F.3d at 412. Judge Wilkins began with a brief review of the history of the concept of academic freedom in the United States. *See id.* at 410-12 (noting influence of German notion of academic freedom in United States and discussing AAUP's professional definition of academic freedom). In view of this history, Judge Wilkins stated that plaintiffs "fail[ed] to appreciate that the wisdom of a given practice as a matter of policy does not give the practice constitutional status." *Id.* at 411 n.12 (citing *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984), for proposition that "[f]aculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution"). Judge Wilkins also found it significant that the "Court has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so." *Id.* at 414. This reading severely distorts the meaning of the academic freedom cases. *See supra* Part III (discussing Supreme Court's recognition of academic freedom).

therefore reversed the judgment of the district court, concluding that the Act did not infringe upon the constitutional rights of public employees.[272]

b. Concurring Opinions

The concurring opinions in *Urofsky* are relevant because two out of the three separate concurring opinions found that Judge Wilkins misapplied the *Pickering-Connick* balancing test to the scholarly speech of state-employed professors.[273] For example, Judge Hamilton again concurred in the judgment, while disputing the rationale.[274] As before, he cited Fourth Circuit precedent for his view that the circuit's prior, but incorrect, decision in *Boring* dictated the result due to stare decisis.[275] Judge Hamilton stated that, "[l]eft to my own devices, I would hold that the [plaintiffs'] speech in this case is entitled to some measure of First Amendment protection."[276]

In a separate opinion, Chief Judge Wilkinson concurred in the judgment while disagreeing with the majority's refusal to recognize that public employees enjoy some First Amendment protection in connection with their work.[277] The majority erred "by placing exclusive emphasis on the fact that the statute covered speech of state employees in their capacity as employees."[278] Furthermore, the majority did not examine the content and context of the expression

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272. *Urofsky*, 216 F.3d at 416. In reaching this conclusion, the majority noted that the Act places the authority to approve or disapprove research projects with the university. *Id.* at 415 n.17. Thus, the majority found that the Act left decisions concerning subjects of faculty research in the hands of the institution. *Id.* However, in a footnote, the majority stated that "while a denial of an application under the Act based upon a refusal to approve a particular research project might raise genuine questions – perhaps even constitutional ones – concerning the extent of the authority of a university to control the work of its faculty, such questions are not presented here." *Id.*

273. *See id.* at 425-26 (Hamilton, J., concurring) (implying inapplicability of *Pickering-Connick* balancing test); *see also id.* at 426-35 (Wilkinson, C.J., concurring) (discussing importance of academic freedom).

274. *See Urofsky*, 216 F.3d at 425-26 (Hamilton, J., concurring) (concurring in majority's opinion).

275. *See id.* at 425 (Hamilton, J., concurring) (finding that majority correctly concluded under "implicit" holding of Fourth Circuit's en banc decision in *Boring v. Buncombe County Board of Education*, 136 F.3d 364, 365 (4th Cir. 1998) (en banc), that speech at issue in *Urofsky* is employee speech and therefore not entitled to First Amendment protection).

276. *Id.* at 425 (Hamilton, J., concurring). Judge Hamilton wrote separately to make clear that the Fourth Circuit left unanswered the question of "whether a governmental employee who seeks to access and disseminate sexually explicit materials rising to the level of matters of public concern, not in his or her role as a governmental employee, but rather as a private citizen, is entitled to some measure of First Amendment protection." *Id.* at 426 (Hamilton, J., concurring).

277. *See id.* at 426-35 (Wilkinson, C.J., concurring) (disputing majority's reasoning but concurring in judgment).

278. *Id.* at 426 (Wilkinson, C.J., concurring).

restricted by the Act, i.e., university scholarship that addressed matters of public concern.[279] Additionally, Chief Judge Wilkinson stated that:

> Academic freedom is necessary to informed political debate. Academic curiosity is critical to useful social discoveries . . . . The content of this research does not involve a professor's wages or working conditions. Rather it concerns an aggregate of subjects with broad social impact – subjects touching our physical health, our mental well-being, our economic prosperity, and ultimately our appreciation for the world around us and the different heritages that have brought that world about. The right to academic inquiry into such subjects cannot be divorced from access to one means (the Internet) by which that inquiry is carried out. By restricting Internet access, a state thus restricts academic inquiry at what may become its single most fruitful source.[280]

The context of the affected speech was also unique because in the university setting "the [Commonwealth] acts against a background and tradition of thought that is at the center of our intellectual tradition."[281] Chief Judge Wilkinson noted that although plaintiffs were state employees, they were hired for the "purpose of inquiring into, reflecting upon, and speaking out on matters of public concern."[282]

Consequently, Chief Judge Wilkinson took issue with Judge Wilkins's equation of government-funded speech with public employee speech.[283] The Supreme Court in *Rust v. Sullivan*[284] drew a distinction between a physician's speech on the one hand and a university professor's speech on the other.[285]

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279. *See id.* at 428 (Wilkinson, C.J., concurring) (stating that academic freedom is matter of public concern because it is "of transcendent value to all of us and not merely to the teachers concerned" (quoting Keyishian v. Bd. of Regents, 384 U.S. 489, 603 (1967))).

280. *Id.* (Wilkinson, C.J., concurring).

281. *Id.* at 428 (Wilkinson, C.J., concurring) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995)).

282. *Id.* (Wilkinson, C.J., concurring) (citations omitted). A faculty is employed professionally to test ideas and to propose solutions, to deepen knowledge and to refresh perspectives. *See* Van Alstyne, *supra* note 11, at 87 (commenting that "[a] faculty, especially a research faculty, is employed professionally to test and propose revisions in the prevailing wisdom . . . . Its function is primarily one of critical review . . . . Its purpose is likewise to train others to the same critical skills.").

283. *Id.* at 428-29 (Wilkinson, C.J., concurring).

284. 500 U.S. 173 (1990).

285. Rust v. Sullivan, 500 U.S. 173, 200 (1991). In *Rust*, the Supreme Court upheld federal regulations that prohibited recipients of Title X grants from engaging in abortion related activities. *Id.* at 203. The *Rust* Court emphasized that the government simply was refusing to fund activities (including speech that promoted those activities) when the scope of the project excluded such activities. *Id.* at 193-94. The Court also stressed that employees in a Title X project remained free to pursue abortion related activities on their own time, when they were

The *Rust* Court said:

> [W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.[286]

Thus, in *Urofsky*, Chief Judge Wilkinson emphasized that beginning and ending the public concern inquiry with the signature on the professors' paychecks or the serial number on their computers "would be to permit all manner of content and viewpoint-based restrictions on speech and research conducted in our universities."[287] As Chief Judge Wilkinson pointed out, professors are far from "state mouthpieces" in their research and writing.[288]

Intrinsic to Chief Judge Wilkinson's analysis was his belief that the enterprise of university research and writing differs fundamentally from secondary school curriculum selection.[289] Distinguishing the facts in *Boring*[290] from those of *Urofsky*, Chief Judge Wilkinson stated that while curricular choices can be perceived to bear the imprimatur of the school,[291] "[n]o one

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not acting under the auspices of the Title X project. *Id.* at 198-99. The *Rust* Court recognized that while employees actually were working on the Title X project, their freedom of expression was limited, but that "this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authorities." *Id.*

286. *Id.* (citing Keyishian v. Bd. of Regents, 385 U.S. 589 (1967)).

287. *Urofsky*, 216 F.3d at 429 (Wilkinson, C.J., concurring). Chief Judge Wilkinson noted that by embracing the Commonwealth's view that "all work-related speech by public employees is beyond public concern, the majority sanction[ed] state legislative interference in public universities without limit." *Id.* at 429-30.

288. *Id.* at 428 (Wilkinson, C.J., concurring).

289. *See id.* at 429-30 (Wilkinson, C.J., concurring) (distinguishing facts of *Boring* and *Urofsky*). *Boring* involved an individual employment decision pertaining to curriculum at the secondary school level, while *Urofsky* involved a broadly applicable statute unrelated to curriculum at the level of higher education. *Id.* at 429 n.3 (Wilkinson, C.J., concurring).

290. 136 F.3d 364 (4th Cir. 1998) (en banc); *see also supra* notes 254-57 and accompanying text (setting out facts of *Boring* case).

291. *Id.* at 429 n.4 (Wilkinson, C.J., concurring). In a footnote, Chief Judge Wilkinson asserted that courts dealing with the question of First Amendment rights concerning curriculum choices "have limited their holdings to curriculum matters in light of the distinctly institutional character of curriculum decisions: '[A] public university professor does not have a First Amendment right to decide what will be taught in the classroom.'" *Id.* (Wilkinson, C.J., concurring) (alteration in original) (quoting Edwards v. Ca. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998)). Chief Judge Wilkinson further noted that "'[a]lthough the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula.'" *Id.* (Wilkinson, C.J., concurring) (quoting Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989)).

assumes when reading a professor's work that it bears the imprimatur of the government or that it carries the approval of his or her academic institution."[292] Thus, Chief Judge Wilkinson recognized that professors have a First Amendment interest in the content of their Internet research.[293]

Chief Judge Wilkinson concurred in the judgment, however, because he believed that despite the high burden established by *NTEU*, the Commonwealth had proven that the expression's impact on the operation of the Government outweighed the interests of the plaintiffs and of society in the expression restricted by the Act.[294] Moreover, he found that the prior permission requirement was only "a minimal intrusion on academic inquiry."[295] Chief Judge Wilkinson concluded that the waiver provision preserved the structure of university self-governance and thus saved the Act from contravening the Constitution.[296]

In his own separate concurrence, Judge Luttig provided a detailed counter argument for the major points stated by Chief Judge Wilkinson.[297] Judge Luttig concluded that there is no constitutional right of free inquiry unique to professors or to any other public employee and that the First Amendment

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292. *Urofsky*, 216 F.3d at 429 (Wilkinson, C.J., concurring). Chief Justice Wilkinson found it significant that state university professors work in the context of considerable academic independence – "in their research and writing university professors are not state mouthpieces – they speak mainly for themselves." *Id.* at 428 (Wilkinson, C.J., concurring). *See generally* Rabban, *supra* note 28, at 242-44 (discussing independence necessary for public university professors).

293. *See Urofsky*, 216 F.3d at 429-31 (Wilkinson, C.J., concurring) (finding that Act restricted speech on matters of public concern).

294. *Id.* at 431 (Wilkinson, C.J., concurring) (quoting United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 468 (1994)) (internal quotations omitted).

295. *Id.* at 432 (Wilkinson, C.J., concurring). Chief Judge Wilkinson additionally stated that "federal courts have no business acting as surrogate university deans" and that "[w]here the state . . . has worked within the traditional governance structure for educational institutions, the hand of the federal judiciary should ordinarily be stayed." *Id.* at 433 (Wilkinson, C.J., concurring). *But see supra* Part III.B.2 (emphasizing that institutional academic freedom does not replace individual academic freedom).

296. *Urofsky*, 216 F.3d at 433-34 (Wilkinson, C.J., concurring). *But see infra* Part VI.A (analyzing waiver provision as impermissible content-based restriction and prior restraint).

297. *See Urofsky*, 216 F.3d at 416-25 (Luttig, J., concurring) (writing to join Judge Wilkins's "fine opinion for the court" and to show that "[t]he Supreme Court's precedents would not countenance the contrary conclusion reached by Judge Wilkinson and the dissent"). Judge Luttig also stated that chronicling the analytical flaws in Judge Wilkinson's analysis was important because, "[c]ollectively, each building upon each other, these errors disguise . . . even from Judge Wilkinson, the uncomfortably counter-precedential and counter-intuitive conclusions that he can, as a result, reach seemingly quite comfortably." *Id.* at 424 (Luttig, J., concurring).

protects the rights of all public employees equally.[298] He noted that academic freedom is "paradigmatic of the truism that not all that we treasure is in need of constitutionalization" because "[n]o university worthy of the name would ever attempt to suppress true academic freedom – constrained or unconstrained by a constitution."[299]

c. *Dissenting Opinion*

Judge Murnaghan and three other judges dissented because they believed the majority adopted an unduly restrictive interpretation of the public concern doctrine.[300] They concluded that the Act's restriction on research, writing, and discussion by university professors, librarians, museum workers, physicians, and social workers touched on matters of public concern and therefore merited constitutional protection.[301] In the dissent's view, the legislature's revision of the Act did not change the analysis because many works of public import can be classified as lascivious, including the works of Toni Morrison, themes found in Victorian poetry, e-mail discussions by psychologists, and publications regarding abnormal sexual behavior.[302]

Reaching the *NTEU* balancing test, the dissent found that the Act was not narrowly tailored to serve the State's asserted interests.[303] The Act was under-inclusive because it addressed neither nonsexual nor noncomputer-related causes of workplace inefficiency and because it ignored books, calendars, pictures, and other off-line material that might create a sexually hostile work environment.[304] Equally important, the Act was over-inclusive because it reached a vast amount of legitimate, nonharassing research and communication.[305] The dissent stated that the prior approval process did not save the Act

298. *Id.* at 425 (Luttig, J., concurring) (writing to deny existence of "academic freedom" because "the true academic is actually in no need of such attempts at support – least of all from the federal judiciary").

299. *Id.* at 425 (Luttig, J., concurring) (stating that even if university suppresses true academic freedom, it would "find itself without its faculty" and "without the public support necessary for its very existence").

300. *Id.* at 435 (Murnaghan, J., dissenting).

301. *Id.* at 438 (Murnaghan, J., dissenting).

302. *Id.* at 438-39 (Murnaghan, J., dissenting). The legislature revised the Act by limiting the definition of "sexually explicit content" to materials and descriptions that are "lascivious." VA. CODE ANN. § 2.1-804 (Michie Supp. 1999), *recodified at* § 2.2-2827 (2001); *see also* notes 218, 221 (explaining amendment).

303. *See id.* at 439-41 (Murnaghan, J., dissenting) (concluding that under-inclusiveness and over-inclusiveness of Act shows "[the] 'obvious lack of "fit" between the government's purported interest and the sweep of its restrictions'" (quoting Sanjour v. EPA, 56 F.3d 85, 95 (1995))).

304. *Id.* at 440 (Murnaghan, J., dissenting).

305. *Id.* at 440-41 (Murnaghan, J., dissenting).

because the "mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."[306] Consequently, the dissent found that "the Act did not survive the heightened scrutiny applied to statutory restrictions on employee speech."[307]

VI. Analysis and Implications of Urofsky

In *Urofsky*, the Fourth Circuit stripped the core of academic freedom by ruling that academic freedom provides no protection to the academic inquiry and research of individual professors.[308] Instead of according academic research and writing full First Amendment protection, the Fourth Circuit applied the more restrictive *Pickering-Connick* balancing test.[309] As a result, the Fourth Circuit chilled academic research and writing by contravening the Supreme Court's prohibition against content-based discrimination and impermissible prior restraints.[310]

The Fourth Circuit's application of the *Pickering-Connick* balancing test to the scholarly speech of public university professors misconstrues the primary mission of academia.[311] Individual scholarly research, writing, and publication lies at the heart of higher education and comes within the First Amendment's protection of academic freedom.[312] Academic inquiry is "necessary to in-

306. *Id.* at 441 (Murnaghan, J., dissenting) (quoting City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988)) (internal quotation marks omitted).

307. *Id.* (Murnaghan, J., dissenting).

308. *See Urofsky*, 216 F.3d at 412 (finding that Supreme Court has recognized only "institutional right of self-governance in academic affairs"). *But see infra* Part VI.A (asserting that Supreme Court specifically constitutionalized right of academic freedom for protection of scholarly research and inquiry).

309. *See Urofsky*, 216 F.3d at 406-09 (misreading *Pickering* and *Connick* as establishing premise that all job-related inquiry and expression by public employees has no constitutional protection); *see also infra* Part VI.B (discussing inapplicability of *Pickering-Connick* balancing test to scholarly speech).

310. *See infra* Part VI.C (arguing that Fourth Circuit's approval of Virginia Act's licensing scheme contravenes Supreme Court First Amendment rulings because Virginia Act discriminates based on content and constitutes impermissible prior restraint).

311. *See* AAUP *Urofsky* Amicus Brief, *supra* note 9, at 13 (recognizing that "[s]tate-employed university scholars are expected to pursue their own research and express their own views in the classroom and through publications, conferences, and research"). The AAUP Amicus Brief went on to state that "[a]s part of their job responsibilities, professors conduct research, write, teach, publish, and debate with colleagues and students." *Id.* Ultimately, "[i]t makes no sense to expect professors to engage in critical inquiry and simultaneously to allow punishment for its exercise." *Id.* at 13-14 (citation omitted).

312. *See* Edgar Dyer, *Collegiality's Potential Chill Over Faculty Speech: Demonstrating the Need for a Refined Version of* Pickering *and* Connick *for Public Higher Education*, 119 EDUC. L. REP. 309, 318 (1997) (discussing flaws of *Pickering* analysis as applied to public

formed public debate" and academic curiosity is "critical to useful social discoveries."[313] Thus, the scholarly speech of professors, with its truth-seeking mission, should be protected outside of the *Pickering-Connick* framework.[314]

A. Constitutional Academic Freedom Protects the Freedom of Research and Inquiry of Individual Professors

The Fourth Circuit's decision in *Urofsky* conflicts with the Supreme Court's holdings that the doctrine of academic freedom protects scholarly speech.[315] No other court of appeals has denied the existence of individual academic freedom.[316] By asserting that academic freedom "inheres in the University, not in individual professors," the Fourth Circuit majority dramatically departed from the established meaning of academic freedom under the First Amendment.[317]

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higher education); *see also infra* Part VI.A (distinguishing between scholarly speech and general public employee speech).

313. *Urofsky*, 216 F.3d at 428 (Wilkinson, C.J., concurring).

314. *See infra* Part VI.A (concluding that *Pickering-Connick* analysis should not be applied to academic speech protected under doctrine of academic freedom).

315. *See, e.g.*, Whitehill v. Elkins, 389 U.S. 54, 59-60 (1967) (declaring that "[w]e are in the First Amendment field. The continuing surveillance which this type of law places on *teachers* is hostile to academic freedom." (emphasis added) (footnote omitted)); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (recognizing individual academic freedom as constitutionally protected right); Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957) (plurality opinion) (noting importance of academic speech in doctrine of academic freedom); *see also* AAUP *Urofsky* Amicus Brief, *supra* note 9, at 4 (finding that Supreme Court precedents, which at least five federal courts of appeals expressly follow, recognize that First Amendment protects academic freedom of state-employed professors).

316. *See, e.g.*, Burnham v. Ianni, 119 F.3d 668, 680 n.19 (8th Cir. 1997) (en banc) (noting that "professors' academic freedom" was "a 'special concern of the First Amendment'") (citations omitted); Cohen v. San Bernardino Valley Coll., 92 F.3d 968, 971-72 (9th Cir. 1996) (concluding that college's vague sexual harassment policy, which had been applied to punish professor's classroom expression, infringed upon individual academic freedom principles); Dube v. State Univ. of N.Y., 900 F.2d 587, 597-98 (2d Cir. 1990) (recognizing that professor's academic freedom was constitutionally protected "'based on [his] discussion of controversial topics in his classroom'") (alteration in original) (citation omitted); Parate v. Isibor, 868 F.2d 821, 829 (6th Cir. 1989) (finding that university violated professor's "First Amendment right to academic freedom" when it ordered professor to change student's original grade); Dow Chem. Co. v. Allen, 672 F.2d 1262, 1275 (7th Cir. 1982) (observing that "whatever constitutional protection is afforded by the First Amendment extends as readily to the scholar in the laboratory as to the teacher in the classroom"); *see also* AAUP *Urofsky* Amicus Brief, *supra* note 9, at 8-9 (commenting that by limiting First Amendment academic freedom to institutions, Fourth Circuit majority decision clearly conflicted with at least five other courts of appeals that specifically recognized professors' First Amendment right of academic freedom).

317. *See* Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001) (holding that doctrine of academic freedom protects institutions only in

For example, in *Dow Chemical Company v. Allen*,[318] the Seventh Circuit held that a professor's First Amendment right of academic freedom extends to research and teaching.[319] Observing that "whatever constitutional protection is afforded by the First Amendment extends as readily to the scholar in the laboratory as to the teacher in the classroom," the court refused to issue a subpoena for materials based on toxicity studies in a university laboratory.[320] The Seventh Circuit agreed with the position of the professors, that individual scholarly research "lies at the heart of higher education" and therefore "comes within the First Amendment's protection of academic freedom."[321]

The mission of higher education includes the seeking of the truth as well as the discovery and improvement of knowledge.[322] Scholarly speech is neither ordinary employee workplace speech nor common public debate. Thus, academic speech deserves full First Amendment protection under the doctrine of academic freedom.

B. Disregarding the Pickering-Connick *Test for Academic Free Speech*

If academic freedom is to remain a special concern of the First Amendment, as the Supreme Court recognized in *Sweezy*, *Keyishian*, and *Ewing*, then courts should refrain from applying the *Pickering-Connick* balancing test to professors' academic speech at colleges and universities.[323] Rather, courts should give the full First Amendment protection of strict scrutiny to the spoken, written, or artistic expressions of an academician who is engaging in

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their corporate capacities); *see also supra* Parts II-III (discussing established professional and constitutional definitions of "academic freedom").

318. 672 F.2d 1262 (7th Cir. 1982).

319. *See* Dow Chem. Co. v. Allen, 672 F.2d 1262, 1274-75 (7th Cir. 1982) (noting that professor's First Amendment right of academic freedom extends to research as well as to teaching).

320. *Id.* at 1275.

321. *Id.* at 1274; *see* Piarowski v. Ill. Cmty. Coll., 759 F.2d 625, 629 (7th Cir. 1985) (recognizing individual academic freedom).

322. *See* Dyer, *supra* note 312, at 319 (noting that mission of higher education is not only simple dissemination of knowledge, but also mission of discovering and improving knowledge).

323. *See* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985) (holding that academic freedom is "a special concern of the First Amendment"); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1969) (announcing that academic freedom is "a special concern of the First Amendment"); Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957) (plurality opinion) (implicitly connecting academic freedom with First Amendment); Fugate, *supra* note 182, at 215 (agreeing that courts should not apply *Connick* and *Waters* when dealing with professors' speech in colleges and universities); *see also supra* Part III (discussing evolution of academic freedom in Supreme Court).

this expression as an academician.[324] However, a professor who is expressing simply as a citizen or public employee should be treated as any other citizen or public employee.[325]

The *Pickering* Court established a balancing test to determine when a public employer may dismiss a public employee based on statements made by the employee that cause disruption to close working relationships that are necessary to perform public services efficiently.[326] The government, like a private employer, is entitled to restrict the speech of its employees to protect its orderly internal processes.[327] Therefore, when university professors are speaking as general public employees, courts should engage in the *Pickering-Connick* analysis to arrive at a balance between the interests of the public university professor, as a citizen, in commenting about matters of public concern, and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees.

However, the *Pickering-Connick* analysis should not apply in evaluating the First Amendment claims of professors regarding their freedom of inquiry and other scholarly pursuits.[328] Professors deserve more freedom from employer control than typical employees because scholarly independence is a prerequisite for the proper performance of academic work.[329] Thus, when an

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324. *See* Dyer, *supra* note 312, at 319-20 (suggesting guidelines for development of new standard).

325. *See id.* (suggesting that *Pickering* standard should apply to any speech of "a personal nature or ad hominem attacks, as opposed to negative critiques of another's work"). Dyer stated that the *Pickering* standard should "apply to professors' complaints, as employees, about institutional matters like curriculum content, grading, admission standards, or other policies." *Id.*

326. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (establishing balancing test for public employee speech); *see also supra* Part IV.A (analyzing *Pickering*).

327. *See* Connick v. Myers, 461 U.S. 138, 147 (1983) (stating that threshold inquiry under *Pickering* balancing test is whether speech relates to matter of "public concern"). Public employee speech is not entitled to First Amendment protection if it is of "purely personal concern to the employee – most typically, a private personnel grievance." Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985) (internal quotations omitted); *see also supra* Part IV (discussing *Pickering-Connick* balancing test).

328. *See* Kimberly K. Caster, Case Note, Burnham v. Ianni: *The Eighth Circuit Forges Protection for the Free Speech Rights of Public University Professors Outside the* Pickering-Connick-Waters *Analysis*, 32 CREIGHTON L. REV. 883, 961-62 (1999) (noting that Eighth Circuit refused to apply *Pickering-Connick-Waters* analysis to university professors' scholarly speech); *see also* Weiner, *supra* note 256, at 630 (observing that *Pickering* test seems inapposite for analyzing First Amendment claims of teachers regarding their in-class speech).

329. *See* Rabban, *supra* note 28, at 242 (noting that requirement of scholarly independence for proper performance of academic work entitles professor to more freedom from employer control than typical employee).

Act or administrative action targets academic speech, the First Amendment standard of strict scrutiny should apply.[330]

This is the view taken by the Eighth Circuit in *Burnham v. Ianni*.[331] The Eighth Circuit held that a university violated the First Amendment academic freedom of two history department faculty members by removing two photographic portraits from a history department display case.[332] The court refused to apply the *Pickering-Connick* analysis on the grounds that the case did not present a question of public employee discipline or termination.[333] Instead, the court concluded that the professors' expressive speech deserved full First Amendment protection.[334] Significantly, the court recognized that its decision specifically protected the professors' academic freedom.[335]

The Eighth Circuit correctly concluded that the *Pickering-Connick* analysis was not triggered because the facts did not present an employee discipline or discharge case.[336] Taking the Eighth Circuit's analysis one step further, application of the *Pickering-Connick* framework to the scholarly speech of university professors is inappropriate. The scholarly research, writing, and publication of state-employed professors merits full protection under the doctrine of academic freedom.

C. Impermissible Content-Based Discrimination and Prior Restraint

Although the right of free speech is not absolute, the First Amendment generally prevents the government from proscribing speech of any kind simply

330. *See* Hiers, *supra* note 3, at 106 (stating that value of academic free speech "both to teachers and the larger society should not be reduced to shreds and patches merely for the sake of putative governmental interests when those interests involve little more than administrative superiors' desire to assert their authority").

331. 19 F.3d 668, 671-74 (8th Cir. 1997) (en banc).

332. Burnham v. Ianni, 119 F.3d 668, 671-74 (8th Cir. 1997) (en banc) (finding individual academic freedom violated when administrator ordered professors to remove materials concerning military history from display case). A professor had asserted that the photographs were inappropriate and constituted sexual harassment, but the history department professors claimed that they were attempting "to convey and advocate their scholarly and professorial interests in military history and in military weaponry's part in their vocation." *Id.* at 674.

333. *Id.* at 678.

334. *See id.* at 675 (stating that "[b]ecause this case involves [the university's] suppression of [the professors'] protected speech, [the professors] have . . . sufficiently established a violation of a constitutional right"). The Eighth Circuit found that university administrators engaged in illegal viewpoint discrimination within a nonpublic forum. *Id.* at 675-76.

335. *See id.* at 680 n.19 (noting that professors' academic freedom was "a 'special concern of the First Amendment'") (citations omitted). Thus, the Eighth Circuit applied strict scrutiny to the professors' expression.

336. *See id.* at 678 (emphasizing that *Pickering* standard applies to determinations of whether public employer has been properly discharged or disciplined for engaging in speech).

because it disapproves of the ideas expressed.[337] With a few exceptions, most speech receives First Amendment protection.[338] The First Amendment's protection extends even to indecent speech.[339] Therefore, if scholarly speech receives full First Amendment protection, it may be limited only when the State clearly has established a compelling and narrowly drawn interest.[340]

1. Content-Based Discrimination

The Supreme Court has stated that content-based discrimination cannot be tolerated under the First Amendment.[341] Underlying this principle is the recognition that "content-based burdens on speech . . . raise the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[342] To justify such restrictions, the government must demon-

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337. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (stating that prohibition of speech based on simple disapproval is unconstitutional).

338. *See* New York v. Ferber, 458 U.S. 747, 756 (1982) (deciding that child pornography is unprotected speech under First Amendment due to low value of communication to society); Miller v. California, 413 U.S. 15, 23 (1973) (holding that obscene speech is unprotected speech); Cohen v. California, 403 U.S. 15, 26 (1971) (concluding that offensive language is protected under First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (describing fighting words that tend to invoke violent reaction from hearer as unprotected speech).

339. *See* Sable Communications of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989) (holding that First Amendment protects indecent communication).

340. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973) (noting that freedom of speech or expression is fundamental right and, as such, judicial standard of review for alleged unconstitutional restrictions is strict scrutiny). Under strict scrutiny review, the government must show a compelling interest in the regulation and a narrow tailoring to achieve its goals. *Id.* See also Van Alstyne, *supra* note 2, at 78, for the following discussion:

> There is, of course, nothing . . . that assumes that the First Amendment subset of academic freedom is a total absolute, any more than freedom of speech is itself an exclusive value prized literally above all else. Thus, the false shouting of fire in a crowded theater may not immunize a professor of psychology from having to answer for the consequences of the ensuing panic, even assuming that he did it in order to observe crowd reaction first-hand and solely to advance the general enlightenment we may otherwise possess of how people act under great and sudden stress.

Id.

341. *See* Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) (stating that regulations that permit Government to discriminate on basis of content of message cannot be tolerated); *see also* Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641-43 (1994) ("Turner I") (recognizing that Supreme Court precedent applies exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content).

342. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

strate a compelling interest, and the restrictions must be narrowly tailored to meet that objective.[343] Furthermore, when a statute is a content-based blanket restriction on speech, it "cannot be 'properly analyzed as a form of time, place, and manner regulation.'"[344]

The Virginia law at issue in *Urofsky* singled out "sexually explicit" material found on the Internet for burdensome regulation and public scrutiny.[345] As noted by the district court, the Act's poor fit and the availability of content-neutral alternatives suggested that the Act was intended to discourage discourse on sexual topics, "not because it hampers public functions but simply because [the state] disagree[s] with the content of the employees' speech."[346] This constitutes an impermissible content-based restriction under Supreme Court precedent.[347] The content-based restriction of faculty expres-

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343. *See id.* at 118 (setting out strict scrutiny standard).

344. Reno v. ACLU, 521 U.S. 844, 868 (1997) (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986)).

345. *See* VA. CODE ANN. § 2.1-805 (Michie Supp. 1999), *recodified at* § 2.2-2827 (2001) (singling out "lascivious" material). The *Urofsky* Brief for Petitioner stated the following:

> Any state-employed writer, researcher, professor, or librarian investigating "sexually explicit" material in the arts, literature, social science, or medicine is barred from doing so unless she or he takes the affirmative step of requesting a license, which may or may not be granted, in the unfettered discretion of the "agency head" and which, if granted – as the Act makes a point of providing – is then subject to scrutiny by any politician or pressure group that chooses to make an issue over the controversial, "offensive," or "immoral" subjects being studied with taxpayer-funded resources.

Urofsky Brief for Petitioner, *supra* note 9, at 21-22.

346. Urofsky v. Allen, 995 F. Supp. 634, 643 (E.D. Va. 1998) (alteration in original) (quoting Rankin v. McPherson, 483 U.S. 378, 384 (1987)) (internal quotation marks omitted). The district court in *Urofsky* held that "[g]iven the over- and underinclusiveness of the Act and the existence of content-neutral alternatives . . . [t]he Act violate[d] the First and Fourteenth Amendments." *Id.* at 643-44. Significantly, the *Urofsky* Petitioner's Brief stated the following:

> [B]oth the prior restraint licensing requirement and the public disclosure provision chill academic discourse and other bona fide research about sexuality by making scholars think very carefully before requesting a license and administrators think equally hard about the possible political consequences before granting it. Thus . . . the licensing scheme does not enhance institutional academic autonomy but interferes with it by imposing unnecessary and inhibiting burdens on universities and targeting research and writing on a subject of which the legislature disapproves.

Urofsky Petitioner's Brief, *supra* note 9, at 22.

347. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) (stating that "[c]ontent-based regulations are presumptively invalid"); F.C.C. v. League of Women Voters, 468 U.S. 364, 384 (1984) (noting that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic" (alteration in original) (citations omitted)); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 536 (1980) (stating that constitutionally permissible

sion on public university Web Servers thus violates the First Amendment academic freedom rights of the university faculty members' scholarly speech.

2. Prior Restraint

Furthermore, Virginia's licensing scheme is an impermissible prior restraint on sexual matters.[348] The statute's approval process requires professors to seek permission to access sexually explicit materials "to the extent required in conjunction with a bona fide, *agency-approved* research project or other *agency-approved* undertaking."[349] As the Fourth Circuit dissent noted, the Act's prior approval process did not contain a check on the discretionary authority of state agencies and such "grants of unbridled discretion to government agents invites arbitrary enforcement."[350] Even if one could assume that approvals would not be withheld arbitrarily, the "mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."[351] Even those professors who receive permission to speak may engage in self-censorship, ultimately to the

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time, place, or manner restriction may not be based upon either content or subject matter of speech).

348. *See* AAUP *Urofsky* Amicus Brief, *supra* note 9, at 16-19 (arguing that Commonwealth's licensing scheme is "clearly an impermissible prior restraint on serious inquiry into sexual matters").

349. VA. CODE ANN. § 2.1-805 (Michie Supp. 1999), *recodified at* § 2.2-2827 (2001) (emphasis added). The AAUP *Urofsky* Amicus Brief states the following:

> [B]oth the prior restraint licensing requirement and the public discourse provision chill academic discourse and other bona fide research about sexuality by making scholars think very carefully before requesting a license and administrators think equally hard about the possible political consequences before granting it. Thus, contrary to the claims of the Commonwealth and the Fourth Circuit majority, the licensing scheme does not enhance institutional academic autonomy but interferes with it by imposing unnecessary and inhibiting burdens on universities and targeting research and writing on a subject of which the legislature disapproves.

AAUP *Urofsky* Amicus Brief, *supra* note 9, at 22.

350. *Urofsky*, 216 F.3d 401, 441 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001) (Murnaghan, J., dissenting).

351. City of Lakewood v. Plain Dealer Publ'g Co, 486 U.S. 750, 757 (1988). The *Lakewood* Court held that:

> [W]hen the determination of who may speak and who may not is left to the unbridled discretion of a government official . . . we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.

Id. at 463-64.

detriment of the public in the form of banal and lifeless discourse.[352] By failing to apply strict scrutiny, the Fourth Circuit upheld a law that discriminates based on sexually explicit content and imposes an impermissible prior restraint.[353]

VII. Conclusion

Freedom of inquiry and scholarship is critical to informed political debate and useful social discoveries. [354] The freedom to pursue research and the right to transmit the fruits of inquiry to the wider community – without limitations from corporate or political interests and without prior restraint or fear of subsequent punishment – are essential to the advancement of knowledge.[355] Thus, when academic freedom is at issue, courts should apply full First Amendment strict scrutiny rather than the *Pickering-Connick* standard.[356]

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352. *See Urofsky*, 216 F.3d at 441 (Murnaghan, J., dissenting) (discussing Act's detriment to public); *see also* Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (declaring that "[i]t is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion"); Sanjour v. E.P.A. 56 F.3d 85, 97 (D.C. Cir. 1995) (noting that "[f]ar from being the saving grace of this regulatory scheme – as the government suggests – the broad discretion that the regulations vest in the agency reinforces our belief that they are impermissible."); Rabban, *supra* note 2, at 1419 (1988) (observing that prior approval scheme for scholarly research "should strike virtually everyone as a violation of academic freedom," even absent "strong evidence of actual abuses").

353. *See Urofsky*, 216 F.3d at 416 (upholding Virginia Act that broadly banned all sexually explicit on-line research and discussion in art, literature, psychology, science, and law).

354. *See* Byrne, *supra* note 2, at 333-40 (elaborating on policy behind constitutional right of academic freedom). Professor Byrne perceptively states:

> The disinterested search for knowledge fosters of discourse that, at its best, is careful, critical, and ambitious. Again, the method of discourse is both a good in itself and a benefit to society . . . scholarly discourse creates the most favorable environment in which thinkers may formulate ideas that stand apart from popular opinion or fashionable error . . . . Disinterested and expert thought is also crucial for society as a whole because it proves a standard by which to gauge how trivial, debased, and false is much public discussion of affairs. It is imperative to gain perspective on the mass of information that pours from the print and electronic media, drivel that so often merely flatters the ignorance and cupidity of its audience . . . . It is important to keep vital the possibility of free intellectual excellence lest we become lost to technically-proficient barbarism.

Id. at 334-35.

355. *See* Report: Academic Freedom in the Medical School, ACADEME (May 22, 1999), *available at* http://www.aaup.org/ja99rpts.htm (last visited Oct. 4, 2001) (reporting on status of academic freedom in medical schools).

356. *See supra* Part VI (discussing inapplicability of *Pickering-Connick* balancing test and suitability of strict scrutiny standard in evaluation of First Amendment claims concerning freedom of academic inquiry).

As demonstrated by *Urofsky*, if courts apply the *Pickering-Connick* balancing test to academic freedom litigation, the result can be an imposition of severe restrictions on traditional and legitimate professional speech by faculty at public colleges and universities.[357] These restrictions impede faculties' ability to teach, share research findings, and publish, especially when doing so might prompt adverse public or political reactions. The Supreme Court warned that such restrictions would harm not only the interests of individual professors, but also the welfare of the public and the nation.[358]

Disinterested scholarship and research is crucial to individual faculty members and to society as a whole. In noting the importance of freedom of inquiry in the development of modern civilization, the Supreme Court in *Sweezy* observed, "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise civilization will stagnate and die."[359] Unfortunately, by failing to appreciate the distinction between garden-variety public employee speech and academic free speech or inquiry, the Fourth Circuit assaulted a fundamental bulwark of First Amendment protection.[360]

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357. *See supra* Part VI (discussing implications of *Urofsky*). In a recently published article, Chris Hoofnagle, Staff Counsel for the Electronic Privacy Information Center (EPIC), presented academic criticism of the "matter of public concern" test (i.e., the *Pickering-Connick* balancing test) and suggested an alternative legal standard for determining the First Amendment value of professors' expression. Chris Hoofnagle, *Matters of Public Concern and the Public University Professors*, 27 J.C. & U.L. 669, 702-06 (2001). Although Hoofnagle took a different route in addressing the "matter of public concern," his conclusion supports my own. *Id.* at 706. Hoofnagle insightfully states the following:

> [The] narrowness, unpredictability, and risk of arbitrariness makes the application of the threshold public concern test and balancing inappropriate for judging expression in the higher education context. In addition, balancing the value of academic speech against potential or actual disruption is inimical to the core principles intellectual freedom. In academe, ideas should not be suppressed based on some potential for disruption.

Id.

358. *See supra* Part III (analyzing Supreme Court academic freedom cases).

359. *Sweezy*, 354 U.S. 234, 250 (1957) (plurality decision).

360. *See* Candido, *supra* note 68, at 120 (recognizing that "[i]f the government, acting through public universities, can eliminate views it finds distasteful from the educational marketplace, not only will the search for truth be hindered, but the basis of free speech as a tool for self-governance and critical, autonomous decision-making [will be] eliminated").