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ACADEMICS, PUBLIC EMPLOYEE SPEECH, AND THE PUBLIC UNIVERSITY

Jennifer Elrod

I. INTRODUCTION

Many Americans have an expansive view of the meaning of free expression. Short of yelling “fire” in a theater, they think that they can say just about anything they please. This stance has been readily accepted and incorporated into the mainstream political and social language of American culture. The notion that citizens are able openly to express their opinions — whatever they may be — is a long cherished ideal. Although people are often drawn to this romanticized belief of commenting freely, the

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1 See Schenck v. United States, 249 U.S. 47 (1919). “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.” Id. at 52.

2 See, e.g., Dimitra DiFotis, Asbestos Exposure: How Well Are Companies Insulated? BARRON’S, Dec. 24, 2001, at 21 (saying asbestos liability is “like shouting ‘Fire!’ in a crowded theater, it doesn’t always mean investors should rush for the exits”); Mitchell Zacks, Motorola’s Big Numbers Impress Skeptical Market, CHICAGO SUN-TIMES, July 16, 2000, at 52 (“Watching a momentum stock after bad news hits is like watching someone yell fire in a crowded theater — the rush for the exits is chaotic and swift.”); Editorial, Soft Money A Menace, OMAHA WORLD-HERALD, Sept. 9, 1999, at 8 (“Perhaps a careful legal analysis could produce a ruling saying that, just as there is no freedom to shout ‘fire’ in a crowded theater, there likewise is no freedom to purchase political favors, thus corrupting the legislative process, by making large contributions.”); Ken Garland, Planner Widens Land-Use Efforts To Whole County After Tract Sale, KNOXVILLE NEWS-SENTINEL, Mar. 15, 1998, at BC1 (“We don’t have a right to cry fire in a crowded theater…. If we were considerate of others, we would have no need for [land use] regulations.”).
applicable legal doctrines do not support this idealized view. This is particularly true for public sector employees.

Many public university professors subscribe to an overly broad vision of what free speech means. They often believe that their expression, both professional and personal, approaches the level of nearly complete protection under the First Amendment; this, however, is not the current legal reality. Because the Supreme Court has deemed professors in public higher education to be public employees, their expression is accorded limited constitutional protection under the public employee speech doctrine. In fact, the protection is far narrower than they—or most citizens—imagine.

There is a particular irony to this situation when public employee speech standards are applied to academics in higher education. After all, a professor is one who professes, one who

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3 My focus in this article centers on the expression by those who teach in public colleges and universities. I have limited my inquiry not only for pragmatic reasons of length and manageability but also because the public higher education institution implicates state action. It is more difficult (though not impossible) to find state action within the private college or university. In that setting, as a general rule, one must find a statutory scheme or contractual agreement. The distinction between public and private educational institutions traces its origin to Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). The Supreme Court held that the New Hampshire legislature's act of changing the name of Dartmouth College to Dartmouth University was a violation of the obligation of contract under the U.S. Constitution because the college was a private corporation based upon its royal charter.

4 I use the term "academic speech" to create a term of art, encompassing expressive activity that is directly related to a professor's scholarly expertise, teaching, and research.

5 Colleges and university teachers are generally viewed as researching, writing, and teaching in an environment which encourages and values diverse views on a broad range of topics in a community of adults. The Supreme Court has endorsed this view in dicta. "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (citations omitted). See also Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) (describing college-aged students as adults).
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openly declares or avows or admits her or his views.\(^6\) It is the basis upon which she or he was hired and tenured. Yet, these views or perspectives involving a professor's field of expertise may be unprotected expression in the wake of *Waters v. Churchill.*\(^7\) In that case, the Supreme Court crafted new restrictions curtailing public employees' opportunities to speak out on matters of public concern. When applied to the expression of public university professors, the implications of *Waters* are potentially chilling and should be of concern to all academics. This is so because academic freedom and public employee speech, when linked together, are difficult concepts to define and implement in the public university setting. *Waters* further complicates this situation by favoring the employer's interest over the employee's.\(^8\)

In this article, I examine the regulation of the expressive activities of public university professors through the lens of *Jeffries v. Harleston,* to look at the impact of *Waters* on the controversial expression of a college teacher.\(^9\) In the former case, Professor Leonard Jeffries was stripped of his chairmanship of the Black Studies Department at City College of New York because he gave a polemical speech off campus. Initially, the Second Circuit said that the professor's remarks were protected speech.\(^10\) But after *Waters* and following remand, the court of appeals held that Jeffries' statements were not protected expression.\(^11\)

My interest is to scrutinize "academic speech" (expressive activity directly related to the professor's field of expertise) that becomes the focus of controversy where the teacher is speaking outside the public university campus and in an unofficial

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\(^7\) 511 U.S. 661 (1994). See infra Part V.D.2, discussing public employee speech and *Waters*; see also infra Part VI, discussing academic speech.
\(^8\) *Id.*
\(^10\) 21 F.3d 1238.
\(^11\) 52 F.3d 9.
capacity. I contend that if the principles of academic freedom, the fundamental democratic values of the First Amendment, the purposes of public higher education, and the functions of a professor are to coexist meaningfully, then the speech of public university academics, directly related to their area of scholarship, must be afforded ample "breathing space," even if this requires a new or unique subcategory of speech: academic speech. Without greater protection for academic speech, professors will be hesitant or reluctant – even unwilling – to explore, to research, and to teach any topics or theories except those that bear the imprimatur: "university approved." As a result, higher education will be stultified.

Greater constitutional protection for academic speech is in keeping with the jurisprudential underpinnings of the speech clause of the First Amendment. Thus, I argue for a zone of protection that allows academic speech both inside and outside the public institution to be protected when professors are speaking or writing on matters related to their scholarly expertise.

The issues of academic freedom and the protection accorded to the speech of public university professors have gained greater importance and urgency in the aftermath of the horrific events of September 11, 2001. The death, devastation, and destruction in the wake of the airplane hijackings and subsequent

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13 See infra Part VI, discussing academic speech.

crashes have been etched indelibly into the national memory.\textsuperscript{15} There is an undercurrent of uneasiness as people work to stabilize their lives and sense of personal safety.

During times of emotional turmoil and national concern, society seeks to avenge or punish the nation's losses by flexing its military strength and using its economic power. Simultaneously, worries over security and social order at home are raised to new heights. In an attempt to respond and preempt attacks in the future, laws are enacted quickly by Congress or Executive Orders are handed down by the President, seeking to punish wrong doers and to prevent other harms or threats to the nation.\textsuperscript{16}

In this atmosphere of heightened tension and fear over safety and domestic tranquility, civil liberties are at great risk of being restricted. This country has a lengthy record of suppressing civil liberties in times of national emergencies. The Alien and Sedition Acts in 1798,\textsuperscript{17} the suspension of civil liberties during the Civil War,\textsuperscript{18} the Espionage Act of 1917,\textsuperscript{19} and the Smith Act of


\textsuperscript{16}See Patricia J. Williams, \textit{By Any Means Necessary}, NATION, Nov. 26, 2001, at 11 (commenting on the unprecedented powers given to law enforcement and intelligence agencies without judicial oversight under the USA Patriot Act).

\textsuperscript{17}See Alien Enemies Act, 1 Stat. 577 (1798) (expired); Sedition Act, 1 Stat. 596 (1798) (expired); Alien Act, 1 Stat. 570 (1798) (expired); Naturalization Act, 1 Stat. 596 (1798) (expired). See also JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956).


\textsuperscript{19}See Act of 1917, ch. 30, § 3, 40 Stat. 219; see also Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553, repealed, Act of March 3, 1921, ch. 136, 41 Stat. 1360. The Act of May 16, 1918, amended the 1917 Act and restricted speech and dissent. See also ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES, chs. II-VII (1942); WILLIAM PRESTON, JR., ALIENS & DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933, chs. IV-VIII (2d ed. 1994).
1940\textsuperscript{20} are some examples of measures enacted when fears concerning threats to the country's security overwhelm decision makers. These can be explained, in part, by the aftershocks of national trauma, "an event that upsets [society's] fundamental ideas about what can and should happen and challenges the authority of its basic values"\textsuperscript{21} as government actors and citizens try to cope and come to terms with horrific occurrences.\textsuperscript{22}

These restrictive laws should serve as reminders that civil liberties are in jeopardy in times of national crisis. What is true in the larger society is also true on the campuses of colleges and universities. The fallout from September 11 has been both positive\textsuperscript{23} and negative\textsuperscript{24} in institutions of higher learning. Like

\begin{itemize}
  \item \textsuperscript{21} See Richard Slotkin, Our Myths of Choice, CHRON. HIGHER EDUC., Sept. 28, 2001, at 11 ("At the bottom of our reaction to a traumatic event like [Sept. 11] is rage, grief, humiliation, and a sense of helplessness. We invoke our myths to help us to begin to function again....").
  \item \textsuperscript{22} See Patricia J. Williams, Homeland Insecurity, NATION, Nov. 12, 2001, at 11.
  \item \textsuperscript{23} See, e.g., Ana Marie Cox, The Changed Classroom, Post-September 11, CHRON. HIGHER EDUC., Oct. 26, 2001, at 16. In institutions of all types and sizes, and in a wide variety of disciplines, [college] instructors are struggling with how the events of September 11 have forced them to re-evaluate what they teach and how they teach it. ... Students' interest in topics related to the terrorists attacks has made for overflowing classrooms in Near Eastern-Studies departments, and had ratcheted up enrollment in course on Islam, Arabic, and international studies as well. Id.
  \item \textsuperscript{24} See, e.g., Arlene Levinson, College Faculty, Staff Find Chilling New Climate for Free Speech On Campus, ASSOC. PRESS STATE & LOCAL WIRE, Oct. 12, 2001. "Around the country, college faculty and staff who express opinions on the terrorist attacks and U.S. bombardment of Afghanistan are
some individuals in the larger society, a number of professors found themselves attacked for failing to espouse pro-patriotism views or for expressing dissident or differing perspectives following September 11th.\textsuperscript{25} Even the Vice President’s wife, Lynne Cheney, jumped onto the bandwagon with her group the American Council of Trustees and Alumni, decrying the expression of dissent on college campuses and publishing a report, naming the names of the unpatriotic.\textsuperscript{26} Such efforts demonstrate

\textsuperscript{25} See, e.g., Comments On U.S. Policy Put Professor On Hot Seat, BERGEN REC. (NJ), Sept. 27, 2001, at A16. “[Robert Jensen] who teaches journalism at the University of Texas at Austin, began writing articles for newspapers and Internet sites soon after the attacks, arguing that the United States has inflicted death and destruction on civilians in Iraq, Vietnam, and Panama.” See also Michael Janofsky, National Briefing Southwest, New Mexico: Professor Jokes about Attack, N.Y. TIMES, Sept. 27, 2001, at A16. “A professor [Richard Bethold] who has taught ancient history at the University of New Mexico for 29 years faces disciplinary action for telling his students after the Sept. 11 terrorist attacks that ‘anyone who can blow up the Pentagon gets my vote.’” Id. He later apologized. CUNY Chancellor, Trustees Rip Professors’ Union Forum, NEWSDAY, Oct. 6, 2001, at A31. “Trustees of the City University of New York plan to endorse a statement by Chancellor Matthew Goldstein denouncing the professors’ union for sponsoring a forum that blamed U.S. foreign policy for the Sept. 11 terrorist attacks.” Id.

\textsuperscript{26} See THE AMERICAN COUNCIL OF TRUSTEES AND ALUMNI (ACTA) Defending Civilization: How Our Universities Are Failing America and What Can Be Done About It (2002).

In the wake of the September 11 terrorist attacks, Americans across the country responded with anger, patriotism, and support of military intervention. ... Not so in academe. Even as many institutions enhanced security and many students exhibited American flags, professors across the country sponsored teach-ins that typically ranged from moral equivocation to explicit condemnations of America. Id. But see Stuart Eskenazi, Is Report a Blueprint for a New Blacklist?; Academic Freedom Is Under Attack Since Sept. 11, Some Professors Say, SEATTLE TIMES, Dec.16, 2001, at A1. “The council report, when originally issued, identified faculty, students and campus speakers by name. But the council removed them a few days later in a revised report now posted on the group’s Web site www.goacta.org.” Id. At the time, ACTA’s board included Richard Lamm, former Governor of Colorado, William Bennett, former Secretary of Education, Saul Bellow, author, and Joseph Lieberman,
the tenuous footing for free expression in times of national trauma, especially at institutions of higher learning.\(^{27}\)

Before explaining the protected zone of academic speech, I discuss four relevant concepts: academic freedom, democracy, higher education, and public employee speech. Each of these principles has an important role in the present configuration of expression that is protected (or not) for professors in public higher education. Although each of these four concepts developed within different time frames and disciplines, there is now intermingling between and among them within the legal system. These principles do not fit neatly or completely within one another. Therefore, it is useful to understand the development and parameters of each because the ways in which these concepts converge and diverge in the context of the law of free speech makes it easier to comprehend why it is necessary and vital to protect the academic speech of professors in institutions of public higher education.

II. ACADEMIC FREEDOM

A. Definitions

Academic freedom is a concept that is often discussed and debated by scholars inside and outside the legal academy.\(^{28}\) There

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\(^{27}\) See, e.g., Kilian Betlach, *McCarthyism Revisited*, U-WIRE, Nov. 20, 2001. [The American Council of Trustees and Alumni report is] not argumentation or criticism or “a robust exchange of ideas.” The ACTA report is blatant intimidation, an ugly attempt to silence voices of dissent. ... Actions such as these have the potential to change the fiber of this country in a way the terrorist attacks were unable to. We are a country founded on dissent and the right of the public to question the workings of government – particularly during a time when Congressional leaders seem so unwillingly to do so – functions as perhaps the most important manifestation of the checks and balances system. *Id.*

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is no agreed upon definition, there are no agreed upon lines of demarcation. Rather than a hard and fast principle, academic freedom is a very elastic concept. It expands and contracts with...

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29 See, e.g., W. Stuart Stuller, High School Academic Freedom: The Evolution of A Fish Out of Water, 77 NEB. L. REV. 301 (1998). "[The] courts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom." Id. at 302. J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 YALE L.J. 251 (1989). "There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles." Id. at 253. Walter P. Metzger, Profession and Constitution: Two Definitions of Academic Freedom in America, 66 TEX. L. REV. 1265 (1988) (hereinafter Metzger, Profession and Constitution). "A sizeable literature of legal commentary asserts that the Supreme Court constitutionalized academic freedom without adequately defining it. A discomforting perception of the weak theoretical underpinnings of this concept seems to go with the inclination to write about it at all." Id. at 1289.
great frequency, allowing for multiple interpretations.\textsuperscript{30} In one formulation, as some scholars, trustees, and judges assert, academic freedom is the province of the educational institution. Its sole purpose is to ensure the university's autonomy to determine its mission, its course of instruction, those professors it employs, and those students it admits, because only those persons within the institution know best how to carry out these functions. This autonomy insulates the university from outside actors such as legislators, judges, and others who lack the requisite expertise in such matters.\textsuperscript{31}

In another formulation, other theorists contend that protection for the individual teacher, researcher, and scholar exists in order to promote, protect, and encourage the discovery of truth and the advancement of knowledge; this is also known as academic freedom.\textsuperscript{32} In many instances, the institution (trustees and high-level administrators) and its faculty are on the same side of the definition and interpretation of academic freedom. Each agrees that the university and its professors ought to have control over the internal operation of the school in all its aspects. The difficulty, however, arises when the university and the professor are on opposing sides of an issue that implicates the academic freedom of the teacher, regardless of whether it is a question of hiring, firing, teaching, or other educational matters.\textsuperscript{33}


\textsuperscript{31} See, e.g., Byrne, supra note 29, at 311-23.

\textsuperscript{32} See, e.g., Perry A. Zirkel, Academic Freedom of Individual Faculty Members, 47 EDUC. L. REP. 809 (1988).

\textsuperscript{33} The issue of tenure is beyond the scope of this article. See MICHAEL A. OLIVAS, THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT ch.3 (2d ed. 1997) (collecting cases and commentary on tenure, promotion, and termination of faculty); see also TERRY L. LEAP, TENURE, DISCRIMINATION, AND THE COURTS (2d ed. 1995) (discussing issues involving the tenure process and reviewing the relevant cases).
When professors turn to the federal courts for resolution of issues connected to their relationship to the university, they often claim – among other things – that their right of free speech has been abridged and then use the term “academic freedom” as a catch-all phrase, implying that these terms are coextensive. The connection between academic freedom and protected expression is not seamless. Indeed, academic freedom is not a recognized category under the Supreme Court’s free speech jurisprudence. The term is a relatively recent occurrence in Court opinions, beginning in the mid-twentieth century. The Court has never decided the issue of academic freedom directly, and, thus, the concept has little, if any, legal traction. Instead, the Court has offered a number of observations and lofty statements with regard to the principles and values of academic freedom and higher education that it deems important. I will analyze these concepts shortly. First, I examine briefly the development of academic freedom in America that occurred outside the legal system. This development is significant because it is responsible for the popular and non-legal view of academic freedom that is held by professors and instructors in higher education and by members of the public.

B. Development Outside the Legal System

1. Expansion of Higher Education

The concept of academic freedom became a valued and desired ideal for university professors in the late nineteenth and early twentieth centuries in the United States. Following the Civil War, higher education experienced the same rapid expansion as did

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34 See infra Part IV.B, discussing Supreme Court’s view of academic freedom in dicta.

35 See Metzger, Profession and Constitution, supra note 29. “Before the middle of [the twentieth] century, no American court had ruled that any provision of the federal constitution protected academic freedom. Indeed, no petitioner in any federal court appears to have framed a legal action that required the issue to be settled judicially one way or the other.” Id. at 1285.

36 See infra Part IV, discussing the Supreme Court and academic freedom.
the nation's economy. The influx of capital, increased industrialization, and the development of the modern major corporation fueled the country's fast-paced economic growth. The university played an important and integral role in the creation of the modern American state. As big business grew, so, too, did the demand for a trained cadre of professionals: lawyers, engineers, architects, accountants, and others who were needed to facilitate and perpetuate the momentous and speedy growth that the national economy was undergoing. Colleges and universities became the primary training ground for professionals and future leaders of industry. Institutions of higher education were often seen by those inside and outside the academy as the incubators of scientific, technological, and social advancements. At the same time, in the public's mind, higher education became a gateway through which one could pass in order to gain greater social status and higher paying positions. Thus, colleges and universities appealed broadly to various segments and communities within the United States since these institutions served multiple purposes.

Along with the growth in the number of American colleges and universities, there were dramatic changes within the institutions themselves. The scientific method was the engine driving the courses, the departments, and the research conducted at colleges and universities. Accompanying the elevation of the scientific approach, the curriculum underwent a radical

37 HOFSTADTER & METZGER, supra note 28, at 22-24. Before the Civil War (1861-65), the average American college was small in size — both as to professors (5 or 6) and students (fewer than 100). Most colleges were little more than a fancy high school. Thus, it was more aspiration than a reality to have a college degree. Id.


39 FREDERICK RUDOLPH, THE AMERICAN COLLEGE & UNIVERSITY 356-57 (1990). The “service ideal of the American university” grew out of “a middle-class sense of obligation, a readiness to bring American society to some new sense of its problems and promises. The simultaneous spread of the Progressive spirit and the university idea would of course tend to reinforce the service element of both.” Id.

40 See LUCAS, supra note 38, at 139-51.
transformation. Rather than a classical education of fixed knowledge that trained students for civic leadership and the ministry, the new curriculum was compartmentalized with specific fields of study such as economics, chemistry, engineering, and other discrete subject areas in order to search for and discover truth. The college curriculum provided more particularized areas of study with direct applications to society. As the curriculum shifted from classical to modern, the institutions of higher education changed significantly, moving rapidly toward greater specialization, increased departmentalization, larger and larger numbers of teachers, and an ever-expanding bureaucracy with the enrollment of more and more students.

2. Professionalization of College Teaching

The rapid expansion of the university also brought with it a problem that was of particular interest to its teachers: the dismissals and forced resignations of professors who espoused views with which the president or trustees of an institution disagreed. At the close of the nineteenth century, a professor

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41 See HOFSTADTER & METZGER, supra note 28, at 226-28. Prior to the emergence of the modern college, the curriculum was based upon a Renaissance model. There were no electives. Students were required to follow a rigid instructional program that included Greek, Latin, Rhetoric, Logic, Philosophy, and Mathematics. The method of instruction was rote learning and recitation by the pupil on a daily basis. Id. "Drudgery in learning and recitation by rote were considered valuable in themselves, as helping to promote mental discipline." Id. at 229. See also S. WILLIS RUDY, THE COLLEGE OF THE CITY OF NEW YORK: A HISTORY, 1847-1947, 61 (1949). The purpose of the classical education was to develop and train the student's mental discipline. Such discipline, in turn, would enhance the student's moral character. Id.


43 See CLYDE W. BARROW, UNIVERSITIES AND THE CAPITALIST STATE: CORPORATE LIBERALISM AND THE RECONSTRUCTION OF AMERICAN HIGHER EDUCATION, 1894-1928, 205 (1990). The firing or forced resignation of professors has been part of the academic landscape since the earliest days of American colleges in the seventeenth century. However, by the late nineteenth and early twentieth centuries, the number of dismissals was quite large and politically driven. Often, college teachers were terminated because both in the classroom and outside the university campus they
who expressed a viewpoint that was deemed socially, economically, or politically unorthodox was often terminated by the university president.\textsuperscript{44} Academics were becoming alarmed by the increasing numbers of professors who were forced out of the teaching ranks. In the wake of these firings and coerced resignations, professors realized that they needed job protection and they began to discuss academic freedom.

3. Teaching Freedom and Job Security

Academic freedom was an idea that had been brought to this country from abroad. After the Civil War, many American professors went to Germany for additional study and training in the absence of doctoral programs in the United States. This cross-cultural exchange brought the German principle of academic freedom to the United States. Edward W. Beemis is one example. A noted economist at the University of Chicago, he was an ardent supporter of populism. Beemis not only wrote scholarly articles on the principles of public ownership of utilities but also spoke about such matters during off-campus public meetings. He was fired when he refused to acquiesce to the demand of the university’s president that Beemis stop all of his outside activities on behalf of populist causes. The University of Chicago had been the recipient of a $35,000,000 donation from John D. Rockefeller, the founder of Standard Oil. It is unlikely that Rockefeller would have favored municipal ownership of utilities. Thus, the president and trustees would have been concerned about the university’s outside sources of funding and its public image in the larger world when Beemis advocated public ownership of utilities both on and off the campus. See also \textsc{Hofstadter} \& \textsc{Metzger}, supra note 28, at 425-36; \textsc{Lucas}, supra note 38, at 194-97. One scholar theorized that the creation of discrete disciplines and the professionalization of college teaching forced academics to choose between keeping their teaching positions and advocating viewpoints that were tied to their academic expertise. See \textsc{Mary O. Furbur}, \textsc{Advocacy \& Objectivity: A Crisis in the Professionalization of American Social Science}, 1865-1905, 163-83 (1975).

\textsuperscript{44} For example, in the late 1890s, John R. Commons was fired from Indiana University because he held “controversial” political views [populism]; James Allen Smith was terminated by Marietta College for speaking out against monopolies during his political science classes; Brown University fired E. Benjamin Andrews because he expressed his position favoring a silver standard. See \textsc{Hofstadter} \& \textsc{Metzger}, supra note 28, at 420-21; \textsc{Furner}, supra note 43, at 198-204, 206-28.
freedom to the American professoriate. Like many university concepts transplanted from Germany to this country, Americans put their own spin on them. As an example, under the German concept, academic research was one component of the larger principle of academic freedom, and it was initiated only from within the university. American college professors adopted this principle and then tacked onto it an external component: an outside person or entity (a business, a group, or an individual) could encourage the university to undertake a particular research project by offering to fund it. Thus, under the American version of the research component, the university and industry enjoyed an increasingly intertwined economic relationship, an arrangement that was improper under the German conception of academic freedom.45

Important to this discussion of academic freedom are two related German concepts: lernfreiheit and lehrfreiheit. In rough translation, these ideals are “learning freedom” (the teacher free to teach and to inquire) and “teaching freedom” (the teacher free of administrative interference in curricular matters). In Germany, under the theory of teaching freedom, professors’ speech was protected only within the classroom setting. Once more, Americans adopted this position and then enlarged it, asserting that teachers were protected when they spoke in their capacity as citizens outside the walls of their institution.

These two principles of learning and teaching freedom gained many adherents when the academic community was galvanized by the terminations of two professors by Stanford University in 1900.46 As a result, a growing number of academics

45 See HOFSKATDTER & METZGER, supra note 28, at 379-83. But see generally BARROW, supra note 43 (providing a critical view of the effect of corporate funding on higher education and its ability to mold university policies and practices).

46 See LAURENCE VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY 402 (1965). Edward A. Ross and George E. Howard were fired. Professor Ross, an economist, spoke publicly about his opposition to Chinese immigration and his promotion of municipal ownership of public utilities. Jane Lathrop Stanford, the university’s sole trustee, disagreed with Ross’ views. She believed that Ross’ association “with the political demagogues of San Francisco ... play[ed] into the hands of the lowest and vilest elements of socialism.....” Id. The university, according to Mrs. Stanford, could not
viewed the freedom from administrative interference and the desire for job security as indispensable components of the emerging concept of academic freedom in America. Teachers in higher education realized that each time one of their colleagues was fired or – as was more likely – forced to resign, there was a clear threat to the intellectual climate of their own research and scholarship. Professors came to believe that they had common goals, concerns, and needs. One of the most important was the right to speak, think, and write about one’s scholarly pursuits without fear of reprisal simply because an administrator or trustee held a contrary view. As one scholar has described it, there was no university unless there was academic freedom. “[I]t was an ideal that elevated academic freedom from an undefined and unconscious yearning to a conscious and declared necessity of academic existence.”

On the faculty’s part, there was a concerted push for greater job security. The pressure of an ever-tighter job market that resulted from the increasing numbers of job seekers who sought professorships and the concern of those holding college teaching....

afford to have its neutrality compromised and she prevailed upon the university’s president to fire Ross. When Professor Howard was subsequently terminated, several other faculty members resigned in protest. *Id.* at 438. *See also* HOFSTADTER & METZGER, *supra* note 28, at 438-45; FURNER, *supra* note 43, at 229-53.

*See* FURNER, *supra* note 43, at 244. According to Furner, the most effective way for professors to protect and defend their positions as advocates of an area of scholarly endeavor was the tenet that the only qualified commentators on a particular topic were those with expertise in that discipline, only other scholars in that field met that qualification. Of course, it is also true that not all scholars shared the same view of what it meant to be engaged in scholarly research. Thus, if a scholar’s views were not embraced or supported by important members of that particular discipline, the academic was ineffective in seeking to challenge the president or trustees of a college who wanted to oust the teacher. The example of Professor Beemis of the University of Chicago illustrates this situation.

Other prominent economists, notably John B. Clark of Amherst College, opposed Beemis’ position of public ownership of utilities and when Beemis became embroiled in a dispute with his home institution, the University of Chicago, he was without the support of influential economists within that specialty. *Id.* at 183-85. *See also* supra note 43.

*See* LUCAS, *supra* note 38, at 198.
positions advanced this issue to the forefront in academia in the early twentieth century. The demand for job security in the form of tenure grew more persistent and more vocal. In turn, teaching freedom and job security were inextricably intertwined or were seen as a unitary concept in the view of many professors.

4. American Association of University Professors

One response to the insistent call for greater job security and teaching freedom by professors was the creation, in 1915, of the American Association of University Professors (AAUP). It was organized by a group of well-respected academics from the top-tier universities and colleges, including Arthur O. Lovejoy, E.R.A. Seligman, and John Dewey, among others. Academics understood that there was a value to and a necessity for an organization that they controlled, including its platform, publications, and publicity; thus, the AAUP was formed.

a. 1915 Declaration of Principles

In part, the AAUP was created to ensure academic freedom and to defend the tenure of the professoriate. Under its organizational principles, the group asserted the need for professors to express their views with regard to their research and writing and not simply to serve as spokespersons for university-mandated ideas; to have freedom in their teaching; and to have the liberty to express their views outside the university, “extra-mural utterance and action.” These three prongs were all necessary

49 See BARROW, supra note 43, at 209-10 (describing academic freedom as a political symbol in garnering support for job security). See also HOFSTADTER & METZGER, supra note 28, at 454.
50 METZGER, DIMENSIONS, supra note 28, at 2 (discussing academic freedom in delocalized academic settings).
52 Id. at 158.
components for the university if it was to be "an intellectual experiment station" with the aim of advancing knowledge.\textsuperscript{53}

The principles of the AAUP addressed one problem inherent in the hierarchy of the university: the ultimate control of the institution of higher education was in the hands of the trustees and not the members of the faculty. This posed a potential difficulty because the faculty thought that its members should guide and manage the university as it was the professors, not the trustees, who had the necessary expertise. To solve this dilemma of control, the AAUP posited that there was a distinction between two types of institutions of higher education: proprietary institutions and those of higher learning. The former was an instrument of propaganda for a specific religious group or a wealthy individual's special cause; it was not amenable to the principles of the freedom of research and discovery.\textsuperscript{54} In contrast, the principles of academic freedom attached to the institution of higher learning. The AAUP maintained that within such an educational institution, the regents held the ultimate power but they were the trustees of a public trust rather than a proprietary interest.\textsuperscript{55}

At the same time, the drafters of the 1915 Declaration sought to ameliorate the problem of control by elevating professors to a unique status: appointee rather than employee. They were experts within their fields while trustees were not. Academics and trustees were analogized to federal judges and the president who nominates them.\textsuperscript{56} Once judges take the bench, the president who appointed them cannot tell them when or how to decide cases. The same principle applied in the academic setting. According to the AAUP, professors were answerable to the public in the sense that teachers were to pursue their scholarly inquiries so that they could make discoveries, advance knowledge, educate students, and create experts to provide service to the community, resolving societal and scientific problems.\textsuperscript{57}

\textsuperscript{53} Id. at 167.
\textsuperscript{54} Id. at 158-59.
\textsuperscript{55} Id. at 150.
\textsuperscript{56} Id. at 162-63.
\textsuperscript{57} Id. at 166-67.
Professors were obliged to conduct themselves in an appropriate manner whether in the classroom or the outside world. In the university classroom setting, teachers were to provide students with an opportunity to ponder intelligently and to think for themselves rather than promote a set of convenient conclusions. Outside the academic institution, professors were obligated to conduct themselves in manner that avoided exaggerated or untested statements. Further, academics were to omit making statements in a sensational or inappropriate fashion. Under AAUP principles, the profession would police itself, leaving control of the faculty in the hands of those (and only those) with the expertise to judge other scholars.

However, the lack of a concrete definition or an agreement as to what constituted knowledge was but one of the potential problems encountered by professors. If, as the AAUP founders urged, the university was an experiment station of the mind, then presumably this arena of experimentation should be open to all types of ideas, theories, and investigations. However, if the concept of knowledge is defined narrowly, depending upon who crafted it, then the term would be quite limiting. As an example, in the late nineteenth and early twentieth centuries, dissident viewpoints that posited a socialist interpretation of political or societal matters might be deemed as outside acceptable knowledge. Therefore, the investigation of socialism would be unprotected under AAUP principles if knowledge were defined in a narrow manner.

In theory, academic freedom as promoted by the AAUP held great promise, but in practice, it fell far short of its stated goals and aspirations. There was some bark but little bite to the principles propounded by the AAUP. Most significantly, there was no avenue through which the AAUP could require or compel a particular university or college to comply with AAUP principles.

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58 Id. at 169.
59 Id.
60 Id. at 172.
61 Id. at 169.
62 See supra notes 43-47 and accompanying text.
and practices, because the organization had no powers other than persuasion to enforce its policies, goals, and principles.63

Further, the university -- that is, trustees and high-level administrators -- had frequently been uncomfortable when its teachers expressed minority, unorthodox, or dissident viewpoints either inside or outside of the academic setting.64 Often, the president or trustees were concerned about the potential or actual interference from outside actors, the possible loss of donations, and the impact of adverse public opinion upon the educational institution. As a result of this discomfiture, a number of professors were fired or forced to resign for statements they had uttered or written, or both, that did not comport with the status quo within a given academic institution. This is illustrated by the many teachers who were terminated for publicly expressing anti-war sentiments during World War I.65 Such terminations were not limited to those war years. During the 1930s, those teachers who were perceived to be “Reds” were ousted from institutions of higher education.66

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63 The federal courts were not appropriate venues for the resolution of academic matters at this historical moment. See infra Part IV, discussing the Supreme Court and academic freedom.

64 As used in this article, the term “minority” is defined expansively and denotes individuals who are members of a group based upon race, ethnicity, gender, sexual orientation, disability, class, political affiliation, or other such identity categories or those who are labeled by the dominant group as being “other,” “outside,” or “different.”

65 See HOFSTADTER & METZGER, supra note 28, at 498-502. During America’s participation in World War I, Columbia University’s President, Nicholas Butler Murray, rescinded academic freedom on campus. Among the many who spoke out against the war in violation of that order were Professors J. McKeen Cattell, Leon Fraser, and Henry Wadsworth Longfellow Dana. They were fired. In response, three other notable Columbia academics resigned: Charles A. Beard, Henry R. Mussey, and Ellery C. Stowell. See also CAROL S. GRUBER, MARS AND MINERVA: WORLD WAR I AND THE USES OF HIGHER LEARNING IN AMERICA 191-206 (1975); WILLIAM SUMMERSCALES, AFFIRMATION AND DISSENT: COLUMBIA’S RESPONSE TO THE CRISIS OF WORLD WAR I, ch. 4 (1990).

66 Those professors who espoused views described as socialist, communist, or bolshevik were often labeled with the catch-all term “Reds.” In 1937, the editors of one law review noted: “Despite the unanimity with which educators profess their faith in the ideal of an independent scholarship, it is clear that some university teachers have been dismissed for their opinions, and many are inhibited in what they say and write on socially controversial
In the 1940s, 1950s, and 1960s, academics were terminated because they were deemed to be communists or because they had refused to sign a loyalty oath.\textsuperscript{67} More recent examples include professors who espoused Marxist views.\textsuperscript{68}

b. 1940 Statement of Principles

The AAUP did reassert itself on the question of academic freedom in its 1940 Statement of Principles, seeking to clarify its position. Professors had to be permitted freedom of expression because the purpose of a university education was the "common good ... which depends upon the free search and its free expression...."\textsuperscript{69} Academic freedom ensured this important goal by protecting both the teaching and research functions carried out by professors.\textsuperscript{70} The AAUP went further. It addressed the issue of extra-mural statements by academics which was – perhaps – the

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\item issues and their political activity, by fear of academic reprisals.” Comment, \textit{Academic Freedom}, 46 \textit{Yale L.J.} 670 (1937).
\item See \textit{generally} Maclver, \textit{supra} note 28. Maclver wrote a thoughtful and thorough study of threats to professors and the struggles over the issue of communism on college and university campuses from 1930s through the early 1950s. He argued forcefully against the imposition of loyalty oaths, the legislative investigations of professors, and the banning of teaching the theory of communism. Such efforts to censor or control higher education are not worthwhile because: “[t]he way of education is to have the student wrestle with ideas, to teach him to reason, to exercise intelligent choice, and to give him the opportunity to do so.” \textit{Id.} at 189 (emphasis in original). See also Ellen W. Schrecker, \textit{No Ivory Tower: McCarthyism & the Universities} ch. 2-3 (1986) (providing an insightful and detailed history of the purging of communists from American universities and colleges during the McCarthy and the Cold War eras).
\item See, e.g., Regents v. Super. Ct., 83 Cal. Rptr. 549 (1969), \textit{vacated}, 476 P.2d 457 (Cal. 1970) (upholding Regents’ power of termination with regard to Angela Y. Davis’ employment at University of California, Los Angeles because she was a Marxist).
\item \textit{The 1940 Statement of Principles on Academic Freedom and Tenure With 1970 Interpretive Comments 3, in American Association of University Professors Policy Documents & Reports} (1990) [hereinafter \textit{The 1940 Statement}].
\end{itemize}
thorniest of the problems that had plagued professors and the organization for many years.

The AAUP posited that professors were not only teachers but also citizens of the larger world. In that latter capacity, academics should be free from institutional intrusions and suppression when speaking or writing as citizens.\(^{71}\) However, professors also were under the obligation to conduct themselves appropriately because the public might draw conclusions about both the profession and the teacher’s home institution.\(^2\) Academics, therefore, were encouraged to be accurate and restrained in making their public statements, to accord respect to the views of others, and to distance themselves from the appearance that they served as a spokesperson for the university.\(^{72}\)

Despite the AAUP’s efforts to create professional norms for the professoriate and the institutions that employed them, the concept and the reality of academic freedom remained susceptible of multiple meanings and interpretations. It was often too elastic, too malleable. One difficulty posed by elasticity was that rather than affording protection, it was too ambiguous, too lacking in guidance for those matters that presented the greatest challenge and difficulty. Principles and goals could be interpreted as widely or as narrowly by the trustees or the administrators as the situation required. More significantly, the AAUP had no power to force colleges or universities to abide by the organization’s rules.\(^{73}\)

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\(^{71}\) See The 1940 Statement, supra note 70, at 4.

\(^{72}\) In its subsequent comments interpreting the 1940 Statement, the AAUP stated that the thrust of its principle was not to discourage a professor from speaking as a citizen. It noted that the only basis for dismissal following extramural statements would be a clear demonstration that the individual was not fit to fulfill his professional duties. “Extramural utterances rarely bear upon the faculty member’s fitness for the position. Moreover, a final decision should take into account the faculty member’s entire record as a teacher and scholar.” Id. at 6, citing Committee A Statement on Extramural Utterances, 51 AAUP BULL. 29 (1965). Further, any dismissal of a faculty member on the basis of extramural utterances would have to be based on a clear showing of the professor’s unfitness for her job. The 1940 Statement, supra note 70, at 4.

\(^{73}\) The 1940 Statement, supra note 70, at x-xii, Adopting or Disclaiming AAUP Polices and AAUP Policies in the Courts; see also id. at xii (describing AAUP policies as “a body of persuasive professional opinion”).
most, the AAUP could place a school on its list of censured institutions. However, there is no evidence that such a listing had any effect upon an institution's ability to educate its students, hire faculty, receive donations, and conduct research. Indeed, this lack of enforcement power would eventually send professors to the courts for results that they could not obtain through the auspices of the AAUP.

III. THE FIRST AMENDMENT'S DEMOCRATIC IMPULSES

A. Madisonian Principles of Democracy

The cornerstone of any theory of free speech under the First Amendment is, implicitly or explicitly, democracy. The Framers looked to earlier thinkers like John Locke and other Enlightenment philosophers to craft the principles of the American Constitution. These enlightened ideals are exemplified by the writings of James Madison. 74 He believed in the principle of equality, that “no man should be a slave and no man a master, ... all alike are born to use the common advantages of nature for their preservation and happiness according to their needs and lights and gifts.” 75 For Madison, men must band together through voluntary compact in order to create popular government — otherwise they will not be subject to the government or its laws — and to secure the general welfare of society. The consent of the governed, the linchpin of democratic government, is expressed most directly through the ballot box and indirectly through the actions of the elected representatives in federal and state legislative bodies. That people must employ reason in exercising their right to vote and that such powers of reason must be predicated upon education are the unspoken premises permeating Madison's writings.

75 Id. at xxv.
1. Active Citizen Participants

One of the core principles driving democracy is the active participation of its citizens in governance. Without them, there is nothing—save totalitarianism or other oppressive forms of government by one or a few. But the promise of democracy cannot be fulfilled without an educated citizenry. Democracy in the United States works best when it is the product of the consent of the governed. Citizen participants in a democracy need to be critical thinkers about the important issues on which they exercise their right to vote. In order to make informed decisions about such key matters, citizens must be able to investigate, to question, and to examine both popular and unpopular ideas. Without "educated" voters who are critical thinkers, political decisions are based simply on public opinion or popular momentary passion rather than independent thought. Critical thinkers must be trained in an educational system that encourages both teachers and students to inquire, to challenge, to debate, and to arrive at well-thought-through decisions. Thus, education plays a primary role in the quality and vitality of American democracy.

76 I use the term "critical thinkers" and "engaged learners" to encompass the concepts used by progressive educators. In general, they assert that individuals should interrogate, confront, and challenge premises, ideas, issues along the multiple axes and intersections of race, gender, class, ethnicity, disability, and sexual orientation in order to engage actively in the process of learning and decision-making by reflecting and acting upon information to achieve praxis. Through the process of examining, challenging, and critiquing an issue from multiple positions and various levels, an individual arrives at a deeper understanding, a more fully informed assessment of that particular matter. See generally PAULO FREIRE, THE PEDAGOGY OF THE OPPRESSED 30-74, 80-118 (Myra Bergman Ramos, trans., 1970); BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM 13-34, 48-58 (1994). See also William Schwartz, Education in the Classroom, 51 J. HIGHER EDUC. 25 (1980) (applying progressive educational concepts and techniques to graduate education in the United States).
2. Education’s Role in a Democratic Society

One of the core goals of education at all levels is the transmission of information about the principles and challenges of democracy. Public education is one avenue through which society can inculcate its youth and immigrant populations of all ages with the ideals and norms of a democracy and the role they will play in it as citizens. At the same time, the government does not enjoy an unfettered right to indoctrinate its students uniformly so that they respond in a Pavlovian manner to a variety of state-mandated doctrines. Rather, the state must allow — even encourage — a variety of views because “the freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”

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77 See, e.g., Ambach v. Norwick, 441 U.S. 68 (1970). “The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.” Id. at 76. See also Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986). “The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.” Id. at 683. Brown v. Bd. of Educ., 347 U.S. 483 (1954). “Today [public education]... is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” Id.

78 See, e.g., Betsy Levin, Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights In the Public School, 95 YALE L.J. 1647 (1986) (analyzing the tensions between the government’s function of educating students for democratic citizenship and the constitutional rights of those individuals in primary and secondary schools).

79 See West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). The Court has also viewed the university classroom as a more open forum and more adult than those settings in either a primary or secondary public school. See Healy v. James, 408 U.S. 169 (1972) (treating college-aged students as adults). In the college or university setting, the Court describes in-class speech as wide ranging, diverse. However, professors in the classroom should neither indoctrinate their students nor incite them to violence.
Of particular importance to America’s democracy is the key role played by higher education. In the college or university setting, education is inextricably tied to the principle that professors must be free to inquire, that is, to research, to challenge ideas, to cast aside out-dated theories and dogma, and to find solutions to a broad variety of matters that have an impact on industry, science, economics, politics, mathematics, and society.

The college and university setting is an environment in which ideas are tested and challenged, accepted or rejected as a part of the institution’s function as an intellectual experiment station, a marketplace of ideas. Without free and wide-ranging research and development of theories, there will be a diminishing return in terms of the advancement of knowledge in all sectors of

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80 See Widmar v. Vincent, 454 U.S. 263, 273 n.14 (1981) (describing college students as “young adults” who “are less impressionable than younger students”). See also Bd. of Regents v. Southworth, 529 U.S. 217, 239 n.4 (2000) (Souter, J., concurring) (opining that “the right of teaching institutions to limit expressive freedom of students have been confined to high schools ... whose students and their schools’ relation to them are different and at least arguably distinguishable from their counterparts in college education.” (citations omitted)).


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

82 See Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (asserting that a “classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.”’ (citation omitted)).
Simultaneously, there will be fewer solutions proposed for social problems, fewer advances in technology and science, and fewer resolutions to political issues.

B. Modern First Amendment Theorists

1. Alexander Meiklejohn

In analyzing Supreme Court opinions and the Constitution, theorists have long supported and embraced the concept that democratic values are at the heart of the First Amendment. Their efforts to describe and devise a comprehensive theory of the First Amendment is the point where their views begin to diverge. Professor Alexander Meiklejohn thought that only those matters or issues tied to the political debate were protected by the speech clause. Further, those specific political issues ought to be determined and resolved through the power of the ballot box. Leaving aside the question of whether Meiklejohn crafted a restrictive view of the scope of the First Amendment, the point is that his analysis begins with a basic principle of democracy: the active participation of citizens through the exercise of their voting

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83 See Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring). "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation." Id.

84 Id. at 262-63. "In a university knowledge is its own end, not merely a means to an end. ... The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to ever be examining and modifying the framework itself." Id.

85 Meiklejohn's earliest theory of free speech was criticized for its restrictive view of speech. The problem centered on his narrow concept of the definition of the issue. He subsequently expanded the protection of the First Amendment to encompass both literature and the arts because they inform the political process. See Alexander Meiklejohn, The First Amendment Is An Absolute, 1961 Sup. Ct. Rev. 245, 262 (hereinafter Meiklejohn, The First Amendment). But see Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 20-21 (1971) (arguing that there is no basis in principle for the protection of artistic expression). Bork posits that the First Amendment protects only political speech, which he defines in very narrow terms.

86 ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (hereinafter MEIKLEJOHN, FREE SPEECH).
power. Underlying this premise is his view that intellectual freedom requires expression. Any attempts to suppress it might produce a short-term advantage for the government; however, in the long run, it would be deleterious: "Men need truth as they need nothing else. In the last resort, it is only the search for and the dissemination of truth that can keep our country safe." For Meiklejohn, education was essential to the democratic process: "Education, in all its phases, is the attempt to inform and cultivate the mind and the will of the citizen. Freedom of education, thus, we all recognize is a basic postulate in the planning of a free society."  

2. Thomas Emerson

Echoing the theme of the citizen participant, Professor Thomas Emerson posited that voters would be more likely to accept and adopt decisions that had been developed out of their participation through the ballot box. Under his theory, citizens were free to form their own beliefs and talk about them openly, beyond the narrow confines of political issues; it was a matter of self-fulfillment. Therefore, to suppress expression was to court disaster because the citizens' attention would be directed away from important and vital issues. Emerson observed that "...the

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87 But see Vincent Blasi, The Checking Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 521. Blasi theorizes that the model of self-government is unworkable for several reasons. Because American society is no longer a manageable size, it is mass media and big government that are the main players and not the individual citizen. Thus, the major media players are the ones who will keep a check on government.

88 See MEIKLEJOHN, FREE SPEECH, supra note 86, at 57-59.

89 Meiklejohn, The First Amendment, supra note 85, at 245; see also id. at 263.

The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned. Id.

process of open discussion, far from causing society to fly apart, stimulates forces that lead to greater cohesion ... [and] rests upon the concept of political legitimation. It is through this process of participation that individuals fully comprehend their stake in a democratic society. Thus, for Emerson, the need for discussion, including discord, is an integral part of the free expression that is necessary to the functioning of a democracy.

3. Kent Greenawalt

Similarly, Professor Kent Greenawalt has wrestled with the question of where and how to draw the boundaries of the free speech clause in a liberal, democratic society. His analysis urges an examination of multiple factors that influence the reasons for permitting or restricting free expression under two broad-based rationales: consequentialism and nonconsequentialism. For the consequentialist, “truth discovery, interest accommodation and social stability, exposure and deterrence of abuses and of authority, autonomy and personality development, and liberal democracy” are the operative concepts in any theory of free expression. The nonconsequentialist, however, asserts that the social contract, limited government, autonomy and rationality, dignity and equality, and the marketplace of ideas are the central tenets of free speech theory. Under either or both of these rationales, Greenawalt suggests that there are two crucial components of American democracy: an appropriate, legitimate political process and an informed electorate. The government’s ability to sort through political ideas is suspect and, therefore, free speech is


93 Id. at 130-47.

94 Id. at 147-54.
necessary to ensure a liberal democracy through the exposition and discussion of political matters.  

4. Laurence Tribe

Other scholars, for example Professor Laurence Tribe, have explicated theories of the First Amendment. Tribe disagrees with the details of Meiklejohn's conceptualization of free speech modeled on rationality and intellect because emotional and expressional needs are overlooked. These qualities play an important role in any theory of free speech. However, Tribe's views are not incompatible with Meiklejohn's oft-repeated theme of democracy and citizen participation. Tribe is arguing for a broader vision of free speech; one that incorporates the intertwining and multiple strands of theory in order to weave a more textured understanding of the First Amendment.

5. Steven Shiffrin

More recently, Professor Steven Shiffrin has articulated another theory of the First Amendment. His organizing principle is the concept of the dissenter in the tradition of Ralph Waldo Emerson or Walt Whitman. A dissenter is one who "criticizes..."

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95 Id. at 146. Greenawalt posits that consequentialism incorporates the theories of John Milton and John Stuart Mill who argued that the discovery of truth was the major rationale for permitting free expression. This ideal is reflected in the opinions of Justices Holmes and Brandeis. Nonconsequentialism looks to the theory of the social contract as articulated by John Locke. Individuals consent or agree to be governed but the power of the government is quite circumscribed. Greenawalt also asserts that it is often difficult to draw bright lines of distinction between these two concepts since they blend into one another.

96 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 787 (2d ed. 1988).

97 Id. at 787-89.


A major purpose of the first amendment ... is to protect the romantics - those who would break out of the classical forms: the dissenters, the unorthodox, the outcasts. The first amendment's purpose and function in the American polity is not merely to protect negative liberty, but also affirmatively to
existing customs, habits, traditions, institutions, or authorities.\textsuperscript{99} Shiffrin contends that those who are the outsiders or the dissidents ought to be the focus of the judiciary’s analysis of First Amendment speech claims in order to ensure vigorous protection for their expression. For a vibrant democracy, under Shiffrin’s theory, the freedom of thought and the right to speak openly are the core elements. This is especially true for those who voice differing or dissenting or minority views in a democratic society.\textsuperscript{100}

C. Democratic Parallels in Higher Education

Parallels exist between the principles of democracy and those of higher education, including the need and respect for dissenting voices, critical inquiry, dissemination of information, and expansion of knowledge. The freedom of faculty members to speak, theorize, and research on a wide variety of matters is essential to the vitality of the university or college.\textsuperscript{101} A broad spectrum of viewpoints plays a central role in developing and refining the skills of students and other academics, in weighing and choosing among competing ideas or theories or values. The value of dissident, different, outsider, or minority viewpoints is a key component of the creation, maintenance, and growth of a robust, broad-based educational program.\textsuperscript{102} Further, when scholars challenge the status quo by creating new theories or revising traditional concepts, knowledge is enhanced and enlarged. The benefits of such diverse theorizing flow into the larger society in a number of ways. They can assist members from varying backgrounds to understand and accept one another. They may help to reduce or eliminate barriers between and among different groups. They allow for the discovery and resolution of a wide range of societal problems. They can spur broader economic

\begin{itemize}
\item \textsuperscript{99} Id. at xi.
\item \textsuperscript{100} Id. at 87-108.
\item \textsuperscript{101} See Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
\item \textsuperscript{102} Id. at 251 (viewing the absence of dissident speakers as a sign of a social ill).
\end{itemize}
opportunities for individuals and communities through the creation of new jobs, products, and industries.

Many applaud and support the goals or aims of a broad-based and diverse educational program. However, the realization of such programs has not been without its critics because there are deep divisions and disagreements about what constitutes the appropriate breadth and depth of the diversity on campuses. Often, these differences have prompted professors to turn to the federal courts when they believe their rights have been violated.

IV. THE SUPREME COURT AND ACADEMIC FREEDOM

A. Free Speech Jurisprudence

During the late nineteenth and early twentieth century, the Supreme Court was silent on the issue of free speech, in general, and academic freedom, in particular, as individual rights. The constitutional challenges to the Espionage Act of 1917 and the Sedition Act of 1918 brought free speech claims to the forefront of the Court’s docket. Although those cases involving anti-war agitators did not result in victories for those who claimed their right of free expression had been abridged, they marked the beginning of the Court’s modern First Amendment jurisprudence.

Moreover, of particular relevance to this discussion, the Court has never directly decided a case that turns upon academic freedom. At best, the Court has offered a number of statements, in dicta, with regard to the importance of higher education and

103 See, e.g., Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Abrams v. United States, 250 U.S. 616 (1919). I use these cases to mark the point at which speech clause cases began to be a part of the Supreme Court’s jurisprudence. There was, however, a vibrant free speech tradition in America prior to these World War I cases in the view of some scholars. See generally MICHAEL KENT CURTIS, FREE SPEECH, THE PEOPLE’S “DARLING” PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997); RUSSELL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830-1860 (1972). See also Michael T. Gibson, The Supreme Court and Freedom of Expression From 1791 to 1917, 55 FORDHAM L. REV. 263 (1986).
academic freedom in relation to democracy.104 Prior to the advent of the public employee speech doctrine in the late 1960s, disputes involving university professors and the issue of academic freedom reached the Supreme Court as a result of a challenge to either a loyalty oath or a legislative investigation in the 1950s and 1960s.105 In either situation, the focus of these cases was the underlying notion of subversion of democratic principles, of disloyalty to the nation, and of potential treason. Often, these cases were more closely related to the freedom of association since the controversies inevitably raised questions about those with whom an academic had associated through membership in a political party or organization. In that era, it was the fear of communism that prompted Congressional investigations of many teachers in all levels of education.

104 See Tribe, supra note 96, § 12-4, at 812-13 n.32. Tribe points out that although the Court has not expressly given academic freedom its own unique category, it has accorded the principle some importance. See also Bd. of Regents v. Southworth, 529 U.S. 217, 237 (2000) (Souter, J., concurring) (stating that academic freedom encompasses university autonomy over pedagogy and individual rights of speech and association).

105 Prior its 1968 decision in Pickering v. Bd. of Educ., 391 U.S. 563 (1968), the Court employed the term “academic freedom” in only eight cases. See Whitehill v. Elkins, 389 U.S. 54 (1967) (refusal by professor in Maryland public university to take state loyalty oath); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (refusal by members of faculty of a New York State public university to sign a loyalty oath); Baggett v. Bullitt, 377 U.S. 360 (1964) (refusal of faculty members of Washington State university to swear a loyalty oath); Yellin v. United States, 374 U.S. 109 (1963) (legislative investigation of steel worker in which dissent mentions academic freedom); Shelton v. Tucker, 364 U.S. 479 (1960) (Arkansas public school and university teachers refusal to sign loyalty affidavit); Barenblatt v. United States, 360 U.S. 109 (1959) (federal legislative investigation of university professor and his refusal to answer certain questions about his political beliefs and associations); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (state legislative investigation of university professor and his refusal to answer questions about his political associations); Adler v. Bd. of Educ., 342 U.S. 485 (1952) (public school teachers challenge New York State loyalty oath). In each instance, the plaintiffs raised the issue of their right of free speech.
B. Academic Freedom as Dicta

1. Loyalty and Intellectual Freedom

The first appearance of the term academic freedom in a Supreme Court opinion is found in the dissent of *Adler v. Board of Education*, decided in 1952. Justice Douglas, joined by Justice Black, opposed New York's Feinberg Law which conditioned the employment of public school teachers upon the signing of a loyalty oath. Although the Court upheld the law, Justice Douglas disagreed and pointed out that "[t]here can be no real academic freedom ... [w]here suspicion fills the air and holds scholars in line for fear of their jobs, there can be no free exercise of intellect. Supineness and dogmatism take the place of inquiry." For Justice Douglas, the purpose of education was the pursuit of truth — wherever it might lead — rather than the reproduction of robotic students who simply repeated the dogma of the day.

This same view of education (as a process of truth seeking) was echoed in *dicta* by the majority in *Sweezy v. New Hampshire*. The Court said that the freedom of inquiry was the essence of the university community and to interfere with it would endanger society. At issue was whether the state attorney general of New Hampshire could force a university professor to disclose the contents of one of his guest lectures at a public university and his knowledge about a minority political party and its members. A close reading of the opinion reveals that although the Court looked at the issues of political association, free speech, and the state's infringement on individual liberty, it decided the case on the basis of due process. Even though the Court commented on academic freedom, it did not explain the requisite parameters of that concept. At best, the Court provided some general statements about the necessity for such freedom within the academic setting so that the

106 342 U.S. at 508 (Douglas, J., dissenting).
107 Id. at 510-11. "This system of spying and surveillance with its accompanying reports and trials cannot go hand and hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect." Id.
108 354 U.S. at 250.
process of investigation and dissemination of ideas would remain unrestricted.

The Court reiterated its view of the necessity of intellectual freedom in *Keyishian v. Board of Regents*, striking down New York’s requirement that public university professors sign a loyalty oath as a condition of their employment.\(^{109}\) Although the Court asserted that academic freedom was “a special concern of the First Amendment,” it did not take the next step of elucidating the rough contours of the concept.\(^{110}\)

### 2. Freedom from Witch Hunts

In these early cases that mention academic freedom, the Court’s central concern was to halt the state and federal witch-hunts which sought to ferret out and purge alleged subversive persons, mostly communists, from all levels of public education. The requirement that a primary or secondary public school teacher or college or university professor sign or swear an oath of loyalty to the nation had little to do with the principles of education or academic freedom (teaching or learning freedom) as posited by educators and the guidelines of the AAUP. Instead, the question of loyalty to the nation centered on political activity, that is, with whom did one associate as a political affiliation. Thus, while the Court sought to preserve the freedom of political association by striking down state loyalty oaths, intellectual freedom for professors still lacked protection of its own.

Although the Court referred to academic freedom in these several opinions, it did not fashion either a definition or a standard for assessing it. The Court has continued to employ the term, but has yet to provide any meaningful lines of demarcation.\(^{111}\) Thus, the question of protection for the speech of academics remains unresolved. Even though the concept of academic freedom has

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\(^{109}\) 385 U.S. 589 (1967).

\(^{110}\) *Id.* at 603.

\(^{111}\) See, e.g., *Southworth*, 529 U.S. at 238-39 (Souter, J., concurring) (stating that although the Court has deferred to the autonomy of public colleges and universities, neither students nor teachers are entirely without First Amendment protection in such settings).
little legal traction, it is the principle that professors often claim has been violated when they sue their home institutions.

V. THE SUPREME COURT AND PUBLIC EMPLOYEE SPEECH

A. No Speech Rights for Employees – *McAuliffe*

The nexus between free speech and public employees did not reach the docket of the Supreme Court until 1968 when Marvin Pickering sued his local school officials.112 Prior to *Pickering v. Board of Education*, the long-standing rule involving the right of free speech for public employees was found in an early opinion of Justice Holmes when he sat on the Massachusetts Supreme Judicial Court.113 The Mayor of New Bedford had fired a policeman, McAuliffe, because the officer had violated a local police regulation banning political participation through solicitation of money or membership in a political committee by members of the force. McAuliffe sued, claiming – among other things – that his right of free speech and of association had been abridged by his termination.114 Justice Holmes, speaking for a unanimous court, would not countenance such a claim. “The petitioner may have a constitutional right to talk politics, but he has no right to be a policeman.”115 Thus, public employees were without the right of free expression.

114 *Id.*
115 *Id.* at 220.

There are few employments for hire in which the servant does not agree to suspend his constitutional rights 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. On the same principle the city may impose any reasonable condition upon holding offices within its control. *Id.*
B. Employee Speech Gains Protection – *Pickering*

The principle that employees surrendered their free speech rights when accepting a position in the public sector remained the general rule until 1968 when the Court held that a high school teacher, Marvin Pickering, had been improperly fired.\(^\text{116}\) Pickering had been terminated because he had written a letter to the editor of the local newspaper that was critical of the performances of the local school board (the Board) and the superintendent of schools (the Superintendent).\(^\text{117}\) In particular, Pickering asserted that they had poorly handled two prior bond proposals for raising and allocating school funds. Other articles on the same topic appeared in the newspaper. One was written by the teachers’ union; another was authored by the Superintendent. Both took a favorable view of the bond proposal. Pickering’s letter, however, prompted his dismissal by the Board, despite the fact that his missive was greeted with “massive apathy and total disbelief” by all except the members of the Board.\(^\text{118}\)

Turning to the jurisprudential underpinnings of the First Amendment, the Court held that individuals who were public employees enjoyed constitutional protection for their comments on matters of public concern; the same protection accorded to private citizens. This was true even though some of the comments made by a public employee might be directed toward his or her supervisor and might also be unflattering. The primary concern for the Court was the potentially chilling effect on speech where a person speaks out in her role as a citizen. This premise rests upon the democratic ideal that all citizens should engage in “free and unhindered debate on matters of importance.”\(^\text{119}\) Indeed, this principle initially outweighed any other consideration. The Court’s new test balanced the interest of the public employee (acting as a citizen) in speaking about matters of public concern

\(^{116}\) 391 U.S. at 563.
\(^{117}\) *Id.* at 566.
\(^{118}\) *Id.* at 570.
\(^{119}\) *Id.* at 573.
and of the government (acting as an employer) in delivering its services efficiently.\textsuperscript{120}

The Court accorded Pickering the same status as any ordinary, private citizen because his comments were, at best, only tangentially connected with his employment as a school teacher. Neither Pickering’s co-workers nor his immediate supervisors were the targets of his letter and, thus, according to the Court, there were no problematic issues of discipline or disharmony in the workplace. Additionally, Pickering did not hold a high-level position that necessitated either personal loyalty to or confidentiality regarding an immediate superior. There was no evidence that Pickering’s letter prevented him from carrying out his teaching duties. The Court reached these conclusions even though some of Pickering’s statements were, in part, erroneous. These comments were matters of public concern about which Pickering and the Board had differing opinions, in the Court’s view.

A key point is the Court attached great importance to the principle that an informed citizenry was crucial to the functioning of a democratic society. The Court concluded “that the interest in the school administration [sic] limiting teachers’ opportunities to contribute to the public debate is not significantly greater than its interest in limiting similar contributions by any member of the general public.”\textsuperscript{121} The Court’s primary emphasis was the core democratic principle that matters of public importance must be openly discussed and debated by citizens, including those who are employed within the public school system.

\textsuperscript{120}Id.

\textsuperscript{121}Id. One difficulty posed by the decision is the lack of a uniform standard for judging such cases. The Court did, however, set forth some general factors that could be taken into account. These included: 1) the maintenance of discipline by immediate supervisors; 2) the need for harmony in the workplace among co-workers; 3) the requirement of confidence and loyalty where relevant to a particular position; and 4) the inability of the employee to carry out his duties. \textit{Id.} at 569-70, 572.
C. Employee Speech Adds Causation Elements – Mt. Healthy

The Court revisited the doctrine of public employee speech in 1977, in another case brought by a high school teacher, Fred Doyle.122 When the local school board (the Board) did not renew Doyle’s teaching contract, he sued. The Board’s action was the result of its review of several negative incidents involving Doyle, including a telephone call to a local radio station.123 During this call, Doyle revealed the gist of an internal memorandum from the school’s principal to its teachers, discussing the dress and appearance of the teachers and their connection to the garnering of public support of a local bond issue. Turning the information into a news item, the disk jockey made an announcement about the teachers’ dress code over the public airways.

Addressing again the issue of balancing the interest of the public employee and that of the government, the Court reviewed a new variation: whether the dismissal of a teacher was permissible on grounds other than those which were constitutionally protected; it answered in the affirmative. A public employee could not avoid dismissal by claiming First Amendment protection where there were other appropriate reasons upon which the employer had based its decision.124 The Court crafted a two-pronged procedural test. An employee had to demonstrate that his speech was protected and that it was the substantial motivation for the employer’s action. Once the plaintiff met his burden, the employer would have to rebut it by showing that it would have dismissed the employee on other legitimate grounds.

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123 Id. at 281-82. Doyle was also involved in other incidents and complaints. He was the subject of a disciplinary complaint for calling students “sons of bitches” and making obscene gestures to female students on school premises.
124 Id. at 285. The Court remanded the case for a further determination because it could not tell whether the Board had met its burden. Doyle demonstrated that his speech was constitutionally protected and that it was the motivating factor for the non-renewal of his contract. The Board, however, did not show that its decision not to rehire was based upon unprotected conduct on Doyle’s part.
The issue of whether a public employee’s speech on matters of public concern was protected in a private conversation between an employee and her immediate supervisor was addressed in a later case. The comments were deemed to be protected expression. A second case held that a private conversation between two lower-level employees in a non-public area of the workplace was also constitutionally protected speech. However, the Court’s central principles for analyzing such claims were narrowed in the early 1980s and mid-1990s.

D. Contraction of Employee Speech Protection – *Connick* and *Waters*

1. Standard Shifted in Favor of Employer – *Connick*

The most significant alteration of the doctrine of public employee speech occurred in the early 1980s. Sheila Myers, an assistant district attorney in New Orleans, resisted her impending transfer from one section of criminal court to another. Feeling frustrated by the turn of events, Myers prepared and distributed a questionnaire to her office colleagues regarding the policies and decision-making practices within the district attorney’s office. In response, the district attorney fired her for her failure to obey his transfer order and for her insubordination in handing out her questionnaire. Myers brought suit, asserting that her speech was protected because the effective functioning of the prosecutor’s office in New Orleans was a matter of public concern. The

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126 *Id.* at 412. A teacher, Bessie Givhan, had approached her direct supervisor, the high school principal, to express her concerns over the racially discriminatory employment policies of the local school district. At the time, the district was under a court-imposed desegregation order. The principal had fired Givhan, characterizing her speech as “insulting,” “hostile,” “loud,” and “arrogant.” *Id.*
127 See Rankin v. McPherson, 483 U.S. 378 (1987) (comments by one clerical worker to another in a constable’s office during the course of a private conversation and in a non-public area were protected by the speech clause).
lower federal courts agreed that her speech was insulated by the First Amendment.

The Supreme Court, however, reversed, and upheld the discharge. Despite the district court’s finding that Myers’ statement, taken as a whole, raised matters of public concern, the Court characterized the questionnaire as merely personal. Once it was labeled as personal, the questionnaire was not a matter of public concern and was, therefore, devoid of constitutional protection. After casting the questionnaire as personal, the Court easily found in favor of the public employer. Because the case was reduced to the status of an ordinary employment decision, the Court quickly and deferentially stepped aside, noting that personnel matters are best left to the employer.

This approach creates at least two problems. First, it ignores or discounts the fact that most public employees who raise concerns are talking about generally intertwined matters of public and personal importance. It is unlikely that an employee would separate or compartmentalize such comments into those two categories. Second, it elevates – even overestimates – the public employer’s skill in assessing whether a statement is a matter of public concern or simply one of a personal nature. If the employer is the one who determines this pivotal issue, it is more likely that the employee’s speech will be denominated as personal.

The Court premised its opinion on what it called the misapplication of Pickering by the lower federal courts. Absent any constitutionally protected speech, “government officials should enjoy a wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.” This was so even though some terminations might be either unfair or mistaken, assuming there was no violation of other statutory or contractual provisions.

It can, however, be argued that the Court misread Pickering’s standard when it placed primary emphasis on the

130 461 U.S. at 148 (characterizing Myers’ questionnaire as nothing more than her dissatisfaction over her transfer).
131 Id. at 146.
132 Id. at 146–47.
requirement of context: the time, place, and manner of the speech in question.\textsuperscript{133} \textit{Connick} radically shifted the balancing test. The standard centered on the employer's interest in efficient operations rather than the public employee's interest in speaking on matters of public concern. The result was the speech in question slipped from a primary to a secondary position,\textsuperscript{134} it was no longer on the same plane as that of a private citizen.\textsuperscript{135} As the dissent observed: "The First Amendment affords special protection to speech that may

\textsuperscript{133} \textit{Id.} at 147-48. "Whether an employee's speech addresses a matter of public concern can be determined by the content, form, and context of a given statement, as revealed by the record as a whole." After looking at the questionnaire, the Court said that because Myers did not allege that the prosecutor's office was not fulfilling its duties and was not performing efficiently, she was simply upset on a personal level. \textit{Id.} at 148. Further, the Court placed a great deal of weight on the efficiency of the employer's operations and the relationship between Myers and her immediate supervisor. \textit{Id.} at 151-52. At the same time, the Court paid little attention to Myers' assertion that she and other attorneys were forced to work for Connick's reelection campaigns. \textit{Id.} at 149.

\textsuperscript{134} \textit{Id.} at 159 (Brennan, J., dissenting) (arguing that the Court had created a standard in which the context of the statement is examined twice).

It is beyond dispute that how and where a public employee expresses his views are relevant in the second half of the \textit{Pickering} inquiry - determining whether the employee's speech adversely effects the government's interests as an employer. ... But the fact that a public employee has chosen to express his views in private has nothing whatsoever to do with the first half of the \textit{Pickering} calculus - whether those views relate to a matter of public concern. \textit{Id.}

\textsuperscript{135} \textit{Id.} at 151. Under \textit{Pickering}, the primacy of the public employee's interest was the first prong to be examined. Additionally, the Court permitted critical comments by a public employee with regard to his or her supervisor. The Court set a high bar, requiring the public employer or supervisor to meet the "reckless disregard" standard of the \textit{New York Times}. The public interest in having free and unhindered debate on matters of public importance - the core value of the Free Speech Clause of the First Amendment - is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. \textit{Id.} at 573, citing \textit{New York Times Co. v. Sullivan}, 376 U.S. 254, 280 (1964).
inform public debate about how our society is governed—regardless of whether it actually becomes the subject of a public controversy."136

In addition to changing the focus of the interest analysis, Connick significantly altered the standard for disruption. This is a serious problem because of the potential for chilling speech. Under Pickering, the test mandated an actual rather than a potential disruption in the workplace.137 Connick's standard elevates the employer's subjective belief of a potential disruption or harm in the working relationship. The district court found that the questionnaire did not result in a disruption in the relationship between Myers and her supervisors. The Court, however, ignored the neutral fact-finder's result, relying upon the public employer's subjective judgment of the potential for interruption or disruption.138 The potential disruption standard invariably favors and reinforces the employer's interest over the employee's.

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136 Connick, 461 U.S. at 159-60 (Brennan, J., dissenting). Although not all speech is susceptible of First Amendment protection, the dissent argued that judges are in a better position to assess whether speech is a matter of public concern by looking at the employee's interest in making statements on matters of public concern.

137 The standard for disruption was first articulated in Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09 (1969) (upholding the free speech rights of middle and high school students to wear black arm bands as a silent protest against the Vietnam War).

[An] undifferentiated fear or apprehension is not enough to overcome the right of freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken in class, in the lunchroom, or on the campus may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U.S. 1, 69 (1949); and our history says that it is this sort of hazardous freedom—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society. Id.

138 Connick, 461 U.S. at 168. "If the employer's judgment is to be controlling, public employees will not speak out when what they have to say is critical of their supervisors." Id. Justice Brennan urged the Tinker standard as controlling the determination of whether a material disruption had occurred. See Tinker, 393 U.S. at 508-09.
public employer will likely view dissidents, whistle-blowers, and critics as potentially disruptive and, therefore, will seek to quiet, silence, or rid itself of these individuals on the basis that the employee's speech might impede or disrupt the efficient delivery of services to the public. Further, the fear of being fired will likely cause public employees to self censor. They will not speak out about matters of public concern even though there may be serious risks or harmful effects to the health, safety, or welfare of the public.

2. Further Shift to Favor Employers – *Waters*

While *Connick* contracted the zone of protected speech for public employees, the Court further reduced that protection in *Waters v. Churchill*. During a break at a public hospital in Chicago, two nurses and a doctor were eating dinner in a small kitchen off the nurses’ station. In a private conversation, Cheryl Churchill and Melanie Perkins-Graham were talking about the hospital’s cross-training policy. Perkins-Graham was contemplating a transfer to the Obstetrics department where Churchill was assigned. The head of that department, Dr. Thomas Koch, was also present.

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139 The standard of a mere apprehension of disruption is a powerful tool. From the public employer’s position, “potential disruption” permits the employer a wide margin of discretion and control over the workplace, requiring a uniformity of viewpoint when dealing with members of the public, delivering services, and speaking to co-workers or supervisors. From the public employee’s position, it is more likely that an employer will “discover” an apprehension of potential disruption when there is an employee who speaks out on *any* matter with which the employer disagrees or where there is an employee who is an irritant or an annoyance.

140 511 U.S. 661 (1994).

141 Dr. Koch was vigorously and vociferously opposed to the hospital’s cross-training policy. He was Churchill’s boyfriend at the time and had complained of the under-staffing of the obstetrical department which he supervised. The Seventh Circuit noted that it was the association between Koch and Churchill that irritated Kathleen Davis, Vice-President of Nursing, and Cynthia Waters because Churchill had provided Koch with information that he could not have otherwise obtained. In turn, Koch utilized this information in his efforts to improve nursing care within his department. *See* 977 F.2d 1114, 1118 (7th Cir. 1992).
The parties dispute what was actually said during the course of that conversation. The hospital claimed that Churchill’s comments were negative statements directed toward Cynthia Waters, Churchill’s immediate supervisor. In contrast, Churchill asserted that she spoke mainly about the hospital’s cross-training policy which she believed would undermine patient care and safety. In the end, Churchill was discharged and she sued. The district court held that the speech at issue was unprotected under the First Amendment but the Seventh Circuit reversed. Using the Connick standard, it found that Churchill’s speech rights had been violated by the hospital. The court of appeals said that an examination of the issue had to begin with what the employee actually said rather than what the employer thought was said.

After reversing the Seventh Circuit, the Supreme Court constructed its own explanation of the relevant standard. The test was framed in a narrow fashion with two prongs: the first required that the speech at issue be a matter of public concern; the second, that the public employee’s interest in commenting on matters of public concern not override any injury from such statements to the public employer’s interest in providing efficient delivery of its services. The new standard allowed any potential harm from the

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142 511 U.S. at 664.
143 Id. at 665. The hospital gleaned its version of the facts from an eavesdropping nurse, Mary Lou Ballew. She heard only intermittent portions of the conversation at issue because she was on duty and responding to patients. She later reported what she had overheard to Waters and Davis. They spoke with Ballew on two occasions before talking with Perkins-Graham. The two supervisors never spoke to Churchill about the incident.
144 Id. at 666. While admitting that she had been critical of Davis’ cross-training policy, Churchill claimed that her comments were directed to that policy which she characterized as a staffing move to cover personnel shortages rather than an actual training program designed to teach skills and procedures. Churchill believed that the cross-training policy would threaten the care and well-being of patients and she had advised both Waters and Davis of her concerns over the course of a number of months.
145 731 F. Supp. 311 (D. Ill. 1990); see also 511 U.S. at 667 (agreeing with the district court that the potential disruptiveness of Churchill’s speech stripped her statements of protection no matter which version was accepted as true).
146 511 U.S. at 667.
147 Id. at 668-69.
employee’s speech to be the basis for the denial of First Amendment protection as seen from the perspective of the public employer.

The Court explained that “reliable procedures” are a necessary accompaniment to the substantive standards of the First Amendment. Specific procedures apply to the government when it acts in its role as a sovereign. However, when the government is an employer, these protective standards are relaxed and significantly lowered. Thus, not every procedural safeguard for speech is required in every situation in the public workplace.

As a public employer, the government may silence its employees in a variety of circumstances that would be constitutionally impermissible when it acts as a sovereign. Additionally, public employers are permitted to predict reasonably whether the employee’s speech might potentially disrupt the efficiency of services provided. The Court, however, did not adequately define what might be deemed a reasonable prediction of either harm or disruption in the public workplace. This deferential standard, favoring the employer, will likely lead to wide variations in the definition and the application of reasonable predictions. Public employers determine what, if any,

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148 Id. at 669 (explaining that the procedures included “a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review”).
149 Id. at 678.

Of course, there will often be situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion. In those situations, many different courses of action will necessarily be reasonable. Only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable. Id.
150 Id. at 671-72. The Court draws a distinction between the government’s role when it serves as a sovereign and when it acts as a proprietor. In the former role, the government is restrained to a greater degree in terms of limiting its citizens’ free expression while the latter role allows it far more latitude in restricting its employees’ speech.
151 Id. at 673 (according greater deference to public employer’s predictions of harm to justify speech restrictions for its employees).
investigations and procedures are required. This, too, is likely to result in wide-ranging interpretations by public employers when they decide whether an inquiry ought to be made into the comments uttered by one of their employees.

As its analytical starting point, the Court utilized Connick's time, place, and context standard. Looking at context, the Court said that in numerous instances, the government as employer must be able to silence or restrict the speech of its employees. To illustrate its point, the Court relied on Cohen v. California. While it was permissible for Cohen to walk through the public hallway of a courthouse wearing a jacket that read "Fuck the Draft," he could not do so in the public workplace as an employee when speaking either to members of the public or to his co-workers.

The result of Waters is the elevation of the government employer's interest in efficiency over any other value, including expression by public employees. The decision further restricts, or nearly eliminates, public employees' opportunities to speak

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152 Id. at 671. "[T]he propriety of a proposed procedure must turn on the particular context in which the question arises -- the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase." Id.


154 Id. at 24-25. In some circumstances, it may be true that a public employee could not use such an expletive. However, Cohen is an inappropriate choice for a number of reasons. By using the extraordinarily offensive word (fuck) from Cohen as an example, the Court has subtly and inextricably linked Churchill's statements with two unseemly and negative images: fornication and unpatriotic (implicitly disloyal) behavior -- either based upon the sentiments expressed or the act of war resistance. For many, the images of the divisive agitation between pro- and anti-war activists in the United States during the Vietnam War was an especially difficult chapter in American history. Further, Cohen's sentiments struck many as an abomination because thousands of young adults had made the ultimate sacrifice for democracy -- losing their lives.

155 511 U.S. at 675.

The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as employer. Id.
about matters of public concern while in the workplace. In *Givhan v. Western Line Consolidated School District*, a teacher’s private conversation about racial discrimination in the school district with her direct supervisor, on school premises, was deemed to be protected.\(^{156}\) In contrast, a nurse’s private conversation about public health and patient safety with two other employees (neither was her immediate supervisor) in a non-public area of the hospital was not protected in *Waters*. This was so despite a finding that the content of the speech at issue was a matter of public concern when reviewed by a neutral fact finder, employing *Connick*’s principles.

*Waters* undercuts two additional elements of *Pickering*. The latter allowed for inaccuracy in statements made by employees when talking about matters of public concern because an unhindered, robust debate and an informed citizenry were of prime importance to a democratic government.\(^{157}\) *Pickering* also permitted negative comments or criticisms with regard to the employee’s supervisors or others in policy-making positions without punishment unless the employer could show that the employee spoke with reckless disregard as to the truth or falsity of his statements.\(^ {158}\)

The *Pickering* Court recognized that public employees mix comments on matters of public concern and criticisms of supervisors rather than separating such statements into two different categories. In sharp contrast, *Waters* allows a public employer to look at the time and place of the speech in question, and then decide for and by itself whether the employee’s speech is potentially disruptive to its ability to perform or carry out its

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\(^{156}\) 439 U.S. 410 (1979). See also *supra* note 126.


\(^{158}\) *Id.* The Court relied on the standard of New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). A public official must demonstrate that the alleged defamatory statements were made “either with knowledge of their falsity or with reckless disregard for their truth or falsity.” See *supra* note 136. See also Harry Kalven, Jr., *The New York Times Case: A Note On “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 213 (theorizing that the breadth of such speech protection “reflects a strategy that requires that speech be overprotected in order to assure that it is not underprotected”). It is robust, open debate on matters of public concern that is at the core of First-Amendment values. See also *Pickering*, 391 U.S. at 573.
functions efficiently.\textsuperscript{159} The employer need not examine the actual content of the speech but may determine what it thought the employee said.\textsuperscript{160} Thus, whether or not the employee's speech involves matters of public concern is hardly relevant. Comments expressing a negative view of one's supervisor are not held to \textit{Pickering}'s requirement of reckless disregard.\textsuperscript{161} Instead, such criticism is viewed as proof of potential disruption and is accorded far more importance than it otherwise ought to have.\textsuperscript{162} In the end, the efficiency of the workplace was elevated above comments on matters of public concern uttered by the public employee. The Court's justification was that "many of the fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees."\textsuperscript{163}

In certain situations, we might agree that the public employer's efficient delivery of services ought to be elevated over the employee's comments on matters of public concern. In other circumstances, we might have reservations about placing primary emphasis on efficiency over statements about public concerns involving the public's health, safety, welfare, or other such important interests. The difficulty posed by the new standard of \textit{Waters} is that there is no longer a balancing of interests between the public employee's speech on matters of concern to the public

\textsuperscript{159} What is absent from the primary calculus in \textit{Waters} is the employee's interest in speaking on matters of public concern. The Court focuses its analysis on the efficiency interest of the employer and disregards the central point of \textit{Pickering} – the interest of a public employee in commenting on matters of public concern and its role in a robust debate on such issues. Additionally, under the restrictive standard of \textit{Connick}, the Seventh Circuit held that Churchill's comments were a matter of public concern and, therefore, were protected. Thus, in the neutral setting of a court, the government employer lost.

\textsuperscript{160} \textit{See Waters}, 511 U.S. at 677-78 (adopting a standard based upon what the public employer reasonably thought was said even if the employer was mistaken).

\textsuperscript{161} \textit{See supra} notes 135 and 158.

\textsuperscript{162} 511 U.S. at 676. "But employers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores." \textit{Id}.

\textsuperscript{163} \textit{Id.} at 672. In the end, one has to wonder whether the Court was inching its way back to the standard of McAuliffe v. Mayor of New Bedford in which a public employee had no right to speak. 155 Mass. 216 (1892).
and the employer’s efficient delivery of services. The standard is tilted and weighted in favor of the employer. Without a balance of interests, there is the potential problem of deciding when and where the public employer’s claim of its provision of efficient services crosses the line from service to self-serving.

E. Application of Waters to Public Higher Education – Jeffries

Although Waters is problematic because its skewed standard nearly eliminates the right of public employees to comment on matters of public concern, the rule when applied to public higher education is very troublesome. This is illustrated by the case of Leonard Jeffries, the controversial tenured Black professor at the City College of New York (CCNY), who was caught in the wake of Waters. He had been brought to CCNY

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165 JAMES TRAUB, CITY ON A HILL: TESTING THE AMERICAN DREAM AT CITY COLLEGE 9 (1994). “City [College] is perhaps the longest running radical social experiment in American History. ... [A]nd it became one of the great democratizing institutions of urban culture. ... For the tens of thousands who went there ... City College was the living emblem of the American Dream.” Id. CCNY is one of the senior colleges in the City University of New York system of two- and four-year schools. Id.
to head up the Black Studies Department which had been created following demonstrations by Black and Latino students in the early 1970s.\textsuperscript{166} Despite the fact that Jeffries had only some of the credentials required for a tenured professor at the City University of New York (CUNY), he was, nevertheless, hired with tenure.\textsuperscript{167}

From his arrival at CCNY until late 1991, Jeffries had been elected and reelected as the Chair of Black Studies by his departmental colleagues.\textsuperscript{168} Their vote in June 1991 produced the same outcome.\textsuperscript{169} As a result, the college's President, Bernard Harleston, had written Jeffries a congratulatory letter on July 1\textsuperscript{st} in which Harleston accepted the election without reservation.\textsuperscript{170} All this good will would change within a few weeks.

On July 20, 1991, Jeffries gave a speech (Albany Speech) during the Empire State Black Arts and Cultural Festival in Albany, New York.\textsuperscript{171} Jeffries, a consultant to the State Education Commissioner, talked of the need for more minority perspectives to be reflected in the curriculum of the state’s public schools.\textsuperscript{172} The major portion of Jeffries' remarks centered on the failure of the New York State public school curriculum to reflect the contributions of the individuals from many different ethnic groups who had contributed to state’s growth. He asserted that education was not neutral; it was not an isolated institution. Rather, it was but one of several interlocking systems (racially, culturally, economically, and politically) of oppression deployed against

\textsuperscript{166} Id. at 238-44.
\textsuperscript{167} Id. Leonard Jeffries held masters and doctoral degrees from Columbia University, he had been the founder of the Black Studies Department at San Jose State University, and he had taught political science at CCNY. However, unlike most tenured faculty, Jeffries had no scholarly publications.
\textsuperscript{168} 828 F. Supp. at 1073 n.1 (noting that Jeffries was elected and reelected unanimously by his colleagues every three years).
\textsuperscript{169} Id. at 1072-73.
\textsuperscript{170} Id. at 1073. “I look forward to working with you and your department .... I am confident that with your assistance and guidance and with the help of your Executive Committee, we will continue to serve the students and citizens of the City College as an educational institution of the highest quality.” Id.
\textsuperscript{172} 828 F. Supp. at 1073.
Blacks. Jeffries argued that the curriculum of the state's public schools reflected the economic, political, and legal institutions that supported and perpetuated a system of white domination, omitting the histories of Blacks who played a role in the state's development. He remarked that Blacks needed to learn about their history and their contributions to the state and the nation.\textsuperscript{173}

Interspersed with these observations, Jeffries made a number of statements deemed to be anti-white and anti-Semitic. For example, he accused Jews of selling rum to Native Americans, supporting the Spanish throne, controlling the slave trade, and laying the groundwork for enslaving African people in the 1400s and 1500s. He asserted that Blacks were "sun people," whites were "ice people," and sun people were superior to all others. He also called Diane Ravitch, a high-ranking official of the U.S. Department of Education, a "sophisticated Texas Jew," and a "Miss Daisy."\textsuperscript{174}

For over two weeks, there was scant attention paid and no reaction to the Albany Speech.\textsuperscript{175} This situation changed dramatically in early August when the \textit{N.Y. Post} carried a story about Jeffries' comments.\textsuperscript{176} The following day, the two other major New York City dailies, the \textit{N.Y. Times} and \textit{Newsday}, picked up the story.\textsuperscript{177} The headline in the former read "CUNY Professor Criticizes Jews."\textsuperscript{178} At the same time, local, state, and federal

\begin{footnotes}
\item[173] See supra note 171.
\item[174] Id.
\item[178] See Steinberg, supra note 177.
\end{footnotes}
politicians began clamoring for CUNY and CCNY officials to take some action against Jeffries. ¹⁷⁹

In response to mounting pressure fomented by the media and the politicians, President Harleston wrote a letter, dated August 8, 1991, to the CCNY faculty, indicating that an investigation of Jeffries would be conducted once the fall semester commenced. ¹⁸⁰ In early September 1991, the President appointed Dean Jeffrey Rosen, Chair of the Social Science Department, to

¹⁷⁹ See, e.g., Sam I. Verhovek, Cuomo Urges CUNY to Act On Professor, N.Y. TIMES, Aug. 8, 1991, at B1. “Gov. Mario M. Cuomo today urged the City University of New York to take disciplinary action against Dr. Leonard Jeffries ... who delivered a racially charged speech at a state-sponsored conference [in Albany] last month.” Id. Vivienne Walt, Cuomo in CUNY Fray Supports Action Against 2 Profs Over Racial Views, NEWSDAY, Aug. 9, 1991, at 3. “A college official, who did not want to be named, said Cuomo’s hard-hitting attack on Jeffries made the school rethink its position.” Id. Vivienne Walt, CUNY Studies Black Prof; College Bows to Cuomo Plea, NEWSDAY, Aug. 9, 1991, at 3. “The City University of New York, responding to pressure from Gov. Mario Cuomo, said yesterday it will consider action against a black studies professor whose racially charged remarks ‘fuel the fires of bigotry and disharmony.’” Id. At the time, Governor Cuomo was considering a run for the Presidency of the United States.

¹⁸⁰ See Jeffries, 828 F. Supp. at 1073 (S.D.N.Y. 1993). “I therefore, would like to assure you that at the beginning of the Fall semester, I will initiate a thorough review of this situation.” Id. The President’s actions were prompted in part by then-Governor Mario Cuomo’s outspoken insistence that CCNY and CUNY ought to take steps against Jeffries for his outrageous and inappropriate statements during the Albany Speech or explain why they were not taking any action. See Verhovek, supra note 179, at B1. “While I cannot order the City University to do so,” Mr. Cuomo said, “it seems to me that the comments are so egregious that the City University ought to take action or explain why it doesn’t.” Id. The governor’s insertion of the power and prestige of his office into the controversy over Jeffries was highly unusual; it was unprecedented. See also Denise K. Magner, Politicians Press Officials at the City College of New York to Punish Black-Studies Chairman for Remarks on Jews, CHRON. HIGHER EDUC., Sept. 4, 1991, at A19. “Initially, Bernard W. Harleston, the president of City College, and W. Ann Reynolds, chancellor of the CUNY system, issued separate statements on [Jeffries’ speech]. Without mentioning Mr. Jeffries, their statements condemned bigotry but defended the right of faculty members to express themselves. As political pressure grew, both administrators issued new statements ... denounc[ing] [Jeffries’] remarks...” Id. at A22.
evaluate Jeffries' job performance. After one week, Rosen reported to Provost Robert Pfeffer that Jeffries was satisfactorily carrying out his duties of administering the Black Studies Department. Two weeks later, Rosen again reported that Jeffries was properly performing his duties, which were largely ministerial. Pfeffer also produced his own written evaluation of Jeffries in which he acknowledged that the professor carried out his administrative duties without any negative effects from either the Albany Speech or the ensuing publicity from the media.

Despite the results of these three investigations, Harleston was not satisfied. In October 1991, he appeared before the CUNY Board of Trustees and asked them to reduce Jeffries' term as Chair from three years to one. The Board agreed to the President's request on October 28, 1991. The following day, Harleston advised Jeffries of the limitation on his term. In late December 1991, Harleston, Rosen, and Pfeffer agreed among themselves to hire a new chair to replace Jeffries. By March 23,
1992, the CUNY Trustees had voted to hire Edmund Gordon to assume the leadership of CCNY’s Black Studies Department upon the expiration of Jeffries’ abbreviated term on June 30, 1992. Subsequently, Jeffries sued Harleston and the Trustees, asserting that his rights under the First and Fourteenth Amendments had been violated.

Jeffries won, following a jury trial. In a separate opinion, the federal district court agreed with the jury’s verdict: the CUNY Trustees had retaliated against Jeffries on the basis of his Albany Speech, expressive activity that was protected under the First Amendment.

The Second Circuit upheld the jury’s verdict: the University had violated Jeffries’ right of free speech. Applying Connick’s principles, the court found the professor had demonstrated that his Albany Speech was a matter of public concern and that it was the substantial motivating factor in CUNY’s decision to shorten his term as head of the Black Studies Department. Moreover, the Second Circuit reiterated CUNY’s failure to provide any credible evidence that Jeffries’ statements had caused any disruption in CCNY’s operation or created problems between Jeffries and other faculty members. The court described the duties of departmental chairs within the CUNY system as ministerial rather than policy making. As such, a Chair need do no more than execute his ministerial functions, which

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188 Id. at 1077-78. The district court was also troubled by the absence of any discussion or documentation at the Trustees’ meeting of Oct. 28, 1991.
189 Id. at 1077.
190 21 F.3d at 1241.
191 Id. at 1245-46 (applying Pickering-Connick factors to assess whether Jeffries had demonstrated that the speech at issue was a matter of public concern and whether the speech was a substantial or motivating factor in the employer’s actions against the plaintiff).
192 Id. at 1246.
193 Id. at 1245-46 (finding that the Albany Speech was the reason Jeffries was demoted).
194 Id. at 1246-47. Because Jeffries’ comments were matters of public concern, CUNY had to show that the college had been substantially disrupted in its operations or the operations had been undermined. The defendants failed to meet their burden because they offered no relevant evidence as to any disruption or interference.
Jeffries did, according to three investigations conducted by Rosen and Pfeffer.\textsuperscript{195}

CUNY again appealed. The Supreme Court vacated and remanded the matter to the Second Circuit, instructing it to reconsider the case in light of \textit{Waters}.\textsuperscript{196} On remand, the court of appeals held that Jeffries' speech rights had not been violated.\textsuperscript{197} Thus, when the principles of \textit{Waters} were applied to the facts of \textit{Jeffries}, the shift in the doctrinal standard in the former allowed for a reversal in the latter even though there was virtually \textit{no} credible evidence offered at trial by CUNY.\textsuperscript{198} In its post-trial opinion, the district court pointed out that despite the offensive, inappropriate, and disgusting nature of Jeffries' attacks on certain groups and individuals, CUNY had failed to present any relevant evidence of an investigation of the impact of the Albany Speech upon the college (class disruption, discord between Jeffries and other faculty members, Jeffries' inability to carry out his administrative or teaching functions).\textsuperscript{199} CCNY had tolerated Jeffries' behavior for more than 20 years.\textsuperscript{200} The court chided CUNY for offering hearsay and self-serving statements in place of credible evidence.\textsuperscript{201} Such efforts, according to the district court, illustrated

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\textsuperscript{195} \textit{Id.} at 1247. The district court laid out a blueprint for CUNY in terms of an appropriate investigation, listing three specific areas of inquiry for the institution to pursue.  
\textsuperscript{196} 513 U.S. 996 (1994).  
\textsuperscript{197} 52 F.3d at 9. The Second Circuit did not need to address the issue of what was said by Jeffries since there was no dispute as to the words spoken in the Albany Speech. In contrast, the parties in \textit{Waters} disagreed as to the actual statements made by the plaintiff, Cheryl Churchill. Thus, the Second Circuit could have distinguished the facts of \textit{Jeffries} and followed its original analysis, finding a violation of the professor's speech rights, while deeming \textit{Waters} inapplicable.  
\textsuperscript{198} See 21 F.3d at 1246 (discussing Jeffries' removal while noting the absence of disruption from his speech).  
\textsuperscript{199} See 828 F. Supp. at 1075, 1082.  
\textsuperscript{200} \textit{Id.} at 1097. "For the most part, ... the University inexplicably and perhaps cowardly, chose to ignore [the indications of serious] improprieties, and only acted against the plaintiff when the public outrage over the July 20, 1991 speech in effect forced its hand." \textit{Id.}  
\textsuperscript{201} \textit{Id.} at 1072.  
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the administration’s impermissible attempt to punish Jeffries for his Albany Speech. The court went further; it pointed out that CUNY’s claim that Jeffries had suffered no harm when it removed him as Chair was unavailing.

Following Waters, the Second Circuit’s standard of disruption shifted from an “actual interference” (a more speech protective test) to a “reasonable expectation of harm” (a less protective standard) as seen from the perspective of the public employer. Moreover, despite the Second Circuit’s assertion that the CUNY Trustees reasonably expected a disruption because of Jeffries’ Albany Speech, it is a troubling result for a number of reasons. First, there was little or no credible evidence of any

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202 Id. The district court admonished CUNY for its “confused and incompetent defense,” including its failure to provide “witnesses, stenographic records, affidavits and the like,” and for proffering “pious press releases and hearsay ridden, elliptical hand-wringing memoranda from academic deans” rather than relevant evidence. Id.

203 Id.

We are told that the professor has lost nothing and hence is not irreparably harmed in his dismissal.... If the Chairmanship meant nothing, why did the University go to such lengths in the trial to justify its denial as a proper and just sanction for a cavalcade of the professor’s non-speech sins? If it meant nothing, why was it bestowed upon, and indeed accepted by one of the most eminent Black Studies scholars in America, Edmund Gordon? Id.

204 52 F.3d at 14. This raises the issue of how “reasonable” is the expectation where there has been no investigation. See also 828 F. Supp. at 1080-82 (explaining in detail the inept defense by CUNY and the incomplete investigation by CCNY officials).

205 52 F.3d at 9. The Second Circuit premised its decision on the inconsistent jury verdicts which it said were irreconcilable, stating that the jury found in one portion of its verdict that nine of fourteen Trustees demoted Jeffries based on their belief that the professor’s speech would harm CCNY and CUNY. Yet, the district court went to great lengths to point out the failures of the university’s attempts to proffer competent and relevant evidence at trial. The omissions were painstakingly listed as part of the permanent public record. See 828 F. Supp. at 1082.

Nor did the Attorney General put on the stand a single CUNY student to testify about possible negative effects of the speech on the functioning of classes or the teacher-student relationship. For example, there was no testimony from a student who decided against taking a particular class as a
potential disruption presented at trial by CUNY. Instead, it offered pious press releases and self-serving statements or hearsay by high-level university officials.\textsuperscript{206} Second, CUNY had performed \textit{no} investigation of the actual or even the potential impact of Jeffries' Albany Speech.\textsuperscript{207} The district court outlined three specific areas that CUNY had failed to examine. They included: (1) Jeffries' relationship with other members of the CCNY faculty, including Jewish professors; (2) the potential for the stigmatization and degradation of the Black Studies Department; and (3) the impact upon donations by alumni and the withdrawal of such contributions.\textsuperscript{208} Third, CCNY's three evaluations of Jeffries as a teacher and the head of a department all concluded that his performance was satisfactory. Thus, in the wake of \textit{Waters}, the public university as an employer need not have conducted a reasonable investigation, need not have proffered relevant credible evidence of a potential for disruption, but need only have provided self-serving comments by high-level officials to support its position.\textsuperscript{209}
I do not suggest that public institutions of higher learning must continue to employ tenured professors whom the institutions deem to be unprofessional or unfit. Rather, I argue that university administrators must use reasonable and appropriate means of investigation to support their decisions and actions against an academic. Otherwise, any professor is potentially at a serious disadvantage because an administrator can rely upon hearsay to silence or punish a public university or college teacher for statements that are deemed to be undesirable, irritating, unpleasant, dissident, controversial, or potentially problematic.

Contrary to the assertion by the Second Circuit, Jeffries was punished when he was stripped of his role as Chair because he made a polemical speech off campus. His Albany Speech, delivered at a public meeting, reflected his views and expertise on the need for Black culture and history to be part of the curriculum in the public middle schools of New York State. This was a subject area that was a matter of public concern and debate since the governor had formed a commission to study the issue. Jeffries was invited to speak at a Black cultural event about his expertise on Black history and its relevance to the curriculum that would be offered in public schools. Mixed into Jeffries' comments were a number of anti-Semitic and anti-white statements, all of

210 witnesses. Thus, there was neither a reasonable investigation nor a credible basis on which to remove Jeffries as Chair of the Black Studies Department at CCNY.

211 Additionally, the university may lose professors who believe that their ability to research, write, and teach on a particular subject area may be interfered with or restricted by administrator who has no expertise in that field.

212 The Second Circuit asserted that Jeffries was not harmed because he had not lost his position as a professor or his tenure. He had been removed as Chair of the Black Studies Department. The court failed to account for the loss of prestige, the potential humiliation or embarrassment, professionally and personally, as harms to Jeffries. Moreover, CUNY had tolerated inappropriate, insensitive, anti-Semitic, and anti-white comments from Jeffries for more than 20 years, according to the district court. 828 F. Supp. at 1072. Thus, it was the Albany Speech delivered by Jeffries that prompted CUNY's actions.

213 828 F. Supp. at 1073.
which were deemed nasty, offensive, and highly inappropriate by the district court.

Between the trial and the appellate court's opinion after remand only one factor had changed: the legal standard applied to the speech of public employees after Waters, holding that a public employee's speech on matters of public concern, delivered in private to another employee, was not protected, even if the employee did not actually make the remarks attributed to her.\footnote{213}{511 U.S. 661 (1994).} By creating a test as seen from the reasonable employer's perspective, the Court allowed public employers greater leeway in silencing and ridding themselves of troubling, troublesome, or critical employees.\footnote{214}{Id. at 681-82.} The application of Waters by the Second Circuit to Jeffries allowed CUNY to demote a tenured professor with little, if any, credible evidence.\footnote{215}{See supra notes 201-08 and accompanying text.}

The more worrisome aspect of Waters is the potential chilling effect it may have upon individual academics, particularly those who espouse dissident, different, outsider, or minority viewpoints. Fearing that they may run afoul of public university administrators or trustees, professors will begin to self censor so that they stay out of harm's way. Such censorship, whether blatant or subtle, will limit, reduce, and – ultimately – eliminate the creation, investigation, and promulgation of new theories or concepts because academics will want to remain free of controversy, free of disapproval by colleagues or high-level administrators, free from the fear that they may have overstepped some invisible boundary of the acceptable as defined by the university. Fewer and fewer new ideas, investigations, experiments, and solutions to social, economic, scientific or political problems or concerns will be generated by professors employed at public colleges and universities. This, in turn, could lead to a number of professors leaving public universities and colleges for private institutions of higher education or private sector employment. In the long run, the brain drain will harm the public college or university, reducing the institution's attractiveness to talented academics and students alike.
VI. ACADEMIC SPEECH

A. Reasons to Protect Academic Speech

Academic speech, a zone of protection for expressive activity directly related to a professor's scholarly expertise, is central to the functions and goals of public higher education. If the public university is an experiment station of the intellect, then the academic speech of its teachers must be afforded protection under the speech clause of the First Amendment. Without such insulation, college professors will be at risk. The benefits of protecting academic speech outweigh the costs when viewed in light of the mission and goals of an institution of higher education. The public university educates and trains its students, the future leaders of the nation, through a variety of methods, including lectures and seminars given by professors. The university, in its efforts to attract the best and brightest students, will market its faculty as the core of its educational program. To maintain its competitive edge, the university provides funding for specific departments or programs and seeks to fill them with the best faculty members in order to attract the brightest students and the largest donations, grants, and research funds to the institution.

However, unless there is meaningful protection for the academic speech of faculty at public universities and colleges, these institutions will not remain competitive in terms of attracting the best teachers, top students, and research monies. Within the ranks of professors, the word will spread that the public university is not amenable to experimentation or investigation because it restricts the expressive activities of its academics. The top scholars will go elsewhere. In turn, research monies and other contributions will be reduced. Programs and departments will be adversely affected by the loss of funding. The reduction in the number of programs or departments will send a clear signal that innovation and experimentation are not supported or encouraged by the public university.

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216 See supra Part III.C, discussing the role of education in a democratic society.
One way to ensure that the public university remains in the forefront of higher education is to value academic speech by protecting and encouraging it through sound administrative policies, practices, and procedures. The hiring and granting tenure to a diverse faculty, the creation of innovative programs and departments, and the funding a broad and diverse range of research projects, conferences, and symposia are a few ways in which the public university can achieve its goal of remaining competitive. Indeed, academic speech sits at the core of each component of the university.

B. Academic Speech and Public Employee Speech

1. Public Higher Education

There are sound reasons for the courts to craft a separate standard for academic speech within the pantheon of free speech jurisprudence. First, the current version of the public employee speech doctrine established by Waters is an uncomfortable and uneven fit between the purposes of higher education and the principles of the First Amendment. At the college level, the doctrine does not respond well to the function of the institution of public higher education that is based upon the concept and practice of teaching and research freedom, an intellectual marketplace of ideas and an experiment station of the mind. Because the public employee speech doctrine requires a one-size-fits-all rule to cover all categories of public employment, the standard must be stretched to encompass multiple workplaces, providing a wide range of services: health care, transportation, vehicle registration, housing, public safety, and others.

2. Public Employers and their Tasks

The institution of public higher education differs significantly from other government workplaces and the public employee speech doctrine is incompatible with the purpose of a university. The primary distinction is found in the services that the college or university provides. The goal of post secondary education is to educate in the broadest sense, that is, to serve as a
safe haven, an incubator, and a testing ground for ideas. The higher education institution seeks to disseminate knowledge as well as invent or create ideas and discoveries in its classrooms, in its various other formal and informal settings, in its laboratories, and in its service to the larger community. The university environment is one that invites and encourages verbal exchanges, including those that are filled with disagreement and disputation between and among those who work, visit, or study there. Indeed, part of the mission of higher education is to create and foster a variety of arenas for discussion, disputation, and debate so that ideas are tested, retested, and refined.

While it can be argued that all government employers provide a type or form of service to society, there are some important distinctions that depend upon the nature or function of the government operation. In order to both discover new theories and create solutions to existing problems, professors charged with carrying out those tasks require an expansive intellectual space in which to do their work. Idea creation, formulation, and refinement flourishes in an atmosphere that encourages exchange rather than one that stifles or limits or suppresses it. When professors fear (either reasonably or unreasonably) that they may be crossing the line between acceptable and unacceptable ideas, they will likely err on the side of caution, reining in or repressing theories that may cause problems with high-level administrators of the university.

In contrast, other government agencies are charged with the efficient delivery of particular services. Public hospitals, for example, dispense medical services, including surgical procedures, prescriptions, and other health-related treatments. The hospital-as-employer focuses on efficient delivery of these services. It is not a workplace that is designed to encourage challenges or debates between the service provider (the public employee) and the recipient of such services (the patient) or between the employee (a nurse) and his supervisor. A public hospital is not created for the

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218 See Sweezy v. New Hampshire, 354 U.S. 234, 261 (1957) (Frankfurter, J., concurring). "It is the business of the university to provide that atmosphere which is most conducive to speculation, experimentation, and creation." See also The 1915 Declaration, supra note 51, at 158. "The institution of higher education is an "intellectual experiment station." Id.
purpose of formulating untried theories or testing new ideas while nurse-employees are delivering health care services to its patients. To the contrary, the institution’s function is the effective and efficient provision of health care services which are dispensed daily by its employees with certain levels of medical training.

The same may be said of the clerk’s office of a court. The lawyers, the litigants, and the members of the public are not permitted to engage in a verbal debate with the court employees over the cost of filing papers and the statutory deadlines that must be met for causes of action, and vice versa. The court employees are required to follow certain routine procedures, including the collection of filing fees. Although employees in both the public hospital and the court clerk’s office might engage in commentary or discussion between and among themselves, there is a limitation on such talk because of the nature of the tasks to be performed and the services to be delivered where efficiency is the baseline of measurement.

3. Public Employees and their Roles

More significantly, a professor’s role in a public higher education institution differs significantly from that of other public sector employees. Professors are hired and tenured (or not) on the basis of their academic expertise. They are paid to develop theories and to speak, write, and teach about their intellectual labors in all stages of the creation, dissemination, and reformulation of those ideas. The intellectual efforts and products of professors are at the core of any public university or college. Indeed, academics are required to put their views on public display almost daily through their scholarship, research, public statements, classroom teaching, and community service.

Professors also play a significant role in the university’s livelihood. Their intellectual production and recognition (inside

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219 Justice Frankfurter opined that teachers were “the priests of democracy” because they played such a central role in our democratic system of governance. See Wieman v. Updegraff, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring).

It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for
and outside the university) aid the institution in attracting other academics, students, research dollars, endowments, and – in many instances – alumni contributions. The public university can garner attention from the media by highlighting the work of a particular teacher or a department. Public notice can bring additional focus on the institution and may also produce sources of revenue, scholars, and students. Thus, the university can reap many benefits (tangible and intangible) from its faculty members and their scholarly efforts.

In addition, the academic expertise of a professor comes about through a lengthy process of publicizing his or her ideas. This process, by its very nature, is one in which theories are tested and retested in order to determine their viability. The opportunity to audition or try out theories is valued and expected by scholars. It is a necessary component of the process because it allows the professor to refine, advance, or discard a particular theory or an aspect of it. These opportunities to test theories are encouraged by the institution itself. Under the rules and regulations of the public university, college teachers are required to publish scholarly articles, to participate in academic conferences, and to speak in responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government. Id.

220 Academic expertise is achieved only after many years of formal schooling beyond the four year undergraduate education. Professors earn doctorates in their respective fields. Then they spend another five to seven years teaching, researching, and writing before they achieve tenure. See also supra note 33.
various educational settings in order to achieve tenure at the university, and to garner respect in the broader academic community. These theories, then, are the result of academics professing their views. By testing, refining, and re-testing these concepts through a variety of formal and informal settings, professors determine whether their theories will withstand scrutiny and challenge and, ultimately, add to the knowledge within a particular subject area.

In contrast, nurses in a public hospital are not hired on the basis of their ideas; they are employed because they have attained a certain level of professional training and have passed a standardized state licensing exam. These examinations are designed to determine whether the applicants are conversant with the standard protocols for medical care. Further, nurses are employed to perform specific, routine tasks and uniform medical procedures directly related to patient care. The hospital's livelihood is not directly tied to the innovation in ideas or theories that its nurses produce. The facility’s income, in large part, is driven by the quality and efficiency of the services performed by its staff, including nurses. In addition, the hospital seeks uniformity and conformity in terms of its employees and the various medical services they deliver daily. Nurses and other health-care workers must conform to the particular standards of the hospital. In a medical facility, there is a greater emphasis upon the uniform and efficient delivery of medical services.

C. The Dissonance between Academic Speech and Public Employee Speech

To illustrate the dissonance between the public employee speech doctrine and public university professors, I return briefly to Connick and Waters. The principles of these two cases were not designed for situations that encompass the speech of academics in an off-campus setting. Jeffries is most telling on this point. In

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221 See Connick, 461 U.S. at 138; Waters, 511 U.S. at 661.
222 In both cases, the plaintiffs were speaking in their respective workplace settings to other colleagues. See Connick, 461 U.S. at 138 (handing out questionnaire and talking with fellow employees in the district attorney’s
Connick and Waters, the plaintiff-employees were in the workplace, speaking with their respective colleagues, and making comments that were critical of their supervisors.\(^{223}\) The likelihood of friction or disharmony in the workplace between the employee and her direct supervisors was the primary reason that the Court deferred to the public sector employer in each instance. In contrast, Jeffries was off campus and speaking at a public event that was not connected to or funded by his home institution, CCNY, or by the larger university, CUNY, when he gave the Albany Speech that became controversial.\(^{224}\) The fact that some individuals made the connection between Jeffries and CCNY or that he was introduced as a professor is not relevant because Jeffries did not hold himself out as a representative of either CCNY or CUNY. He spoke as an expert on Black history who had been invited to talk about the work he had done in connection with a state-funded education commission that had been charged with studying and proposing changes to the curriculum of the public schools in New York State.\(^{225}\) Moreover, the thrust of Jeffries’ Albany Speech was the omission of Black history from the state’s public school curriculum, a topic that was a matter of public concern to the citizens of the state.

The plaintiffs in Connick\(^ {226}\) and Waters\(^ {227}\) were speaking about matters that were deemed by the Court to be personal and critical of their superiors. They were discussing the decision-making and the policies of their superiors while physically present in their respective workplaces. Of greater significance, neither Sheila Myers nor Cheryl Churchill were required to speak out about their views, beliefs, or opinions as a condition of their public employment. Stated another way, assistant district attorneys are

\(^{223}\) See Connick, 461 U.S. at 141; Waters, 511 U.S. at 665-66.

\(^{224}\) See 52 F.3d at 11.

\(^{225}\) Id. at 12.

\(^{226}\) 461 U.S. at 148.

\(^{227}\) 511 U.S. at 681.
required to carry out the mandate and the directives of the district attorney for whom they work.\footnote{461 U.S. at 147-49.} The same is true for nurses employed in public hospitals.\footnote{511 U.S. at 667-69.} There is no debate about the job requirements for these lower level employees. Their function is to perform their assigned duties and not to challenge policies, procedures, or practices that are put into place by their supervisors or other high-level decision-makers.

To the contrary, Jeffries was speaking about his academic area of expertise when he delivered his Albany Speech. He was hired and tenured by CCNY on the basis of his work in the field of Black Studies. Further, Jeffries was not on the campus of CCNY when he spoke about the state’s public school curriculum. He did not criticize the president of CCNY, the faculty members of CCNY, or the trustees of CUNY.\footnote{Both plaintiffs in Connick and Waters had been critical of their employers and supervisors. \textit{See} Connick, 461 U.S. at 140-42; Waters, 511 U.S. at 667.} Thus, Jeffries is easily distinguishable from the plaintiffs in \textit{Connick} and \textit{Waters} who were critical of their supervisors while on the job.

Under CUNY’s Bylaws, Jeffries was not required to carry out a particular mandate of the institution other than to abide by those rules. As a Department Chair, Jeffries was obligated to handle rather routine ministerial duties such assigning courses, preparing the department’s budget, and supervising the department.\footnote{\textit{See} Bylaws of Board of Trustees By Laws, The City University of New York, § 9.3 Duties of Department Chairperson (Sept.1993) (on file with author).} In his role as a classroom teacher, Jeffries was required to carry out his teaching assignments. According to CCNY’s three cursory investigations of his work as a Chair and teacher, Jeffries had met his obligations.\footnote{\textit{See} 828 F. Supp. at 1082.}

Additionally, Jeffries was not found to be uttering statements that were simply the airing of personal grievances against his supervisors in the workplace, as was true of the plaintiff in \textit{Connick}. Rather, his comments on the absence of Black history from the state’s public school curriculum were interspersed with bigoted statements about whites, Jews, and a high-ranking member

\footnotetext[228]{461 U.S. at 147-49.} \footnotetext[229]{511 U.S. at 667-69.} \footnotetext[230]{Both plaintiffs in \textit{Connick} and \textit{Waters} had been critical of their employers and supervisors. \textit{See} \textit{Connick}, 461 U.S. at 140-42; \textit{Waters}, 511 U.S. at 667.} \footnotetext[231]{\textit{See} Bylaws of Board of Trustees By Laws, The City University of New York, § 9.3 Duties of Department Chairperson (Sept.1993) (on file with author).} \footnotetext[232]{\textit{See} 828 F. Supp. at 1082.
of the U.S. Department of Education. These statements were presented at a public gathering in Albany, New York, more than 125 miles from the CCNY campus. The audience received Jeffries’ comments with applause. On the day that Jeffries delivered his Albany Speech, there was little or no attention paid to it by the general public, the media, university administrators, or elected officials. More than two weeks passed before a number of local and state politicians began to complain publicly in the news media about Jeffries’ comments and demand that the university do something to silence or censure the professor. Once the full force of the media, the governor and other elected officials was brought to bear on President Harleston of CCNY, he instituted an investigation of the matter.

When Jeffries reached its conclusion, the result was a blow for academics and the intellectual freedom that is at the center of university as marketplace for intellectual experimentation. The application of Waters’ principles to a controversial professor provided the university with an easy solution to a tough problem.

D. Righting the Balance of Interests in Public Higher Education

Because the public employee speech doctrine has been weighted in favor of the public employer as a result of the decisions in Connick and Waters, there can be greater restrictions placed on the expression of professors in public higher education as Jeffries illustrates.233 However, both the professor’s and the university’s interests are important and should be respected in any process of dispute resolution. In order to achieve a more equitable balance of these two competing interests, the scales must be reset where academic speech is at issue.

I propose a test of factors to reposition the balancing of the academic’s interest in commenting on matters directly tied to her scholarly expertise and the university’s interest in educating its students without disruption. First, the professor should be required to demonstrate that the expressive activity at issue is related

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233 See supra notes 221-32 and accompanying text.
directly to her academic expertise.\textsuperscript{234} If it is, the activity will be presumed to be protected academic speech. The burden then moves to the public university to rebut this presumption. In shifting the burden to the institution, the problem of the weak, incompetent, or non-existent investigation would likely be reduced or even eliminated. The proceedings would promote the objectives of fairness, thoroughness, and competence on the part of the university’s administrators.\textsuperscript{235} The institution would have to undertake a reasonable and reliable inquiry before any action could be taken against the professor. To provide guidance for a reasonable investigation, I propose a modification of the \textit{Pickering} standard that requires the public university to assess the following factors: 1) whether the professor has daily contact with the person or persons about whom the comments were made; 2) whether there is an adverse impact on other professors or an impairment of discipline by supervisors such as deans, provost, or the president; 3) whether the professor’s expressive activity impeded her performance of her duties as a teacher or researcher or scholar; 4) whether the professor’s expressive activity interfered with the regular, daily operations of the university, including its fund raising from alumni, such that there is an actual disruption; and 5) whether the expressive activity occurred on-campus\textsuperscript{236} or off-

\textsuperscript{234} The expressive activity must have a direct connection to the professor’s academic expertise. This would eliminate from coverage, the potential claim that an engineering professor who spoke about theories of eugenics in his classroom was engaged in protected academic speech. See, e.g., \textsc{Olivas}, \textit{supra} note 33, at 153 (describing the refusal of Stanford University to allow Professor William Shockley, Nobel Prize winner in electrical engineering, to teach a course on his theory of eugenics). The proposed standard incorporates the requirement that the academic speech in question is the motivating factor in the public university’s action against the professor.

\textsuperscript{235} These rules could be memorialized in the university’s by-laws, its collective bargaining agreements, or in its employment handbook.

\textsuperscript{236} Although the central focus of this essay is off-campus expressive activity of a public university professor, there is also the issue of an academic’s in-class speech and conduct. This latter subject is beyond the scope of this article. See \textit{supra} note 12 (collecting commentary about in-class speech).
The university would be required to make written findings as to each factor.

This standard would place duties and obligations on the professor and the university. It would allow the academic and high-level administrators an opportunity to parse through the facts, the rights, the duties, and the responsibilities of each party in order to arrive at a more balanced and equitable result. Further, the standard creates specific guidelines so that both the professor and the university would have a better understanding of the process and their respective roles in it. Perhaps such a set of guidelines would reduce or minimize the number of incidents that reach the federal courts as full-blown disputes because both sides would have an opportunity to present, debate, and review the relevant facts. Indeed, it might further the goal of resolving the dispute at an earlier stage because each side would have a set of guidelines in place that spell out the standards and responsibilities on both sides of the line. Finally, each side might have more confidence in a standard that creates obligations for both parties.

VII. Conclusion

Academic speech, a zone of protected expressive activity directly tied to the professor’s expertise both inside and outside the public university, is essential to the vitality of the public university or college. If higher education is truly to be a marketplace of ideas, the multitude of voices, as the Supreme Court has often said it is,\textsuperscript{238} then the public institution must accept the verbal tumult, discord, and even unpleasantness, that may accompany the expression of minority, unorthodox, or dissident viewpoints either inside or outside of the academic setting. The university as an intellectual marketplace of ideas and information exchange can be

\textsuperscript{237} If the expressive activity takes place off campus, the university should make an inquiry as to whether the professor held herself out as a university spokesperson or as an expert in her field. The former might present the university with a reason to be concerned that the professor is impermissibly holding out herself in a role that she is not authorized to play. In the latter situation, the professor’s academic expertise would be examined on its merits.

\textsuperscript{238} See supra notes 5, 81-84.
analogized to a formal debate where there is verbal interaction—noisy challenges, verbal sparring, and vociferous disagreements—as points are made and disputed by each side. Perhaps the public university is not precisely a verbal free-for-all but it should be an open forum for the sharing of multiple and diverse ideas, where concepts are challenged, debated, contested, and either accepted or rejected. It should be a space, a metaphorical laboratory for intellectual experimentation, where increased understanding can be achieved through an exchange of a variety of different, diverse, and differing ideas. This experimental model requires ample room, enough breathing space, so that various ideas from a broad theoretical spectrum can have an opportunity to be reviewed, critiqued, debated, refined, reformulated, and, on occasion, discarded.

A metaphorical laboratory of idea exchange is also larger than the public university because a professor's theories are not confined to or contained within the four walls of the institution of higher education. Ideas are easily portable and transmittable. Academics carry their theories and inquiries with them wherever they may travel, thinking and talking about these concepts in a variety of settings. Theories are the stock in trade of professors, the basis upon which they earn their livelihood. Teachers are often asked to speak about their theoretical perspectives and research in settings outside the university. Not only are these opportunities for professors to explain their viewpoints but they also afford academics with the chance to receive comments, questions, and challenges to their theories. Professors learn from others and, quite frequently, factor in those additional queries, critiques, and remarks as they refine their thinking in their particular area of expertise.

Without wide-ranging, free-flowing academic speech, professors will tend to stifle and suppress new ideas, limit or eliminate challenges to existing theories, and confine or constrict knowledge as though it can be frozen in time. Academics will become overly cautious—even timid—in their theorizing and their commenting upon their ideas. In turn, higher education and, ultimately, society will suffer because the advancement of knowledge and the resolution of societal problems will be hindered and, then, halted.
If the concepts of democracy, free speech, academic freedom, and higher education are to have meaning with regard to the academic speech of public university professors, then these terms must have a bite rather than just a bark. At the same time, they must be balanced without weighting one at the expense of the others. If, as a society, we seek a citizenry of critical thinkers who can participate actively and effectively in the democratic process, then we must allow – even encourage – the rough and tumble of the intellectual marketplace that flows from the minds and theories of academics, and is enhanced by a variety of diverse perspectives. The pluralistic public university is (and must continue to be) a mirror of our larger society. In the institutional setting where multiple ideas are in play, there will inevitably be conflicts. These clashes of ideas, ideologies, and values are part and parcel of the intellectual marketplace of learning, teaching, and experimenting. Thus, academic speech must be encouraged by protecting rather than curtailing it.

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239 By affording protection to academic speech, the scales are more evenly balanced between the professor and the university. Once a professor demonstrates that her speech is directly related to her academic expertise, the university will have to rebut this presumption through credible evidence. Each side is obligated to produce relevant proof. In turn, this process can assist both sides in resolving the conflict by reviewing the documents and witnesses that have been produced. It becomes a more transparent process.
