MENDING THE FEDERAL CIRCUIT SPLIT ON THE FIRST AMENDMENT RIGHT OF PUBLIC UNIVERSITY PROFESSORS TO ASSIGN GRADES

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The ability to assign grades to students is an element of a professor's academic freedom that has been litigated in several circuits with different results. In this Note, Evelyn Sung explores the differences in the methods of analysis employed by the courts to determine the level of constitutional protection appropriately accorded to professors and the extent to which college administrators may exact alterations in professors' grading policies. Sung evaluates education theory and conducts historical analysis to determine that grade assignment qualifies as symbolic speech under current caselaw. Accordingly, the interest of professors to assign grades must be balanced against the interest of college administrators to promote efficiency in the services they provide, such as the thorough preparation and evaluation of graduating students. The maintenance of standardized grading policies, Sung argues, is at the core of the mission of the public unversity. A college administrator's interest in making grades consistent and meaningful must be balanced delicately with a professor's First Amendment right to assign grades.

INTRODUCTION

On January 16, 2002, Temple University terminated the employment of Martin Eisen, age 69, who had been working at the university for nearly 35 years.[1] The decision was made in response to students' complaints about his grading practices.[2] After his termination, Eisen filed a complaint in the Eastern District of Pennsylvania alleging, among other things, that his termination violated his First Amendment right to freedom of expression.[3]

This Note addresses a string of federal cases which, like *Eisen*, are based on the claim that a professor possesses a First Amendment right

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1 Eisen v. Temple Univ., No. Civ.A. 01-4165, 2002 WL 1565331 (E.D. Pa. July 9, 2002) (denying defendants' motion for summary judgment on First Amendment claim). See also Michael Rubinkam, Temple Fires Tenured Professor, AP Online, Jan. 31, 2002, 2002 WL 11686037 (describing *Eisen* case).

2 Rubinkam, supra note 1.

3 *Eisen*, 2002 WL 1565331, at *1.

to assign grades.[4] In such cases, the State[5] is acting as the employer, raising the concern that it is overstepping constitutional boundaries.[6]

The Courts of Appeals in the First, Third, Fifth, Sixth, and Seventh Circuits all have addressed similar First Amendment grade cases and presented divergent outcomes and reasoning.[7] This Note clarifies the doctrine in this area of law by assessing the approaches of the several circuits and outlining how current Supreme Court doctrine can be adapted to such academic cases.

In recent years, it has become particularly important to achieve clarity on the issues of grade assignment and professorial authority. Public university administrators have been compelled to address campus grading policies in response to media attention on perceived grade inflation.[8] In addition, students have started turning to courts

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[4] See, e.g., Brown v. Armenti, 247 F.3d 69 (3d Cir. 2001) (holding First Amendment right to expression regarding grade assignment was vested in university, not individual professor); Keen v. Penson, 970 F.2d 252 (7th Cir. 1992) (holding First Amendment did not shield professor from sanctions for failure to apologize and change student's unfair grade); Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989) (holding university officials may not compel individual professor to change student's grade, because assignment of grade is protected speech); Lovelace v. Southeastern Mass. Univ., 793 F.2d 419 (1st Cir. 1986) (holding First Amendment does not protect individual professor's insubordination with respect to university's grading policies); Hillis v. Stephen F. Austin State Univ., 665 F.2d 547 (5th Cir. 1982) (holding First Amendment does not protect nontenured teachers from being fired for refusal to assign particular grade). See also Edgar Dyer, The Authority to Assign Grades in Public Higher Education: A "Third Essential Freedom" for Instructors or Institutions?, 162 Educ. L. Rep. 645 (2002) (reviewing circuit split and arguing for greater process before overriding teacher's grade assignments).

[5] This Note uses the capitalized term "State" to describe any government entity, including the governments of cities and states.

[6] See Connick v. Myers, 461 U.S. 138, 142 (1983) ("For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."). The authority of private administrations is restricted largely through contractual and normative controls rather than legal ones. See Hudgens v. NLRB, 424 U.S. 507, 513 (1976) ("[W]hile statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself."); Note, Developments in the Law: Academic Freedom, 81 Harv. L. Rev. 1045, 1054 (1968) (observing that courts "consistently deferred to the decision of the private institution on virtually all matters of curriculum policy"). The question of whether private universities also should be afforded academic freedom protections is an important one, but beyond the scope of this Note.

[7] See supra note 4 and accompanying text.

[8] See Karen W. Arenson, At CUNY, A Debate on Grade Inflation, N.Y. Times, July 28, 1997, at B3 (describing controversy over grade inflation at City University of New York); Patrick Healy, Harvard's Quiet Secret: Rampant Grade Inflation, The Boston Globe, Oct. 7, 2001, at A1 (assessing grade inflation at Harvard University); Arlene Levinson, Universities Address Grade Creep, AP Online, Dec. 2, 2002, 2002 WL 11686981 (describing response of U.S. universities to perceived grade inflation); Julie Westfall, U. Illinois Struggles with Grade Inflation, U-Wire, Dec. 8, 2000 (discussing University of Illinois faculty response to perceived grade inflation), LEXIS, University Wire File.

for protection from arbitrary and capricious grading, with at least some success.[9] As administrators respond to these pressures by tightening their grading policies, professors also may turn to the courts to resolve their disputes.[10]

Cases arising from a professor's termination due to his grading also could become more frequent as a result of the expansion of the freedom of speech rights of state employees. In the first half of the twentieth century, the Supreme Court stood by the classic dogma that "a public employee had no right to object to conditions placed upon the terms of employment–including those which restricted the exercise of constitutional rights."[11] However, since 1967, the Court has held that "a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."[12] The boundaries of this doctrine in the educational context, however, are still in dispute, partly because the Supreme Court has suggested, without much explanation, that professors at public universities should be afforded special protections under the First Amendment.[13]

The current literature on this subject, including stances taken by the American Association of University Professors, is of little help in clarifying the Court's approach since it generally discusses the normative aspects of grading cases.[14] The legal precedents and principles are

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[9] See Thomas A. Schweitzer, "Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?, 41 Am. U. L. Rev. 267, 282-88, 338-60 (1992).

[10] See supra note 4 (listing recent federal appellate cases on this issue). See also Yohn v. Univ. of Mich., No. 01-1734, 2002 WL 1378212 (6th Cir. June 24, 2002) (affirming district court's dismissal of case); Eisen v. Temple Univ., No. Civ.A. 01-4165, 2002 WL 1565331 (E.D. Pa. July 9, 2002) (denying defendant's motion for summary judgment on First Amendment claim).

[11] *Connick*, 461 U.S. at 143.

[12] Id. at 142 (citing series of cases beginning with *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967)).

[13] See generally Richard H. Hiers, Academic Freedom in Public Colleges and Universities: O Say, Does That Star-Spangled First Amendment Banner Yet Wave?, 40 Wayne L. Rev. 1 (1993) (providing extensive explanation of academic freedom precedents and areas of doctrinal ambiguity); see also Ailsa W. Chang, Note, Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond *Pickering* and *Connick*, 53 Stan. L. Rev. 915 (2001) (arguing for modified academic freedom paradigm that would grant professors more managerial power under First Amendment).

[14] See, e.g., Dyer, supra note 4, at 657, which concludes:

> Any resulting change in grades should be performed by faculty authorization only, after review by a prescribed process adopted by the faculty through established institutional procedures. The institutions thus retain their vested "third essential freedom" by being the initiators and guardians of such a concomitant policy. The faculty collectively retain the authority to assign grades. Most importantly, however, students receive the benefit of a mutually-applied remedy for the arbitrary or capricious actions of unreasonable academicians.

used merely as an introduction to policy arguments behind giving professors the ultimate responsibility in grading. In contrast, this Note deals with the "real world" consequences of granting a right to assign grades, but also provides a legal grounding to support such a right.

This Note articulates the split among the federal circuits over possible First Amendment protections for grade assignment. Reflecting the complexity of these cases that involve potential academic freedoms, symbolic speech, and State employees, the circuits are fractured in their analyses, even if not in their outcomes. While several circuits' decisions have the same practical effect on a professor's right to grade, the reasoning in each case differs, which may cause confusion in subsequent lower court cases with slightly different fact patterns. Formulating a consistent approach to assigning rights to grade will also aid in avoiding further professor-university conflict. This Note will not simply side with one circuit's holding, but instead will clarify the various arguments of the circuits and emerge with a coherent scheme for approaching grading cases.

Part I outlines the split among the circuits. Part II argues that the assignment of grades constitutes symbolic speech. It then discusses how academic freedom concerns should inform the First Amendment analysis and why the test generally used for speech by public employees is appropriate for use in grading cases. This test balances the interest of the professor against the interest of the government. Part III applies this test to various grading scenarios to show the practical effects of this approach.

Ultimately, this Note concludes that although grades constitute speech possessing some First Amendment protections, an individual professor's right to assign grades is limited by the State's interest in maintaining efficiency and fairness in its administration. Because the professor engaging in this speech acts largely as an employee, the State may regulate grading to the extent necessary to accomplish its goals in running an academic institution.

I
THE FEDERAL CIRCUIT SPLIT

The First, Third, Fifth, Sixth, and Seventh Circuits have used a myriad of approaches to decide cases pertaining to professors' rights

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See also Donna R. Euben, Am. Ass'n of Univ. Professors, Who Grades Students? Some Legal Cases, Some Best Practices (Nov. 2001) (detailing case law and giving practical suggestions to give faculty more power in grading), at http://www.aaup.org/Legal/info%20outlines/leggrad.htm (last visited Aug. 29, 2003).

to assign grades. Three major questions over which the courts have diverged include: 1) the threshold question of whether grading constitutes "speech" protected by the First Amendment; 2) if it does, whether professors are accorded protection from dismissal for refusal to change a grade; and 3) how to fit the notion of academic freedom into their inquiry.

A. Grades as Speech

The First and Fifth Circuits limit their analysis to the first question, holding that grading, and the refusal to change a grade, constitutes action, not speech, which the First Amendment does not protect.[15] In each of these cases, the refusal to change a grade was just another example of behavior by the professors warranting dismissal or nonrenewal of contract, which might explain the courts' dismissive attitude of the speech claims.[16] However, the First Circuit, interpreting an earlier decision from the Fifth Circuit, also argued that "two distinct matters were potentially at issue" in grading cases: "1) whether plaintiff's *speech* in protesting the directive was protected and 2) whether plaintiff's *action* in disobeying the directive [to change a grade] was protected."[17] It noted a "speech/action distinction" and suggested that "the insubordination . . . would not be protected."[18] The professor's refusal to assign a grade was thus characterized as an act without speech value.

In contrast, the Sixth Circuit characterized the assignment of grades as a "communicative act" which "sends a message to the recipient."[19] It looked directly at the communicative value of grades, ultimately deciding that "[t]he message communicated by the letter grade 'A' is virtually indistinguishable from the message communicated by a formal written evaluation indicating 'excellent work.' Both communi-

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[15] See Lovelace v. Southeastern Mass. Univ., 793 F.2d 419, 425 (1st Cir. 1986) (distinguishing between speech in protesting grade change from act of disobeying administration's order); Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 550, 552 (5th Cir. 1982) (distinguishing between "plain insubordination" and "first amendment-protected criticism" and holding that incident involving professor's dispute with administration on grades was merely example of his general lack of cooperation). See also Vance v. Bd. of Supervisors of S. Univ., No. Civ.A. 96-2196, 1996 WL 580905 (E.D. La. Oct. 9, 1996) (finding that "the refusal to assign a certain grade at the direction of university administration d[oes] *not* constitute a 'teaching method' included in the concept of academic freedom, and rooted in the First Amendment").

[16] See, e.g., *Hillis*, 665 F.2d at 551-52 (describing instances in which professor verbally abused staff members, refused to follow procedures for purchases, and persisted in attending class from which he had been transferred).

[17] *Lovelace,* 793 F.2d at 426.

[18] Id.

[19] Parate v. Isibor, 868 F.2d 821, 827 (6th Cir. 1989).

cative acts represent symbols that transmit a unique message."[20] The court did not elaborate further on why grades constituted speech.

This Note argues that grades possess communicative value requiring general First Amendment protection.[21]

B. Academic Freedom

Further confusing the issue of whether grades are speech is a series of Supreme Court decisions involving the so-called "academic freedom" rights of professors and/or universities. Since the 1950s, the Supreme Court has discussed in dicta the existence of a special "academic freedom" under the First Amendment.[22] It explicitly described "four essential" freedoms that a university possesses, namely the right to "determine for itself on academic grounds who may teach, what may be taught, *how it shall be taught*, and who may be admitted to study."[23] Later Supreme Court cases described academic freedom as "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[24] As explained by Justice Brennan in his dissent in *Minnesota State Board v. Knight*, this special invocation of the First Amendment arises because the classroom has a unique role of "protecting the free exchange of ideas within our schools," which is of "profound importance in promoting an open society."[25] Thus, Brennan argues that the Court should recognize "the First Amendment freedom to explore novel or controversial ideas in the classroom."[26]

Unfortunately, the Supreme Court has not defined clearly what rights are invoked by the academic freedom doctrine. The doctrine suffers from the fact that it derives its authority from dicta of cases

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[20] Id.

[21] See infra Part II.A.

[22] See Sweezy v. New Hampshire, 354 U.S. 234 (1957) (finding First and Fourteenth Amendment violations when state Attorney General questioned university professors about their ties to "subversive organizations").

[23] Id. at 263 (emphasis added) (quoting The Open Universities in South Africa, at 10-12 (statement of a conference of senior scholars from University of Cape Town and University of Witwatersrand, including A. V. D. S. Centlivres and Richard Feetham, as Chancellors of respective universities)).

[24] Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967) (holding New York statutory provisions that make seditious speech grounds for removal of public school employees unconstitutionally vague and in violation of First Amendment).

[25] Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 296 (1984) (Brennan, J., dissenting) (action by community college faculty members challenging constitutionality of Minnesota statute that required public employers to engage in official exchanges of views only with their professional employees' exclusive representatives).

[26] Id. at 296-97.

which were ultimately decided on more established legal grounds.[27] As the Fifth Circuit in *Hillis* noted, "'Academic freedom is an amorphous field about which a great deal has been said in esoteric law journal articles and academic publications, but little determined in explicit, concrete judicial opinions.' . . . [I]ts perimeters are ill-defined and the case law defining it is inconsistent."[28] In particular, it is unclear what speech is protected under the academic freedom doctrine and whether academic freedom vests in the individual professor or only the university. It could be argued that grades are protected as speech under this formulation as well.

In the grading cases, almost all of the circuits referred to academic freedom. However, they diverged in their use of the idea, reflecting the confusion in the doctrine itself. For example, the Fifth Circuit acknowledged that academic freedom's "roots have been found in the first amendment insofar as it protects against infringements on a teacher's freedom concerning classroom content and method."[29] However, they then rejected, without elaboration, the claim that the professor's refusal to assign a grade to his student constituted a "teaching method."[30]

In contrast, the Third Circuit characterized grading as "pedagogic" and therefore "subsumed under the university's freedom to determine how a course is to be taught."[31] However, it held that the right to assign grades, rooted in the right to determine pedagogy, does not vest in the professor, but in the university—that is, in the State.[32] According to the Third Circuit, grades do count as speech, but in making such speech, "the university [is] the speaker and the professor [is] the agent of the university for First Amendment purposes."[33]

This Note clarifies how the academic freedom doctrine ought to be applied in the grading inquiry, mainly arguing for its use as a factor

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27 See Chang, supra note 13, at 928-29 (listing leading cases decided on narrower grounds).

28 Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 553 (5th Cir. 1982) (citation omitted).

29 Id.

30 Id. See also Vance v. Bd. of Supervisors of S. Univ., No. Civ.A.96-2196, 1996 WL 580905 at *3 (E.D. La. Oct. 9, 1996) ("[T]he refusal to assign a certain grade at the direction of university administration d[oes] *not* constitute a 'teaching method' included in the concept of academic freedom, and rooted in the First Amendment.").

31 Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001).

32 "When the University determines the content of the education it provides, it is the University speaking. . . . [And] the University's own speech . . . is controlled by different principles." Id. at 74-75 (quoting Rosenberger v. Univ. of Va., 515 U.S. 819, 833-34 (1995)).

33 Id. at 74.

in the balancing test, discussed below, that is used in public employee speech cases.

C. The Pickering *Test*

Those circuits that characterized grades as symbolic speech have had to make a further determination of whether the professor, as an individual, possessed First Amendment protections in such speech. In *Keen v. Penson*, the Seventh Circuit applied a test used in public employment cases and described in the Supreme Court's opinion in *Pickering v. Board of Education*.[34] The "*Pickering* test" balances "the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."[35] The Seventh Circuit's analysis compared the professor's speech interests in assigning grades against "the University's interest in ensuring that its students receive a fair grade and are not subject to demeaning, insulting, and inappropriate comments," which was part of the University's responsibilities to third parties in serving its public function.[36] The Court found that the "First Amendment does not shield [the professor's] conduct from sanctions," analogizing the situation to a university's right to punish a professor who failed a student for refusing sexual advances.[37]

Without explicitly saying so, the Sixth Circuit performed a similar balancing test, but came to a slightly different conclusion. In *Parate v. Isibor*, it held, "Although the individual professor does not escape the reasonable review of university officials in the assignment of grades, she should remain free to decide, according to her own professional judgment, what grades to assign and what grades not to assign."[38] In this case, the university had attempted to force the professor to sign a memorandum changing the student's grade.[39] Having decided that grading qualifies as speech,[40] the court of appeals barred the univer-

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[34] Keen v. Penson, 970 F.2d 252, 257-58 (7th Cir. 1992) (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[35] Id. at 258 (balancing interests to show that professor would have no rights to grade even if grading were considered speech deserving First Amendment protection) (internal citations and quotations omitted).

[36] Id.

[37] Id.; see also Wozniak v. Conry, 236 F.3d 888, 891 (7th Cir. 2001) ("[B]oth a university and its students have powerful interests in the comparability of grades across sections, for grades are a university's stock in trade and class rank may be vital to a student's future."), cert. denied, 533 U.S. 903 (2001).

[38] 868 F.2d at 828.

[39] Id. at 824.

[40] See supra notes 19-20 and accompanying text.

sity from compelling the professor's speech, concluding that the university always had the ability to change the grade administratively.[41] While the Sixth Circuit did not explicitly state that it was balancing interests, its compromise solution did just that. By giving the professor a right to assign grades but granting the administration the right to review and administratively change such grades, the court balanced the professor's speech interests against the university's administrative interests.

Some commentators have suggested that the *Pickering* test offers inadequate protection for the academic freedom of teachers.[42] This Note argues that the Pickering test has the capacity to take into account academic freedom and should be used to determine the degree to which a school may regulate a professor's assignment of grades.[43]

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[41] *Parate*, 868 F.2d at 830.

[42] See Chang, supra note 13, at 937-38 (arguing that balancing test inadequately takes into account professors' managerial roles). Also, see generally Hiers, supra note 13 (providing extensive history of narrowing of *Pickering* test and subsequent diminishment of professors' academic freedom rights).

[43] Several circuits, in non-grading cases, have applied an alternative test to determine the First Amendment protections for teachers' in-class speech that relies upon *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988). In that case, the Supreme Court held that school administrations can exercise editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. Id. at 273. Some lower courts have applied this test to regulate teachers' in-class speech, since *Connick*, *Pickering*, and *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 273 (1977), all involved speech outside of the classroom. See generally William G. Buss, Academic Freedom and Freedom of Speech: Communicating the Curriculum, 2 J. Gender Race & Just. 213, 218, 224-30 (1999) (distinguishing *Pickering* from *Hazelwood* by arguing teacher's interest in communicating curriculum in classroom has substantial constitutional protection); Karen C. Daly, Balancing Act: Teachers' Classroom Speech and the First Amendment, 30 J.L. & Educ. 1 (2001) (outlining circuit split between *Hazelwood* and *Pickering* tests); Stacy E. Smith, Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities, 59 Wash. & Lee L. Rev. 299 (2002) (arguing Fourth Circuit misapplied *Pickering-Connick* balancing test in *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000)). None of the circuits that characterized grades as speech used the *Hazelwood* test. A comparison of the two tests is outside the scope of this Note. However, this Note applies the *Pickering* test for several reasons. First, while the in-class/out-of-class distinction is real, the *Pickering* test already accounts for the context of the speech. Second, the rationales justifying control of secondary school students' speech, including the inculcation of "shared social goals," only apply indirectly to university professors. Finally, the *Pickering* test best suits the adult status of the professor as well as the employment relationship between the professor and university. This relationship often involves a proxy role for the professor and allows for greater freedom of choice by both parties than does the relationship between a student and his school.

II
DETERMINING THE APPROPRIATE APPROACH

As Part I explained, the circuits are extremely scattered in their approaches to the First Amendment right to grade. This Part offers a clearly defined approach to the grading cases. After Section A analyzes the speech value of grades, Section B addresses the academic freedom doctrine and its incorporation into both the threshold definition of grades as speech and into the public employment balancing test.

A. Grades Are Symbolic Speech

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech."[44] In order to be subject to First Amendment analysis, grades must first qualify as "speech." Contrary to the holdings of several circuits on this matter, which distinguished acts from speech,[45] the Supreme Court has acknowledged that symbols and conduct may constitute speech protected under the First Amendment. For example, the Supreme Court has recognized the wearing of black armbands by students in a silent war protest,[46] the wearing of a jacket labeled "Fuck the Draft,"[47] and the display of a flag with a peace symbol attached[48] as forms of communication that potentially deserve protection under the Constitution. It has held that "[s]ymbolism is a primitive but effective way of communicating ideas."[49]

However, in *Spence v. Washington*, the Court declined to accept that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,"[50] and required an inquiry into whether a symbol is "sufficiently imbued with elements of communication."[51] Under the

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[44] U.S. Const. amend. I.

[45] See supra notes 15-20 and accompanying text.

[46] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (finding that wearing black armbands in school conveyed message about Vietnam War).

[47] Cohen v. California, 403 U.S. 15, 18 (1971) ("Thus, we deal here with a conviction resting solely upon 'speech,' not upon any separately identifiable conduct . . . which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself.").

[48] Spence v. Washington, 418 U.S. 405, 411 (1974) ("We are confronted then with a case of prosecution for the expression of an idea through activity.").

[49] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

[50] *Spence*, 418 U.S. at 409 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

[51] Id. See also Joshua Waldman, Note, Symbolic Speech and Social Meaning, 97 Colum. L. Rev. 1844, 1851-62 (1997) (arguing that subjective intent prong is not relevant to symbolic speech inquiry, which turns instead on prongs of Spence test—"context" and "likelihood of audience understanding").

test developed in *Spence*, a court may grant protection to "the expression of an idea through activity"[52] after looking at: 1) the intent to convey a particularized message; 2) the likelihood that the message would be understood by those who viewed it; and 3) the context of the conduct.[53]

The last two factors of the *Spence* test, both involving the reception of the communication by its audience, are not dispositive. That is, the Court has explicitly rejected the proposition that the expression of a "narrow, succinctly articulable message" is a condition of constitutional protection.[54] A message need not be perfectly understood to count as speech. "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their [sic] themes to isolate an exact message as the exclusive subject matter of the speech."[55]

Grades fulfill the requirements of the *Spence* test and thus qualify as speech deserving of First Amendment protection. First, from the perspective of the educator, there is a clear and actual intent to convey a particularized message when he assigns grades. A recent publication by the Association for Supervision and Curriculum Development declared, "The primary goal of grading and reporting is *communication*. Regardless of the format, its purpose is to provide high-quality information to interested persons in a form they can understand and use effectively."[56]

The history of grading systems supports the assertion that grades are used to communicate teachers' evaluative information. It was not until 1783 that grades were first used in this country, at Yale College.[57] At most schools before 1850, grades were not used, since the norm was a one-room schoolhouse where students were grouped by age and background.[58] Most students did not continue their education beyond

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[52] *Spence*, 418 U.S. at 411.

[53] See Parate v. Isibor, 868 F.2d 821, 827-28 (6th Cir. 1989); Waldman, supra note 51, at 1845.

[54] Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group, 515 U.S. 557, 569 (1995).

[55] Id. at 569-70.

[56] Thomas R. Guskey, Introduction to 1996 ASCD Yearbook: Communicating Student Learning 1, 3 (Thomas R. Guskey ed., 1996).

[57] Yale's first grading system used the titles "optime" (honor men), "second optime" (pass men), "inferiores" (charity passes), and "pejores" (unmentionables) to indicate a student's level of achievement. See James O. Hammons & Janice R. Barnsley, Everything You Need to Know About Developing a Grading Plan for Your Course (Well, Almost), 3 J. on Excellence in C. Teaching 51, 52 (1992), available at http://ject.lib.muohio.edu/articles/pdf-to-text.php?article=76 (requires registration); Grading and Marking in American Schools: Two Centuries of Debate 7 (John A. Laska & Tina Juarez eds., 1992).

[58] Thomas R. Guskey, "Reporting on Student Learning: Lessons from the Past—Prescriptions for the Future," in 1996 ASCD Yearbook: Communicating Student Learning 14 (Thomas R. Guskey ed., 1996).

the elementary level.[59] As the number of students increased, teachers began to use progress evaluations of students' work. Such evaluations, however, contained little more than a list of skills that the student had mastered, the mastery of which was required in order to advance to the next level.[60]

After the passage of compulsory attendance laws at the elementary level, and as more students began to enter high school in the late 1800s, schools created more specialized courses and acquired more diverse student populations. Thus the need for a systematized form of evaluation arose. For example, high school teachers assigned percentages and other similar marks to comment on students' accomplishments in diverse subjects.[61] Grading, then, from its inception, was intended to substitute for written evaluations.

Since then, as teachers decide between varying methods of evaluating students' achievement, a fierce debate has developed over how and whether grades should be used. The Educational Resources Information Center (ERIC) System contains over 4000 references to journal articles and reports published since 1960 on the topic of grading.[62] Because of the many ideological choices teachers must make in grading, grades have been described as "unidimensional symbols into which complex and multidimensional judgments have been compressed."[63] Illustrating the complexity of the issues are practical texts for teachers that define a grade as "the alphabetic or numeric symbol representing the end product of an evaluation process used in a specific course, taught by a particular individual, during a specific semester."[64] That is, a host of factors—including attendance, class participation, timely submission of assignments, completion of extra credit activities, and scores on quizzes, tests, papers, and projects—may be used by faculty in "rational yet idiosyncratic manners."[65]

Thus, the grade fulfills the first part of the *Spence* test, by sending a particularized message to the student and third parties who see the grade. Moreover, while the institution may play a role in this communication, it is the professor who ultimately chooses the particulars of

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[59] Id.

[60] Id.

[61] Id. ("While elementary teachers continued to use written descriptions to document student learning, high school teachers began to employ percentages and other similar markings to certify students' accomplishments in different subject areas.").

[62] Id. at 16.

[63] Ohmer Milton et al., Making Sense of College Grades xiii (1986).

[64] James Eison, The Meaning of College Grades, 1 POD Network Essays on Teaching Excellence, No. 6 (1989-1990), at http://www.ulib.iupui.edu/teaching_excellence/vol1/v1n6.htm (last visited Aug. 29, 2003). See also Guskey, supra note 56, at 3.

[65] Eison, supra note 64.

this message. As educational theorist James Eison observed, "Though institutional grading systems typically dictate the particular symbols used (e.g., letter grades, letter grades with pluses and minuses, numbers), individual faculty are responsible for creating the evaluation process used in the courses they teach."[66] The teacher chooses a particular method or combination of methods to evaluate a student's progress.

For example, a teacher may choose summative evaluations, occurring at the end of a program or course, or formative evaluations, designed to help the teacher mark a student's progress throughout the course.[67] She may rely on teacher-made tests, standardized tests, or portfolios of student work; she may choose norm-referenced tests, comparing a student's score to that of a group, or criterion-referenced tests, relating a student's score to a domain of knowledge.[68] She may choose between individual and group tests, verbal and nonverbal exams, and sample and sign tests.[69] These choices reveal the particular teaching ideologies and course goals that the individual teacher has. She then makes an evaluation of the student's performance and abilities, based on the information she obtains from these assessment methods, and condenses her unique perspective into a single symbolic grade. This grade is an expression of both her teaching ideology and personal evaluation of the student's work.

The assignment of grades also satisfies the second and third prongs of the *Spence* test. The likelihood is that the message relayed by the grade will be understood by those who view it, although the message may depend upon the context and the audience. In one recent study, researchers surveyed the attitudes of students, faculty, parents of students, and business recruiters toward grades and grading practices. All four groups believed that the most important current purpose of grading was to provide other educational institutions with information for making decisions about a student, with its use as a reward or warning to students as a popular second choice.[70] Moreover, all four groups expressed a desire that the most important purpose of grades "be that of communicating to students about learning."[71] That is, those surveyed acknowledged that the grades

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66 Id.

67 See Gilbert Sax, Principles of Educational and Psychological Measurement and Evaluation 14 (1997).

68 See id. at 19-21.

69 See id. at 21-24. Sample tests measure only "a partial aspect or sample of the student's total behavior," while sign tests are "used diagnostically to distinguish one group of individuals from another." Id. at 23.

70 See Milton, supra note 63, at 60-61.

71 Id. at 62.

communicated to third parties information about students, but also hoped that the grades communicated to students information about their progress in learning. In sum, not only do educators believe that they are *sending* a particularized message, but students, parents, and business recruiters see grades as a communication understood by other parties, either by the graduate and professional schools or by the students themselves.[72]

For example, by giving a student a particular grade, a professor sends the administration a signal that could be interpreted to mean that the student is qualified to advance to the next level of study or to receive a degree or license. This message may be sent to future employers or higher-level schools, who view the grade as shorthand for a letter of evaluation by the professor. The source of the grade also matters—those who are trying to interpret a grade may adjust their expectations depending on the school.[73] Grades may even end up relaying a more general message about whether a student should be protected from the military draft,[74] whether a student is capable of becoming a doctor,[75] or whether a candidate is considered qualified to serve as President of the United States.[76]

Depending on the context of the grade and any supplemental evaluations offered by the teacher, there may be some ambiguity as to exactly which dimensions of the student's performance the teacher has assessed. However, the Supreme Court does not require the speaker to isolate a "narrow, succinctly articulable message;"[77] a speaker must merely express an idea that has a *likelihood* of being understood. Although the exact meaning of the grade may not be interpreted perfectly, the likelihood is that the general message of the grade will be relayed.

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[72] But see id. at 10-12, which discusses studies demonstrating that individuals differ in their interpretations of grades in different contexts. For example, when several experienced faculty were asked what a "B" grade in their course meant, most teachers responded unequivocally and with straightforward replies. When the same faculty members were asked how they would interpret a grade given to their child by another teacher, most were uncertain or ambivalent.

[73] See Milton, supra note 63, at 88 (noting that almost half of business respondents believed reputation of college was of "great or crucial importance").

[74] See Healy, supra note 8 (describing roots of grade inflation, including pressure on professors to give good grades during Vietnam War draft).

[75] See Yohn v. Univ. of Mich., No. 01-1734, 2002 WL 1378212 (6th Cir. June 24, 2002) (administration changed grades given by tenured dental professor but did not terminate professor's employment).

[76] Mary Leonard, Real Smarts: Grades in College Are Not the Best Indicators of How Good a President a Candidate Might Be, Boston Globe, Nov. 7, 1999, at A1 (arguing good grades, counter to popular criticism, may not correlate with good presidential candidates).

[77] Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group, 515 U.S. 557, 569 (1995).

Given this analysis of grades as speech, it is unclear why some courts have chosen to characterize them otherwise. One possibility is that judges simply consider it judicial overreaching to protect the speech-value of something that, from their perspective, seems inconsequential. However, the Supreme Court has said, "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests."[78] If, instead of a university professor, a nonprofit group published grades and report cards on industrial companies based on their environmental effects,[79] or a watchdog organization graded election candidates based on their disclosure of the source of their special interest contributions,[80] the courts would have no trouble recognizing such grades as symbolic speech.

Moreover, from the perspective of educators, employers, and higher-level schools, grades have great social value. In many cases, diversity of viewpoints regarding student evaluations may be necessary to reduce the effects of one professor's favoritism or racism. Where grades determine whether a student may practice a certain profession, the freedom of professors to express their viewpoints is necessary to protect the integrity of these professions and the quality of any range of services, including health care and legal services.[81]

The fact that judges have failed to characterize grades as speech suggests that judges may underestimate or misconstrue the value of speech made by teachers in the university setting. And yet, the Supreme Court itself has observed the particular importance of maintaining freedom of speech in academic institutions.[82] As explained in the next Section, this special academic freedom right must be considered in any analysis of grades as speech.

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[78] Roth v. United States, 354 U.S. 476, 484 (1957) (explaining that obscenity, having no redeeming social importance, has limited protection under First Amendment).

[79] See, e.g., Press Release, Clean Computer Campaign, Most U.S. High-Tech Companies Fail to Earn Passing Grades on Environmental Report Card (Dec. 18, 2000), at http://www.svtc.org/media/releases/ccc_121800.htm (last visited Aug. 29, 2003).

[80] See, e.g., Press Release, Wisconsin Democracy Campaign, WDC Grades Officials on Disclosure (May 14, 2002), at http://www.wisdc.org/pr051402.html (last visited Aug. 29, 2003).

[81] See, e.g., Reply Brief for Appellant at 10, Yohn v. Univ. of Mich. (6th Cir. 2001) (No. 99-CV-75997) (on file with *New York University Law Review*).

[82] See supra notes 22-26 and accompanying text; infra Part II.B.

B. Academic Freedom Does Not Require a Separate Test

The above discussion demonstrates that the assignment of grades is not only speech, but a teaching method. Under the seminal academic freedom case, *Sweezy v. New Hampshire*, the Supreme Court stated that a university possesses, inter alia, the freedom to determine "how [class material] shall be taught."[83] If grades constitute a method of teaching class material, they ought to be protected under *Sweezy*. Although the characterization of the assignment of grades as a teaching method has been rejected by at least one circuit,[84] the above discussion, along with this Section, supports the idea that grading involves a host of ideologies about how to teach class material.[85]

In addition to the purely communicative value of grades, educational experts have observed other purposes of the assignment of grades that lend strength to the argument that grading is a teaching method. Grades are used: (a) to allow institutions to make distinctions among students according to their performance; (b) to motivate students; (c) to give limited information to instructors about the quality of their instruction; and (d) to meet a variety of institutional and administrative needs related to the functioning of the institution.[86] These all constitute choices in "how to teach," protected as one of *Sweezy*'s academic freedoms.

The matter of academic freedom, however, is not resolved simply by defining the assignment of grades as a teaching method. The pedagogy of universities may be protected against state interference, but it is unclear whether the academic freedom doctrine protects individual professors against interference by university administrations to the same extent, if at all. In their decisions on grading, the circuit courts approach academic freedom from different sides. Some suggest a doctrine separate from the *Pickering* test; others simply refer to the idea of academic freedom without any clear discussion of how it applies.[87]

The literature also presents differing views on the role of academic freedom in free speech claims by professors. More than one

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[83] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting The Open Universities in South Africa at 10-12 (statement of conference of senior scholars from University of Cape Town and University of Witwatersrand, including A. V. D. S. Centlivres and Richard Feetham, as Chancellors of their respective universities)).

[84] Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 553 (5th Cir. 1982) (deciding grades are not type of teaching method).

[85] See supra notes 65-71 and accompanying text.

[86] Ginny Mehlert et al., An Examination of Faculty Grading Practices and Beliefs About Grade Inflation, 11 J. on Excellence in C. Teaching 19, 19-20 (2002).

[87] See supra notes 29-33 and accompanying text.

commentator has suggested that a special academic freedom doctrine is necessary to resolve this issue, since the *Pickering* test does not take into account the special role of the professor. Ailsa Chang, for example, argues against the use of the *Pickering* test because "university professors are not employees in the traditional sense."[88] Since they "share a significant amount of managerial power at a university," Chang believes that "in many respects, professors are their own bosses."[89] Moreover, Chang argues that a "mechanistic" application of the *Pickering* test "cannot effectively take into account the university's institutional academic freedom interests as a public employer."[90] A simplistic *Pickering* approach might squeeze a multifaceted consideration of the academic freedom concerns of an educational institution into the narrow heading of "efficiency."[91] By explicitly considering academic freedom interests of the university, Chang's paradigm would provide more protection of the professor's individual rights.

Another commentator, Karen Daly, attacks the *Pickering* test from a different angle, arguing that the lower courts have construed "matters of public concern" far too narrowly, failing to take full account of the possibility that teachers may speak on matters of public concern in the classroom as well as outside of it.[92] She argues for a "new balance" that takes into account: 1) the need for classrooms to be free from indoctrination; 2) a student's right to hear; and 3) necessity for protection of a teacher when a university board is acting in response to student complaints.[93]

In response to these arguments, another commentator, Todd DeMitchell, argues that public education ought to "meet the needs of the public," not "provide a forum for educators."[94] He notes that "[t]eachers as employees are essentially hired to speak," and, moreover, to further the message chosen by the board.[95] If professors were paid to speak without restriction, it would amount to both a gov-

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88 Chang, supra note 13, at 937.

89 Id. at 938. See also NLRB v. Yeshiva Univ., 444 U.S. 672, 686-92 (holding that faculty at private university exercise managerial authority and therefore are excluded from category of employees entitled to benefits of collective bargaining under National Labor Relations Act).

90 Chang, supra note 13, at 938.

91 Id. at 938-39.

92 Daly, supra note 43, at 9-11.

93 Todd A. DeMitchell, A New Balance of In-Class Speech: No Longer Just a "Mouthpiece," 31 J.L. & Educ. 473, 481 (2002) (outlining and challenging Daly's approach). Ultimately, Daly argues for a judicial presumption that teachers' decisions are reasonably related to legitimate pedagogical concerns. See generally Daly, supra note 43, at 53-62.

94 DeMitchell, supra note 93, at 481.

95 Id. at 475.

ernment subsidy granting teachers a captive audience and state-supported power over the classroom. He contends that permitting a teacher to speak as she wishes undermines the government's own message that it sends via its curriculum. Further, DeMitchell observes that any academic freedom that a professor possesses "is derived from the employment relationship with an institution of higher education," since it never has been posited that academic freedom belongs to a person merely "trained to be an academic but not employed as a professor, nor is it asserted that a professor retains the right of academic freedom upon retirement or when she or he is between faculty positions."[96] Ultimately, DeMitchell finds, "Academic freedom does attach to individual professors, but it is subject to the primary right of the university. . . . [E]mployee speech, which harms, interferes with, or is in conflict with the institution's pursuit of academic freedom, must yield to the institution."[97]

Chang and Daly raise valid concerns about how the *Pickering* test should be applied; however, the creation of a rigid and separate standard to protect teachers would forsake the main value of a balancing test—its ability to account for speech in the context of an employment relationship. Unlike a static vesting of academic freedom rights in either the professor or the university, the *Pickering* test is attuned to the fluid roles of both the professor and university. It makes little sense to say that academic freedom belongs only to the professor or only to the university. A professor shifts among multiple roles, at times speaking in his own voice, whether in scholarship or through traveling lectures, and at other times speaking as an agent of the university. Likewise, the university has multiple interests derived from its roles as an employer, an institution of scholarship, and a provider of education to its students. If the university is acting in conjunction with the government, such as when a public university administrator is appointed by the state governor or city mayor, then it becomes indistinguishable from the State. In such cases, the academic freedom interest should weigh heavily on the professors' side.

Contrary to what the Third Circuit has suggested,[98] the Supreme Court has not taken the stance that academic freedom vests only in the teacher or only in the university. The Court often has come to conclusions that suggest a consideration of the roles given to both the professor and the university. For example, for purposes of excluding professors from the benefits of collective bargaining under the

[96] Todd A. DeMitchell, Academic Freedom—Whose Rights: The Professors or the Universities?, 168 Ed. L. Rep. 1, 17 (2002); see also id. at 16.

[97] Id. at 19.

[98] See supra notes 31-32.

National Labor Relations Act, the Supreme Court has characterized university faculty as managerial employees.[99] The Court noted that the managerial role has an inherently "dual nature"—professors both follow and create university policy.[100] In the academic freedom context, when professors argue for a right to be heard on matters of university policy, the Supreme Court has explicitly stated, "To be sure, there is a strong, if not universal or uniform, tradition of faculty participation in school governance, and there are numerous policy arguments to support such participation. But this Court has never recognized a constitutional right of faculty to participate in policymaking in academic institutions."[101] Thus, the Supreme Court has distinguished between a professor's right to express views on university policy and a government obligation to listen, the latter of which it has declined to require.[102]

Even while recognizing the university's role as employer, the Supreme Court has never explicitly supported the view that the right of academic freedom should vest only in the university. Although the language of the early academic freedom cases protects universities in particular against State intervention, there was no discussion of individual professor rights because the interests of the professors and the universities seeking to protect them were aligned. In these cases, the Attorney General questioned teachers about their "subversive" associations and beliefs.[103] The Court would have been inconsistent if it were to protect professors from interrogation by the Attorney Gen-

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99 NLRB v. Yeshiva Univ., 444 U.S. 672, 686.

100 Id. at 687 n.25 ("Managers by definition not only conform to established policies but also exercise their own judgment within the range of those policies.").

101 Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 287 (1984) (citations omitted).

102 Id. at 285. State employees "have no constitutional right as members of the public to a government audience for their policy views." Id. at 286.

103 See Wieman v. Updegraff, 344 U.S. 183, 184-86 (1952). In his concurrence, Justice Frankfurter stated,

> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for 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

eral, but then permit public university administrators themselves to question teachers about their Communist associations.[104] In the early academic freedom cases, it was appropriate for the Supreme Court to speak in terms of the university because the professor was equivalent to the university.

The State's interest as an employer and the professor's interest as an individual vary depending upon what role they play with respect to the speech in question, thus undermining the claim that academic freedom should vest solely in one party. The *Pickering* test appropriately balances "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[105] By examining the interests of the professor as a citizen, the *Pickering* test acknowledges that the professor does not "shed" her "constitutional rights to freedom of speech . . . at the schoolhouse gate."[106] And yet, by considering the government's interest as an employer, the *Pickering* test acknowledges that the professor's rights have limits when she enters the public workplace.

As DeMitchell suggested,[107] academic freedom should enter the calculus by aligning the objectives of free speech with the objectives of public universities. The test is the same. The academic freedom dicta should simply remind courts that because of the teacher's unique role as employee, much of what she says is a matter of public concern.[108] The dicta also highlight the fact that one major government purpose in running an academic institution is to encourage a diversity of viewpoints and foster democracy.[109]

> speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.

Id. at 196-97 (Frankfurter, J., concurring).

104 See Sweezy v. New Hampshire, 354 U.S. 234 (1957) (holding Attorney General's investigation of professor a violation of Fourteenth Amendment).

105 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). The *Pickering* standard has been applied as a three part test: First, the individual speech interest must outweigh the governmental interest in efficiency; second, the speech in controversy must have been a substantial motivating factor in the employer's decision to dismiss; and third, there must not be any other independent grounds upon which the employer may have dismissed the employee anyway. See *Pickering*, 391 U.S. at 569-71; Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284-87 (1977).

106 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1968); see also Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (recognizing teacher's liberty interest in teaching foreign language to students).

107 See supra notes 94-97 and accompanying text.

108 See supra notes 70-73, 77 and accompanying text.

109 See supra note 23 and accompanying text.

C. *The* Pickering *Test Applied to University Cases*

This Part clarifies how the *Pickering* test, developed in the context of public employment, can be sensitive to both academic freedom and administrative efficiency concerns.

First, the public employment cases weighing the professor's interest, as part of the *Pickering* test, have afforded varying protection based upon the content of the speech. In *Connick v. Myers*, the Supreme Court held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," the courts should not intervene in the employer's decision to regulate such speech.[110] To determine whether the employee's speech addresses a matter of public concern, the court must examine the "content, form, and context of a given statement, as revealed by the whole record."[111] The speech must relate to "a matter of political, social or other concern to the community."[112] Whether the speech is "inappropriate or controversial" is "irrelevant" to this determination, so that even a comment supporting (but not threatening) the assassination of the President would be considered a matter of public concern.[113] Speech is also especially protected on matters in which "free and open debate is vital to informed decision-making by the electorate."[114] The application of this rubric to teachers who are employed by the State protects teachers from suppression of their speech, but should vary the protection according to the content of such speech. The more political and individualized the speech, the less likely it is that the professor is speaking as a proxy and an employee of the State, and the less likely it is that harm is being inflicted on the academic freedom of the institution. The *Pickering* test thus can be sensitive to the shifting roles of the professor as either employee acting as proxy for the State or private individual speaking on matters of public concern.

Second, the *Pickering* test, as it has been applied to teachers, already includes a consideration of schools' multiple purposes.[115] The

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[110] Connick v. Myers, 461 U.S. 138, 147 (1983).

[111] Id. at 147-48.

[112] Id. at 146.

[113] Rankin v. McPherson, 483 U.S. 378, 387 (1987) (finding that constable's interest in firing one of his employees did not outweigh employee's First Amendment rights to make political comment about President).

[114] Pickering v. Bd. of Educ., 391 U.S. 563, 571-72 (1968).

[115] *Pickering* itself involved secondary school settings. Several commentators have argued for a separate standard for universities because they have a distinct mission. Professors at universities are "expected to engage in critical examination of the dominant paradigms in their fields," whereas elementary and secondary school teachers "are expected to be role models and authority figures." Mark G. Yudof, Three Faces of Aca-

Supreme Court—in addition to examining the content of the speech—also has examined factors such as: 1) whether the teacher's statement raises a "question of maintaining either discipline by immediate superior or harmony among coworkers"; 2) the nature of the teacher's relationship with the employer, and whether "personal loyalty and confidence are necessary to their proper functioning"; and 3) whether the statements were detrimental to the interests of the school, not just to the individual directly criticized.[116] It is not necessary for "an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."[117] The "manner, time and place" of the speech are relevant factors in deciding whether dismissal was necessary to prevent disruption of the efficient operation of public services.[118]

In weighing the government interest in pursuing its interests efficiently, the *Pickering* test gives necessary discretion to the university administration in the case of speech that serves as evidence of incompetence rather than as a distinct cause for dismissal.[119] Under the *Pickering* test, if a teacher makes a public statement that is "so without foundation as to call into question his fitness to perform his duties in the classroom[,] the statements would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal."[120] Likewise, if the board is capable of rebutting the teacher's errors by releasing a more accurate statement, then the disruptiveness of the speech is considered less severe.[121]

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demic Freedom, 32 Loy. L. Rev. 831, 836-37 (1987) (citations omitted). See also Chang, supra note 13, at 938-40 (arguing that *Pickering-Connick* standard should not apply to university cases because universities themselves have greater academic freedom interests than secondary schools). As suggested in the previous Section, these arguments are weak in light of the situations in which employees are expected to engage in critical examination. For example, there is an interest in promoting a diversity of viewpoints and independent reporting by research scientists and experts who make policy recommendations to the government, but these employees are not offered special protections.

116 *Pickering*, 391 U.S. at 569-71.

117 Connick v. Myers, 461 U.S. 138, 152 (1982).

118 Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415 n.4 (1979) (high school teacher dismissed for making complaints about desegregation order) (citations omitted).

119 *Pickering*, 391 U.S. at 573 n.5.

120 Id. Merely making "erroneous public statements" would not suffice to invoke this argument, absent any showing that the statements "impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." Id. at 572-73.

121 See id. at 572. However, if the "teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts," then the board would have a stronger showing of potential disruptiveness of the statement. Id.

In addition to these considerations already built into the *Pickering* test, the courts, in measuring the government interests in academic cases, also should account for academic freedom interests. One major role of the public educational system is that of "protecting the free exchange of ideas" and "promoting an open society."[122] If an administration's actions are in direct contravention of these academic goals, then its interest in suppressing the speech is greatly outweighed. In any use of the *Pickering* test, the government interest should be measured in the context of its goal of furthering academic freedom.

In conclusion, to determine whether the speech interest outweighs the efficiency interest, the courts should look at the content, form, and context of the speech to determine how strong a speech interest is possessed by the individual professor and to what extent the professor is speaking as an individual. Balanced against this interest is the government interest in the efficient administration of its goals. To weigh this interest, the court should look at how the speech affects relationships within the university, how the speech reflects upon the teacher's competence, and whether the university's suppression of speech undermines or furthers its interest in academic freedom.

III
FROM THEORY TO PRACTICE

How, then, would this clarified approach actually affect the rights of a professor in a grading case? In most cases, outcomes based upon this reasoning align with the results reached by most of the circuits. That is, in the typical case, the courts will not interfere with an administrative decision to fire a professor due to his grading practices.

Consider again the case of Martin Eisen, the professor fired by Temple University partly in response to students' complaints about his grading.[123] Eisen had a high failing rate, resulting in many student complaints.[124] The administration considered over 1200 pages of student testimony before making their decision.[125] The professor eventually settled his case against the university.[126] Under the approach set forth in this Note, he would not have any First Amendment claim against the university, though, as a tenured professor, he may have some contractual rights.

In Eisen's case, the government's interest outweighs his speech interest in the grades. Although it is true that by assigning grades, a

122 Minn. St. Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 296 (1984).
123 See supra notes 1-4 and accompanying text.
124 Fired Math Professor Settles Lawsuit, 25 Pa. L. Wkly., Sept. 30, 2002, at 9.
125 Id.
126 Id.

professor speaks on a matter of some public concern, there are other interests at stake besides the individual teacher's speech interest. All parties in an educational institution—students, teachers, and administrators—rely on grades to determine whether the student may continue to advance at his present school or gain admittance to another,[127] and employers often rely on professors' appraisals in making hiring decisions. A professor's choice to grade leniently, harshly, or not at all might be a product of his teaching, political, or philosophical ideology.[128] As an assessment of a student's performance, a student's grades could be considered a matter that requires "free and open debate,"[129] which is why a student will receive a range of grades from different professors in different courses. Under the *Pickering* test, therefore, the professor would have an individual interest requiring protection, provided there is no conflicting government interest.

However, grading is also an administrative task that a university requires of its professors in their roles as employees. With respect to academic freedom, the role of grades as a teaching method is not as important as the university's interest in maintaining consistency across the board.

Here, Temple University, facing complaints from students affected by Eisen's grading practices, assessed his entire grading scheme and deemed it inconsistent with the university's standards.[130] If a university wishes to maintain a consistent grading standard among its teachers and for the benefit of its students, it must have the authority to discipline individual teachers for failing to follow that standard. When a grade is arbitrary or capricious, the professor's speech is detrimental to the interests of the school, which has a duty to its students and a reputation to uphold.

Moreover, a grade is not just a communication from the professor to the student, but a communication from the university to the public. Temple University paid the professor in part to act as proxy for the university in assigning grades. Thus, Eisen acted more as an administrator than as an individual when he assigned grades. Furthermore, Eisen's grades were so arbitrary that the university administration called into question his "fitness to teach."[131] Based on its investiga-

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127 See supra notes 70-76 and accompanying text.

128 See supra notes 70-76 and accompanying text.

129 Pickering v. Bd. of Educ., 391 U.S. 563, 571-72 (1968).

130 In other cases, the university might have instituted stricter grade curves to address problems with grade inflation. See infra notes 150-163 and accompanying text.

131 See supra notes 124-126 and accompanying text.

tions, the administration had deemed Eisen to be "incompetent."[132] Because it was not an isolated case, but a pattern of harsh grading, the university could not simply correct the erroneous grades.[133] The interest of the university in maintaining fair grading standards outweighed the minor expressive interest of the professor.

However, the Sixth Circuit case of *Parate v. Isibor*[134] suggests at least one situation where the use of the *Pickering* test could result in greater protection for the professor. *Parate* involved a more direct and less necessary suppression of speech. In this case, the professor assigned a student the grade of "B," which corresponded with his numerical score of 86.4.[135] The student requested a grade change to an "A," presenting medical excuses for his poor performance.[136] The professor refused because he had "personally observed the student cheating on the final examination, confronted him, and refused to give him credit for plagiarized answers."[137] Furthermore, the professor also disbelieved the medical excuses, since the student "had previously offered medical excuses lacking in credibility" and the notes documenting the illness had been altered obviously.[138]

At this time, the head of the department, after hearing the professor's reasoning, agreed with his refusal to change the student's grade.[139] The student threatened to get his grade changed "through the Dean," and subsequently did so.[140] The Dean required the professor to sign a memorandum purporting to change the numerical score requirements for an "A" grade and requesting a grade change for the student.[141] Parate signed the memorandum, but communicated his opposition by attaching a note: "as per instructions from Dean and Department Head at meeting."[142] These memoranda were rejected by the administration and a second set of memoranda was sent to Parate, with instructions not to add the notation.[143] Parate responded by again signing the memoranda, but, in expression of fur-

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132 Rubinkam, supra note 1.

133 See supra notes 124-126 and accompanying text.

134 Parate v. Isibor, 868 F.2d 821, 824, 828 (6th Cir. 1989).

135 Under the professor's grading scheme, scores between 80 and 90 qualified as a "B" grade, while scores between 90 and 100 constituted an "A." The professor retained the discretion to bump up grades under special circumstances, as he did for one student who had to miss class due to serious legal matters. Id. at 823-24.

136 Id. at 824.

137 Id.

138 Id.

139 Id.

140 Id.

141 Id. at 824.

142 Id.

143 Id.

ther protest, with a different style of signature.[144] Parate was sent another set of the memoranda which he was ordered to sign normally or face sanctions; he finally signed this set to avoid losing his job.[145]

Each of the administration's acts was accompanied by threats to "mess up" Parate's annual evaluations; and his reluctance to sign the memoranda was punished by a series of "retaliatory acts," culminating in the non-renewal of his tenure-track appointment.[146]

In this case, the government interest in forcing the professor's hand was nominal compared to the professor's expressive interest in the grade. The professor already had agreed to the official administrative change in the grade, so his responsibility as an employee already had been satisfied. It was his speech as an individual, not as a proxy, that was unnecessarily suppressed. Instead of furthering the university's interest, forcing Parate's hand worked against the university's interest because it fostered hostility with a faculty member for no apparent purpose. This was not a case of imposing a government obligation to listen.[147] Rather, the government denied the professor the right to speak freely on a matter of public concern.

Unlike Eisen, Parate did not show incompetence in his grading practices or reluctance to grade according to the university's standards.[148] Nor was there a valid objection to content: Initially, Parate's grading choices had been approved by the head of the department. It was only after the student personally spoke to the Dean that Parate was harassed for his decision. Therefore, the administration should not have been permitted to fire Parate or subject him to retaliatory actions for his refusal to sign the affidavit.

Thus, the balancing test permits a nuanced approach. While in most cases the university administration may still regulate the assignment of grades, the recognition that grades have expressive value should afford the professor greater protection when a university stifles speech without a compelling interest. And where, as in *Parate*, the governmental action wholly undermines its interest in academic freedom, such actions should be limited to the extent necessary to protect the individual professor's interest. In *Parate*, the Sixth Circuit correctly restricted the university to changing a student's grade administratively, prohibiting it from using its power as employer to compel a professor to change personally a student's grade.

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144 Id.

145 Id.

146 Id.

147 Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 285 (1984).

148 See supra notes 113-125 and accompanying text.

CONCLUSION

This Note attempts to reconcile the current circuit split on the First Amendment right to assign grades by providing a methodological approach to the grading cases. It argues for the characterization of grades as speech and the use of the *Pickering* test in such cases. In order to protect adequately the professor's interest as an individual in speaking on a matter of public concern, i.e., the teacher's grade of a student's performance, the courts must take into account the academic freedom interest of the government. On most occasions, the university should be permitted to regulate grades to protect the interests of its students and standardize its grading policies, especially where a teacher's grades are so arbitrary and capricious as to call into question his fitness to teach. However, the university should take action in such a way that truly serves its purposes as an educational institution and suppresses minimally the individual professor's speech. Thus, where an administrative grade change would resolve a grading dispute, the university should not force the professor to affirm the change.

The importance of articulating an approach to grading cases has been heightened by recent public interest in grade policies at universities. The media has in the past few years increased their focus on possible grade inflation at many American universities.[149] The attention is due to concern about misallocation of public school funds, harm to students bringing claims, and professors' interests.

At public universities, grade policy goes to the core of their mission.[150] Community-funded institutions are responsible for providing students of all classes and races with free or inexpensive access to higher education.[151] Public schools are dedicated to providing the

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[149] See supra note 8 and accompanying text.

[150] Experts have disagreed about the extent to which grade inflation has affected public universities, since some statistics suggest the problem is limited to the most elite institutions. See Stephanie McSpirit & Kirk E. Jones, Grade Inflation Rates Among Different Ability Students, Controlling for Other Factors, Educ. Pol'y Analysis Archives No. 7-30 (1999), at http://epaa.asu.edu/epaa/v7n30.html (last visited Aug. 29, 2003).

[151] Grade inflation debates also may implicate race politics. At least one prominent professor, without any evidence backing his claim, has blamed affirmative action for grade inflation, claiming that professors feel compelled to lower standards to compensate for under-performing black students. Harvard President Disputes Remarks, Boston Globe, Feb. 16, 2001, at B2 (discussing Harvard professor and longtime critic of affirmative action Harvey C. Mansfield's unsupported comments suggesting enrollment of black students was to blame for grade inflation). Political leaders must confront the accusation that professors are inflating grades to advance non-white students who have not had the same quality of secondary education as wealthier, white students. Hugh B. Price, The Preparation Gap, 21 Educ. Wk. (Nov. 28, 2001), http://www.edweek.org/ew/newstory.cfm?slug=13price.h21 (noting that African-American, Latino and Native American children do not perform

community with an educated, productive citizenry. The existence of grade inflation suggests that universities are advancing under-prepared students, doing a disservice to both taxpayers and students.[152] Moreover, grade inflation may mask inadequacies in students' secondary school preparation. Since universities typically are more expensive to fund than high schools,[153] grade inflation suggests a misallocation of government funds. That is, money that should be used to prepare high school students for college is being applied instead to universities.

At the same time as they consider these public economic interests, public universities must consider the interests of students in establishing grade policies. Grades may influence if and where a student works after graduating,[154] whether a student will be accepted into the next level of education,[155] whether a student will be permitted

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"even close to 'on par' with their white and Asian American peers") (last visited Aug. 29, 2003). This concern is of special importance at public universities, which have the added goal of serving the entire community and whose state-subsidized prices may attract more individuals from poorer backgrounds. See McSpirit & Jones, supra note 150 (discussing moral pressure teachers feel to advance under-prepared students at public universities).

[152] Public pressures potentially contribute to grade inflation and certainly add to the political aspects of grade debates. Because of teachers' roles in society's socioeconomic mobility scheme, they may feel even more moral pressure to advance students who need the degree to get jobs or reach the next level of education. See McSpirit & Jones, supra note 150. Likewise, because a state's funding of public universities is sometimes linked to enrollment figures, administrators may push grade inflation, to cater to students who prefer to attend a school where they can attain good grades and therefore gain advantages in the job and graduate school markets. See J.E. Stone, Inflated Grades, Inflated Enrollment, and Inflated Budgets: An Analysis and Call for Review at the State Level, Educ. Pol'y Analysis Archives No. 3-11 (1995), at http://epaa.asu.edu/epaa/v3n11.html (last visited Aug. 29, 2003); see also Richard J. Barndt, Fiscal Policy Effects on Grade Inflation, at http://www.newfoundations.com/Policy/Barndt.html (last visited Aug. 29, 2003).

[153] The average government spending per student in the elementary and secondary schools was $6911 during the 1999-2000 school year. The state with the highest expenditure per student was New Jersey, at $10,337. See Nat'l Ctr. for Educ. Statistics, Statistics in Brief (May 2002), at http://nces.ed.gov/pubs2002/2002367.pdf (last visited Aug. 29, 2003). In 1995-1996, the average government contribution to educational and general expenditures of postsecondary degree-granting institutions was $10,583 per student. See Nat'l Ctr. for Educ. Statistics, 3 Dig. Educ. Statistics, tbl.341 (2001), at http://nces.ed.gov/pubs2002/digest2001/tables/dt341.asp (last visited Aug. 29, 2003). A 1998 study found that the U.S. spent $6043 per student on public and private elementary schools, $7764 on public and private secondary schools, and $19,802 per student on public and private postsecondary educational institutions. See Nat'l Ctr. for Educ. Statistics, The Condition of Education 108 (2002), at http://nces.ed.gov/pubs2002/2002025.pdf (last visited Aug. 29, 2003).

[154] See Schweitzer, supra note 9, at 269-70. But see Jack Katzanek, Grades Just One Piece of Job Pie: Many Employers Say They Want to Know Much More About College Grads Who Apply for Positions with Their Firms, Press-Enterprise, Feb. 18, 2001, at H1.

[155] See, e.g., The Princeton Review, The Admissions Index, at http://www.princetonreview.com/law/apply/articles/admission/admissionsindex.asp (last visited Aug. 29, 2003) (describing law school admissions "index number," comprised of undergraduate GPA and LSAT score, as "the first thing most law schools will look at when

to continue her studies at an institution, and whether, following dismissal at one school, she may enroll at another.[156] Consequently, students have sought legal recourse to dispute grades resulting in their academic dismissal or denial of diploma.[157] Although most students do not win grade challenges,[158] courts have, at times, protected students from arbitrary and capricious grading, usually under broad contract theories.[159]

If public university administrators wish to establish clear and fair grading practices, taking into account all of these policy considerations, they must have a clear idea of how much authority they can exercise in regulating professors' grading.[160] In their zeal to deliver on their promises, administrators will inevitably face opposition from professors.[161] Even in the best of circumstances, such as those at private universities like Harvard, where professors have enormous voting and bargaining power,[162] grade debates have garnered high profile publicity. At Harvard, a dispute over grade inflation between prominent Afro-American Studies Professor Cornel West and President Lawrence Summers partially contributed to West's departure from Harvard to teach at Princeton.[163] At public universities—where

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evaluating your application"); The Princeton Review, What Are Medical Schools Looking For?, at http://www.princetonreview.com/medical/research/articles/criteria/want.asp (last visited Aug. 29, 2003) ("In 2001, the average matriculated . . . medical student had an undergraduate science GPA of 3.54, a non-science GPA of 3.68, and an overall GPA of 3.60 . . . .").

156 Schweitzer, supra note 9, at 269-70. See Healy, supra note 8 (describing the roots of grade inflation, including pressure on professors to give good grades during Vietnam War draft); Julie Smyth, Recruiters Skeptical After Report: Grade Inflation at Harvard May Affect Job Prospects, Nat'l Post, Nov. 23, 2001, at A14.

157 See generally Schweitzer, supra note 9. See also Harold Weinberger & Andrew Shepherd, Judicial Review of Academic Student Evaluations: A Comment on *Susan "M" v. New York Law School* From Those Who Litigated It, 77 Educ. L. Rep. 1089 (1992); See generally Dina Lallo, Note, Student Challenges to Grades and Academic Dismissals: Are They Losing Battles?, 18 J.C. & U.L. 577 (1992).

158 Schweitzer, supra note 9, at 273 (noting that "student plaintiffs have lost the vast majority of reported cases in which they have challenged adverse academic evaluations").

159 See Schweitzer, supra note 9.

160 For an example of a public university administrator publicly discussing the need to control grade inflation, see Arenson, supra note 8 (describing conflict between Herman Badillo, Vice Chair of City University of New York's Board of Directors, and other administrators and educators regarding grade inflation at CUNY).

161 Columbia University, Stanford University, Dartmouth College, and Eastern Kentucky University are among the schools that have recently announced changes in allocation of honors and in how grades are reported. See supra note 8 and accompanying text.

162 See Arlene Levinson, Too Many A's: Universities Wrestle with Grade Inflation, Grand Forks Herald, Feb. 3, 2002, at A1 (explaining that changes to grading policy were voted on by faculty); Nicholas Wapshott, Harvard's Honours a Degree Harder, The Times (London), May 23, 2002, at 18 (detailing professors' push for changes in grade policy).

163 See Lynne Duke, Moving Target, Wash. Post, Aug. 11, 2002, at F1 (explaining that West left after President Lawrence Summers criticized him for, among other things,

professors have lower salaries and prestige, and fewer perks than do their peers at Ivy League institutions—professors face the additional obstacle of intrusive administrations, who are themselves subject to intense political pressures. In light of universities', professors', and students' competing rights and interests, the need for clear guiding principles with respect to grading policies is even more urgent in the public university context.

Despite this urgency, the courts have shown a reluctance to interfere with university administration decisions. Perhaps the courts are attempting to heed the Supreme Court's warning:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint .... Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.[164]

As this Conclusion suggests, outside of the legal context there are strong normative reasons why a university should give its professors leeway in grading. However, these policy arguments alone are not enough to permit the courts to second-guess universities in every employment decision. This Note grounds its conclusions in a First Amendment analysis and outlines the circumstances in which the court should step in to protect a professor against governmental suppression of speech. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools .... [T]he First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom."[165] Thus, where an administration's sanctions are only nominally in the government's interest, or in cases where academic freedom concerns are particularly strong *against* the government's interest in promoting a diversity of view-

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missing classes for political activities, producing music CD, publishing too little traditional scholarship, and being too generous with grades); see also Ronald Roach, The Great "Misunderstanding" at Harvard, Black Issues in Higher Education, Feb. 14, 2002, at 10 (discussing President Lawrence Summers's general hostility towards Afro-American Studies Department).

164 Epperson v. Arkansas, 393 U.S. 97, 104 (1968). However, courts increasingly have been called upon to intervene in university disputes. Universities have become more vulnerable to litigation in general, as evidenced by the dramatic surge in legal challenges to school administrative decisions in the latter part of the twentieth century. See generally Perry A. Zirkel & Sharon N. Richardson, The "Explosion" in Education Litigation, 53 Educ. L. Rep. 767 (1989) (discussing the increasing number of suits brought by students against teachers and other school administrators). See also Perry A. Zirkel, The Volume of Higher Education Litigation: An Update, 126 Educ. L. Rep. 21 (1998) (comparing trends in higher education litigation at state and federal level with similar trends in K-12 litigation).

165 *Epperson*, 393 U.S. at 104-05 (internal citation omitted).

points, the university should not have the power to curtail professor speech.