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On Balancing Scales, Kaleidoscopes and the Blurred Limits of Academic Freedom

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ON BALANCING SCALES, KALEIDOSCOPES, AND THE BLURRED LIMITS OF ACADEMIC FREEDOM

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I. Introduction

When must a professor's academic freedom yield to a public university's interests as an employer and its own academic autonomy? Apart from considerations of pedagogy and prudence, this issue involves a balance of a professor's First Amendment rights to research, to speak, and to publish with a public university's duty and mission to provide higher education to the citizenry. The United States Supreme Court has held that a "particularized balancing" is appropriate,[1] but its analytical construct is a patchwork that fails to provide reasonable guidance to federal district and appellate courts. The result is that both professors and institutions of higher education are uncertain of their rights and obligations in this area.

This article argues that institutional academic autonomy rests on independent First Amendment interests that often justify reasonable, professional regulation of professors' speech. Constitutional doctrine should more carefully and more precisely distinguish between when a professor's academic freedom is paramount, and when the professor's interests must yield to the duties of the college or university. Part II defines "academic freedom" and discusses the parameters of the concept. Part III tracks the evolution of the current Supreme Court analysis in this area and identifies the most recent permutation of the test for First Amendment protection of public

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1. *See* Connick v. Myers, 461 U.S. 138, 150 (1983).

employee speech in the workplace. Part IV, through an examination of two recent cases, illustrates the confusion created by the Supreme Court's decisions. Part V offers an alternative approach to "particularized balancing" in pursuit of a more useful, more reliable constitutional test for benefit of both professors and institutions.

II. Academic Freedom and Its Limits

As applied to academic employments, federal law is influenced, though not controlled, by tradition that courts should be "alert against intrusion . . . into th[e] constitutionally protected domain" of "academic teaching-freedom and its corollary learning-freedom."[2] The federal courts have often expressed a constitutional faith that this nation ought to be "deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."[3]

A professor's academic freedom is often divided into three conceptual parts: freedom to teach, freedom to research, and freedom to publish opinions on issues of public concern.[4] Judges, lawyers, and academics have offered many justifications for academic freedom, but a utilitarian theme dominates. "Academic freedom . . . is rooted . . . in the recognition that '[i]nstitutions of higher education are conducted for the common good . . . [which] depends upon the free search for truth and its free exposition.'"[5]

In many ways, academic freedom is a distinctly American idea.[6] In contrast to the German ideas of academic freedom,

> [t]he American theorists focused almost exclusively on the freedom of the individual teacher and researcher. . . . In the American theory, . . . the autonomy of an the institution as a self-governing entity of faculty . . . was largely neglected. Because American institutions were

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2. Barenblatt v. United States, 360 U.S. 109, 112 (1959).

3. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

4. *See* Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, LAW & CONTEMP. PROBS., Summer 1990, at 8-9. It is possible, however, to see academic freedom in more complex terms:

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

Id. (footnotes omitted).

5. Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom"*, 45 STAN. L. REV. 1835, 1835 (1993) (quoting ACADEMIC FREEDOM AND TENURE: 1940 STATEMENT OF PRINCIPLES AND 1970 INTERPRETIVE COMMENTS, *reprinted in* AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 3 (6th ed. 1989)) (alterations and third omission in original).

6. *See* Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 821 (1983).

> not self-governing entities of faculty, the freedom expressly claimed by American scholars was not autonomy for the institution, but a freedom from the institution's own duly constituted lay governing authority.[7]

Perhaps as a natural consequence of focusing on individual rights, professorial freedom was linked with the First Amendment. Indeed, the phrase "academic freedom" is often used as little more than a short-hand phrase to refer to First Amendment rights of free expression as applied to professors, colleges, and universities.[8]

The First Amendment influence is evident in the fact that a claim premised on academic freedom is weak, if the aggrieved party cannot show that government sought to punish or penalize speech;[9] or sought to impose a prior restraint on the advocacy of doctrine,[10] on the expression of any theory, or on the search for any information; or sought to restrict any creative or artistic activity.[11] The courts take care to look for governmental action that represents an "express or implied command" that faculty conform to any ideology, philosophy, creed, or point of view.[12] In this sense, the concept of academic freedom refers to constitutional and nonconstitutional legal principles barring governmental interference with a professor's academic speech, as well as a professor's right to speak and publish controversial opinions in public discourse.[13] Two classic cases illustrate the point.

In *Sweezy v. New Hampshire*,[14] the United States Supreme Court found "an invasion of [a lecturer's] liberties in the areas of academic freedom and political expression."[15] The investigations of the state attorney general into alleged subversive activities were an ideological crusade that attempted to compel an academician to disclose his political views, his political associations, and the content of his classroom lectures. In *Keyishian v. Board of Regents*,[16] New York statutes

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7. *Id.* at 828 (emphasis omitted).

8. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach — indeed the freedom of the entire university community.") (citations omitted); Gray v. Board of Higher Education, 692 F.2d 901, 909 (2d Cir. 1982) ("'[A]cademic freedom' is a concept fashioned from other constitutional rights, including First Amendment and due process rights of faculty to avoid censure for the views they teach and espouse.").

9. *See* University of Pa. v. EEOC, 493 U.S. 184, 197-98 & n.6 (1990).

10. *See id.* (University's claim of academic freedom violation is weak in part because there was no allegation that challenged government action was "intended to or will in fact direct the content of university discourse toward or away from particular subjects or points of view.").

11. *See id.* at 199-200.

12. *See id.* at 201 ("[T]he First Amendment does not invalidate every incidental burdening of the press that may result from enforcement of . . . statutes of general applicability.") (citing and quoting Branzburg v. Hayes, 408 U.S. 665, 682 (1972)); *see also Branzburg*, 408 U.S. at 681 (enforcement of subpoena did not impose "prior restraint on what the press may publish, and no express or implied command that the press publish what it prefers to withhold").

13. *See University of Pa.*, 493 U.S. at 197.

14. 354 U.S. 234 (1957).

15. *Id.* at 250.

16. 385 U.S. 589 (1967).

required removal of teachers who made "treasonable or seditious" statements.[17] The justices concluded that the New York laws created a program to "cast a pall of orthodoxy over the classroom."[18] The Court added that "the uncertainty [of the statute's] proscriptions [made] it a highly efficient *in terrorem* mechanism."[19] New York law "stifle[d] 'that free play of the spirit which all teachers ought especially to cultivate and practice . . . .'"[20] Both cases sought to protect "the intellectual life of a university,"[21] from a state government's efforts to suppress free expression. These two cases reflect the pattern of First Amendment doctrine, which embodies an enduring and persistent judicial hostility toward viewpoint discrimination.[22]

Nevertheless, the First Amendment roots of academic freedom can be overemphasized. Though the Supreme Court has characterized academic freedom as a "special concern" of the First Amendment,[23] "[t]he concepts of free speech and academic freedom are symmetrical and overlapping, not synonymous."[24] One commentator has decried

> an annoying tendency . . . to treat academic freedom as arising full blown out of the first amendment, like Athena out of Zeus' head . . . . [T]he idea of academic freedom does not arise from the Constitution in the first instance, nor does it depend upon the courts for its existence. The law of academic freedom involves less the creation of novel first amendment arguments than the more subtle (and as yet imperfectly realized) process of constitutional assimilation of an older, largely nonconstitutional idea.[25]

The problem of distinguishing academic freedom from other First Amendment concepts is compounded by the fact that while the Supreme Court has indicated that First Amendment rights are especially important for academic institutions, the justices have not suggested that they are different for academics and academic institutions. In particular, the justices have not suggested that the First Amendment protects academics to a greater degree than other citizens. In the words of one commentator:

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17. *See id.* at 597.

18. *Id.* at 603.

19. *Id.* at 601.

20. *Id.* (quoting Wieman v. Updegraff, 344 U.S. 183, 195 (Frankfurter, J., concurring)).

21. *Sweezy*, 354 U.S. at 261 (Frankfurter, J., concurring).

22. *See* Rosenberger v. University of Va., 115 S. Ct. 2510 (1995); JOHN HART ELY, DEMOCRACY AND DISTRUST 111-12 (1980); *see also infra* notes 213-45 and accompanying text.

23. *See Keyishian*, 385 U.S. at 603.

24. Olivas, *supra* note 5, at 1838; *see also* WILLIAM W. VAN ALSTYNE, THE SPECIFIC THEORY OF ACADEMIC FREEDOM AND THE GENERAL ISSUE OF CIVIL LIBERTY, *reprinted in* THE CONCEPT OF ACADEMIC FREEDOM 59, 61-63 (Edmund L. Pincoffs ed., 1972).

25. Finkin, *supra* note 6, at 841 n.94 (1983); *see also* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988) (distinguishing between professional conceptions of academic freedom and constitutional protections for academic freedom).

> Who is entitled to the protections of academic freedom? The AAUP has answered: 'every academic and no one but an academic.' The answers courts have discovered in the Constitution concede little to the profession's claim of comprehensiveness and nothing to its claim of exclusiveness.[26]

The idea that academic institutions are entitled to broader, stronger, or better First Amendment rights than the rest of the nation is inconsistent with this Court's rejection of special First Amendment privileges for other institutions dedicated to expressive activity.[27]

To the extent that academic freedom is defined and defended not as an extension of constitutional freedom of speech but as a form of professional autonomy, problems emerge. First, it is not clear why professors deserve more professional freedom than lawyers, doctors, nurses, or many others. The claim of the individual professor to personal autonomy is not easy to distinguish from a claim of professional autonomy that might be asserted by many other professionals.

> The problem is that the equation of academic freedom with a broad conception of professionalism releases academic freedom from its conceptual moorings. The engineer at NASA, the physician at a public hospital, and the accountant in the state budget office have equally plausible claims to such a distended version of academic freedom, though they are not working in the academy.[28]

> Is there a constitutional right to embrace an assertedly superior educational philosophy or are we left only with recent yuppie theories of free speech, the assertion that expression promotes self-realization? If so, why do not engineers at NASA have the constitutional right to engineer rockets in the most efficient, productive and self-realizing manner — even if their managers and the Congress disagree with them? To be sure, professors speak and write for a living and engineers conceptualize problems and design solutions (a form of communication) but why should that matter? So too, hot tubs, home ownership, and football games, sometimes, may also promote self- realization; but constitutional entitlements to those aspects of the good life have yet to be established.[29]

On the other hand, defining the concept of academic freedom as a precept of professional autonomy can result in less, not more, protection. Early formulations of academic freedom conceded as much. The American Association of University

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26. Metzger, *supra* note 25, at 1295.

27. *See* Branzburg v. Hayes, 408 U.S. 665 682-85 (1972) (the press does not enjoy immunity from laws of general applicability or special access to proceedings or information withheld from the public).

28. Mark G. Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finkin*, 66 TEX. L. REV. 1351, 1354-55 (1988) (footnote omitted); *see also* Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 834-35 (1987) [hereinafter Yudoff, *Three Faces*].

29. Yudof, *Three Faces*, *supra* note 28, at 840.

Professors (AAUP) is a preeminent exponent of academic freedom, and its policy statements are basic source documents essential to understand the claim of academic freedom, and its limits. The AAUP's 1915 Declaration defined academic freedom for professors, but it also articulated reciprocal professional obligations.[30] A professor was to respect institutional norms and standards, enforceable by faculty peer evaluations. Faculty judgments about peers were to be overridden by administration or governing bodies only when impartial professorial review procedures and norms were not employed.[31]

The AAUP's 1940 Statement continues the emphasis on a link between professional autonomy and professional responsibility. The Statement defines an academic freedom that is more limited than rights of the ordinary citizen. "The teacher is entitled to freedom in the classroom in discussing [his or her] subject, but . . . should be careful not to introduce into [his or her] teaching controversial matter which has no relation to [his or her] subject."[32] A standard of materiality or relevance arises from a balance struck between expressive liberty and professional duties, not from the intrinsic meaning of free speech. Some formulations of academic freedom are difficult to understand because they embrace incompatible or inconsistent principles. For example, according to the AAUP, when the professor speaks or writes as a citizen, he or she "should be free from institutional censorship or discipline, but [his or her] special position in the community imposes special obligations."[33] Specifically, the professor "should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that [they are] not . . . institutional spokesmen."[34]

If older cases suggested, often in dicta, that professors ought to enjoy "nearly absolute autonomy . . . under traditional academic freedom norms,"[35] more recent cases "indicate that teaching styles and methodologies may be open to greater scrutiny"[36] by academic employers. In short, at one point it appeared that law "carved out a majestic *cordon sanitaire* around college classroom instruction as against institutional interference, protecting professors from governmental intrusion."[37] But though the underlying foundations of academic freedom seemed to presuppose an "exceptional vocational freedom,"[38] the arguments for such freedom generally conceded that academics were to pay a price for such freedom.

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30. *See* GENERAL REPORT OF THE COMMITTEE ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915), *reprinted in* LAW & CONTEMP. PROBS., Summer 1990, at 393 app.

31. *See id.* at 402-06.

32. ACADEMIC FREEDOM AND TENURE: 1940 STATEMENT OF PRINCIPLES AND 1970 INTERPRETIVE COMMENTS, *reprinted in* AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 3 (6th ed. 1989).

33. *Id.* at 4.

34. *Id.*

35. Olivas, *supra* note 5, at 1840.

36. *Id.*

37. *Id.*

38. VAN ALSTYNE, *supra* note 24, at 76.

Academics owed a duty of "exceptional care in the representation of [the truth as they view it], a professional standard of care."[39] In short, the most prominent advocates of strong legal protection for academic freedom conceded a professor ought to be responsible, and subject to appropriate and proportionate discipline from academic colleagues, if guilty of careless teaching or misrepresentations in the dissemination of information or ideas in the classroom.[40]

Needless to say, unless academics' concessions to "special obligations" are merely aspirational, advisory, and unenforceable, some form of professional "discipline" is appropriate, even essential. The professional responsibilities must be enforceable despite the influence of the First Amendment. Necessarily, the enforceability of such professional duties requires a legal doctrine that does not define a professor's rights to academic speech — that is, classroom teaching and publications in academic journals — with the same scope, methods, and substance as the rights of every citizen to argue, protest, and campaign in the public forums of the community.

The door to striking the balance between academic freedom and academic professionalism can be found in the "the unfolding law of employment."[41] Indeed, this conception of balance between academic freedom and academic professionalism fits well with the approach of the United States Supreme Court in *Pickering v. Board of Education*,[42] and subsequent limitations and revisions of doctrine in *Connick v. Myers*.[43]

III. Pickering, Connick, and Waters: The First Amendment and Public Employee Speech in the Workplace

A. The Relic: The Right-Privilege Dichotomy

First Amendment protection for public employee speech in the workplace is a recent development in the law. Until the middle of the twentieth century, the courts viewed public employment as a privilege that could be granted or withdrawn without any consideration of possible First Amendment consequences.[44] Public employment was viewed as a privilege, not a right, and anyone who accepted public employment was deemed to have accepted the attendant limitations on their First Amendment rights in the workplace.[45]

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39. *Id.*

40. *See* Olivas, *supra* note 5, at 1844-45.

41. Matthew W. Finkin, *"A Higher Order of Liberty in the Workplace" Academic Freedom and Tenure in the Vortex of Employment Practices and the Law*, LAW AND CONTEMP. PROBS., Summer 1990, at 379; *see also* Olivas, *supra* note 5, at 1839.

42. 391 U.S. 563, 568 (1968).

43. 461 U.S. 138 (1983); *see* Finkin, *supra* note 41, at 368; Olivas, *supra* note 5, at 1839.

44. *See, e.g.*, Mark Coven, *The First Amendment Rights of Policymaking Public Employees*, 12 HARV. C.R.-C.L. L. REV. 559, 563 (1977); 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 299, at 930 (1913).

45. Mark Coven, *The First Amendment Rights of Policymaking Public Employees*, 12 HARV. C.R.-C.L. L. REV. 559, 563 (1977); 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 299, at 930 (1913).

The classic articulation of this doctrine, known as the right-privilege dichotomy, was fashioned by Justice Holmes, while sitting on the Supreme Judicial Court of Massachusetts. In a case involving the termination of a policeman for his political activities, he stated that "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[46] He went on to state: "There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him."[47] These words of Justice Holmes reflected an understanding that, when the government acted in the same role as a private employer, the government's actions were not constrained by First Amendment concerns. In such roles, traditional master-servant law governed the relationship and the employee was required to honor the government employer's demands without question.[48]

As recently as 1952, the United States Supreme Court affirmed the right-privilege distinction. In *Adler v. Board of Education*,[49] the Court upheld a New York law that denied civil service and educational system employment to anyone advocating, or belonging to, any organization supporting the violent overthrow of the government. The Court upheld the distinction, announcing that if public employees "do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."[50] Clearly, the employer's interests were fully served by the rights-privileges distinction. An employer needed only to demonstrate that his actions were neither arbitrary nor capricious.

It was not until 1967, against the backdrop of anticommunist hysteria, ignited by the Korean War and fueled by McCarthyism,[51] that the right-privilege distinction was fully repudiated by the United States Supreme Court. In *Keyishian v. Board of Regents*,[52] the Court found unconstitutional a provision of New York law, previously upheld in *Adler*, which allowed the government to terminate professors for knowingly belonging to a subversive organization.[53] *Keyishian* opened the door for the application of the First Amendment to government employee speech in the workplace.[54]

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46. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

47. *Id.* at 517-18.

48. *See* Mathew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1328 (citing LABATT, *supra* note 44, at 930).

49. 342 U.S. 485 (1952).

50. *Id.* at 492.

51. Although the right-privilege distinction was repudiated during this era, other factors also contributed to its demise. *See* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1462-64 (1968).

52. 385 U.S. 589 (1967).

53. *See id.* at 609.

54. The end of the right-privilege distinction was completed only after decades of confusing discussion by the Court. As early as 1926 in an economic due process case, the Court held that states may not take away rights 'under the guise of a surrender of a right in exchange for a valuable privilege." Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593 (1926) (state law requiring

B. The Pickering Test: Establishing Balancing

One year after *Keyishian*, the United States Supreme Court, in *Pickering v. Board of Education*,[55] again addressed a case involving a public employee's first amendment rights, this time articulating the foundation of today's standard for evaluating such cases. In *Pickering*, a high school teacher was terminated for writing a letter to the local media. The letter, written in the wake of a recently proposed tax increase, criticized the way in which the school board and the superintendent handled past proposals to raise revenues for the district.[56] The Court found that the dismissal violated the teacher's First Amendment rights.[57]

In arriving at this holding, the Court followed the *Keyishian* line of cases, as they relate to the role of the public employee/citizen, along with the thrust of *New York Times Co. v. Sullivan*,[58] commenting that public employees do not lose all First Amendment protection regarding matters of public concern upon accepting public employment.[59] The Court stated that teachers do not "relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of public schools in which they work."[60] In so holding, the Court dealt the final, fatal blow to the right-privilege distinction.

The Court then recognized the countervailing interests of the government/ employer, stating: "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[61] Upon identifying these competing concerns, the Court announced the need to balance these interests, stating: "[T]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the

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transportation company to perform as common carrier). In a wide variety of cases, the Court has struck down government policies requiring waiver or surrender of rights as a precondition to governmental benefits. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Board of Regents v. Roth, 408 U.S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."); Goldberg v. Kelley, 397 U.S. 254, 264-66 (1970) (welfare receipt may not be conditioned on waiver of due process rights); Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 680 (1990) ("It is rudimentary that the State cannot exact as the price of . . . special advantages the forfeiture of First Amendment rights") (Scalia, J., dissenting). *See also, e.g.*, Van Alstyne, *supra* note 51; Peter Westen, *The Rueful Rhetoric of "Rights"*, 33 UCLA L. REV. 977, 995-1008 (1986) ("rights" terminology is ambiguous; the term may mean "entitlements" or it may mean "interests").

55. 391 U.S. 563 (1968).

56. The letter at issue is reprinted in its entirety in the Appendix to the Opinion of the Court. *See id.* at 575.

57. *See id.* at 574-75.

58. 376 U.S. 254 (1964).

59. *See Pickering*, 391 U.S. at 568 (quoting *Keyishian*, 385 U.S. at 605-06 ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.")).

60. *Id.*

61. *Id.*

interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[62]

The Court provided some limited guidance on how to evaluate the side of the balancing test concerning the interest of the teacher as citizen. The Court emphasized that whether a school district needs additional funds and how those funds are allocated are matters of "legitimate public concern."[63] The employee-interest side was also strengthened by the public context of the speech and by the fact that the speech concerned a topic on which the speaker had an informed opinion.[64]

On the other side of the balancing test, however, the Court was more specific. The Court examined whether the teacher's action would interfere with either his superior's ability to provide discipline or his own working relationship with his co-workers.[65] The Court also noted that the teacher did not work with the board or the superintendent in such a way that "personal loyalty and confidence are necessary to their proper functioning."[66]

The Court summarized its findings, phrasing its conclusion in the negative, stating:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which neither are shown nor can be presumed to have in any way impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.[67]

The opinion reveals that the primary inquiry on the employer side of the balancing test relates to the impact on the institution, not the impact on anyone in his or her personal capacity.[68] This delicate distinction is evidenced by a footnote to the opinion in which the Court indicates that the impact on any individual is to be accorded weight only to the extent that it impacts the working relationship.[69] Finally, in determining the impact on the operation and efficiency of the school, the Court looked to the actual result of the speech, instead of the perceived or intended result at the time of the termination.[70]

In the wake of *Keyishian*, the *Pickering* Court faced the difficult decision between the need for efficiency in the public workplace and the desire to protect cherished individual First Amendment rights. Faced with this choice, the Court seems to draw heavily upon the rationale employed by the Court in *New York Times Co. v.*

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62. *Id.*
63. *Id.* at 571.
64. *See id.* at 571-72.
65. *See id.* at 570.
66. *Id.*
67. *Id.* at 572-73.
68. *See id.*
69. *See id.* at 570 n.3.
70. *See id.* at 570-71.

Sullivan.[71] In *New York Times Co.*, the Court recognized the importance of the First Amendment in the context of alleged defamatory statements against public officials.[72] *New York Times Co.* and its progeny established a clear standard that a state cannot allow the recovery of damages by a public official in a defamation case unless the public official can show that such statements were made with knowledge of their falsity or with reckless disregard for their truth or falsity. On the *Pickering* facts, Justice Marshall seems to follow *New York Times Co.* and apply a "categorical balancing" or "definitional balancing."[73] It seems clear that although the Court applied such a clear test on the facts before it, the Court contemplated other factual circumstances which justify a case-by-case balancing. Thus, the Court settled on a new test, a test that clearly rejected the bright line test afforded by the right-privilege doctrine and one that is not quite the clear, categorical balancing of *New York Times Co.*

This new standard clearly was an attempt to dampen the pendular swing caused by *Keyishian* balancing the employee's First Amendment rights with the government/employer's interest in efficiency. In the process, the Court created considerable confusion, not just because it was a new pronouncement but because the Court provided so little guidance as to the application of the test. As described above, the Court provides almost no useful guidance for the employer or the employee in weighing the competing interests. The Court admits as much, stating:

> [W]e do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.[74]

Although the Court makes a noble effort at establishing a new test, the guidance provided by the Court is of such a general nature that the relevant factors and their appropriate weights cannot be adequately ascertained. The result is a balancing test (which is naturally subjective) that provides little guidance or functional clarity.

C. The Connick Test: The Two-Step Analysis

In *Connick v. Myers*,[75] the United States Supreme Court again addressed the issue of the First Amendment rights of a public employee, this time in the context

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71. 376 U.S. 254 (1964).

72. *See id.* at 269.

73. Without particularity, *Pickering* seems to urge a test of judicial care, possibly "close scrutiny" that distinguishes two situations: one, when government authority seeks to restrict the marketplace of ideas (as seen by the Court in *Pickering*) or to protect itself from voters' awareness of criticism, and other situations — not discussed until *Connick v. Myers*, 461 U.S. 138 (1983) and *Waters v. Churchill* 511 U.S. 661 (1994) — when the employer's interests are preeminent.

74. *Pickering*, 391 U.S. at 569.

75. 461 U.S. 138 (1983).

of employee speech criticizing the actions of an employer with whom the employee had a direct working relationship. *Connick* narrowed First Amendment protection for all government employees, including university professors. "Within a year of *Connick*, college professors were consistently losing claims that they might have won under the broader conception of protected activities in *Pickering*."[76] Though *Connick* did not overrule *Pickering* or its progeny, district courts had little doubt about the meaning of the Supreme Court's revised approach:

> A careful study of all these decisions leads to the inevitable conclusion that the First Amendment in the employment context is now to be more narrowly interpreted to give greater scope to the legitimate rights of governmental entities as employers, and also to reduce the burdens on the courts caused by the burgeoning of litigation initiated by the decisions upon which plaintiff relies here.[77]

In *Connick*, Sheila Myers, an Assistant District Attorney with five years experience in the office, learned that she was to be transferred to a different division of the criminal court system. She voiced her strong opposition to the transfer to both the District Attorney and the First Assistant District Attorney.[78] Despite her efforts, she was transferred. On the day of her transfer, she again told the First Assistant District Attorney of her reluctance to accept the transfer, as well as a number of other concerns she had with the office. Upon being informed that it was believed her concerns were not shared by others in the office, she stated that she would do some research on the matter.[79] The next day Myers prepared and circulated a fourteen-question "questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in superiors, and whether employees felt pressured to work in political campaigns."[80] On that day, Myers was terminated for

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76. Olivas, *supra* note 5, at 1839.
77. Landrum v. Eastern Ky. Univ., 578 F. Supp. 241, 247 (E.D. Ky. 1984).
78. *See Connick*, 461 U.S. at 140.
79. *See id.* at 140-41.
80. *Id.* at 141. The questionnaire, reproduced as Appendix A in the opinion, stated:
PLEASE TAKE THE FEW MINUTES IT WILL REQUIRE TO FILL THIS OUT. YOU CAN FREELY EXPRESS YOUR OPINION WITH ANONYMITY GUARANTEED.
* * *
1. How long have you been in Office? ___
2. Were you moved as a result of the recent transfers? ___
3. Were the transfers as they effected [sic] you discussed with you by any superior prior to the notice of them being posted? ___
4. Do you think as a matter of public policy, they should have been? ___
5. From your experience, do you feel office procedure regarding transfers has been fair? ___
6. Do you believe there is a rumor mill active in the office? ___
7. If so, how do you think it effects [sic] overall working performance of A.D.A. personnel? ___
8. If so, how do you think it effects [sic] office morale? ___
9. Do you generally first learn of office changes and developments through rumor? ___

refusing to accept the transfer and for insubordination by attempting a "mini-insurrection."[81]

The *Connick* Court expanded upon the *Pickering* test by establishing a two-step analysis questioning whether the speech concerned a matter of "public concern" as a threshold, discrete inquiry. First, to evaluate the speech's status as a matter of public concern, the Court looked to see if the speech involved a "matter of political, social, or other concern to the community."[82] Second, if the speech was determined of public interest, then the court found a balancing of government/employer interests contrasted with individual interests to be in order.[83]

The Court hinged its analysis on *Pickering*, stating: "*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge."[84] The Court elaborated, holding that

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[85]

Thus, the Court erected an important barrier between the public employee's free speech interest and the interests of the government employer: public employee speech should only be eligible to receive constitutional protection if it touches upon a matter of public concern. To hold otherwise would eviscerate public, managerial

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10. Do you have confidence in and would you rely on the word of:
Bridget Bane ___
Fred Harper ___
Lindsay Larson ___
Joe Meyer ___
Dennis Waldron ___
11. Do you ever feel pressured to work in political campaigns on behalf of office supported candidates? ___
12. Do you feel a grievance committee would be worthwhile addition to the office structure?___
13. How would you rate office morale? ___
14. Please feel free to express any comments or feelings you have. ___
THANK YOU FOR YOUR COOPERATION IN THIS SURVEY.

Id. at 155.

81. *Id.* at 141.

82. If the employee expression is not deemed to be in the public interest, then "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146.

83. *See id.* at 150-51.

84. *Id.* at 146.

85. *Id.* at 147 (citing Bishop v. Wood, 426 U.S. 341, 349-50 (1976)).

control. Thus, through the public concern test, the Court preserves *Pickering*, and confines protection to public discussion of public issues.

The Court provided further guidance on what is a matter of "public concern," indicating that the relevant inquiry is into the "content, form and context" of the speech.[86] Because the questionnaire was not developed with the goal of educating the public concerning the failure of the office to properly discharge its duty or seek to reveal violations of the public trust, the Court found that none of the questions, save one, addressed a matter of public concern. Notably, the questionnaire was formed and circulated for the purpose of furthering a personal, internal grievance.[87]

One question on the questionnaire, the question addressing whether employees felt pressured to work on political campaigns, was found to have addressed a matter of public concern, requiring a balancing of the relevant interests.[88] In weighing the government's interest in the efficient operation of the office, the Court agreed with the lower court that it was essential for Assistant District Attorneys to maintain a close working relationship with their superiors.[89] The Court also noted that in cases where a close working relationship is necessary, a great deal of deference should be given to the employer's judgment.[90] Additional factors the Court considered relevant were the time, place, and manner in which the questionnaire was disseminated.[91] The *Connick* Court found particularly compelling the context in which the dispute took place. Because the speech at issue was spoken pursuant to a grievance concerning internal policy, the Court gave additional weight to the employer's view that his authority to run the office had been jeopardized.[92]

The Court also established that with regard to the government/employer side of the scale, the proper inquiry is into the employer's reasonable belief at the time of the action, not to the actual result. The Court stated "[t]he limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[93]

Connick fundamentally shifted the *Pickering* test in the government/employer's favor, but provided little guidance to apply the test.[94] First, while the Court pronounced the public concern test as the threshold inquiry, the Court did not effectively establish how balancing relates. As the dissent points out, this manner

86. *Id.* at 147-48.
87. *See id.* at 148.
88. *See id.* at 149.
89. *See id.* at 151.
90. *See id.* at 151-52.
91. *See id.* at 152.
92. *See id.* at 153.
93. *Id.* at 154.
94. The Court reiterated the caveat issued in *Pickering*, stating, "Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." *Id.* (quoting *Pickering*, 391 U.S. at 569).

and context balancing clearly was part of the second step in the test, but not part of the previous public concern determination.[95]

Second, the Court found that the district court "erred in imposing an unduly onerous burden on the State to justify Myers' discharge."[96] After determining that Myers' speech was a matter of public concern, the district court believed that the government's burden was to "clearly demonstrate" that the speech at issue "substantially interfered" with official responsibilities.[97] The Court rejected the district court's interpretation, instead adopting a much more amorphous standard. The Court stated "that the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests."[98]

Finally, the Court placed added emphasis on the importance of the employer's interest in the balancing test. The Court stated that "the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinder efficient operation and to do so with dispatch."[99] The Court continued to emphasize the importance of the employer's interest, indicating that, "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."[100]

Adding even more confusion to the balancing test, the Court stated the following:

> [W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.[101]

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95. *See id.* at 159 (Brennan, J., dissenting). The dissent also takes issue with the distinction the majority makes between the case at issue and *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1970). In *Givhan*, the Court held that First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly. *See Givhan*, 439 U.S. at 413. *Givhan* involved an employee's statements concerning the school district's allegedly racially discriminatory policies. In *Connick*, the dissent criticizes the majority for distinguishing *Givhan* from the case at issue on the public concern test by stating that in Givhan the speech protesting racial discrimination is "inherently of public concern." *Connick*, 461 U.S. at 159 (Brennan, J., dissenting) (quoting *Connick*, 461 U.S. at 148 n.8). The dissent criticized the majority for effectively creating "two classes of speech of public concern: statements 'of public import' because of their content, form, and context, and statements that, by virtue of their subject matter, are 'inherently of public concern.'" *Id.* at 159-60 (Brennan, J., dissenting). The dissent believes that "whether a particular statement by a public employee is addressed to a subject of public concern does not depend on where it was said or why." *Id.* at 160 (Brennan, J., dissenting).

96. *Connick*, 461 U.S. at 149-50.

97. *Id.* at 150.

98. *Id.*

99. *Id.* at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., separate opinion)).

100. *Id.* at 151-52.

101. *Id.* at 152.

Thus, it seems the Court created a further complicating step in the process. Even after determining if the speech at issue involves a matter of public concern, the second step, the balancing test, is dependant upon how "substantial" the matter of public concern is. This further complicates an already unpredictable test. Nevertheless, the *Connick* two-step analysis creates a reasonable framework from which to evaluate a public employee's First Amendment rights. In the higher education context, the test could be used to appropriately consider professorial considerations, such as academic freedom, in the balance, without allowing such considerations to be used as a bar to reasonable managerial enforcement of professional norms (discussed *infra*).[102]

D. Waters v. Churchill: Another Layer

In 1994, in *Waters v. Churchill*,[103] the United States Supreme Court again dealt with public employee speech in the workplace. In this plurality opinion, the Court significantly enhanced the weight to be accorded the government employer's interest. In what appears to be an effort to protect against the employer's ability to avoid constitutional scrutiny by a mere invocation of "disruption," the Court created a new procedural requirement that falls short of the task.

In *Waters*, the plaintiff was terminated from her job as a nurse at a public hospital because of statements she allegedly made to Perkins-Graham, her co-worker, during a work break. Despite considerable dispute over what was actually said during the conversation,[104] the hospital administrators terminated her without either speaking with the plaintiff prior to termination or verifying her story.[105] Thus, the Court was faced with a novel question: What level of inquiry is required of the employer in determining the actual content of the speech?[106]

Justice O'Connor wrote the plurality opinion, first reaffirming the *Pickering/Connick* standard and then adding a new due process requirement. Although O'Connor claims to have adopted *Connick*, in fact, she significantly reinforced the rationale behind the government/employer interest and increased the deference given to this interest in the balancing test.[107] The plurality stated:

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102. *See* discussion *infra* Part V.

103. 511 U.S. 661 (1994).

104. *See id.* at 665-65. The hospital administrators based their decision upon allegations of two individuals who overheard the conversation. These individuals claimed that the plaintiff had tried to convince Perkins-Graham not to take a transfer to another department by describing how bad the department was and that she had said "unkind and inappropriate negative things about [the administrators]." *Id.* at 665. The plaintiff claimed that the conversation at issue primarily concerned a training policy for nurses and other staffing policies that she felt "threatened to 'ruin' the hospital because they 'seemed to be impeding nursing care.'" *Id.* at 666.

105. The plaintiff's version of the story was corroborated by two individuals who overheard the conversation; however, they were not interviewed by the hospital administration. *See id.*

106. *See id.* at 668.

107. *See id.* at 677-78.

> [C]onstitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign . . . .
>
> . . . [T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. The reason the governor may . . . fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively.
>
> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.[108]

Although not going as far as Justice Holmes did when defining the right-privilege doctrine, *Waters* seems to have adopted a similar general philosophy towards free speech rights in the workplace.

The plurality opinion then went on to adopt a new due process right. If this due process right was intended to prevent an employer from avoiding constitutional concerns by a mere claim of "threatened disruption," then O'Connor did not achieve her goal. The plurality concluded that an employer must use reasonable procedures to determine whether the First Amendment protected the speech at issue.[109] Thus, the plurality effectively required the employer to engage in a reasonable inquiry into the speech using a *Pickering/Connick* standard, before the employer may avoid liability for transgressing the First Amendment.[110] Any burdens relieved by O'Connor's deference are replaced by the employer's new, more uncertain duties created by this novel procedural protection.[111]

As part of the Court's evaluation of the employer's inquiry, the plurality then questioned whether the *Pickering/Connick* test should be applied to what the employer believed was said, or to what the finder of fact determines was actually

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108. *Id.* at 674-75.
109. *See id.* at 677.
110. *See id.*
111. *See id.* at 686-94 (Scalia, J., concurring).

said. The Court decided the relevant inquiry was into what the employer believed, but only if that belief was reasonable. The plurality announced: "It is necessary that the decision maker reach its conclusion about what was said in good faith, rather than as a pretext; but it does not follow that good faith is sufficient."[112] The plurality concluded that a supervisor must make a reasonable inquiry into what was actually said before dismissing an employee for speech that may implicate First Amendment protection.[113] The Court tautologically added, "[o]nly procedures outside the range of what a reasonable manager would use may be condemned as unreasonable."[114]

Justice Scalia, joined by Kennedy and Thomas, concurred in the judgment, but took issue with the new procedural requirement. He castigated O'Connor for creating not just a new procedural protection for an established First Amendment right, but a wholly new First Amendment right.[115] Scalia interpreted the opinion to change the nature of the government employer's First Amendment liability in this area from one based upon an intentional wrong to liability based upon negligence.[116] Scalia asserted that the "pretext" analysis (which was the standard before *Waters*) affords the appropriate level of protection when determining if First Amendment protection attaches to employee speech in the workplace when the employee does not have a property interest in his position.[117]

Justice Stevens' dissent, which was joined by Justice Blackman, portrays the plurality's "reasonable belief" requirement as subterfuge, attempting to conceal an employer friendly device. Stevens maintained that the requirement allows for the deprivation of an employee's First Amendment right if termination is based merely upon an employer's "reasonable mistake."[118] He asserts that the "reasonable belief" standard "provides less protection for a fundamental constitutional right than the law ordinarily provides for less exalted rights, including contractual and statutory rights applicable in the private sector."[119] Stevens believes that facts upon which the *Pickering/Connick* test should be applied are "what the trier of fact ultimately determines to have been said."[120]

Beyond requiring greater deference to government employer's interest, *Waters* creates more confusion than clarity. By adding a wholly new, ill-defined layer of procedure to the analysis, *Waters* further frustrated the confused contours of the public employee free speech test by eroding the minimal pragmatic guidance previously provided by *Connick*.[121] Scalia addressed this concern, and chided

112. *Id.* at 677.
113. *See id.* at 677.
114. *Id.* at 678.
115. *See id.* at 686 (Scalia, J., concurring).
116. *See id.* at 688-89 (Scalia, J., concurring).
117. *See id.* at 690 (Scalia, J., concurring).
118. *Id.* at 698 (Stevens, J., dissenting).
119. *Id.* at 695 (Stevens, J., dissenting).
120. *Id.* at 697 (Stevens, J., dissenting) (quoting *Waters*, 511 U.S. at 664).
121. Not discussed is the usual confusion caused by a plurality opinion in an area where circuits and states have applied differing standards.

O'Connor for "provid[ing] more questions than answers, subjecting public employers to intolerable legal uncertainty."[122] Addressing the new procedural requirement, Scalia asserted that "[d]espite the difficulties courts already encounter in distinguishing between protected and unprotected speech and in determining whether speech pertains to a matter of public concern, Justice O'Connor creates yet another speech-related puzzlement that government employers, judges and juries must struggle to solve."[123] O'Connor provides no guidance on what a "reasonable supervisor" would base her judgment as to whether "there is a substantial likelihood that what was actually said was protected."[124] It is not clear whether the open questions that flow from O'Connor's broad pronouncement are to be answered by judge or jury. Unanswered also is the question of what consequences flow from a determination that the employer's investigation was unreasonable.[125] This new layer of confusion compounds the mountain of questions already confronting any court, any employee, or any employer attempting to determine what rights a public employee might have to free speech in the workplace. Justice Scalia summarized this conundrum well, stating "[w]e will spend decades trying to improvise the limits of this new First Amendment procedure that is unmentioned in text and unformed by tradition. It seems to me clear that game is not worth the candle . . . ."[126]

One might infer that in the wake of *Waters*, the prospect of an enforceable First Amendment speech right in the public workplace rests on a weak foundation. However, because the pattern of cases has been so variable and the holdings so intensely fact-specific, any such conclusions are speculative at best. This is borne out through an examination of two post-*Waters* cases.

IV. A Tale of Two Cases

The confusion wrought by *Pickering* and its progeny is best illustrated by an examination of two recent cases that have attempted to apply the appropriate test.

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122. *Id.* at 692 (Scalia, J., concurring).

123. *Id.* (Scalia, J., concurring) (citations omitted).

124. *Id.*

125. Justice Scalia states that

> O'Connor does not reveal what the remedy for this violation is to be. There are various possibilities: One could say that the discharge without observance of the constitutionally requisite procedures is invalid, and must be set aside unless and until those procedures are complied with. Alternatively, one could charge the employer who failed to conduct a reasonable investigation with knowledge of the protected speech that a jury later finds — producing a sort of constructive retaliatory discharge, and entitling the employee to full reinstatement and damages. Or alternatively again, the jury could be required to determine what information a reasonable investigation would have turned up, and then to decide whether it would have been permissible for the employer to fire the employee based on that information.

Id. at 894 (Scalia, J., concurring).

126. *Id.* at 694 (Scalia, J., concurring).

Jeffries v. Harleston[127] and *Cohen v. San Bernardino Valley College*[128] reflect the varied results and clouded commentary that are a necessary and unfortunate by-product of the Supreme Court's failure to provide adequate guidance in this area.

A. Jeffries I and Jeffries II

First in 1994 and then again on remand in 1995, the Second Circuit addressed a case involving a public speech given by a Professor in which the Professor harshly criticized the institution that employed him. The facts presented the Second Circuit with an ideal opportunity to recognize both the importance and confines of academic freedom while clearly establishing the necessary authority a public employer must have to effectively function. Unfortunately, the court missed the opportunity, and instead of providing function clarity, propagated the continued confusion of *Waters*.

Leonard Jeffries was a professor at City College (part of the City University of New York (CUNY)), and was chairman of the Black Studies Department. After being introduced as holding these titles, Jeffries delivered a speech at an African-American cultural festival that was wholly unaffiliated with CUNY. Jeffries spoke for more than an hour concerning racial and ethnic biases he perceived in the public school curriculum. In the speech, Jeffries made several comments about Jews that were "hateful and repugnant."[129]

Jeffries' speech created a firestorm of controversy. His speech, initially broadcast on an Albany televisions station, "received extensive media attention in the New York City area."[130] This furor led Harleston, the President of City College, to release a statement almost three weeks later that "condemn[ed] Jeffries for undermining CUNY's policy of striving toward racial, ethnic and religious harmony, and indicat[ed] that he would 'initiate a thorough review of this situation.'"[131] The Chancellor, Chair, and Vice Chair of the Board of Trustees of CUNY issued a press release at the same time. They indicated that they would "'examine Professor Jeffries' actions and statements and, if warranted, . . . pursue vigorously with City College the remedies that may be appropriate . . . .'"[132]

At the October Board of Trustees meeting, Harleston, supported by the Chancellor, recommended that Jeffries term as department chairman be limited to a one-year term, instead of the customary three-year term. The Board approved the recommendation. After the vote, Harleston wrote Jeffries of the Board's decision,

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127. 21 F.3d 1238 (2d Cir.) (*Jeffries I*), *vacated mem.*, 115 S. Ct. 502 (1994), *and rev'd*, 52 F.3d 9 (2d Cir. 1995) (*Jeffries II*).

128. 92 F.3d 968 (9th Cir. 1996).

129. *See Jeffries I*, 21 F.3d at 1242 ("For example, Jeffries launched several *ad hominem* invectives at specific state and federal officials who supported the curriculum, calling one an 'ultimate, supreme, sophisticated, debonair racist,' and a 'sophisticated, Texas Jew.' Jeffries also told his audience that Jews had a history of oppressing blacks. He said that 'rich Jews' had financed the slave trade, and that Jews and Mafia figures in Hollywood had conspired to 'put together a system of destruction of black people' by portraying them negatively in films.").

130. *Id.*

131. *Id.*

132. *Id.*

stating that the speech "threatened recruitment, fundraising, and CUNY's relationship with the community."[133] At the March 20, 1992, Board meeting, the Trustees voted unanimously to replace Jeffries as chairman of the department.[134]

At trial, the jury returned four special verdicts. Among these verdicts, the jury found that the Board would not have reduced Jeffries' term as chairman but for the speech;[135] that the defendant did not show that the speech "hampered the effective and efficient operation of the Black Studies Department, the College, or the University;"[136] and that defendant's actions were motivated by a reasonable expectation that the speech would "cause the disruption of the effective and efficient operation of the Black Studies Department, the College, or the University."[137] Based upon the answers to four special verdict questions, the trial court found that Jeffries' speech substantially involved a matter of public concern and noted that the jury had concluded that there was not interference with CUNY operations. The trial court concluded that the plaintiff's interests outweighed CUNY's interests, and, thus, that the defendants had violated Jeffries' First Amendment rights.[138]

In *Jeffries I*, the Second Circuit Court of Appeals adopted a *Pickering*-esque approach: providing great deference to the right to free speech, requiring an actual showing of disruption, and narrowly drawing the contours of what can be defined as interference with operations. The court began its analysis by extolling the importance of the First Amendment, even in the workplace. The court felt compelled to invoke the seventy-five-year-old words of Justice Holmes, who in a dissent, opined:

> [W]e should be eternally vigilant against attempts to check the expression of opinions that we loath and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[139]

After a perfunctory determination that Jeffries' speech substantially concerned public issues,[140] the court turned to the balancing test. The court preordained its conclusion by defining the balancing test in a way that almost completely prevented any finding other than in favor of Jeffries. Drawing upon specific language in *Connick*, the court strangulated the intention of the United States Supreme Court and then extrapolated its conclusion to find in favor of Jeffries. Citing *Connick* for authority, the court stated that, "[h]ow much interference the government must show

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133. *Id.*

134. Jeffries was replaced as chairman by Professor Edmund Gordon, retired chairman of Yale University's African-American studies department. *See id.* at 1243.

135. *See id.* at 1243.

136. *Id.*

137. *Id.* at 1243-44.

138. *See id.* at 1244.

139. *Id.* at 1245 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

140. *See id.* at 1245.

to justify sanctioning an employee for his speech will vary, depending on the degree that the speech involved matters of public concern."[141] Then the court relied upon an earlier Second Circuit opinion to establish that if "the speech substantially addressed public issues, the government must show the statements 'actually undermined the effective and efficient operation' of the employee's department."[142] The court then formulated a novel test, finding that "[b]ecause, as we held above, Jeffries' speech *substantially* concerned public issues, the defendants shoulder the weightier burden of showing that the speech caused *substantial* disruption at CUNY."[143]

The court found in favor of Jeffries because it believed the defendants did not show the required substantial interference. The court recognized that "the government generally has more discretion to sanction an employee who serves in a 'confidential, policymaking, or public contact role' than one who performs ministerial functions,"[144] citing, parenthetically, that "the employee's responsibilities determine whether his statement 'somehow undermines the mission of the public employer.'"[145] Nevertheless, the court only paid lip-service to the important employer interests at stake. The court ignored reality and found that department chairs are "ministerial positions."[146] The court then ended its analysis with a conclusory finding:

> In short, to rebut Jeffries' *prima facie* case, the defendants must show substantial interference. We find that the defendants have provided meager evidence at best that Jeffries' speech had any real disruptive effect on CUNY operations, and thus, have fallen short of their burden.[147]

In reaching this conclusion, the court apparently ignored its finding earlier in its opinion that "as evidenced by the ensuing uproar, its content affronted many who heard it or, at least, heard about it."[148] The court also recognized, but then failed to consider that there was great publicity surrounding the speech for several days and that Jeffries was recognized as a professor and departmental chair of the College. Finally, the court gave no credence to the fact that as a departmental chair, Jeffries was serving in an administrative capacity for the College and as such carried more weight than an average professor to speak on behalf of the institution. Even assuming *arguendo* that actual disruption must be shown, certainly the court

141. *Id.* at 1246 (quoting *Connick*, 461 U.S. at 146-47). "If the speech only tangentially touched on public issues, the government need not wait until 'the disruption of the office and the destruction of working relationships is manifest' before taking action." *Id.* (quoting *Connick*, 461 U.S. at 152).

142. *Id.* (quoting Piesco v. City of New York, 933 F.2d 1149, 1159 (2d Cir. 1991)).

143. *Id.* (emphasis added).

144. *Id.* at 1247.

145. *Id.* (citing Rankin v. McPherson, 483 U.S. 378, 390-91 (1987).

146. *Id.* at 1247.

147. *Id.* at 1247.

148. *Id.* at 1245.

has admitted to more than "meager evidence" of disruption. Clearly, the court failed to give proper weight to the important employer interests at stake for the College.

One month after *Jeffries I* was decided, the Supreme Court spoke in *Waters*. In light of *Waters*, the Supreme Court remanded *Jeffries I* for reconsideration.[149] In *Jeffries II*,[150] the Second Circuit reversed its previous ruling.[151] While the holding was correct, the rationale was flawed. The court predicated its reversal on their mistaken belief "that the First Amendment protects a government employee who speaks out on issues of public interest from censure by his employer unless the speech *actually* disrupted the employer's operations."[152] The court then summarized the test under *Waters*.

> *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if: (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.[153]

The court refined the test, finding that "even when the speech is squarely on public issues — and thus earns the greatest constitutional protection — *Waters* indicates that the government's burden is to make a substantial showing of *likely* interference and not an *actual* disruption."[154]

Although the court adequately described the *Waters* test, its application of the facts to the law and the supporting rationale are conclusory and misguided. The court accepted the jury's finding through special verdict that the defendants were motivated by a "reasonable expectation" that the speech would harm CUNY. The court accepted this conclusion despite the fact that in *Jeffries I*, the court found that "the defendants . . . provided meager evidence at best that Jeffries' speech had any real disruptive effect on CUNY operations."[155] Although the court in *Jeffries II* recognized the key is "reasonable belief" and not "actual effect," the two blur together on the facts of this case as the action at issue, the vote of the Board to limit the term of Jeffries' chairmanship, took place three months after the speech. Presumably any harm to CUNY would have been evident within that three month window. Thus, in this case, it seems there is no real difference between what was a "reasonable expectation" of the effect of the speech and what actually occurred or was occurring as a result of the speech. Therefore, it is difficult to harmonize the court's conclusion in *Jeffries II* with its finding in *Jeffries I*.

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149. *See* Harleston v. Jeffries, 115 S. Ct. 502 (1994) (mem.).

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

151. *See id.* at 13.

152. *Id.* at 12. The court noted that at the time of *Jeffries I*, "the strict actual interference requirement reflected the law of the Second Circuit." *Id.*

153. *Id.* at 13.

154. *Id.*

155. *Jeffries I*, 21 F.3d at 1247.

The court went on to hold, without any application of the facts, that "as a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value [Jeffries' speech] might have had."[156] Such a conclusory holding is incredible considering that less than one year earlier the *Jeffries I* court had found that the speech at issue involved "issues . . . suffused with social and political hues"[157] and that in *Jeffries II* the court found the issues "squarely involved issues of public concern."[158] The only guidance given by the court for this sea change in the balancing was its recognition that the *Waters* plurality "emphasized that greater deference must be given to the government when it acts as employer rather than as sovereign."[159] Certainly, the court should have explained how the balance of the interests changed so dramatically.

B. Cohen v. San Bernadino College

In *Cohen v. San Bernadino Valley College*,[160] the Ninth Circuit confronted a case in which a professor's classroom teaching tactics were measured against sexual harassment guidelines. The facts of the case come close to providing a basis for the worst caricatures and stereotypes of what professors may do when protected by overbroad concepts of academic freedom. Cohen was a tenured professor teaching English and Film Studies at the California community college. He apparently enjoyed controversy. The district court described the professor's unusual teaching method:

> By his own admission, Cohen uses a confrontational teaching style designed to shock his students and make them think and write about controversial subjects. He assigns provocative essays such as Jonathan Swift's "A Modest Proposal" and discusses subjects such as obscenity, cannibalism, and consensual sex with children. At times, Cohen uses vulgarities and profanity in the classroom.[161]

The professor used this style in a spring 1992 remedial English class, a prerequisite to other college-level classes, much to the dismay of one female student:

> One of the students . . . became offended by Cohen's repeated focus on topics of a sexual nature, his use of profanity and vulgarities, and by his comments which she believed were directed intentionally at her and some other female students in a humiliating and harassing manner . . . . Cohen began a class discussion . . . on the issue of pornography and played the "devil's advocate" by asserting controversial viewpoints. During classroom discussion on this subject, Cohen stated in class that

156. *Jeffries II*, 52 F.3d at 13.
157. *Jeffries I*, 21 F.3d at 1245.
158. *Jeffries II*, 52 F.3d at 12.
159. *Id.* at 13.
160. 92 F.3d 968 (9th Cir. 1996).
161. Cohen v. San Bernardino Valley College, 883 F. Supp. 1407, 1410 (C.D. Cal. 1995), *rev'd in part*, 92 F.3d 968 (9th Cir. 1996).

> he wrote for Hustler and Playboy, and he read some articles out loud in class. Cohen concluded the class discussion by requiring his students to write essays defining pornography.[162]

In proceedings to enforce the college's sexual harassment policy, the accusing party was required to show "verbal or physical conduct of a sexual nature."[163] The more explicitly sexual the behavior, the better for the accuser. The student grievant was able to present a quantity of evidence that impressed the district court. Also, in college grievance proceedings, students from the professor's other classes had testified that he had used similar sexually explicit subjects for his teaching method. For example, the professor assigned his own article on pornography and film criticism as mandatory reading. Typical of the material used to the professor's disadvantage was his definition, in his article, of a "four-handkerchief movie," which was "a pornographic film . . . extremely arousing to the male viewer."[164] Also, though the litigation focused on the professor's classroom discussion, some of the student's allegations went beyond the professor's behavior in class. Among facts emphasized by the district court were the student's allegations that the professor offered the complaining student a better grade "if she met him in a bar," that the professor "would look down her shirt, as well as the shirts of other female students," and that the professor said the student "was overreacting because she was a woman."[165]

The student stopped attending class. She refused to write the assigned paper on pornography. She requested an alternative assignment. The professor refused to give her one.[166] So, she suffered an "F" grade for her scruples. After complaining to the chair of the English Department, without obtaining relief, her next step was to initiate a complaint alleging that the professor's conduct constituted sexual harassment. She believed that the professor's remarks were directed at her and at other female students. A college grievance committee agreed and disciplined Professor Cohen.[167]

The findings, conclusions, and recommendations of the grievance committee were forwarded to the President of the college, who concluded that the professor had violated the college's policy against sexual harassment.[168] He found the professor had engaged in "sexual harassment which had the effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile or offensive work environment."[169]

Both the professor and student appealed to the college's governing board. The board upheld the president and disciplined the professor. It ordered the professor

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162. *Id.* at 1410 (footnote omitted).
163. *Id.* at 1410 n.4.
164. Id. at 1410 n. 3.
165. *Id.* at 1410.
166. *See id.*
167. *See id.*
168. *See id.* at 1411.
169. *Id.*

to submit his class syllabus for review by the chair of the department. He was ordered to attend a sexual harassment seminar. And more generally, he was directed to "[b]ecome sensitive to the particular needs and backgrounds of his students, and to modify his teaching strategy when it becomes apparent that his techniques create a climate which impedes the students' ability to learn."[170] He was warned that he would be fired, if he did not comply.[171]

If the college was confident, it was probably because its policy[172] was identical in form and substance to guidelines of the Equal Employment Opportunity Commission (EEOC), save only for the fact that the college policy talked of a learning environment, and the EEOC speaks to a work environment.[173] Even more comforting was the fact that the EEOC guidelines were twice upheld by unanimous decisions of the United States Supreme Court.[174]

It was the professor's turn to complain that his rights had been violated. He turned to the federal courts. He filed a lawsuit based on allegations that the college's discipline violated his freedom of speech.

Before the district court, the professor lost.[175] The court decided the case after a bench trial on a stipulated record and written briefs.[176] According to the district judge, the principal issue of the case was "whether a state college may limit the classroom speech of its professors in order to prevent the creation of a hostile, sexually discriminatory environment for its students."[177] The court ruled "a state college may do so, if the limitations involved are reasonable and narrowly tailored to achieve the college's mission of effectively educating its students."[178]

The district court began its legal analysis by observing "[t]he concept of academic freedom . . . is more clearly established in academic literature than it is in the courts."[179] Indeed, the district judge continued, "[w]hile Supreme Court cases contain strongly worded defenses of 'academic freedom,' their rhetoric is broader

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170. *Id.*

171. *See Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971 (9th Cir. 1996).

172. The college policy read as follows.

> Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature. it [sic] includes, but is not limited to, circumstances in which: 1. Submission to such conduct is made explicitly or implicitly a term or condition of a student's academic standing or status. 2. Such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment. 3. Submission to or rejection of such conduct is used as the basis for academic success or failure.

Id. at 971.

173. *Compare supra* note 172 *with* 29 C.F.R. § 1604.11 (1996) (EEOC Guidelines on Discrimination Because of Sex).

174. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

175. *See Cohen*, 883 F. Supp. at 1407.

176. *See id.* at 1409.

177. *Id.*

178. *Id.* at 1409-10.

179. *Id.* at 1412.

than their holdings."[180] The court pointed to several lower court decisions that "found substantial university control over grading policies and teaching methods."[181] The judge ruled:

> [D]espite eloquent rhetoric on "academic freedom," the courts have declined to cede all classroom control to teachers. The parameters of academic freedom are not distinct, particularly in relation to the potential conflict with a university's duty to ensure adequate education of its students. What is clear, however, is that invocation of the "academic freedom" doctrine does not adequately address the complex issues presented by this case. For that reason, this Court declines to hold that [the college's] discipline of [the professor] is precluded by general notions of academic freedom under the First Amendment.[182]

The district court then considered the application of cases discussing the First Amendment rights of government employees; including *Connick v. Myers*.[183] First, the district court addressed the threshold test of *Connick*. Though "Cohen's profanity is not speech on a matter of public concern,"[184] the judge admitted to difficulty and doubt when considering a professor's classroom discussion of sexually explicit topics.

> [I]t is less clear whether Cohen's comments on pornography and other sexual topics constitute speech on a matter of public concern. The determination of whether an employee's speech is a matter of public concern is often a difficult one, for which there are few bright-line tests . . . .
>
> . . . .
>
> Based on this case law, the Court finds that the pornography topic and the other sexually-oriented topics discussed in Cohen's classes are matters of concern to the community and thus are topics of public concern. The Court further finds that the record shows that the content and form of Cohen's statements addressed these topics. Thus, Cohen's

180. *Id.*

181. *Id.* at 1414. *See, e.g.*, Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 552-53 (5th Cir. 1982) (nontenured teacher could be terminated for refusing to give an unearned grade to a student); Hetrick v. Martin, 480 F.2d 705, 708-09 (6th Cir. 1973) (upholding university's decision to decline to renew a nontenured teacher because of her pedagogical methods); Clark v. Holmes, 474 F.2d 928, 931-32 (7th Cir. 1972) (upholding university's decision to decline to renew a nontenured teacher because of the teacher's refusal to conform to university-required course content and teaching approach); Peloza v. Capistrano Unified Sch. Dist., 782 F. Supp. 1412, 1416 (C.D.Cal. 1992) (high school biology teacher has no "constitutional right to conduct himself as a loose cannon in his classroom"), *aff'd in part and rev'd in part on other grounds*, 37 F.3d 517 (9th Cir. 1994).

182. *Cohen*, 883 F. Supp. at 1414.

183. 461 U.S. 138 (1983).

184. *Cohen*, 883 F. Supp. at 1416.

> commentary on those topics is commentary on a matter of public concern.[185]

The district court's analysis of the *Connick* balancing test led to the conclusion that "the burden shifts to Defendants to show that their legitimate interests outweigh [the professor's] First Amendment interests."[186]

> In applying this balancing test, the Court must consider the manner, time, place, and context of the employee's expression . . . . The state's burden in justifying the regulation varies according to the nature of the employee's expression . . . . Essentially, the state's interest is based on "the effective functioning of the public employer's enterprise."
>
> The Court must consider the employer's interest in effectively functioning, and whether that effective function is disrupted . . . . In so determining the government's interest, the Court should consider whether the statement at issue impairs discipline, co-worker relations, or impedes the performance of the speaker's duties or the operation of the enterprise . . . . If the speech at issue directly deals with issues of public concern, a stronger showing of disruption is required. The context of the situation determines how strong a showing must be made . . . . A showing of real, not imagined disruption, is required.[187]

Applying the test and relevant precedent to the case at bar, the district court concluded "[t]he College brings forth substantial, uncontroverted evidence showing that the educational process was disrupted by [the professor's] focus on sexual topics and teaching style."[188] The court conceded the evidence of the professor's effectiveness was mixed. Some students responded well; some did not. Though the court noted that some of the professor's colleagues described him as "a gifted and enthusiastic teacher,"[189] the court concluded that "this evidence does not controvert the evidence showing that the learning process for a number of students was hampered by the hostile learning environment created by [the professor]."[190]

On appeal, the Ninth Circuit awarded victory, if not true vindication, to the professor. In a short but unanimous opinion, the judges offered a brief discussion of the facts and evidence. The court was unwilling to "define . . . the precise contours of the protection the First Amendment provides the classroom speech of college professors."[191] The judges offered no analysis of academic freedom and no discussion of the *Connick* test. Instead, the appellate court concluded "the

185. *Id.* at 1416-17.
186. *Id.* at 1417.
187. *Id.* at 1417-18 (citations omitted).
188. *Id.* at 1418.
189. *Id.* at 1419.
190. *Id.*
191. Cohen v. San Bernardino Valley College, 92 F.3d 968, 971 (9th Cir. 1996).

[sexual harassment] Policy's terms were unconstitutionally vague as applied to [the professor]."[192] Specifically, the court held,

> officials of the College, on an entirely ad hoc basis, applied the Policy's nebulous outer reaches to punish teaching methods that Cohen had used for many years. Regardless of what the intentions of the officials of the College may have been, the consequences of their actions can best be described as a legalistic ambush.[193]

C. Jeffries and Cohen — Unbalanced

Jeffries I, *Jeffries II*, and *Cohen* demonstrate the results that flow from the failure of the United States Supreme Court to provide an appropriate level of guidance on how to apply the balancing test. Faced with unique factual situations and almost no guidance on the balancing test, the lower courts have been forced to fill the vacuum. The results and rationales reveal the struggle that they, and all other courts faced with the same issue, encounter — how to balance important and conflicting interests without knowing what interests should be considered, nor the weight to be accorded to them.

As detailed above, *Jeffries I* and *Jeffries II* demonstrate a futile attempt to follow *Pickering* and its progeny. It is unfortunate that the court in *Jeffries II* did not engage in some explanation of its balancing of the relevant considerations, beyond a conclusory comment that *Waters* put greater emphasis on the government's interest when it acts as an employer. Although the correct result was reached by the court, under *Waters*, it should have been reached after a thoughtful balancing of the relevant considerations. On the employee interest side, the court should have stood by its determination in *Jeffries I*, that Jeffries' speech involved matters of important public concern and that because he was a professor, matters of academic freedom were involved. On the employer side, the court was right to accord the government/employer some degree of deference in managing its administration, but should not have merely concluded that because there was such an interest, there was no need to consider the employee's interests.

In *Jeffries II*, the court briefly addressed the issue of academic freedom. Although the court correctly refused to weigh academic freedom in the equation, it did so for the wrong reason. At the end of its opinion the court committed a paragraph of commentary to address an argument by an amicus curiae.[194] The amicus asserted that *Waters* was not applicable because Jeffries, as a faculty member, deserved greater First Amendment protection than did the nurse in *Waters*. Although recognizing academic freedom as an important First Amendment concern, the court concluded that Jeffries' academic freedom was not infringed upon. In dicta, the court stated that "Jeffries is still a tenured professor at CUNY, and the

192. *Id.* at 971-72.
193. *Id.* at 972.
194. *See* Jeffries v. Harleston, 52 F.3d 9, 14-15 (2d Cir. 1995).

defendants have not sought to silence him, or otherwise limit his access to the 'marketplace of ideas' in the classroom."[195]

The court is wrong to tie academic freedom to work only "in the classroom." Concerns for academic freedom exist not just in the classroom but also to related professional endeavors outside of the classroom. In this instance, Jeffries was clearly speaking on matters directly related to his area of study and area of instruction in his role as a professor of Black Studies at CUNY, and therefore involved his academic freedom. The consideration of academic freedom should be rejected in this case not because it is uninvolved but because the punishment does not jeopardize his academic freedom as a tenured professor of Black Studies at CUNY.

Jeffries I and *Jeffries II* reflect an inherent flaw in the *Pickering/Connick/Waters* test — that the test looks only at the relevant interests, and not at the burden created by the government imposed sanction. Possibly one reason the court did not explain its balancing of the relevant interests in this case is that it does not produce the correct outcome. Looking only at the interests considered under *Pickering* and its progeny, the balance appears to weigh in favor of Jeffries. In the balance is the interest of a professor's pursuit of academic freedom on the important social topic in the very area of his expertise. Certainly, this must be a classic example of the type of speech the First Amendment was meant to protect. The employer's interest is rather nebulous, that of not injuring the revenues and reputation of the institution.

The decision of the district court in *Cohen*, detailed above, provides perhaps the best articulation and analysis of the relevant considerations that can be divined from the relevant Supreme Court decisions. The district court extracted the essence of the balancing test and applied it appropriately. This understanding was made clear in the following passage:

> [C]olleges and universities must have the power to require professors to effectively educate all segments of the student population, including those students unused to the rough and tumble of intellectual discussion. If colleges and universities lack this power, each classroom becomes a separate fiefdom in which the educational process is subject to professorial whim. Universities must be able to ensure that the more vulnerable as well as the more sophisticated students receive a suitable education. The Supreme Court has clearly stated that the public employer must be able to achieve its mission and avoid disruption of the workplace. Within the educational context, the university's mission is to effectively educate students, keeping in mind students' varying backgrounds and sensitivities. Furthermore, the university has the right to preclude disruption of this educational mission through the creation of a hostile learning environment.[196]

195. *Id.*

196. *Cohen*, 883 F. Supp. at 1419-20.

After a thoughtful examination of the many complex considerations, including the importance of "academic freedom," the district court rendered its holding:

> Thus, even though Cohen's speech on the topic of pornography was speech on a matter of public interest, the College's interest in effectively educating its students outweighs Cohen's interest in focussing on sexual topics in the classroom, to the extent that the university only requires Cohen to warn potential students of his teaching style and topics.[197]

Remarkably, the appellate court repudiated the district court's legal approach, opting instead to reject the sexual harassment policy at issue under the "vagueness" doctrine. In short, the appellate court deliberately left undecided and unexplained what the college could do either to enforce its sexual harassment policy or professional standards. By failing to discuss the district court's analysis that the professor's teaching methods disrupted the educational mission, the circuit judges did not confront, for example, whether the college is left vulnerable to lawsuits by female students, who can recover money because of federal and state laws on sexual harassment. By refusing to define "the precise contours" (or even the general contours) of a professor's free speech rights, college and university faculty and administrators cannot know whether the educational institution possesses the ordinary authority of an employer to say to a professor that he is doing a poor job. Likewise, the governing authorities of a college or university cannot know whether they possess the power and authority to pursue academic or professional objectives. For example, it is impossible to say whether a state college can do anything to act on the belief that a professor should direct efforts to enlighten the students and to elevate discourse, other than to offer an unenforceable opinion that if the professors must teach about sex, then there is more value in Chaucer and Shakespeare than *Hustler* and *Playboy*. The opinion says literally nothing about whether a college and university can take action to insist that its literature classes teach from good novels and fine poetry. In short, the decision upholds expressive liberty and academic freedom without any apparent regard for college and university authority to possess and enforce professional standards.

Thus, the opinions in *Jeffries* and *Cohen* reflect the failure of the present balancing test. The lack of guidance by the Supreme Court has left the lower courts adrift — clinging only to the sparse and inconsistent guidance provided by *Pickering* and its progeny. By not providing adequate direction for the application of the balancing test, the courts are left to speculate or, worse yet, allowed to engage in outcome-based decision making. The effect is inconsistent results in the courts and a lack of necessary guidance for both employees and employers to understand their respective rights and obligations.

197. *Id.* at 1420.

V. Balancing: A Tentative Assessment of Relevant Factors

From the preceding discussion of *Jeffries* and *Cohen*, it should be apparent that if balancing be inevitable, it may still be hazardous to both the causes of expressive liberty and institutional academic autonomy, particularly if the analytical mechanism is too facile.[198] A careful and probing judicial scrutiny need not thwart legitimate and reasonable university action to perform its assigned educational mission. Ultimately, we conclude that Professor Jeffries' removal as chair was constitutional, but that the rhetoric of the Second Circuit was unduly destructive to principles of academic liberty. *Jeffries*' rationale was wrong, or at least misleading and dangerous, because a confused appellate court felt obliged to be too deferential: the judges concluded that a reasonable governmental prediction of disruption was sufficient to override a professor's free speech interests.

On the other hand, we conclude that in *Cohen* the Ninth Circuit should have upheld the college's first, tentative, and restrained efforts to promote reasonable professional standards. Indeed, it might be said that the Ninth Circuit's analysis was only close scrutiny in superficial form; it was neither close nor scrutiny in substance, because it was not careful and it shirked the most important problems. Even if the decision to set aside the discipline in *Cohen* might be defensible, the language and reasoning of the appellate court was wrong, or at least misleading and dangerous. The appellate court felt free to ignore a careful and sensitive calculation of professional considerations underlying the collective judgment of a public college.

A. Relevant Consideration in Balancing

In both cases, the judges refused to define their thinking on a central issue of importance — the meaning and scope of academic freedom, and its relation to emerging standards of the First Amendment.[199] Because we are critical of the two appellate courts' decisions — or at least their written explanations of their decisions — to shirk responsibility for discussing the balancing test with more care, it seems appropriate to discuss a tentative understanding of the appropriate judicial inquiries.

To adapt Winston Churchill's famous description of democracy,[200] balancing is the worst way to define constitutional principle, except for all of the others that have been tried from time to time.[201] For most of America's history, lawyers and

198. *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

199. *See, e.g.*, Stephen A. Newman, *At Work in the Marketplace of Ideas: Academic Freedom, The First Amendment, and* Jeffries v. Harleston, 22 J.C. & U.L. 281 (1995) (concluding that in *Jeffries*, "judges paid little attention to the issue of academic freedom, despite its importance to the nation's academic community").

200. "[I]t has been said that democracy is the worst form of Government — except all those others that have been tried from time to time." Winston S. Churchill, Speech Before the House of Commons (Nov. 11, 1947), *in* 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897-1963 at 7566 (Robert Rhodes ed., 1974).

201. *See* W. William Hodes, *Lord Brougham, The Dream Team, and Jury Nullification of the Third*

judges have believed that "[t]he rights which the First Amendment creates cannot be established by any theoretical definition."[202] It was — and is — easy to assume that "[t]he First Amendment is no coherent theory that points our way to unambiguous decisions."[203] "Absolute" First Amendment rights are an illusion.[204] It is more realistic to see the law as "a series of compromises and accommodations confronting us again and again with hard questions to which there is no certain answer."[205] Balancing is the customary method of attempting to answer hard questions without hope of certainty.[206]

Whatever strengths or weaknesses exist in the balancing approach, balancing in First Amendment cases seems to be here to stay. *Connick* and *Waters* are two cases that show that "[d]espite vituperative criticism of balancing as an unprincipled technique for restricting speech, the Court never abandoned the methodology. Indeed, . . . the Court has resorted to balancing in First Amendment cases with increasing frequency."[207] What is not clear is whether the judicial scrutiny required by these tests is to be deferential, or whether judges are expected to use a close scrutiny. Federal court decisions after *Connick* provide evidence for almost any reasonable prediction, which is a clear sign that current doctrine is muddled — or even incoherent. As Professor Michael Olivas has pointed out, there are a wide "variety of available paradigms and metaphors concerning academic freedom,"[208] leaving great discretion in every analyst and judge to adopt their own. Professor Olivas chose one that described well the unpredictable perceptions permitted by a general balancing test:

> I now adopt my own, that of the kaleidoscope, the wonderful child's toy that — with a turn — reconstitutes one mosaic into another while using the same shards of glass and refracted light. How one characterizes classroom interactions is akin to turning a kaleidoscope in the light: From one perspective it is a professor's autonomy to teach how she sees

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Kind, 67 U. COLO. L. REV. 1075, 1091 & n.43 1996).

202. ALEXANDER BICKEL, THE MORALITY OF CONSENT 57 (1975).

203. *Id.*

204. Justice Felix Frankfurter offered one famous statement of the argument that absolutism is impossible, in an infamous case that also demonstrates that balancing can deteriorate into improper deference to a government's viewpoint discrimination.

> Absolute rules . . . lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society . . . are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

Dennis v. United States, 341 U.S. 494, 524-25 (1951) (Frankfurter, J., concurring).

205. BICKEL, *supra* note 202, at 57.

206. *See* Aleinikoff, *supra* note 198, at 943 ("That some . . . process [of balancing] must be a part of any practical legal system is undeniable. But that should not blind us to the extreme danger of too facile a use of "balancing"' in a system of justice.) (quoting Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2123-24 (1985)).

207. *Id.* at 967 (footnote omitted).

208. Olivas, *supra* note 5, at 1855.

> fit; from another it is a student's right to learn in an environment free of harassing behavior; from yet another it is the Dean's duty to ensure that appropriate instruction is taking place; and finally, it may be the accrediting agency's responsibility to maintain uniform standards across institutions. Rotating the toy counterclockwise can produce a bullying or insensitive professor, a hypersensitive or grade-grubbing student, a high-handed or inattentive dean, an interfering legislature, or even an outsider with some political axe to grind.[209]

A first step toward some analytical order is to develop a fair and comprehensive list of relevant considerations. Such a list must not and will not be mistaken for a formula. It will surely lack the predictability of a strict scrutiny test — particularly the test "strict in theory, fatal in fact" designed for purposeful race discrimination.[210] Hopefully, it will bear no resemblance to a rational basis test, designed to leave the great multitude of public policy questions to the uncertainties of the democratic process.[211]

A reasonable reading of *Connick* leads to the idea that the announced test is a separate and independent thing, not to be tied to any of the other distinctive approaches to problems of free expression. And yet, when defining the balancing test — and its components — judges and courts have no reason to ignore context. A balancing test is surrounded by other tests and approaches and by consistent warnings about the meaning of the First Amendment. A jurisprudence that relies so heavily on a mechanical metaphor with no apparent content or values must turn that metaphor into a manageable tool by borrowing content and values from the other judge-made devices that seek to give meaning to the broad phrases of the Constitution. In short, even though the *Connick* test is packaged as a separate device for resolving government employment cases, the judgments of courts ought to be influenced by emerging patterns of judicial review in a wide variety of First Amendment cases.[212]

B. Viewpoint Discrimination

In particular, courts ought not to feel obliged to strike the balance between interests of the employer and the employee without regard to the lesson that viewpoint discrimination is a sin worse than other forms of government action. The presumptive unconstitutionality of viewpoint discrimination provides a useful beginning for a list of relevant considerations. As the Court recognized in *Pickering*

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209. *Id.* at 1855-56.

210. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 362-63 (1978) (Brennan, J., concurring in the judgment in part and dissenting) (quoting Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,"* 86 HARV. L. REV. 1, 8 (1972)).

211. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 35-46 (1962).

212. Both *Pickering* and *Connick* seem to call for a balancing test in which the burden on the state varies according to facts and circumstances, including the protected or unprotected nature of the employee's speech. "Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests." Connick v. Myers, 461 U.S. 138, 150 (1983).

and *Connick*, judicial review of public employment decisions based on the First Amendment must be vigilant for those cases when government seeks to restrict the marketplace of ideas or to impose a sovereign's will against unpopular opinions.[213] The principle that an employee must address an issue of public concern is linked to this idea, but this threshold requirement only does part of the job. Even if the speaker addressed a matter of public concern, there is need to make a judgment about government's motivation.

Viewpoint discrimination turns on thematic content, messages, or unpopular opinions.[214] The Supreme Court has too often blurred the distinction between viewpoint discrimination and content discrimination, particularly in many majority opinions that break new doctrinal ground, but do so by offering compromise language and studied ambiguities. For example, Justice Scalia was uncharacteristically imprecise in *R.A.V. v. City of St. Paul*,[215] when he wrote: "The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid."[216] At times in the *R.A.V.* opinion, Justice Scalia wrote of government's inability to restrict "the subjects the speech addresses."[217] At other times, he seemed to distinguish carefully between different subcategories of content discrimination, that is between topic or subject matter discrimination and viewpoint discrimination.[218] Though many interpretations are possible, Justice Scalia's probable concern was government action that places some people at a disadvantage because of their opinions and ideologies. And so, in *R.A.V.*, he was careful to denounce a statute used to punish cross-burning, because "[i]n its practical operation . . . the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination."[219] The city had "no such

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213. *See, e.g.*, Swank v. Smart, 898 F.2d 1247, 1250-51 (7th Cir. 1990) (Posner,. J.) (First Amendment not violated when a police officer was terminated because he picked up a young college student and gave her a ride on the back of his motorcycle).

> The purpose of the free-speech clause . . . is to protect the market in ideas, broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions — scientific, political, or aesthetic — to an audience whom the speaker seeks to inform, edify, or entertain. Casual chit-chat between two persons or otherwise confined to a small social group is unrelated, or largely so, to that marketplace, and is not protected. Such conversation is important to its participants but not to the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values, and consequences of the speech that is protected by the First Amendment.

Id.

214. John Hart Ely argued for an "unprotected messages" approach, in which government would have very narrow and well-defined authority to act when "the evil the state is seeking to avert is one that is thought to arise from the particular dangers of the message being conveyed." ELY, *supra* note 22, at 111. The term "viewpoint discrimination" seems to be the conventional label for this type of First Amendment case.

215. 505 U.S. 377 (1992).

216. *Id.* at 382 (citations omitted).

217. *Id.* at 381.

218. *See id.* at 381-90.

219. *Id.* at 391.

authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry Rules."[220]

In a more recent case concerning higher education, *Rosenberger v. Rector and Visitors of the University of Virginia*,[221] the Court was clearer on the point. Justice Kennedy, writing for the Court, observed a distinction between content discrimination and viewpoint discrimination. "[D]iscrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one."[222] Thus, in *Rosenberger*, the Court held: "Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[223] Though the Court has often blurred the distinction between content and viewpoint discrimination, usually in cases when it was taking pains to avoid a rule that would require aggrieved citizens to show intentional ideological bias, the *Rosenberger* opinion sensibly approaches the matter. The danger to free speech at a public university is extreme when governmental authorities act to restrict the marketplace of ideas: "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses."[224]

In short, in light of the most sensible interpretation of both *R.A.V.'s* ambiguities and the explicit analysis of *Rosenberger*, one important inquiry is whether governmental power or interference casts a "pall of orthodoxy"[225] over a professor's classroom expression. If so, a tougher scrutiny is appropriate; if not, there is good reason to presume that federal courts should not interfere with the academic autonomy of a college or university.[226] Another way to understand the point is to

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220. *Id.* at 392.

221. 115 S. Ct. 2510 (1995).

222. *Id.* at 2517.

223. *Id.* at 2516.

224. *Id.* at 2520. On this point, there seemed to be no disagreement, even from the dissenters in *Rosenberger*:

> The issue whether a distinction is based on viewpoint does not turn simply on whether a government regulation happens to be applied to a speaker who seeks to advance a particular viewpoint; the issue, of course, turns on whether the burden on speech is explained by reference to viewpoint. As when deciding whether a speech restriction is content-based or content-neutral, "[t]he government's purpose is the controlling consideration."
>
> Accordingly, the prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate. Other things being equal, viewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond.

Id. at 2548 (Souter, J., dissenting) (citations omitted) (citing and quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

225. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

226. *See* Parate v. Isibor, 868 F.2d 821, 830-31 (6th Cir. 1989) (administrators' unprofessional

recall the famous maxim of *Tinker v. Des Moines Independent Community School District*,[227] that students and teachers do not "shed their constitutional rights . . . at the schoolhouse gate."[228] In short, though expressive liberty is not quite the same in the educational context, a core set of principles banning viewpoint discrimination must be honored, as even the dissenting Justice Harlan observed in *Tinker*. There ought to be no dispute that the First Amendment is sharply implicated when a student or teacher can prove "that a particular school measure was motivated by other than legitimate school concerns — for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion."[229] Justice Harlan may have been too restrictive in suggesting that proof of ideological discrimination is the only way for a student to prevail, but surely there should be no doubt that such proof always makes for a strong case that the First Amendment has been violated.[230]

However, a plaintiff's proof of viewpoint discrimination never ends the inquiry or the case. In such cases, the federal courts usually deploy a categorical or definitional balancing. The well-established way for government to justify viewpoint discrimination would be to show that its action is directed solely against "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[231] Though the list has been refined over the years, the unprotected categories of expression include obscenity,[232] defamation,[233] "fighting words,"[234] incitement to violence or lawless activity,[235] threats,[236] offers of bribery or criminal solicitation,[237] perjury,[238] fraud,[239] and perhaps a few others yet to be discovered.[240] Such forms

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treatment of professor in class on one occasion "could not have resulted in a 'pall of orthodoxy'" in the classroom) (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)); *see also* Miles v. Denver Pub. Sch., 944 F.2d 773, 779 (10th Cir. 1991) (adopting similar test).

227. 393 U.S. 503 (1969).

228. *Id.* at 506.

229. *Id.* at 526 (Harlan, J., dissenting).

230. *See also, e.g.*, Papish v. Board of Curators, 410 U.S. 667, 670 (1973) (per curiam) ("[M]ere dissemination of ideas — no matter how offensive to good taste — on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973) ("A college, acting 'as the instrumentality of the State, may not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent.'") (quoting Healy v. James, 408 U.S. 169, 187-88 (1972)). *Cf.* Board of Educ. v. Pico, 457 U.S. 853, 870-71 (1982) (narrow and partisan decisions to remove books from library violate the First Amendment).

231. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

232. *See* Miller v. California, 413 U.S. 15 (1973).

233. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

234. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

235. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

236. *See R.A.V.*, 505 U.S. at 388 (discussing threats against the life of the President).

237. For discussion of possible formulae to define unprotected forms of expression, see WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 24-28 (1984).

238. *See id.*

239. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980) (commercial speech may be protected if not misleading or fraudulent).

240. *See, e.g.*, VAN ALSTYNE, *supra* note 237, at 24-28.

of expression are unprotected because they are "no essential part of any exposition of ideas, and are of . . . slight social value as a step to truth."[241] Expression deemed unprotected in the society at large is surely not somehow protected and immune from sanction merely because it occurs in a university setting. In or out of the higher education environment, government may punish a speaker because of the dangers of the speaker's message but only when it falls into predefined categories of unprotected expression. If a government can offer such proof, it should prevail. Unless all lessons about punishing ideas, ideology, opinions, and viewpoints are to be lost when government employment and academic employment is at issue, the relatively principled approach of categorical balancing is necessary. In sum, the federal courts must not ignore or forget the Supreme Court's repeated warnings about viewpoint discrimination in cases like *R.A.V.* and *Rosenberger* when the *Pickering-Connick* balancing tests are struck.

The basic danger of the Second Circuit's reasoning in the *Jeffries* litigation is that the appellate court lost sight of the university's viewpoint discrimination as it deferred to the fears of university administration about disruption. In the absence of some other explanation, *Jeffries* appears to be a case in which the professor's rights to think and to speak ought to have received the greatest protection and solicitude from courts. There are alternative ways in which the *Jeffries* outcome might have been justified. First, Jeffries was not dismissed from his tenured position as a faculty member. Therefore, it might be argued that he did not suffer an undue burden for views expressed.[242] Second, he was dismissed as a departmental chair. Despite the approach of the Second Circuit, it might be argued that a departmental chair performs important leadership responsibilities.[243] Institutional academic autonomy requires that the academic decision makers have a range of discretion to choose its leaders based upon subjective and controversial judgments about the viewpoints and judgments of academicians.[244] Unfortunately, as written, *Jeffries* stands for none of these potentialities, but only as an example of how a balancing test can be manipulated to approve almost any university decision to "becom[e] subordinate to the immediately practical, to the shortsightedly expedient."[245]

C. Professional Standards and Limits of Appropriate Content Review

If, as argued above, the *Connick* test need not lead to an unprincipled deference in cases of viewpoint discrimination, what is the appropriate approach for cases in which the court concludes, as a matter of fact, that the state interests and motivations are viewpoint neutral, but still content discriminatory? In this category of cases, the *Connick* approach seems to require a careful and sensitive weighing

241. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

242. *See* Newman, *supra* note 199, at 300-01; *see also infra* notes 256-61 and accompanying text.

243. *See id.* at 308-18, 329; Richard H. Hiers, *New Restrictions on Academic Free Speech:* Jeffries v. Harleston II, 22 J.C. & U.L. 217, 222 (1995).

244. *Cf.* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) (deference to academics' substantive judgment is appropriate).

245. Frederick Jackson Turner, *Pioneer Ideals and the State University, in* FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY 245, 258-59 (1977 ed.).

of competing interests without excessive deference and without rigid suspicion. This standard reflects a possible contribution, perhaps the underlying purpose of the *Connick-Waters* test applied to academic contexts, including academic speech. Some content review is inevitable, but it must be careful and, ultimately, designed solely to reinforce the professional responsibilities of the teacher and scholar — responsibilities that have always been conceded to mark the outer boundaries, however indistinct, of legitimate academic freedom.

Once it is clear that the perils of viewpoint discrimination are not present, a court should give close scrutiny, not strict scrutiny, to the state's articulated justifications for discipline. Close scrutiny should take the familiar path of "middle-tier" or "intermediate" levels of review: (i) the burden of proof should remain on the state or institution; (ii) the articulated interests should be viewpoint-neutral, professional interests of a substantial nature; (iii) discipline should be premised on institutional policies that effectively serve the articulated interests; (iv) the disciplinary policies and apparatus should be carefully focused on achieving the articulated interests, though not necessarily the only means of doing so. Justifications for institutional action ought to be rooted in the long-proclaimed acknowledgement that professional norms limit academic freedom. The varied considerations are many, but they must be professionally driven. The "substantial" or "significant" university interest must derive from the particular discipline or interdisciplinary framework of the professor's expression. The university's regulation or sanction must have roots in standards and processes that are professionally defined, professionally enforced, and professionally reviewed.[246] The uncertainties and ambiguities of this standard ought not to be daunting, despite ambiguities and flexibilities, because a policy of academic self-regulation[247] may need latitude to substitute a fair process for a substantive standard that cannot be defined with precision.

Essentially, there is little need for anything new in the way of doctrine, when the *Pickering-Connick* test is applied to a professor's academic speech or extracurricular political statements: The need is for care, sensitivity, and a recognition that there is legitimate room for professional self-regulation. Other types of content discrimination often seek objectives not related to removing ideas from the public square.[248] The principle here is that government may "channel" or restrict (but not

246. "When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Ewing*, 474 U.S. at 225.

247. To be sure, "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Id.* at 226 n.12.

248. This test should be distinguished from the line of cases dealing with content-neutral time, place and manner regulation of public forums. Government may adopt time, place and manner regulations that are (i) content-neutral, (ii) justified by significant government interests, and (iii) narrowly tailored. Government may restrict expression when it is reasonably incompatible or inconsistent with the purposes for which public property is being used. Among examples of this test are governmental restrictions on demonstrations near schools, courthouses, and abortion clinics; statutes requiring police permits for use of parks or streets; regulations creating procedure for rental of convention centers or other public forums.

prohibit) particular types or forms of expression — even if protected — in pursuit of substantial or important government objectives, if the regulations are "narrowly tailored" so as not to burden or disadvantage particular philosophies or viewpoints. There are many examples governed by this test: regulations of political campaign contributions,[249] the ban on electioneering near polling place,[250] and the use of zoning powers to restrict or contain sexually-oriented activity.[251]

Any number of hypotheticals can be presented to demonstrate the need for limited content-based discretion — or at least the need to discuss the idea more seriously. Could an institution reward a professor who takes the view that professors should not indoctrinate, while declining to reward a professor who uses the classroom solely to inculcate students with his or her own views? Could an institution review a professor's grading of examinations in light of a student's submission of evidence that the student was punished for the student's viewpoint? Could an institution review a professor's conduct in class or in discussions with a student against reasonable standards of courtesy and civility? Could a mathematics professor continue to teach at a university if the professor maintained that 2 + 2 = 5?[252] Could a scholar continue to enjoy the privilege of research and expression if the scholar is found guilty of plagiarism? Is a university forced to forego whatever advantages and benefits come from students' teaching evaluations? The argument for a university's power or duty to review the behavior or words of a professor in any of the preceding contexts rests on professional standards, but it still involves content discrimination. Simply, a university must possess some real professional latitude for dealing with such situations.

In this context, it is hard to explain why the college lost in the *Cohen* case. The policies at issue were indisputably derived from professional norms. The key factual finding of the college's investigation was that the professor had selected his teaching strategy, at least in part, because it made life more difficult for women. The college policy was both customary and as clear as possible: it incorporated the guidelines of the EEOC that had been approved by two unanimous panels of United States Supreme Court justices, despite claims that the guidelines were too vague. The college discipline was imposed only after a careful, professional assessment. Finally, the discrimination was mild; it amounted to a formal warning, linked with

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249. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

250. *See* Burson v. Freeman, 504 U.S. 191 (1992).

251. *See* City of Renton v. Playtime Theatres, 475 U.S. 41 (1986).

252. *See* Olivas, *supra* note 5, at 1844-45:

> [A]cademics still must adhere to professional standards in voicing their views.
>
> This "professorial function" approach protects classroom utterances so long as they meet professional standards and result from training, developed expertise, and scrupulous care in presenting material. Conversely, a mathematician who insisted that 2+2=5 could be fired for failing to meet professional measures of competence; an English teacher, police file clerk, or telephone operator, though, could not be fired for holding such a belief. While the calculus grows more complex for interdisciplinary fields, peer-review journals and tenure committees routinely invoke the professional standard of care. Professional standards are, in short, common in academic practice.

Id.

a program of remediation. If a college is permitted to articulate and enforce professional norms that a teacher may not violate, the institution ought to be encouraged to develop a graduated scale of disciplinary steps, and the first step ought not to be caricatured as a "legal ambush."

Truly content-neutral regulations probably will be litigated only infrequently. One familiar pattern of cases focuses on content-neutral regulation for objectives unrelated to suppression of expression. This is the so-called *O'Brien* test, after the famous case in which the court upheld federal law banning wilful destruction of draft cards.[253] When government regulates behavior for purposes unrelated to suppression of expression, there is only an incidental interference with free speech. Though a "weighing" process is involved, the presumption of constitutionality is not yet rebutted and reasonable government action likely will be sustained.[254] A longer line of cases makes the same basic point that regulatory laws of general applicability may not implicate genuine First Amendment concerns.[255]

D. Undue Burdens

As argued earlier, the outcome in *Jeffries* seems inconsistent with the prevailing principle that viewpoint discrimination violates the core values of the First Amendment. On the other hand, the decision to uphold the university's decision to remove Jeffries from his position as departmental chair could be justified on an alternative principle. The First Amendment is not a guarantee of complete and perfect immunity particularly in a professional environment resting on professional self-regulation: An individual is not protected from every consequence arising from protected expression, but only from substantial interference or undue burdens.[256] In *Branzburg v. Hayes*,[257] the Court recognized that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil . . . statutes of general applicability."[258] The same principle must also apply to other institutions dedicated to First Amendment activity, including colleges and universities. An individual who claims to have suffered a loss of expressive liberty must demonstrate that government action poses a "threat of substantial governmental encroachment upon important and traditional aspects of individual freedom [that] is neither speculative nor remote."[259] As applied to

253. *See* United States v. O'Brien, 391 U.S. 367 (1968).

254. *See* Konigsberg v. State Bar, 366 U.S. 36, 50-51 (1961).

255. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (enforcement of contract); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (antitrust laws); Associated Press v. NLRB, 301 U.S. 103 (1937) (labor laws).

256. *See generally* Newman, *supra* note 199.

257. 408 U.S. 665 (1972).

258. *Id.* at 682.

259. Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); *see also* Webster v. Reproductive Health Servs., 492 U.S. 490, 530 (1989) (O'Connor, J., concurring) (only state regulations that are "undue burdens" on the woman's right of privacy are unconstitutional); Board of Educ. v. Pico, 457 U.S. 853, 866 (1982) (powers of local school boards should be restricted only when "'basic constitutional values' are 'sharply and directly implicate[d]'") (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)) (alteration in original); Carey v. Population Servs. Intl, 431 U.S. 678, 688 n.5, 689 (1977) ("significant

Jeffries, of great importance is the fact that the professor was not fired. Though he was ultimately removed from a position of leadership, his status as a tenure faculty member was not impaired. It is sensible for a university to create a balanced arrangement in which an academic has tenure as a faculty member, but serves in a leadership position that is more accountable to institutional control.[260] To be sure, rendering the professor accountable to a university or an academic unit for failures of leadership requires some latitude for what might be described as a content-discriminatory judgment about the leader's words.[261] But just as surely, the decision to limit his tenure as chairman was not a real intrusion into the traditional concept of academic freedom. In *Jeffries*, the professor suffered no undue burden because he continued to enjoy the benefits of academic freedom.

E. A Tentative Synthesis

Sorting through factors to be considered is easier than synthesizing the factors into a formal test. Inevitably, a court's assessment of relevant considerations will differ depending on facts and circumstances. And even the order and sequence of analysis varies. Initially, however, an employee at a public institution of higher education will need to satisfy the so-called threshold tests: first and most frequently explained in the *Connick*-line of cases is whether the instructor has addressed a matter of public concern. In addition to this inquiry, a court might reasonably ask whether the instructor has suffered an "undue burden" or a substantial penalty for academic speech. Unless a court reaches an affirmative answer to both inquiries, almost certainly a First Amendment claim will not and ought not to prevail.

Next, the court must undertake a subjective inquiry. The court must determine the government's motivation: What has government done and why? The answer to this question must be a candid and careful assessment of the government's interests; also, the answer should serve to categorize the case as either viewpoint discrimination, content discrimination, or viewpoint-neutral and content-neutral regulation. As in all other civil liberties cases, this categorization process is decisive in determining the level of judicial scrutiny and skepticism.

Only at this point should a court turn to the metaphorical weight scales implicit in the *Connick-Pickering* balancing test. The substantiality of government objectives, the effectiveness of its strategies, the availability of alternatives and less restrictive penalties, and even the precision and professionalism of its processes for reaching a decision are all relevant and material considerations. Though scientific exactitude is probably too much to ask, the preceding approach should amplify and

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burden" on right of privacy); Bellotti v. Baird, 428 U.S. 132, 147 (1976) ("undue burden"); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the [First Amendment's] requirement for governmental neutrality if it unduly burdens the free exercise of religion."); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 545 (1963) (First Amendment restricts state laws that "infringe substantially" on protected activity); Finkin, *supra* note 6, at 850 ("[T]he extent of constitutional protection depends upon the strength of the connection between the particular invasion of autonomy and academic freedom.").

260. *See* Newman, *supra* note 199, at 300-01, 319.

261. *See id.*

give effect to fundamental principles that the Supreme Court never renounced even in *Connick*, *Waters*, and other government employment cases: (i) a significant impairment of First Amendment rights, particularly viewpoint discrimination, must endure and survive exacting scrutiny;[262] (ii) the government's interest advanced must be paramount, which means the public interest gain must outweigh the loss of protected individual rights;[263] and (iii) "the government must 'emplo[y] means closely drawn to avoid unnecessary abridgement.'"[264]

VI. Conclusion

Principles of academic freedom and institutional academic autonomy collide when the institution attempts to regulate the speech of professors. The United States Supreme Court has addressed this conundrum only generally by recognizing limitations on the free speech rights of public employees. Although the steps of the balancing test articulated by the Court are facially straightforward, subsequent case law has shown the guidance provided by the Court for the application of the test to be confused and unworkable.

In sum, the Supreme Court should modify the *Pickering-Connick* balancing test to include a threshold inquiry into whether the speaker has suffered an "undue burden." Assuming the threshold inquiries are met, careful judicial scrutiny should ensure that a government's viewpoint discrimination is narrowly focused only on categories of unprotected expression or truly compelling considerations. But when the institution acts to promote professional standards of higher education, federal courts should show more respect and consideration for a public employer's interests and mission. Such a modified "particularized balancing" should provide more guidance to allow judges — and professors and administrators — to know the basic contours of academic freedom.

262. *See* Elrod v. Burns, 427 U.S. 347, 362 (1976).
263. *See id.*
264. *Id.* at 362-63 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)) (alteration in original).