DEFENDING THE IVORY TOWER: A TWENTY-FIRST CENTURY APPROACH TO THE *PICKERING-CONNICK* DOCTRINE AND PUBLIC HIGHER EDUCATION FACULTY AFTER *GARCETTI*

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"If the teachers of mankind are to be cognizant of all that they ought to know, everything must be free to be written and published without restraint."

—John Stuart Mill, *On Liberty*[1]

I. INTRODUCTION

During the second half of the twentieth century, courts dramatically broadened the scope of the free expression doctrine, significantly expanding the range of activities that invoke First Amendment consideration.[2] One such activity is the exercise of academic freedom. Since the Supreme Court first mentioned the term in a dissent to *Adler v. Board of Education*,[3] academic freedom has slowly gained acceptance among courts and scholars as a proper subject of First Amendment jurisprudence.

In acknowledging that academic freedom merits First Amendment protection, courts have used numerous analytical approaches including public forum doctrine,[4] the *Pickering-Connick*[5] "public concern" dichotomy, and traditional content distinction analysis. All of these approaches have treated public college and

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1. JOHN STUART MILL, ON LIBERTY 101 (Penguin Books 1985) (1859).

2. *See, e.g.*, Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1287–88 (1984) (listing examples of the broadening of the First Amendment, including symbolic speech, indecent material, and commercial advertising).

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

4. *See generally* Derek P. Langhauser, *Drawing the Line Between Free and Regulated Speech on Public College Campuses: Key Steps and the Forum Analysis*, 181 EDUC. L. REP. 339 (2003).

5. Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

university faculty similarly to other public education teachers or to public sector employees generally. As a result, courts have analyzed faculty scholarly research in a manner not much different than they would a secondary school teacher's lesson plan. While some courts have discussed (and rejected) the notion that faculty should receive more First Amendment protection than other state employees, no court and only a few scholars have acknowledged that public college and university faculty members' duties are unique from those of all other public educators.

But they are unique. Unlike primary and secondary teachers, whose principal duty is intra-institutional knowledge dissemination, major public college and university faculty members' primary duty is the creation and *public*, i.e., *extra*-institutional, dissemination of knowledge. Recognizing this fact, a few scholars have suggested tests for analyzing the academic freedom rights of these college and university faculty members. Such tests include balancing the First Amendment academic freedom rights with those of the institution as well as a "functional necessity" test to determine if the state's restriction on faculty speech is necessary for the proper functioning of the school. Yet even these analyses fail to distinguish between faculty teaching responsibilities on one hand and faculty research on the other.

The September 11, 2001 attacks on the World Trade Center and the Pentagon ushered in a period of general wariness over national and personal security unknown in the United States since the heart of the Cold War. The subsequent news of growing casualties and horrific executions in the aftermath of the United States-led invasions of Afghanistan and Iraq, as well as additional terrorist attacks in Spain, Great Britain, and other countries, further exacerbated the national and international trepidation. Repeating a common historical phenomenon, this climate increased intolerance for dissent perceived as contrary to national security objectives.

Other recent cultural trends—though unrelated—have produced similar effects. Well before the events of September 2001, the 1990s witnessed increasing efforts to foster a cultural environment conducive to racial and sexual diversity, particularly on college and university campuses throughout the nation. A natural byproduct of this trend was a corresponding decrease in tolerance for speech thought inconsistent with such an environment. In response to this trend and the collegiate "culture wars" that ensued, some interest groups and other members of the public began to demand that such public institutions better reflect their own political and cultural views.[6]

Each of these phenomena—enhanced American nationalism, the appearance of politically sensitive speech and behavior codes, and the rising influence of popular sentiment regarding issues of public concern on colleges and universities—have

6. Jon B. Gould, Note, *Look Who's (Not) Talking: The Real Triumph of Hate Speech Regulation*, 8 GREEN BAG 2d 367 (2005); John K. Wilson, *Myths and Facts: How Real is Political Correctness?*, 22 WM. MITCHELL L. REV. 517 (1996); Richard Bernstein, *On Campus, How Free Should Speech Be?*, N.Y. TIMES, Sept. 10, 1989, at D5; Alan M. Dershowitz, *Censorship on Campus—Free Express: Danger on the Left*, SEATTLE TIMES, May 2, 1989, at A-11.

proponents and detractors. Whether these trends are healthy or detrimental, their confluence has endangered campus academic freedom to a degree unprecedented since the McCarthy era. Compounding the problem, in 2006 the Supreme Court held in *Garcetti v. Ceballos*[7] that "when public employees make statements pursuant to their official duties"[8]—as public college and university faculty do with their scholarship—the First Amendment offers no protection.

This article shows how the Supreme Court's failure to establish a coherent academic freedom approach may have adverse consequences not just for First Amendment jurisprudence or educational institutions, but also for society's economic and cultural vitality. The article begins by examining how courts have treated government action tending to inhibit academic freedom at public institutions of higher education over the past fifty years.[9] It then shows how the Cold War era jurisprudence represented a meaningful advance for academic freedom and provided substantial protection of such expression. It concludes by illustrating how the recent political trends discussed above demand a new analytical framework to protect academic freedom.

II. THE ORIGINS AND EVOLUTION OF ACADEMIC FREEDOM DOCTRINE

A. Principles of Academic Freedom

"Academic freedom"[10] is not a singular concept; scholars and courts use the term to convey two different, though interrelated, notions.[11] First, it is used in a purely legal sense, as in the degree to which the Constitution protects the rights of academics, students, and academic entities to be free of government restrictions on their academic-related speech. Second, the term conveys an ethical value, that is, a set of goals and ideals contemplated by academics and philosophers and codified by the American Association of University Professors (AAUP) in its 1915 *Declaration of Principles*[12] and later AAUP documents. *The Oxford Companion*

7. 126 S. Ct. 1951 (2006).

8. *Id.* at 1960.

9. While academic freedom is a salient issue at both private and public colleges and universities, this article considers the issue with regard only to public institutions. Because public colleges and universities are considered state actors for the purpose of constitutional analysis, the thesis presented here applies mainly to public institutions. For a discussion of faculty freedom of expression at private colleges and universities, see Gabriel J. Chin & Saira Rao, *Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities*, 64 U. PITT. L. REV. 431 (2003).

10. This article does not undertake a comprehensive theoretical treatment of the meaning of academic freedom. For such a discussion, see, e.g., J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251 (1989); Mark G. Yudoff, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987).

11. Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm*, 91 CAL. L. REV. 1061, 1066 (2003).

12. ASS'N UNIV. PROFESSORS, GEN. REPORT OF THE COMM. ON ACADEMIC FREEDOM & ACADEMIC TENURE (1915), *reprinted in* 53 LAW & CONTEMP. PROBS. 393 (1990).

to Philosophy affirms this view of academic freedom, defining it as "the right of teachers in universities and other sectors of education to teach and research as their subject and conscience demands."[13] While the former meaning is most relevant to the ideas discussed here, a basic understanding of the philosophical roots of academic freedom is instructive in contemplating the evolution of the concept's relationship to the First Amendment.

1. First Amendment Doctrine and Philosophical Roots of Free Expression

The European Enlightenment produced the conviction that intellectual curiosity, if unfettered, would produce knowledge that would serve to benefit society generally.[14] *Lehrfreiheit*, the German concept meaning that public college and university professors enjoy the legal right to undertake their research and teaching without government interference, is the chief inspiration for American notions of academic freedom.[15] This concept's importance was perhaps most famously articulated during the nineteenth century in John Stuart Mill's *On Liberty*, in which he declared, "If the teachers of mankind are to be cognizant of all that they ought to know, everything must be free to be written and published without restraint."[16]

Mill's notion of academic freedom derived from principles underlying the First Amendment and free speech generally. Mill thought that freedom of speech facilitated a "search for truth" and believed that academic inquiry was a vanguard in that search.[17] Another approach, advanced most notably by Alexander Meiklejohn, holds that the most significant value of free speech is to improve our ability to self-govern.[18] In Meiklejohn's view, the First Amendment "is not the guardian of unregulated talkativeness."[19] Therefore, the primary duty of free speech is not to require that everyone who wants to speak is permitted to do so, but to ensure that every point of view is heard.[20] Robert Bork expounded on this theory, but took a more extreme view, arguing that the First Amendment should protect only political speech. Bork claims that while expression may serve purposes other than political ones, such as personal development, speech is not unique in its ability to serve a political purpose, and therefore no principled reason exists to protect speech while not protecting other expression.[21] This philosophy has been criticized for its narrow view of free speech by scholars such as

13. Anthony O'Hear, *Academic Freedom*, *in* THE OXFORD COMPANION TO PHILOSOPHY (Ted Honderich ed., 1995).

14. Neil W. Hamilton, *Academic Freedom*, *in* THE OXFORD COMPANION TO UNITED STATES HISTORY (Paul S. Boyer ed., 2001).

15. *Id.*

16. MILL, *supra* note 1.

17. GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 9 (1999).

18. *Id.*

19. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

20. *See* STONE ET AL., *supra* note 17, at 11.

21. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 25 (1971).

Professors David Richards[22] and Martin Redish,[23] who have advanced various approaches emphasizing the importance of self-realization or autonomy as an underlying free speech value. Others have also posited several lesser-known philosophies.[24]

All of these views provide some support for First Amendment recognition of academic freedom. Bork's narrow approach, however, would support academic freedom only for scholarship of interest to the electorate in making political decisions. The autonomy/self-realization rationale, mindful of the rights of the scholar (though not necessarily the audience), would strongly protect all forms of scholarship. But in doing so, academic freedom would not be a substantially greater First Amendment concern than other forms of self-realization that do not reach an audience. Meiklejohn's "town hall" principle is consistent with the value-to-society goal of academic freedom, but only to the extent that ideas are not duplicated. Of the various approaches, Mill's "search for truth" appears most targeted at academic freedom. His insistence that free speech helps society discover true knowledge is similar to the academic's goal of knowledge production through science, objectivity, and intellectual rationalism.

2. The Birth of the American Association of University Professors

This last principle, that free speech is necessary to facilitate the search for truth, gained growing urgency at the beginning of the nineteenth century as scholars began an unprecedented challenge to popular philosophical and scientific beliefs.[25] College and university officials soon recognized this, and many instiutions voluntarily gave their faculty the contractual right to pursue their research and teaching without fear of administrative retribution for the viewpoints expressed in their work.[26]

Not all college and university officials did so, however. In 1900, Stanford University's sole trustee dismissed a professor who had published work supporting the "free silver" movement.[27] Eight other professors eventually resigned in protest or were terminated for supporting the professor.[28] This incident eventually gave rise to a movement among professors at Johns Hopkins University to found an association of academics that would work to protect the academic freedom of faculty nationwide.[29] In 1915, the American Association of University Professors

22. *See* David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

23. *See* Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

24. These include the "safety valve," see THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); the "tolerant society," see LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986); and the "checking value," see Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

25. Hamilton, *supra* note 14.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

(AAUP) was born.[30]

In 1940, the AAUP, together with the Association of American Colleges (AAC), published a manifesto describing the fundamental values inherent in academic freedom, entitled the *Statement of Principles on Academic Freedom and Tenure*.[31] The statement set forth detailed expectations for America's colleges and universities with respect to the academic freedom of faculty members.[32] It identified three principle components of academic freedom: "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action."[33]

The statement itself is, of course, not binding law, as it has never been expressly incorporated into any state or federal statute or judicial decision.[34] It has, however, been incorporated into most faculty handbooks and college and university mission statements.[35] The statement has also been a source of influence for academic freedom principles which federal courts began to recognize in the early 1950s.

Thus, the American tradition of faculty academic freedom began as a defensive reaction to suppression of research originating at the college and university level. It should not be surprising that research is the first value listed among the three; the AAUP's formation was a direct response to college and university officials punishing faculty for the viewpoints expressed in their scholarly works.

B. Brief History of Government Treatment of Academic Freedom

Before the research suppression that triggered the AAUP's founding, federal, state, and local government officials had routinely targeted domestic dissent that they claimed was a menace to public order and security. A common target of this war is knowledge-producing information thought inconsistent with the state's security objectives—activity which has historically come in disproportionately high numbers from America's colleges and universities.

From the country's founding through the first part of the twentieth century,

30. *Id.*

31. *Declaration of Principles on Academic Freedom and Tenure*, 1 BULL. AM. ASS'N U. PROFESSORS 1 (1915), *reprinted in* 40 BULL. AM. ASS'N U. PROFESSORS 90 (1954).

32. *Id.*

33. *Id.*

34. Because the statement has been incorporated into some college and university handbooks and employment contracts, it may have legal force—even at private institutions—to the extent that the principles contained therein represent binding contractual terms between the college or university and its faculty members.

35. *See, e.g.*, UNIV. OF CAL. REVISED ACADEMIC PERSONNEL MANUAL, ACADEMIC FREEDOM, (Sept. 29, 2003), *available at* http://www.ucop.edu/acadadv/acadpers/apm/apm-010.pdf; KAN. UNIV. FACULTY HANDBOOK, ACADEMIC FREEDOM, § C.2.a.4 (1998), *available at* http://www.ku.edu/~unigov/fachand1998.html; UNIV. OF MICH. FACULTY HANDBOOK, FUNDAMENTAL TENETS STATEMENT, § 1A (June 18, 1990), *available at* http://www.provost.umich.edu/faculty/handbook/; UNIV. OF WASH. FACULTY HANDBOOK VOL. 2, A STATEMENT OF PRINCIPLE: ACADEMIC FREEDOM AND RESPONSIBILITY, §§ 24–33 (May 27, 1992), *available at* http://www.washington.edu/ faculty/facsenate/handbook/Volume2.html; UNIV. OF WASH. ROLE AND MISSION STATEMENT, (Feb. 1998) *available at* http://www.washington.edu/home/mission.html.

government officials seeking to neutralize activity thought to undermine national policy used official coercion, in some instances going so far as to criminalize dissent.[36] As activists and commentators began to call for strengthened First Amendment protection of expression critical of the government after World War I, many federal and state officials began employing an alternate strategy: building unity of national conscience against anti-patriotic and anti-government speech by using popular sentiment as its own agent, while minimizing the risk of violating constitutional liberties. This phenomenon was illustrated in the early to middle Cold War periods, the years often referred to as the McCarthy era.[37]

1. The Espionage Act of 1917

Before the First Amendment's expansion in the mid-twentieth century, direct suppression was both available and routinely employed by the government. In the weeks before the United States officially entered into World War I, President Woodrow Wilson sharply condemned domestic dissent and warned that disloyalty must be "crushed out."[38] He directed Assistant Attorney General Charles Warren to draft a bill that, after some congressional modification, would become the Espionage Act of 1917.[39] Among other things, the Act forbade anyone to "willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States" during times of war.[40] The Justice Department used the Act to wage the most aggressive campaign on dissent in American history. Two thousand dissenters were prosecuted, and many received lengthy prison sentences of up to twenty years.[41]

36. The best examples are the Sedition Act of 1789 and the Espionage Act of 1917. The Sedition Act stemmed from a 1789 diplomatic fiasco with France commonly known as the XYZ affair. The incident sparked anti-French sentiment in the United States and prompted the Federalist Party to take measures in preparation for a potential war with France. David Jenkins, *The Sedition Act of 1789 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM J. LEGAL HIST. 154, 155–56 (2001). Republicans, who constituted a minority of Congress, thought such posturing was unwise and played into the hands of Britain, who was still at war with France. *Id.* at 156. The Republicans began assailing the Federalists' policy in the press. Citing such attacks as hostile to American interests and having the tendency to undermine national security, the Federalists pushed through the Alien and Sedition Acts. The Sedition Act punished the publication of criticism of the government, although a showing that the criticism was true was an absolute affirmative defense. *Id.*

37. *See generally* ELLEN SCHRECKER, MANY ARE THE CRIMES (1998).

38. President Woodrow Wilson's Third Annual Message to Congress (Dec. 7, 1915), *quoted in* DAVID M. KENNEDY, OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY 67 (1980). *See also* Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 336 (2003).

39. PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 53 (1979).

40. Espionage Act of 1917, Ch. 30, 40 Stat. 217, 219 (1917).

41. Stone, *supra* note 38, at 337. One such person was the editor of the Jewish Daily News, Rose Pastor Stokes. In a speech to the Women's Dining Club of Kansas City, she stated that she was "for the people, while the government is for the profiteers." Stokes v. United States, 264 F. 18, 20 (8th Cir. 1920). The government argued that the military could "operate and succeed only so far as they are supported and maintained by the folks at home," and that Ms. Stokes' speech

In addition to the numerous individuals whom the government silenced with prosecution and incarceration, colleges and universities were similarly responsible for quashing academic scholarship. Illustrative is the ironic case of Harvard free speech scholar Zechariah Chafee, Jr.[42] Chafee was targeted as a junior faculty member after publishing a law review article criticizing the Espionage and Sedition Acts.[43] The Justice Department, led by Anti-Radical Division Chief J. Edgar Hoover, responded by prompting Harvard officials to subject Chafee to an academic inquisition determining his fitness to remain at Harvard.[44] Although he was acquitted and retained by one vote, the incident sent a clear, chilling message through the American academy.[45]

2. Early Cold War/McCarthy Era

During the early years of the Cold War, faculty members were again targeted as subversives.[46] Many public and private college and university academics, especially more vulnerable untenured junior faculty members, lost their positions, were denied tenure, or in some cases, were effectively exiled from academia altogether.[47] These academics were selected chiefly for their past or present relationship with the Communist Party, their leftist political leanings, or their refusal to satisfactorily testify before the House Un-American Activities Committee.[48] While most of these academics were targeted because of their political affiliations, many drew attention with their research or other professional activity. One such case is that of Yale law professor Vern Countryman.

Countryman had come to Yale from the University of Washington, where he published a study critical of the state congressional Canwell Committee[49] and had been ostracized in Seattle as a result.[50] In addition to his scholarship, Countryman routinely represented Communists in legal matters.[51] This reputation followed him

could "chill enthusiasm . . . and retard cooperation" of the women's club members who heard it. Stone, *supra* note 38, at 339. She was convicted and sentenced to ten years in prison, although the Eighth Circuit later overturned the sentence on procedural grounds. *Stokes*, 264 F. at 26. (finding that trial judge's jury instructions had impermissibly lowered the burden of proof by including a factual discussion).

42. Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons From History*, 87 MASS. L. REV. 72, 76–77 (2002).

43. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1918–19).

44. *Id.*

45. *Id.*

46. *See* ELLEN SCHRECKER, NO IVORY TOWER 219–64 (1986).

47. *Id.* at 241–64.

48. *Id.* at 219–40.

49. The Canwell Committee was, in a sense, the State of Washington's version of the House Un-American Activities Committee. Albert Canwell was a state representative who chaired a "fact-finding" committee which, starting in 1946, worked to expose communists in Washington's private organizations and colleges and universities. *Id.* at 94–112.

50. *Id.* at 252.

51. *Id.*

to Yale.[52] Just two years after arriving, the law school faculty board unanimously approved Professor Countryman for a full professor position.[53] However, the dean and president of Yale denied him tenure.[54] They justified their decision in a *New York Times* article, claiming that Countryman's Canwell Committee work was not sufficiently scholarly and that the position of tenured "professor must be zealously guarded" at Yale.[55] Countryman soon left Yale and entered private practice.[56]

These tactics of covertly undermining the careers of faculty with political views outside the mainstream inhibited academic freedom just as direct criminalization of seditious libel did during the World War I era. Cold War historian Ellen Schrecker has argued that the chilling effect of the inquisition must be measured not only by the scholarship that was deterred, but also by the scholarship which was produced: "The fifties were . . . the heyday of consensus history, modernization theory, structural functionalism, and the new criticism. Mainstream scholars celebrated the status quo, and the end of ideology dominated intellectual discourse."[57] According to Schrecker, "there is considerable speculation that the devastating effects of the [Institute of Pacific Relations][58] hearings on the field of East Asian Studies made it hard for American policy-makers to get realistic advice about that part of the world" in the period leading up to the Vietnam War.[59]

The McCarthy era was not the last time the state brought its powers to bear on the academy. Shifting trends in domestic cultural politics and American foreign policy beginning in the 1990s have again threatened academic freedom. To examine how the constitutional jurisprudence might address these threats, this article reviews academic freedom doctrine from its origins to the present.

III. ACADEMIC FREEDOM JURISPRUDENCE: 1892–2006[60]

In a line of seminal cases beginning in 1952 and continuing into the late 1960s,

52. *Id.*

53. *Id.*

54. *Id.*

55. Tad Szulc, *Professor Quits; Yale is Accused*, N.Y. TIMES, Dec. 30, 1954, at 6.

56. SCHRECKER, *supra* note 46, at 253. Countryman later accepted a tenured position at Harvard Law School. *Id.*

57. *Id.* at 339. Schrecker acknowledges the inherent speculation in attributing causation to this phenomenon and notes that the issue needs further study.

58. The Institute of Pacific Relations was a private research organization comprised mainly of academics (including most of the academics in that field), which was targeted by the FBI beginning in 1951. *Id.* at 161–67.

59. *Id.*

60. For a complete historical treatment of courts' First Amendment academic freedom jurisprudence, see PEGGIE J. HOLLINGSWORTH, ED., UNFETTERED EXPRESSION: FREEDOM IN AMERICAN INTELLECTUAL LIFE (Univ. of Mich. 2000); Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35 (2002); Gary Pavela, *A Balancing Act: Competing Claims for Academic Freedom*, 87 ACADEME 21 (2001); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990); Ralph R. Fuchs, *Academic Freedom—Its Basic Philosophy, Function and History*, 28 LAW & CONTEMP. PROBS. 431, 433 (1963).

various members of the Supreme Court lent their support—explicitly or implicitly—to the notion that academic freedom is a value appropriate for constitutional recognition.[61] A half a century before, courts began considering issues that would lay the groundwork for the recognition of academic freedom as a First Amendment concern.

A. The Judicial Foundation for *Pickering–Connick*

In the 1892 Massachusetts Supreme Judicial Court case *McAuliff v. Mayor of New Bedford*, Oliver Wendell Holmes introduced the "right-privilege" distinction into the then primitive body of free-speech laws.[62] McAuliff was a city police officer who had been fired for soliciting political funds and being a member of a political committee in violation of local police regulations.[63] There was no evidence that he did these things while on duty or on department grounds.[64] Justice Holmes found for the city, holding that McAuliff "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[65] Holmes further held that "there is nothing in the Constitution . . . to prevent the city from attaching obedience to [the rule prohibiting political solicitation] as a condition to the office of policeman."[66] As a result, Holmes reasoned, the government was free to deny public employees free speech rights as a prerequisite to employment.[67]

This reasoning was later termed the "right-privilege" distinction.[68] This principle holds that where a person seeks to obtain a benefit from the government that the Constitution does not otherwise guarantee him, i.e., a *privilege*, the government may require the person to waive some *right* to obtain that privilege.[69] Had this principle survived, it would have precluded the development of constitutionally-protected academic freedom of state teachers and professors.

Fortunately for the academic freedom doctrine, however, the right-privilege distinction did not survive. In 1925, in adjudicating a claim brought by a trucking company against the local railroad commission, the Supreme Court endorsed what came to be called the "unconstitutional conditions" doctrine.[70] A state statute conditioned private truckers' use of California highways on their assuming the

61. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Wieman v. Updegraff, 344 U.S. 183 (1952); Adler v. Bd. of Educ., 342 U.S. 485, 508 (1952).

62. McAuliff v. Mayor of New Bedford, 29 N.E. 517, 517–18 (Mass. 1892).

63. *Id.* at 517.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *See generally* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

69. *Id.*

70. Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 599 (1925).

duties and burdens of a common carrier.[71] The truckers argued that the law constituted a taking of private property without just compensation and without due process of law, in violation of the Fourteenth Amendment.[72]

That due process forbids the legislature from converting a private carrier into a common carrier against his will, the Court held, is not in dispute.[73] Therefore, it instead framed the issue as: "whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, [may be] within the power of the state altogether to withhold if it sees fit to do so."[74] The Court determined that it may not.[75] It reasoned that it would be a "palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution," while upholding a law "by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold."[76] In essence, then, "[i]t is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."[77]

Although courts continued intermittent application of the right-privilege distinction rationale for decades,[78] *Frost*'s rebuke of that doctrine set the stage for full adoption of the unconstitutional conditions principle. This in turn would make way for the *Pickering-Connick* public employee doctrine and the development of the public teacher academic freedom doctrine.

The first notable explicit judicial mention of "academic freedom" came in a series of McCarthy-era cases dealing with public employee loyalty oaths. Although the majority holding rested on grounds other than the First Amendment in *Adler*,[79] *Updegraff*,[80] and *Sweezy*,[81] the concurring and dissenting opinions are of interest both for their novel justification for First Amendment protection of academic freedom and because the opinions would prove influential in later majority holdings.

In *Adler v. Board of Education*, the Court considered the constitutionality of a New York statute that used various means to eliminate individuals holding certain beliefs from working in state government.[82] The statute, called the Feinberg Law, prohibited public employees from advocating the use of violence to alter the form

71. *Id.* at 592.
72. *Id.* at 589.
73. *Id.* at 592.
74. *Id.* at 592–93.
75. *Id.* 593–94.
76. *Id.* at 593.
77. *Id.* at 594.
78. *See, e.g.*, Adler v. Bd. of Educ., 342 U.S. 485, 508 (1952) (using right-privilege distinction in upholding law prohibiting public employees from membership in subversive groups).
79. *Id.* at 485.
80. Wieman v. Updegraff, 344 U.S. 183 (1952).
81. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
82. *Adler*, 342 U.S. at 485.

of government, provided that membership in a "subversive" organization would be considered *prima facie* evidence of unfitness for employment, and required related oaths.[83] The Court upheld the law.[84] Relying on the right-privilege distinction rationale, it stated that "[teachers] are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."[85]

The dissenting opinion of Justice Douglas (himself a former academic) was based on academic freedom and the First Amendment. Douglas' opinion claimed that the law impermissibly treaded on academic freedom by excluding an entire ideology from the classroom but without a showing that such exclusion is necessary to achieve the state's objectives.[86] Second, Justice Douglas wrote that the law created a substantial chilling effect on academic freedom for existing teachers by making them leery and uncertain that some forms of expression could cost them their jobs.[87] Justice Douglas' *Adler* dissent is memorable because it is the first to recognize academic freedom as a right protected by the First Amendment.[88] In his opinion, academic freedom is a distinct value of First Amendment jurisprudence.[89]

In *Wieman v. Updegraff*, decided nine months after *Adler*, Justice Frankfurter further developed Justice Douglas' reasoning.[90] This time the Court, in an opinion by Justice Clark, relied on a substantive due process rationale to overturn an Oklahoma law requiring a loyalty oath as condition of public employment.[91] Justice Frankfurter, joined by Justice Douglas, concurred on First Amendment grounds.[92]

Paul W. Updegraff was a "citizen and taxpayer" who sued to enjoin Oklahoma state officials from paying salaries to Oklahoma Agricultural and Mechanical College professors, teachers, and other employees who had not signed a state statutorily-imposed loyalty oath.[93] The oath required the subscriber to affirm that:

> within the five (5) years immediately preceding the taking of this oath (or affirmation) [he] ha[s] not been a member of . . . any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization . . . .[94]

83. *Id.* at 486–91.
84. *Id.* at 496.
85. *Id.* at 492.
86. *Id.* at 509 (Douglas, J., dissenting).
87. *Id.* at 509–10.
88. *See* Van Alstyne, *supra* note 60, at 107.
89. *Id.*
90. Wieman v. Updegraff, 344 U.S. 183 (1952).
91. *Id.* at 183.
92. *Id.* at 194–98 (Frankfurter, J., concurring).
93. *Id.* at 183–86.
94. *Id.* at 186.

The state district court and the Supreme Court of Oklahoma held in favor of the plaintiff and enjoined the officials.[95] The state supreme court employed the right-privilege distinction in holding the law compatible with the Fourteenth Amendment. It reasoned that the teachers "have no constitutional right to be so employed . . . . The act does not purport to take away their right to teach. Public institutions do not have to hire nor retain employees except on terms suitable to them."[96] On appeal, the United States Supreme Court overturned the holding on due process grounds.[97]

Justices Black, Douglas, and Frankfurter agreed with the majority's Fourteenth Amendment reasoning but concurred on First Amendment grounds in two separate opinions.[98] Justice Frankfurter's opinion is noteworthy because it identified teachers, teaching, and scholarship as uniquely worthy of protection.[99] He argued that demanding homogeneity of association in our educators is uniquely worrisome because of their vital role in society.[100] He stated that the law irrationally narrowed the pool of academics that could be employed by the state and deterred even "qualified" academic employees from exercising legitimate academic freedom, thus creating a chilling effect.[101] Without mentioning academic freedom explicitly, Justice Frankfurter endorsed the normative elements of the AAUP's manifesto: he declared that the loyalty oath "has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."[102] He further stated, "The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and National power."[103]

Justice Frankfurter then reasoned that the state's undisputed power to eliminate public educational institutions altogether does not give it the power to take the lesser step of curtailing the employees' freedoms while the institutions are in existence.[104] In so doing, the concurring Justices reiterated Justice Douglas' *Adler* view that the unconstitutional conditions doctrine, along with the First and Fourteenth Amendments, limited the power of the state to curtail academic freedom of public education employees.

Four years later, a controlling plurality of the Court used the same reasoning. In *Sweezy v. New Hampshire*, Chief Justice Warren made it clear that principles of academic freedom deserve some constitutional protection.[105] Paul Sweezy was an

95. Bd. of Regents of Okla. Agric. Coll. v. Updegraff, 237 P.2d 131 (Okla. 1951), *rev'd*, 344 U.S. 183 (1952).

96. *Id.* at 306.

97. Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

98. *Id.* at 192–98.

99. *Id.* at 194–98 (Frankfurter, J., concurring).

100. *Id.* at 195–97.

101. *Id.* at 195.

102. *Id.*

103. *Id.* at 197.

104. *Id.*

105. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

instructor at the University of New Hampshire who had been summoned before the New Hampshire Attorney General to answer questions about his Communist affiliations, teachings, and beliefs.[106] Sweezy disavowed affiliation with the Communist party but admitted that he considered himself a "classical Marxist" and that he had written and still believed that socialism was morally superior to capitalism.[107] He refused, however, to answer other questions about his beliefs and the content of his lectures.[108] As a result, he was jailed for contempt, a charge the New Hampshire Supreme Court upheld.[109]

In considering Sweezy's appeal, Justice Warren declared:

> The essentiality of freedom in the community of American universities is almost self-evident . . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . . 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.[110]

Despite this sweeping edict on academic freedom's value, the Court ultimately dismissed the case on jurisdictional grounds.[111] Therefore, the case is most notable not for its result, but for Justice Frankfurter's concurrence, in which he expounded on the value of academic freedom and found that the First Amendment should bar the state's action. Justice Frankfurter, joined this time by Justice Harlan, wrote: "For society's good—if understanding be an essential need of society—inquiries into [the social sciences], speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible."[112] He continued:

> These pages need not be burdened with proof . . . of the dependence of a free society on free universities. . . . [i.e.,] the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars . . . ."[113]

He then laid out a rule for determining the constitutionality of laws restricting academic freedom: "Political power must abstain from intrusion into [social science inquiry], pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."[114]

Other Court decisions not obviously linked with education or scholarship would also prove significant to the development of constitutional academic freedom

106. *Id.* at 238–43.
107. *Id.* at 243.
108. *Id.* at 240–44.
109. *Id.* at 244–45.
110. *Id.* at 250.
111. *Id.* at 255.
112. *Id.* at 262 (Frankfurter, J., dissenting).
113. *Id.*
114. *Id.*

doctrine. For example, in a 1964 decision that one leading American constitutional scholar characterized as "an occasion for dancing in the streets,"[115] the *New York Times Co. v. Sullivan* Court raised the standard for libel against public officials.[116] The Court held that such claims require "actual malice," i.e., knowledge of the claim's falsity or recklessness with regard thereto.[117] L.B. Sullivan, a public affairs commissioner for the City of Montgomery, Alabama, had sued three Alabama clergymen and the *New York Times* for publishing an ad that claimed that the commissioner had committed several outrageous acts in violation of student protestors' civil rights.[118] The ad was largely true but contained some misleading statements and exaggerations.[119] The trial court found for Sullivan and awarded him $500,000.[120] The Alabama Supreme Court upheld the judgment.[121]

The Supreme Court granted certiorari and reversed the Alabama Supreme Court's decision.[122] Writing for the Court, Justice William Brennan declared "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[123] For the first time, the Court expressly repudiated the Sedition Act of 1789, stating that there was "a broad consensus" that the Act, "because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[124] *Sullivan* implicates academic freedom because it raised the government's burden to punish criticism of a governmental body or official such that mere falsity of a statement is insufficient.[125]

Just three years after *Sullivan*, in *Keyishian v. Board of Regents*, the Court majority adopted Justice Frankfurter's reasoning from *Sweezy*.[126] *Keyishian* represented the first time that a majority of the Court powerfully endorsed the notion that academic freedom was worthy of First Amendment protection.[127] It did so in striking down the Feinberg Law, the same law the Court held constitutional fifteen years before in *Adler*.[128] The law continued to disqualify individuals deemed "subversive" from public school employment, "subversiveness" often being determined by membership in one of several

115. Harry Kalven, Jr., *The* New York Times *Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (quoting Alexander Meiklejohn).

116. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

117. *Id.*

118. *Id.* at 256.

119. *Id.*

120. *Id.*

121. N.Y. Times Co. v. Sullivan, 144 So. 2d 25 (Ala. 1962), *rev'd*, 376 U.S. 254 (1964).

122. *Sullivan*, 376 U.S. at 254.

123. *Id.* at 270.

124. *Id.* at 276 (internal citations omitted).

125. The decision may have also influenced the *Pickering* outcome, as *Sullivan* allowed the Court to overlook misstatements in *Pickering*.

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

127. *See id.*

128. *Id.* at 608–09.

organizations compiled by the New York State Board of Regents.[129]

In finding the law unconstitutional, Justice Brennan wrote:

> 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 to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools.[130]

The Court based its holding squarely on the First Amendment, finding the law both unconstitutionally vague and overbroad.[131] The law was unconstitutionally vague because it prohibited advocacy not just of violent overthrow of the government, but "treasonable or seditious" conduct.[132] The Act was impermissibly broad because it lacked any element of intent.[133]

In its holding, the Court cemented the unconstitutional conditions doctrine in its jurisprudence, stating, "The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."[134] In so doing, the Court paved the way for its use of the unconstitutional conditions doctrine in the context of faculty dissent one year later.

B. *Pickering-Connick* and its Progeny

In 1968, four years after *Sullivan* and one year after *Keyishian*, the Court decided *Pickering v. Board of Education*,[135] the springboard for many later public college and university faculty academic freedom claims. In *Pickering*, the Court held that when public employees speak as citizens and on matters of public importance, they enjoy the protection of the First Amendment.[136] In the decades following *Pickering*, courts decided numerous cases with academic freedom implications. Below is a discussion of those cases most relevant to the proposal in Part VI of this article.

Marvin L. Pickering was a public high school teacher who was terminated after he wrote a letter to the editor in a local paper criticizing how the Board of Education was handling a school bond issue.[137] In the letter, Pickering caustically criticized the Board's fund management and its allocation of funds to various school programs.[138] The letter's factual assertions were largely accurate except for

129. Milton R. Konvitz, *Keyishian v. Board of Regents*, *in* THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS (Kermit L. Hall ed., 1999).

130. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (internal citations omitted).

131. *Id*. at 605.

132. *Id*. at 598.

133. *Id*. at 605.

134. *Id*. at 605–06.

135. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

136. *Id.* at 578.

137. *Id.* at 564.

138. *Id.* at 569.

three misstatements about the cost of athletics and school lunches.[139] Pickering identified himself as a teacher but disclaimed that he was signing as a "citizen, taxpayer and voter."[140] The School Board voted to terminate him.[141]

After he was fired, Pickering filed a lawsuit alleging a violation of his First Amendment rights.[142] An Illinois circuit court found for the school board and the Illinois Supreme Court affirmed.[143] The state supreme court utilized a form of right-privilege distinction reasoning to hold that because Pickering was a teacher-employee, he "is no more entitled to harm the schools by speech than by incompetency, cruelty, negligence, immorality, or any other conduct for which there may be no legal sanction."[144] Pickering appealed to the United States Supreme Court.

The Supreme Court granted certiorari.[145] Finding for Pickering, Justice Thurgood Marshall wrote for a four-justice plurality.[146] Justice Marshall used a form of unconstitutional conditions principle, reasoning that "teachers may [not] be constitutionally compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest" even if the comments concern school matters and even if the comments criticize school policy.[147] In considering such claims, the Supreme Court held that courts must "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[148]

Applying this rule to the facts, the Court found that allocation of school funds was a matter of public concern.[149] It stated, "On such a question free and open debate is vital to informed decision-making by the electorate."[150] It recognized that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent."[151] The Court next found that the speech was "neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the

139. *Id.* at 578–82.

140. *Id.* at 578.

141. *Id.* at 564.

142. Pickering v. Bd. of Educ., 225 N.E.2d 1 (Ill. 1967).

143. *Id.*

144. *Id.* at 6.

145. Pickering v. Bd. of Educ, 391 U.S. 563 (1968).

146. Justices Douglas and Black concurred in the decision. 391 U.S. at 575–82. Justice White dissented, arguing that a determination that the statements were made knowingly or recklessly should not warrant First Amendment protection regardless of the harm created. Moreover, Justice White felt that there was insufficient evidence in the record to conclude that the statements were not so made. *Pickering*, 391 U.S. at 582–84.

147. *Id.* at 578–81.

148. *Id.*

149. *Id.* at 571.

150. *Id.* at 571–72.

151. *Id.* at 572.

regular operation of the schools generally."[152] Finally, applying *Sullivan*, the Court found that the letter's falsities were not made knowingly or recklessly.[153] As a result, the Court held that the First Amendment prohibited the school from disciplining Pickering for his speech: "in a case such as this . . . a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[154]

Although the opinion did not expressly mention academic freedom, it would nonetheless impact the doctrine. *Pickering* and *Sullivan* together gave public-institution faculty the right to criticize the government in good faith without substantial fear of losing their jobs as retribution, subject to the restrictions later holdings would impose.

The Court clarified and slightly narrowed the *Pickering* rule fifteen years later in *Connick v. Myers*.[155] *Connick* is significant because it clarified what type of speech implicates a matter of "public concern."[156] In *Connick*, Sheila Myers, an Assistant District Attorney, learned that she was being considered for a transfer to another criminal court section.[157] Strongly objecting to the transfer, she circulated a questionnaire among her colleagues seeking opinions on various office policy matters, including the transfer.[158] Informed that the incident had created a "mini-insurrection," Connick, the District Attorney, terminated Myers, ostensibly for refusing to accept the transfer and for causing the disruption.[159] Myers sued, alleging unlawful termination on the basis of protected free speech (circulating the questionnaire) under the First and Fourteenth Amendments.[160]

Applying *Pickering*, the federal district court found that Myers' activities touched on matters of public importance and did not substantially or materially interfere with the efficient and effective operation of the office.[161] Because the employer was unable to show that it would have taken the same action but for the plaintiff's protected conduct, the court found for Myers.[162] The Fifth Circuit Court of Appeals affirmed, but the Supreme Court reversed.[163]

In so holding, the Court stated that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[164] The speech should address an issue of "political, social, or other concern to the community."[165] The Court

152. *Id.* at 572–73 (internal footnote omitted).
153. *Id.* at 573.
154. *Id.* at 574.
155. Connick v. Myers, 461 U.S. 138 (1983).
156. *Id.* at 142.
157. *Id.* at 140.
158. *Id.*
159. *Id.* at 140–41.
160. *Id.*
161. *Id.* at 142.
162. *Id.*
163. *Id.*
164. *Id.* at 147–48.
165. *Id.* at 146.

found only one of its statements to touch on a matter of public concern—a portion that questioned whether employees ever felt pressure to support office-endorsed political candidates.[166] It found that the other subjects were not of public concern.[167] Because the bulk of the speech was not of public concern, the Court balanced the value of that speech, which it found to be low, with the level of disruption that it caused.[168] Citing the supervisor's characterization of the result as a "mini-insurrection," the Court held for the government.[169]

In the 1987 case *Rankin v. McPherson*, the Court further refined the *Pickering-Connick* standard, clarifying the workplace disruption prong of the analysis.[170] In March 1981, Ardith McPherson, a county constable's office clerical employee, was talking with a coworker about President Ronald Reagan's recent attempted assassination. McPherson said, "If they go for him again, I hope they get him."[171] Another coworker overheard the comment and reported it to Constable Rankin.[172] After confirming the comment with McPherson, Rankin immediately fired her.[173] The district court upheld the termination, the Court of Appeals for the Fifth Circuit overturned the decision, and the Supreme Court affirmed.[174]

The Court began its analysis by reiterating *Pickering-Connick*'s balancing requirement "'between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[175] It then held that speech may still not be protected if "the statement impairs discipline by superiors or harmony among co-workers" or if it has "a detrimental impact on close working relationships for which personal loyalty and confidence are necessary."[176] However, the Court held, "The inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern."[177]

The Court found that McPherson's comment, however inappropriate, dealt with a matter of public concern.[178] Notably, the Court further held that the comment's private nature did not remove it from being a matter of public concern.[179] The Court employed the *Pickering* balancing test. It found that as a low-level employee not in a "confidential, policymaking, or public contact role," the remark

166. *Id.*
167. *Id.* at 149.
168. *Id.* at 150–52.
169. *Id.* at 151–54.
170. Rankin v. McPherson, 483 U.S. 378 (1987).
171. *Id.* at 381.
172. *Id.*
173. *Id.* at 382.
174. *Id.* at 378.
175. *Id.* at 384 (quoting *Pickering*) (brackets in original).
176. *Rankin*, 483 U.S. at 387.
177. *Id.*
178. *Id.* at 386.
179. *Id.* at 386 n.11.

did not disrupt the office's functioning or undermine its purpose.[180] The Court, therefore, held that McPherson's termination violated her First Amendment rights.

In a public employee speech case from 2004, the Court further clarified and narrowed the standard for determining whether speech is of "public concern."[181] The case, *City of San Diego v. Roe*, involved a police officer who, while off-duty, made and distributed pornographic movies of himself.[182] Richard Roe (a pseudonym) sold the movies, which did not identify him as affiliated with the San Diego Police Department, on the online auction website eBay.[183] One of his supervisors found the advertisement and recognized the officer. He was soon terminated.[184] Roe sued, claiming that his "off-duty, non-work related activities" were protected under the First Amendment and could not be grounds for termination.[185] Without applying the *Pickering* balancing test, the district court granted summary judgment to the city, finding that Roe had not demonstrated that his actions touched on a matter of public concern and, thus, that they were not protected speech.[186] The Court of Appeals for the Ninth Circuit reversed, finding that speech occurring outside of the work environment and unrelated to the employee's "status in the workplace" is protected under the public concern doctrine.[187]

Granting certiorari, the Supreme Court reversed the circuit court, finding that although the officer's actions were unrelated to his employment and he was speaking as a private citizen, the speech was not of public concern; moreover, the employer sufficiently demonstrated a legitimate interest in restricting the activity.[188] In so doing, the Court held that the common law invasion of privacy standard should apply to public concern analysis. That is, the speech must concern something of "legitimate news interest" that is a "subject of general interest and of value and concern" to the public when it is published.[189]

In a 2006 landmark ruling,[190] the Court solidified and bolstered the principle that when public employees speak pursuant to their duties, that speech is unprotected.[191] Richard Ceballos was a supervising Deputy District Attorney in the Los Angeles County District Attorney's Office.[192] After reviewing a search warrant in a case in which he was involved, Ceballos determined that the warrant

180. *Id.* at 389–91.

181. City of San Diego v. Roe, 543 U.S. 77, 79 (2004).

182. Courts generally treat movies and other creative media as speech. *See, e.g.*, Heller v. New York, 413 U.S. 483, 491 (1973).

183. Roe v. City of San Diego, 356 F.3d 1108, 1110 (9th Cir. 2004).

184. *Id.*

185. *Id.*

186. *Id.* at 1112, 1122.

187. *Id.* at 1120.

188. *Id.*

189. City of San Diego v. Roe, 543 U.S. 77, 84 (2004).

190. Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).

191. *Id.*

192. *Id.*

was based on factual misrepresentations.[193] He reported his findings to his supervisors, both orally and in a memorandum recommending that the office move to dismiss the case.[194] Nonetheless, Ceballos' supervisors decided to continue the prosecution.[195] In a later hearing in which Ceballos testified to his conclusions, the court denied the defense's motion to suppress the warrant.[196] Subsequently, according to Ceballos, he was subjected to a series of minor adverse actions, which he claimed were in retaliation for his protected speech on the warrant and the prosecution.[197] When his internal complaint was dismissed, Ceballos sued.[198]

The district court granted summary judgment for the defendant, holding that Ceballos was speaking pursuant to his duties as an employee and that his speech was therefore unprotected by the First Amendment.[199] Citing *Pickering* and *Connick*, the Ninth Circuit reversed, holding that the speech addressed a matter of public concern.[200] The Supreme Court granted certiorari and reversed the circuit court. Writing for the majority, Justice Kennedy rejected the notion that "the First Amendment shields from discipline the expressions employees make pursuant to their professional duties."[201] Finding that Ceballos wrote his memo as an employee, the Court determined that his speech was unprotected by the First Amendment. Justice Stevens, writing in dissent, opined that there was "no adequate justification for the majority's line categorically denying *Pickering* protection to any speech uttered 'pursuant to . . . official duties.'"[202]

Garcetti is particularly relevant to academic freedom because, as is argued in Part VI below, faculty members disseminating their scholarship nearly always do it pursuant to their "official duties." If this is true, then the Supreme Court's current academic freedom jurisprudence would provide faculty scholarship with almost no First Amendment protection whatsoever. Although Justice Kennedy warned that the Court had not decided whether its analysis "would apply in the same manner to a case involving speech related to scholarship or teaching,"[203] none of the Court's prior holdings suggest that it would not.

In recent decades, lower courts have struggled to interpret the Supreme Court's limited academic freedom jurisprudence. In failing to adopt a reliable approach, they have put individual academic freedom on shaky ground and limited the degree to which faculty may rely on its protection in defending their academic expression.

In *Hetrick v. Martin*, the Court of Appeals for the Sixth Circuit considered Eastern Kentucky University's (EKU) decision not to renew the contract of a non-tenured teacher whose teaching style was at odds with the university-endorsed

193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004).
201. *Garcetti*, 126 S. Ct. at 1962.
202. *Id.* at 1965 (Stevens, J., dissenting).
203. *Id.* at 1962.

approach. [204] The professor, Phyllis Hetrick, adopted a pedagogical approach that she claimed would teach students "how to think rather than merely to accept and parrot what they heard," rather than the "by the book" approach that EKU demanded.[205]

EKU had offered Hetrick a one-year, non-tenured position teaching English for the 1969–70 academic year, which she accepted on the mutual anticipation that the contract would be renewed until she acquired tenure.[206] In her classes, she discussed her familial status and her views on the Vietnam War and the draft.[207] On February 27, 1970, EKU informed her that it did not intend to renew her contract for the following academic year.[208] She requested and was denied a hearing and written reasons for the decision, although the head of the English Department testified before the district court that the decision was made because he believed Hetrick assigned too light of a workload and because she did not complete her Ph.D. until the second semester, when EKU believed she would complete it during her first semester.[209] Hetrick sued EKU, alleging that she was fired in retaliation for expressing her views during class.[210] The district court held that EKU's actions were not retaliation.[211]

The Sixth Circuit affirmed, holding that a professor's general in-class approach to educating students is accessible to college and university administration in determining whether to renew contracts and is not broadly protected under the First Amendment.[212] The court of appeals stated that "[w]hatever may be the ultimate scope of the [professor's] amorphous 'academic freedom,'"[213] it "does not encompass the right of a nontenured teacher to have her teaching style insulated from review" by the institution.[214] The court claimed to have little guidance in this area, and thus undertook a sort of "functional necessity"[215] analysis, that is, determining whether it was necessary to EKU's functioning to regulate the professor's speech in this manner. The court distinguished *Pickering*'s citizen speech categorization. While *Hetrick* is limited to academic freedom's coverage of classroom curriculum and does not purport to address scholarship, the holding nonetheless demonstrates the self-confessed lack of guidance that courts receive in deciding academic freedom matters generally.

In *Jeffries v. Harleston*, the Court of Appeals for the Second Circuit considered,

204. Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973) (hereinafter *Hetrick II*).

205. *Id.* at 707.

206. *Id.* at 706–07; Hetrick v. Martin, 322 F. Supp. 545, 545–46 (E.D. Ky. 1971) (hereinafter *Hetrick I*).

207. *Hetrick II*, 480 F.2d at 706.

208. *Hetrick I*, 322 F. Supp. at 546.

209. *Hetrick II*, 480 F.2d at 707; *Hetrick I*, 322 F. Supp. at 546.

210. *Hetrick II*, 480 F.2d at 707.

211. *Id.*

212. *Id.* at 709.

213. *Id.*

214. *Id.*

215. Lynch, *supra* note 11, at 1086.

on remand from the Supreme Court,[216] the right of a City University of New York (CUNY) professor to retain his department chair position.[217] CUNY had attempted to demote Leonard Jeffries following public controversy over a lecture he had given.[218] Jeffries, the chair of the Black Studies Department, had made a public speech in 1991 in which he had degraded Jews.[219] Jeffries devoted much of his speech to "an explication of the . . . role of 'rich Jews' in the enslavement of Africans."[220] He also referred to his CUNY colleague, Bernard Sohmer, as "the head Jew at City College,"[221] and argued that "negative images of African peoples in the film industry were the result of: a conspiracy, planned and plotted and programmed out of Hollywood, [which comprised] people called Greenberg and Weisberg and Trigliani and whatnot . . . ."[222]

At trial, CUNY denied that it had demoted Jeffries for his speech. University officials testified that the University had actually demoted him for "tardiness in arriving at class and sending in his grades, and for . . . brutish behavior."[223] The jury disagreed and found for Jeffries.[224] On appeal, the Second Circuit, while rejecting CUNY's justification, nonetheless found that it had not violated Jeffries' rights.[225] The court held that because he had made the speech in his position as department chair and not as professor and because the only sanction was a demotion, his academic freedom had not been infringed.[226] The Second Circuit's reasoning is noteworthy, in part, because it departs from the well-established employment law principle that a demotion usually constitutes an adverse employment action,[227] which may not be based on the employee's engaging in a federally protected activity.

In 2000, the Court of Appeals for the Fourth Circuit ruled in *Urofsky v. Gilmore* that a Virginia law restricting state employees, including all public college and university professors, from accessing certain kinds of on-line research material was not a violation of the First Amendment.[228] Six faculty members employed by

216. The Supreme Court remanded *Jeffries* in its decision of *Waters v. Churchill*, 511 U.S. 661 (1994), an unrelated case where a plurality of the Court indicated that the government could fire an employee based on a reasonable prediction that the speech will cause disruption. *Id*. at 674–75.

217. Jeffries v. Harleston, 52 F.3d 9 (2d Cir. 1995).

218. *Id.* at 9.

219. *Id.* at 14.

220. Brief of Defendant-Appellant at *10, Jeffries v. Harleston (2d Cir. 1995) (No. 93-7876), 1993 WL 13030296.

221. *Id.*

222. *Id.* at *9.

223. Jeffries v. Harleston, 828 F. Supp. 1066, 1071 (S.D.N.Y. 1993).

224. *Id.* at 1071.

225. *Jeffries*, 52 F.3d at 14–15.

226. *Id.*

227. *See, e.g.*, Noviello v. City of Boston, 398 F.3d 76, 88 (1st Cir. 2005); James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376 (4th Cir. 2004), *cert. denied*, 543 U.S. 959 (2004); Doe v. DeKalb County Sch. Dist., 145 F.3d 1441, 1448 (11th Cir. 1998); James v. Sears, Roebuck & Co., 21 F.3d 989, 992 (10th Cir. 1994).

228. Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000).

various colleges and universities brought suit, challenging that the law prohibited access to sexually-explicit content on state-owned computers and violated their academic freedom under the First Amendment.[229] Because the court determined that the law was aimed only at state employees and not citizens in general, it pursued the non-public concern employee speech prong of *Pickering-Connick*[230] and, predictably, found for the state.[231] Most strikingly, the court found that no constitutional academic freedom for faculty members did exist or ever had existed.[232]

C. The Present State of Academic Freedom Doctrine

Although the Supreme Court has made clear that academic freedom is "a special concern to the First Amendment" and is worthy of constitutional protection,[233] it has given very little additional guidance. As a result, the lower courts have interpreted the Court's scarce language on the subject in different ways and have brought various approaches to cases implicating academic freedom rights. Consequently, the present state of academic freedom doctrine is murky at best. This absence of coherent jurisprudence amplifies the chilling effect that faculty members might experience. Without a clear pronouncement on what conduct is protected, faculty members may be deterred from treading near the edge of protected behavior.

In the words of Professor William Van Alstyne writing in 1990, "it would . . . be quite incorrect to suggest that the protection of academic freedom is reasonably secure. Assuredly it is not."[234] In light of the Fourth Circuit's 2000 declaration in *Urofsky*, that "to the extent the Constitution recognizes any right of 'academic freedom' . . . the right inheres in the University, not in individual professors,"[235] and *Garcetti*'s pronouncement that "when public employees make statements pursuant to their official duties . . . the Constitution does not insulate their communications from employer discipline,"[236] there is little cause to think that Professor Van Alstyne's assessment is any less valid today.

IV. EXPANDING STATE ENCROACHMENT ON ACADEMIC FREEDOM OVER THE PAST TWO DECADES

While courts have been undermining academic freedom's doctrinal foundation, various political and sociological developments have encouraged state actors to

229. *Id.* at 403.

230. *Id.* at 406–09.

231. *Id.* at 404. Notably, the court suggested that it would have been an infringement of rights had the restriction been applied to the public generally. *Id.* at 406. Therefore, the court appears to imply that restricting information to the public on a content basis may violate the First Amendment, though not when applied to a particular subset of the public. *See id.*

232. *Id.* at 415–16.

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

234. Van Alstyne, *supra* note 60, at 153.

235. *Urofsky*, 216 F.3d at 410.

236. Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006).

begin eroding faculty members' academic freedom in practice. This encroachment has come chiefly from two separate and intuitively diametric forces: a climate of increased American nationalism following the events of September 11, 2001 and the subsequent American military actions, and the heightened sensitivity toward sexual and racial issues—sometimes termed "political correctness"—which has led American colleges and universities to adopt policies designed to encourage this sensitivity. In addition, legislatures and the general public have paid greater attention to various "hot button" issues such as gay rights and race relations on campus.[237] This confluence has begun to infiltrate academia, thereby threatening faculty academic expression.

A. Government Has Increasingly Sought to Curb Expression and to Regulate Academic Knowledge Since 9/11

As during the Cold War and other periods when the nation has perceived an imminent threat from an external enemy, the post-9/11 period has precipitated a decreased tolerance for academic and other expression that might suggest leniency toward—or even empathy for—the national adversary. Included in this category is language deemed inconsistent with the government's view of proper security policy objectives or their means of execution.

After the September 2001 attacks on the World Trade Center and the Pentagon, President George W. Bush's administration and other government leaders began a campaign to unite the American public behind the administration's policies, particularly (although not exclusively) those policies designed to execute the newly-declared "War on Terror." One feature of this campaign was that appointed and elected officials began admonishing those who criticized the administration or otherwise expressed opinions deemed counterproductive to the War on Terror.[238] These officials routinely denounced such expressions as unpatriotic, dangerous, or even disloyal. One of the most significant effects of these tactics was a

237. For example, in several states in the mid-1990s, political groups lobbied for measures aimed at cutting or denying public funding to gay organizations and limiting gay-rights laws. Public institutions watched these trends with concern, wary that they and sub-institutions would be affected, especially "in constraints placed on curriculum content, college policies and services, and use of institutional facilities for meetings." Jeff Carmona, *Anti-Gay Initiatives Cause Anxiety on State Campuses*, CHRON. OF HIGHER EDUC., Mar. 30, 1994, at A32. In fact, one initiative in the State of Washington would have prohibited public educational institutions, including colleges and universities, from teaching that homosexuality is morally acceptable. *Id.* In Oregon, an amendment to the state constitution was proposed that would prohibit state employees from "expressing approval for homosexuality." *Id.* University of Oregon President Myles Brand (now president of the NCAA) said that the measure, if passed, would "[a]t the very least . . . create a chilling environment [on the university]." *Id.*

238. Bill Carter & Kelcity Barringer, *A Nation Challenged: Speech And Expression; In Patriotic Time, Dissent is Muted*, N.Y. TIMES, Sept. 28, 2001, at 1. *See also* Dan Eggen, *Ashcroft Defends Anti-Terrorism Steps; Civil Liberties Groups' Attacks 'Only Aid Terrorists,' Senate Panel Told*, WASH. POST, Dec. 7, 2001, at A01 (describing Attorney General John Ascroft's declaring "[t]o those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to . . . enemies and pause to . . . friends.").

correspondingly decreasing tolerance among the public for these forms of dissent. As will be shown, the effects of this change in popular sentiment did not stop at the campus gates; academics, whose job is to publicize candidly the results of their research, were frequently among the targeted dissenters.

1. The American Council of Trustees and Alumni Report

The American Council of Trustees and Alumni (ACTA) is a "nonprofit, educational organization committed to academic freedom, excellence and accountability at America's colleges and universities."[239] The organization was founded by Senator Joseph Lieberman[240] and Vice President Dick Cheney's wife, Lynne Cheney.

Approximately two months after September 11, 2001, ACTA released a report entitled "Defending Civilization: How Our Universities Are Failing America and What Can Be Done About It."[241] The report claims that college and university faculty are out of touch with the rest of America's response to the attack.[242] The publication criticizes America's colleges and universities as bastions of un-Americanism[243] and makes three key points. First, it contrasts college and university-associated opinions on matters related to 9/11 and U.S. foreign policy with those of the American public in general, implying that such dissonance is probative of the academy's dangerous disconnect with the country.[244] The report implies that dissent among academics is undesirable per se, stating that "many professors failed [to condemn the attacks], and even used the occasion to find fault with America. And while faculty should be passionately defended in their right to academic freedom, that does not exempt them from criticism."[245]

The report lists 115 quotes from individuals "associated" with colleges and universities[246] that purport to demonstrate the "Blame America First" mentality that the report claims now pervades institutions of higher learning.[247] Those quoted are mainly academics such as the Dean of the Woodrow Wilson School at Princeton[248] but also include journalists and guest speakers.[249] While one of those

239. American Council of Trustees & Alumni, About ACTA: Mission, http://www.goacta.org/about_acta/mission.html (last visited Mar. 6, 2007).

240. Lieberman once denied being a co-founder, although ACTA continues to claim otherwise. *See infra* note 262.

241. *See* JERRY L. MARTIN & ANN D. NEAL, AM. COUNCIL OF TRS. & ALUMNI, DEFENDING CIVILIZATION: HOW OUR UNIVERSITIES ARE FAILING AMERICA AND WHAT CAN BE DONE ABOUT IT (2002).

242. *Id.* at 1–4.

243. *Id.* at 4–5.

244. *Id.*

245. *Id.* at 4.

246. The "associations" are as close as a college dean and as attenuated as reporters covering campus events. *Id.* at 13–29.

247. *Id.* at 3.

248. *Id.* at 2.

249. *Id.* at 3.

quoted expresses actual support for the attack on the Pentagon,[250] most are far less controversial. More typical are statements such as: "[I]ntolerance breeds hate,"[251] "We need to hear more than one perspective on how we can make the world a safer place,"[252] and, "We have to learn to use courage for peace instead of war."[253] The report also calls for colleges and universities to teach more American (rather than world) history: "We call upon all colleges and universities to adopt strong core curricula that include rigorous courses on the great works of Western civilization as well as courses on American history."[254] The report expresses general disapproval of colleges and universities that have expanded course offerings in Islamic or Arab history studies.[255]

To address these problems, which the report views as symptomatic of college and universities' failings,[256] the authors urge alumni, donors, and trustees to take action.[257] Unless officials at institutions containing faculty members who espouse the "Blame America First" view and other "un-patriotic" rhetoric take preemptive steps to address the failings, the report recommends that donors to those institutions cut funding.[258]

The report has been both praised and criticized. In a December 15, 2001, *Washington Times* opinion column titled, "How Universities Can Help the War Effort," one commentator extolled the ACTA report and declared, "Even as flags are exhibited throughout the nation in this time of grief and conflict, naysayers on campus have their acolytes. In many instances, they point an accusatory finger at America . . . ."[259] The column went on to criticize "[the naysayers'] hatred of the nation that offers a sanctuary for the pursuit of their scholarship."[260]

Although ACTA is officially and nominally independent,[261] ACTA's founders' government ties have led some commentators to view the report as quasi-governmental action. First, ACTA itself touts its close association with government officials. According to the ACTA website, "ACTA was launched by former National Endowment for the Humanities chairman Lynne V. Cheney, former Governor Richard D. Lamm of Colorado, Senator Joseph I. Lieberman of Connecticut," and others.[262]

250. *Id.* ("Anyone who can blow up the Pentagon gets my vote.")

251. *Id.* at 19.

252. *Id.* at 21.

253. *Id.* at 16.

254. *Id.* at 8.

255. *Id.* at 6–7.

256. *Id.*

257. *Id.* at 8.

258. *Id.*

259. Herbert London, *How Universities Can Help the War Effort*, WASH. TIMES, Dec. 15, 2001, at A12. Herbert London is president of the Hudson Institute and is the John M. Olin Professor of Humanities at New York University.

260. *Id.*

261. Lynne Cheney is also the former head of the National Endowment for the Arts.

262. American Council of Trustees & Alumni, *supra* note 239 (listing Senator Lieberman as a co-founder of ACTA). Senator Lieberman has said that he disagrees with the report and has said that he is "incorrectly" listed as a co-founder. Joe Lieberman, *Letter to ACTA*, THE NATION,

In addition, some scholars have compared ACTA's tactics to those of McCarthy-era government officials. For example, Tufts University History professor Martin J. Sherwin likened the ACTA report to historical government attempts to suppress dissent. In an advertisement published as an open letter in *The Nation*, Sherwin quipped, "ACTA's report does not have the cachet of President Nixon's 'Enemies List,' nor the intimidating force (yet?) of Senator Joseph McCarthy's too-numerous-to-list lists . . . ."[263] Others view ACTA and the report similarly. A San Jose State University professor compared ACTA's report to Senator McCarthy's inquisitions, writing, "The targeting of scholars who participate in civic debates might signal the emergence of a new McCarthyism directed at the academy."[264] Gonzalez went on to characterize the report's "official accusations of anti-Americanism" as a form of "fascism."[265]

Moreover, ACTA has not always operated independently from the government. On at least one occasion, a conservative-led government has summoned ACTA to help facilitate change in academia. In the summer of 2001, Florida Governor Jeb Bush called on ACTA officials to organize the orientation for the state colleges' and universities' new gubernatorial-appointed trustees.[266] Anne Neal, an ACTA vice president and "Defending Civilization" co-author, was one of the key speakers.[267] After the orientation sessions, one of the new Bush-appointed public trustees remarked, "[ACTA] gave us just the advice we need to get started."[268]

To the extent that it is a quasi-governmental publication designed to elicit popular support for its authors' efforts to change the academy, the ACTA report is not unprecedented. In 1947, former FBI agents began publishing *Counterattack*, a newsletter whose stated purpose was "expos[ing] and combat[ing] Communist activities."[269] *Counterattack* focused largely on alleged subversives in Hollywood, but also targeted colleges and universities and leftist faculty therein.[270] For example, on March 6, 1953, a headline read "Can Colleges and Universities be Counted On to Deal With Communist Infiltration?"[271] Another article that ran that same month asked "When Will Columbia University Do Something About Germ Warfare Gene?"[272] The headline referred to feminist Columbia University anthropology lecturer Gene Weltfish, who the year before had claimed that the

Dec. 18, 2001, *available at* http://www.thenation.com/doc/20020128/lieberman20020117.

263. Martin J. Sherwin, *Tattletales for an Open Society: An Open Letter to Dr. Lynne Cheney and Senator Joseph Lieberman*, THE NATION, Jan. 21, 2002, at 40, *available at* http://www.thenation.com/doc/20020121/sherwin20020109.

264. Roberto J. Gonzalez, *Lynne Cheney-Joe Lieberman Group Puts Out a Blacklist*, SAN JOSE MERCURY NEWS, Dec. 13, 2001.

265. *Id.*

266. American Council of Trustees & Alumni, *Florida Joins Accountability Movement*, INSIDE ACADEME, Spring/Summer 2001, at 1, *available at* http://www.goacta.org/publications/newsletters/acta_2001-spring-summer.pdf.

267. *Id.* at 4.

268. *Id.* at 5.

269. SCHRECKER, *supra* note 46, at 152 (quoting *Counterattack*, Mar. 6, 1953).

270. *Id.*

271. *Id.*

272. *Id.* at 256 (quoting *Counterattack*, Mar. 27, 1953).

United States had used germ warfare in Korea.[273] She had been at Columbia for seventeen years.[274] Three months after the article ran, Columbia declined to renew her contract.[275]

It is difficult to ascertain the degree of influence ACTA and *Counterattack* gained by virtue of their affiliation with the Vice Presidency/Senate and FBI, respectively. Nonetheless, as the ACTA and *Counterattack* cases demonstrate, when government-affiliated entities set out to influence academia, the effect is not always benign.

2. Faculty Harassment

While nothing approaching the McCarthy era's assault on college and university faculty has occurred in the post-9/11 era, the recent threats to academic freedom have not been completely idle. Numerous faculty members have been threatened with job retribution or otherwise intimidated as a result of beliefs they expressed, either orally or in writing, following the events of September 11, 2001.[276]

In the days following the attacks, University of New Mexico (UNM) associate history professor Richard M. Berthold told his class that "anyone who can blow up the Pentagon" had his support.[277] After much of the University community reacted hostilely, Berthold quickly apologized for the remark.[278] Nonetheless, Berthold was banned from teaching freshman-level classes, was issued a letter of reprimand by UNM, and was subjected to a post-tenure review.[279] Some state legislators, feeling that this discipline was insufficient, tried (unsuccessfully) to repeal Professor Berthold's salary from the state budget.[280]

On September 12, 2001, Professor Charles Fairbanks of Johns Hopkins University publicly blamed Palestinians for 9/11 and told his class that he would "bet a Koran" that Osama bin Laden would not be captured.[281] As a result, the University demoted Dr. Fairbanks, but he was later reinstated following protests from professor groups.[282]

On October 2, 2001, some faculty members at City University of New York held a teach-in.[283] The purpose was to discuss the causes of the terrorists

273. *Id.*

274. *Id.*

275. *Id.*

276. R. Kenton Bird & Elizabeth Barker Brandt, *Academic Freedom and 9/11: How the War on Terrorism Threatens Free Speech on Campus*, 7 COMM. L. & POL'Y 431, 450 (2002).

277. *Id.* at 450.

278. Richard M. Berthold, *Letter to the Editor*, UNIV. OF N.M. DAILY LOBO, Sept. 24, 2001 (on file with author).

279. Bird & Brandt, *supra* note 276.

280. *Id.*

281. *Id.* at 453.

282. *Id.*

283. *Id.* at 452.

attacks.[284] Some faculty members who conducted research in relevant fields criticized American policy during the event.[285] Soon thereafter, the Board of Trustees passed a resolution that condemned the entire event, calling it "seditious."[286]

One of the most high-profile cases of post-9/11 suppression of faculty expression is that of Dr. Sami Al-Arian, a Computer Science professor at the University of South Florida.[287] Al-Arian, an outspoken advocate for Palestinian independence, had urged the waging of Jihad on the Fox News Network's "The O'Reilly Factor."[288] Host Bill O'Reilly also repeatedly accused him of being involved with terrorists.[289] Following massive protest and demands for his removal from public and state officials, the University fired Al-Arian.[290] After threats of sanction from the AAUP, the University relented and restored Al-Arian to his former position.[291]

Similar incidents have continued on America's campuses in the years following September 2001. Ward Churchill, a tenured Native American scholar and faculty chair of the Ethic Studies Department at the University of Colorado, published a book in 2003 containing an essay in which he argued that the United States' foreign policy was largely responsible for the September 11 attacks. In the book, *On the Justice of Roosting Chickens: Reflections on the Consequences of U.S. Imperial Arrogance and Criminality*,[292] Churchill condemned the attacks. He also claimed, however, that many of the World Trade Center victims could not legitimately be called "innocent."[293] This was so, he argued, because some of the victims were like "little Eichmans,"[294] in that, like the notorious leader of German industrialists, they were technocrats serving the corporate and governmental

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* For a complete narrative and analysis of the Al-Arian incident through 2004, see Jeffrey S. Strauss, Note, *Dangerous Thoughts? Academic Freedom, Free Speech, and Censorship Revisited in a Post-September 11th America*, 15 WASH. U. J.L. & POL'Y 343 (2004).

288. Bird & Brandt, *supra* note 276, at 454.

289. Strauss, *supra* note 287, at 343.

290. *Id.*

291. *Id.* Al-Arian was fired again in 2003 after he was indicted on numerous criminal counts flowing from alleged financial support for Palestinian terrorists, perjury, and immigration violations. Eric Lichtblau, *Setback for U.S. in Terror Trial*, N.Y. TIMES, Dec. 7, 2005, at A1. After a five-month federal trial that ended in December 2005, a jury either deadlocked or acquitted him on each charge. *Id.* The Justice Department brought the charges again, and in February 2006, Al-Arian entered into a plea agreement in which he pleaded guilty to one of the eight charges against him. Under the terms of the agreement, he will serve some time in prison and then be deported. Elaine Silvestrini, *Al-Arian to be Deported*, TAMPA TRIB., Apr. 15, 2006, at 1. Between the time of his appearance on "The O'Reilly Factor" and the University of South Florida's resulting efforts to terminate him, however, Al-Arian had not been charged with any crimes.

292. WARD CHURCHILL, ON THE JUSTICE OF ROOSTING CHICKENS: REFLECTIONS ON THE CONSEQUENCES OF U.S. IMPERIAL ARROGANCE AND CRIMINALITY (2003).

293. *Id.* at 19.

294. *Id.*

entities chiefly responsible for the offending foreign policy.[295]

The writing received little attention until January 2005, when Hamilton College in New York asked Churchill to come to speak on his views.[296] This engagement drew awareness to his writings and prompted widespread outrage, ultimately resulting in Hamilton's canceling Churchill's speaking engagement.[297] In the meantime, Churchill and various Hamilton College officials received death threats, Churchill's vehicle was vandalized and painted with a swastika, and several state and federal officials called for—and tried to effectuate—Churchill's termination.[298] The Colorado state legislature passed measures condemning him[299] and (perhaps taking a page from the New Mexico legislature's playbook) unsuccessfully sought to repeal Churchill's salary from the state budget.[300] The governor of Colorado called for his termination, a Board of Regents member declared that "he can be fired,"[301] and New York Governor George E. Pataki said of Hamilton College's invitation to host Churchill: "[t]here's a difference between freedom of speech and inviting a bigoted terrorist supporter."[302] Churchill soon resigned his post as department chair.[303]

Soon thereafter, the University Board of Regents began an investigation to determine whether Churchill should be fired, ostensibly investigating evidence of his plagiarism and other misconduct.[304] As of July 2006, a University panel had found him guilty of misconduct, but the case was still pending.[305] Nonetheless, even if the allegations of plagiarism are valid, it seems clear that they would not

295. *Id.*

296. Patrick D. Healy, *College Cancels Speech Over 9/11 Remarks*, N.Y. TIMES, Feb. 2, 2005, at B1.

297. *Id.*

298. Michelle York, *Professor is Assailed by Legislature and Vandals*, N.Y. TIMES, Feb. 3, 2005, at B6.

299. H.R.J. Res. 1011, 65th Leg. (Colo. 2005); S.J. Res. 010, 65th Leg. (Colo. 2005); Richard T. DeGeorge, *Purely Academic: Even Professors Misinterpret This Freedom*, WASH. POST, May 15, 2005, at B3; Mike Littwin, *Now, It's All Ward Churchill, All The Time*, ROCKY MOUNTAIN NEWS, Feb. 10, 2005, at 7A.

300. Dave Curtin, *A College in Crisis*, DENVER POST, Mar. 11, 2005, at A1.

301. *Id.*

302. Michelle York, *Professor Quits a Post Over a 9/11 Remark*, N.Y. TIMES, Feb. 1, 2005, at B8.

303. *Id.*

304. Kirk Johnson, *Incendiary in Academia May Now Find Himself Burned*, N.Y. TIMES, Feb. 11, 2005, at A13.

305. In early 2005, a five-member faculty committee found that the academic misconduct allegations against Churchill had merit, and recommended dismissal. The eleven-member Standing Committee on Research Misconduct also recommended dismissal. Churchill appealed the determination to the Faculty Senate Committee on Privilege and Tenure on July 5, 2006, alleging retaliation over statements made in his book. The Committee will convene a panel to hear arguments and make its recommendation to University of Colorado President Hank Brown, which will take anywhere from two weeks to several months. Brown will decide whether to forward the recommendation on to the Board of Regents, which will then take a final public vote on whether to dismiss Churchill. Sara Burnett, *Churchill Appeals Pending Dismissal: Retaliation Over Free Speech Alleged*, ROCKY MOUNTAIN NEWS, July 6, 2006, at 6A; Manny Gonzales, *Churchill Appeals Suggestion That CU Fire Him*, DENVER POST, July 6, 2006, at B1.

have been brought but for the uproar that Churchill's controversial views provoked. One Hamilton College senior said of the incident, "I think it's no longer about free speech—it's turned into this kind of thing that we can't talk about September 11 . . . [but] [t]he fact that [Churchill] is so extreme challenges people to think more."[306]

It is difficult to gauge the precise extent to which these actions by federal, state, and public college and university officials in recent years have abridged scholars' academic freedom of speech. None of these incidents, nor any other incident in which a faculty member was penalized for his or her expression, has been grounds for a civil lawsuit to date. Nonetheless, history and conventional wisdom teach us that the actions by these government officials may well have chilled faculty productivity and inhibited the otherwise relatively unfettered environment for expression. That this effect cannot yet be easily measured does not diminish its potential significance.

According to free speech scholars R. Kenton Bird and Elizabeth Barker Brandt, "the reluctance of U.S. faculty members to engage in constructive criticism of the Bush Administration and its policies stems from a realization that their presidents are less likely to defend free speech in this climate."[307] Because of their views, the government threatened both Churchill and Al-Arian with losing their jobs. Moreover, Churchill felt compelled to resign his department chair as a result of the firestorm surrounding his essay. As these cases demonstrate, "the informal mechanisms designed to promote hegemony and deter dissent are working effectively."[308] Bird and Brandt attribute the effectiveness of these "informal mechanisms" to "the failure of colleges and universities to defend the importance of academic freedom in the face of the public climate of intolerance for dissent"[309] and claim that "prominent leaders within academia have believed it necessary . . . to take action against campus critics of U.S. policy."[310] Such actions may have created a chilly climate for the production of ideas. As faculty members have become increasingly unsure of the extent to which they will face retribution for statements that could be thought to undermine national foreign policy, the environment for their candid expression has become quite unfriendly. To the extent scholars are wary of the incongruity of current academic freedom doctrine, this awareness—inadequate redress in the courts—surely contributes meaningfully to the campus chilling effect.

B. Speech Codes and Heightened Political Sensibilities Have Curbed Academic Freedom

Threats to academic freedom in recent years have not come solely from college and university officials reflecting traditional values of patriotism or support for a conservative-leaning federal administration. Since the early 1990s, higher

306. Johnson, *supra* note 304.
307. Bird & Brandt, *supra* note 276, at 459.
308. *Id.*
309. *Id.* at 458.
310. *Id.*

education culture has increasingly embraced a set of progressive principles sometimes collectively described (especially by their critics) as "political correctness." These principles purport to support "broad social, political, and educational change, especially to redress historical injustices in matters such as race, class, gender, and sexual orientation"[311] and hold that "language and practices which could offend political sensibilities . . . should be eliminated."[312] Many colleges and universities have changed their codes of conduct to include prohibitions of speech and behavior thought to be inconsistent with these values. Some such regulations have, in various ways, sought to prohibit the use of language deemed to "offend political sensibilities."

Predictably, such regulations have clashed with First Amendment principles in both debates over their prudence and litigation over their legality.[313] While speech codes that have faced court challenges have consistently been declared unlawful,[314] colleges and universities continue to employ codes that are either of questionable legality and go unchallenged, or that are potentially lawful as written but enforced unlawfully.[315] The existence of such codes—even when the codes are ultimately struck down—exerts a strong speech-chilling effect on members of the academic community.[316] Moreover, although many such codes are usually codified and target student conduct, unwritten, implied speech mores, along with written codes, have directly affected faculty members and their research. Two notable cases are typical.

David Ayers was a conservative assistant professor of sociology at Dallas

311. AMERICAN HERITAGE DICTIONARY 1401 (3d ed. 2000).

312. MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2001).

313. For a thorough discussion of the constitutional implications of college and university speech codes**,** see generally J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991).

314. *See, e.g.*, Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 370–72 (M.D. Pa. 2003) (holding that the following provisions of a university's speech code were unconstitutionally overbroad: provisions prohibiting "acts of intolerance"; provisions directing students to "communicate their beliefs 'in a manner that does not provoke, harass, intimidate or harm anther [sic]'"; provisions prohibiting one from "maliciously intend[ing] to engage in activity . . . that causes subordination" on listed grounds; and provisions requiring "every member of the [Shippensburg University] community to ensure that the principles of [Shippensburg's] ideals were mirrored in their attitudes and behaviors"); UWM Post, Inc. v. Bd. of Regents of Univ. of Wisc. Sys., 774 F. Supp. 1163, 1166 (E.D. Wis. 1991) (holding speech code impermissibly vague and overbroad, and not lawful under the First Amendment's "fighting words" exception where code prohibited speech that was "racist or discriminatory," "directed at an individual," "[d]emean[ed] the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual addressed," and "[c]reate[d] an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity"); Doe v. Univ. of Mich., 721 F. Supp. 852, 856, 858 (E.D. Mich. 1989) (ruling that policy prohibiting, *inter alia*, "creat[ing] an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities" was overbroad and unconstitutionally vague where sanctionable conduct included, e.g., a male student saying in class, "[w]omen just aren't as good in this field as men").

315. *See, e.g., Doe*, 721 F. Supp. at 865 (holding that policy was overbroad in part because it was "consistently applied to reach protected speech").

316. *See, e.g., Bair*, 280 F. Supp. 2d at 365.

Baptist University.[317] His research included critiques of modern feminism.[318] In one of his articles, he presented cross-cultural research supporting his claims that the roots of patriarchy are biological and that efforts to establish a gender-neutral society are unnatural.[319] The essay[320] was published in a book that was named Book of the Year by *Christianity Today*.[321]

After Ayers presented his work at an on-campus colloquium, outrage among campus feminists sparked the organization of another colloquium, at which Ayers' work was harshly criticized and a paper equally critical of him was distributed.[322] When Professor Ayers learned that he was being disparaged by faculty members in other classes, he distributed a copy of the critical paper and put the recordings of both his and his critics' lectures (all of which were already publicly available) on reserve at the school's library.[323] The University soon charged Ayers with "defaming a faculty member" and with disclosing the "confidential materials" from a faculty colloquium.[324] Ayers' dean, John Jeffrey, who was made responsible for investigating the matter, ultimately defended Ayers, saying that "[e]ven if all the charges [the University president] has made against Dave Ayers were true, none would represent any perceivable wrongdoing in light of our Faculty Handbook, and the AAUP guidelines . . . ."[325] Jeffrey cited academic freedom concerns and refused to investigate the matter further.[326] One week later, with no reason given, both Ayers and Dean Jeffrey were terminated.[327]

Judith Kleinfeld was a professor of psychology at the University of Alaska-Fairbanks specializing in the study of the indigenous peoples of Alaska.[328] At a lecture she was invited to give by a University regent and a dean, she suggested that there were "equity pressures on professors to graduate native students" before they were truly prepared to graduate.[329] When the content of her lecture circulated, campus groups organized demonstrations with the purpose of protesting views they considered racist.[330] The University suspended her from teaching while it conducted an investigation into the matter.[331] Various members of the University

317. ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES 122 (1998).

318. *Id.*

319. *Id.*

320. David Ayers, *The Inevitability of Failure*, *in* RECOVERING BIBLICAL MANHOOD AND WOMANHOOD: A RESPONSE TO EVANGELICAL FEMINISM 312 (John Piper & Wayne A. Grudem, eds., 1991).

321. KORS & SILVERGLATE, *supra* note 317.

322. *Id.* at 122–23.

323. *Id.* at 123.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 124.

328. *Id* at 127–28.

329. *Id.* at 127.

330. *Id.* at 128.

331. *Id.*

filed charges with the U.S. Department of Education Office of Civil Rights.[332] Both investigations eventually concluded that there were no grounds for action, but not before Kleinfeld had spent thousands of dollars in legal fees defending herself.[333] According to Kleinfeld, she now refrains from addressing "in even the broadest terms the educational issues that affect native students" (her academic focus) as a result of the University and government actions.[334]

The actions of these officials to reprimand or otherwise admonish faculty for the viewpoints articulated in their scholarly expression both violate the academic freedom of the professors involved and create a universal chilling effect on expression considered outside the mainstream. Indeed, faculty academic freedom has been besieged in recent years from those traditionally thought to occupy both the right and the left of the political spectrum.

V. A BRIEF REVIEW OF SELECTED ACADEMIC FREEDOM SCHOLARSHIP

Several law commentators have addressed the issue of whether and to what extent the First Amendment should protect academic freedom at public colleges and universities.[335] Some have also considered what standards are most appropriate for college and university faculty versus primary and secondary school faculty. Three relevant recent works are described below.

Writing in the *California Law Review* in 2003, Commentator Rebecca Gose Lynch argues that faculty expression cases analyzed under *Pickering-Connick* should only be deemed to involve academic freedom if the faculty member is not speaking as a citizen and the public employee prong is used.[336] Moreover, Lynch

332. *Id.*

333. *Id.*

334. *Id.*

335. *See, e.g.,* Lynch, *supra* note 11, at 1107; Hiers, *supra* note 60 (recognizing the failure of the Supreme Court to address "whether the severely restrictive standards developed in the . . . line of cases [concerning public school teachers and other public employees] must also apply to academic free speech," and concluding that the struggle between individual and institutional academic freedom has been overblown, and that court holdings can be read to endorse both); Karen Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1 (2001) (arguing that courts have construed the definition of "public concern" too narrowly and urging courts to recognize the need for classrooms to be free from "indoctrination," the student's right to obtain information, and the need for structural protections when teachers are faced with student complaints concerning their teaching); Karin Hoppmann, *Concern with Public Concern: Towards a Better Definition of the Pickering/Connick Threshold Test*, 50 VAND. L. REV. 993 (1997); Richard Hiers, *New Restrictions on Academic Free Speech:* Jeffries v. Harleston II, 22 J.C. & U.L. 217 (1995); Stacy E. Smith, Note, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299 (2002); Ailsa W. Chang, Note, *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond* Pickering *and* Connick, 53 STAN. L. REV. 915, 938 (2001) (recognizing inherent problems in applying *Pickering-Connick* public employee speech analysis to academic contexts and noting that professors, unlike most other employees, "share a significant amount of managerial power at a university," and arguing that the "mechanistic" *Pickering-Connick* approach "cannot effectively take into account the university's institutional academic freedom interests as a public employer").

336. Lynch, *supra* note 11, at 1066.

argues, in cases that involve true academic freedom when the professor is speaking as an employee, the expression is within the state's "managerial realm" and the state therefore has a "managerial interest" in the speech.[337] In that case, courts should use a "functional necessity" analysis. That is, it should be determined "whether restricting the speech is functionally necessary to realization of the state or institutional goals." If so, then the employer is free to limit the expression.[338] Lynch's novel approach, however, could restrict speech where doing so is necessary to realize "state goals" that are constitutionally illegitimate, for example, quashing incendiary speech such as Ward Churchill's work.

Professor Edgar Dyer, writing in 1997, identifies the inherent problem of not recognizing a "distinction between higher education and primary/secondary education" in applying *Pickering-Connick* to college and university faculty.[339] He urges giving "the utmost protection to the spoken, written, or artistic expressions of an academician who is engaging in such expression as an academician," who is speaking within his or her field of expertise, and who "speak[s] or express[es] for the purpose of advancing the truth."[340] Those speakers meeting these criteria would be afforded special treatment by the courts; those faculty who do not meet each of the criteria would be subject to traditional *Pickering-Connick* analysis.[341]

Dyer wisely acknowledges the inadequacy of *Pickering-Connick* as applied to public college and university faculty. But his three-part approach raises several questions and provides little guidance to courts in fashioning a more appropriate model.

First, Dyer proposes a special standard for academicians, but does not define the term. The status of some speakers as academicians is obvious, but the status of most speakers is less obvious. What of those employees of teaching-focused institutions, particularly "instructors" or "lecturers," who do not engage in scholarship? Dyer makes much of *Pickering-Connick*'s inapplicability to higher education. But are not, for instance, the duties of an instructor at a technical educational institution (while they certainly are critical to society) more like those of a high school teacher than a research professor?

Dyer's approach also protects too many types of speech. Under his proposal, "utmost protection" would apparently even be provided to the content of classroom curriculum. This would effectively strip institutions of all control over curriculum, raising several problems. For example, because it is the institution and not the professor who contracts with students to provide a certain standard of education, those institutions must assume responsibility for delivering the educational product. To remove control of pedagogy from the institution would turn public higher education on its head.

337. *Id.*

338. *Id.*

339. Edgar Dyer, *Collegiality's Potential Chill Over Faculty Speech: Demonstrating the Need for a Refined* Pickering *and* Connick *for Public Higher Education*, 119 EDUC. L. REP. 309, 318 (1997).

340. *Id.* at 319–20.

341. *Id.* at 320.

Dyer's approach also is problematic in its requirement that the academician's purpose must be "advancing the truth." Apart from the inherent difficulty in ascertaining a scholar's actual purpose for research, the standard significantly overprotects scholars and scholarship. Using this approach, scholarship riddled with major methodological errors and procedural blunders could be fully protected, so long as it is well-intentioned. As a result, this standard could bar institutions from using any consideration of scholarship quality in making hiring, firing and tenure decisions. So while Dyer deserves credit for recognizing that the public concern test has not adequately served higher education, his approach would prove untenable.

In *A New Balance of In-Class Speech: No Longer Just a "Mouthpiece,"* Professor Todd DeMitchell takes a limited view of academic freedom, urging that to the extent it exists at all, state interests should take priority.[342] DeMitchell argues that the approach of another commentator, Karen Daly, "distances the public from their public schools."[343] DeMitchell claims that "[s]chools serve the public good and are answerable to the public through elections and budget sessions."[344] Therefore, he concludes, public institutions should not be a "forum for educators" but should "meet the needs of the public."[345]

DeMitchell's argument makes the mistake of failing to distinguish between primary and secondary institutions on one hand, and institutions of higher education on the other. The thesis centers on the various roles of teachers, administrators, and the public in public education. But with no mention of the role of faculty research, he implicitly extends his conclusion to cover all higher education faculty conduct. DeMitchell's position is one of many that considers only the rights of secondary school faculty, thereby limiting the scope of academic freedom and failing to recognize the very different role and responsibilities of college and university faculty.

Where DeMitchell discusses higher education, he acknowledges an academic freedom right in faculty members, but claims that it is always subordinate to the academic freedom of the institution: "[E]mployee speech which . . . interferes with, or is in conflict with the institution's pursuit of academic freedom, must yield to the institution."[346] Because, as we have seen, it is usually the institution (sometimes under pressure from the state) seeking to limit professors' academic freedom, the scope of faculty academic freedom under his approach is almost negligible. Moreover, DeMitchell's approach is under-inclusive because the underlying values of academic freedom, as conceived by Enlightenment philosophers, the AAUP founders and many modern scholars—to shield faculty research from government censorship *based on its viewpoint*—are not sufficiently served.

342. Todd A. DeMitchell, *A New Balance of In-Class Speech: No Longer Just a "Mouthpiece,"* 31 J.L. & EDUC. 473, 481 (2002).

343. *Id.* at 473.

344. *Id.* at 479.

345. *Id.* at 481.

346. *Id.*

VI. A NEW APPROACH: THE RESEARCH DERIVATIVE TEST AND RESEARCH VIEWPOINT ANALYSIS

Although *Pickering* concerned a public school teacher and its holding purported to stem in part from academic freedom principles, the *Pickering-Connick* analysis was intended to apply to public employees generally. It did not address the unique free speech interests of academics. Some courts and scholars have scoffed at the notion of faculty members receiving special First Amendment protection not afforded to other public employees.[347] This position, however, fails to consider the underlying principles of free speech theory. Faculty speech should receive protection not because of the speaker's title or status, but because the kind of expression that faculty (and others) often provide is among the most valuable of all speech.

As discussed above, one school of free speech theory holds that speech must be protected because it permits individuals to "self-realize."[348] That is, it allows individuals to develop their faculties, achieve a unique identity, and so on.[349] Viewed from this perspective, scholarly research is a form of self-expression deserving of protection, but not necessarily more protection than other forms of self-realizing expression, such as discussing a favorite baseball team or playing the guitar.

Two other schools of free speech theory, however, both stress that the most important basis for protecting speech is its social and political utility. According to Alexander Meiklejohn, speech is valuable to the extent that it serves to educate and inform those who hear it and gives them the opportunity to make choices that improve their lives.[350] According to John Staurt Mill, free speech is important to maintain the "marketplace of ideas" and the search for truth, but Mill also valued the results that are derived from society's hearing and weighing various viewpoints. If one accepts that either of these is the primary justification (or even just a valid independent justification) for free speech protection, then scholarly research is perhaps the most valuable of all speech.[351] Again viewed from the audience's perspective, scholarship is, in a sense, professional speech. The purpose of scholarship—and a chief motivator for most scholars—is the creation

347. *See, e.g.*, Urofsky v. Gilmore, 216 F.3d 401, 415 (4th Cir. 2000) (concluding Supreme Court jurisprudence does not extend a right to professors beyond the rights protected for all public employees), *cert. denied*, 531 U.S. 1070 (2001).

348. *See supra* text accompanying notes 22–23.

349. *Id.*

350. *See supra* text accompanying note 18–20.

351. Critics may respond that other forms of speech—e.g., pamphlets exposing human rights abuses or government corruption—are of equal or greater value than scholarship. This category of speech, which includes revealing government wrongdoing, is certainly among the most valuable speech. No doubt, the value of some individual revelations in this category will often trump the value of *individual* pieces of scholarship. However, it is the author's belief—and this article's assumption—that scholarship as a broad *category* of speech is more important than all other individual categories. A complete defense of this position is outside the scope of this article. As the argument briefly goes, scholarship is the most valuable mode of speech because, from a systemic perspective, it is the nerve center of society. In the marketplace of ideas, scholars are not just the traders, but the craftsmen as well.

and expression of novel information that will in some way serve the public. Economists tell us what actions will maximize our welfare; those studying public policy predict how various policy choices will affect other people, states, and nations; microbiologists and chemists tell us how to make better medicines; law professors explain what rules of law will result in the most just outcome; and so on. Justice Earl Warren left no doubt of the importance to society he attached to scholarship when he wrote in *Sweezy v. New Hampshire* that scholars "must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[352]

The *Pickering-Connick* holdings created a dichotomy in freedom of expression doctrine for public school employees. It identified a class of speech of the "citizen, commenting upon matters of public concern," and speech that concerns only private or employment-related matters generated by the employee, acting strictly as an employee. [353] The former category is heavily protected under *Pickering-Connick*; the latter, under *Garcetti*,[354] receives no protection. This analytical framework, while readily applicable to many primary and secondary school teachers, is not so easily applied to public college and university faculty members.

Under *Pickering-Connick* and *Garcetti*, one is deemed either a citizen who is commenting on matters of public concern or an employee who is commenting on matters that are not of public concern. The doctrine appears not to contemplate a *citizen* commenting on matters of *non-public* concern, or more critically, an *employee* commenting (as an employee) on matters of *public* concern. As Justice Stevens noted in his *Garcetti* dissent, a dichotomy that "categorically den[ies] *Pickering* protection to any speech uttered 'pursuant to . . . official duties'" is unjustified.[355]

This dichotomy is problematic, especially for college and university faculty. As employees whose job it is both to produce knowledge and to disseminate it (via the classroom, publication, and public lecture), professors' craft does not fit neatly into the *Pickering-Connick* paradigm, as it actually falls into both of the Court's categories: faculty members are almost always employees commenting on matters of public concern.

This is true because, in theory, the information that faculty members produce and disseminate through publication and scholarly lecture necessarily involves some matter of public concern. Otherwise, it is of little value. The academic's work need not bear on a contemporary political issue, but it must, at a minimum, potentially influence some sector of society. This holds for every academic discipline, from molecular genetics to ancient Greek. Considering only this aspect of faculty members' research, such expression—disseminated orally or in writing—would fall into the citizen-speaker category of *Pickering-Connick*. But the nature of faculty academic research can also be framed in a different way.

In addition to representing expression that deals with matters of public concern,

352. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

353. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

354. Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).

355. *Id.* (Stevens, J., dissenting).

researching and publishing is at the very heart of the faculty members' job description. The academic is being paid to do this work; but for her employment with the institution, she might be unwilling or unable to engage in such endeavors. In this sense, the expression is more akin to the second *Pickering-Connick* category, because the expression comes solely from the employee's position as an employee and is actually one of the employee's listed responsibilities. It is distinguishable from the first category in that the faculty member cannot be understood to be "speaking" only as a citizen. But the academic's job duties are entirely unlike any other government worker; per the generally accepted AAUP principles, it is understood that the academic's job duties are to bring his intellect and expertise to bear in thinking freely, employing valid methodology, and divulging, in good faith, the intellectual product of this process. So while the academic performs his work pursuant to his employment contract, he runs afoul of his duties only when he behaves dishonestly, ceases to exert a good faith effort toward his goals, or clearly treads outside the boundaries of his field.

Thus, in disseminating research, the academic is at once speaking about public concerns and discharging his contractual employment obligations to the state. As such, the academic's work product shares traits from both the protected and unprotected categories of *Pickering-Connick*, leaving academic research freedom in a precarious position within the *Pickering-Connick* analytical framework. The approach that *Pickering-Connick* and its progeny have created, which effectively lumps employee behavior into either citizen-public concern speech or employment-related speech, appears to have been constructed with the liberty rights of the speaker in mind. But by focusing exclusively on the right of the speaker, the approach overlooks the benefit of the speech to the listener.

Considering only the facts of *Pickering* (a secondary school teacher writing about the school's bond levy), *Connick* and *Garcetti* (district attorney's offices), and *Rankin* (a law enforcement agency), it is understandable that the Court would fashion a rule that does not identify scholarly research as occupying a unique place in First Amendment doctrine. But as courts have demonstrated,[356] a rule that ignores the benefits of academic speech for academic research will most certainly under-protect such speech. Therefore, only an approach to scholarly research that is mindful of the uniquely significant value of such expression to society will be adequately protective. A new approach is needed.

A. Approach Overview

For the reasons discussed above, when considering restrictions on the speech of public institution faculty, courts should acknowledge the difference between restriction of classroom speech and that of scholarship speech. The traditional *Pickering-Connick* analysis is adequate for instances where the speech being restricted clearly involves the faculty member acting in her personal capacity, for speech touching on matters of public concern, and when the speech clearly involves the faculty member as classroom teacher. However, the test does not

356. *See, e.g.,* Jeffries v. Harleston, 52 F.3d 9 (2d Cir. 1995).

satisfactorily apply to faculty scholarly research. Therefore, when such speech is implicated, a third standard should be utilized. The standard would closely mimic traditional First Amendment viewpoint-sensitive analysis by seeking the basis on which the speech is being regulated. That finding would determine the standard of scrutiny to be applied. The approach introduced here has two parts: (1) the research derivative test and (2) research-viewpoint analysis.

Unlike many other suggested approaches,[357] the analytical approach recommended here is not unduly complex to employ. Moreover, instead of giving special rights to a class of people, it utilizes the well-established First Amendment practice of considering a *form of speech*—in this case, scholarship—to be of higher value than others. [358] That is, it alters the *Pickering-Connick* doctrine to require full First Amendment protection for the *types of speech* that faculty members are largely responsible for producing.

B. The Research Derivative Test

Lumping research speech and teaching speech into the same group ignores the significant differences between the two endeavors. Consequently, it fails to provide the separate analytical schemes that are appropriate for the two distinct behaviors. Despite this, courts have historically considered the fruits of faculty research to be in one of the two *Pickering-Connick* categories. When faculty undertake traditional research within the campus walls, courts have generally treated it under the employee/non-public concern *Pickering-Connick* prong.[359] When a faculty member speaks publicly (even when she is speaking pursuant to her scholarship), courts treat it as public concern speech.[360] This is an incoherent approach.

The research derivative test significantly expands the scope of public concern speech. Under the test, all scholarly speech—either oral or written—that is derived from state-sponsored scholarship or from research performed pursuant to a public employee's duties is classified as scholarship and considered not as private employee speech but as speech of public concern. It is then subjected not to traditional *Pickering-Connick* balancing, but to the *research viewpoint analysis* described below.

This standard should be afforded only to speech deriving from research within the scholar's field of expertise.[361] When faculty members speak on matters in

357. *See supra* text accompanying notes 339–41.

358. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (discussing low value speech in holding that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which [do not] raise any Constitutional problems").

359. *See, e.g.*, Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000).

360. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 564 (1968).

361. For example, the test would not protect the comments made by former Harvard University President Lawrence H. Summers (even assuming he were employed by a public institution). Summers, an economist, said at a January 2005 academic conference that biological differences between men and women may partially explain why men have historically enjoyed more success in the sciences than women. Sam Dillon, *Harvard Chief Defends His Talk on Women*, N.Y. TIMES, Jan. 18, 2005, at 16. The resulting uproar was a factor in his resignation in

which they have no particular expertise or those that cannot reasonably be considered to be within their field, such statements should fall under the private employee speech category.[362]

The *Jeffries* case shows how the secondary school *Pickering-Connick* analysis fails to perform properly when applied to higher education faculty. [363] Deciding the case on remand from the Supreme Court,[364] the Second Circuit used the public concern prong of *Pickering-Connick*, and in so doing, found that because of Jeffries' public statements and the resulting reaction, the college had acted with reasonable belief that allowing Jeffries to maintain his position would have been disruptive to the operation of the campus.[365]

Although the speech of both Pickering and Jeffries dealt with matters of public concern, Jeffries' statements are easily distinguishable from Pickering's. Although Pickering acquired the information expressed in his letter in part through his position with the school, he was, nonetheless, acting as a citizen, speaking on a subject wholly unrelated to his professional duties. Jeffries, however, was speaking on a subject related to his academic duties.[366] He was describing the findings of his professional research—required behavior for college and university faculty. Therefore, under the research derivative approach, Jeffries was engaged in research pursuant to his academic duties and would accordingly receive the protection of academic freedom doctrine.

The David Ayers Dallas Baptist University incident,[367] although it occurred at a private university and resulted in no litigation, is also illustrative. David Ayers

February 2006. Alan Finder et al., *President of Harvard Resigns, Ending Stormy 5-Year Tenure*, N.Y. TIMES, Feb. 22, 2006, at 1. Because Summers was not speaking as a scholar (as he had done no work in that field), the research derivative test would be inapplicable.

362. Under the functional necessity approach recommended by Lynch, *supra* note 11, the test for the validity of an academic freedom "managerial realm" speech restriction is similar to the test for a restriction affecting an employee-citizen speaking on a matter of public concern. Both involve the assessment of the degree to which the speech interferes with the functioning of the institution. Because teaching and speaking as a citizen sit at opposite ends of the academic freedom spectrum (the former being the most within the state's managerial realm and therefore of most concern to it, the latter most *outside* the managerial realm and therefore of *least* concern to it), it is counterintuitive that they should undergo the same analysis. Nonetheless, they function adequately because public concern speech that is at odds with the institution's priorities typically interferes less with the functioning of the institution than does, say, classroom speech that contradicts the school's pedagogical mission or speech critical of an office's functioning.

363. *Jeffries*, 52 F.3d 9. *See supra* notes 216–27 and accompanying text.

364. In considering the case the second time, the Second Circuit was bound by the Supreme Court's recent decision in *Waters v. Churchill*, 511 U.S. 661 (1994). *Waters* held that a government employee may be terminated for speaking on a matter of public concern where "(1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech." *Jeffries*, 52 F.3d at 13. *Waters* altered the *Jeffries* analysis by requiring the court to consider what disruption the college or university reasonably believed would likely result from the speech, not merely the disruption that actually occurred. *Id.* at 10.

365. *Jeffries*, 52 F.3d at 9.

366. *Id.*

367. *See supra* notes 317–27 and accompanying text.

was apparently terminated because some of his colleagues found the conclusions of his research objectionable. Moreover, the action was taken by the administrators of a conservative Baptist university. If, hypothetically, this incident had taken place at a public school, because the incident stemmed from a speech he gave, traditional *Pickering*-*Connick* analysis might apply the public concern test to Ayers. This would balance the disruption to the institution against his free speech rights, producing an uncertain outcome. Alternatively, courts, especially after *Garcetti*, might consider the lecture as part of his public employee duties (he was invited to give it by the college vice president), thus giving Ayers no hope of prevailing on any First Amendment claim.[368] The research derivative test, however, would do neither; it would consider the lecture to flow naturally from his scholarly work and would analyze it under the more scrutinizing research viewpoint analysis test described below.

C. Research Viewpoint Analysis

Speech that is determined to flow from research or scholarship should be analyzed using what is termed, for purposes of this article, as research viewpoint analysis, an approach that relies on traditional First Amendment viewpoint distinction analysis.[369]

368. *Cf.* Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000).

369. Viewpoint distinction is a narrower form of content distinction and is recognized as the "most pernicious of all distinctions based on content." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 895 (1995) (Souter, J., dissenting). The viewpoint distinction principle, as the term implies, holds that a regulation may not "discriminate against speech on the basis of its viewpoint." *Id.* at 829. *See also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785–86 (1978) ("Especially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.") (footnote omitted).

To better comprehend the viewpoint distinction principle, a brief discussion of the First Amendment content distinction doctrine is instructive. The content distinction doctrine arose out of a line of cases beginning with *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), and *Schacht v. United States*, 398 U.S. 58 (1970). The doctrine holds that where the government seeks to limit speech based on its content, courts should use strict scrutiny in reviewing the constitutionality of the law that provided the warrant for the state's action. On the other hand, when a law restricts speech without regard for content, i.e., is "content-neutral," a less rigorous standard of review should be applied. So a ban on all public expression outside of a polling place during an election is content neutral, warranting low scrutiny, while a ban on speech related to a given levy issue is content discriminatory, triggering strict scrutiny. The distinction is grounded in the premise that restrictions on speech that discriminate based on the type of speech being conveyed are more obnoxious to free speech principles than are restrictions that limit only the method of delivery.

Although this approach has been criticized as unprincipled by some legal commentators, see Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981) (arguing that the content distinction is an illogical method of analysis), the Supreme Court as recently as 2003 has continued to endorse its use. *See* McConnell v. FEC, 540 U.S. 93 (2003). For a complete discussion of content and content-based doctrine, see Steven J. Heyman, *Spheres Of Autonomy: Reforming The Content Neutrality Doctrine In First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647 (2002); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme*

This approach would meaningfully increase judicial protection of faculty scholarship. When a public college or university seeks to restrict scholarship by taking adverse action against its producer, the first step of the analysis would ask the justification for the restriction. If it is viewpoint neutral, then the decision would not receive strict scrutiny. Because the approach would give more deference toward restrictions that are merely content sensitive, the institution would retain the power, as described in *Lamb's Chapel*,[370] to control the general subject matter of its faculty members' scholarship. In this case, the institution's desire to preserve its reputation for exemplary scholarship, to prioritize certain disciplines or subject matters, or to clear room for more productive research would all suffice as valid objectives accomplished through means such as termination of the scholar or other adverse action calculated to discourage poor quality work.

If, on the other hand, the restriction is determined to be viewpoint-sensitive, that is, based on the scholar's view or message, then it would receive the highest level of scrutiny. While it would be difficult to sustain restrictions falling into this category, it would not be impossible. A showing by the state that the restriction was the only way to curtail massive, sustained disruption or impending violence would likely be sufficient.[371]

In the *Jeffries* case, if it was determined that disagreement with his scholarly views or the resulting public reaction motivated the University's action, this approach would have mandated strict scrutiny. It would have required the University to show that the adverse action against Jeffries was necessary to prevent major disruption of the University's functioning, even if the only deprivation was Jeffries' removal as department chair.[372]

Court's Application, 74 S. CAL. L. REV. 49 (2000); Redish, *supra*.

Speech that discriminates on the basis of viewpoint is even less tolerable to the Constitution than content discrimination. *Rosenberger*, 515 U.S. at 829–30 ("Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."). For example, then, a law that prohibited pro-life speech would likely be held invalid even under circumstances under which a law that prohibited all abortion-related speech might be permitted. In the context of secondary schools, restrictions on speech "can be based on subject matter . . . so long as the distinctions drawn are reasonable . . . and are viewpoint neutral." Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993).

370. *See Lamb's Chapel*, 508 U.S. at 392–93.

371. *See* Waters v. Churchill, 511 U.S. 661 (1994) (plurality opinion).

372. On remand, the Second Circuit hinted that had the sanction been more severe, it might have required applying a higher standard than that used in *Waters*. Jeffries v. Harleston, 52 F.3d 9, 14–15 (2d Cir. 1995). The court stated:

> [A]n amicus curiae argues . . . as a faculty member in a public university, [Jeffries] deserves greater protection from state interference with his speech than did the nurse in *Waters* who complained about the obstetrics division of the hospital. We recognize that academic freedom is an important First Amendment concern. Jeffries' academic freedom, however, has not been infringed here. . . . Jeffries is still a tenured professor at CUNY, and the defendants have not sought to silence him, or otherwise limit his access to the "marketplace of ideas" in the classroom.

In the case of Richard Ayers, the result would have been similar. Although the University ostensibly took action against Ayers for improperly distributing a faculty member's material, the court would have likely seen this as pretext for discrimination on the basis of viewpoint. (Recall that the faculty members who distributed *his* paper were not sanctioned.) Again, faced with strict scrutiny, the University would have been hard-pressed to justify its actions.

And in the Ward Churchill case, Churchill composed his essay as part of his scholarly endeavors; the initial negative reaction to it was quite obviously because of its viewpoint. While the University maintains that its investigation into his research methodology was content neutral, a court would be responsible for resolving this factual dispute. To the extent any adverse action was the result of Churchill's viewpoint, it would be unlawful.

D. Criticism Addressed

Some may respond that this viewpoint analysis approach is unworkable because of the difficulty in distinguishing between adverse action against a faculty member or his research because of its poor quality on one hand, and because its results or conclusions render it objectionable on the other. Critics may suggest that a typical evaluator determining the "worth" of research will inevitably consider both the degree to which the final product resonates with him and the quality of the work that underlies the result. Very often, the two are inseparable, the argument would go; as a result, attempting to classify an evaluation of a research product as solely based either on its "quality" or its viewpoint is a generally futile undertaking.

However, scholars have already suggested methods for distinguishing faculty endeavors that should be considered protected by academic freedom and those that should not. Florida State University College of Law Dean Donald J. Weidner has characterized academic freedom as:

> [T]he freedom of a teacher or researcher in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.[373]

College and university officials and faculty review committees, the majority of whom presumably value academic freedom and self-regulate against its infringement, routinely make these hard decisions,[374] as do faculty members in

Id. (internal citations omitted).

373. Donald J. Weidner, *Academic Freedom and the Obligation to Earn It*, 32 J.L. & EDUC. 445, 447 (2003).

374. *See, e.g.,* UNIV. OF COLO., REPORT OF THE INVESTIGATIVE COMM. OF THE STANDING COMM. ON RESEARCH MISCONDUCT AT THE UNIV. OF COLO. AT BOULDER CONCERNING ALLEGATIONS OF ACAD. MISCONDUCT AGAINST PROF. WARD CHURCHILL (May 9, 2006), *available at* http://www.colorado.edu/news/reports/churchill/churchillreport051606.html.

evaluating the quality of their students' research. They are obliged to assign a grade, and in many cases are forced to distinguish their personal feelings about the conclusion from the objective quality of the work: the former should not be considered in assigning the grade, the latter must be. Whether it is possible to draw a bright line between the quality of work and the degree to which it resonates with a given person or persons, the fact remains that doing so is an essential part of the administration of a scholarship-producing entity. If academics can do it, then courts, with the expert advice and assistance of scholars, can as well.

There are many cases—during the Cold War and today—where the action taken against the professors was transparently based solely on the viewpoint they expressed and not on any concern with the quality of their work. In most of these cases administrators, including deans, provosts, and presidents, may have recognized and respected the academic work from a scholarly standpoint, but felt compelled to act to suppress it for fear of retribution from outside forces, whether the state legislature, federal law enforcement, or private and corporate donors.

One highly probative indicator of an action being taken due to the content of the professor's expression is that the adverse action appears to occur as a result of a group's overt display of disapproval with the individual and her work. This may take the form of public criticism or protests, boycotts, petition drives, condemnation by public officials, and so on. People and groups are unlikely to engage in these types of active public displays where they approve of the result but take exception to the methodology. The people and groups expressing their outrage will admit as much in their statements, their literature, and any other communication they use to rally support against the professor. So cases such as that of Yale law professor Vern Countryman, CUNY faculty member Leonard Jeffries, and Alaska-Fairbanks professor Judith Kleinfeld, where sanctions against the professor occurred only after the institution was pressured to do so, are obviously based on content not quality, and courts should have little difficulty making this determination from the circumstantial evidence available to them.

Concededly, there will also be some more difficult cases in which there is a paucity of evidence of the motivation for the adverse action and the facts could point to either conclusion. In many such cases, the faculty member, bearing the burden of persuasion, may indeed have a difficult time proving that the action was based on improper motives. But this fact should not prevent us from adopting the analysis. A similar problem faces Title VII[375] discrimination plaintiffs challenging an employer's defense that their termination was based on factors other than sex, race, etc. But by introducing circumstantial evidence such as the treatment of similarly-situated individuals, these plaintiffs are sometimes able to prevail, and it would be similar with faculty members bringing claims for wrongful employment action based on First Amendment grounds. To the extent such claims enjoyed any success in the courts, the suits would create a deterrent against colleges and universities taking action against faculty for the content of their scholarship. Despite the difficulty of prevailing, the standard would certainly provide faculty

375. Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (2006) (prohibiting employment discrimination on the basis of race, color, religion, sex and national origin).

more academic freedom protection than the various disjointed and unreliable approaches that courts currently employ.

In the case of Yale law professor Vern Countryman (setting aside, for a moment, that he worked at a private university), establishing that his denial of tenure was due to his politics would have been difficult, but not impossible. The faculty board voted unanimously to promote him; if he could show that no one had ever been denied tenure under such circumstances before, he could arguably establish a *prima facie* case. At the very least, the deterrent effect would be strong; with such a standard in place, the president might have opted to avoid the expense and public embarrassment that litigation would create and simply have promoted him.

VII. CONCLUSION

The First Amendment protection afforded to academic freedom that was developed during the Cold War was an important step in staving off inappropriate government oversight of the academy. But as academic freedom has again come under siege and courts have begun to veer from recognizing college and university faculty members' right to academic freedom, a new approach is required.

In the wake of *Garcetti*, courts must take advantage of the opening that Justice Kennedy provided when he wrote that "[t]here is some argument that expression related to academic scholarship . . . implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[376] Adopting the approach introduced here would fully satisfy that "additional constitutional interest" to which the Court alluded.

Although it may still sometimes prove difficult for faculty-plaintiffs to prevail in a civil action, this approach is superior to those currently being used and to any that have been proposed. It would alleviate concerns that affording faculty members a special First Amendment privilege would prohibit institutions from terminating faculty members who are conducting poor quality work. It would preserve the institutional academic freedom and institutional autonomy, whose importance recent court decisions have stressed. It would also protect unpopular viewpoints from censorship originating in a climate that, in the past several years, has become decreasingly tolerant of dissent, particularly when concerning matters of foreign policy, American nationalism, or cultural politics.

Ellen Schrecker argues, "The academy did not fight McCarthyism. It contributed to it."[377] Professors Bird and Brandt assert that since September 11, "prominent leaders within academia have believed it necessary . . . to take action against campus critics of U.S. policy."[378] These academic leaders did not and do not act out of disdain for academic freedom, but rather out of fear of the ramifications their institutions face due to inaction. In these cases, the courts must enforce the counter-majoritarian doctrine upon which the government was

376. Garcetti v. Ceballos, 126 S. Ct. 1951, 1962 (2006).

377. SCHRECKER, *supra* note 46, at 340.

378. Bird & Brandt, *supra* note 276, at 458.

founded. When fear for public safety creates a political climate increasingly intolerant of dissent, courts must be ever more vigilant in protecting the civil liberties of expression generally and academic freedom specifically.

The social and political events of recent years have created such a climate. Judicial complacency, if it continues, will have serious consequences. It will leave America's most vital producers of knowledge vulnerable to Mill's "tyranny of the majority,"[379] a corrupting force to which our public officials—including university officials—too often fall victim.

379. MILL, *supra* note 1, at 62.