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***669** MATTERS OF PUBLIC CONCERN AND THE PUBLIC UNIVERSITY PROFESSOR

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I. INTRODUCTION

The "matter of public concern" test is the threshold inquiry courts use to determine whether a public employee's expression falls within the bounds of constitutionally protected speech. This test has been extended into the realm of academia, and it is now used to determine the First Amendment value of professors' expression as well. Under the test, a professor's expression must relate to a matter of political, social, or other concern to the community to gain protection under the First Amendment.

What expression qualifies as a matter of political, social, or other concern to the community? For many reasons, this is a difficult question to answer both in ordinary public employment situations and in academia. Indeed, this article includes many cases where different courts (and different Justices) view the same set of facts, and come to opposite conclusions on whether the expression at issue pertained to a matter of public concern. This article will trace these free speech cases arising in the academic environment in order to determine what expression falls within the ambit of public concern and what expression does not. Despite the gray areas between public and private concern, an analysis of these cases can elucidate trends and provide insight for the professor-plaintiff attempting to evaluate a free speech case.

Public concern cases involving professors tend to arise in one of four different contexts: faculty expression concerning the internal affairs of the institution; faculty expression motivated by personal interest; faculty expression made in private and not shared with the public; and vulgar or derogatory language employed by faculty in the classroom. In this article I will argue that, in each of the four contexts, courts have not always been sensitive to the special differences between ordinary public employment and employment at an institution of higher education. Also, in all four contexts, it is clear that the matter of public concern test does not encompass the traditional notions of protection offered by academic freedom.

To explain the trends in public concern jurisprudence, it is helpful to review the history of constitutional protection for public employee free expression. ***670** Part II of this article will review the rise of First Amendment protection for academic freedom, the development of the public concern test, and academic standards for free expression. Part III will describe the current procedural hurdles that plaintiffs and defendants must maneuver when a professor's free speech rights are being litigated. Part IV contains an analysis of public concern cases in terms of the four categories listed above. Finally, Part V presents academic criticism of the matter of public concern test and alternative legal standards for determining the First Amendment value of professors' expression.

Professors must exercise caution when relying on the First Amendment or academic

freedom to shield their expression from retaliation because only speech on matters of public concern enjoys protection under the Constitution. The plaintiff-professor bears the burden of clearing this elusive hurdle of public concern before proceeding any further in the litigation. And, as Part III will illustrate, whether the expression relates to a matter of public concern is just the first of many hurdles that a professor must clear in litigating a free speech claim. Between the imposition of more procedural hurdles and the modern trends in public concern analysis, the scope of professors' protected speech has been limited.

II. HISTORY

A. Development of Academic Freedom

Before the "matter of public concern test" was adopted in 1968, public employee free speech rights were frequently evaluated under the "rights/privilege" approach. Under this approach, public employment was viewed as a privilege. As a condition of this privilege, public employees waived their rights to free expression. [FN1] Oliver Wendell Holmes, Jr., when he was a justice on the Supreme Judicial Court of Massachusetts, provided an example of the rights/privilege approach when he declared in McAuliffe v. City of New Bedford [FN2] that a police officer who commented on politics "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." [FN3] Later cases rejected Justice Holmes' rights/privilege approach and the implication that First Amendment rights are waived upon gaining public employment. [FN4] However, the rights of the public employee did not evolve into modern precepts overnight. Rather, a series of cases first broadened the associational rights of public employees, developed academic freedom as a recognized First Amendment right, and later led to the development of the matter of public concern test. In analyzing these cases, it is important to note that academic freedom first developed in contexts where outside actors attempted to interfere with individuals within the institution. Later academic freedom cases employing the public concern test typically ***671** involve intra-institutional conflict, where a professor alleges that the college administration itself has punished protected expression.

In Wieman v. Updegraff, [FN5] the Supreme Court initiated the process of articulating significant protections for the associational rights of public employees. In Wieman, a citizen named Paul Updegraff sued to enjoin state officials from paying certain staff and faculty members of Oklahoma Agricultural and Mechanical College. These staff and faculty members had refused to take a loyalty oath. At the time, an Oklahoma statute required state employees to swear that they had not been nor would ever become members of "subversive" groups. [FN6] The staff and faculty members in question intervened in the suit, asserting Due Process and Contracts Clause violations. Updegraff was successful in the District Court of Oklahoma County, where the loyalty oath was upheld and the State ordered to terminate the faculty and staff members. The Supreme Court of Oklahoma upheld the lower court decision, which led the intervenors to appeal to the Supreme Court. [FN7]

In reviewing the Oklahoma statute, Justice Clark recognized that the state legislature pursued a valid interest in national security by requiring loyalty oaths of state employees. The Court reasoned, however, that the national security interest must be pursued without infringing the rights of citizens. [FN8] This particular loyalty oath, the Court said, infringed those rights by violating the Due Process Clause of the Fourteenth Amendment. The violation stemmed from the fact that

> association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources .... Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process. [FN9]

Justice Clark's opinion concluded, "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or

discriminatory." [FN10]

Justices Black and Frankfurter wrote concurring opinions in Wieman that focused on the free speech implications of loyalty oaths. Justice Black wrote:

> ***672** We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven. And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost. [FN11]

Similarly, Justice Frankfurter's concurrence in Wieman focused on the importance of academic freedom:

> It is the special task of teachers to foster those habits of open- mindedness and critical inquiry which alone make for responsible citizens .... Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open- mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. [FN12]

Following Wieman, a series of loyalty oath cases further developed the rights of the public employee. These cases laid the foundation for constitutional protection of academic freedom. In Sweezy v. New Hampshire, [FN13] a statute empowered the New Hampshire Attorney General to conduct investigations into the loyalty of state employees. When called before the Attorney General for questioning, Paul Sweezy, a faculty member of the University of New Hampshire, read a prepared statement and refused to answer questions that "transgress[ed] the limitations of the First Amendment." [FN14] The Attorney General summoned Sweezy to testify again later in the year. In the second proceeding, the Attorney General questioned Sweezy regarding his affiliation with the "Progressive Party," and whether he had advocated or taught Marxist or socialist ideals in class. [FN15] Sweezy again refused to answer these questions. To force compliance with the investigation, the Attorney General then summoned Sweezy to a county superior court where Sweezy was asked to testify as a witness in the presence of a judge. Sweezy refused, and was found in contempt of court. [FN16] The Supreme Court of New Hampshire upheld Sweezy's contempt conviction upon appeal. Sweezy appealed from that decision, and gained review by the Supreme Court of the United States on certiorari. [FN17]

***673** Three justices joined Chief Justice Warren's plurality opinion in Sweezy. The plurality said that the Attorney General's actions in exposing past political associations and in questioning the content of university lectures through compulsory disclosure violated Due Process and constituted an invasion of Sweezy's liberty in academic freedom and political expression: "We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression--areas in which government should be extremely reticent to tread." [FN18] The Attorney General's actions moved Chief Justice Warren to offer this defense of protection for academic freedom in a democracy:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principals are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. [FN19]

Justices Frankfurter and Harlan concurred, reasoning that the attorney general's investigation violated Due Process. The concurring justices, however, used different language to emphasize the importance of academic freedom:

> For society's good--if understanding be an essential need of society-- inquiries into [anthropology, economics, law, psychology, sociology and related scholarship], speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's

well-being, except for reasons that are exigent and obviously compelling. [FN20]

Following these pronouncements, the Court again visited the issue of loyalty oaths and foreshadowed a balancing test for the future academic freedom cases in Keyishian v. Board of Regents. [FN21] That case had its origins in the merger of the University of Buffalo, which had been a private university, into the New York State University system. As employees of the system, faculty and staff of the former University of Buffalo were required to sign anti-Communist loyalty certificates. Some of those Buffalo employees refused to do so. At the time, state employment was conditioned upon compliance with ***674** the "Feinberg Law," a complex series of regulations designed to prevent public employment of "subversive" persons. [FN22] As a result of non-compliance with the certificate requirement, university officials did not renew the teaching contract of Harry Keyishian, an English instructor. Officials also dismissed a part-time lecturer who refused to answer a question under oath regarding affiliation with subversive groups. Two other faculty members, who were still under contract, were allowed to continue teaching but were subject to discipline pending the outcome of litigation. [FN23] The faculty and staff members pursued declaratory and injunctive relief in federal court, but, after some hesitation, a three-judge panel of the Western District of New York upheld the validity of the Feinberg Law. [FN24] The Supreme Court noted probable jurisdiction over the case and reversed. [FN25]

Writing for the majority of the Supreme Court, Justice Brennan invalidated, as violative of Due Process, provisions of the statutory scheme that required a loyalty certification. New York had a legitimate and substantial interest in protecting its educational system from subversion, he said, but that interest "cannot be pursued by means that broadly stifle fundamental personal liberties." [FN26] Quoting Supreme Court precedent, [FN27] Justice Brennan articulated a strong standard for protection of associational rights that resembled a strict scrutiny test:

We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most preciousfreedoms," "[f]or standards of permissible statutory vagueness are strict in the area of free expression .... Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wide of the unlawful zone ...." [FN28]

Justice Brennan also noted that:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. [FN29]

***675** Three other justices joined Justice Clark, who had written the opinion invalidating the Wieman loyalty oath, in dissenting from the majority opinion in Keyishian. Justice Clark issued a strong critique of Justice Brennan's reasoning, which, in a "blunderbuss fashion ... [made] it difficult to grasp the true thrust of its decision." [FN30] Justice Clark dissented on a broad range of issues, pointing out that Board of Trustees no longer required the certificate and oath and that the faculty and staff members had not exhausted their administrative remedies. While never citing Wieman, Justice Clark also objected to the precedent set in Keyishian, finding it inconsistent with "over 15 years of this Court's history." [FN31] Justice Clark noted, furthermore, that two of the statutes stricken in the majority decision could not be enforced against the plaintiff-appellants because those statutes applied only to civil service and high school employees. [FN32] Justice Clark's dissent was not limited to arguments for judicial consistency and restraint. Ultimately, Justice Clark concluded that the New York loyalty oath was justified under a state's interest in "self-preservation." [FN33] He wrote:

> [The issue] is simply this: May the State provide that one who, after a hearing with full judicial review, is found to have willfully and deliberately advocated, advised, or taught that our Government should be overthrown by force or violence or other unlawful means ... is prima facie disqualified from teaching in its

university? My answer, in keeping with all of our cases up until today, is "Yes"! [FN34]

Despite this strong language, Clark's opinion was the minority one. Academic freedom had become a "special concern of the First Amendment." [FN35]

A recent decision from the Fourth Circuit Court of Appeals deserves mention here. In Urofsky v. Gilmore, [FN36] six professors challenged a Virginia statute that prohibited state employees from accessing "sexually explicit" materials on computers that are owned or leased by the state. A provision in the statute allowed state employees to access the prohibited materials when pursuing approved research or when permission from certain agency heads had been obtained. [FN37] The professor-plaintiffs in Urofsky alleged that the prohibition nevertheless violated the academic freedom of professors. The professors were successful in the District Court, where the statute was invalidated on First Amendment grounds at summary judgment. [FN38] On review, the Fourth Circuit reversed, finding that the statute did not infringe any right to ***676** academic freedom. [FN39] The court reasoned that the right of academic freedom, if it exists at all, inheres in the institution rather than the individual professors. [FN40] Since the statute allowed an institution to determine approved research, the court said, no violation of the institutional academic freedom could occur under the statute. [FN41]

According to the Fourth Circuit, academic freedom for individual professors is a professional norm rather than a constitutional right. [FN42] To reach this conclusion, the court distinguished both Sweezy and Keyishian as relying upon Due Process grounds rather than academic freedom. [FN43] Further, the court characterized these cases as supporting an institutional rather than an individual right to academic freedom. [FN44] The court also relied upon Epperson v. Arkansas [FN45] and Edwards v. Aguillard [FN46] to reject the notion of an individual right to academic freedom. [FN47] In both Epperson and Edwards, the Supreme Court invalidated statutes that interfered with or prohibited the teaching of evolution. In both cases, the statute in question was invalidated on Establishment Clause grounds. The Fourth Circuit reasoned that both Epperson and Edwards provided the Court with an opportunity to articulate an individual right to academic freedom, yet the Court failed to do so. [FN48] This failure, the Fourth Circuit said, represents an unwillingness to create a constitutional right to academic freedom in individual teachers. [FN49]

Urofsky aside, the rights of public employees have progressed greatly since the days of application of the rights/privilege doctrine. The Keyishian-era decisions marked a change in the law governing public employment from a regime of waiver of First Amendment rights to a system where the state could regulate association only with narrow specificity. Keyishian, according to Professor Richard H. Hiers, represents the "high water mark" for academic freedom in American courts. [FN50] One year after Keyishian was decided, the Supreme Court articulated the standard by which it would measure free expression cases for the ordinary public employee: whether expression centered on a matter of public concern. [FN51] Later, this standard for ordinary public ***677** employees was extended to the higher education context, and to the speech of college and university professors. [FN52]

B. The Modern Standard: Matters of Public Concern

Pickering v. Board of Education [FN53] and its progeny help to define the critical element in a modern public employee freedom of speech case: whether the expression centered on a matter of "public concern." In Pickering, a county board of education dismissed Marvin Pickering, a public high school teacher, for writing a letter to a local newspaper. The teacher wrote critically of the local school board, its handling of bond issue proposals, its allocation of finances, and its suppression of teachers' adverse opinions to an upcoming tax increase. [FN54] At a hearing required by state law, the school board based Pickering's dismissal on false statements in the letter, damage to the reputations of local school officials, and for disruption of the educational process. [FN55] Pickering sought reinstatement by bringing suit, but the Board's decision to dismiss Pickering was upheld in the Circuit Court of

Will County and on appeal to the Illinois Supreme Court. [FN56] On appeal, the Supreme Court of the United State noted probable jurisdiction over Pickering's case and reversed. [FN57]

In reversing Pickering's dismissal, the Supreme Court held that "statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors." [FN58] The Court found that some of Pickering's statements in the letter were false. It went on to say, however, that the interest in having debate on matters of public interest is so great that the public officials defamed by the statement would have to prove "actual malice" on Pickering's part before they could collect damages from him. [FN59] In addition to expressing strong support for the First Amendment value of public employees' speech, the Pickering Court articulated a new rule for protection of this expression: to gain constitutional protection for their expression, public employees must comment upon matters of public concern, subject to a balancing test of relative employee and employer interests. [FN60] The Court found that Pickering's letter did constitute expression on matters of public concern and that Pickering's interest in expression outweighed his employer's interest in maintaining an efficient school system. [FN61]

Pickering presents problems for the modern-day professor-plaintiff because, although it described guidelines for determining public concern, it ***678** failed to define public concern with any specificity. The Court cited an "enormous variety of fact situations" that would prevent any attempt to "lay down a general standard against which all such statements may be judged." [FN62] By not defining public concern, the Court forced plaintiffs to infer the standard from post-Pickering cases, which is not an easy task. Furthermore, Pickering concerns a high school teacher, rather than an employee of a college or university. In later cases, when professors alleged that their institution disciplined them in violation of free expression, courts applied the Pickering standard without spelling out the difference between routine public employees and professors who teach at public institutions. [FN63]

Later Supreme Court cases further defined the Pickering standard for matters of public concern. In doing so, however, the Court erected higher barriers for plaintiffs' actions and limited the scope of matters of public concern. None of those cases involved a college or university professor, but the limitations defined by the Court are important to modern free expression actions by those in higher education. In Connick v. Myers, [FN64] for example, Sheila Myers was fired for circulating a questionnaire to coworkers. Myers, an Assistant District Attorney in Orleans Parish, Louisiana, circulated the questionnaire to protest her transfer to another department. Myers thought that her transfer would violate ethical duties, as she was to prosecute suspects in a section of the criminal court where she had previously counseled individuals. [FN65] When one of Myers' supervisors told her that none of her colleagues shared her concerns about the ethical conflict of interest involved in the transfer, Myers said she would research the issue. [FN66] She did that by distributing a questionnaire to coworkers during a lunch hour. The questionnaire guaranteed anonymity, and requested coworkers to comment on office issues, including transfers, the existence or not of an office "rumor mill," the performance of other office employees, office morale, pressure to work on political campaigns, honesty of co-workers, and the possibility of creating a grievance committee. [FN67] Connick, the District Attorney, dismissed Myers for circulating this questionnaire. Myers then brought suit in federal court alleging that she had been retaliated against for protected expression. [FN68] The District Court for the Eastern District of Louisiana ordered Myers' reinstatement, back pay, and compensatory damages. [FN69] Connick appealed, ***679** but the Fifth Circuit upheld the District Court's opinion. [FN70] Connick appealed again, gaining Supreme Court review by certiorari. [FN71]

In evaluating Myers' claim, the Supreme Court held that employee expression must be evaluated in light of the "content, form, and context of a given statement, as revealed by the whole record." [FN72] Applying this analysis, the Court found that all the issues on Myers' questionnaire except one failed the matters of public concern test. [FN73] Only a question regarding employer pressure to participate in

political campaigns was held to be a matter of public concern. [FN74] The Court characterized Myers' questionnaire as a personal grievance, a subject that in most circumstances is not appropriate for federal court review. [FN75] In dicta, the Court said that: "While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." [FN76] Saying that Myers did not seek to inform the public of official wrongdoing, the Court refused to "constitutionalize [an] employee grievance." [FN77]

Connick is important for two reasons: First, Connick establishes that public employee speech must be evaluated by its "content, form, and context ... as revealed by the whole record." [FN78] Second, Connick limits the scope of protected expression by classifying some internal office disputes as personal grievances that are not matters of public concern, except under the most unusual circumstances. [FN79]

In Rankin v. McPherson, [FN80] Ardith McPherson, a Deputy Constable in the office of the Constable of Harris County, Texas, was dismissed for making a comment to a coworker. Upon hearing of an attempted assassination on former President Reagan's life, McPherson had said, "[If] they go after him again, I hope they get him." [FN81] A supervisor reported this statement to the Constable, Walter Rankin, who conducted an investigation and dismissed her. [FN82] McPherson brought suit in federal court, but the District Court for the Southern District of Texas, ruling on a motion for summary judgment, upheld her discharge. [FN83] On appeal, the Fifth Circuit Court of Appeals reversed and remanded, finding that unresolved material issues of fact precluded summary ***680** judgment. [FN84] On remand, the District Court again found for Rankin, ruling from the bench that the statement McPherson made was not protected speech. [FN85] The Circuit Court reversed again, finding that McPherson's speech was protected and that the government's interest in maintaining efficiency did not outweigh McPherson's interest in free expression. [FN86] The Circuit Court then remanded the case to the District Court for a determination of damages. [FN87] Rankin then applied for, and was granted, certiorari by the Supreme Court. The Supreme Court affirmed the Circuit Court in a five-to-four opinion written by Justice Marshall. [FN88]

During Rankin's investigation, McPherson admitted to making the comment, and affirmed that she "meant" what she said. [FN89] As an aside, the Supreme Court, in a footnote, recognized an ambiguity in what McPherson may have "meant." [FN90] The Court noted that she could have meant that she disliked the president, or that she approved of political assassination. [FN91] The Court remarked that this "ambiguity makes evident the need for carefully conducted hearings and precise and complete findings of fact." [FN92] This topic is discussed more fully below.

The Court found that the facts of Rankin supported a finding for McPherson, despite her apparent status as a law enforcement officer. The Court recognized that: "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." [FN93] Vigilance in examination of the facts of Rankin illustrated that public disruption was highly improbable: all employees of the office, regardless of their job function, were called "Deputy Constables." [FN94] McPherson's job was purely clerical. [FN95] She worked in an office without public access or a telephone as a data entry clerk for a civil court. [FN96] Furthermore, the comment in question arose from a private conversation that was political in nature. [FN97] Taking these facts into account, the Court found that McPherson's statements plainly dealt with a matter of public concern. [FN98] The Court noted: "The inappropriate or controversial character of a statement is irrelevant ***681** to the question of whether it deals with a matter of public concern." [FN99] Further, finding that McPherson's expression did not cause workplace disruption, the Court held that the discharge violated her First Amendment rights to freedom of expression. [FN100] Note that Rankin elevated the determination of whether the expression was a matter of public concern to a threshold inquiry. [FN101] Plaintiffs now have to prove that their expression is a matter of public concern before a court will proceed to balance interests. [FN102]

Justice Scalia registered a strong dissent in Rankin, commenting that employees of law enforcement organizations should not be permitted to "ride with the cops and cheer for the robbers." [FN103] Justice Scalia argued that McPherson's comment did not deserve constitutional protection, as the comment was different in nature from the expression found to be a matter of public concern in Pickering and Connick. [FN104] He viewed McPherson's comment as resembling an advocacy of violence or a threat against the president, two categories of speech unprotected by the First Amendment. [FN105] Furthermore, he argued, any interest McPherson had in making the comment should have been outweighed by the government's interest in maintaining an efficient workplace. [FN106] Rankin had important interests in maintaining the confidence of the public, Justice Scalia said, and those interests would be undermined by tolerating employees who advocate "that the president [should] be killed." [FN107]

In Pickering, Connick, and Rankin, there was no dispute about the substance of the public employee's expression. In Waters v. Churchill, [FN108] the Court set down a rule for situations in which the parties disagree about the nature of the utterance. In Waters, Cheryl Churchill, a nurse at a public hospital employed on an "at-will" basis, made comments critical of the hospital to a coworker during a break. [FN109] A hospital supervisor investigated the comments, Churchill's past behavior, and Churchill's attitude, and concluded that the comments were disruptive and negative. [FN110] The supervisor's research revealed that Waters had disparaged the hospital and its administration, and that this behavior adversely affected the workplace. [FN111] For that reason, Ms. Churchill was fired.

Churchill claimed that she had criticized a "cross-training" policy for nurses and the decision-making of the Vice President for Nursing at the hospital. ***682**[FN112] Churchill was concerned that the cross-training policy, where nurses substituted for staff shortages in other departments of the hospital, endangered the quality of care for patients. [FN113] Churchill alleged that her comments constituted protected expression and that she was illegally dismissed for expressing them. [FN114] Churchill brought suit in federal court, where the District Court for the Central District of Illinois held that neither version of the conversation was protected, and even if either version were protected, the potential for disruption due to Ms. Churchill's comments negated any interest that she might have had in expressing herself. [FN115] The Seventh Circuit Court of Appeals reversed, holding that the speech, viewed in a light most favorable to Churchill, pertained to a matter of public concern, and that the expression was not disruptive. [FN116] The Supreme Court granted certiorari and held in a plurality opinion that Churchill's speech was not protected. [FN117]

For purposes of public concern analysis, the Court used the employer's version of Churchill's comments. The Court concluded that Churchill's expression, according to the hospital's version of the facts, did not satisfy the public concern test. [FN118] In addition, the Court said, even if one of the two versions did constitute a matter of public concern, the disruptive effects of the speech would have negated any interest Churchill would have had in the expression. [FN119] There are two important principles to glean from Waters: first, where there is a disagreement over the content of an employee's expression, the employer must conduct a reasonable investigation to determine what was actually said. [FN120] The employer's investigation will, however, not be limited by the legal rules of evidence or procedure--that is, the employer may rely on hearsay, past actions of the employee, and other evidence that might be excluded from a court hearing. [FN121] Second, a court will give deference to the employer's reasonable conclusions about what was said, and to reasonable predictions of disruption that might flow from the employee's expression. [FN122] In cases where the plaintiff alleges that the employer made an inaccurate conclusion about the content of the employee's speech, the employee may still have state or federal statutory remedies. [FN123]

The Pickering line of public concern cases solidified several rules for the protection of public employee's speech. Pickering protected employee ***683** speech where it is a matter of public concern, subject to a balancing of employee and state employer interests. [FN124] Connick established that the content, context and form

of the expression must be used to evaluate public concern, and that personal grievances are not matters of public concern. [FN125] Rankin established that the matter of public concern test is a threshold inquiry that must be proved by the plaintiff before an inquiry into the balancing of employee and employer interests. [FN126] Waters granted deference to the state as employer in investigating and determining the content of and potential for disruption of an employee's expression. [FN127] Connick, Rankin, and Waters, in further defining the notion of public concern, limited the scope of protected expression for public employees.

C. Academic Standards of Free Expression

Well before Wieman, Sweezy, Keyishian, or the Pickering line of public concern cases, the American Association of University Professors (AAUP) developed the seminal writing on academic freedom: The 1940 Statement of Principles on Academic Freedom and Tenure. [FN128] The 1940 Statement, which has been adopted by more than 150 organizations in higher education, [FN129] sets out broad protections for academic expression. Here is what it said under the heading "Academic Freedom:"

> (a) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties ....
>
> (b) Teachers are entitled to freedom in the classroom in discussing the subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subjects ....
>
> (c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution. [FN130]

Although it has been refined over the years, the 1940 Statement still stands for the proposition that professors must have broad freedom of expression tempered by responsibility and thoughtfulness. Consistent with the Statement, the administration of a college or university should ensure that faculty instruct within their areas of expertise and assignment. [FN131] But, "university professors may not be ordered what to teach and what not to teach to their students, and surely not what examples may or may not be used, what tone to take, what readings to stress, and so on." [FN132]

As will be noted below, courts do quote the 1940 Statement and other AAUP policies, but they have not protected expression to the extent endorsed by the AAUP and others. [FN133]

III. CURRENT PROCEDURAL HURDLES

The matter of public concern test constitutes the principal hurdle that plaintiffs must clear in litigating a public institution's alleged infringement of protected expression. [FN134] The plaintiff must show that the expression may be "fairly characterized as constituting speech on a matter of public concern." [FN135] This determination is a question of law for the court and must be based on an analysis of "content, form, and context of a given statement, as revealed by the whole record." [FN136] Additional hurdles also exist. After it is satisfied that a professor's speech related to a matter of public concern, a court will engage in a balancing test to determine the relative interests of the parties. [FN137] It will weigh "the interests of the [employee], as a citizen, in commenting upon matters ***685** of public concern," against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [FN138] The state bears the burden of justifying the discipline, but the difficulty of the burden varies depending upon the nature of the employee's expression. The more

directly and importantly the expression bears upon topics of public concern, the greater the government's burden of proving actual or potential disruption. [FN139]

Factors included in the balancing test include: "[W]hether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." [FN140] Underlying this balancing test is the principal established in Pickering that: "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of citizenry in general." [FN141] In Waters, this same principal was stated more forcefully: "[T]he government as employer indeed has far broader powers than does the government as sovereign" and an employer's reasonable prediction of disruption can justify punishment for protected speech. [FN142]

Plaintiffs must also show that the expression at issue was a substantial cause of the state employer's retaliation. [FN143] This is a question of fact for the jury. [FN144] Additionally, an educational institution may escape liability where, even in the absence of protected conduct, it can show by a preponderance of the evidence that it would have disciplined a professor on other grounds. [FN145] This is termed the "same decision anyway" defense: the employer could have disciplined the employee regardless of the protected expression. [FN146] The defense was created to avoid placing an employee "in a better position as a ***686** result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." [FN147]

Qualified immunity may become an issue when professors assert that the institution or its officers violated the First Amendment. Qualified immunity shields public officials acting under their discretionary authority from liability when sued in their individual capacities unless they abridge "clearly established ... constitutional rights of which a reasonable person would have known." [FN148] Qualified immunity shields those officials from monetary damages; they are still subject to injunctive, equitable, or declaratory relief. [FN149] Qualified immunity satisfies the "need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority." [FN150] Some circuits read the qualified immunity defense quite liberally. The Eleventh Circuit, for example, has held that defendants who raise qualified immunity in 42 U.S.C. § 1983 suits are shielded "except in the extraordinary case where Pickering balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful." [FN151] The problem with this standard for qualified immunity is that it is difficult to predict what the highly fact-sensitive Pickering public concern and balancing tests will yield. Accordingly, when state actors enjoy protection from liability except where their actions would inevitably fail the Pickering test, there is potential for chilling of protected speech.

Finally, there is an emergent requirement that professor-plaintiffs must have commented on matters of public concern in their role as a private citizen rather than as a public employee. [FN152] This distinction between job- related speech and private-citizen speech is a result of the recently decided Urofsky v. Gilmore. [FN153] In Urofsky, the Fourth Circuit upheld a state statute prohibiting public employees from accessing sexually explicit materials on the Internet. The court reasoned that the restriction was valid because accessing explicit materials while on the job could not constitute protected expression. [FN154] That is, since the prohibited activity applies to citizens only in their roles as state employees, the statute did not restrict expression made in the ***687** role of a private citizen on matters of public concern. To come to this conclusion, the court reasoned that the state literally "purchases" the speech of the professors and other public employees by employing them and providing Internet access. [FN155] Accordingly, the court said, the state can control expression that it purchases. To do otherwise would give employees "a First Amendment right to dictate to the state how they will do their jobs." [FN156]

Urofsky is difficult to square with public concern precedent. [FN157] The case relies on a false analogy, and concludes erroneously that protecting job-related speech would empower employees to ignore their employer's wishes or act in defiance of their directions. [FN158] Nevertheless, for professor-plaintiffs in the Fourth Circuit, Urofsky requires that their expression be made in their role as a private citizen to gain First Amendment protection.

IV. THE MODERN CASES AND TRENDS

Professors' free speech claims tend to arise in four contexts: expression concerning the internal affairs of the institution, expression motivated by personal interest, expression made in private and not shared with the public, and vulgar language or derogatory language employed in the classroom. In all four contexts, courts have not always been sensitive to the special nature of higher education. [FN159] Some courts apply secondary-school precedent to the ***688** college setting without mention of the contextual differences. [FN160] What is worse, courts that equate either K-12 classrooms or general public employee cases with the university setting ignore the special part context plays in public concern cases according to language employed in Connick. [FN161] Courts should recognize the special context of higher education and the importance of academic freedom, and act to broaden protections for professors' expression. [FN162] Significant case law and sound reasoning support drawing a distinction between expression made inside and outside the higher education context and providing greater protection to those in academe. [FN163]

A. Internal Affairs of the Institution

Connick limited the scope of protected employee speech by establishing that some conflicts involving internal affairs of public offices are not matters of public concern. Otherwise, the Court reasoned, "[E]very criticism ... would plant the seed of a constitutional case." [FN164] In order to avoid the ability of employees to turn an office dispute into a "cause cèlèbre," [FN165] courts have ***689** established a high standard for showing that expression bears upon a matter of public concern when professors comment on the internal affairs of their institutions. Public concern exists, the courts say, only where professors' expression "directly affects the public's perception of the quality of education in a given academic system." [FN166] Reasonable persons can, however, disagree on what issues "directly affect" public perception of a school's quality. By further limiting the scope of public concern, Connick has made predicting the outcome of public concern cases more difficult.

The Eleventh Circuit, in particular, has found that many important quality-affecting issues in higher education are internal matters that do not deserve First Amendment protection. These include salary levels, [FN167] course syllabi, [FN168] tenure decisions, [FN169] and the quality of textbooks used by a department. [FN170] Courts often cite two Eleventh Circuit high school cases to conclude that no public concern exists at a college regarding internal affairs disputes. These decisions held that expression on course registration, [FN171] teaching assignments, [FN172] and willingness to share jobs [FN173] were motivated by personal interest and were therefore not matters of public concern.

In some internal affairs cases, which usually involve non-tenured professors, courts have denied protection to faculty expression without performing a public concern analysis. For example, academic standards, [FN174] teaching methods, [FN175] and choice of classroom materials and curriculum [FN176] are commonly ***690** ruled to be protected by the academic freedom of the institution, not that of the teacher. [FN177] Judges reason that affording constitutional protection to these issues would keep the institution from defining and performing its educational mission. [FN178]

Jackson v. Leighton [FN179] illustrates the way courts sometimes dispose of internal affairs disputes. In that case, W. Thomas Jackson, an assistant professor and department head employed by the Medical College of Ohio (MCO) spoke out

regarding a merger of MCO with Toledo Hospital. [FN180] After the Ohio General Assembly rejected this merger, he commented on a transfer of the MCO pediatric division to Toledo Hospital. [FN181] In exchange for the transfer of the pediatric division, Jackson said, MCO would receive $4 million from a corporation called ProMedica. [FN182] Jackson then criticized a tenure offer made to a new professor without a candidate search. The offer included full tenure, an institute directorship, and more space and resources than other professors received. [FN183] Jackson also advocated sending the Board of Trustees a no-confidence letter in response to the MCO President's actions in supporting the merger and tenure offer. [FN184] Jackson's vigorous dissents from institutional policy resulted in his removal from the chairmanship of the Orthopedic Surgery Division. [FN185] Jackson filed suit for injunctive relief in federal court in the Northern District of Ohio. The court ruled for the college on summary judgment. [FN186] Jackson appealed, but the Sixth Circuit Court of Appeals affirmed on different grounds. [FN187]

The Sixth Circuit ruled that Jackson's comments on the MCO merger with Toledo Hospital constituted matters of public concern. [FN188] The merger could have resulted in the closing of a state-funded college and the merger was debated in the Ohio General Assembly. [FN189] Furthermore, MCO provided medical care to many in the community, making its closing important to the locality. [FN190] The court found, however, that Jackson's comments on the transfer of the pediatric division and on the disputed tenure offer were not matters of public concern. [FN191] The court reasoned that the pediatric division transfer ***691** did not threaten the existence of MCO or affect the quality of health care provided in the area. [FN192] The court found that the grant of full-tenure to the person in dispute involved internal office politics and could "hardly be considered important to members of society." [FN193] Ultimately, the Sixth Circuit upheld Jackson's removal because his interest in expression was outweighed by the government's interest in operating a college efficiently. [FN194] Furthermore, Jackson failed to prove that his protected comments on the MCO merger were a substantial cause of his removal. [FN195]

Other courts have ruled that the following institutional affairs are matters of public concern because they directly affect the public's perception of education: accreditation and educational standards as they relate to students' future employment, [FN196] state public school curriculum, [FN197] racial oppression in the curriculum, [FN198] racial or ethnic discrimination, [FN199] compliance with federally-mandated programs for the disabled, [FN200] compliance with affirmative action programs, [FN201] misuse of public funds, [FN202] corruption or wrongdoing, [FN203] complaints regarding a college official misrepresenting academic credentials, ***692** [FN204] admissions policies at law schools, [FN205] complaints of sexual harassment, [FN206] and comments on gender equity problems. [FN207] Professors who comment on internal affairs issues must exercise caution, as many quality-affecting topics in higher education are not protected under the matter of public concern test. Furthermore, as Jackson illustrates, discerning the difference between protected and unprotected speech is difficult.

B. Private Interests and Personal Grievances

Professors' speech intended only to further a "private interest," such as a personal grievance, does not implicate a matter of public concern. [FN208] The courts have ruled that judicial intervention in the private, interpersonal affairs within a university would impair institutional efficiency. [FN209] One must, however, consider that some degree of personal interest underlies most speech. Accordingly, courts have recognized that expression delivered with mixed motives of personal and public interest may nonetheless be matters of public concern. [FN210] In Maples v. Martin, [FN211] for instance, the Eleventh Circuit Court of Appeals held that a critical self-study distributed with mixed motives of personal and professional interest to a visiting accreditation board was speech on a matter of public concern. The authors of the self-study were faculty members of the mechanical engineering department at Auburn University. [FN212] They had opposed the appointment of the mechanical engineering department head and had maintained an ongoing conflict with him on salary issues, allocations of resources, and management style. [FN213]

***693** After years of intradepartmental disputes, the professors surveyed other faculty members in the department and submitted the results of the self-study to an accreditation board. [FN214] In a tone critical of the department head, the self-study highlighted the need for new faculty, additional funding and physical space, and more faculty involvement in administrative decision-making. [FN215] One of the faculty members who helped perform the critical self-study hoped that it would "demonstrate that [the department head] 'had to go."' [FN216] The accreditation board reviewed the self-study and concluded that the information collected pertained to personnel and administrative matters, issues that were merely tangential to the accreditation process. [FN217] The accreditation board did, however, visit the department and found that intradepartmental conflict was "seriously disrupting the educational process there and affecting faculty in other engineering programs." [FN218] These findings led the institution's administration to transfer the professors in question to separate departments. [FN219] Despite the transfer, the faculty members did not suffer loss of income, rank, or tenure status. [FN220]

One of the professors, along with his co-plaintiffs, alleged that the transfer was motivated by retaliation for protected speech. [FN221] He sued and lost in the District Court and then appealed. [FN222] In reviewing the professor's claim, the Eleventh Circuit recognized the intense personal conflict in the mechanical engineering department. [FN223] Nevertheless, the court found that the self-study exposed substantive issues that could influence the public's perception of the quality of education provided by the department. [FN224] Specifically, it revealed weaknesses in the curriculum, inadequate facilities, low faculty-student ratios, and poor performance of students on professional licensing exams. [FN225] The court recognized that these issues could "endanger the ability of the Department to prepare students for professional engineering careers." [FN226] Despite the sometimes personal nature of the intradepartmental conflict, the Eleventh Circuit found that the self-study implicated matters of public concern. [FN227] The court concluded that the self-study authors were sincere in their efforts to raise public awareness about the problems within the mechanical ***694** engineering department, and that: "Speech by members of an academic community, even when critical in nature, should not be easily denied constitutional protection." [FN228] Although the Eleventh Circuit held that the professors' expression pertained to matters of public concern, the court upheld their transfer out of the mechanical engineering department because of the disruptiveness of their self-study. [FN229]

Johnson v. Lincoln University [FN230] involved similar departmental infighting based on "great personal animosity." [FN231] In that case, Professor William Johnson, an outspoken critic of Lincoln University's president, engaged in heated controversies within his department and sent a letter critical of the institution to an accreditation body. [FN232] As a result, Johnson was terminated. [FN233] Johnson brought suit in Federal District Court, where the college was granted summary judgment on his Due Process and First Amendment claims. [FN234] On appeal, the Third Circuit vacated the summary judgment order pertaining to Johnson's First Amendment claims. [FN235] In reviewing the departmental conflict, the Third Circuit Court of Appeals found that "at least some of the controversy concerned questions of educational standards and academic policy of a scope broader than their application within the department." [FN236] Specifically, Johnson objected to grade inflation, which he believed would harm the integrity of the institution and thus constituted "a kind of crime against students, Lincoln University, and Black people." [FN237] Johnson also complained generally about lowering academic standards, including the practice of allowing students to take advanced courses without completing prerequisite instruction, [FN238] and he claimed that academic freedom was being suppressed by the administration. A recent settlement in another case involving the Lincoln University administration supported this allegation. [FN239] Under the settlement provisions, Lincoln University administrators agreed to "refrain from violating any of the plaintiffs' constitutional rights." [FN240]

***695** The court found that issues contained in Johnson's letter to the accreditation board "clearly touch almost entirely upon matters of public concern." [FN241] The issues exposed by Johnson, including "a master's degree program that admitted students without a bachelor's degree and required only a tenth grade

literacy level," would be important to the public in evaluating the quality of education received by students. [FN242] The court recognized that employee expression, even if it is an "outgrowth of his personal dispute, does not prevent some aspect of it from touching upon matters of public concern." [FN243] Accordingly, despite the personal nature of Johnson's criticism of administrative policy, his comments were found to relate to matters of public concern. [FN244]

It should be noted that the underlying facts of Johnson helped his case. Johnson proved that genuine concern for the quality of education at Lincoln motivated his expression. He had left private employment and a substantial salary to teach at Lincoln, and he had advocated the achievement of equal opportunity for blacks. [FN245] Rather than complaining about how he personally or professionally disagreed with grade inflation, Johnson stated objections to the practice in terms of potential harm to the institution. [FN246] In one memorandum, for example, he said "Standards of Black Colleges are always suspect and it took 50-60 years for Lincoln to earn a high reputation for quality education and high standards." [FN247] These objections elevated his dissent to a matter of public concern: the educational quality of historically Black institutions.

Lowery v. Texas A & M University System [FN248] provides another example of a professor expressing concern on a professional issue. In that case, the women's basketball coach and women's athletic coordinator at Tarleton State University, Jan Lowery, complained of gender inequity. [FN249] As a result, Lowery claimed, she received poor performance evaluations, was passed over for promotion, and was demoted. [FN250] She brought suit asserting civil rights, due process, and First Amendment violations in federal district court. [FN251] The court noted that Lowery served as an advocate for women's athletics and had been appointed to a gender equity task force. [FN252] From years of experience as a women's advocate, Lowery, the court said, was the most likely person at the university to have developed an informed opinion on gender equity issues. [FN253] The court found that, despite having a personal interest in the university ***696** achieving gender equity, she spoke to a matter of public concern: "[H]er mixed motives will not convert otherwise public issues into private ones." [FN254]

Expression delivered by a professor with mixed motives, such as a genuine interest in improving the institution, may be found to relate to a matter of public concern. Accordingly, professors should use evidence that demonstrates good faith efforts to improve the institution. Professors who have made sacrifices for their school, such as the plaintiff in Johnson, should ensure that their service to the institution is pled in their complaint. On the other hand, professors whose expression is intended to advance a purely personal interest, such as a personal grievance, will not enjoy protection under the First Amendment. The courts have ruled that inquiry into interpersonal disputes hinders governmental efficiency, and they have expressed a clear antipathy to airing personal quarrels by means of litigation. For example, in Gumbhir v. Curators of University of Mississippi, the Eighth Circuit Court of Appeals commented that the parties had engaged in an "incredible sequence of petty, venomous exchanges ... that should have been beneath the dignity and intelligence of the seemingly well-educated combatants." [FN255]

C. Private Expression

Professors can speak privately on matters of public concern and still enjoy First Amendment protection. Expression does not lose First Amendment protection "simply because a public employee makes her comments privately to a supervisor rather than openly in public." [FN256] The time, place, manner and content of employee's private speech can, however, affect the Pickering balancing test. The Supreme Court protected private expression made on matters of public concern in Givhan v. Western Line Consolidated School District. [FN257] In Givhan, Bessie Givhan, a junior high school teacher, was fired for confronting the school's principal and criticizing school policy in a private setting. Givhan believed that the school's policies were discriminatory. According to the school principal, Givhan aired this belief using "petty and unreasonable demands" described as insulting, hostile, loud, and arrogant. [FN258] In her effort to win reinstatement, Givhan intervened in a

desegregation suit pending against the school district. [FN259] The District Court ordered reinstatement, holding that Givhan's dismissal was motivated by retaliation for her comments on school policy. On appeal, the Court of Appeals for the Fifth Circuit reversed, holding that the private nature of Givhan's expression ***697** stripped it of First Amendment protection. On certiorari, Justice Rehnquist wrote the opinion reversing the circuit court. [FN260] Finding that the principal was not an "unwilling participant" in Givhan's speech, the Court held that Givhan's expression was protected despite its delivery in a private setting. [FN261] The Court, however, did specify that private speech may affect the Pickering balancing test. This is because the time, place, manner, and content of an employee's private expression may affect the agency's institutional efficiency. [FN262]

While employees do not have to publicize their speech to enjoy First Amendment protection, some courts use publicity as a factor in finding the expression to be of public concern. In Williams v. Alabama State University, [FN263] for example, the court used lack of publicity incident to a professor's statement to show that no public concern existed. In that case, Professor Williams complained about an English textbook used in her department. This textbook had been written by Williams' department head and Williams found many grammatical errors in it. [FN264] Williams aired her criticism only to fellow members of her department. As a result of the criticism, Williams said, she was denied tenure and dismissed. [FN265] William filed suit in federal court and was successful there in showing that she was terminated in retaliation for protected speech. [FN266] On appeal, the Eleventh Circuit reversed, concluding that the lack of publicity surrounding William's complaints made it "especially evident" that no public concern existed. [FN267]

D. Use of vulgar language, derogatory language, and sexually-explicit language

Professors should avoid the use of vulgar or derogatory language in the classroom. The Supreme Court said in Waters v. Churchill [FN268] that the State has an "indisputable right to prohibit its employees from using profanity or abusive language." [FN269] Accordingly, the courts have held consistently that vulgar or racially-offensive expression does not constitute a matter of public ***698** concern regardless of the speaker's intent or the context of the situation. Professors who employ sexually-explicit language for pedagogical purposes may, however, enjoy protection for their expression under the First Amendment. Courts have found that expression on sexual topics can constitute a matter of public concern.

The use of vulgar language inside a public university classroom was found not to be a matter of public concern in Martin v. Parrish. [FN270] In Martin, a tenured professor, J.D. Martin, aggressively used colorful language to motivate and castigate his class. Despite receiving warnings from administrators, Martin continued to employ such expression as "bullshit," "hell," "damn," "God damn," and "sucks" in class. [FN271] Martin's castigation of the class ended with: "the attitude of the class sucks," and "if you don't like the way I teach this God damn course there is the door." [FN272] Following student complaints, administrators began termination proceedings that resulted in Martin's dismissal. [FN273] Martin sued in Federal District Court, where a jury found that he was dismissed in violation of his right to free speech. [FN274] The District Court, however, entered judgment notwithstanding the verdict for the institution, holding that Martin's profanity did not enjoy protection. On appeal, the Fifth Circuit affirmed. [FN275] Basing its holding on the existence of a national interest in promoting civic virtue, on the violation of a professor's duty to respect his students in the repeated use of in-class profanity, and on the potential for a negative influence on students implicit in the profanity, the Circuit Court found that his termination did not violate the First Amendment. [FN276] The students were, the court said, a captive audience to speech that lacked an academic purpose. [FN277]

Similarly, in Dambrot v. Central Michigan University, the use of racially-derogatory language during a team pep-talk was found not to involve a matter of public concern. [FN278] There, a basketball coach instructed his players to "'play like niggers on the court"' but not "to act like niggers in the classroom." [FN279] In upholding the termination of the coach, the Sixth Circuit Court of Appeals found

that the coach's speech imparted no socially or politically relevant message to his players. [FN280] Again, in Gee v. Humphries, a Federal District Court upheld the firing of a white professor who used a derogatory term in the classroom. [FN281] He had told a group of students before class that "Anyone who doesn't take advantage of the opportunities that are there ... ***699** may be guilty of having what some would call a 'nigger mentality."' [FN282] Although he had predicated his remark with a caveat that it was not directed at specific individuals, the court, relying on Dambrot and Martin, found that no public concern existed. [FN283]

A court may also deny protection to faculty expression if its derogatory content creates a reasonable prediction of public disruption. [FN284] In Jeffries v. Harleston II, Professor Jeffries, the chair of the black studies department at City University of New York (CUNY), delivered an off-campus speech on school curriculum and black oppression that contained a number of racist and anti-Semitic claims. [FN285] Jeffries was removed from his position at chair of the black studies department as a result of his inflammatory speech. [FN286] He brought suit in Federal District Court, where the reduction in position was held to have violated Jeffries' First Amendment rights. [FN287] On appeal, the Second Circuit affirmed. The institution then sought and won review in the Supreme Court. The Court vacated the Circuit Court opinion, remanding with instructions to reconsider Jeffries' case in light of the Court's recent decision in Waters v. Churchill. [FN288] On remand, the Second Circuit reversed the holding for Jeffries, reasoning that the institution's decision to discipline Jeffries was based upon a reasonable prediction of disruption. [FN289]

Jeffries' speech concerned the state public school curriculum and black oppression--topics that the Second Circuit found "squarely involv[ing] issues of public concern." [FN290] He expressed concern for these topics, however, in a particularly objectionable fashion: "Jeffries launched several ad hominem invectives at specific state and federal officials who supported the curriculum, calling one an 'ultimate, supreme, sophisticated, debonair racist,' and a 'sophisticated, Texas Jew."' [FN291] Jeffries also told his audience that Jews had a history of oppressing blacks. [FN292] "He said that 'rich Jews' had financed the slave trade, and that Jews and Mafia figures in Hollywood had conspired to 'put together a system of destruction of black people' by portraying them negatively in films." [FN293] Although there was no actual disruption from the speech, CUNY's prediction that a potential for public disruption existed, the court said, justified the removal of Jeffries from his chairmanship of the black ***700** studies department. [FN294] After the decision, Jeffries remained at CUNY as a regular faculty member. [FN295]

It is important to note that the Second Circuit denied the request of an amicus curiae to extend greater protections to Jeffries in the interests of academic freedom. [FN296] The court reasoned that Jeffries' service as departmental chair was "ministerial, and provides no greater public contact than an ordinary professorship." [FN297] His academic freedom was therefore not violated, the court said, by his removal from the position of chair, and CUNY had not attempted "to silence him, or otherwise limit his access to the 'marketplace of ideas' in the classroom" as a member of the faculty. [FN298]

Despite the sometimes vulgar and derogatory nature of expression on sexual issues, courts have ruled that sexually-explicit speech can constitute a matter of public concern. It is important to note that, in the following cases, the professors who used sexually-explicit language did so for pedagogical reasons. In Silva v. University of New Hampshire, [FN299] Donald Silva, a tenured professor of Communications, used sexual metaphors and similes to explain aspects of technical writing. During one class, he explained the idea of focus in terms of sexual pursuit and engagement: "Focus is like sex. You seek a target .... Focus connects experience and language. You and the subject become one." [FN300] At another class, Professor Silva described belly dancing as "jello [sic] on a plate with a vibrator under the plate." [FN301] Silva claimed that he used these examples for the pedagogical purpose of catching the attention of students. [FN302] In addition, Silva had employed this technique for years, having derived the specific analogy of focus and sex from writings and interviews involving Ernest Hemingway, David Bartholomew, and Ray Bradbury. [FN303]

Eight students complained of Silva's behavior. Two of the complaints involved Silva's behavior outside the classroom, where students alleged that he made inappropriate comments. [FN304] For instance, a student alleged that, addressing a student who was on her hands and knees retrieving a floor-level card index in the library, he had said: "It looks like you've had a lot of experience down there." [FN305] As a result of these complaints, the institution created shadow sections for Silva's classes, issued a formal reprimand, and charged him with violating the institution's sexual harassment policy. [FN306] A faculty hearing panel, the institution's president, and an appellate faculty panel evaluated Silva's behavior. Through a lengthy process, the institution determined ***701** that he had violated the sexual harassment policy. [FN307] The institution found that he had offended students, that twenty-six students had transferred to the shadow sections as a result, and that he may have intimidated the students who filed complaints. [FN308] The institution imposed a one-year suspension without pay and mandatory counseling sessions. [FN309]

Silva brought suit in a Federal District Court alleging violations of his First Amendment rights. The court held that Silva's in-class speech related to matters of public concern, that it was made for legitimate pedagogical purposes directly related to the protection of academic freedom, and that offensive speech should be tolerated in the classroom. [FN310] To arrive at this conclusion, the court cited dozens of recent newspaper articles concerning the appropriateness of using offensive speech in schools. [FN311] In addition, the court found that the sexual harassment policy employed impermissibly subjective standards and that its application to Silva's in-class speech violated the First Amendment. [FN312] The District Court ordered Silva's reinstatement with full pay and benefits. [FN313]

In Cohen v. San Bernardino Valley College, [FN314] Dean Cohen, a tenured professor, was disciplined for using vulgar language, sexual innuendo, and profanity in a remedial English class. Cohen played "devils advocate" with his remedial-level students, he assigned them controversial readings such as Jonathan Swift's "A Modest Proposal," and he led classroom discussions on obscenity, cannibalism, and consensual sex with children. [FN315] Cohen also required his students to write an essay defining pornography. [FN316] Cohen employed these pedagogical methods in order to "shock" the students and "make them think about ... controversial subjects." [FN317] A student in Cohen's class requested an alternative assignment for the pornography essay, stopped attending the class, and filed a grievance alleging that Cohen sexually harassed her. [FN318] As a result, Cohen was found to have violated a recently instituted sexual harassment policy and was required to comply with a number of disciplinary recommendations, including attending a sexual harassment seminar. [FN319] Cohen brought suit in federal court alleging that the disciplinary measures violated his First Amendment rights to free speech and academic freedom. [FN320]

***702** At the district court level, Cohen's expression was divided into two categories for purposes of applying the matter of public concern test: use of vulgarities and obscenities in the classroom, and curricular focus on sexual topics. [FN321] Citing Waters, Martin, and Dambrot, the district court ruled that Cohen's use of vulgarities and obscenities was not a matter of public concern. [FN322] The district court expressed some difficulty in determining whether the curricular focus on sexual topics pertained to a matter of public concern. [FN323] After a review of cases where employees were disciplined for criticism of their governmental employers, the district court concluded that Cohen's curricular focus on sexual topics did constitute a matter of public concern. [FN324] The right to this expression, however, was outweighed in the court's mind by substantial evidence of disruption that was presented by the institution. [FN325] On appeal, the Ninth Circuit did not engage in public concern analysis but did find that the sexual harassment policy used to punish Cohen was unconstitutionally vague, and it enjoined punishment of Cohen under the policy. [FN326]

Cases flowing from the Waters-Martin-Dambrot line suggest that courts may uphold an institution's punishment for use of vulgar or racially derogatory language, whether or not the language is meant to offend, inside or outside the classroom.

[FN327] Courts have, however, granted First Amendment protection to sexually-explicit expression when it is used for pedagogical purposes.

V. COMMENTARY

A. Academic Writings on Matters of Public Concern

In a 1988 comment, Dr. Perry A. Zirkel painted a bleak picture for faculty involved in disputes over their expression:

> The results of [my] analysis are sobering for the faculty member in higher education who might drink too deeply of the bottle labeled "academic freedom" as a euphoric cure for various problems with colleagues, administrators, and external government agencies ....
>
> Regardless of the faculty member's rank and discipline and regardless of whether s/he is nontenured or tenured, whether the adverse action is the denial of a salary increment or the loss of employment, whether the expressive conduct is within or outside the classroom, and whether the academic freedom claim is explicit or implicit, the outcomes of the reported ***703** court decisions clearly favor the defendant college or university rather than the plaintiff faculty member. [FN328]

This bleak picture is due in part to judicial reliance on the public concern test to resolve disputes over expression in the academic context. This reliance poses special problems in the academic context, which Professor Edgar Dyer summarized:

> "This is not a very firm foundation upon which to build solid rights of expression for faculty at public institutions of higher learning. There are far too many variables. Where is the line between professor and citizen? What context is acceptable? What form is satisfactory? What content is agreeable? What is a matter of public concern? What factors will determine the weightier of the two interests in the balance? "This vagueness, in and of itself, is certainly enough to 'chill' speech ... [FN329]

Recognizing these problems, Dyer proposed guidelines for a new Pickering test for those in academia. He argued that, since the mission of higher education is to seek truth, broad protections of expression are necessary to shield professors. [FN330] Furthermore, "[n]ew ideas, theories, philosophies, performing arts, or visual arts are not always matters that concern the public." [FN331] To avoid the weaknesses of the public concern test when applied to higher education, he proposed that academicians speaking within their discipline or field of expertise for the purpose of advancing the truth should be afforded an impervious judicial shield. [FN332]

Dyer's proposal employs a functional approach to academic free expression cases. That is, professors performing the function of advancing truth would enjoy higher protections for their expression than ordinary public employees will. [FN333] On the other hand, professors who speak on institutional matters or express complaints in their role as employees would not be protected by this heightened judicial shield. Many cases in this article concern professors who commented on important institutional issues that did not fall within their professional fields of expertise. These issues - from tenure offers made without candidate searches, such as in Jackson v. Leighton, to the self-studies on curricular weaknesses written by professors in Maples v. Martin - occupy a place of special importance to those in higher education. In not granting heightened protection to expression on institutional issues and other employment-related complaints, Dyer's proposal fails to provide a sufficient shield. Comment on institutional issues, whether or not courts agree, is often crucial to the actual quality of college or university life. The failure to protect ***704** this expression would deny professors the shield needed to engage in honest and vigorous exchanges regarding institutional governance.

In his review of academic freedom and public concern cases, Professor Richard Hiers argues that that application of the public concern requirement is "entirely out of place in academe." [FN334] He does, however, suggest three ways in which public concern analysis could be improved to broaden freedoms for professors. [FN335] First, in performing a Pickering balance, the interest of academic freedom should be included on the professor's side of the scale. This is justified because,

as the Supreme Court has recognized, academic freedom is a matter of "transcendent value to all." [FN336] Second, to succeed in the Pickering balancing, the institution should have to demonstrate actual harm, rather than probable disruption, to efficient operations. [FN337] Third, the institution should afford all public employees notice of cause and a hearing before dismissal or other discipline. [FN338]

Hiers has focused on an important and underemphasized aspect of public concern analysis: the balancing of the speaker's interest against the governmental interest in maintaining an efficient workplace. A significant number of academic free speech cases fail because interests in governmental efficiency are found to outweigh the professor's interest in expression. [FN339] In these cases, courts have not always been sensitive to the context in which academic speech is delivered. [FN340] Hiers' proposal takes account of academic freedom, and would provide greater protection for those in higher education. Hiers' proposal does not, however, alter the threshold determination of whether expression pertains to a matter of public concern. To fully address interests in academic freedom, alternative public concern analyses should address both balancing and the threshold determination of whether expression pertains to a matter of public concern.

Writing in the context of ordinary public employees, Professor Stephen Allred has made a proposal that would also boost protections to those in academe. [FN341] He recognizes that many public concern cases involve expression that has mixed aspects of personal interests and matters of public concern. To address the prevalence of mixed-motive expression, Allred suggests a "return to the standard originally set forth in Pickering." [FN342] According to that standard, Professor Allred says, whether or not expression pertained to a matter of public concern would no longer be a threshold test. Rather, the court would engage in a "broader inquiry into balancing the respective interests ***705** of the parties." [FN343] Allred's proposal would balance speech that "arguably addresses a matter of public concern ... in the overall context of the legitimate interests of the parties." [FN344] Allred's proposal would go far in protecting expression on important issues such as tenure and institutional governance, matters that have gone completely unprotected under current public concern analysis. His analysis addresses both the threshold determination of public concern, and the balancing of interests.

Karen Hoppmann offers another proposal, a "pure context-based" analysis, that would discriminate between workplace speech and speech outside employment. [FN345] Under Hoppmann's alternative, the public concern test would be changed in two important ways: First, the defendant, rather than the plaintiff would bear the burden of showing that the expression at issue was not a public concern. Second, if the expression is found to be on a matter of public concern, the court would extend absolute protection to the speech without balancing interests. Expression that fails the public concern test would have to succeed in the Pickering balance to enjoy protection. [FN346] Employing agency law principles, Hoppmann offers a system where speech occurring within the scope of employment would not be a matter of public concern. This speech could still gain protection if the government employer could not prove disruption. Speech occurring outside the employment environment would enjoy absolute protection and would not have to be balanced against the potential for disruption. [FN347] Hoppmann's proposal suffers the same weakness as Dyer's proposal: expression on institutional governance matters would not be protected. In Hoppmann's scheme, participation in institutional affairs would constitute expression within the scope of employment. Accordingly, this speech would be protected only if the professor's interest in expression outweighed the institution's interest in maintaining an efficient workplace.

In reviewing these proposals for the public concern test, I have concluded that a combination of Professor Dyer's proposal with some of the suggestions offered by Hoppmann would provide the most appropriate protection for those in academe. A combination of these proposals would protect both pure academic speech and comment on institutional issues. Dyer's proposal would provide an impervious judicial shield for academics speaking in their field for the purpose of advancing truth. Hoppmann's proposal could bolster protection for speech on institutional affairs by shifting burdens of proof, giving all expression on matters of public concern absolute

protection, and offering heightened protection to expression that fails the matter of public concern test. To ensure protection for expression on institutional governance ***706** issues, Hoppmann's "scope of employment" suggestion should not apply to those in academe.

If academic freedom is a transcendent value to all, professors need broad protections for their expression. A broad legal standard may protect more speech than necessary to ensure the freedom of professors and students to teach, inquire, and learn. The risk of chilled speech in academe, however, greatly outweighs the price of tolerating a few wayward or disruptive professors.

The current public concern test is too narrow and unpredictable in its determination of expression that should be protected by the First Amendment. Under the test, certain speech that is important in a university setting is sometimes found not to be a matter of public concern. In addition, the determination is sometimes made in a conclusory manner, leaving one with the impression that a certain amount of arbitrariness underlies the inquiry into public concern. Indeed, many cases reviewed in this article show that different judges can view the same facts and come to opposite conclusions as to whether public concern exists. It is also not beyond the bounds of reasonableness to suspect that the test could be manipulated to produce results consistent with some first impression or "gut reaction" to a set of facts. That is, a judge could evaluate expression based on personal biases and first impressions and then manipulate the public concern test to produce results consistent with personal biases. This narrowness, unpredictability, and risk of arbitrariness makes the application of the threshold public concern test and balancing inappropriate for judging expression in the higher education context. In addition, balancing the value of academic speech against potential or actual disruption is inimical to the core principles of intellectual freedom.

In academe, ideas should not be suppressed based on some potential for disruption. Indeed, as Dyer notes: "If ideas were suppressed simply because they did not find favor with the powers-that-be, due to their likelihood of institutional disruption, the Earth would still be a flat plane around which the Sun rotates." [FN348]

VI. CONCLUSION

Professors must exercise caution when relying on the First Amendment or academic freedom to shield their expression from retaliation because the only academic speech likely to enjoy protection under the Constitution is speech on matters of public concern. The matter of public concern test does not encompass the traditional notions of protection offered by academic freedom. And, even if a professor is successful in showing that the speech in question pertains to a matter of public concern, the professor's case must still survive Pickering balancing, qualified immunity challenges, and other procedural hurdles. Courts applying the matter of public concern test to faculty speech sometimes are insensitive to the special context of higher education. As a result, professors must consider that important expression in the academic ***707** environment may appear as inconsequential to a judge. This insensitivity and difference in worldviews results in less protection for free speech, and as a result, it endangers academic freedom.

Cases applying the matter of public concern test to faculty speech are highly fact-sensitive. But some generalizations can be made about public concern cases to help faculty evaluate their free speech rights:

(1) Many important internal affairs issues are not matters of public concern. To be protected, expression on internal affairs issues must directly affect the public's perception of quality of education. As a result, faculty speech on many important, quality-affecting issues is not protected by the First Amendment.

(2) Faculty expression that is motivated by purely personal interest will not enjoy First Amendment protection. Courts will also reject First Amendment claims by faculty who use public issues as a pretense to air their personal grievances. However, faculty who have mixed motives of personal and sincere public interest may have their speech protected.

(3) Professors do not have to publicize their expression in order to enjoy First

Amendment protection. Private expression on matters of public concern is protected by the First Amendment.

(4) Professors who use vulgar or derogatory language should exercise caution because an institution or court might not consider the context or speaker's intent carefully. As a result, professors cannot rely on First Amendment protection for vulgar or derogatory speech. Sexually-explicit expression that is motivated by pedagogical purposes has, however, been found to relate to a matter of public concern.

There are workable alternatives to the matter of public concern test. These alternatives, suggested by Dyer, Hiers, Allred, and Hoppmann, are better suited for determining whether expression should be protected in the higher education context. Commentators who focus on this issuefrom a higher education perspective recognize that ultimately there must be some change in the public concern test in order to protect academic freedom.

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[FN1]. See Karin Hoppmann, Concern with Public Concern: Towards a Better Definition of the Pickering/Connick Threshold Test, 50 VAND. L. REV. 993, 999 (1997).

[FN2]. 29 N.E. 517 (Mass. 1892).

[FN3]. Id. at 517.

[FN4]. See infra notes 5-35 and accompanying text.

[FN5]. 344 U.S. 183 (1952). For a detailed account of the McCarthy era, see ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (1998). Schrecker serves as Professor of History at Yeshiva University and editor of the AAUP magazine Academe. For an excellent critique of American fascism written during the McCarthy era, see FRANCIS BIDDLE, THE FEAR OF FREEDOM (1952). Biddle served as Attorney General to President Franklin Delano Roosevelt, when he recommended against the internment of Japanese-Americans.

[FN6]. Prohibited associations included the Communist Party, or any other group "which has been officially determined by the United States Attorney General or other authorized agency ... to be a communist front or subversive organization." Wieman, 344 U.S. at 187.

[FN7]. See id. at 186.

[FN8]. See id. at 187-88.

[FN9]. Id. at 191.

[FN10]. Id. at 192.

[FN11]. Id. at 193 (Black, J., concurring).

[FN12]. Id. at 196 (Frankfurter, J., concurring).

[FN13]. 354 U.S. 234 (1957).

[FN14]. Id. at 240. The specific questions Sweezy refused to ask included:
"Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?"
"Did you advocate Marxism at that time?"
"Did you express the opinion, or did you make the statement at the time that Socialism was inevitable in America?"
"Did you in this last lecture on March 22 or in any of the former lecture espouse the theory of dialectical materialism?"
Id. at 260.

[FN15]. See id. at 243-44.

[FN16]. See id. at 244-45.

[FN17]. See id. at 235-36.

[FN18]. Id. at 250.

[FN19]. Id.

[FN20]. Id. at 262.

[FN21]. 385 U.S. 589 (1967).

[FN22]. See id. at 591-92.

[FN23]. See id at 592.

[FN24]. See Keyishian v. Board of Regents of the Univ. of the State of N.Y., 255 F. Supp. 981 (W.D.N.Y. 1966).

[FN25]. See 385 U.S. at 593.

[FN26]. Id. at 602 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

[FN27]. See NAACP v. Button, 371 U.S. 415 (1963).

[FN28]. Keyishian, 385 U.S. at 603-04 (internal citations omitted).

[FN29]. Id. at 603.

[FN30]. Id. at 620-21.

[FN31]. Id. at 625. Justice Clark is referring to Adler v. Board of Education, 342 U.S. 485 (1952), where the Court found no constitutional infirmity in the Feinberg law.

[FN32]. See id. at 625-26.

[FN33]. Id. at 628.

[FN34]. Id. at 628-29.

[FN35]. Id. at 603.

[FN36]. 216 F.3d 401, 404 (4th Cir.), cert. denied, 121 S.Ct. 759 (2001).

[FN37]. See id. at 404 (citing Va. Code Ann. § 2.1-804 to 806 (Michie Supp. 1999)).

[FN38]. See Urofsky v. Allen, 995 F. Supp. 634, 644 (E.D. Va. 1998) (finding that the statute was overinclusive and underinclusive, and that the requirement of approval from an agency head would have a chilling effect on speech).

[FN39]. See Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2001).

[FN40]. See id. at 412. For a discussion of institutional and individual academic freedom, see Elizabeth Mertz, The Burden of Proof and Academic Freedom: Protection for Institution or Individual?, 82 NW. U. L. REV. 492 (1988).

[FN41]. See Urofsky, 216 F.3d at 415 n.17.

[FN42]. See id. at 411.

[FN43]. See id. at 412-14.

[FN44]. See id.

[FN45]. 393 U.S. 97 (1968).

[FN46]. 482 U.S. 578 (1987).

[FN47]. See Urofsky, 216 F.3d at 414-15.

[FN48]. See id. at 415.

[FN49]. See id. It is important to note that that both Epperson and Edwards pertained to teachers in the secondary school setting. Significant precedent exists supporting broader First Amendment protection for those in academe. See infra note 161.

[FN50]. Richard Hiers, Academic Freedom in Public Colleges and Universities: O Say, Does That Star-Spangled First Amendment Banner Yet Waive?, 40 WAYNE L. REV. 1 (1993).

[FN51]. Pickering v. Board of Educ., 391 U.S. 563 (1968).

[FN52]. See infra notes 165-329 and accompanying text.

[FN53]. 391 U.S. 563 (1968).

[FN54]. See id. at 566.

[FN55]. See id. at 567.

[FN56]. See id. at 565.

[FN57]. See id.

[FN58]. Id. at 574.

[FN59]. See id.

[FN60]. See id. at 568.

[FN61]. See id. at 572.

[FN62]. Id. at 569.

[FN63]. A discussion of the difference between ordinary public employees and

professors is contained in Edgar Dyer, Collegiality's Potential Chill Over Faculty Speech: Demonstrating the Need for a Refined Version of Pickering and Connick for Public Higher Education, 119 EDUC. L. REP. 309, 317-20 (1997).

[FN64]. 461 U.S. 138 (1983).

[FN65]. See id. at 141.

[FN66]. See id.

[FN67]. See id. at 155-56.

[FN68]. See id. at 141.

[FN69]. See id. at 141-42.

[FN70]. See id.

[FN71]. See id.

[FN72]. Id. at 147-48.

[FN73]. See id. at 148.

[FN74]. "Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?" Id. at 155 (appendix to opinion of the Court).

[FN75]. See id. at 147.

[FN76]. Id. at 149.

[FN77]. Id. at 154.

[FN78]. Id. at 147-48.

[FN79]. See id. at 147.

[FN80]. 483 U.S. 378 (1987).

[FN81]. Id. at 380 (internal quotations omitted).

[FN82]. See id. at 382.

[FN83]. See id.

[FN84]. See id.

[FN85]. See id. at 383.

[FN86]. See id.

[FN87]. See id.

[FN88]. See id. at 382-83.

[FN89]. See id.

[FN90]. See id. at 382 & n.4.

[FN91]. See id.

[FN92]. Id.

[FN93]. Id. at 384.

[FN94]. See id. at 380.

[FN95]. See id.

[FN96]. See id.

[FN97]. See id. McPherson commented on Reagan administration cutbacks on "welfare and CETA." Id. at 381.

[FN98]. See id. at 386.

[FN99]. Id. at 387. McPhearson's expression did not amount to a threat, which would have been unprotected speech. See id.

[FN100]. See id. at 389.

[FN101]. See id. See also Hiers, supra note 50, at 42.

[FN102]. See Rankin, 483 U.S. at 385.

[FN103]. Id. at 394 (Scalia, J., dissenting) (internal quotations omitted).

[FN104]. See id.

[FN105]. See id.

[FN106]. See id. at 395-401.

[FN107]. Id. at 401.

[FN108]. 511 U.S. 661 (1994).

[FN109]. See id. at 664-65.

[FN110]. See id. at 665.

[FN111]. See id. at 665-66.

[FN112]. See id. at 666.

[FN113]. See id.

[FN114]. See id. at 664-68.

[FN115]. See id. at 667.

[FN116]. See Churchill v. Waters, 977 F.2d 1114 (7th Cir. 1992).

[FN117]. Waters, 511 U.S. at 667-68.

[FN118]. See id. at 680.

[FN119]. See id.

[FN120]. See id. at 677.

[FN121]. See id. This seems to run contrary to language in Rankin, which specified the need for "carefully conducted hearings and precise and complete findings of fact" to merely resolve an ambiguity over what an employee "meant." Rankin v. McPherson, 483 U.S. 378, 382 n.4 (1987).

[FN122]. See Waters, 511 U.S. at 677.

[FN123]. See id. at 679.

[FN124]. See Pickering v. Board of Educ., 391 U.S. 563 (1967).

[FN125]. See Connick v. Myers, 461 U.S. 138 (1982).

[FN126]. See Rankin v. McPherson, 483 U.S. 378 (1986).

[FN127]. See Waters v. Churchill, 511 U.S. 661 (1993).

[FN128]. American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, ACADEME, May-June 1990, at 37, reprinted in POLICY DOCUMENTS & REPORTS 3, 3-4 (8th ed. 1995).

[FN129]. See id. at XI.

[FN130]. Id. at 3-4.

[FN131]. See ROBERT O'NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY 44 (1997). Professor O'Neil currently serves as Director of the Thomas Jefferson Center for the Protection of Free Expression and Chair of AAUP's Committee A on Academic Freedom and Tenure.

[FN132]. Id.

[FN133]. See WILLIAM KAPLIN & BARBARA LEE, THE LAW OF HIGHER EDUCATION § 3.7 (3d ed. 1995).

[FN134]. See generally Mertz, supra note 40. Faculty handbooks, which often incorporate AAUP policy, may be contractually binding on institutions and thus provide more legal protection to professors both at public and private schools. AAUP pulishes a state-by-state guide on faculty handbook case law, FACULTY HANDBOOKS AS ENFORCEABLE CONTRACTS: A STATE GUIDE (1999); see also Donna Euben, The Faculty Handbook as a Contract: Is it Enforceable? ACADEME, Sept.- Oct. 1998, at 87.

[FN135]. Connick v. Myers, 461 U.S. 138, 146 (1982).

[FN136]. Id. at 147-48.

[FN137]. For cases where public concern is found, but outweighed by the interest in operating an efficient workplace, see Webb v. Board of Trustees of Ball State University, 167 F.3d 1146 (7th Cir. 1999) (although plaintiffs' sexual harassment complaint and other grievances were likely to be protected, the complex and personal

nature of the speech became a disruption where department head failed to produce scholarly work for three years, students reported dissatisfaction, and professors left the department); Shovlin v. University of Medicine and Dentistry of New Jersey, 50 F. Supp. 2d 297 (D.N.J. 1998) (criticism of policies and practices of administration was public concern, but disruption from frequent unsupported allegations against faculty members negated speaker's interest in expression); Jeffries v. Harleston, 52 F.3d 9 (2d. Cir. 1995), cert. denied, 516 U.S. 862 (1995) (potential disruptiveness, as a matter of law, outweighed any First Amendment value of professor's off-campus speech, which contained racially derogatory statements); Maples v. Martin, 858 F.2d 1546 (11th Cir. 1988) (critical self-study was a matter of public concern, but interference with the department operation justified transfer of professor-authors).

[FN138]. Rankin v. McPherson, 483 U.S. 378, 384 (1986) (quoting Pickering, 391 U.S. at 568) (internal quotes omitted).

[FN139]. See Connick, 461 U.S. at 150.

[FN140]. Rankin, 483 U.S. at 388.

[FN141]. Pickering v. Board of Educ., 391 U.S. 563, 568 (1967).

[FN142]. Waters v. Churchill, 511 U.S. 661, 671 (1993).

[FN143]. For cases where substantial cause was not proven, see Jackson v. Leighton, 168 F.3d 903 (6th Cir. 1999) (professor's appointment was renewed after he commented on matters of public concern, but professor was later fired after making comments on matters of private concern); Roberts v. Broski, 186 F.3d 990 (7th Cir. 1999) (professor had been recommended for discharge twice because of poor job performance before expression on a matter of public concern).

[FN144]. See Mount Healthy v. Doyle, 429 U.S. 274 (1977).

[FN145]. See Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979). For cases where the institution could have disciplined a professor on grounds besides protected speech, see, e.g., Lange v. Kent State Univ., 221 F.3d 1334, No. 99-3636, 2000 WL 922966 (6th Cir. Jun. 30, 2000) (professor made numerous statements on public concern, but was dismissed for using "tactics of fear and intimidation," producing anxiety and fear among the faculty, and for using university letterhead to express personal opinions).

[FN146]. See Givhan, 439 U.S. at 416.

[FN147]. Id. (quoting Mt. Healthy, 429 U.S. at 285).

[FN148]. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[FN149]. See id.

[FN150]. Id. at 807 (quoting Butz v. Economou, 438 U.S. 478, 506 (1978) (internal quotations omitted).

[FN151]. Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323 (11th Cir. 1989). See also Williams v. Alabama State Univ., 102 F.3d 1179 (11th Cir. 1997) (defendant institution was entitled to qualified immunity where professor complained of administrator's textbook; criticism of textbooks has never been held to be constitutionally protected expression). Cf. Hollister v. Tuttle, 210 F.3d 1033 (9th Cir. 2000) (defendants not entitled to qualified immunity for retaliation against English professor who publicly objected to feminist criticism of literature and non-traditional courses offered in the department. "Any member of the faculty or administration would know ... that it would be to deny his constitutional right to speak to deny him a promotion or pay increase in retaliation.").

[FN152]. See Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000).

[FN153]. The academic freedom implications of this case are discussed supra, notes 36-49 and accompanying text.

[FN154]. See Urofsky, 216 F.3d at 409.

[FN155]. See id. at 407.

[FN156]. Id.

[FN157]. The Urofsky court repeatedly quotes Connick to support the proposition that protecting job-related speech is untenable because "government offices could not function if every employment decision became a constitutional matter." Id. at 408. Connick itself, however, supports the protection of speech made in the role as a public employee. The Court found that one question on the employee's survey in Connick touched on matters of public concern. See Connick v. Myers, 461 U.S. 146, 149 (1983).

[FN158]. In an effort to explain why job-related expression cannot be protected, the court offered an analogy describing a wayward assistant district attorney (ADA). If job-related speech were protected, the court reasoned, an ADA would have a First Amendment right to make comments to the media in contradiction of his employer's wishes. That ADA could literally dictate how he would perform his job. Urofsky, 216 F.3d at 407-08. This analogy is false. First, the context of the expression is different. See Landrum v. Eastern Ky. Univ., 578 F. Supp. 241, 246 (E.D. Ky. 1984) ("This court recognizes that there must be more room for divergent views in a university situation than in a prosecutor's office ...."). Second, and more importantly, the analogy does not take account of the full process of public concern analysis. If an ADA made comments to the media on matters of public concern, he may indeed enjoy First Amendment protection for his expression. That expression would, however, be weighed against the state's interest in maintaining an efficient workplace. If, as the Fourth Circuit suggests, the ADA was insubordinate, he may have caused workplace disruption that would justify discipline.

[FN159]. See Dyer, supra note 63, at 318 ("[V]irtually every court that has addressed this matter has made no distinction between higher education and primary/secondary education ...."); Gail Sorenson & Andrew LaManque, The Application of Hazelwood v. Kuhlmeier in College Litigation, 22 J.C.& U.L. 971 (1996) ("[T]he analysis shows that courts at all levels may be unwittingly merging important lines

of distinction between secondary and post-secondary settings and consequently may be according undue deference to institutions of higher education, especially where institutional and faculty interest conflict.").

[FN160]. See Jonathan Alger, From Father to Big Brother: Applying K-12 Law to Colleges, ACADEME, Jan.-Feb. 1999, at 71.

[FN161]. Form, content, and context are considered in determining whether expression pertains to a matter of public concern. See Connick v. Myers, 461 U.S. 146 (1983).

[FN162]. See Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503, 506, 508-09 (1969); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.") (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960) (internal quotations omitted)).

[FN163]. See Tinker, 393 U.S. at 506 (First Amendment rights should be evaluated in light of the special characteristics of the school environment); Hollisterv. Tuttle, 210 F.3d 1033, 1035 (9th Cir. 2000) ("The lifeblood of a college is free inquiry and its companion, free speech, by its faculty on subjects pertaining to education. A high school teacher cannot be disciplined arbitrarily for speech on a matter of public concern. A fortiori, a college teacher cannot.") (internal citation omitted); Bonnell v. Lorenzo, 81 F. Supp. 2d 777 (E.D.Mich. 1999) ("The Court recognizes that colleges are a resource for ideas, free thought, experimentation, and critical thinking. The position of a college English professor includes with it First Amendment protections that may not be present in the military service or in an industrial job .... When a college gags the professor or censors the students, the free expression of ideas and thoughts as supported by the First Amendment is impinged upon."); Jeffries v. Harleston (II), 52 F. 3d 9 (2d Cir. 1995) (academic freedom is an important First Amendment concern, but not at issue here because professor was removed from ministerial position rather then being fired or silenced); Maples v. Martin, 858 F.2d 1546, 1553 (11th Cir. 1988) ("Speech by members of an academic community, even when critical in nature, should not be easily denied constitutional protection."); Martin v. Parrish, 805 F.2d 583, 588 (5th Cir. 1986) (Hill, J., concurring) ("What might be instructionally unacceptable in high school might be fully acceptable in college."); Johnson v. Lincoln Univ., 776 F.2d 443, 453-54 (3d Cir. 1985) ("In an academic environment, suppression of speech or opinion cannot be justified by an 'undifferentiated fear or apprehension of disturbance,' nor by 'a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."') (quoting Tinker, 393 U.S. at 508-09); Landrum v. Eastern Ky. Univ., 578 F. Supp. 241 (E.D. Ky. 1984) (referring to Connick, the court stated that: "This court recognizes that there must be more room for divergent views in a university situation than in a prosecutor's office ....").

[FN164]. Connick, 461 U.S. at 149.

[FN165]. Id. at 148.

[FN166]. Maples, 858 F.2d 1546, 1553 (11th Cir. 1988).

[FN167]. See Ballard v. Blount, 581 F. Supp. 160, 163-64 (N.D. Ga. 1983), aff'd, 734 F.2d 1480 (11th Cir.), cert. denied, 469 U.S. 1086 (1984) ("An individual's salary ... has no relationship to public concern."); but cf. Lowrey v. Texas A & M Univ. Sys., 11 F. Supp. 2d 895 (S.D. Tex. 1998) (sex discrimination in pay is a public concern).

[FN168]. See Ballard, 581 F. Supp. at 164 (although syllabus had eventual, derivative effect on students, any speech by tenured professor relating to the discussion of the syllabus did not relate to matters of public concern).

[FN169]. See id. at 165 (absent unusual circumstances, an administrative decision to grant or deny tenure is not a matter of public concern).

[FN170]. See Williams v. Alabama State Univ., 979 F. Supp. 1406 (M.D. Ala. 1997).

[FN171]. See Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986).

[FN172]. See id. at 1516.

[FN173]. See Renfroe v. Kirkpatrick, 722 F.2d 714 (11th Cir. 1984).

[FN174]. See Lovelace v. Southeastern Mass. Univ., 793 F. 2d 419 (1st Cir. 1986) (non-tenured professor's refusal to lower academic standards was not protected by the First Amendment; universities must be allowed to set course content, homework load, and grading policy). But see Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989) (assignment of letter grade sent message to student, a communicative act entitled to some measure of First Amendment protection).

[FN175]. See Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1190 (6th Cir. 1995) ("An instructor's choice of teaching methods does not rise to the level of protected expression"); Hetrick v. Martin, 480 F.2d 705, 708 (6th Cir. 1973) (university was entitled to not renew a non-tenured professor's contract because of displeasure with her pedagogical attitude).

[FN176]. Edwards v. California Univ. of Pa., 156 F.3d 488 (3d. Cir. 1998), cert. denied, 525 U.S. 1143 (1999) (tenured professor did not have a First Amendment right to decide what will be taught in the classroom in contravention of the university's dictates); Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), cert. denied, 411 U.S. 972 (1973) (nontenured professor was involved as teacher and not interested citizen in disputes over course content; course content dispute was not matter of public concern).

[FN177]. "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the institution itself." Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) (citations omitted); see also Mertz, supra note 40.

[FN178]. Lovelace, 793 F.2d at 426; Hetrick, 480 F.2d at 707 (university wanted professor to teach on basic level to accommodate "generally unsophisticated" student body).

[FN179]. 168 F.3d 903 (6th Cir. 1999).

[FN180]. See id. at 906.

[FN181]. See id. at 907.

[FN182]. See id.

[FN183]. See id.

[FN184]. See id.

[FN185]. See id. at 905-08.

[FN186]. See id. at 906.

[FN187]. See id.

[FN188]. See id. at 910.

[FN189]. See id.

[FN190]. See id.

[FN191]. See id. at 910-11.

[FN192]. See id. at 910.

[FN193]. Id.

[FN194]. See id. at 912.

[FN195]. See id.

[FN196]. See Johnson v. Lincoln Univ. 776 F.2d 443 (3d Cir. 1985); Maples v. Martin, 858 F.2d 1546 (11th Cir. 1998).

[FN197]. See Jeffries v. Harleston (II), 52 F.3d 9 (2d. Cir. 1995), cert. denied, 516 U.S. 862 (1995) (speech "unquestionably involved public issues" but derogatory language created potential for public disruption).

[FN198]. See id. at 12 (speech on black oppression in state's school curriculum "squarely involved issues of public concern").

[FN199]. See Gumbhir v. Curators of the Univ. of Mo., 157 F.3d 1141, 1144 (8th Cir. 1998) (complaints regarding ethnic slurs and "unfavorable comments concerning immigrants" were matters of public concern); Pinelo v. Northern Ky. Univ., No. 96-5765, 1998 WL 165136, *5 (6th Cir. Mar. 31, 1998) ("plaintiff's contention that he was retaliated against for speaking out with respect to discrimination in the hiring of minority applicants undeniably constitutes a matter of public concern.").

[FN200]. See Southside Pub. Schs. v. Hill, 827 F.2d 270 (8th Cir. 1987).

[FN201]. See Johnson v. University of Cincinnati, 215 F.3d 561 (6th Cir. 2000).

[FN202]. See Brown v. Texas A & M Univ., 804 F.2d 327 (5th Cir. 1986) (plaintiff did not allege retaliation on matter of public concern; court remanded case to allow an amended complaint) (public university accountant informed supervisor by memorandum that faculty member was diverting institutional funds inappropriately; bringing wrongdoing to light may constitute a matter of public concern); Roberts v. Broski, 979 F. Supp. 746 (N.D. Ill. 1997) (administrator's comments on possible misuse of funds were matters of public concern; however, termination was justified because of administrator's poor performance).

[FN203]. See Wallace v. Texas Tech Univ., 80 F.3d 1042 (5th Cir. 1996) (speech made in role of employee is a matter of public concern when it involves report of corruption or wrong-doing to officials); Harris v. District Bd. of Trustees of Polk Comm. College, 9 F. Supp. 2d 1319 (M.D. Fla. 1998) (memorandum sent to state law enforcement agency detailing corruption in criminal justice department at community college was matter of public concern).

[FN204]. See Gardetto v. Mason, 100 F.3d 803, 812-13 (10th Cir. 1996) ("The integrity, qualifications, and misrepresentations of a highly visible public official, such as the president of a college, obviously impact the social and political life of a community.").

[FN205]. See Honore v. Douglas, 833 F.2d 565 (5th Cir. 1987) (law professor's comments on the law school admission policy, the size of the student population, the administration of the budget, and failure to certify graduates for bar examination were matters of public concern).

[FN206]. See Wilson v. UT Health Ctr., 973 F.2d 1263, 1269 (5th Cir. 1992) (complaints about sexual harassment at public educational institutions are "of great public concern").

[FN207]. See Lowery v. Texas A & M Univ. Sys., 11 F. Supp. 2d 895 (S.D. Tex. 1998).

[FN208]. See Connick v. Myers, 461 U.S. 138, 147 (1983). For cases where the court concluded that the expression in question furthered only private interests, and thus did not constitute public concern, see, e.g., Lighton v. University of Utah, 209 F.3d 1213 (10th Cir. 2000) (professor-plaintiff's allegations of impropriety against colleague were motivated by retaliation for failed relationship with colleague and by colleagues' subsequent allegations of sexual harassment); Pinelo v. Northern Ky. Univ., No. 96-5765, 1998 WL 165136, at **5 (6th Cir. Mar. 31, 1998) ("A lawsuit initiated to promote one's career, and not a cause, is not protected speech."); Stein v. Kent State Univ. Bd. of Trustees, 994 F. Supp. 898 (N.D. Ohio 1998) (personal grievances motivated professor's filing of sex discrimination and ethical violation complaints); Bessman v. Powell, 991 F. Supp. 830, 838 (S.D. Tex. 1998)

(professor-plaintiff's speech "consists almost entirely of his internal efforts ... to avoid blame for a patient's death following two reports that partly implicate him").

[FN209]. See Connick, 461 U.S. at 143.

[FN210]. See Johnson v. Lincoln Univ., 776 F.2d 443, 451 (3d Cir. 1985).

[FN211]. 858 F.2d 1546 (11th Cir. 1988).

[FN212]. See id. at 1548.

[FN213]. See id.

[FN214]. See id. at 1549.

[FN215]. See id.

[FN216]. Id.

[FN217]. See id.

[FN218]. Id.

[FN219]. See id.

[FN220]. See id. at 1549 n.4.

[FN221]. This professor also joined the other authors of the self-study in alleging that the transfer violated procedural due process and deprived them of property interests in academic freedom and in continued assignment to the department. The trial court denied these claims. See id.

[FN222]. See id.

[FN223]. See id. at 1548.

[FN224]. See id. at 1553.

[FN225]. See id.

[FN226]. Id.

[FN227]. See id.

[FN228]. Id.

[FN229]. See id. at 1555.

[FN230]. 776 F.2d 443 (3d Cir. 1985).

[FN231]. Id. at 451.

[FN232]. See id. at 449, 452.

[FN233]. See id. at 449.

[FN234]. See id.

[FN235]. See id. at 447.

[FN236]. Id. at 452.

[FN237]. Id.

[FN238]. See id. at 453.

[FN239]. See Trotman v. Board of Trustees of Lincoln Univ., 635 F.2d 216 (3d Cir. 1980), cert. denied, 451 U.S. 968 (1981).

[FN240]. Johnson, 776 F.2d at 448. The settlement specified that: "[f] aculty members ... shall have the rights to freedom of expression as guaranteed by the First Amendment ... and the defendants [Lincoln University Administration] shall not take or threaten any retaliatory action because of the exercise of such rights." Id. (internal quotes omitted). Professor Johnson was a named plaintiff in the settled case. See id. at 448 (citing Trotman, 635 F.2d at 216).

[FN241]. Id. at 452.

[FN242]. Id.

[FN243]. Id. at 451 (internal quotes omitted).

[FN244]. See id.

[FN245]. See id. at 447-48.

[FN246]. See id. at 452.

[FN247]. Id. at 452.

[FN248]. 11 F. Supp. 2d 895 (S.D. Tex. 1998).

[FN249]. Tarleton State University is managed and controlled by the Texas A & M University System. See id. at 900.

[FN250]. See id. at 900-02.

[FN251]. See id. at 902-03.

[FN252]. See id. at 919.

[FN253]. See id.

[FN254]. Id.

[FN255]. 157 F.3d 1141, 1144 (8th Cir. 1998); see also Dorsett v. Board of Trustees for State Colleges and Univs., 940 F.2d 121, 124 (5th Cir. 1991) (primary motive for speech was personal concern over work environment; employee cannot "transform a personal conflict into an issue of public concern simply by arguing that his speech might have been of interest to the public.").

[FN256]. Lowery, 11 F. Supp. 2d at 919.

[FN257]. 439 U.S. 410 (1979).

[FN258]. Id. at 412.

[FN259]. See id. at 411.

[FN260]. See id. at 411-13.

[FN261]. See id. at 415.

[FN262]. See id. at 410 & n.4.

[FN263]. 979 F. Supp. 1406 (M.D. Ala. 1997).

[FN264]. See id. at 1407.

[FN265]. See id.

[FN266]. See Williams v. Alabama State Univ., 865 F. Supp. 989 (M.D. Ala. 1994, rev'd, 102 F.3d 1179 (11th Cir. 1997).

[FN267]. See Williams v. Alabama State Univ., 102 F.3d 1179, 1182-83 (11th Cir. 1992); see also Dorsett v. Board of Trustees for State Colleges and Univs., 940 F.2d 121, 125 (5th Cir. 1991) ("[T]he private form and context of Dorsett's speech indicate that the speech did not address a matter of public concern. Dorsett did not direct his complaints to anyone outside the university.") (citations omitted).

[FN268]. 511 U.S. 661 (1994).

[FN269]. Yniguez v. Arizonans for Official English, 42 F.3d 1217, 1235 n.20 (9th Cir. 1994); but cf. Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992) (establishment of shadow sections and committee to investigate actions of professor for publishing racially-denigrating writings violated professor's First Amendment rights; court made no matter of public concern analysis).

[FN270]. 805 F.2d 583 (5th Cir. 1986).

[FN271]. Id. at 584.

[FN272]. Id. (internal quotes omitted).

[FN273]. See id.

[FN274]. See id.

[FN275]. See id. at 583.

[FN276]. See id. at 585.

[FN277]. See id. at 586.

[FN278]. 55 F.3d 1177 (6th Cir. 1995).

[FN279]. Id. at 1181.

[FN280]. See id.

[FN281]. See Gee v. Humphries, No. 95-40031-RH, slip op. (N.D. Fla. Dec. 3, 1996),

aff'd, No. 97-2265 (11th Cir. Apr. 3 1998), cert. denied, 525 U.S. 869 (1998).

[FN282]. Slip op. at 4.

[FN283]. See Slip op. at 9.

[FN284]. See Jeffries v. Harleston (II), 52 F.3d 9 (2d Cir. 1995).

[FN285]. See id.

[FN286]. See id. at 10-11.

[FN287]. See id.

[FN288]. See id. at 10. Waters is discussed supra at notes 108-23.

[FN289]. See id.

[FN290]. Id. at 12.

[FN291]. Jeffries v. Harleston (I), 21 F.3d 1238, 1242 (2d Cir. 1994), rev'd, 52 F.3d 9 (2d Cir. 1995).

[FN292]. See id.

[FN293]. Id.

[FN294]. See Jeffries II, 52 F.3d at 13.

[FN295]. See id. at 14.

[FN296]. See id. at 16.

[FN297]. Jeffries II, 52 F.3d at 14.

[FN298]. Id. at 14-15.

[FN299]. 888 F. Supp. 293 (D.N.H. 1994).

[FN300]. Id. at 299 (citing plaintiffs' complaint).

[FN301]. Id.

[FN302]. See id. at 299.

[FN303]. See id.

[FN304]. See id. at 305.

[FN305]. Id. at 310.

[FN306]. See id. at 304.

[FN307]. See id. at 305-07.

[FN308]. See id. at 307.

[FN309]. See id. at 311.

[FN310]. See id. at 315-16.

[FN311]. See id.

[FN312]. See id. at 314.

[FN313]. See id. at 332.

[FN314]. 92 F.3d 968 (9th Cir. 1996), cert. denied, 520 U.S. 1140 (1997).

[FN315]. See id. at 970.

[FN316]. See id.

[FN317]. Cohen v. San Bernardino Valley College, 883 F. Supp. 1407, 1410 (1995) (district court opinion).

[FN318]. See id.

[FN319]. See id. at 1411.

[FN320]. See id. at 1411-12.

[FN321]. See id. at 1415-16.

[FN322]. See id. at 1416.

[FN323]. See id.

[FN324]. See id. at 1417.

[FN325]. See id. at 1420.

[FN326]. See 92 F.3d 968.

[FN327]. See Gee v. Humphries, No. 95-40031-RH, slip op. (N.D. Fla. Dec. 3, 1996), aff'd, No. 97-2265 (11th Cir. Apr. 3 1998), cert. denied, 525 U.S. 869 (1998).

[FN328]. Perry A. Zirkel, Commentary: Academic Freedom of Individual Faculty Members, 47 ED. LAW. REP. 809, 824 (1988).

[FN329]. Dyer, supra note 63, at 313-14.

[FN330]. See id. at 318.

[FN331]. Id. at 321.

[FN332]. See id. at 319-22.

[FN333]. See id. at 320.

[FN334]. Hiers, supra note 50, at 106.

[FN335]. See id.

[FN336]. Id. (quoting Keyishian, 385 U.S. at 603).

[FN337]. See id.

[FN338]. See id. at 107.

[FN339]. See supra note 137.

[FN340]. See supra notes 158-62 and accompanying text.

[FN341]. See Stephen Allred, From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern, 64 IND. L.J. 43 (1988).

[FN342]. Id. at 77.

[FN343]. Id.

[FN344]. Id. at 81.

[FN345]. Hoppmann also identifies practical and theoretical problems with the public concern test. Her thoughtful and complete analysis exceeds the scope of this article. See Hoppmann, supra note 1.

[FN346]. See id. at 1020.

[FN347]. See id. at 1023-24.

[FN348]. Dyer, supra note 63, at 321.

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