

HOW COURTS VIEW ACADEMIC FREEDOM

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I. INTRODUCTION	2
A. Context for Research Questions.....	2
B. Organization of this Research Article	4
II. HOW PROFESSORS DEFINE ACADEMIC FREEDOM.....	5
A. Early Disputes over Academic Freedom: The Individual Versus the School	6
B. Academic Freedom as Defined by Professors: Faculty Association Versus the School	10
III. JUDICIAL REGULATION OF ACADEMIC FREEDOM FOR PROFESSORS	12
A. Institutional Governance of Academic Freedom	12
B. From Self-Governance to Judicial Application of the First Amendment	13
IV. FIRST AMENDMENT FACULTY CASES:.....	20
RESEARCH METHODS AND FACT FINDINGS.....	20
A. Method for Creating the Sample	20
B. Sample Characteristics	23
C. Data and Fact Findings	23
V. CONCLUSIONS	38
APPENDIX OF CASES INVOLVING FIRST AMENDMENT CLAIMS.....	44
BY COLLEGE AND UNIVERSITY PROFESSORS AND INSTRUCTORS	44
A. Federal Courts	44
<u>B. State Courts</u>	55

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I. INTRODUCTION

*Because public scholarship means pissing people off.*¹

*I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to . . . official duties."*²

A. Context for Research Questions

Academic freedom for professors is an elusive concept.³ Does this allow them to create a classroom climate that students perceive as harassment?⁴ Does academic freedom mean that professors are privileged to ignore campus directives to issue "trauma trigger warnings" when they assign students upsetting materials?⁵ Does academic freedom extend to a professor whose apoplectic blog incites followers to send rape wishes to a Ph.D. student at his university?⁶

1. Scott Jaschik, *Regret Over Tweets on Race*, INSIDE HIGHER EDUC. (May 13, 2015), <https://www.insidehighered.com/print/news/2015/05/13/professor-center-debate-over-her-tweet-white-male-students-expresses-regret?width=775&height=500&ifram%E2%80%A6> (quoting Prof. Tressie McMillan Cottom).

2. *Garcetti v. Ceballos*, 547 U.S. 410, 438 (2006) (Souter, J., dissenting)

3. E.g., Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC. (May 29, 2015), <http://chronicle.com/article/My-Title-IX-Inquisition/230489/> ("The more colleges devote themselves to creating 'safe spaces' — that new watchword — for students, the more dangerous those campuses become for professors."); Morton Schapiro, *The New Face of Campus Unrest*, WALL ST. J. (Mar. 18, 2015), <http://www.wsj.com/articles/morton-schapiro-the-new-face-of-campus-unrest-1426720308> ("You better have a compelling reason to punish anyone—student, faculty member, staff member—for expressing his or her views, regardless of how repugnant you might find those views.").

4. *Bonnell v. Lorenzo*, 241 F.3d 800, 803–05 (6th Cir. 2001) (ruling for college that removed professor who caused complaints about constantly using classroom vulgarities, including "fuck," "cunt," and "pussy," and "butt fucking.")

5. Associated Press, *Trauma Warnings Move from Internet to Ivory Tower*, N.Y. TIMES (Apr. 26, 2014), http://www.nytimes.com/aponline/2014/04/26/us/ap-us-college-trigger-warnings.html?_r=0 (reporting that Oberlin College instructs faculty members to "[u]nderstand triggers, avoid unnecessary triggers, and provide trigger warnings . . . [related to] racism, classism, sexism, heterosexism, cissexism, ableism, and other issues of privilege and oppression."). One faculty member believes that Oberlin's "imperative voice" and "massively long list of -isms," could eventually lead to litigation involving a faculty member. *Id.*

6. E.g., Cheryl Abbate, *Gender Based Violence, Responsibility, and John McAdams* (Feb. 9, 2015), <https://ceabbate.wordpress.com/2015/01/20/gender-based-violence-responsibility-and-john-mcadams/>

(Abate received backlash online through e-mails, in which she was called names such as a "fag enabler," and online comments, in which online forum users claimed, among

My Article considers these types of imponderable scenarios in a comprehensive data analysis of First Amendment court rulings involving college and university faculty as plaintiffs. I derived a sample of 210 published court opinions from 1964 through 2014. The cases, which include appeals, yielded 339 First Amendment decisions. Schools won 73% of First Amendment rulings.⁷

My research provides an empirical perspective for a research literature that is dominated by doctrinal analysis.⁸ My conclusions contribute to a wider debate about academic freedom.⁹ This research also offers guidance to courts that are ruling in a growing number of campus speech disputes.¹⁰

other things, that she “suck[s] cock”); Conor Friedersdorf, *Stripping a Professor of Tenure Over a Blog Post*, ATLANTIC (Feb. 9, 2015), <http://www.theatlantic.com/education/archive/2015/02/stripping-a-professor-of-tenure-over-a-blog-post/385280/> (reporting on tenured professor fired for blog post that attacked a graduate student, and prompted others to verbally attack her).

7. Universities, four-year colleges, and community colleges constitute institutions of higher education for this analysis. For economy, I refer to them as schools, but this usage does not include elementary and high schools.

8. See Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791 (2010), for an excellent study to read in conjunction with my Article. While lacking the empirical perspective, this study delves deeply into cases from the 1960s. See Vikram Amar & Alan Brownstein, *Academic Freedom*, 9 GREEN BAG 2D 17 (2005); J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251 (1989); Mathew W. Finkin, *On “Institutional” Academic Freedom*, 61 TEX. L. REV. 817 (1983); Burton M. Leiser, *Threats to Academic Freedom and Tenure*, 15 PACE L. REV. 15 (1994); Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third “Essential Freedom,”* 45 STAN. L. REV. 1835 (1993); David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (Summer 1990); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907 (2006); Mark G. Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finkin*, 66 TEX. L. REV. 1351 (1988); see also Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 YALE L.J. 376 (1979) (cited in 10 court opinions); Stacy E. Smith, Note, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299 (2002), for other seminal studies.

9. See *infra* Part V (faculty and campus officials should join in crafting principles of academic freedom that deal with 21st century issues of academic freedom); see William G. Bowen & Eugene Tobin, *Commentary: Scott Walker’s Test of Academic Freedom*, CHI. TRIB. (June 22, 2015), <http://www.chicagotribune.com/news/opinion/commentary/ct-scott-walker-tenure-university-wisconsin-perspec-0623-20150622-story.html>.

10. E.g., *Keating v. Univ. of S.D.*, 569 Fed. Appx. 469 (8th Cir. 2014); *Benison v. Ross*, 765 F.3d 649 (6th Cir. 2014); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Frieder v. Morehead State Univ.*, 770 F.3d 428 (6th Cir. 2014); *Meade v. Moraine Valley Cmty. Coll.*, 770 F.3d 680 (7th Cir. 2014); *Jackson v. Tex. S. Univ.*, 997 F. Supp. 2d 613 (S.D. Tex. 2014); *Meyers v. Cal. Univ. of Penn.*, 2014 WL 3890357 (W.D. Pa. 2014); *Oller v. Roussel*, 2014 WL 4204836 (W.D. La. 2014); *Simpson v. Alcorn State Univ.*, 27 F. Supp. 3d 711 (S.D. Miss. 2014).

My main conclusion is that faculty and courts define academic freedom quite differently, as evidenced by my primary finding that faculty lose seventy-three percent of First Amendment rulings. This statistic implies that many professors believe that *all* speech in their classrooms, publications, and public pronouncements is constitutionally protected.¹¹ My research shows, however, that courts view academic freedom more narrowly.

B. Organization of this Research Article

In Part II, I track the origins of academic freedom.¹² To frame this discussion, I highlight current examples of campus speech codes.¹³ The timeline in Part II.A¹⁴ begins in 1754 by denoting the first American college program that was not based on medieval or religious traditions.¹⁵ I chronicle court opinions involving faculty dismissals from 1790 through 1955¹⁶— the pre-modern era of faculty speech disputes. Part II.B¹⁷ explains the origins of academic freedom as articulated by the association that professors formed to protect their free speech.

This discussion flows into Part III, which analyzes court rulings on faculty speech.¹⁸ In Part III.A I explain how faculty speech disputes were primarily handled without court involvement.¹⁹ Part III.B analyzes how that picture changed as McCarthy-era laws affected professors and forced courts into the First Amendment arena.²⁰ I explain how Supreme Court precedents shifted, at first protecting faculty from loyalty oaths,²¹ but later treating speech controversies more like regular employment disputes.²² I provide illustrations to demonstrate how courts diminished academic freedom.²³

Part IV is the heart of my analysis— an explanation of my data and reporting of eleven key fact-findings.²⁴ Part IV.A discusses how I created

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11. See Leiter, *infra* note 33.
 12. See *infra* notes 30–74.
 13. See *infra* notes 30–32.
 14. See *infra* notes 39–62.
 15. See *infra* note 40.
 16. See *infra* notes 47–60.
 17. See *infra* notes 63–74.
 18. See *infra* notes 75–136.
 19. See *infra* notes 75–80.
 20. See *infra* notes 81–136.
 21. See *infra* note 81.
 22. See *infra* notes 93–136.
 23. See *infra* notes 100–105; 114–124; 132–136.
 24. See *infra* notes 137–206.

the sample and identifies the limits of my methodology.²⁵ Part IV.B reports the characteristics of the sample,²⁶ while Part IV.C uses data tables to organize my fact-findings.²⁷

Part V has my conclusions.²⁸ This discussion includes significant caveats. Part VI is an Appendix of all cases in the sample, and is organized by federal circuits and state courts.²⁹

II. HOW PROFESSORS DEFINE ACADEMIC FREEDOM

Free speech is cherished in academe—but is also contracting. Campus codes regulate disrespectful language.³⁰ Some schools mandate civility³¹ and decency.³² By contrast, professors often prefer unbounded speech.³³ So does the American Association of University Professors (AAUP), the main group that advocates for academic freedom.³⁴

Even permissive standards of academic freedom at colleges and universities have some speech limits. Some define academic freedom broadly but include vague limits.³⁵ Academic freedom can be more

25. *See infra* notes 137–150.

26. *See infra* notes 151–152.

27. *See infra* notes 153–206.

28. *See infra* notes 207–234.

29. Manuscript at 51–63.

30. *E.g., Institute Policy on Acceptable Use of Electronic Information Resources*, CAL. INST. OF TECH., available at <http://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2005/02/Cal-Tech-Acceptable-Use-13-14.pdf> (prohibiting communications that discriminate, harass, defame, offend, or threaten individuals or organizations).

31. *Community Standards Policy*, CARLTON COLL., available at <http://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2004/11/Carleton-Community-Standards-13-14.pdf> (creating and sustaining a climate of “civility”); *SSU Statement on Civility and Tolerance*, SONOMA STATE UNIV., available at <http://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2014/01/Sonoma-Civility-and-Tolerance-13-14.pdf> (requiring all members of the university community to communicate with each other in a “civil manner”).

32. *Middlebury Coll. Handbook: General Conduct 14–15*, MIDDLEBURY COLL., available at http://www.thefire.org/fire_speech-codes/middlebury-general-conduct-14-15/ (prohibiting “flagrant disrespect for persons” and “flouting of common standards of decency”).

33. *E.g., Brian Leiter, University of Illinois Repeals the First Amendment of Its Faculty*, HUFF POST COLL. (Oct. 23, 2014), http://www.huffingtonpost.com/brian-leiter/university-of-illinois-re_1_b_5703038.html (“The First Amendment’s protection of such speech is that government, including a state university, is prohibited from punishing the speaker for his expression or viewpoint.”).

34. *See American Ass’n of Univ. Professors (AAUP)*, *infra* notes 63–69.

35. *Report of the Committee on Freedom Expression*, UNIV. OF CHI., available at <http://provost.uchicago.edu/FOECommitteeReport.pdf>. The policy broadly protects academic freedom, as such: “Although the University greatly values civility, . . . concerns about civility and mutual respect can never be used as a justification for

restricted when government bodies define it.³⁶ Federal government adds another layer of regulation by broadly defining classroom and workplace harassment.³⁷

In Part II, I trace two historical developments that have begun to collide in courts. Faculty members, over centuries, have enjoyed autonomy to set standards for their professional discourse. From the late 1700s to the early 1960s, courts rarely intruded in this domain. But courts have become more involved, prompted by campus speech disputes.³⁸ Part II is an important backdrop for my empirical results. The main result: Courts often rule for colleges and universities in faculty speech conflicts.

A. Early Disputes over Academic Freedom: The Individual Versus the

closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.” *Id.* But it curtails this freedom when it says that “[t]he freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish. . . . [T]he University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University.” *Id.*

36. *E.g.*, The State University of New York’s policy on academic freedom is: to maintain and encourage full freedom, within the law, of inquiry, teaching and research. . . . [F]aculty members may, without limitation, discuss their own subject in the classroom; they may not, however, claim as their right the privilege of discussing in their classroom controversial matter which has no relation to their subject. The principle of academic freedom shall be accompanied by a corresponding principle of responsibility. In their role as citizens, employees have the same freedoms as other citizens. However, in their extramural utterances employees have an obligation to indicate that they are not institutional spokespersons.

N.Y. Comp. Codes R. & Regs., tit. 8 § 335.27 (1994).

37. *Sexual Harassment: It’s Not Academic*, U.S. DEP’T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html#_t1b (last visited Ja. 31, 2016). Examples include: making sexual propositions or pressuring students for sexual favors, *see Trejo v. Shoben*, 319 F.3d 878, 883 (7th Cir. 2003) (“Students went on to explain they felt uncomfortable and awkward around Trejo and were avoiding contact with him by steering clear of his office and were refusing to enroll in his classes.”); displaying or distributing sexually explicit drawings, pictures, or written materials, *see Piarowski v. Ill. Comm. Coll.*, 759 F.2d 625, 627 (7th Cir. 1985) (faculty member challenged relocation of his stained glass exhibit of a “brown woman . . . before a robed white male whose most prominent feature is a grotesquely oversized phallus (erect penis) that the woman is embracing”); and performing sexual gestures or touching oneself sexually in front of others, *see Northwestern University Professor under Fire After Class Sex Toy Demonstration*, HUFF POST CHI. (May 25, 2011), http://www.huffingtonpost.com/2011/03/02/northwestern-university-p_n_830423.html (reporting that Northwestern University professor arranged for a live demonstration of woman brought to orgasm with a high-intensity vibrator in sexuality class).

38. Lauren DeLap, Note, *Look Ahead, Dixieland: An Examination of State University Discretion in Mascot Selection*, 64 ALA. L. REV. 881 (2013) (University of Mississippi’s retirement of Colonel Reb in 2003).

School

Colleges and universities began as subjects of the crown and church. These authorities determined faculty credentials.³⁹ Early American colleges and universities, modeled after English counterparts, took on a more secular identity in 1754.⁴⁰ These nascent academies enjoyed much autonomy.⁴¹

Detailed information about college and university governance from the 1700s is scarce.⁴² In this time, there were no academic freedom cases; however, college and university charters authorized boards of trustees to appoint and remove professors.⁴³ A few court opinions offer a glimpse of strained relationships between professors and their overseers. Some decisions recount these quarrels.⁴⁴ In others, professors sued after losing their jobs.⁴⁵ Unlike current faculty disputes over the First Amendment,⁴⁶ there was no constitutional jurisprudence relating to academic freedom.

Lacking this avenue, faculty members attacked the appointment process that muzzled them. The earliest opinion, *Bracken v. Visitors of William & Mary College*,⁴⁷ deferred to board discretion in denying tenure.⁴⁸

39. 2 T. MACAULAY, *HISTORY OF ENGLAND* 86-109 (Everyman's ed. 1906) (English universities were religiously oriented before the 1800s due to a requirement of ordination for faculty members).

40. Joe W. Kraus, *The Development of a Curriculum in the Early American Colleges*, 1 *HIST. OF EDUC. Q.* 64, 68 (1961) (describing how the College of Philadelphia—later University of Pennsylvania—instigated the first American college education program that was not based on medieval tradition nor had a religious objective).

41. J. Peter Byrne, *supra* note 8, at 267-68.

42. See GEORGE W. PIERSON, *A YALE BOOK OF NUMBERS: HISTORICAL STATISTICS OF THE COLL. & UNIV. 1701-1976* (1983), <http://oir.yale.edu/1701-1976-yale-book-numbers#D>, for a rare source of this information. Faculty often served for more than 35 years. *Id.* at 435. Trustees tended to have shorter tenures, however, most served more than four years. *Id.* at 431.

43. *City of Louisville v. President & Trs. of Univ. of Louisville*, 54 Ky. 642, 702 (Ky. Ct. App. 1855) (reciting that majority of trustees “may appoint and remove the professors in either department of the university, at pleasure”).

44. See *State v. Senft*, 20 S.C.L. 367 (S.C. App. L. & Eq. 1834) (involving a battle between faculty and their campus over a building for a medical college).

45. *Head v. Univ. of Mo.*, 86 U.S. 526 (1873) (ruling that state legislature retained power to change university board of curators, and through the new body, terminate a faculty member).

46. See *infra* notes 86-88.

47. *Bracken v. Visitors of Wm. & Mary Coll.*, 7 Va. 573 (Va. 1790).

48. See *Field v. Girard Coll. Dirs.*, 54 Pa. 233 (1867) (involving the removal of a steward). College and university boards exercise discretion, and are not ceremonial figureheads or rubber stamps. The Supreme Court of Pennsylvania concluded that the school's charter, which authorized the creation of certain positions, could not be used to “convert this into a direction that appointees are to hold by any given tenure.” *Id.* at 239. The purpose of a university's charter is “to furnish a rule for the guidance of the

Even without a specific reason, trustees were privileged to oust a professor due to antagonisms in their relationship. They “had a right to their likes and their dislikes; and they had an equal right to express them in a lawful manner.”⁴⁹ Courts also declined to order schools to name faculty to vacant posts.⁵⁰ But courts did not put boards above the law. Dismissed faculty members could recover contractual damages for improper termination.⁵¹

Continuing into the twentieth century, courts remained deferential to university authorities.⁵² A trickle of cases hinted at faculty terminations due to disagreements between instructors and administrators. In what may be the first court case explicitly involving academic freedom, the regents of West Virginia University removed Prof. James Hartigan for opposing policies of the university president.⁵³ The state supreme court ruled that the removal of a professor did not require notice of charges or a hearing.⁵⁴ In

trustees— not to define the rights of their appointees.” *Id.*; see also *Cobb v. Howard Univ.*, 106 F.2d 860 (D.C. Cir. 1939) (refusing to overturn board’s decision not to renew the appointment of a part-time law professor).

49. *People of the State of N.Y. ex rel. Charles B. Kelsey v. N.Y. Post-Graduate Med. Sch. & Hosp.*, 29 A.D. 244, 250 (N.Y. App. Div. 1898).

50. *Id.*; see also *People v. Regents of Univ. of Mich.*, 18 Mich. 469 (1869). The legislature passed separate laws empowering a board to enact ordinances for the University of Michigan, and to name officers and professors. Another law required the university to name a professor of homeopathy. Over thirteen years, the regents failed to name anyone for that position. The regents prevailed in arguing that a mandamus would contravene the law exclusively authorized them to appoint faculty.

51. *Butler v. Regents of the Univ.*, 32 Wis. 124, 132 (1873) (involving claim for non-payment of salary after faculty member was dismissed); *but see Graney v. Bd. of Regents of the Univ. of Wisc.*, 286 N.W.2d 138 (Wis. Ct. App. 1979) (concluding that board had implied power to terminate tenured employees for reasons of financial exigency).

52. *Ward v. Bd. of Regents of Kan. State Agric. Coll.*, 138 F. 372, 376 (8th Cir.1905) (concluding “the interest of the college is committed to the sound discretion of the board of regents.”). The court added: “If the regents are vested with the right to discharge a professor whenever in their judgment the best interest of the college require such action, then, if they act in good faith, the discharge cannot be ‘wrongful.’” *Id.*; see also *People ex rel. Kelsey*, *supra* note 49 (refusing to issue writ to restore professor his former faculty position); *Devol v. Bd. of Regents*, 56 P. 737 (Ariz. 1899) (dismissing lawsuit over discharge of faculty member); *Phillips v. Commonwealth*, 98 Pa. 394, 402 (1881) (stating that the “number and character of the professorships to be created under the charter is left solely to the discretion of the trustees”); see also *Vincenheller v. Reagan*, 64 S.W. 278 (Ark. 1901) (reporting on state law that abolished academic position).

53. *Hartigan v. Bd. of Regents of W. Va. Univ.*, 38 S.E. 698 (W. Va. 1901). For an article on the ambiguity of 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) (“Courts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom.”).

54. *Hartigan*, 38 S.E. at 700 (“[I]f Dr. Hartigan’s right to notice depends upon his being a public officer, he had no right to notice, because he is not a public officer, but a mere employee of the board of regents, in a legal point of view, and cannot, as a matter

Brookfield v. Drury College, an instructor was removed after she spoke up in an apparent labor dispute with the campus president over the size of the faculty.⁵⁵ In *Darrow v. Briggs*, the Court dismissed an action by a professor who was fired for expressing “non-Christian” beliefs.⁵⁶ The University of Mississippi dismissed a professor over a pay dispute.⁵⁷ In an unusual win for a professor, a state supreme court ruled that a faculty union organizer was unlawfully terminated.⁵⁸ Professors lost cases when they theorized deprivation of academic freedom as a tort.⁵⁹ Rulings often turned on the nature of the academic appointment— whether the professor held a public office or was merely an employee.⁶⁰

In sum, from the late 1700s until World War I, courts rarely ruled in disputes between professors and their schools. Institutional factors were likely responsible for the muted role of courts. Private universities were not bound by the First Amendment.⁶¹ In any event, constitutional principles had not evolved to touch upon academic freedom.⁶² When faculty disputes with schools erupted, courts resolved them by using common law doctrines in associations and contracts.

of right, demand hearing, right of defense, and trial.”).

55. 123 S.W. 86 (Mo. Ct. App. 1909).

56. 169 S.W. 118 (Mo. 1914). Where a college terminated a professor for his religious beliefs and teachings, the college president said, “When a teacher eating the bread of a Christian institution *teaches* doctrine non-Christian and antagonistic to a personal God, when a man makes use of his position to *spread his fad by attempting to proselyte* and force his belief upon students, he is either weak . . . or wrong”. *Id.* at 121 (emphasis added).

57. *Univ. of Miss. v. Deister*, 76 So. 526 (Miss. 1917).

58. *State ex. rel. Keeney v. Ayers*, 92 P.2d 306 (Mont. 1939) (involving a professor who was organizing a labor union at Montana State University).

59. *Clarke v. McBaine*, 252 S.W. 428, 430-31 (Mo. 1923) (involving the University of Missouri’s dismissal of a law professor following his role in organizing a no-confidence vote for the president). The professor published an article in the *St. Louis Post Dispatch* stating his side of the story; and the president published a rebuttal stating that the professor was dismissed for cause. The court dismissed the professor’s libel suit. *Id.*; *Gottschalck v. Shepperd*, 260 N.W. 573 (N.D. 1935) (dismissed professor unsuccessfully sued university board on tort theories).

60. *See State ex rel. Posin v. State Bd. of Higher Educ.*, 74 N.W.2d 79 (N.D. 1955) (ruling that dismissed faculty members may sue only for breach of contract).

61. *See infra* note 212 (more recent cases show that the First Amendment does not apply to private schools).

62. *See infra* note 83.

B. Academic Freedom as Defined by Professors: Faculty Association Versus the School

The failure of professors to define academic freedom also delayed First Amendment rulings on their speech disputes. If they had no formal sense of the concept, why would courts? The modern era for academic freedom is marked by the formation of the American Association of University Professors (AAUP) and its 1915 report on faculty expression.⁶³ In “Declaration of Principles,” the association focused on professors who lost their jobs over academic freedom.⁶⁴

The group did not advocate unlimited faculty rights. Instead, academic freedom was tied to professional duties and responsibilities.⁶⁵ Scholars were counseled to base their conclusions on accepted disciplinary methods. Professors were expected to represent their research “with dignity, courtesy, and temperateness of language.”⁶⁶ As instructors, faculty members were also told to “set forth justly, without suppression or innuendo, the divergent opinions of other investigators.”⁶⁷ Interestingly, the AAUP instructed professors to “observe certain special restraints” in classroom discussions with students who were in the first two years of their college education.⁶⁸ While the AAUP imposed limits on academic freedom, they also directed college and university leaders not to interfere with professorial thought, belief and expression.⁶⁹

63. *Appendix I, 1915 Declaration of Principles on Academic Freedom and Academic Tenure*, AM. ASS’N OF UNIV. PROFESSORS, available at <http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>.

64. Academic freedom is “freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.” *Id.* at 292.

65. *Id.* at 298. In teaching a controversial subject, a university instructor was entitled to state his views, but was also expected to “set forth justly, without suppression or innuendo, the divergent opinions of other investigators. . . .” *Id.* The policy admonished instructors to “remember that his business is not to provide his students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently.” *Id.*

66. Am. Ass’n of Univ. Professors, *supra* note 63, at 292.

67. *Id.*

68. *Id.* The AAUP added that the “teacher ought also to be especially on his guard against taking unfair advantage of the student’s immaturity by indoctrinating him with the teacher’s own opinions.” *Id.* at 298–99.

69. *Id.* at 300 (“Lay governing boards are competent to judge concerning charges of habitual neglect of assigned duties, on the part of individual teachers, . . . [b]ut in matters of opinion, and of the utterance of opinion, such boards cannot intervene without destroying, . . . the essential nature of a university.”).

From the AAUP's vantage, professors were the sole arbiters of academic freedom. They wished to exclude administrators, trustees, and lawmakers from regulating faculty speech.⁷⁰ This position was put to an early test in a wide variety of controversies— some over a professor's extramural speech⁷¹ and others where professors criticized administrators.⁷² Over time, the association persuaded most schools to adopt its "1940 Statement of Principles on Academic Freedom and Tenure."⁷³ These developments cultivated early First Amendment faculty cases by sensitizing professors to their professional speech norms.

The rise of the AAUP as tribune for academic freedom coincided with the modern era in higher education. College and university enrollments swelled due to public funding for returning World War II veterans.⁷⁴ Academic freedom flourished, with little evidence of conflict between schools and their faculties. But the McCarthy era, just a few years ahead, portended legislative threats to free speech in academe.

70. Brief of Am. Ass'n of Univ. Professors as Amicus Curiae, *Barenblatt v. U.S.*, 1958 WL 91977, at *15 (U.S. 1958) ("[Our universities are governed by laymen; our administrators, wrestling with budgets, have been known to please and appease prospective donors; our local communities have not refrained from telling the universities what to do."].

71. Jordan E. Kurland, *Ten Decades of AAUP Investigations*, ACADEME (Jan.-Feb. 2015), <http://www.aaup.org/article/ten-decades-aaup-investigations#.VMbPE0tG70>. For example, the University of Pittsburgh did not renew the appointment of a history professor due to his activism for the New Deal and related causes— plus his outspoken critiques of religious organizations in class. In 1946, the AAUP investigated the University of Texas after trustees directed the president to dismiss professors whose communications offended Texas values. Yale University also had a serious controversy over academic freedom. Judith Ann Schiff, *Firing the Firebrand*, YALE ALUMNI MAGAZINE (May/June 2005), http://archives.yalealumnimagazine.com/issues/2005_05/old_yale.html (explaining why Prof. Jerome Davis was denied tenure).

72. *State ex rel. Richardson v. Bd. of Regents of Univ. of Nev.*, 269 P.2d 265 (Nev. 1954) (ruling that a faculty member was not insubordinate when spoke as AAUP chapter leader. The discharged professor, who favored more stringent admissions standards, circulated an article that criticized the university's education department and president.).

73. *1940 Statement of Principles on Academic Freedom and Tenure*, AM. ASS'N OF UNIV. PROFESSORS, <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>; see Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective Action*, 16 CORNELL J. L. & PUB. POL'Y 263, 268-71 (2006-2007), for elaboration.

74. John Bound & Sarah Turner, *Going to War and Going to College: Did World War II and the G.I. Bill Increase Educational Attainment for Returning Veterans*, NBER WORKING PAPER 7452, 1 (Dec. 1999), available at <http://www.nber.org/papers/w7452.pdf> (college enrollment increased from 1.3 million in 1939 to over 2 million in 1946).

III. JUDICIAL REGULATION OF ACADEMIC FREEDOM FOR PROFESSORS

As I explain here, the Supreme Court avoided faculty speech controversies until the 1950s. The following discussion reveals growing conflict between academe and many government units. The former quested for self-governance, while the latter sought to impose its irrational fear of Communist subversion and infiltration.

A. Institutional Governance of Academic Freedom

From 1954-2014, faculty members litigated at least 210 First Amendment controversies with colleges and universities.⁷⁵ These cases are probably a small fraction of disputes over academic freedom. Some are handled via AAUP enforcement procedures.⁷⁶ On occasion, the AAUP censures schools.⁷⁷ Still, no court has suggested that AAUP speech standards supplant judicial doctrines for the First Amendment. A few opinions have cited AAUP standards for academic freedom principles.⁷⁸ But federal appeals courts have also read AAUP standards as authority to limit academic freedom⁷⁹ or as private precepts apart from the First Amendment.⁸⁰

75. See *infra* Part III.B.

76. See *Bulletin of the Am. Ass'n of Univ. Professors*, AM. ASS'N OF UNIV. PROFESSORS, 4-15 (July-Aug. 2014), available at http://www.aaup.org/sites/default/files/files/Bulletin_AcademeJulyAugust14full.pdf (describing a tenure dispute and related speech issues at Northeastern Illinois University).

77. See *Censure List*, AM. ASS'N OF UNIV. PROFESSORS, <http://www.aaup.org/our-programs/academic-freedom/censure-list>, for list of censored schools.

78. See generally *Krotkoff v. Goucher Coll.*, 585 F.2d 675, 679 (4th Cir. 1978) (observing that “because it was formulated by both administrators and professors, all of the secondary authorities seem to agree it [the 1940 statement] is the ‘most widely-accepted academic definition of tenure.’”); see also *Barnes v. Wash. State Cmty. Coll.* Dist. No. 22, 529 P.2d 1102, 1104 (Wash. 1975) (Washington Supreme Court’s reliance on AAUP standards).

79. *Bonnell v. Lorenzo*, 241 F.3d 800, 822 (6th Cir. 2001) (stating that the American Civil Liberties Union and AAUP “recognize that limitations must exist on college professors’ speech in order to provide a learning environment free of harassment; however, such organizations maintain that the limitations must be narrowly drawn so as not to compromise the professors’ rights to academic freedom.”); see also *Starsky v. Williams*, 353 F. Supp. 900, 917 (D.Ariz. 1972) (“Calling Mr. Sumner a ‘bastard,’ etc., adds very little to the world of ideas. It communicates only vituperation, . . . and may be the exact kind of conduct meant to be avoided by the A.A.U.P. standard of ‘appropriate’ restraint.”).

80. See *Urofsky v. Allen*, 216 F.3d 401, 411 (4th Cir. 2000) (en banc) (“Significantly, the AAUP conceived academic freedom as a professional norm, not a legal one: The AAUP justified academic freedom on the basis of its social utility as a means of advancing the search for truth, rather than its status as a manifestation of First Amendment rights.”).

B. From Self-Governance to Judicial Application of the First Amendment

The First Amendment might have been left out of faculty employment disputes if schools and the AAUP exclusively dealt with these matters.⁸¹ During the McCarthy era, the AAUP published reports on the dismissal or non-reappointment of nineteen college and university faculty members.⁸² As lawmakers took aim at professors, courts waded into First Amendment disputes in higher education.⁸³

In *Sweezy v. New Hampshire*, the Supreme Court ruled that a faculty member's right to speak on matters of political controversy couldn't be subjected to a state's anti-subversive laws.⁸⁴ Justice Frankfurter's concurrence suggested that colleges and universities have autonomy to define academic freedom.⁸⁵ In another significant victory, *Keyishian v. Board of Regents of New York*, professors successfully challenged a New York law that required them to swear an oath against Communism.⁸⁶ In broad terms, the Court said: "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

81. William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical View*, 53 LAW & CONTEMP. PROBS. 79, 93 (1990) ("Successful academic freedom claims did not develop naturally or easily as an incident of early twentieth century first amendment doctrine. Rather, they developed largely without benefit of the first amendment, generally under private auspices and in response to the vacuum of doctrine associated with the first amendment as hard law.").

82. Brief, *supra* note 70, at *2.

83. See Application of McGill, 174 N.Y.S.2d 784 (N.Y. Sup. Ct. 1958) (New York courts upheld the dismissal of a tenured professor because he used a pseudonym to publish articles in *The Communist*); *Monroe v. Trs. of the Cal. State Colls.*, 491 P.2d 1105 (Cal. 1971) (California Supreme Court ordered reinstatement of a professor who was dismissed in 1950 for his violation of the state's loyalty oath law, which itself was declared unconstitutional in 1967); see also *Adler v. Bd. of Educ. of City of N.Y.*, 342 U.S. 485, 496-97 (1952) (Black, J., dissenting) ("This is another of those rapidly multiplying legislative enactments which make it dangerous—this time for school teachers—to think or say anything except what a transient majority happen to approve at the moment.").

84. See *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (state's inquiry into content of lectures, under the guise of regulating subversive activities, violated First Amendment right to free speech).

85. *Id.* at 263 ("It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevails 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.").

86. *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589 (1967).

special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”⁸⁷

At this point, First Amendment jurisprudence for faculty stopped developing on an academic track. Speech rights for professors merged with the Court’s growing regulation of speech for public employees. Over the next 40 years, the law did little to distinguish between the expressive elements for the occupation of professor, on the one hand, and high school teacher,⁸⁸ hospital nurse,⁸⁹ and assistant state’s attorney, on the other.⁹⁰ The result is a one-size-fits-all First Amendment jurisprudence.⁹¹

Diagram 1 (*infra*) shows the Supreme Court’s development of First Amendment rights for public employees. In each case, a public employer terminated an employee— as distinguished from withdrawing an offer⁹² — due to a speech controversy.

87. *Id.* at 603.

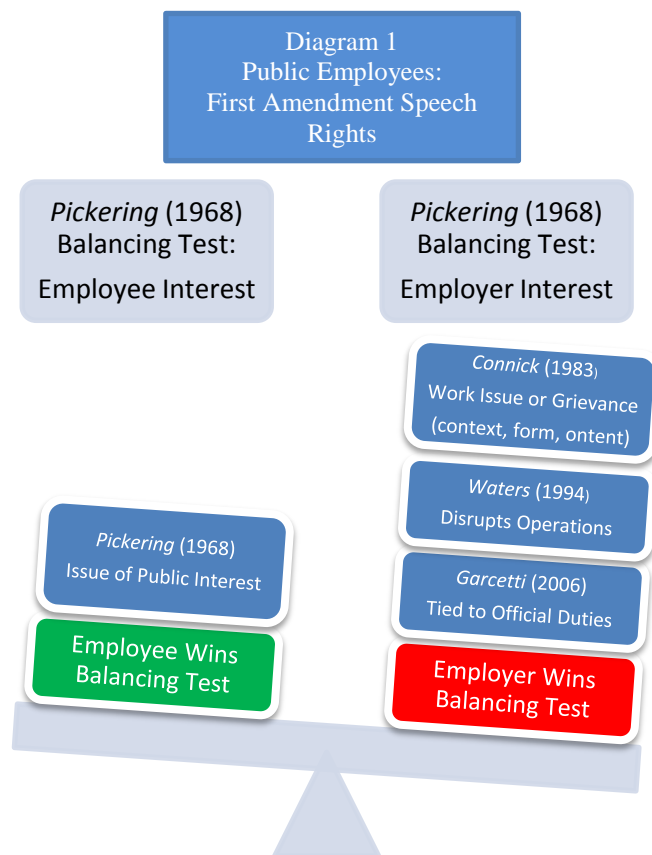
88. Pickering, *infra* note 93.

89. Waters, *infra* note 114.

90. Garcetti v. Ceballos, 547 U.S. 410 (2006)

91. *But see* Rabban, *supra* note 8, at 255 (observing that there are difficulties in “distinguishing constitutional academic freedom from general free speech principles.”).

92. In rare cases, professors have had First Amendment disputes after accepting a job offer but before their appointments were finalized. In this limbo, the issue is whether they are employees. *E.g.*, Complaint, Salaita v. Kennedy, 2015 WL 364111 (N.D. Ill.) (No. 1:15-cv-00924); see Johns Hopkins Univ. v. Ritter, 689 A.2d 91 (Md. Ct. Spec. App. 1996), for ruling. The college recruited two professors after the department chair assured that the board of trustees would grant them tenure. When they arrived on campus, their interactions with colleagues caused upheaval. Due to this disruption, Johns Hopkins did not grant tenure. The Maryland appellate court found that the university’s department chair could not make a hiring commitment for the board of trustees.



The diagram is ordered by chronology. In the first case, a high school teacher was fired after his letter in a local newspaper criticized the board for favoring sports over education.⁹³ *Pickering* sets forth a balancing test that later decisions refined. While the precedent recognizes that public teachers do not relinquish First Amendment rights in their employment, it enables a government employer to regulate the speech of its employees differently from citizens.⁹⁴ Courts must weigh the competing interests of public employees and their employers.⁹⁵

93. *Pickering v. Bd. of Educ. of Tp. High Sch. Dist.* 205, 391 U.S. 563 (1968).

94. *Id.* at 568.

95. *Id.* (“[T]o 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.”). Because *Pickering*’s letter discussed a matter of public concern, the school district could not categorically deny First Amendment protection to the teacher’s critical comments. *Id.* at 569. The Court also determined that the letter, while critical of the board, was not detrimental to the school system. Although it had factual

Diagram 1 reflects two main aspects of *Pickering*. Courts evaluate speech to see if it addresses a matter of public concern. If so, the disputed expression must be balanced against the employer's interests in limiting this speech.⁹⁶ A balancing test may be used even if the individual opposes the employer's policy preferences or makes a false statement.⁹⁷ *Pickering* recognizes, however, a public employer's interest in promoting efficient operations through its employees.⁹⁸

How do courts apply *Pickering* to faculty disputes in higher education? The balancing test applies on a case-by-case basis. As my database shows, courts usually weigh these interests in favor of colleges and universities.⁹⁹ One example, *Brooks v. Univ. of Wisc. Bd. of Regents*,¹⁰⁰ illustrates this tendency. Neurologists filed a First Amendment lawsuit after their department chair closed their clinic.¹⁰¹ Although the school cited financial reasons, faculty alleged that their vocal criticism of their department chair motivated the closure.¹⁰² The majority discounted the public character of the professors' criticisms because their statements were vague.¹⁰³ Citing *Pickering*, however, the dissent weighed First Amendment interests differently.¹⁰⁴ The split vote in *Brooks* highlights the subjectivity in applying a *Pickering* balancing test.¹⁰⁵

Fifteen years after deciding *Pickering*, the Court added more weight to a public employer's interests in *Connick v. Myers*.¹⁰⁶ Sheila Myers, an

errors that put the district's referendum support in a bad light, its constitutional protection was undiminished. *Id.* at 569-70.

96. *Pickering v. Bd. of Educ. of Tp. High Sch. Dist. 205*, 391 U.S. 563, 569-70 (1968).

97. *Id.*

98. *Id.*

99. *See infra* Fact Finding 3.

100. *Brooks v. Univ. of Wisc. Bd. of Regents*, 406 F.3d 476 (7th Cir. 2005).

101. *Id.* at 477.

102. *Id.* at 478.

103. *Id.* at 479-81 (noting that the plaintiffs did not specify what aspects of their speech caused the school to retaliate against them by closing the clinic).

104. *Id.* at 484 (Cudahy, J. dissenting) ("This case brings sharply to mind *Pickering*. . . , the very font of First Amendment law involving protests of public employees affecting matters of their employment. . . . Obviously, the teacher had a personal interest in the allocation of funds, but this did not detract from the public importance of his protest." Relating *Pickering* to the plaintiffs, Judge Cudahy observed that they were outspoken on a matter of public concern—the proper functioning of a public medical school. *Pickering*, *supra* note 93. He concluded: "If these public questions can be cast as mere office complaints, the First Amendment will shrink accordingly, and speech that ought to be protected will be diminished." *Id.* at 481-82.

105. Judge Cudahy believed that the professors' criticism raised issues that might directly impact the taxpaying public—for example, mismanagement of priorities and resources. *Id.* at 484.

106. *Connick v. Myers*, 461 U.S. 138 (1983). The case is depicted to the right in

assistant state's attorney, was fired after she circulated a survey to co-workers.¹⁰⁷ Her communications were partly a grievance about work conditions, and also criticism about the operation of a public workplace.¹⁰⁸ Grappling with the different layers of Myers' concerns, *Connick* examined the context, form, and content of her survey and grievance to determine their public value.¹⁰⁹

By allowing courts three different ways to parse employee speech, *Connick* deepens a court's role as arbiter of protected speech. A case-in-point is *Urofsky v. Gilmore*,¹¹⁰ involving a Virginia statute that barred professors at public colleges and universities from accessing sexually explicit materials on their school computers. Professors contended that this restriction impaired their right to further their research—for example, by accessing lascivious poetry.¹¹¹ Ruling *en banc*, the Fourth Circuit held that the law did not infringe First Amendment rights of faculty.¹¹² Its schism over *Connick*'s test for context-form-content shows the subjectivity of this approach.¹¹³

In 1994, the Court added to the *Pickering* balancing scale when it addressed disruptive speech in a public workplace. In *Waters v. Churchill*,¹¹⁴ an obstetrics nurse was fired by her supervisor for voicing negative opinions to a co-worker about her department, causing that nurse to change her mind about transferring to the unit.¹¹⁵ *Waters* expands the

Diagram 1.

107. *Id.* at 140–42.

108. *Id.* at 141. Viewing the survey as an employee insurrection, *Connick* fired Myers for insubordination. *Id.* Reversing lower court rulings that favored Myers, the Court reasoned that the First Amendment does “not require a grant of immunity for employee grievances.” *Id.* at 147. The Court also discussed expression that falls between a matter of public concern and an employee grievance. Without offering much guidance, the Court said that this type of speech enjoys more protection than obscenity, a category that has “so little social value . . . that the State can prohibit and punish such expression by all persons in its jurisdiction.” *Connick*, *supra* note 106, at 147.

109. *Id.* at 147–48.

110. *Urofsky v. Allen*, 216 F.3d 401 (4th Cir. 2000).

111. *Id.* at 409 n.9.

112. *Id.* at 438–39.

113. *Id.* at 429–430. Judge Wilkinson was in the middle of this divide, concurring with the majority but opposing their view of *Connick*'s content prong. *Id.* at 429–430. The statute's initial content restrictions were “stunning in their scope” because they swept within its ambit “research and debate on sexual themes in art, literature, history, and the law.” *Urofsky*, *supra* note 80, at 429–430. (citation omitted). At the same time, he criticized dissenters for minimizing the fact that the law authorizes deans, provosts and similar authorities to issue waivers to professors engaging in sexually-themed research. *Id.* at 432. This law preserved institutional self-governance. *Id.* at 433.

114. *Waters v. Churchill*, 511 U.S. 661 (1994).

115. The hospital based its termination on investigatory interviews. *Id.* at 667. The nurse said she raised issues of public concern by speaking against a cross-training

range of employee speech that falls within *Connick*'s government efficiency domain. The majority opinion also limits the public concern element in *Pickering* by declaring that "many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees."¹¹⁶ Going further, *Waters* defers to administrative predictions of harm to efficient public services.¹¹⁷

In this Article's database, *Jeffries v. Harleston*¹¹⁸ shows the pivotal effect of *Waters*. Prof. Jeffries made insulting references to Jews in a widely publicized speech.¹¹⁹ The school removed him as department chair but retained him as a professor.¹²⁰ In 1993, Jeffries won damages and reinstatement to his department chair post,¹²¹ and the appeals court affirmed most of this judgment.¹²² In an unusual ruling that suggested a narrowing of *Pickering*'s public interest element, the Supreme Court vacated the appellate ruling and remanded it for reconsideration.¹²³ Applying the recently decided *Waters* case, the appellate court reversed itself.¹²⁴

The Supreme Court further restricted the meaning of public interest in *Garcetti v. Ceballos*.¹²⁵ Richard Ceballos, like Sheila Myers, was an assistant state's attorney who was fired for speech that angered his elected boss.¹²⁶ But while Myers' speech clearly pertained to her work grievance, Ceballos was transferred for opposing the prosecution of a case that he believed had evidence fabricated by the police.¹²⁷ The Ninth Circuit concluded that Ceballos' oppositional memo stated a public concern that was akin to alleging official misconduct.¹²⁸

program that could diminish nursing care. *Id.* at 666.

116. *Id.* at 672.

117. *Id.* at 673 ("We have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern.").

118. *Harleston v. Jeffries*, 513 U.S. 996 (1994), vacating *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir. 1994).

119. *Jeffries v. Harleston*, 828 F. Supp. 1066, 1091 (S.D.N.Y. 1993) (describing CUNY's president as the "head Jew at City College" who consulted with his "Jews at the City College")

120. *Id.* at 1071.

121. *Id.* at 1098.

122. *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir. 1994).

123. *Harleston v. Jeffries*, 513 U.S. 996 (1994).

124. *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) (concluding that CUNY reasonably believed that this speech could disrupt operations, and this belief outweighed the professor's First Amendment interests).

125. *Garcetti v. Ceballos*, 547 U.S. 410, 428 (2006) .

126. *Id.* at 413.

127. *Id.* at 414.

128. *Id.* at 415.

The Supreme Court disagreed, concluding that Ceballos did not act as a citizen but rather as a subordinate.¹²⁹ As in *Waters*, *Garcetti* calibrated the balancing test in favor of public employers when speech disrupts their operations.¹³⁰ In broad terms, *Garcetti* rejected “the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.”¹³¹

The impact of *Garcetti* appears in this study’s cases. Ward Churchill was dismissed from his tenured faculty position at the University of Colorado after he published an essay that equated the victims of the 9/11 attack to Nazi war criminals.¹³² He was not fired for this publication, but the story caused the university to investigate him for research misconduct.¹³³ This fact is important because his dismissal was couched in terms of his research duties as a tenured professor.¹³⁴ After an investigation found evidence to support charges of falsification and plagiarism, the university dismissed the professor.¹³⁵

The university agreed with Churchill that the First Amendment protected his speech. But under the “official duties” prong of *Garcetti*, the university argued—and the appeals court agreed—that an employer may investigate an employee for speech-related misconduct without chilling his expressive rights. Thus, *Garcetti* allowed the chancellor to reframe the disciplinary case against Churchill as an investigation related to the official duties of a professor, while the campus administrator disingenuously said that Churchill’s 9/11 essay was protected speech.¹³⁶

129. *Id.* at 422 (“When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.”).

130. *Garcetti*, 547 U.S. at 422–23.

Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper or discussing politics with a co-worker (citation omitted). When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

Id.

131. *Id.* at 426.

132. *Churchill v. Univ. of Colo. at Boulder*, 293 P.3d 16, 22 (2010).

133. *Id.* at 22–23. A committee investigated Churchill under the university’s misconduct rules. Eventually, this group voted 6–3 in finding that this research misconduct warranted dismissal. *Id.* at 23.

134. Grounds for dismissing a tenured professor included conduct below standards of professional integrity. *Id.* at 28.

135. *Id.* at 23.

136. *Churchill*, 293 P.3d at 22. With the *Garcetti* framework in the background, the state appeals court concluded that “Churchill’s academic freedom did not include the right to commit research misconduct that was specifically proscribed by the

I close Part III by summarizing its main conclusions:

1. From the late 1700s through the early 1900s, professors had no institutional definition of academic freedom.
2. After professors founded the AAUP in 1915, they were largely successful in persuading colleges and universities to adopt their principles of academic freedom.
3. The McCarthy era, with its emphasis on government-imposed loyalty oaths, adversely affected professors; and as a result, the Supreme Court established First Amendment precedents that shielded faculty from ideological coercion.
4. Starting with *Pickering* in 1968, and continuing through *Garcetti* in 2006, the Supreme Court narrowed the speech rights of public employees while broadening the right of government employers to sanction employees for grievances or disruptive speech that affects efficiency.
5. The precedents *Pickering* through *Garcetti* spilled over to academe without noticeable adjustment for academic freedom as conceived by the AAUP or numerous schools that adopted these foundational standards for research, instruction, and dissemination of knowledge.

IV. FIRST AMENDMENT FACULTY CASES:

RESEARCH METHODS AND FACT FINDINGS

Part III tracked the development of academic freedom by professors, the emergence of First Amendment jurisprudence that protected this liberty during the McCarthy era, and the Supreme Court's subsequent speech precedents that favor public employers. The question is: How often do courts rule for faculty in speech disputes? I analyze data from 210 First Amendment cases in Part IV to answer this question and derive more specific findings.

A. Method for Creating the Sample

Identifying Cases: I created a database of First Amendment cases with professors and college instructors as plaintiffs. The sample was derived from Westlaw's internet service. My search explored federal and state sources. In every case, faculty alleged that a school violated their First Amendment right to free speech. The sample did not include cases

University's policies and enforced through a system of shared governance between the administration and the faculty." *Id.* at 37.

involving college coaches and advisors who alleged a First Amendment violation.¹³⁷

I began with a simple keyword search.¹³⁸ I read cases to see if they met the inclusion criteria. In valid cases, faculty alleged a violation of the First Amendment's prohibition against government abridgement of speech.¹³⁹ This approach produced a sample composed almost entirely of public institutions and their faculty members.¹⁴⁰

Each valid case was added to a roster. As this catalogue grew, new cases were checked to avoid duplication. In these cases, the database was extended forward and back in time. Looking forward, all cases were KeyCited to find newer decisions that involved a professor or college instructor who alleged a First Amendment violation by his or her employer. Within each case, all precedents were checked for earlier First Amendment cases that were not in the sample.

Collecting Data: Next, relevant data were taken from each case. Variables included information about the (1) plaintiff,¹⁴¹ (2) type of speech that led to an employment dispute between a faculty member and school,¹⁴² (3) laws that a university or college allegedly violated,¹⁴³ (4) type of court (federal or state; trial or appellate),¹⁴⁴ (5) type of court order,¹⁴⁵ (6) winner

137. *E.g.*, *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1177–78 (6th Cir. 2004) (ruling for school on First Amendment claim by coach who was fired for exhorting his team to “play like niggers on the court” and not to act like “niggers in the classroom”); *Moore v. Watson*, 838 F. Supp.2d 735 (N.D. Ill. 2012) (awarding attorney’s fees to advisor to student newspaper who also was fired from job in publicity office).

138. The search terms were “First Amendment,” and “professor,” and “college or university,” and “speech.”

139. U.S. CONST., amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

140. See *Franklin v. Leland Stanford Junior Univ.*, 218 Cal. Rptr. 228 (Cal. Ct. App.1985), and *Greene v. Howard Univ.*, 271 F. Supp. 609 (D.D.C. 1967), *aff’d*, 412 F.2d 1128 (D.C. Cir. 1969), for exceptions. The First Amendment is not applicable to private actors, absent state action; and this likely explains why the database is almost entirely comprised of cases involving public institutions. See *infra* note 212.

141. I coded cases for the personal characteristics of the plaintiff—tenure status and gender.

142. In addition, I classified the faculty member’s type of speech. This variable involved an element of subjectivity. If speech could be classified more than one way, I coded it in multiple sub-variables. For example, a faculty member’s speech against the War in Vietnam could be classified as “political” and “protest” (separate sub-variables). *Duke v. N. Tex. State Univ.*, 338 F. Supp. 990 (E.D. Tex. 1971). If the faculty member alleged that his academic appointment was not renewed due to speech, I also coded this as “retaliation.” If this instructor also criticized his campus administration over regulating anti-war protest, I also coded this as “campus critic.”

143. Another variable recorded laws that schools allegedly violated. While some cases dealt only with a First Amendment issue, many involved Due Process, contracts, and other claims.

144. Data coding also included the type of court. Variables included state or

of a court ruling,¹⁴⁶ (7) reasoning used by a court,¹⁴⁷ (8) relief, if ordered, and (9) year of ruling. Data for each case were entered into a spreadsheet and eventually analyzed using SPSS, a statistics program.

In the following data analysis, I ask questions about the winner—a term that I explain here. To begin, many cases had more than one court decision. I coded a winner for each round that a court ruled on a First Amendment claim. For an opinion to be coded as win-all for a professor, a court issued a permanent restraining order, awarded damages, or ordered other relief.¹⁴⁸ Or, faculty could win part of a ruling. These outcomes varied but typically included a pre-trial ruling that denied a school's motion to dismiss the faculty member's First Amendment claim. When a court refused to grant immunity to a public official—for example, a provost who sanctioned a faculty member—this procedural ruling was coded as a part-win for a professor. In short, a part win ruling kept the claim alive for further litigation and possible settlement negotiation, but did not conclusively decide the First Amendment issue.

federal court; and whether a case came from a trial or appellate court. Because many cases had more than one round of litigation, variables were created to capture information for the first, second, third, and fourth court to rule on an issue. To illustrate, in *Kostic v. Tex. A & M Univ. at Commerce*, 2013 WL 1293901 (N.D. Tex. 2013), a federal magistrate judge ruled against a faculty member's First Amendment claim; and on appeal, a federal district judge affirmed this ruling. In this case, data were entered for the winner of the first round and second round ruling on the First Amendment. The second round decision appears in *Kostic v. Tex. A & M Univ. at Commerce*, 2013 WL 1296515 (N.D. Tex. 2013).

145. Rulings included dismiss complaint, deny motion to dismiss complaint, grant or continue injunction, award damages, order reinstatement, and remand matter to the institution for more procedure.

146. I used another variable to record the winner of the First Amendment issue, and separately, for the overall case. Winning a ruling was coded as (1) faculty member wins-all, (2) faculty member wins part, or (3) school wins-all. For example, a professor could lose her First Amendment argument, but her claim for Due Process could survive a motion to dismiss. This outcome would be coded as a total win for the school on the First Amendment and a partial win for the professor on the Due Process issue. *E.g.*, *Harris v. Ariz. Bd. of Regents*, 528 F. Supp. 987 (D. Ariz. 1981). If a faculty member won damages or reinstatement, the case was coded as a total victory for the plaintiff. *E.g.*, *Jacobs v. Meister*, 615 P.2d 982 (N.M. 1980) (awarding professor \$80,000 in damages).

147. Examples include whether a court applied a Pickering balancing test, Waters' guidance on disruptive speech, or seventeen other reasons. If a court used more than one approach, codes were entered for each reason.

148. Only 1.9% of the cases resulted in a reinstatement order. *E.g.*, *Endress v. Brookdale Cmty. Coll.*, 364 A.2d 1080 (N.J. Super. Ct. App. Div. 1976) (ordering reinstatement, back pay, and damages); *see also Aumiller v. Univ. of Del.*, 434 F. Supp. 1273 (D. Del. 1977) (ordering punitive damages, back pay, and reinstatement for a lecturer whose contract was not renewed after his statement in a newspaper that he is homosexual).

In some of the following data tables, I lumped faculty win-all and win-part in one group.¹⁴⁹ For some analyses, there were so few cases that a display of win-all and win-part would yield data cells with zeroes. This would obscure a big picture of the data. In other analyses, I asked broader questions that drew on the full database. These analyses were suitable for data tables showing faculty win rates.

The remaining category was “college wins,” meaning that a court dismissed a faculty member’s First Amendment claim. But many of these cases continued with different issues—for example, by ruling for a professor on a university’s motion to dismiss a due process claim.¹⁵⁰

B. Sample Characteristics

My sample contained 210 cases decided from 1964 through 2014. Most cases had multiple rulings due to appeals. In total, there were 339 First Amendment court rulings.¹⁵¹ The database designates first court, second court, and so forth instead of using “trial” and “appellate” court. This treatment was necessary because in some cases a federal district judge ruled on an appeal from a magistrate’s ruling. My analysis would be misleading if I labeled the district court—ruling at this point of reconsideration—as a federal appeals court. Adding to this potential for confusion, some cases were decided initially by a district court, then by a federal appeals court, and remanded to the district court with instructions. Again, it would be misleading to call the third court an appellate body. I chose, instead, numerical labels for courts that tracked the progression of litigation.¹⁵² Next, I present my fact-findings.

C. Data and Fact Findings

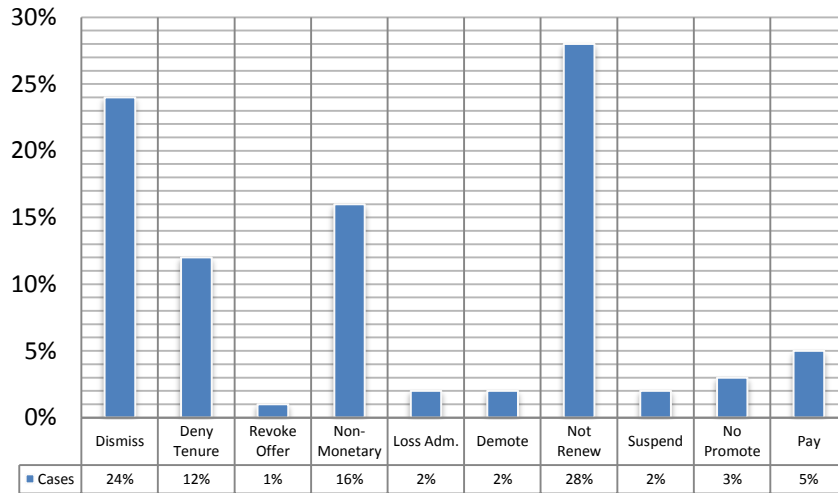
149. *See infra* Table B.

150. *E.g.*, Harris, 528 F. Supp. 987.

151. Among the 210 cases, 206 had a ruling for the first court. The other four cases were appeals that did not report the outcome of the lower court ruling, or involved a faculty member’s first-time mention of a First Amendment violation. There were 138 second court rulings, 10 third court rulings, and two fourth court rulings.

152. *See supra* note 146; *see also* Kohlhausen v. SUNY Rockland Cmty. Coll., 2011 WL 1404934 (S.D.N.Y. 2011) (involving first court ruling); Kohlhausen v. SUNY Rockland Cmty. Coll., 2011 WL 2749560 (S.D.N.Y. 2011) (ruling from same court to clarify and amend its first order). For an example of a third court ruling by a district court after a second court ruling by an appellate court, *see* Adams v. Trs. of the Univ. of N.C. Wilmington, 2013 WL 10128923 (E.D.N.C. 2013).

**Table A: Fact Finding 1
Adverse Employment Actions in First
Amendment Cases**

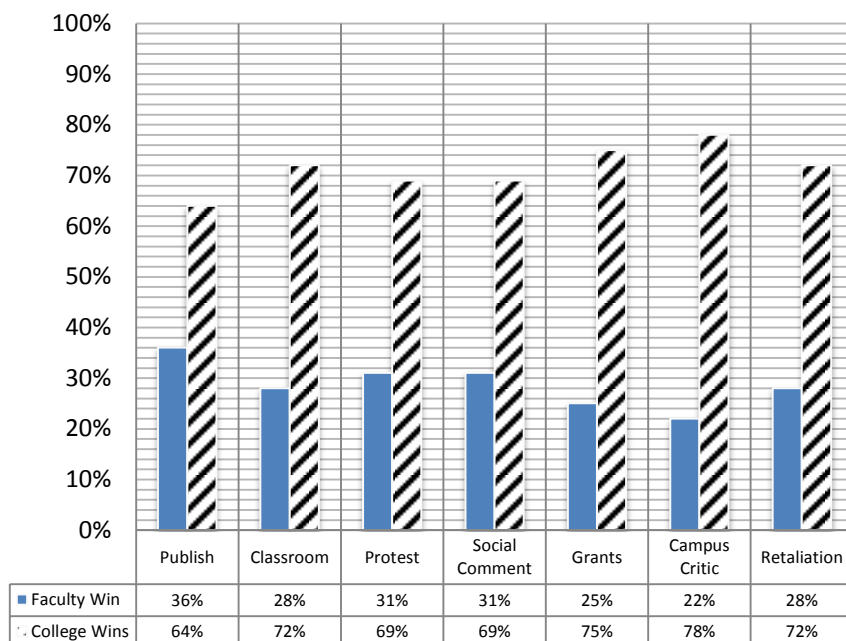


Fact Finding 1: The most common actions taken by schools against faculty were non-renewal of appointment (28%) and dismissal (24%). In some cases, the school characterized the instructor's loss of employment as non-renewal of an annual appointment, while the plaintiff said it was dismissal. In those cases, I entered data codes for both variables. In other words, there is some duplication for non-renewal and dismissal cases. Regardless, in non-renewal cases employment was not terminated during a contractual period. But in the dismissal category, terminations arose from a particular event and did not always coincide with the end of an appointment period.¹⁵³

153. *Fong v. Purdue Univ.*, 692 F. Supp. 930, 947 (N.D. Ind. 1988) (reporting on Purdue's February 15th dismissal hearing for tenured professor).

Non-monetary actions were the next largest category (16%). These cases included ordering a recalcitrant faculty member to enter grades for a course, where the professor said this amounted to compelled speech,¹⁵⁴ or creating a parallel course section that directed students away from a faculty member who published his views that African-Americans are inferior.¹⁵⁵

**Table B: Fact Finding 2
Winner by Types of Speech in First Court
Cases**



Next, denial of tenure was tied to a First Amendment claim in twelve percent of the cases,¹⁵⁶ while revocation of a job offer occurred in just one percent of the cases.¹⁵⁷

Fact Finding 2: Colleges and universities won two-thirds or more of cases involving publishing, classroom speech, protests, social

154. *McDonough v. Trs. of Univ. Sys. of N.H.*, 704 F.2d 780, 781 (1st Cir. 1983).

155. *Levin v. Harleston*, 770 F. Supp. 895 (S.D.N.Y. 1991).

156. *E.g.*, *Blum v. Schlegel*, 830 F. Supp. 712 (W.D.N.Y. 1993).

157. *E.g.*, *Duke v. N. Tex. State Univ.*, 338 F. Supp. 990 (E.D. Tex. 1971) (reporting that professor said “motherfucker” in anti-war protest); *Ollman v. Toll*, 518 F. Supp. 1196 (D.Md. 1981) (discussing Marxist professor who said he was denied department head position because of his political beliefs).

commentary, grants, campus criticism, and retaliation. Table B reports data for categories of speech.¹⁵⁸ Some speech was classified more than one way.¹⁵⁹

- Schools sanctioned faculty for speech connected to grants. In *Miller v. Bunce*, for example, a professor said his university retaliated for reporting grant fraud.¹⁶⁰ Schools won seventy-five percent of these cases.
- “Campus critic” cases included college instructors engaged in ordinary union activities¹⁶¹ and department chairs who opposed campus reorganization plans.¹⁶² Schools won seventy-eight percent of these cases—for example, *Ghosh v. Ohio Univ.*, where a professor complained that his department took away a summer course for which he had been scheduled, and offered a different course with more pay to a colleague.¹⁶³
- When disputed speech was related to faculty publishing or classroom activities, schools usually won on First Amendment issues (sixty-four percent for publishing; seventy-two percent for classroom). Labels for these categories imply that administrators censored faculty members, but this was not generally the case. In *Fong v. Purdue Univ.*, a professor exploded in hostile confrontations with colleagues concerning his research publications.¹⁶⁴ The university said he was terminated for his aggressive confrontations, not his publishing.¹⁶⁵

158. Two small exceptions to this finding are omitted from Table B due to space constraints. Ten cases involved a school’s allegation that a faculty member engaged in fraud. *E.g.*, *Churchill v. Univ. of Colo. at Boulder*, 293 P.3d 16 (2010). Faculty members who denied charges of fraud won six (sixty percent) rulings. Also, only four cases involved political speech. *E.g.*, *Ollman*, 518 F. Supp. 1196. Faculty won two (fifty percent) rulings.

159. *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979). This case involved a professor’s classroom announcement that he was a Communist. *Id.* at 810. The court held that this information did not “materially or substantially disrupt his classes.” *Id.* The opinion reasoned “in the context of a university classroom, Cooper had a constitutionally protected right simply to inform his students of his personal political and philosophical views.” *Id.* at 811. This speech was coded for “classroom,” but also for “political” because this speech related to the professor’s party affiliation.

160. *E.g.*, *Miller v. Bunce*, 220 F.3d 584, *2 (5th Cir. 2000).

161. *Meade v. Moraine Valley Cmty. Coll.*, 770 F.3d 680 (7th Cir. 2014).

162. *Schrier v. Univ. of Colo.*, 427 F.3d 1253 (10th Cir. 2005).

163. *Ghosh v. Ohio Univ.*, 861 F.2d 720 (6th Cir. 1988).

164. 692 F. Supp. 930 (N.D. Ind. 1988).

165. *Id.* The case demonstrates that when faculty claimed a First Amendment violation related to their publications, there was more to the story. No cases involved censorship, as the category implies. A flavor of these publication rulings is captured in the district court’s conclusion: “Neither the law, nor the university’s policies can be read to impose an affirmative duty on the part of Purdue, to tilt all the windmills of all

• Social commentary cases included faculty statements that denigrated homosexuality and capitalism. In *Lopez v. Fresno City Coll.*, a college instructor was reprimanded after students complained that he allegedly said that “homosexuals are an abomination,” called gays “faggots,” and said “homosexuality is a sin.”¹⁶⁶ A Marxian Economics professor was denied reappointment in *McDonough v. Trs. of Univ. Sys. of N. H.* after he gave all “A” grades because “[i]f everyone gets A’s, it destroys the hierarchy. It confuses the capitalists when they are trying to figure out how much you’re worth.”¹⁶⁷ Schools won sixty-nine percent of these cases.

In the next data analysis, I divided the entire sample into two groups: pre- and post-cases for *Waters v. Churchill*,¹⁶⁸ decided on May 31, 1994. My purpose was to see if *Waters*’ doctrine on disruptive speech¹⁶⁹ was associated with lower win rates for faculty.

Table C shows these rulings, which are arranged by first, second, and third courts.¹⁷⁰ Decisions are split in pre-*Waters* and post-*Waters* groups.¹⁷¹ The far-left column presents pre-*Waters* statistics for first courts, followed to the right by first court rulings after *Waters*. For this analysis, it did not matter whether the case involved a finding of disruptive speech, nor did it matter if a court cited *Waters*. This is because many courts cited cases that were based indirectly on *Waters*.

its employed geniuses, however correct their theories and research might ultimately turn out to be.” *Id.* at 933.

166. 2012 WL 844911, *4 (E.D. Cal. 2012).

167. *McDonough v. Trs. of Univ. Sys. of N.H.*, 704 F.2d 780, 781 (1st Cir. 1983).

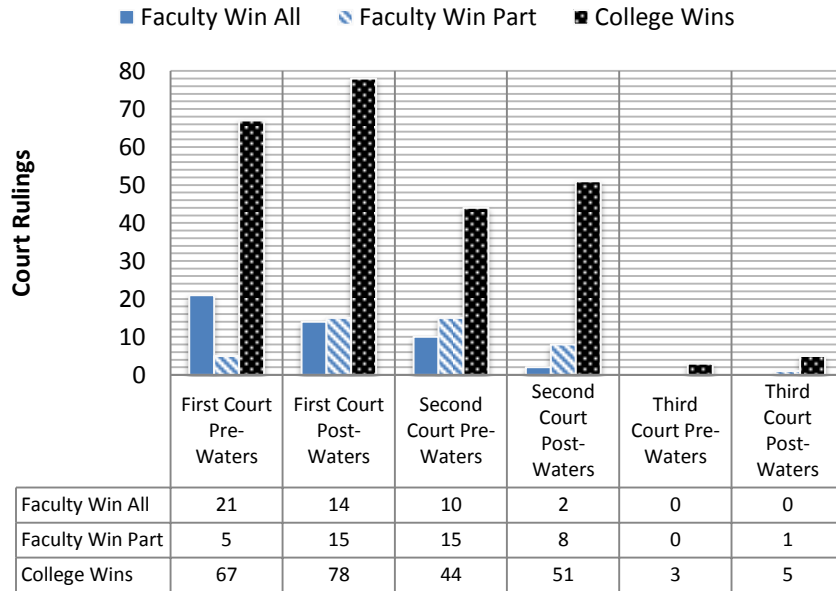
168. *Waters v. Churchill*, 511 U.S. 661 (1994).

169. *Id.* at 675 (“The key to First Amendment analysis of government employment decisions, then, is this: The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.” Continuing, the opinion explained: “The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.”).

170. There were too few rulings by a fourth court to show in the table.

171. By coincidence, about half of the cases (48.3%) were decided from 1964 to 1994. The remainders were decided after *Waters* through the present. *Waters* is therefore a natural dividing point in this database.

Table C: Fact Findings 3-7
First Amendment Win Rate for Faculty Drops After
Waters v. Churchill



Adding data in all cells, Table C has 339 First Amendment rulings. In the “College Wins” row, schools won 248 First Amendment rulings in first, second and third courts. In the row for “Faculty Win Part,” professors and instructors partially won 44 First Amendment rulings, and won all in 47 rulings. Table C is the source for Fact Findings 3-7.

Fact Finding 3: Colleges and universities won more than 73% of First Amendment rulings. Again, summing across the columns for “College Wins,” schools won 248 of 339 First Amendment rulings, yielding a win rate of 73.2%. Faculty had partial wins in 44 of 339 rulings (13%), and total wins in 47 of 339 rulings (13.8%).¹⁷²

Fact Finding 4: In first court rulings, the win-all rate for faculty fell after *Waters*, from 22.6% to 13.1%. Faculty entirely won 21 of 93 rulings in the pre-*Waters* column (22.6%). Their win-all rate fell after

172. A separate analysis was run for cases involving contract claims. There were only seventeen cases— less than ten percent of the sample. The data were too thin from 1964 to 2014 to put in a table. Here are the results: Faculty won all in three cases (17.6%), and won part in 4 cases (23.5%). Schools won 10 cases (58.8%). Given the small sample, I cannot conclude that these results differed from those for First Amendment claims.

Waters to 14 of 107 rulings (13.1%).¹⁷³ However, the partial win rate for faculty increased from 5 of 93 pre-*Waters* rulings (5.4%) to 15 of 107 post-*Waters* rulings (14.0%). Meanwhile, the win rate for schools remained steady before *Waters* (67 of 93 rulings, 72.0%) and thereafter (78 of 107 rulings, 72.9%). Overall, *Waters* was not associated with a change in wins and losses between schools and faculty—but the precedent appeared to diminish win-all rulings for faculty while increasing their partial wins. In effect, faculty won fewer cases on summary judgment, and probably encountered longer litigation of First Amendment claims.

Textual analysis adds support to the finding that faculty won fewer speech cases after *Waters* was decided. Eighteen court opinions ruled in favor of schools while mentioning that faculty speech was disruptive.¹⁷⁴ Two speech themes emerged in these cases: a faculty member's personalization of sex topics, and hostile confrontations with co-workers or students. The former included discussions of a faculty member's sex life,¹⁷⁵ inappropriate advances,¹⁷⁶ lewd class discussions,¹⁷⁷ and assignment of a reading about a male instructor's sexual arousal.¹⁷⁸ Hostility cases involved faculty speech that was confrontational, degrading, or intimidating.¹⁷⁹

In contrast, 23 opinions ruled for a faculty member while referencing disruptive faculty speech.¹⁸⁰ This statistic is misleading because after

173. The drop in the win rate for faculty was not likely due to chance (χ^2 6.285; $df=2$, $p<.043$).

174. *DePree v. Saunders*, 588 F.3d 282 (5th Cir. 2009); *Trejo v. Shoben*, 319 F.3d 878, 883 (7th Cir. 2003); *Bonnell v. Lorenzo*, 241 F.3d 800, 803–05 (6th Cir. 2001); *Jackson v. Leighton*, 168 F.3d 903 (6th Cir. 1999); *Scallet v. Rosenblum*, 106 F.3d 391 (4th Cir. 1997); *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995); *Maples v. Martin*, 858 F.2d 1546 (11th Cir. 1988); *Ghosh v. Ohio Univ.*, 861 F.2d 720 (6th Cir. 1988); *DePree v. Saunders*, 2008 WL 4457796 (S.D. Miss. 2008); *Marinoff v. City Coll. of N.Y.*, 357 F. Supp.2d 672 (S.D.N.Y. 2005); *Scallet v. Rosenblum*, 911 F. Supp. 999 (W.D. Va. 1996); *Cohen v. San Bernardino Valley Coll.*, 883 F. Supp. 1407 (C.D. Cal. 1995); *Wirsing v. Bd. of Regents of Univ. of Colo.*, 739 F. Supp. 551 (D. Colo. 1990); *Fong v. Purdue Univ.*, 692 F. Supp. 930 (N.D. Ind. 1988); *Landrum v. E. Ky. Univ.*, 578 F. Supp. 241 (E.D. Ky. 1984); *Bradford v. Tarrant Cnty. Junior Coll.*, 356 F. Supp. 197 (N.D. Tex. 1976); *Franklin v. Leland Stanford Junior Univ.*, 218 Cal. Rptr. 228 (Cal. Ct. App.1985); *Mills v. W. Washington Univ.*, 208 P.3d 13, 21 (Wash. App. 2009)(*rev'd on other grounds*).

175. *Scallet*, 911 F. Supp. 999 at 1007.

176. *Trejo v. Shoben*, 319 F.3d 878, 888 (7th Cir. 2003).

177. *Bonnell v. Lorenzo*, 241 F.3d 800, 803–04 (6th Cir. 2001).

178. *Cohen v. San Bernardino Valley Coll.*, 883 F. Supp. 1407, 1410 n.3 (C.D. Cal. 1995).

179. *Maples v. Martin*, 858 F.2d 1546, 1554 (11th Cir. 1988); *Fong v. Purdue Univ.*, 692 F. Supp. 930, 955 (N.D. Ind. 1988); *Mills v. W. Washington Univ.*, 208 P.3d 13, 21 (Wash. App. 2009).

180. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001); *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (en banc); *Burnham v. Ianni*, 98 F.3d 1007 (8th Cir. 1996) (en banc); *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir. 1994); *Levin v. Harleston*,

Waters only eight court opinions ruled in favor of instructors.¹⁸¹ But in rare disruption cases with controversial ideas or expressions, courts found that schools violated the First Amendment rights of faculty.¹⁸²

Fact Finding 5: In second court rulings, the win-all rate for faculty fell after *Waters*, from 14.5% to 3.3%. Before *Waters*, the faculty win all rate from second courts was 14.5% (10 of 69 cases). After *Waters*, this rate fell to 3.3% (2 of 61 cases).¹⁸³ Their partial win rate also fell from 21.7% (15 of 69 pre-*Waters* rulings) to 13.1% (8 of 61 post-*Waters* rulings).

Fact Finding 6: In second court rulings, the win rate for colleges and universities rose after *Waters* from 63.8% to 83.6%. Schools won 83.6% of second-round rulings (51 of 61 cases) after *Waters*. Before *Waters*, schools won 44 of 69 cases (63.8%). The best textual evidence of *Waters*' influence appears in three appellate rulings in a single case—the Second Circuit's affirmance of a judgment for a professor whose public speech had insulting references to Jews in *Harleston v. Jeffries*,¹⁸⁴ the

966 F.2d 85 (2d Cir. 1992); *Stern v. Shouldice*, 706 F.2d 742 (6th Cir. 1983); *Daulton v. Affeldt*, 678 F.2d 487 (4th Cir. 1982); *Kim v. Coppin State Coll.*, 662 F.2d 1055 (4th Cir. 1981); *Trotman v. Bd. of Trs. of Lincoln Univ.*, 635 F.2d 218 (3d Cir. 1980); *Appel v. Spiridon*, 2011 WL 3651353 (D. Conn. 2011); *Milman v. Prokopoff*, 100 F. Supp.2d 954 (S.D. Iowa 2000); *Bonnell v. Lorenzo*, 81 F. Supp.2d 777 (E.D. Mich. 1999); *Burnham v. Ianni*, 899 F. Supp. 395 (D. Minn. 1995); *Jeffries v. Harleston*, 828 F. Supp. 1066 (S.D.N.Y. 1993); *Bishop v. Aronov*, 732 F. Supp. 1562 (N.D. Ala. 1990); *Croushorn v. Bd. of Trs. of Univ. of Tenn.*, 518 F. Supp. 9 (M.D. Tenn. 1980); *Hickingbottom v. Easley*, 494 F. Supp. 980 (E.D. Ark. 1980); *Hillis v. Stephen F. Austin State Univ.*, 486 F. Supp. 663 (E.D. Tex. 1980); *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979); *Aumiller*, *supra* note 149; *Duke v. N. Tex. State Univ.*, 338 F. Supp. 990 (E.D. Tex. 1971); *Close v. Lederle*, 303 F. Supp. 1109 (D.Mass. 1969).

181. *Burnham v. Ianni*, 98 F.3d 1007 (8th Cir. 1996); *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (en banc); *Hardy*, 260 F.3d 671; *Appel*, 2011 WL 3651353; *Burnham v. Ianni*, 899 F. Supp. 395 (D. Minn. 1995); *Milman v. Prokopoff*, 100 F. Supp.2d 954. Notably, the *Burnham* case contributed three opinions to this small total. In the post-*Waters* period, there was one significant ruling against a school that asserted a disruptive speech argument. In *Hardy*, a college instructor who taught a communication course devoted a class period to language that marginalizes minorities. Students offered words such as “girl,” “lady,” “faggot,” “nigger,” and “bitch.” *Hardy*, 260 F.3d at 675. After their classmate complained, campus administrators fired Prof. *Hardy*. Distinguishing this case from *Bonnell*, the Sixth Circuit reasoned that this was “a classic illustration of ‘undifferentiated fear’ of disturbance on the part of the College’s academic administrators.” *Id.*

182. *See Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992). The Second Circuit ruled that a professor engaged in constitutionally protected speech, even though this caused disruptive protests on campus, when he published that African-Americans are intellectually inferior to Caucasians. *Id.* Faculty members who criticized campus administrators engaged in protected speech, even though their communications unsettled operations. *See also Trotman v. Bd. of Trs. of Lincoln Univ.*, 635 F.2d 218 (3d Cir. 1980).

183. This decline was not likely due to chance (χ^2 7.516, df=2; p<.023).

184. *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir. 1994).

Supreme Court's terse order to vacate this judgment in light of *Waters*,¹⁸⁵ and on remand, the Second Circuit's order to reverse the original judgment.¹⁸⁶

Fact Finding 7: Prolonged litigation improved the win rate for colleges and universities. Faculty won less often in second rulings compared to first rulings— in cases before *Waters*¹⁸⁷ and after.¹⁸⁸ Specifically, the faculty win-all rate in first courts after *Waters* dropped 9.5 percentage points.¹⁸⁹ By contrast, there were fewer second rulings for faculty that reversed a school's win in a first ruling.¹⁹⁰ In other words, prolongation of litigation diminished faculty wins— and even if they won in a third court ruling, long delay mitigated their wins.¹⁹¹

185. *Harleston v. Jeffries*, 513 U.S. 996 (1994).

186. *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995).

187. *Bishop v. Aranov*, 926 F.2d 1066 (11th Cir. 1991); *Staheli v. Univ. of Miss.*, 854 F.2d 121 (5th Cir. 1988); *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419 (1st Cir. 1986); *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547 (5th Cir. 1982); *Duke v. N. Tex. State Univ.*, 469 F.2d 829 (5th Cir. 1972); *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970); *Bishop v. Aranov*, 732 F. Supp. 1562 (N.D. Ala. 1990); *Jacobs v. Meister*, 775 P.2d 254 (N.M. App. 1989); *Staheli v. Univ. of Miss.*, 621 F. Supp. 449 (N.D. Miss. 1985); *Hillis v. Stephen F. Austin State Univ.*, 486 F. Supp. 663 (E.D. Tex. 1980); *Jacobs v. Meister*, 615 P.2d 982 (N.M. 1980); *Duke v. N. Tex. State Univ.*, 338 F. Supp. 990 (E.D. Tex. 1971); *Close v. Lederle*, 303 F. Supp. 1109 (D.Mass. 1969).

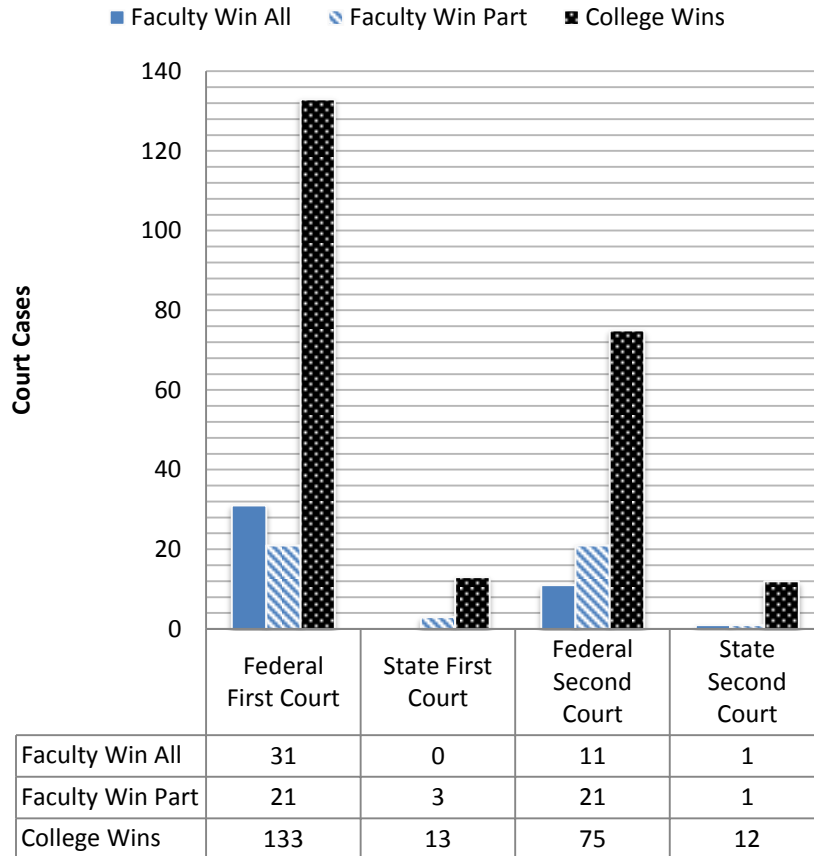
188. *Keating v. Univ. of S.D.*, 980 F. Supp.2d 1137 (D.S.D. 2014); *Bonnell v. Lorenzo*, 241 F.3d 800, 803–05 (6th Cir. 2001); *Urofsky v. Allen*, 216 F.3d 401 (4th Cir. 2000); *Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999); *Harrington v. Harris*, 108 F.3d 598 (5th Cir. 1997); *Keating v. Univ. of S.D.*, 569 Fed. Appx. 469 (8th Cir. 2014); *Bonnell v. Lorenzo*, 81 F. Supp.2d 777 (E.D. Mich. 1999); *Urofsky v. Allen*, 995 F. Supp. 634 (E.D. Va. 1998); *Churchill v. Univ. of Colo. at Boulder*, 285 P.3d 986 (Colo. 2012); *Churchill v. Univ. of Colo. at Boulder*, 293 P.3d 16, 22 (2010); *Churchill v. Univ. of Colo.*, 2009 WL 2704509 (2009); see also *Gies v. Flack*, 1996 WL 1671234 (S.D. Ohio 1996); *Gies v. Flack*, 495 F. Supp.2d 854 (S.D. Ohio 2007) (ruling for university that dean had misappropriated funds), where a professor who was removed from being dean and from teaching lost two court decisions that were rendered 11 years apart.

189. See *supra* Fact Finding 4, faculty win-rate of 22.6% in first court rulings [column 1] fell to 13.1% in second court rulings [column 2]).

190. *E.g.*, *Meade v. Moraine Valley Cmty. Coll.*, 770 F.3d 680 (7th Cir. 2014); *D'Andrea v. Adams*, 626 F.2d 469 (5th Cir. 1980); *Rampey v. Allen*, 501 F.2d 1090 (10th Cir. 1974). The D'Andrea court ruled that a geography professor's critical statements about university finances resulted in retaliation, and his statements were protected under the First Amendment. Meade overturned a lower court ruling by concluding that a college instructor's letter, critical of the college's treatment of adjunct faculty members, raised matters of public concern. Rampey overruled a lower court by concluding that a faculty member's criticism of university administration was protected under the First Amendment.

191. See *Jacobs v. Meister*, 615 P.2d 982 (N.M. 1980). After an assistant professor's employment was not renewed in 1975, he sued in state court and a jury awarded him \$80,000. *Id.* at 983-84. The New Mexico Supreme Court remanded the matter because the lower court erred by not giving the jury proper instructions for

Table D: Fact Finding 8
Federal Court Is Better Than State Court For Faculty
Speech Claims



Continuing with the statistical analysis, Table D shows results for the winner of First Amendment rulings in federal and state court at the first and second rounds of litigation.

evaluating a First Amendment claim under *Pickering*. *Id.* at 984-85. On the First Amendment issue, this case was coded as faculty wins first court ruling and university wins second ruling. This was a rare case that had a third ruling. In *Jacobs v. Meister*, 615 P.2d 982 (N.M. 1980), the professor eventually prevailed on his First Amendment claim— nine years after the second court ruling, and 14 years after he lost his job due to criticism of the university administration. For a similar record of prolonged litigation, *see Appel v. Spiridon*, 463 F. Supp.2d 255 (D. Conn. 2006); *Appel v. Spiridon*, 2011 WL 3651353 (D. Conn. 2011); *Appel v. Spiridon*, 521 F.App'x 9 (2d Cir. 2013).

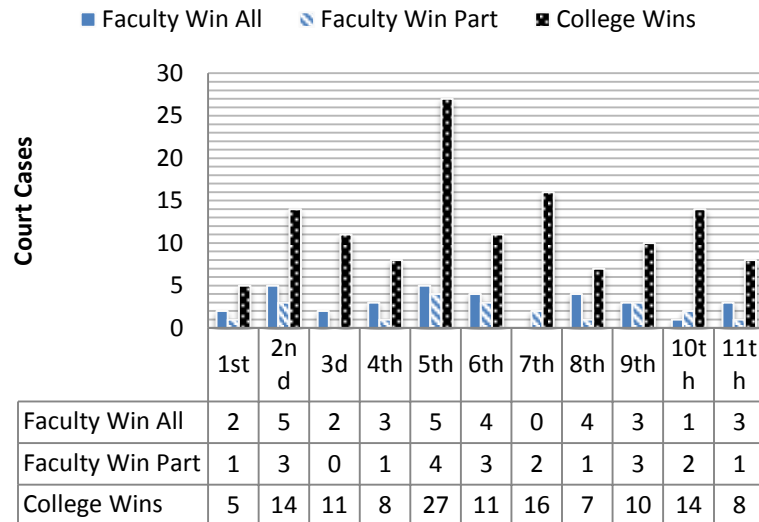
Fact-Finding 8: The win rate for faculty was higher in federal court than state court. In federal first round rulings, faculty had a win-all rate of 16.8% (31 of 185 rulings), and 11.4% for partial wins (21 of 185 rulings). Combining these outcomes, faculty won all or part of 28.2% First Amendment rulings. But in state first round rulings, faculty had no win-all rulings and 18.8% partial wins (3 of 16 rulings). Comparing these outcomes, faculty were 9.4 percentage points more successful in federal courts compared to state courts.

These results were basically repeated in second round rulings (two right-hand columns in Table D). In federal courts, faculty won all or part in 32 (11 plus 21 in column 3) of 107 rulings for a win rate of 29.9%. By contrast, in state courts faculty had a combined win rate of 14.2% (winning part or all in 2 of 12 rulings in column 4). The faculty win rate was 15.7 percentage points more for federal courts in second court rulings.

Table E and Table F show First Amendment wins by federal circuits for first round and second round rulings.¹⁹² Fact Findings 9-11 are based on these tables.

192. Faculty members raised a First Amendment issue in a case in the D.C. Circuit. Therefore, the case was added to the sample. The district and appellate court, however, decided the lawsuit on other grounds. Thus, there are no First Amendment data for *Greene v. Howard Univ.*, 271 F. Supp. 609 (D.D.C. 1967), *aff'd*, 412 F.2d 1128 (D.C. Cir. 1969).

**Table E: Fact Finding 9
First Rulings by Federal Circuits on First
Amendment**



Fact Finding 9: In first court rulings, win rates for colleges and universities were highest in the Seventh, Third, and Tenth Circuits, and lowest in the Eighth, Ninth, First, and Second Circuits. Table E shows that schools had their highest win rates in the Seventh Circuit (88.9%),¹⁹³ Third Circuit (84.6%),¹⁹⁴ and Tenth Circuit (82.4%).¹⁹⁵ Schools

193. Schools prevailed in several first level cases. *Brooks v. Univ. of Wisc. Bd. of Regents*, 406 F.3d 476 (7th Cir. 2005); *Omosogbon v. Wells*, 335 F.3d 668 (7th Cir. 2003); *Trejo v. Shoben*, 319 F.3d 878 (7th Cir. 2003); *Webb v. Bd. of Trs. of Ball State Univ.*, 167 F.3d 1146 (7th Cir. 1999); *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992); *Eichman v. Ind. State Univ. Bd. of Trs.*, 597 F.2d 1104 (7th Cir. 1979); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972); *Meade v. Moraine Valley Cmty. Coll.*, 2014 WL 411296 (N.D. Ill. 2014); *Renken v. Gregory*, 2005 WL 1962988 (E.D. Wis. 2005); *Lopez v. Bd. of Trs. of Univ. of Ill. at Chi.*, 344 F. Supp.2d 611 (N.D. Ill. 2004); *Lim v. Trs. of Ind. Univ.*, 2001 WL 1912634 (S.D. Ind. 2001); *Rubin v. Ikenberry*, 933 F. Supp. 1425 (C.D. Ill. 1996); *Colburn v. Trs. of Ind. Univ.*, 739 F. Supp. 1268 (S.D. Ind. 1990); *Fong v. Purdue Univ.*, 692 F. Supp. 930 (N.D. Ind. 1988); *Weinstein v. Univ. of Ill.*, 628 F. Supp. 862 (N.D. Ill. 1986).

194. *Brown v. Armenti*, 247 F.3d 69 (3d Cir. 2001); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488 (3d Cir. 1998); *Trotman v. Bd. of Trs. of Lincoln Univ.*, 635 F.2d 218 (3d Cir. 1980); *Gooden v. Pa.*, 2010 WL 5158996 (E.D. Pa. 2010); *Gorum v. Sessoms*, 2008 WL 399641 (D. Del. 2008); *Keddie v. Pa. State Univ.*, 412 F. Supp. 1264 (M.D. Pa. 1976); *Lasuchin v. Perrin*, 1988 WL 95079 (E.D. Pa. 1988); *Shovlin v. Univ. of Med. & Dent. of N.J.*, 50 F. Supp.2d 297 (D.N.J. 1998); *Skehan v. Bd. of Trs. of Bloomsburg State Coll.*, 436 F. Supp. 657 (M.D. Pa. 1977); *Stiner v. Univ. of Del.*, 243

were least successful in first court rulings in the Eighth Circuit (58.3%),¹⁹⁶ Ninth Circuit (62.5%),¹⁹⁷ First Circuit (62.5%),¹⁹⁸ and Second Circuit (63.6%).¹⁹⁹ The spread between high and low first courts was 30.6

F. Supp.2d 106 (D. Del. 2003).

195. Schrier v. Univ. of Colo., 427 F.3d 1253 (10th Cir. 2005); Clinger v. N.M. Highlands Univ., Bd. of Regents, 215 F.3d 1162 (10th Cir. 2000); Lighton v. Univ. of Utah, 209 F.3d 1213 (10th Cir. 2000); Bunger v. Univ. of Okla. Bd. of Regents, 95 F.3d 987 (10th Cir. 1996); Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974); Smith v. Losee, 485 F.2d 334 (10th Cir. 1973); Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969); Duckett v. Okla. ex rel. Bd. of Regents of Univ. of Okla., 986 F. Supp.2d 1249 (W.D. Okla. 2013); Idaho State Univ. Faculty Ass'n for the Preservation of Free Speech v. Idaho State Univ., 2012 WL 1313304 (D. Idaho 2012); Sadwick v. Univ. of Utah, 2001 WL 741285 (D. Utah 2001); Loving v. Boren, 956 F. Supp. 953 (W.D. Okla. 1997); Thornton v. Kaplan, 937 F. Supp. 1441 (D. Colo. 1996); Gressley v. Deutsch, 890 F. Supp. 1474 (D. Wyo. 1994); Wirsing v. Bd. of Regents of Univ. of Colo., 739 F. Supp. 551 (D. Colo. 1990); Schultz v. Palmberg, 317 F. Supp. 659 (D. Wyo. 1970).

196. Gumbhir v. Curators of the Univ. of Miss., 157 F.3d 1141 (8th Cir. 1998); Mumford v. Godfried, 52 F.3d 756 (8th Cir. 1995); King v. Univ. of Minn., 774 F.2d 224 (8th Cir. 1985); Frazier v. Curators of Univ. of Mo., 495 F.2d 1149 (8th Cir. 1974); Heublein v. Wefald, 784 F. Supp.2d 1186 (D. Kan. 2011); Tonkovich v. Kan. Bd. of Regents, 1996 WL 705777 (D. Kan. 1996); Day v. Bd. of Regents of Univ. of Neb., 911 F. Supp. 1228 (D. Neb. 1995); Russ v. White, 541 F. Supp. 888 (W.D. Ark. 1981); Milman v. Prokopoff, 100 F. Supp.2d 954 (S.D. Iowa 2000); Cooper v. Ross, 472 F. Supp. 802 (E.D. Ark. 1979); Hibbs v. Bd. of Ed. of Iowa Cent. Cmty. Coll., 392 F. Supp. 1202 (N.D. Iowa 1975).

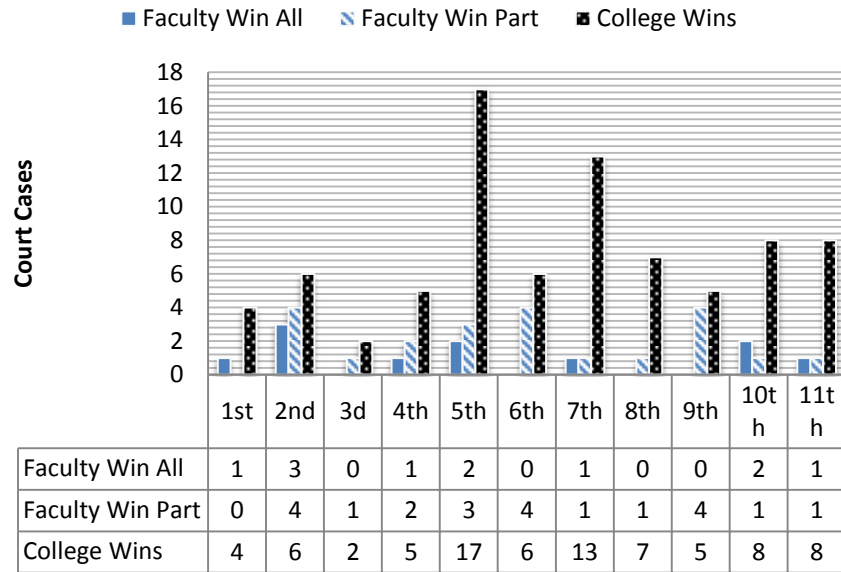
197. Rodriguez v. Maricopa Cnty. Cmty. Coll., 605 F.3d 703 (9th Cir. 2010); Lamb v. Univ. of Haw., 145 F.3d 1338 (9th Cir. 1998); Cohen v. San Bernardino Valley Coll., 92 F.3d 968 (9th Cir. 1996); Piarowski v. Ill. Comm. Coll., 759 F.2d 625 (7th Cir. 1985); Haimowitz v. Univ. of Nev., 579 F.2d 526 (9th Cir. 1978); Bignall v. N. Idaho Coll., 538 F.2d 243 (9th Cir. 1976); Hong v. Grant, 516 F. Supp.2d 1158 (C.D. Cal. 2007); Cohen v. San Bernardino Valley Coll., 883 F. Supp. 1407 (C.D. Cal. 1995); Pressman v. Univ. of N.C. at Charlotte, 337 S.E.2d 644 (1985); Harris v. Ariz. Bd. of Regents, 528 F. Supp. 987 (D. Ariz. 1981); Wolfe v. O'Neill, 336 F. Supp. 1255 (D. Alaska 1972).

198. Lovelace v. Se. Mass. Univ., 793 F.2d 419 (1st Cir. 1986); McDonough v. Trs. of Univ. Sys. of N.H., 704 F.2d 780 (1st Cir. 1983); Alberti v. Carlo-Izquierdo, 818 F. Supp.2d 452 (D.P.R. 2011); Nelson v. Univ. of Me. Sys., 923 F. Supp. 275 (D. Me. 1996); Stitzer v. Univ. of P.R., 617 F. Supp. 1246 (D.P.R. 1985).

199. Ezuma v. City Univ. of N.Y., 367 F.App'x 178 (2d Cir. 2010); Flyr v. City Univ. of N.Y., 2011 WL 1675997 (S.D.N.Y. 2011); Jay Jian-Qing Wang v. Swain, 2011 WL 887815 (N.D.N.Y. 2011); Kohlhausen v. SUNY Rockland Cmty. Coll., 2011 WL 1404934 (S.D.N.Y. 2011); Isenalumhe v. McDuffie, 697 F. Supp.2d 367 (E.D.N.Y. 2010); Kalderon v. Finkelstein, 2010 WL 3359473 (S.D.N.Y. 2010); Shub v. Westchester Cmty. Coll., 556 F. Supp.2d 227 (S.D.N.Y. 2008); Ezuma v. City Univ. of N.Y., 665 F. Supp.2d 116 (E.D.N.Y. 2009); Marinoff v. City Coll. of N.Y., 357 F. Supp.2d 672 (S.D.N.Y. 2005); Radolf v. Univ. of Conn., 364 F. Supp.2d 204 (D. Conn. 2005); Harris v. Merwin, 901 F. Supp. 509 (N.D.N.Y. 1995); Meadows v. State Univ. of N.Y. at Oswego, 832 F. Supp. 537 (N.D.N.Y. 1993); Jeffries v. Harleston, 828 F. Supp. 1066 (S.D.N.Y. 1993); Blum v. Schlegel, 830 F. Supp. 712 (W.D.N.Y. 1993); Vega v. State Univ. of N.Y. Bd. of Trs., 2000 WL 381430 (S.D.N.Y. 2000); Narumanchi v. Bd. of Trs. of Conn. State Univ., 1986 WL 15753 (D. Conn. 1986);

percentage points (comparing the Seventh and Eighth Circuits), suggesting that federal courts do not consistently rule on First Amendment issues.²⁰⁰

**Table F: Fact Finding 10
Second Rulings by Federal Circuits on First
Amendment**



Fact Finding 10: In second court rulings, schools were most successful in the Eighth and Seventh, and least successful in the Second and Sixth Circuits. In Table F, schools in the Eighth Circuit won 87.5% of First Amendment rulings at the second level.²⁰¹ The Seventh Circuit ruled for schools almost as often (86.7%).²⁰² Schools were less successful in the

Lieberman v. Gant, 474 F. Supp. 848 (D. Conn. 1979).

200. This is a plausible interpretation, but not proven by the statistics. Courts could uniformly apply First Amendment tests across the circuits, but variation in win rates could be explained by regional differences in how campuses deal with speech controversies. The lower success rate for schools in the Eighth Circuit could mean that administrators take harsher actions in response to speech controversies.

201. Keating v. Univ. of S.D., 569 Fed. Appx. 469 (8th Cir. 2014); Gumbhir v. Curators of the Univ. of Miss., 157 F.3d 1141 (8th Cir. 1998); Burnham v. Ianni, 98 F.3d 1007 (8th Cir. 1996); Day v. Bd. of Regents of Univ. of Neb., 83 F.3d 1040 (8th Cir. 1996); King v. Univ. of Minn., 774 F.2d 224 (8th Cir. 1985); ; Russ v. White, 541 F. Supp. 888 (W.D. Ark. 1981); Tonkovich v. Kan. Bd. of Regents, 159 F.3d 504 (10th Cir. 1998); Russ v. White, 680 F.2d 47 (8th Cir. 1982); ; Frazier v. Curators of Univ. of Mo., 495 F.2d 1149 (8th Cir. 1974).

202. Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008); Brooks v. Univ. of Wisc.

Second Circuit (46.2%)²⁰³ and Ninth Circuit (55.6%).²⁰⁴ In second round rulings, the spread between the highest and lowest win rates for schools was 41.3 percentage points (comparing the Eighth and Second Circuit).

Fact Finding 11: Combining first and second court rulings in Table E and Table F, Seventh Circuit courts were the most favorable for schools, while courts in the Second Circuit and Ninth Circuit were the most favorable for faculty. This conclusion is based on Fact Finding 9 and Fact Finding 10.

Summary: After *Waters v. Churchill*, judgments against colleges and universities were less frequent.²⁰⁵ However, this does not mean that *Waters* caused this change. Other factors, such as change in the composition of the judiciary or more restraint by schools over the past 20 years, could influence this difference. Still, the fact that post-*Waters* rulings shifted more faculty victories from “win all” to “win part” may signify that courts follow *Waters* and want to hear schools put on evidence of disruption to campus operations.²⁰⁶ Considering that schools are better able to shoulder the costs of trials and appeals, this shift appears to be consequential.

Bd. of Regents, 406 F.3d 476 (7th Cir. 2005); Trejo v. Shoben, 319 F.3d 878 (7th Cir. 2003); Omosogbon v. Wells, 335 F.3d 668 (7th Cir. 2003); Webb v. Bd. of Trs. of Ball State Univ., 167 F.3d 1146 (7th Cir. 1999); Feldman v. Ho, 171 F.3d 494 (7th Cir. 1998); Colburn v. Trs. of Ind. Univ., 973 F.2d 581 (7th Cir. 1992); Keen v. Penson, 970 F.2d 252 (7th Cir. 1992); Weinstein v. Univ. of Ill., 811 F.2d 1091 (7th Cir. 1987); McElearney v. Univ. of Ill. at Chi. Circle Campus, 612 F.2d 285 (7th Cir. 1979); Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972); Lopez v. Bd. of Trs. of Univ. of Ill. at Chi., 344 F. Supp.2d 611 (N.D. Ill. 2004); Fong v. Purdue Univ., 692 F. Supp. 930 (N.D. Ind. 1988); Roth v. Bd. of Regents of State Colls., 310 F. Supp. 972 (W.D. Wis. 1970).

203. Blum v. Schlegel, 18 F.3d 1005 (2d Cir. 1994); Ezuma v. City Univ. of N.Y., 367 F.App’x 178 (2d Cir. 2010); Kalderon v. Finkelstein, 495 F.App’x 103 (2d Cir. 2012); Kohlhausen v. SUNY Rockland Cmty. Coll., 2011 WL 1404934 (S.D.N.Y. 2011); Marinoff v. City Coll. of N.Y., 357 F. Supp.2d 672 (S.D.N.Y. 2005)

204. Hong v. Grant, 403 F.App’x 236 (9th Cir. 2010); Cohen v. San Bernardino Valley Coll., 92 F.3d 968 (9th Cir. 1996); Lamb v. Univ. of Haw., 145 F.3d 1338 (9th Cir. 1998); Piarowski v. Ill. Comm. Coll., 759 F.2d 625 (7th Cir. 1985);); Cohen v. San Bernardino Valley Coll., 883 F. Supp. 1407 (C.D. Cal. 1995); Wolfe v. O’Neill, 336 F. Supp. 1255 (D. Alaska 1972); Pressman v. Univ. of N.C. at Charlotte, 337 S.E.2d 644 (1985).

205. My research design does not permit an inference about causation. Probably, the before-and-after differences are due to other factors: ideological change over time in the judiciary, differences in how school administrators respond to speech issues, changes in student sensitivities to speech, stricter non-discrimination laws related to the classroom and workplace, and others.

206. *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (“When someone who is paid a salary so that she will contribute to an agency’s effective operation begins to do or say things that detract from the agency’s effective operation, the government employer must have some power to restrain her.”).

V. CONCLUSIONS

Principles of academic freedom are broad and permissive.²⁰⁷ Faculty and their schools widely endorse these precepts.²⁰⁸ Nonetheless, *Pickering*, *Connick*, *Waters*, and *Garcetti* do not adequately protect academic freedom.²⁰⁹ This conclusion is not novel.²¹⁰ However, my study provides the first empirical support for this conclusion.

How do courts view academic freedom? My study answers this question, albeit with important caveats. To begin, the First Amendment is not synonymous with academic freedom. Even with my study's emphasis on quantitative analysis, I cannot estimate their overlap.

Second, my fact-findings only pertain to public colleges and universities. This is not to say that private schools are immune from speech controversies. They are not.²¹¹ But faculty at these schools lack the same constitutional protection of free expression.²¹²

207. AAUP, *supra* note 73.

208. Univ. of Chicago, *supra* note 35.

209. *See supra* Part III.B.

210. White, *supra* note 8, at 841.

Here, then, are the salient features of a half-century of decided case law on the academic freedom rights of the nation's faculty members: Those rights have been articulated in precious few Supreme Court decisions—hardly more than a half-dozen significant cases in fifty years. Those rights have been diluted by lack of consensus over what academic freedom protects and who can invoke its protections.

Id. *See also* Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 *HAMLIN L. REV.* 1, 21 (2007); Bridget R. Nugent & Julee T. Flood, *Rescuing Academic Freedom from *Garcetti v. Ceballos*: An Evaluation of Current Case Law and a Proposal for the Core Academic, Administrative, and Advisory Speech*, 40 *J.C. & U.L.* 115, 157-58 (2014) (“*Garcetti*, if applied to core academic speech, portends an ominous future for public college and university professorial expression.”); Larry D. Spurgeon, *The Endangered Citizen Servant: *Garcetti* Versus the Public Interest and Academic Freedom*, 39 *J.C. & U.L.* 405, 466 (2013) (“Though fixing the *Garcetti* problem for public employee speech mitigates the harm to academic freedom, it does not address the fundamental problem that speech in the public arena is very different from academic speech. Therefore, the Court should exempt academic speech from the public employee speech doctrine. . . .”); W. Stuart Stullar, *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* Hilary Habib, Note, *Academic Freedom and the First Amendment in the *Garcetti* Era*, 22 *S. CAL. INTERDISC. L.J.* 509, 543 (2013) (“As it stands under *Garcetti*, in most circumstances, professors are left with inadequate First Amendment protection, and their academic freedom is severely threatened.”).

211. *E.g.*, Jaschik, *supra* note 1 (reporting on Prof. Saida Grundy's controversial tweets, such as “deal with your white sh*t [sic], white people. Slavery is a *YALL* thing.” At the time, Prof. Grundy was about to start her job as a Sociology professor at Boston University.

212. When professors at private schools allege a First Amendment violation, they

My finding that schools win more than 70 percent of First Amendment cases is subject to a third caveat: The sample is not the universe of faculty speech disputes—far from it. Omitted cases involve faculty speech controversies that are covered by a collective bargaining agreement,²¹³ and others that are settled privately through negotiation.²¹⁴

The settled cases might tell us more about the tensions around academic freedom than the First Amendment cases in this study. Hypothetically, a professor who teaches a course on feminism might demonstrate how society marginalizes women by isolating men in the

argue that their school has a sufficient government nexus to implicate constitutional protection. Courts reject this reasoning. *E.g.*, *Spark v. Catholic Univ. of America*, 510 F.2d 1277 (D.C. Cir. 1975); *Blouin v. Loyola Univ.*, 506 F.2d 20 (5th Cir. 1975); *Wahba v. N.Y. Univ.*, 492 F.2d 96 (2d Cir. 1974); *Moor-Jankowski v. Bd. of Trs. of N.Y. Univ.*, 1998 WL 474084 (S.D.N.Y. 1998); *Jones v. Kneller*, 482 F. Supp. 204 (E.D.N.Y. 1979); *but see Isaacs v. Bd. of Trs. of Temple Univ. of Com. Sys. of Higher Educ.*, 385 F. Supp. 473 (E.D. Pa. 1974) (finding state action where Pennsylvania appropriated substantial support to Temple). The AAUP sums up this situation: “Private universities are largely not subject to . . . constitutional requirements . . . and students, faculty, and staff at most private universities therefore do not enjoy a ‘First Amendment’ right of protection against discipline for speech-related infractions.” Rachel Levinson, *Academic Freedom and the First Amendment*, AAUP (2007), <http://www.aaup.org/our-work/protecting-academic-freedom/academic-freedom-and-first-amendment-2007#3>.

213. Typically, those disputes are eligible for arbitration. On rare occasion, the matter is so public that some details appear in the news. *E.g.*, Associated Press, *Professor Linked to Alleged Terrorists Vows to Fight Dismissal*, First Amendment Center, Jan. 15, 2002, <http://www.firstamendmentcenter.org/professor-linked-to-alleged-terrorists-vows-to-fight-dismissal>. While the University of South Florida gave notice to terminate Prof. Sami Al-Arian due to alleged terror connections, he alleged that he was punished for expressing anti-Israel views. The matter was set for arbitration.

214. *E.g.*, Kendi Anderson, *Bryan College, Professors Settle Lawsuit*, TIMESFREEPRESS.COM (Oct. 8, 2014), <http://www.timesfreepress.com/news/local/story/2014/oct/08/bryan-college-professors-settle-lawsuit/269025/> (reporting settlement where some faculty refused to agree to college statement ruling out evolution); *East Georgia College Settles Lawsuit for \$50,000 After Firing Professor Who Criticized Sexual Harassment Policy*, FIRE (Sept. 6, 2011), <https://www.thefire.org/east-georgia-college-settles-lawsuit-for-50000-after-firing-professor-who-criticized-sexual-harassment-policy-2/>; Scott Jaschik, *\$600K for Fired Professor*, INSIDE HIGHER ED (Jan. 26, 2007), <https://www.insidehighered.com/news/2007/01/26/cobbs>. Some cases in my database settled after a court ruled. *E.g.*, Michael Bragg, *Former Washington State U. Professor Agrees to Settlement in Free Speech Case*, SPLC, Nov. 13, 2014, <http://www.splc.org/article/2014/11/former-washington-state-u-professor-agrees-to-settlement-in-free-speech-case>; Harvey Rice, *Fired Mainland Professor Settles Lawsuit*, HOUS. CHRON. (Dec. 15, 2014), <http://www.houstonchronicle.com/news/article/Fired-Mainland-professor-settles-lawsuit-5958998.php>; *Fired Calif. Professor Exonerated in Settlement of Lawsuit Against San Jose College District*, ALLIANCE DEFENDING FREEDOM (July 22, 2010), <http://www.adfmedia.org/News/PRDetail/153>.

class— perhaps by refusing to call on them in discussions or respond to their questions, ignoring their e-mails, and not grading their work.²¹⁵ A college, on the other hand, would treat this as gender discrimination, and counteract the professor's pedagogy. The parties could compromise by creating an exclusive section for women and parallel section for all students, with no employee discipline and no First Amendment lawsuit.

So far, I have discussed caveats for cases that are not in the sample. I must add two more reservations about cases in my study. First, some faculty took minor disputes to court.²¹⁶ These cases had the outward appearance of academic freedom because they were grounded in the First Amendment—but they had nothing to do with the marketplace of ideas.

Second, schools seemed to use an internal *Pickering* analysis. Thus, they took less extreme measures in order to improve their odds in court—for example, by sequestering hostile professors instead of firing them.²¹⁷ Consistent with this theory, schools rarely terminated tenured faculty members.²¹⁸ In short, the high win rate for schools is partly due to a mix of cases where some faculty made mountains out of molehills, and others where schools took optimal instead of maximal actions.

215. See *McDonough v. Trs. of Univ. Sys. of N.H.*, 704 F.2d 780 (1st Cir. 1983).

216. In a mundane dispute over a performance review, a university denied a pay raise to a professor who refused to use a standard course evaluation. *Wirsing v. Bd. of Regents of Univ. of Colo.*, 739 F. Supp. 551 (D. Colo. 1990). The *Wirsing* case is in the database because the professor contended she had a First Amendment right to administer her own course evaluation. Similarly, a faculty member sued over a low performance rating because he operated his chemistry lab out of his home, a unique situation that disqualified him from grants. See *Day*, *supra* note 196. These were kooky First Amendment cases. In a related vein, faculty members escalated a trivial speech dispute into an epic legal battle. In *Burnham*, *supra* note 201, historians engaged in protracted litigation over their university's decision to remove their department photos showing them humorously posing with historical weapons after this public display terrified a colleague to the point of making her own complaint. This lawsuit was less about academic freedom and more about a dysfunctional history department.

217. *E.g.*, *Duckett v. Okla. ex rel. Bd. of Regents of Univ. of Okla.*, 986 F. Supp.2d 1249 (W.D. Okla. 2013) (involving a tenured faculty member who was stripped of his duties and prohibited from entering the campus without permission). The professor alleged that the university took this action in response to his strident complaints that African-Americans were under-represented on the faculty. *Id.* The university countered that he was not excluded due to his advocacy but for shouting at colleagues that they are racists. *Id.* See Joint Status Report and Discovery Plan, *Duckett v. Ross*, 2014 WL 1028957 (W.D. Okla. 2014) (No. CIV-13-312-D).

218. See Sarah Kuta, *CU-Boulder Moves to Fire Professor Accused of Retaliating Against a Sexual Assault Victim*, DAILY CAMERA (Aug. 7, 2014) (for only the fourth time over 138 years, University of Colorado moved to fire a tenured professor). Terminations of tenured faculty members were uncommon in the sample. *E.g.*, *Fong v. Purdue Univ.*, 692 F. Supp. 930 (N.D. Ind. 1988); *Churchill v. Univ. of Colo. at Boulder*, 293 P.3d 16 (2010).

At the core of my study, only a few First Amendment cases dealt with controversial ideas. A key conclusion is that courts rarely rule on intellectual aspects of academic freedom. This implies that colleges and universities rarely interfere with the expression of objectionable and controversial ideas.

But rumblings in my database also reveal instances where schools suppressed unorthodox viewpoints. In these cases, courts were evenly divided. Sometimes, they applied the First Amendment to protect unpopular ideas.²¹⁹ But, just as often, courts sided with schools. These rulings devalued academic freedom. Courts minimized the thought provoking value of sexually-themed art.²²⁰ Courts stood behind schools that shielded students from a professor who espoused the intellectual inferiority

219. *E.g.*, *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) (“Hardy’s speech was germane to the subject matter of his lecture on the power and effect of language. The course was on interpersonal communications, and Hardy’s speech was limited to an academic discussion of the words in question.”); *see also* *Dube v. State Univ. of N.Y.*, 900 F.2d 587 (2d Cir. 1990), involving a professor who was denied tenure several years after the school discontinued his course equating Zionism with Nazism due to protest and controversy. His dean decided not to approve him for tenure, citing his paucity of publications. *Id.* at 591. Dube contended, however, that the tenure decision was retaliation for his outspoken views on Zionism. *Id.* at 592-93. Ruling that his First Amendment claim was triable, the Second Circuit said: “[W]hile we recognize that courts should accord deference to academic decisions . . . for decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation ‘that cast a pall of orthodoxy’ over the free exchange of ideas in the classroom.” *Id.* at 598 (citations omitted). In another case, a professor with expertise in seismology alleged that his employment was terminated in response to pressure from an electrical power company after he voiced concern on a radio program that the siting of a new power plant was too close to an active fault line. *See McCann v. Ruiz*, 802 F. Supp. 606 (D.P.R. 1992). The professor prevailed before a jury, and was awarded \$605,000.00 as compensatory damages and an additional \$145,000.00 as punitive damages. *Id.* at 609. In 2015, eight months after my data collection ended, a federal district court ruled that controversial Twitter posts were protected by the First Amendment. *Salaita v. Kennedy*, 2015 WL 4692961, at *9 (N.D. Ill. 2015) (stating: “Dr. Salaita’s has alleged facts that plausibly demonstrate he was fired because of the content of his political speech in a public forum. In other words, Dr. Salaita’s tweets implicate every ‘central concern’ of the First Amendment.”).

220. *See Piarowski v. Ill. Cmty. Coll.*, 759 F.2d 625 (7th Cir. 1985). To justify its rejection of the instructor’s First Amendment claim, the Seventh Circuit used subjective reasoning in stating that the “concept of freedom of expression ought not be pushed to doctrinaire extremes.” *Id.* at 630. The court blurred the line between academe and the broader public domain, reasoning that “[i]f Claes Oldenburg, who created a monumental sculpture in the shape of a baseball bat for display in a public plaza in Chicago, had created instead a giant phallus, the city would not have had to display it next to a heavily trafficked thoroughfare.” *Id.* While art in a public plaza has no claim to academic freedom, the Seventh Circuit did not explain how this example fit an academic setting, where controversial ideas are given more latitude.

of African-Americans.²²¹ But these rulings deprived students a rare opportunity to confront an authority figure who trades in contemptible ideas. One court backed a school that denied tenure to a professor whose conservatively oriented research attacked Fidel Castro.²²² Another court allowed Virginia to restrict faculty access to the Internet.²²³ These were not cases where speech intimidated or abused students or co-workers²²⁴—again, they dealt with a faculty member’s controversial, unconventional, or loathsome ideas. Courts eroded academic freedom by finding no First Amendment violations in these cases.

Ultimately, I conclude that First Amendment jurisprudence does not protect the most controversial ideas expressed by faculty in higher education. The *Pickering* balancing test and subsequent rulings in *Connick*, *Waters*, and *Garcetti* were meant for other work settings. Today, they tip the scales for schools in speech controversies.

My empirical findings counsel professors to be more realistic about the limits of First Amendment protection.²²⁵ These findings are encapsulated in one court’s idea that while a university depends on academic freedom to achieve its full realization, professors “fail to appreciate that the wisdom of a given practice as a matter of policy does not give the practice constitutional status.”²²⁶

Faculty must think more deeply about strategies to preserve academic freedom. Courts are not suited for this task.²²⁷ Faculty, in their employment relationships, should rely less on the First Amendment and negotiate

221. *Levin v. Harleston*, 770 F. Supp. 895 (S.D.N.Y. 1991), *rev’d* in part by *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992).

222. *Lopez v. Bd. of Trs. of Univ. of Ill. at Chi.*, 344 F. Supp.2d 611 (N.D. Ill. 2004).

223. *Urofsky v. Allen*, 216 F.3d 401 (4th Cir. 2000).

224. Michael H. LeRoy, “#AcademicFreedom: Twitter and First Amendment Rights for Professors,” 90 NOTRE DAME L. REV. ONLINE 158, 166 (2015).

225. See Leiter, *supra* note 33. See Tanaz Ahmed, *University of Illinois Censured for Pulling Professor’s Job Offer over Anti-Israel Tweets*, USA TODAY (June 18, 2015), <http://college.usatoday.com/2015/06/18/university-of-illinois-censured/> (reporting Prof. Katherine Franke’s idea “speaking favorably about Palestinian rights or speaking critically about Israeli state policy seems to not get the full-range of first amendment protection”), for another overstated view of First Amendment protection appears; see also David Moshman, *Academic Freedom at the University of Illinois*, HUFFPOST COLL. (Sept. 2, 2014), http://www.huffingtonpost.com/david-moshman/academic-freedom-at-the-u_b_5745702.html (contending there is a strong First Amendment case against a university that withdrew a job offer due to controversial tweets).

226. *Urofsky v. Allen*, 216 F.3d 401, 411 (4th Cir. 2000).

227. See Byrne, *supra* note 8, at 253 (“The problems are fundamental: There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in law, picking up decisions as a hull does barnacles.”).

stronger assurances of free expression in their contracts.²²⁸ Within higher education, faculty leaders and university presidents should come together to craft principles of academic freedom that deal with 21st century issues—campus speech codes,²²⁹ extramural speech in social media,²³⁰ academic freedom for research that has political implications, professional speech that is tied to corporate funding²³¹—and more. As politicians take aim at tenure while attacking intellectual culture in higher education,²³² faculty should mobilize for an academic bill of rights for professors.²³³ At bottom, my research shows that the alternative to these proactive measures are court rulings that treat academe more like a government agency than a laboratory of experimentation.

228. See also Joan DelFattore, *To Protect Academic Freedom, Look Beyond the First Amendment*, CHRON. HIGHER EDUC. (Oct. 31, 2010), <http://chronicle.com/article/To-Protect-Academic-Freedom/125178/>; Modern Language Association, *Ramifications of the Supreme Court's Ruling in Garcetti v. Ceballos* (Feb. 2010), http://www.mla.org/garcetti_ceballos.

229. See Laurie Essig, *Trigger Warnings Trigger Me*, CHRON. OF HIGHER EDUC. (Mar. 10, 2014), <http://chronicle.com/blogs/conversation/2014/03/10/trigger-warnings-trigger-me/> (“Trigger warnings are a very dangerous form of censorship because they’re done in the name of civility. Learning is painful.”).

230. Compare N.Y. Comp. Codes R. & Regs, *supra* note 36, with *Appendix I, 1915 Declaration of Principles on Academic Freedom and Academic Tenure*, *supra* note 63.

231. Compare John Hardin, *The Campaign to Stop Fresh College Thinking*, WALL ST. J. (May 26, 2015), <http://www.wsj.com/articles/the-campaign-to-stop-fresh-college-thinking-1432683566>, with David Brock, *Fresh Thinking Includes Disclosure*, WALL ST. J. (June 5, 2015), <http://www.wsj.com/articles/fresh-thinking-includes-disclosure-1433532786?KEYWORDS=%22academic+freedom%22>.

232. See Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 956 (Fall 2006). When university board members are elected, they can be subjected to political pressures that conflict with principles of academic freedom. *Id.* at 968, n.48.

233. See Beverly Earle & Anita Cava, *The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom*, 18 BERKELEY J. EMP. & LAB. L. 282, 313–314 (1997) (discussing the Leonard Law). The California statute prohibits a private school from disciplining a student for speech. The law provides:

(a) No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.

Cal. Educ. Code § 94367 (Deering 1996).

The law could be broadened to include faculty members as a protected group.

APPENDIX OF CASES INVOLVING FIRST AMENDMENT CLAIMS

BY COLLEGE AND UNIVERSITY PROFESSORS AND INSTRUCTORS

The cases for this database are subdivided into federal and state groups. The federal cases are organized by federal circuits. These cases are followed by state court opinions.

A. Federal Courts

First Circuit

Alberti v. Carlo-Izquierdo, 818 F.Supp.2d 452 (D.P.R. 2011); Alberti v. Carlo-Izquierdo, 869 F.Supp.2d 231(D.P.R. 2012); Alberti v. Carlo-Izquierdo, 548 Fed. App'x. 625 (1st Cir. 2013).

Close v. Lederle, 303 F.Supp. 1109 (D. Mass. 1969); Close v. Lederle, 424 F.2d 988 (1st Cir. 1970).

Lovelace v. Se. Mass. Univ., 793 F.2d 419 (1st Cir. 1986).

McCann v. Ruiz, 788 F.Supp. 109 (D.P.R. 1992); McCann v. Ruiz, 802 F.Supp. 606 (D.P.R. 1992).

McDonough v. Trs. of Univ. Sys. of N.H., 704 F.2d 780 (1st Cir. 1983).

Nelson v. Univ. of Me. Sys., 914 F.Supp. 643 (D. Me. 1996); Nelson v. Univ. of Me. Sys., 923 F.Supp. 275 (D. Me. 1996).

Silva v. Univ. of N.H., 888 F.Supp. 293 (D.N.H. 1994).

Stitzer v. Univ. of P.R., 617 F.Supp. 1246 (D.P.R. 1985).

Second Circuit

Appel v. Spiridon, 463 F.Supp.2d 255 (D. Conn. 2006); Appel v. Spiridon, 2011 WL 3651353 (D. Conn. 2011); Appel v. Spiridon, 521 Fed. App'x. 9 (2d Cir. 2013).

Blum v. Schlegel, 830 F.Supp. 712 (W.D.N.Y. 1993); Blum v. Schlegel, 18 F.3d 1005 (2d Cir. 1994).

Dube v. State Univ. of N.Y., 900 F.2d 587 (2d Cir 1990).

Ezuma v. City Univ. of N.Y., 665 F.Supp.2d 116 (E.D.N.Y. 2009); Ezuma v. City Univ. of N.Y., 367 Fed. App'x. 178 (2d Cir. 2010).

Flyr v. City Univ. of N.Y., 2011 WL 1675997 (S.D.N.Y. 2011).

Harris v. Merwin, 901 F.Supp. 509 (N.D.N.Y. 1995).

Isenalumhe v. McDuffie, 697 F.Supp.2d 367 (E.D.N.Y. 2010).

Jay Jian-Qing Wang v. Swain, 2011 WL 887815 (N.D.N.Y. 2011); Jay Jian-Qing Wang v. Swain, 486 Fed. App'x. 947 (2d Cir. 2012).

Jeffries v. Harleston, 828 F.Supp. 1066 (S.D.N.Y. 1993); Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994), Jeffries v. Harleston, 513 U.S. 996 (1994); Jeffries v. Harleston, 52 F.3d 9 (2d Cir. 1995).

Kalderon v. Finkelstein, 2010 WL 3359473 (S.D.N.Y. 2010); Kalderon v. Finkelstein, 495 Fed. App'x. 103 (2d Cir. 2012);

Keyishian v. Bd. of Regents of Univ. of State of N.Y., 233 F.Supp. 752 (W.D.N.Y. 1964); Keyishian v. Bd. of Regents of Univ. of State of N. Y., 345 F.2d 236 (2d Cir. 1965); Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589 (1967).

Kohlhausen v. SUNY Rockland Cmty. Coll., 2011 WL 1404934 (S.D.N.Y. 2011); Kohlhausen v. SUNY Rockland Cmty. Coll., 2011 WL 2749560 (S.D.N.Y. 2011).

Levin v. Harleston, 752 F.Supp. 620 (S.D.N.Y. 1990); Levin v. Harleston, 770 F.Supp. 895 (S.D.N.Y. 1991); Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992).

Lieberman v. Gant, 474 F.Supp. 848 (D. Conn. 1979); Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980).

Mahoney v. Hankin, 593 F.Supp. 1171 (S.D.N.Y. 1984).

Marinoff v. City Coll. of N.Y., 63 Fed. App'x. 530 (2d Cir. 2003); Marinoff v. City Coll. of N.Y., 357 F.Supp.2d 672 (S.D.N.Y. 2005).

Meadows v. State Univ. of N.Y. at Oswego, 832 F.Supp. 537 (N.D.N.Y. 1993).

Narumanchi v. Bd. of Trs. of Conn. State Univ.; 1986 WL 15753 (D. Conn. 1986); Narumanchi v. Bd. of Trs. of Conn. State Univ., 850 F.2d 70 (2d 1988).

Radloff v. Univ. of Conn., 364 F.Supp.2d 204 (D. Conn. 2005).

Rehman v. State Univ. of N.Y. at Stony Brook, 596 F.Supp.2d 643 (E.D.N.Y. 2009).

Selzer v. Fleisher, 629 F.2d 809 (2d Cir. 1980).

Shub v. Westchester Cmty. Coll., 556 F.Supp.2d 227 (S.D.N.Y. 2008).

Vega v. State Univ. of N.Y. Bd. of Trs., 2000 WL 381430 (S.D.N.Y. 2000);
Vega v. Miller, 273 F.3d 460 (2d Cir. 2001).

Third Circuit

Aumiller v. Univ. of Del., 434 F.Supp. 1273 (D. Del. 1977).

Brown v. Armenti, 247 F.3d 69 (3d Cir. 2001).

Edwards v. Cal. Univ. of Pa., 156 F.3d 488 (3d Cir. 1998).

Eisen v. Temple Univ., 2002 WL 1565331 (E.D.Pa. 2001); Eisen v. Temple
Univ., 2002 WL 32706 (E.D. Pa. 2002); Eisen v. Temple Univ., 2002 WL
1565331 (E.D. Pa. 2002).

Gooden v. Pa., 2010 WL 5158996 (E.D. Pa. 2010).

Gorum v. Sessoms, 2008 WL 399641 (D. Del. 2008); Gorum v. Sessoms, 561
F.3d 179 (3d Cir. 2010).

Keddie v. Pa. State Univ., 412 F.Supp. 1264 (M.D. Pa. 1976).

Lasuchin v. Perrin, 1988 WL 95079 (E.D.Pa. 1988).

Meyers v. Cal. Univ. of Pa., 2013 WL 795059 (W.D. Pa. 2014); Meyers v. Cal.
Univ. of Pa., 2014 WL 3890357 (W.D. Pa. 2014).

Shovlin v. Univ. of Med. & Dent. of N.J., 50 F.Supp.2d 297 (D.N.J. 1998).

Skehan v. Bd. of Trs. of Bloomsburg State Coll., 436 F.2d 657 F.Supp. (M.D.
Pa. 1977); Skehan v. Bd. of Trs. of Bloomsburg State Coll., 590 F.2d 470 (3d
Cir. 1985).

Stiner v. Univ. of Del., 243 F.Supp.2d 106 (D. Del. 2003).

Trotman v. Bd. of Trs. of Lincoln Univ., 635 F.2d 218 (3d Cir. 1980).

Fourth Circuit

Adams v. Trs. of the Univ. of N.C. Wilmington, 2010 WL 10991020 (E.D.N.C. 2010); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011); Adams v. Trs. of the Univ. of N.C.-Wilmington, 2013 WL 10128923 (E.D.N.C. 2013).

Chitwood v. Feaster, 54 F.R.D. 204 (N.D. W.Va. 1972); Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972).

Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982).

Howze v. Va. Polytechnic, 901 F.Supp. 1091 (W.D. Va. 1995).

Kim v. Coppin State Coll., 662 F.2d 1055 (4th Cir. 1981).

Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981).

Ollman v. Toll, 518 F.Supp. 1196 (D. Md. 1981); Ollman v. Toll, 704 F.2d 139 (4th Cir. 1983).

Scagnelli v. Whiting, 554 F.Supp. 77 (M.D.N.C. 1982).

Scallet v. Rosenblum, 1994 WL 723063 (W.D. Va. 1994); Scallet v. Rosenblum, 911 F.Supp. 999 (W.D. Va. 1996); Scallet v. Rosenblum, 106 F.3d 391 (4th Cir. 1997).

Shaw v. Bd. of Trs. of Frederick Cmty. Coll., 549 F.2d 929 (4th Cir. 1976).

Urofsky v. Allen, 995 F.Supp. 634 (E.D.Va. 1998); Urofsky v. Gilmore, 167 F.3d 191 (4th Cir. 1999); Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000) (en banc).

Huang v. Rector and Visitors of Univ. of Va., 896 F.Supp.2d 524 (W.D.Va. 2012).

Fifth Circuit

Adamo v. Bd. of Sup'rs of La. State Univ., 1994 WL 202368 (E.D. La. 1994).

Anderson-Free v. Steptoe, 970 F.Supp. 945 (M.D. Ala. 1997); Anderson-Free v. Steptoe, 993 F.Supp. 870 (M.D. Ala. 1997).

Bradford v. Tarrant Cnty. Junior Coll., 356 F.Supp. 197 (N.D. Tex. 1976); Bradford v. Tarrant Cnty. Junior Coll., 492 F.2d 133 (5th Cir. 1974).

Cotten v. Bd. of Regents of Univ. Sys. of Ga., 395 F.Supp. 388 (S.D. Ga. 1974); Cotten v. Bd. of Regents of Univ. Sys. of Ga., 515 F.2d 1098 (5th Cir. 1975).

D'Andrea v. Adams, 626 F.2d 469 (5th Cir. 1980).

DePree v. Saunders, 2008 WL 4457796 (S.D. Miss. 2008); DePree v. Saunders, 588 F.3d 282 (5th Cir. 2009).

Dorsett v. Bd. of Tr. for St. Coll. & Univ., 940 F.2d 121 (5th Cir. 1991).

Duke v. N. Tex. State Univ., 338 F.Supp. 990 (E.D. Tex. 1971); Duke v. N. Tex. State Univ., 469 F.2d 829 (5th Cir. 1972).

Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

Fluker v. Ala. State Bd. of Ed., 441 F.2d 201 (5th Cir. 1971).

Foley v. Univ. of Hous. Sys., 324 F.3d 310 (5th Cir. 2003); Foley v. Univ. of Hous. Sys., 355 F.3d 333 (5th Cir. 2003).

Gentilello v. Rege, 2008 WL 2627685 (N.D. Tex. 2006); Gentilello v. Rege, 627 F.3d 540 (5th Cir. 2010).

Grace v. Bd. of Trs. for State Coll. & Univ., 1992 WL 111837 (M.D. La. 1992); Grace v. Bd. of Trs. for State Coll. & Univ., 805 F.Supp. 390 (M.D. La. 1992); Grace v. Bd. of Trs. for State Coll. & Univ., 8 F.3d 23 (5th Cir. 1993).

Griffin v. Sorber, 247 F.3d 241 (5th Cir. 2001).

Harrington v. Harris, 108 F.3d 598 (5th Cir. 1997); Harrington v. Harris, 118 F.3d 359 (5th Cir. 1997).

Hillis v. Stephen F. Austin State Univ., 486 F.Supp. 663 (E.D. Tex. 1980); Hillis v. Stephen F. Austin State Univ., 665 F.2d 547 (5th Cir. 1982).

Honore v. Douglas, 833 F.2d 565 (5th Cir. 1987).

Jackson v. Tex. S. Univ., 997 F.Supp.2d 613 (S.D. Tex. 2014).

Kaprelian v. Tex. Woman's Univ., 509 F.2d 133 (5th Cir. 1975).

Kostic v. Tex. A & M Univ. at Commerce, 2013 WL 1293901 (N.D. Tex. 2013); Kostic v. Tex. A & M Univ. at Commerce, 2013 WL 1296515 (N.D. Tex. 2013).

Marino v. La. State Univ. Bd. of Supervisors, 1997 WL 358141 (E.D. La. 1997); Marino v. La. State Univ. Bd. of Supervisors, 1998 WL 560290 (E.D. La. 1998).

Markwell v. Culwell, 515 F.2d 1258 (5th Cir. 1975).

Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986).

Megill v. Bd. of Regents, 541 F.2d 1073 (5th Cir. 1976).

Miller v. Bunce, 60 F.Supp.2d 620 (S.D. Tex. 1999); Miller v. Bunce, 220 F.3d 584 (5th Cir. 2000).

N. Cent. Tex. Coll. v. Ledbetter, 566 F.Supp.2d 547 (E.D.Tex. 2006).

Oller v. Roussel, 2014 WL 4204836 (W.D. La. 2014).²³⁴

Richmond v. Coastal Bend Coll. Dist., 883 F.Supp.2d 705 (S.D. Tex. 2012).

Rushing v. Bd. of Supervisors of Univ. of La. Sys., 2011 WL 6047097 (M.D. La. 2011); Rushing v. Bd. of Supervisors of Univ. of La. Sys., 544 WL Fed. App'x. 287 (M.D. La. 2011);

Shoecraft v. Univ. of Hous.-Victoria, 2006 WL 870432 (S.D.Tex. 2012).

Simpson v. Alcorn State Univ., 2014 WL 2685133 (S.D. Miss. 2014).

Smith v. Coll. of the Mainland, 2012 WL 6020066 (S.D. Tex. 2012).

Staheli v. Univ. of Miss., 621 F.Supp. 449 (N.D. Miss. 1985); Staheli v. Univ. of Miss., 854 F.2d (5th Cir. 1988);

Stewart v. Bailey, 396 F.Supp. 1381 (N.D. Ala. 1975); Stewart v. Bailey, 556 F.2d 281 (5th Cir. 1977); Stewart v. Bailey, 561 F.2d 1195 (5th Cir. 1977).

Stone v. Bd. of Regents of Univ. Sys. of Ga., 620 F.2d 526 (5th Cir. 1980).

Schmelzer v. Alexander, 2005 WL 723660 (N.D. Tex. 2005).

Van Heerden v. Bd. of Sup'rs of La. State Univ. & Agr. & Mech. Coll., 2011 WL 320921 (M.D. La. 2001).

234. This case has a ruling in 2015. *See* Oller v. Roussel, 2015 WL 1529084 (5th Cir. 2015) (ruling for the university on professor's First Amendment claim). The sample does not include this case because cases were collected for 1964 to 2014.

Wagner v. Tex. A & M Univ., 939 F.Supp. 1297 (S.D. Tex. 1996).

Sixth Circuit

Benison v. Ross, 983 F.Supp.2d 891 (E.D. Mich. 2013); Benison v. Ross, 765 F.3d 649 (6th Cir. 2014).

Bonnell v. Lorenzo, 81 F.Supp.2d 777 (E.D. Mich. 1999); Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001).

Croushorn v. Bd. of Trs. of Univ. of Tenn., 518 F.Supp. 9 (M.D. Tenn. 1980).

Dvorak v. Wright State Univ., 1997 WL 1764779 (S.D. Ohio 1997).

Frieder v. Morehead State Univ., 2013 WL 6187786 (E.D. Ky. 2013); Frieder v. Morehead State Univ., 770 F.3d 428 (6th Cir. 2014).

Ghosh v. Ohio Univ., 861 F.2d 720 (6th Cir. 1988).

Gies v. Flack, 1996 WL 1671234 (S.D. Ohio 1996); Gies v. Flack, 495 F.Supp.2d 854 (S.D. Ohio 2007).

Hardy v. Jefferson Cmty. Coll., 2000 WL 33975576 (W.D. Ky. 2000); 260 F.3d 671 (6th Cir. 2001).

Hetrick v. Martin, 322 F.Supp. 545 (E.D. Ky. 1971); Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973).

Jackson v. Leighton, 168 F.3d 903 (6th Cir. 1999).

Johnson-Kurek v. Abu-Absi, 423 F.3d 590 (6th Cir. 2005).

Kerr v. Hurd, 694 F.Supp.2d 817 (S.D. Oh. 2010).

Landrum v. E. Ky. Univ., 578 F.Supp. 241 (E.D. Ky. 1984).

Morreim v. Univ. of Tenn., 2013 WL 5673619 (W.D. Tenn. 2013).

Nuovo v. The Ohio State Univ., 726 F.Supp.2d 829 (S.D. Oh. 2010).

Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989).

Savage v. Gee, 716 F.Supp.2d 709 (S.D. Ohio 2010); Savage v. Gee, 665 F.3d 732 (6th Cir. 2012).

Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983).

Yohn v. Coleman, 639 F.Supp.2d 776 (E.D. Mich. 2009).

Seventh Circuit

Brooks v. Univ. of Wisc. Bd. of Regents, 406 F.3d 476 (7th Cir. 2005).

Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972).

Colburn v. Trs. of Ind. Univ., 739 F.Supp. 1268 (S.D. Ind. 1990); Colburn v. Trs. of Ind. Univ., 973 F.2d 581 (7th Cir. 1992).

Eichman v. Ind. State Univ. Bd. of Trs., 597 F.2d 1104 (7th Cir. 1979).

Feldman v. Bahn, 12 F.3d 730 (7th Cir. 1993); Feldman v. Ho, 171 F.3d 494 (7th Cir. 1998).

Fong v. Purdue Univ., 692 F.Supp. 930 (N.D. Ind. 1988); Fong v. Purdue Univ., 976 F.2d 735 (7th Cir. 1992).

Keen v. Penson, 970 F.2d 252 (7th Cir. 1992).

Lim v. Trs. of Ind. Univ., 2001 WL 1912634 (S.D. Ind. 2001); Lim v. Trs. of Ind. Univ., 297 F.3d 575 (7th Cir. 2002).

Lopez v. Bd. of Trs. of Univ. of Ill. at Chi., 344 F.Supp.2d 611 (N.D. Ill. 2004).

McElearney v. Univ. of Ill. at Chic. Circle Campus, 612 F.2d 285 (7th Cir. 1979).

Meade v. Moraine Valley Cmty. Coll., 2014 WL 411296 (N.D. Ill. 2014); Meade v. Moraine Valley Cmty. Coll., 770 F.3d 680 (7th Cir. 2014).

Omosogbon v. Wells, 335 F.3d 668 (7th Cir. 2003).

Piarowski v. Ill. Cmty. Coll., 759 F.2d 625 (7th Cir. 1985).

Renken v. Gregory, 2005 WL 1962988 (E.D. Wis. 2005); Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008).

Roth v. Bd. of Regents of State Coll., 310 F.Supp. 972 (W.D. Wis. 1970); Roth v. Bd. of Regents of State Coll., 446 F.2d 806 (7th Cir. 1972); Roth v. Bd. of Regents of State Coll., 408 U.S. 564 (1972).

Rubin v. Ikenberry, 933 F.Supp. 1425 (C.D. Ill. 1996).

Trejo v. Shoben, 319 F.3d 878 (7th Cir. 2003).

Webb v. Bd. of Trs. of Ball State Univ., 167 F.3d 1146 (7th Cir. 1999)

Weinstein v. Univ. of Ill., 628 F.Supp. 862 (N.D. Ill. 1986); Weinstein v. Univ. of Ill., 811 F.2d 1091 (7th Cir. 1987)

Eighth Circuit

Burnham v. Ianni, 899 F.Supp. 395 (D. Minn. 1995); Burnham v. Ianni, 98 F.3d 1007 (8th Cir. 1996) (en banc); Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997) (en banc).

Cooper v. Ross, 472 F.Supp. 802 (E.D. Ark. 1979).

Day v. Bd. of Regents of Univ. of Neb., 911 F.Supp. 1228 (D.Neb. 1995); Day v. Bd. of Regents of Univ. of Neb., 83 F.3d 1040 (8th Cir. 1996).

Frazier v. Curators of Univ. of Mo., 495 F.2d 1149 (8th Cir. 1974).

Gumbhir v. Curators of the Univ. of Mo., 157 F.3d 1141 (8th Cir. 1998).

Heublin v. Wefald, 784 F.Supp.2d 1186 (D. Kan. 2011).

Hibbs v. Bd. of Ed. of Iowa Cent. Cmty. Coll., 392 F.Supp. 1202 (N.D. Iowa 1975).

Hickingbottom v. Easley, 494 F.Supp. 980 (E.D. Ark. 1980).

Keating v. Univ. of S.D., 980 F.Supp.2d 1137 (D. S.D. 2014); Keating v. Univ. of S.D., 569 Fed. App'x. 469 (8th Cir. 2014).

King v. Univ. of Minn., 587 F.Supp. 902 (D. Minn. 1984); King v. Univ. of Minn., 774 F.2d 224 (8th Cir. 1985).

Milman v. Prokopoff, 100 F.Supp.2d 954 (S.D. Iowa 2000).

Mumford v. Godfried, 52 F.3d 756 (8th Cir. 1995).

Parsons v. Burns, 846 F.Supp. 1372 (W.D. Ark. 1993).

Russ v. White, 541 F.Supp. 888 (W.D. Ark. 1981); Russ v. White, 680 F.2d 47 (8th Cir. 1982).

Tonkovich v. Kan. Bd. of Regents, 1996 WL 705777 (D. Kan. 1996);
Tonkovich v. Kan. Bd. of Regents, 159 F.3d 504 (10th Cir. 1998).

Ninth Circuit

Adamian v. Jacobsen, 359 F.Supp. 825 (D. Nev. 1973); Adamian v. Jacobsen,
523 F.2d 929 (9th Cir. 1975).

Bignall v. N. Idaho Coll., 538 F.2d 243 (9th Cir. 1976).

Cohen v. San Bernardino Valley Coll., 883 F.Supp. 1407 (C.D. Cal. 1995);
Cohen v. San Bernardino Valley Coll., 92 F.3d 968 (9th Cir. 1996).

Demers v. Austin, 2011 WL 2182100 (E.D. Wash. 2011); Demers v. Austin,
729 F.3d 1011 (9th Cir. 2013); Demers v. Austin, 746 F.3d 402 (9th Cir.
2014).

Gressley v. Deutsch, 890 F.Supp. 1474 (D. Wyo. 1994).

Haimowitz v. Univ. of Nev., 579 F.2d 526 (9th Cir. 1978).

Harris v. Ariz. Bd. of Regents, 528 F.Supp. 987 (D. Ariz. 1981).

Heath v. Cleary, 708 F.2d 1376 (9th Cir. 1983).

Hong v. Grant, 516 F.Supp.2d 1158 (C.D. Cal. 2007); Hong v. Grant, 403 Fed.
App'x. 236 (9th Cir. 2010).

Idaho State Univ. Faculty Ass'n for the Preservation of Free Speech v. Idaho
State Univ., 2012 WL 1313304 (D. Idaho 2012).

Lamb v. Univ. of Haw., 145 F.3d 1338 (9th Cir. 1998).

Lopez v. Fresno City Coll., 2012 WL 844911 (E.D. Cal. 2012).

Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976).

Peacock v. Duval, 597 F.2d 163 (9th Cir. 1979); Peacock v. Duval, 694 F.2d
644 (9th Cir. 1982).

Rodriguez v. Maricopa Cnty. Cmty. Coll., 605 F.3d 703 (9th Cir. 2010).

Sadid v. Vailas, 936 F.Supp.2d 1207 (D. Idaho 2013).

Sheldon v. Bilbir Dhillon, 2009 WL 4282086 (N.D. Cal. 2009).

Starsky v. Williams, 353 F.Supp. 900 (D. Ariz. 1972); Starsky v. Williams, 512 F.2d 109 (9th Cir. 1975).

Toney v. Reagan, 326 F.Supp. 1093 (N.D. Cal. 1971); Toney v. Reagan, 467 F.Supp. 953 (9th Cir. 1972).

Wolfe v. O'Neill, 336 F.Supp. 1255 (D. Alaska 1972).

Tenth Circuit

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