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Academic Freedom Under Attack: Replacing the *Pickering-Connick* Balancing Act

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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 . . . 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.[1]

I. ABSTRACT

Since its decisions in *Keyishian v. Board of Regents* and *Sweezy v. New Hampshire*, the United States Supreme Court has recognized both that university professors play a vital role in the development of our nation's youth and that they occupy a protected sphere under the First Amendment. However, those decisions provide very little guidance to lower courts in determining exactly how far the rights of professors should extend. As lower courts are left floundering, academic freedom is under attack in the United States to a degree reminiscent of the McCarthy era and its quest to root out communism. This Note seeks to remedy this problem, equipping courts with a context-based, workable standard that provides sufficient protection for those who guide and train our youth. In doing so, this Note provides a comprehensive analysis of the current state of the law as well as various approaches taken by courts throughout the United States and borrows the most pertinent elements of each to craft a comprehensive test that covers all aspects of a professor's speech.

II. INTRODUCTION

This article seeks to answer two age-old questions: does a public university professor have a constitutional right to academic freedom under

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

the First Amendment, even when that right runs contrary to the wishes of their employer?[2] And if said professors do retain such a right, how far and in what circumstances does this right extend? When it comes to answering these questions, the Supreme Court has equipped lower courts with very little guidance, and what guidance it has provided stems primarily from cases decided over fifty years ago.[3] I will seek to answer these questions by not only analyzing several recent cases that have grappled with these difficult questions but also by confronting the intuitive and practical consequences (both positive and negative) that granting such a right in particular circumstances will reap.[4] In answering these questions, I hope to provide a workable standard that courts in the United States could adhere to when resolving disputes between university administration and their professors.[5] Further, it is my intention to craft this standard in such a way that it pays sufficient credence to the importance of academic freedom to the intellectual leaders in our free society.[6]

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2. *See generally* Garcetti v. Ceballos, 547 U.S. 410 (2006); *See id.* at 425 ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching"). Of course, if the Court's employee-speech jurisprudence *does* apply to the official duties of a university professor, then it is hardly arguable that professors retain any right of academic freedom contrary to the wishes of their employers. This controversy very much remains an open question of law. *See* Robert J. Tepper & Craig G. White, *Speak no Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U.L. REV. 125, 126 (2009).

3. *See generally Sweezy*, 354 U.S. 234; Keyishian v. Bd. of Regents*,* 385 U.S. 589 (1967).

4. *See infra* Parts VI-VII. Diversity, equity, and inclusion policies have become increasingly more prevalent, and often collide with academic freedom and free expression rights. Professors are experiencing constraints on the things they can say and do within the classroom as universities institute policies requiring professors to conduct their classes in certain ways. *See generally* Khiara M. Bridges, Evaluating Pressures on Academic Freedom, 59 HOUS. L. REV. 803 (2022). Brian Soucek, Diversity Statements, 55 U.C. DAVIS L. REV. 1989, 1991 (2022) ("University faculty increasingly can't get hired, tenured, or promoted without submitting a statement describing their contributions to diversity, equity, and inclusion. As diversity statements have become more widely mandatory, they have also grown more controversial: decided as unconstitutional viewpoint discrimination, an invasion of academic freedom, or even - according to some – a reversion to the loyalty oaths used to drive out Communist faculty in the mid-twentieth century") (Internal quotations omitted).

5. *See infra* Part VII.

6. Austin v. Univ. of Fla. Bd. Of Trs., 580 F. Supp. 3d 1137, 1144 (N.D. Fla. 2022):

> For more than twenty years, an imposing, eight-meter-tall statue stood on the University of Hong Kong's campus. Commemorating the 1989 Tiananmen Square Massacre victims, the statue—known as the Pillar of Shame—was "a towering entanglement of human suffering cast in bronze, copper and concrete." Its base said simply: "The old cannot kill the young forever."
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> In December 2021, however, the University decided to remove the statue. A statement explaining the decision declared simply that removing the statue was in

Part III of this article will analyze both the historical common law background of the right to academic freedom and Supreme Court decisions that discuss the issue.[7] Part IV of this article will utilize several modern cases to highlight how relevant the issue of academic freedom is in modernity and the approaches that courts have taken to resolve the issue.[8] Part V will then discuss whether a right to academic freedom should and does exist under the First Amendment, ultimately concluding that it does.[9] In concluding such a right does exist, Part VI will seek to show why the *Pickering* balancing test, the test often applied to professorial speech, is both ill-suited and provides inadequate protections for professors in this particular First Amendment context.[10] Given that I advocate for replacing the standard utilized by many courts to determine these issues, Part VII will then explore a new, context-based standard which is specifically tailored to the unique constitutional place professorial speech occupies in our country.[11]

III. HISTORICAL BACKGROUND OF ACADEMIC FREEDOM IN AMERICA

Academic freedom can take many forms, but at its very core academic freedom "is that freedom of members of the academic community, assembled in colleges and universities, which underlies the effective performance of their functions of teaching, learning, practice of the arts, and research."[12] Academic freedom has always played an important role in American universities, granting scholars intellectual freedom and autonomy to research, teach, and publish without fear of losing their livelihoods.[13] And, although the concept of academic freedom predates the inception of the United States, it has been a cornerstone of our universities since the very beginning.[14]

"the best interest of the University." In many ways, the Pillar's demise was emblematic of the demise of academic freedom in Hong Kong.

7. *See infra* Part III.
8. *See infra* Part IV.
9. *See infra* Part V.
10. *See infra* Part VI.
11. *See infra* Part VII.
12. Ralph F. Fuchs, *Academic Freedom–Its Basic Philosophy, Function, and History*, 28 L. AND CONTEMPORARY PROBLEMS 431, 431 (1963). *See also* David Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. R. 1405, 1408-09 n.11 (1988) (quoting Arthur Lovejoy, *Academic Freedom*, 1 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 384, 384 (1930) ("Academic freedom is the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics")).
13. Fuchs, *supra* note 12, at 431.
14. Shannon Dea, *A Brief History of Academic Freedom*, UNIVERSITY AFFAIRS (Oct. 9, 2018) https://www.universityaffairs.ca/opinion/dispatches-academic-freedom/a-brief-history-of-academic-freedom/ (explaining that the concept of *de facto* academic freedom emerged during the 10th and 11th

However, just because academic freedom has long been a concept inherent to our university system, that does not necessarily mean that it is a right guaranteed to a university professor under the Constitution.[15] Although the Court has not explicitly answered this question, they have rendered a decision in several cases that do lend some guidance.[16] The two decisions rendered by the Court that touch most specifically on the issue of academic freedom are *Keyishian v. Board of Regents* and *Sweezy v. New Hampshire*.[17]

The aforementioned cases are the remnants of McCarthy era[18] employer's efforts to force their employees to sign statements asserting they were not members of "subversive groups."[19] In *Sweezy*, a professor was subpoenaed by the Attorney General to testify about "his past conduct and associations," but refused to answer several questions during the course of the interrogation, including questions relating to his prior contacts with Communists and statements the professor made to his class two years earlier.[20] In his refusal to answer the questions, the professor asserted that said questions infringed upon his First Amendment rights.[21] The Court agreed with the professor's argument and found in his favor, explaining that, "[w]e believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."[22]

Likewise, in *Keyishian*, the Court considered a similar question: can a professor's continued employment be conditioned on them signing a

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centuries in Middle Eastern and North African universities, which reemerged and became a permanent staple in 19th century Germany).

15. *See* Stacy E. Smith, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299, 313-14 (2002).

16. *See generally Sweezy*, 354 U.S. 234; *Keyishian v. Bd. of Regents,* 385 U.S. 589 (1967).

17. *Id.* Although *Keyishian* and *Sweezy* are two of the most prevalent cases rendered by the Supreme Court on the issue of academic freedom, Justice Douglas's dissent in Adler v. Bd. of Educ., 342 U.S. 485 (1952) is the first time a Justice hinted at a right of academic freedom arising under the First Amendment. *See id.* at 509 (Douglas, J., dissenting) ("The very threat of such a procedure is certain to raise havoc with academic freedom. Youthful indiscretions, mistaken causes, misguided enthusiasms–all long–become the ghosts of a harrowing present . . . A teacher caught in that mesh is almost certain to stand condemned. Fearing condemnation, she will tend to shrink from any association that stirs controversy")).

18. McCarthyism, ENCYCLOPEDIA BRITANNICA (Online ed. 2022) ("McCarthyism is part of the Red Scare period of American history in the late 1940s and 1950s. During that time, Wisconsin Senator Joseph McCarthy produced a
series of investigations and hearings to expose supposed communist infiltration of various areas of the U.S. government . . . The term McCarthyism has since become a byname for defamation of character or reputation by
indiscriminate allegations on the basis of unsubstantiated charges").

19. David R. Pfalzgraf, *An Appraisal of Security Legislation in Education in Light of* Keyishian*: A Proposed Solution*, 16 BUF. L. REV. 781, 781-82 (1967).

20. *Sweezy*, 354 U.S. at 238, 243.

21. *Id.* at 238, 244.

22. *Id.* at 238, 250.

certificate stating that said professor is not a Communist?[23] The Court answered this question in the negative, rendering its decision primarily on vagueness and overbreadth grounds.[24] However, it did include some language in the opinion that has been repeatedly cited to as having established a First Amendment right to academic freedom for university professors:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[25]

The Court then explained that the regulatory scheme did not pass constitutional muster because of the constricting effect it had on teaching and scholarship.[26]

Another wrinkle was injected into the issue of academic freedom with the Court's decision in *Regents of University of Michigan v. Ewing*, wherein the Court framed the issue of academic freedom as one that can also be retained by universities, not just individuals.[27] That case dealt with the expulsion of a student from a medical degree program.[28] In *Ewing*, the Court held that "academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, *but also, and somewhat inconsistently*, on autonomous decision making by the academy itself."[29] The majority in *Ewing* relied on the Court's previous holding in *Regents of the*

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23. *Keyishian*, 385 U.S. at 592.
24. *Id.* at 604.
25. *Id.* at 603. *See also Wieman v. Updegraff,* 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) ("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").
26. *Keyishian*, 385 U.S. at 603-04.
27. *See generally* Regents of Univ. of Michigan v. Ewing, 474 U.S. 214 (1985); *Id.* at 225-26 (citations omitted):

> When judges are asked to review the substance of a genuinely academic decision . . . they may not override it unless it is a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment . . . Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment."

28. *Id.* at 215.
29. *Id.* at 226 n. 12 (citations omitted) (emphasis added).

University of California v. Bakke to justify this conclusion.[30] Because the Court recognized in *Ewing* that the concept academic freedom is broad enough to encompass the right of a university to operate without judicial interference, several circuit courts have since concluded that either the Court never intended to create a constitutional right to academic freedom at all, or if it did, such a right is purely institutional, not individual.[31]

Beyond the noticeable similarities that the above cases share, they also share one less obvious trait: they give absolutely no guidance to lower courts on what the confines of a right to academic freedom might be, or whether that right is one that is institutional or individual.[32] All of the above cases speak in broad strokes about the value that professors hold in our society and the harms that would befall our country if those persons were silenced, but they do not tell lower courts which circumstances triggers the protection of academic freedom, nor do they provide a standard by which lower courts should judge such claims.[33] Thus, it has been largely a free-for-all for the better part of a century in this area of the First Amendment, leaving the circuit courts entirely to the wolves.[34] This is a problem that requires solving, as existing frameworks for resolving said issue are wholly insufficient and leave professors and universities in a constant state of constitutional limbo.[35]

IV. ACADEMIC FREEDOM IN MODERNITY – RECENT CASES

Although academic freedom has been a concept that has existed in relative harmony over the course of the last century, it is currently under siege unlike any other time period since the rise of the Third Reich in Nazi Germany.[36] In states across the country, and particularly in Republican

30. *Id.* at 226 n. 12;. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body").

31. See Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991) ("Though we are mindful of the invaluable role academic freedom plays in our public schools . . . we do not find support to conclude that academic freedom is an independent First Amendment right"): Schrier v. Univ. of Colo., 427 F.3d 1253, 1266 (10th Cir. 2005) ("an independent right to academic freedom does not arise under the First Amendment"); Urofsky v. Gilmore, 216 F.3d 401, 409-10 (4th Cir. 2000) ("to the extent the Constitution recognizes any right of academic freedom . . . the right inheres in the University, not in individual professors") (internal quotations omitted).

32. Smith, *supra* note 15, at 313-14 ("Yet, somewhat problematically, the Court has never seized the opportunity to explain systematically the theory behind its incorporation of academic freedom into the First Amendment. Consequently, appellate courts have found it difficult to resolve 'the tension between the individual and institutional components of academic freedom'").

33. *Id.* at 336 ("Nevertheless, the Court has never defined precisely the relationship between the protection of academic freedom and the regulation of public employee speech.").

34. *Id.*

35. *See infra* Part V.

36. Irene Mulvey, et. al, *Florida Bill would Destroy Higher Education as we Know it*, AM. FED. OF TEACHERS (Feb. 27, 2023), https://www.aft.org/press-release/florida-bill-would-destroy-higher-educa

Governor Ron DeSantis's Florida, concerted efforts are being levied against public universities to control not only what a professor can say in the classroom, but also to control things that professors can do wholly outside of the university's campus.[37] Thus, academic freedom once again occupies the First Amendment spotlight, and courts have had to grapple with the issue, with which, as has been previously stated, there are very few guiding principles.[38] As one can imagine, courts have dealt with the issue of academic freedom in various contexts and in incredibly disparate ways.[39] The below cases are included as a way not only to highlight these disparate approaches taken by circuit courts to solve these difficult First Amendment issues, but also to show the different reasonings that develop in justifying entirely different conclusions.[40]

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tion-we-know-it ("With the introduction of HB 999, the Florida legislature—at Governor DeSantis's urging—has doubled down on its attacks on academic freedom with a bill that would effectively silence faculty and students across the ideological spectrum and purge whole fields of study from public universities"); Yascha Mounk, *How to Save Academic Freedom from Ron DeSantis*, THE ATLANTIC (Mar. 7, 2023), https://www.theatlantic.com/ideas/archive/2023/03/ron-desantis-book-illiberal-policies-florida-education/673297/ ("Now [DeSantis's] administration is preparing to go a step further: House Bill 999, pending in Florida's legislature, would fundamentally remake the nature of public education in the state by abolishing certain majors and granting political appointees the power to fire tenured faculty members").

37. Glenn C. Altschuler & David Wippman, *Florida is Trying to Roll Back a Century of Gains for Academic Freedom*, WASH. POST (Feb. 6, 2023, 6:00AM), https://www.washingtonpost.com/made-by-history/2023/02/06/academic-freedom-florida/ ("Academic freedom is under attack across the United States, but nowhere more so than in Florida. . . the gravest threat to academic freedom comes from a legal argument Florida has advanced in defense of the Stop WOKE Act. The legislation is part of a wave of 'educational gag orders' banning the teaching of 'divisive concepts' ").

38. *See generally Free Speech is Under Attack on Campuses and it's Not by the "Woke Left"*, THE CASE WESTERN RESERVE OBSERVER (Feb. 24, 2023), https://observer.case.edu/editorial-free-speech-is-under-attack-on-campuses-and-its-not-by-the-woke-left/; David Maxwell & Tara D. Sonenshine, *Academic Freedom is Under Assault – we Have a Sacred Duty to Protect it*, THE HILL (Mar. 29, 2022, 9:30 AM), https://thehill.com/opinion/education/600123-undermining-higher-educations-vital-role-in-american-democracy/.

39. *See generally* Gabrielle Dohman, *Academic Freedom and Misgendered Honorifics in the Classroom*, 89 U. CHI. L. REV. 1557 (2022); Alisa W. Chang, *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond* Pickering *and* Connick, 53 Stan. L. Rev. 915, 917-18 (2001):

> The ambiguous command of the high court to protect a freedom it has not fully defined forces lower courts today to cling to the familiar public employee speech rules found in *Pickering v. Board of Education* and *Connick v. Myers* for lack of a better test to use when public universities attempt to penalize professors for instances of speech. Despite superficial allusions these lower courts may make to academic freedom, their knee-jerk embrace of *Connick* is troublesome because mechanically applying public employee speech rules to academic contexts causes the judiciary to disregard the unique considerations that distinguish academic freedom cases from generic employee speech disputes.

40. *See infra* Part III.

A. Meriwether v. Hartop

In *Meriwether v. Hartop*, the United States Court of Appeals for the Sixth Circuit ruled that university professors retain a right to academic freedom under the First Amendment, even in spite of their employer's wishes.[41] In doing so, it joined the Fourth, Fifth, and Ninth Circuits in recognizing such a right.[42] Nicholas Meriwether was a professor of philosophy at Shawnee State University, and had been for over twenty-five years, boasting a "spotless disciplinary record" during that time.[43] However, in 2018, Mr. Meriwether was stripped of this spotless record when he refused to address a student by their preferred pronouns during in-class Socratic questioning,[44] as doing so contradicted what he stated were his sincerely held religious beliefs.[45] This incident came after several years of infighting between Mr. Meriwether and the Shawnee State University administration, which emailed the Shawnee State University faculty in 2016 and told the professors to refer to students by their preferred pronouns in the classroom setting, otherwise those professors would be subject to disciplinary action.[46] This policy applied to all of the university's "employees, students, visitors, agents and volunteers" and applied to both academic and non-academic events alike, regardless of a professor's religious convictions.[47]

When Professor Meriwether reported the incident that had occurred between himself and the student to administration, the administration requested that he no longer use sex-based personal pronouns while addressing students in class.[48] Eventually, Professor Meriweather and the administration compromised by referring to the student only by their last name but said

41. Meriwether v. Hartop, 992 F.3d 492, 505 (6th Cir. 2021). *See generally* U.S. CONST. AMEND. I.

42. *Meriwether*, 992 F.3d at 505. *See generally* Adams v. Trustees of North Carolina–Wilmington, 640 F.3d 550 (4th Cir. 2011); Buchanan v. Alexander, 919 F.3d 847 (5th Cir. 2019); Demers v. Austin, 729 F.3d 1011 (9th Cir. 2013).

43. *Meriwether*, 992 F.3d at 498.

44. *Socratic Questions*, UNIV. OF CONN. (last visited Apr. 15, 2023), https://cetl.uconn.edu/resources/teaching-your-course/leading-effective-discussions/socratic-questions/ ("Socrates, the early Greek philosopher and teacher, believed that disciplined and thoughtful questioning enabled the student to logically examine and validate ideas. Using Socrates' approach, the instructor feigns ignorance of the topic in order to engage in dialogue with the students. By using Socratic questioning, instructors promote independent, higher-level thinking in their students, giving them ownership of what they are learning through discussion, debate, evaluation, and analysis of material").

45. *Meriwether*, 992 F.3d at 498. *See also id.* at 498 ("Professor Meriwether is also a devout Christian . . . Meriwether believes that God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires") (internal citations omitted).

46. *Id.* at 498-99.

47. *Id.* at 498-99.

48. *Id.* at 499.

student remained dissatisfied with this compromise.[49] After the student reported Professor Meriwether to the administration several more times, Meriwether again pleaded with the university administration for some sort of compromise.[50] This time, Meriwether stated that he would use the preferred pronouns, so long as the university would allow him to place a disclaimer in his syllabus that using the preferred pronouns of an individual runs contrary to his religious and personal beliefs.[51] Shawnee State administration, again, denied Professor Meriwether's request, and ultimately filed a dubious complaint with the university's Title IX office.[52] A barebones investigation was launched against Professor Meriwether by the Title IX office and eventually the administration brought a formal charge against Meriwether that was placed in his file, stating that future transgressions would subject him to suspension without pay, termination, or other severe consequences.[53]

In overturning the district court's grant of summary judgment in favor of Shawnee State, the Sixth Circuit noted that "the First Amendment protects the academic speech of university professors."[54] Further, the Court explained that the "prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed."[55] Finally, the Court relied on the decisions of *Sweezy v. New Hampshire* and *Keyishian v. Board of Regents* to justify its conclusion that professors have a right to academic freedom, even in the classroom setting.[56] The *Meriwether* court only addressed academic freedom in the context of teaching and scholarship, holding that "professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship."[57] How far does this right extend? The Sixth Circuit utilized the *Pickering-Connick* test to balance the interests of the university and the professor.[58] Joined together, *Pickering v.*

49. *Meriwether*, 992 F.3d at 499.

50. *Id.* at 499.

51. *Id.* at 500.

52. *Id.* at 500-501.

53. *Id.* at 501.

54. *Meriwether*, 992 F.3d at 503. *See also id.* (quoting Speech First, Inc. v. Schlissel, 939 F.3d 756, 761) ("Universities have historically been fierce guardians of intellectual debate and free speech").

55. *Id.* (quoting Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2471 & n. 8 (2018)). *See also id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)) ("professors or students [do not] 'shed their constitutional rights to freedom of speech or expression at the [university] gate' ").

56. *Id.* at 504.

57. *Meriwether*, 992 F.3d at 505. *See also id.* at 506 (citing Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 670 (1973)) ("By forbidding Meriwether from describing his views on gender identity even in his syllabus, Shawnee State silenced a viewpoint that could have catalyzed a robust and insightful in-class discussion. Under the First Amendment, 'the mere dissemination of ideas . . . on a state university campus may not be shut off in the name alone of 'conventions of decency' ").

58. *Id.* at 507-08 ("We must now apply the longstanding *Pickering-Connick* framework to determine whether Meriwether has plausibly alleged that his in-class speech was protected by the First Amendment. Under that framework, we ask two questions: First, was Meriwether speaking on a matter of

Board of Education and *Connick v. Myers* require a reviewing court to determine first whether the public employee spoke as a private citizen on a matter of public concern, and if so, the reviewing court must then balance the value of the public employee's speech against the university's interest in regulating the speech.[59]

In conducting the *Pickering* balancing test, the Court found that "a teacher's in-class speech about 'race, gender, and power conflicts' addresses matters of public concern,"[60] and that "[t]he linchpin of the inquiry is, . . . for both public concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives."[61] To this point, the Court emphasized that the professor was seeking to convey a message when he refused to use particular pronouns, which "implicat[e] a sensitive topic of public concern."[62] Having concluded that Professor Meriwether's speech was on a matter of public concern, the Court balanced his interest in making the speech and the interests of the university in promoting the efficiency of its services to the public.[63] Professor Meriwether won this battle with little difficulty and his speech was ruled to be protected.[64]

b. Austin v. University of Florida Board of Trustees

Another recent case that neatly highlights how academic freedom plays a vital role when a university seeks to prohibit a professor from engaging in certain conduct is *Austin v. University of Florida Board of Trustees*.[65] In that

public concern? And second, was his interest in doing so greater than the university's interest in promoting the efficiency of the public services it performs through him?") (internal citations omitted) (internal quotations omitted).

59. *Id.*

60. *Id.* at 508 (citing Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679 (6th Cir. 2001)).

61. *Meriwether*, 992 F.3d at 508 (citing Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1189 (6th Cir. 1995)). This statement is particularly interesting insofar as it seems to be interpreting the *Pickering* standard far more broadly than the Supreme Court has given any basis for.

62. *Id.*

63. *Id.* at 510-11.

64. *Id.* at 509-10 ("And the First Amendment interests are especially strong here because Meriwether's speech also relates to his core religious and philosophical beliefs. Finally, this case implicates an additional element: potentially compelled speech on a matter of public concern . . . Here, the university refused even to permit Meriwether to comply with its pronoun mandate while expressing his personal convictions in a syllabus disclaimer. That ban is anathema to the principles underlying the First Amendment"). In considering the interests of the university, the Court noted that "the university's interest in punishing Meriwether's speech is comparatively weak[,]" and that the compromises offered by Meriwether further undermined the legitimacy of those interests. *Id.* at 510-11.

65. Austin v. Univ. of Fla. Bd. Of Trs., 580 F. Supp. 3d 1137, 1145 (N.D. Fla. 2022) ("[Plaintiffs contend that] UF has bowed to perceived pressure from Florida's political leaders and has sanctioned the unconstitutional suppression of ideas out of favor with Florida's ruling party. Declaring such activities, a conflict of interest, UF has repeatedly blocked professors from providing expert testimony against the State in cases implicating hot-button political issues").

case, the University of Florida (UF) implemented a new policy that sought to ensure that professors did not engage in activities that conflict with their obligations to UF.[66] This policy was implemented in response to the widely known scrutiny that the Florida legislature has subjected its public universities to, and which passed legislation requiring Florida's universities to implement such policies.[67] Relevant to this particular case, the policy implemented by UF required that professors disclose when they sought to serve as an expert witness.[68] UF professors who all served in various academic departments and had long served as expert witnesses in lawsuits that related to their fields of expertise suddenly and repeatedly were told that they could no longer do so, citing conflicts with Florida's executive branch.[69] Further, UF faculty members were told not to publicly criticize the Governor or UF policies related to COVID-19, and were forced to change their websites and course syllabi so that the words "critical" and "race" did not appear in the same sentence.[70]

In granting an injunction in favor of the plaintiffs, the Court did not explicitly explain that the reason it did so was because of academic freedom, instead holding that the UF policy was an unlawful prior restraint on the speech of the professors.[71] The Court then applied the *Pickering-Connick* test to determine whether the speech of the professor was protected.[72] Quite obviously, the speech made by the professors were on extremely pertinent matters of public concern.[73] But, when the professors testified in court proceedings, were they speaking as citizens? The Court answered this

66. *Id.* at 1148 ("The policy governs two types of conflicts. A conflict of commitment 'occurs when a University Employee engages in an Outside Activity, either paid or unpaid, that could interfere with their professional obligations to the University[]' . . . On the other hand, a conflict of interest 'occurs when a University Employee's financial, professional, commercial or personal interests or activities outside of the University affects, or appears to affect, their professional judgement or obligations to the University' ").

67. *Id.* (these policies must, according to the Florida legislature, "require employees engaged in the design, conduct, or reporting of research to disclose and receive a determination that outside activity or financial interest does not affect the integrity of the state university."). *See* Fla. Stat. § 1012.977(1) (2022).

68. *Austin*, 580 F. Supp. 3d at 1148.

69. *Id.* at 1149-51 (Plaintiffs to the suit tried to testify on various matters, including changes to Florida's election laws, how masking affects children, and restoring felon's voting rights. Participating in any action against the state, irrespective of the context, was deemed an unallowable conflict of interest); *Id.* at 1152 ("UF's Faculty Senate issued a Report on the state of academic freedom at the University. The Report noted 'palpable reticence and even fear on the part of faculty to speak up' on hot button issues.").

70. *Id.* at 1153.

71. *Id.* at 1162.

72. *Austin*, 580 F. Supp. 3d at 1168 (citing Lane v. Franks, 573 U.S. 228, 236 (2014)) ("Public employees retain their First Amendment rights; after all, public employees do not renounce their citizenship when they accept employment. That said, the State, as an employer, has an interest in controlling the operation of its workplaces. To balance these countervailing interests, this Court must apply the test established in [*Pickering*], and its progeny") (internal citations omitted) (internal quotations omitted).

73. *Id.*

question in the affirmative, paying special credence to UF's disclosure form which, required the professors to sign that they were testifying in their capacity as private citizens.[74] The Court then determined the interests of the university in controlling the professor's speech, explaining that the university's "side of the *Pickering* scale is entirely empty."[75] In counterbalancing UF's interest, the Court found that "[p]laintiffs' interest in speaking weighs heavy . . . Plaintiffs seek to speak on matters touching on the very heart of the First Amendment," and that "[p]laintiffs' speech, by its very nature, may merit additional judicial solicitude."[76]

Further, the Court found that "[t]he Supreme Court of the United States has long regarded teachers, from the primary grades to the university level, as critical to a healthy democracy."[77] Additionally, the Court explained that professors are "priests of democracy" that "guide us in our pursuit of truth and informed citizenship," and that the speech of professors seems to "merit additional judicial solicitude."[78] Academic freedom and the concerns it implicates undergirded the entirety of the *Austin* court's reasoning.[79]

c. Buchanan v. Alexander

The last relevant case worthy of mentioning that grapples with the issue of academic freedom is *Buchanan v. Alexander*, decided by the United States Court of Appeals for the Fifth Circuit in 2019.[80] In that case, Dr. Teresa Buchanan, an associate professor in Louisiana State University's (LSU) Early Childhood Program, was terminated in response to a number of complaints filed by the superintendents of local public schools she visited in the course of her employment with LSU, as well as a number of complaints from her students at LSU.[81] Dr. Buchanan was hardly a sympathetic plaintiff, making comments to one of her students regarding her student's sexual relationship with her fiancé, recording her students crying, using excessive profanity regularly, and making offensive comments such as "a woman is thought to be a dike [*sic*] if she wears brown pants."[82]

The Fifth Circuit upheld the district court in determining that Dr. Buchanan's speech was not protected by the First Amendment.[83] The Fifth Circuit reasoned that although "[t]he Supreme Court has established

74. *Id.* at 1169.
75. *Id.* at 1171 (citing *Franks*, 573 U.S. at 242).
76. *Id.* at 1172.
77. *Austin*, 580 F. Supp. 3d at 1175.
78. *Id.* at 1172-76.
79. *See generally Id.* at 1137.
80. Buchanan v. Alexander, 919 F.3d 847, 850 (5th Cir. 2019).
81. *Id.* at 850-51.
82. *Id.* at 851.
83. *Id.* at 856.

that academic freedom is 'a special concern of the First Amendment' . . . Students, teachers, and professors are not permitted to say anything and everything simply because the words are uttered in the classroom context."[84] The question for the Fifth Circuit then became: by what standard should the professor's comments be judged? The Fifth Circuit answered this question by applying the *Pickering*-*Connick* standard.[85]

Perhaps unsurprisingly, the Fifth Circuit determined that Dr. Buchanan's speech relating to the private sex lives of herself and her students and her frequent use of profanity were not matters of public concern.[86] To this point, the Fifth Circuit held that "in the college classroom context, speech that does not serve an academic purpose is not of public concern."[87] In so holding, the Fifth Circuit explained that while university professors may have some right to academic freedom, such a right does not encompass the ability to speak in the classroom on matters that are not germane to the subject matter of the class.[88] This case is useful for this particular discussion not only because it deals directly with balancing the issue of academic freedom between a professor and a university, but also because the Fifth Circuit provided some guidance regarding the contexts in which academic freedom as a concept should protect a professor's speech.[89]

V. ANALYSIS – DOES A RIGHT TO ACADEMIC FREEDOM EXIST UNDER THE FIRST AMENDMENT?

Quite obviously, the text of the First Amendment does not explicitly recognize a constitutional right to academic freedom.[90] If the text of the First Amendment is silent regarding this issue, then one must look to the ultimate arbiter of Constitutional interpretation: the Supreme Court. As previously stated, the Court has had very little to say about the issue of academic freedom, being that academic freedom is a "term that is often used, but little explained, by federal courts."[91] Thus, "judicial opinions have not developed

84. *Id.* at 852.

85. *Buchanan*, 919 F.3d at 853 (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968) and Connick v. Myers, 461 U.S. 138 (1983)). *See also* Joseph O. Oluwole, *The Pickering Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133, 135-139 (2008) (explaining how the *Pickering* and *Connick* decisions work together to form one cohesive test).

86. *Buchanan*, 919 F.3d at 853 ("We agree with the district court here that Dr. Buchanan's use of profanity and discussion of her sex life and the sex lives of her students was not related to the subject matter or purpose of training Pre-K-Third grade teachers").

87. *Id.* (citing Martin v. Parrish, 805 F.2d 583, 585 (5th Cir. 1986)).

88. *Id.* (citing Bonnell v. Lorenzo, 241 F.3d 800, 820 (6th Cir. 2001)) ("Plaintiff may have a constitutional right to use words such as 'pussy,' 'cunt,' and 'fuck,' but he does not have a constitutional right to use them in a classroom setting where they are not germane to the subject matter . . .").

89. *Id.* at 854.

90. *See* U.S. CONST. AMEND. I.

91. *Urofsky*, 216 F.3d at 409-10.

a consistent interpretation of constitutional academic freedom or pronounced a consistent framework to analyze such claims."[92] And, to make matters worse, the Court's decision in *Bakke* explained that, "[a]cademic freedom . . . [is] not a specifically enumerated constitutional right."[93]

So, what does one do with the seemingly inconsistent holdings of the highest court in the land? Given that the Supreme Court has had little to say about the issue, it is helpful to analyze how the circuit courts have interpreted the Supreme Court's language in *Sweezy* and *Keyishian*.[94]

Unsurprisingly, the inconsistent holdings have generated a circuit split.[95] Clearly, the Fifth and Sixth Circuits have determined that a professor maintains a right to academic freedom, given their holdings in *Buchanan* and *Meriwether*, respectively.[96] These decisions are consistent with an overwhelming majority of courts that hold that professors retain some right of academic freedom because of their unique position in our society, although a few courts have held that even if that right exists, it is constricted by the Court's holding in *Garcetti*.[97] And, although these courts recognize that such a right exists, they use very different justifications and apply different standards when doing so, given their severe lack of guidance from the Court.[98] At the very core of it all, however, is a recognition that professors have to maintain some level of First Amendment protection that ordinary citizens do not.[99]

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92. *Case Categories: Academic Freedom*, FREE SPEECH CENTER AT MIDDLE TENNESSEE STATE UNIVERSITY (last visited Apr. 15, 2023), https://www.mtsu.edu/first-amendment/encyclopedia/case/2/academic-freedom.

93. *Bakke*, 438 U.S. at 312.

94. While the Supreme Court has had little to say on the issue outside of *Keyishian* and *Sweezy*, it has not been completely silent. *See* Healy v. James, 408 U.S. 169, 180-81 (1972) ("[W]e break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom").

95. Hanna Diamond, *The Sixth Circuit Joins the Split: Higher Education Freedom of Speech and the Breadth of Academic Freedom Remain in Limbo*, 12 WAKE FOREST L. REV. ONLINE 111, p. 3 (2022), http://www.wakeforestlawreview.com/2022/11/the-sixth-circuit-joins-the-split-higher-education-freedom-of-speech-and-the-breadth-of-academic-freedom-remain-in-limbo/ ("In *Meriwether v. Hartop*, the Sixth Circuit joined the circuit split regarding which freedom of speech test applies to higher-level teacher speech for First Amendment purposes. The breadth of freedom of speech on campuses is a recurring issue and a highly litigated matter. Until there is a consistent test that courts can apply, and that professors can rely upon, the confusion surrounding professors' protections and academic freedom will continue").

96. *See id.* at 3. *See also infra* Part IV..

97. *See, e.g.* Dube v. State Univ. of New York, 900 F.2d 587, 598 (2d Cir. 1990) ("for decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation "that cast a pall of orthodoxy" over the free exchange of ideas in the classroom. We therefore conclude that, assuming the defendants retaliated against Dube based upon the content of his classroom discourse, such conduct was, as a matter of law, objectively unreasonable.") (citations omitted). *See also* Nick Cordova, *An Academic Freedom Exception to Government Control of Employee Speech*, 22 FEDERALIST SOC'Y REV. 284, 286-88 (2021).

98. *Id.*

99. Cordova, *supra note 97 at* 291.

Given the confusion that the Supreme Court's academic freedom jurisprudence has caused for even the most astute legal minds of our country, the Supreme Court should grant certiorari on one of the many cases pending before lower courts that will inevitably petition it to clarify its position on the issue of academic freedom.[100] I proceed with the assumption that *Keyishian* and *Sweezy* do establish an individual right to academic freedom for university professors throughout the rest of this Note, in order to discuss what standard should be applied in those circumstances.[101]

VI. ANALYSIS – WHY SHOULD THE *PICKERING-CONNICK* STANDARD BE REPLACED?

The *Pickering-Connick* balancing test is the most common test courts rely on when determining who has superior First Amendment rights as between a university employer and a professor when a professor is discharged as a result of their expressive conduct.[102] As stated previously, the *Pickering-Connick* balancing test requires that a reviewing court first determine that the speech for which the public employee was terminated was on a matter of public concern.[103] If the Court answers this question in the negative, then no further analysis is necessary: the public employer wins.[104] If the Court answers this question in the affirmative, then it must balance the public employee's interest in commenting on that matter of public concern with the state's interest in efficiently delivering public services.[105] At its core, the goal of the *Pickering-Connick* standard is "the maximization of employee expression on matters of public concern consistent with the mission of the particular government entity."[106] Plainly, the *Pickering-Connick* standard is insufficient when evaluating the assertion of Free Speech rights of a public

100. Mark Strasser, *Pickering, Garcetti, and Academic Freedom*, 83 BROOKLYN L. REV. 579, 612 (2018) ("the Court must still make clear the conditions under which rights to academic freedom may be overridden. If the *Pickering* analysis is used to make that determination, then academic freedom will be much weaker than is commonly thought").

101. *See infra* Part VI-VII.

102. This is again, of course, assuming that a Court does not apply the *Garcetti* framework. *See* Strasser, *supra* note 100 at 579 ("Even when the Garcetti exception is not triggered, the circuits offer very different interpretations of how to apply the prevailing jurisprudence").

103. *See* Oluwole, *supra* note 85 at 135-39.

104. *Id.*

105. *Id.*

106. Joseph J. Martins, *Tipping the Pickering Balance: A Proposal for Heightened First Amendment Protection for the Teaching and Scholarship of Public University Professors*, 25 CORNELL J. OF L. AND PUB. POL'Y 649, 668 (2016).

university professor against their employer.[107] The reasons underlying this assertion are many and will be discussed in turn.[108]

First, a state's interest in providing efficient services to the public in the university context, one side of the ledger in a *Pickering* analysis, is almost always minimal to nonexistent.[109] The fact that one side of the balancing equation is almost always empty strongly suggests that the test may be ill-suited in this context.[110] The purpose of a university is to educate its students, not to provide any sort of service or to deliver a message to the public at large.[111] If anything, a professor aids the university in providing its service of education to its students.[112] And further, the university is distinct from any other context in which the *Pickering-Connick* test would apply, as the university has long been a uniquely positioned constitutional arena.[113] It stretches credibility to suggest that professors should be subject to the same First Amendment test as any other type of public employment, given that courts have long held that professors hold a unique constitutional niche in our society.[114]

Second, the Supreme Court itself has held that "the extra power the government has [to constrict its employees' speech] comes from the government's mission as employer."[115] Controversy and general viewpoint diversity is an inextricable and expected part of the university setting and of a university's mission.[116] If the core functions of a university are truly to

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107. Paul Cerkvenik, *Who Your Friends Are Could Get You Fired! The Connick "Public Concern" Test Unjustifiably Restricts Public Employees' Associational Rights*, 79 MINN. L. REV. 425, 433-34 (1994).

108. *See infra*; Further, the Supreme Court recently muddied the *Pickering* waters even further when it decided Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022). In that case, the Court ruled that a football coach's private prayer at midfield constituted a matter of public concern sufficient to pass *Pickering* muster. *Id.* at 2414. If an entirely private prayer qualifies as a matter of public concern, then it is not clear what *Pickering* even means anymore.

109. *See Austin*, 580 F.Supp. 3d at 1171 ("And what are UF's interests? Why must Defendants regulate Plaintiffs' speech? How does Plaintiffs' speech prevent the efficient delivery of government services, impair discipline, workplace harmony, or employer confidence?").

110. Martins, *supra* note 106 at 673 ("Because controversy is inherent in the university's distinct educational mission, the university is less likely to suffer a disruption in its provision of services due to controversial speech than other public entities") (internal citations and quotations omitted).

111. *Meriwether,* 992 F.3d at 510 (citing Blum v. Schlegel, 18 F.3d 1005, 1012 (2d Cir. 1994)) (" 'the efficient provision of services' by a university 'actually depends, to a degree, on the dissemination in public fora of controversial speech implicating matters of public concern' ").

112. Martins, *supra* note 106 at 674 ("When professors teach and publish, they presumptively advance the core functions of the university: knowledge creation and knowledge dissemination").

113. *Id.* at 656.

114. Diamond, *supra* note 95 at 116 ("Professors' speech protections must be closely guarded given the unique role that professors hold, which can only be properly performed if professors know that they are protected by the First Amendment").

115. Waters v. Churchill, 511 U.S. 661, 674 (1994).

116.

create knowledge and disseminate information, then professors speaking and researching on controversial topics do not hinder this mission, rather, they further it.[117] Thus, the justification in applying *Pickering* in this context is further undermined. We should be seeking to foster university environments that investigate controversial topics as their core mission, not creating echo chambers wherein only one perspective gets any airtime.[118]

Third, when a professor's scholarship involves very controversial views, as scholarship often does, the *Pickering* analysis begins to fall apart.[119] Perhaps most illustrative on this point is *Levin v. Harleston.*[120] Professor Levin published several writings that contained "a number of denigrating comments concerning the intelligence and social characteristics of blacks."[121] In response to criticism, the dean of the college then created a separate "shadow" class which Professor Levin's students could transfer to, which created significant strife between faculty members.[122]

The district court held that "the shadow classes 'were established with the intent and consequence of stigmatizing Professor Levin solely because of

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> Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty.

JOHN STUART MILL, ON LIBERTY 68 (2d Ed. 1859).

117. Martins, *supra* note 106 at 674; Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 476 (2005) ("The primary purpose of the university was to promote inquiry and advance the sum of human knowledge. Modern academic scholarship had an essentially scientific character that could best thrive if researchers were afforded complete and unlimited freedom to pursue inquiry and publish [their] results") (internal quotations omitted).

118. Conor Friedersdorf, *They Learn to Parrot What They Know They're Supposed to Say*, THE ATLANTIC (May 17, 2021), https://www.theatlantic.com/ideas/archive/2021/05/true-inclusion-requires-viewpoint-diversity/618899/; *Seeing Things Differently: Viewpoint Diversity in Education*, THE SHIPLEY SCHOOL (last visited Apr. 15, 2023), https://blogs.shipleyschool.org/seeing-things-differently-viewpoint-diversity-in-education#:~:text=Fostering%20viewpoint%20diversity%20helps%20to,us%20to%20allow%20for%20ambiguity.

119. Strasser, *supra* note 100 at 611 (In his discussion about the *Levin* decision, Mr. Strasser writes, "It is precisely this kind of case (i.e., one in which a professor's scholarship involves very controversial views) that makes academic freedom precarious under a Pickering analysis. Suppose that the college feared a loss of funding. Would *Pickering* have allowed Levin to be fired? Even were funding issues not presented, Levin's classes were picketed, which of course affected workplace efficiency. Under a *Pickering* balancing test, such a professor might well not be protected by the First Amendment if suspended or fired for his published writings").

120. Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992).

121. *Id.* at 87.

122. *Id.* at 87-88.

his expression of ideas' and enjoined their continuance."[123] The United States Court of Appeals for the Second Circuit upheld the injunction.[124] Although the Court did not apply *Pickering*, had the college feared losing federal funding because of the professor's comments, it is likely that the *Pickering* standard would have allowed him to be fired given the disruption Professor Levin caused to the university;[125] which is precisely why the *Pickering* standard does not work in this context. It allows professors who investigate controversial issues and make unpopular comments to be terminated.[126] Even if these professors' ideas are not well-constructed or lack justification, the "marketplace of ideas" should be allowed to filter out those less worthy assertions.[127] The university should not have the power to unilaterally silence those who have been repeatedly held to be essential to continuing our democracy.[128]

Fourth, the Supreme Court and many circuit courts have repeatedly held that they are reluctant to intrude upon the decisions of university administration, who are undoubtedly better equipped to deal with the sort of issues outlined in this note than federal courts.[129] Put simply, federal courts lack the practical experience and expertise of academic institutions that

123. *Id.* at 88 (citing Levin v. Harleston, 770 F.Supp. 895, 915, 927 (S.D.N.Y. 1991)) (citations omitted).

124. *Id.* at 87.

125. *See generally Levin*, 966 F.2d 85.

126. *See* Soucek, *supra* note 4 at 2026 ("Even if the First Amendment applies to mandated diversity statements, then, faculty may still struggle with *Pickering-Connick* balancing, where the university's interest in inefficiently carrying out its mission might necessitate the very viewpoint discrimination that challengers are complaining about"); Daniel Ortner, *In the Name of Diversity: Why Mandatory Diversity Statements Violate the First Amendment and Reduce Intellectual Diversity in Academia,* 79 CATH. U. L. REV. 515, 534 (2021). *See also* Wagner v. Jones, 664 F.3d 259, 264 (8th Cir. 2011) (professor alleging they were not hired by Iowa College of Law because they frequently advocated for socially conservative causes).

127. *See* Pernell v. Fla. Bd. of Governors of State Univ. Sys., 2022 U.S. Dist. LEXIS 208374, n. 4-5 ("What this is about strictly is . . . the idea that our universities, our state colleges, our institutions of higher learning *are marketplaces of ideas*, and what we want are *all of those ideas to be welcomed, even the wrong ones* . . . the State has responded to fears of 'woke indoctrination' in university classrooms. But rather than combat 'woke' ideas with countervailing views in the 'marketplace of ideas,' the State has chosen to eliminate one side of the debate") (emphasis in original).

128. *See* Michael Wines, *In Florida, a Firestorm Over Silenced University Professors Grows*, N.Y. TIMES (Nov. 4, 2021), https://www.nytimes.com/2021/11/04/us/florida-professors-lawsuit.html; Colleen Flaherty, *More Alleged Faculty Intimidation at Linfield*, INSIDE HIGHER ED (Mar. 24, 2022), https://www.insidehighered.com/news/2022/03/25/professor-accuses-linfield-u-silencing-faculty-members; Daniel Golden, *It's Making us More Ignorant*, THE ATLANTIC (Jan 3, 2023), https://www.theatlantic.com/ideas/archive/2023/01/ron-desantis-florida-critical-race-theory-professors/672507/.

129. *See Adams,* 640 F.3d at 557 (citing Smith v. Univ. of North Carolina, 632 F.2d 316, 345-46 (4th Cir. 1980)) ("[u]niversity employment cases have always created a decisional dilemma for the courts. Unsure how to evaluate the requirements for appointment, reappointment and tenure, and reluctant to interfere with the subjective and scholarly judgments which are involved, the courts have refused to impose their judgment as to whether the aggrieved academician should have been awarded the desired appointment or promotion. Rather, the courts review has been narrowly directed as to whether the appointment or promotion was denied because of a discriminatory reason").

handle these matters on a daily basis.[130] However, the *Pickering* analysis requires a federal court to conduct a difficult balancing test that requires them to become intimately involved with academic minutiae. Unlike the confines of an academic freedom right, the Supreme Court spoke on this very issue in *Ewing*, wherein it held that it was reluctant:

> to trench on the prerogatives of state and local educational institutions [because of the courts'] responsibility to safeguard their academic freedom, a special concern of the First Amendment. If a federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making.[131]

The circuit courts have faithfully adhered to the Court's hesitation to tread into the deep, intricate waters of university disputes.[132] Disposing of the *Pickering-Connick* standard in the university context is thus consistent with this hesitation, as that standard requires a federal court to review those personnel decisions with the procedural tools available to the judiciary.

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130. *See* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 686 (2010) (quoting Board of Ed. of Hendrick Hudson Central Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 206 (1982)) ("Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist substituting their own notions of sound educational policy for those of the school authorities which they review") (internal quotations omitted); David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW AND CONTEMPORARY PROBLEMS 227, 287 (1990) ("Whatever their holdings, these decisions emphasize that courts should afford broad deference to professional expertise. Academic decisions are necessarily subjective and beyond the competence of judges. Courts cannot become a 'Super-Tenure Review Committee' or 'evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions.' Rather,
judges should override 'a genuinely academic decision' only if 'it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment'").

131. *Ewing*, 474 U.S. at 226.

132. Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991) ("we cannot supplant our discretion for that of the University. Federal judges should not be ersatz deans or educators"); Knight v. Alabama, 14 F.3d 1534, 1552 (11th Cir. 1994) (citing Knight v. Alabama, 787 F.Supp. 1030, 1333 (N.D. Ala. 1991)) ("Curricula design has historically been left to the university. One of the central tenets of academic freedom is the right to decide matters of course content. Such freedom is essential to guarantee the unimpeded exchange of ideas. It is not the duty of a federal court to dictate to a university the content of its curriculum; such decisions belong to the institution's faculty *in the absence of a constitutional violation*") (emphasis added by the Eleventh Circuit); Pearson v. Walden Univ., 144 F.Supp. 3d 503, 509 (S.D.N.Y. 2015) ("courts have long been reluctant to intervene in controversies involving purely academic determinations[,] which are vital to the integrity of the academic institution") (internal quotations omitted).

Fifth, and finally, is an issue of the language of the *Pickering* test itself. In order for a professor to have protection under the *Pickering-Connick* standard, they must be speaking as a *private citizen* on a matter of public concern.[133] Although this is not always the way that courts apply the test, that is what the language of the *Pickering* case requires.[134] Thus, if the language of *Pickering* were adhered to faithfully, it would lead to a severe diminishment of the First Amendment rights of professors, given that most of their speech that would implicate the interests of academic freedom is made pursuant to their job duties, not as a private citizen.

VII. A NEW, CONTEXTUAL-BASED STANDARD

Having established that a right to academic freedom does exist under the First Amendment and that the *Pickering-Connick* test is insufficient for this circumstance, the pertinent question then becomes: what should the standard be?[135] To answer this, I will analyze whether the right to academic freedom should apply in the most common circumstances in which a professor would be likely to assert such a right.[136] The three primary areas in which professional academic freedom for university professors may exist are: (1) freedom during classroom instruction, (2) freedom to research and publish, and (3) freedom to speak and write as a citizen outside of the university.[137] Essentially, the standard I propose would be a very simple solution to a rather complex issue: whether the constitutional right to academic freedom attaches depends only upon the context in which the professor is speaking.[138] Not only can clear categories be delineated utilizing this approach, which would provide significant guidance to courts in the United States, but the contexts in which such a right would apply are remarkably finite and determinable.[139] Further, another primary benefit of this approach would be that courts would

133. Alexis Martinez, *The Right to be an Asshole: The Need for Increased First Amendment Public Employment Protections in the Age of Social Media*, 27 AM. U.J. GENDER SOC. POL'Y & L. 285**,** 304 (2019).

134. Patricia M. Nidiffer, *Tinkering with Restrictions on Educator Speech: Can School Boards Restrict what Educators Say on Social Networking Sites?,* 36 DAYTON L. REV. 115, 124 (2010); Lumturije Akiti, *Facebook Off Limits? Protecting Teachers' Private Speech on Social Networking Sites,* 47 VAL. U.L. REV. 119, 155 (2012).

135. *See supra* Part V-VI.

136. *See infra* Part VII(a)-(c).

137. Tepper & White *supra* note 2, at 127 ("At its core, professional academic freedom for college and university teachers involves the following: (1) freedom in research and publication, (2) freedom in classroom discussion concerning the curriculum, and (3) freedom to speak or write as citizens. Universities exist for the common good, which 'depends upon the free search for truth and its free exposition'").

138. *See infra* Part VII(a)-(c).

139. *Id.*

no longer have to conduct difficult *Pickering-Connick* analyses on factually intensive cases.[140]

a. Contextual Approach–Classroom Lecturing

Out of all the duties that a professor is employed to perform, classroom teaching seems to be the duty that the university has the highest interest in ensuring that the messages conveyed match up with the curriculum dictated to the professor.[141] Indeed, many courts that have considered the issue of academic freedom in the classroom have ruled that a professor does not maintain the right to disobey a university's curricular instructions.[142] So, what right should a professor have to maintain their own judgment as to what should be taught during their classroom instructional time? The answer to this question is simple: so long as the professor's speech is germane to the subject matter they have been tasked with teaching, the professor should retain the right to teach without fear of university interference.[143] This standard allows the professor ample latitude to conduct their classroom lectures while also allowing the university to subject the professor to discipline if they refuse to teach the curriculum prescribed, consistent with their inherently higher interest in controlling the professor's speech in this context.[144]

What does it mean for speech to be "germane to the subject matter?"[145] For speech to be germane to the subject matter, it must be performed during classroom instruction time and must be able to be seen as appropriate to further a legitimate pedagogical purpose.[146] This means that a cosmetology professor could not take advantage of classroom instruction time to lecture about the sinfulness of homosexuality,[147] nor could Dr. Buchanan speak

140. *Id.*

141. *Meriwether*, 992 F.3d 504 (citing *Sweezy*, 354 U.S. at 249-50) ("The Court explained that it 'could not be seriously debated' that a professor's 'right to lecture' is protected by the Constitution").

142. *See* Virgil v. Sch. Bd., 862 F.2d 1517, 1520 (11th Cir. 1989) ("In matters pertaining to the curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity").

143. Jon M. Garon, *Beyond the First Amendment: Higher Education's Need for Procedural Safeguards to Mute Social Media Outrage*, 40 QUINNIPIAC L. REV. 327, 352 (2022) ("Faculty members generally enjoy wide latitude in how they teach and what they say, provided it is germane to the subject matter of the course. . . Professors are not permitted to say anything and everything simply because the words are uttered in the classroom context.") (internal quotations omitted).

144. *Id.* at 343-44.

145. This standard, as shown in Part IV, has been consistently used by the Fifth and Sixth Circuits. *See Hardy*, 260 F.3d at 683; *Buchanan*, 919 F.3d at 853-54; *Bonnell*, 241 F.3d at 811.

146. Kracunas v. Iona College, 119 F.3d 80, 88 n. 5 (2d Cir. 1997) (this standard can also be applied to conduct during classroom instruction, as "[t]eachers of drama, dance, music, and athletics, for example, appropriately teach, in part, by gesture and touching").

147. Piggee v. Carl Sandburg College, 464 F.3d 667, 668, 671 (7th Cir. 2006) ("No college or university is required to allow a chemistry professor to devote extensive classroom time to the teaching of

about the private sex lives of herself and her students in the classroom, as those comments do not further any legitimate pedagogical purpose.[148] Further, a professor would not have the latitude to go on racist or sexist tirades during classroom instruction, which have become increasingly prevalent in recent years.[149] What this standard does allow for, however, is professors expounding controversial and unpopular topics to challenge students to think critically and evaluate perspectives that differ from their own, one of the core purposes of our Nation's colleges and universities.[150]

Certainly, this standard is not immune to pushback. One could argue that this standard allows professors too much freedom in the classroom to dictate what is taught and prohibits the university from providing any oversight. However, this standard should not prevent the university from being able to prescribe the curriculum taught in class, including what books to use and what subject matter must be taught, and it does not mean that the teacher is immune to discipline for failing to teach effectively.[151] Even under this standard, professors would remain accountable under normal administrative review processes, including student evaluations and administrative performance reviews.[152] These reviews would continue to be an independent basis for

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James Joyce's demanding novel *Ulysses,* nor must it permit a professor of mathematics to fill her class hours with instruction on the law of torts. Classroom or instructional speech, in short, is inevitably speech that is part of the instructor's official duties, even though at the same time the instructor's freedom to express her views on the assigned course is protected").

148. *Buchanan*, 919 F.3d at 851.

149. Vimal Patel, *UPenn Accuses a Law Professor of Racist Statements. Should She be Fired?*, THE NEW YORK TIMES (Mar. 24th, 2023), https://www.nytimes.com/2023/03/13/us/upenn-law-professor-racism-freedom-speech.html ("Amy Wax, a law professor, has said publicly that 'on average, Blacks have lower cognitive ability than whites,' that the country is 'better off with fewer Asians' . . . Professor Wax has shown 'callous and flagrant disregard' for students, faculty and staff, subjecting them to 'intentional and incessant racist, sexist, xenophobic and homophobic actions and statements'"); Colleen Flaherty, *'Did I Insult them?'*, INSIDE HIGHER ED (Oct. 18, 2022), https://www.insidehighered.com/news/2022/10/19/uc-san-diego-suspends-instructor-racist-comments
("The University of California, San Diego, removed an instructor from the classroom for the term, following racist remarks he made during an organic chemistry lecture last week. According to a video of the class—which the university was recording for student use, and which has since been shared widely on social media—the instructor, Robert Ternansky, exited the lecture hall to address noise outside. Speaking to people out of view, Ternansky said, 'Sí, sí, señor. Ándale, ándale. Arriba, arriba.' . . . After some students' seemingly awkward laughter, Ternansky said, 'Did I insult them?' He added, 'Someone tell me if they start running in here with their weapons'").

150. *See, e.g.*, *Hardy*, 260 F.3d at 674-75, 683 (wherein an adjunct communication professor utilized words like "bitch," "faggot," and "nigger" to examine how language "is used to marginalize minorities and other oppressed groups in society," during a lecture about language and social constructivism. The Court determined this speech was protected, stating "[r]easonable school officials should have known that such speech, when it is germane to the classroom subject matter and advances an academic message, is protected by the First Amendment." *Id*. At 683. This is precisely the type of lecture this standard is crafted to protect).

151. Garon, *supra* note 143 at 344.

152. *Id.* at 378.

disciplining or terminating the instructor, should they demonstrate that the instructor is simply not effective at doing their job.[153]

b. Contextual Approach–Academic Publishing and Scholarship

Unlike the classroom context, what professors research and publish pursuant to their individual academic pursuits is subject to very little university oversight.[154] Indeed, many professors who publish and research are not even required to do so by their employment contracts.[155] Nevertheless, research oftentimes is an integral component of a professor's job responsibilities.[156] Thus, it seems apparent that a professor would have a much stronger claim that they maintain academic freedom in this context, and the university has a much less significant right, if any at all, to constrict the professor's speech in this context.[157] A standard that applies in this context should adequately account for those considerations, which, as has already been shown, *Pickering* does not.[158] The standard that I propose is simple: professors should be afforded categorical and full freedom to research and publish the results thereof. The search for knowledge and truth and the dissemination thereof is critical to the health of democracy and necessary to

153. *Id.*

154. Lauren K. Ross, *Pursuing Academic Freedom After Garcetti v. Ceballos*, 91 TEX. L. REV. 1253, 1277-78 ("While I agree any right to academic freedom should protect professors' teaching and scholarship, I believe a right to academic freedom should go further and also protect the speech of professors outside the classroom when the professor uses his or her professional expertise in speech that supports the academic function of the university").

155. *See generally* Alyssa Di Sabatino, the 'Untouchables': *Can Tenured Professors be Fired for Inflammatory Comments?*, THE CORD (Jul. 15, 2020), https://thecord.ca/the-untouchables-can-tenured-professors-be-fired-for-inflammatory-comments/.

156. Strasser, *supra* note 100 at 605 ("At the university level, research is often an important component of a professor's job responsibilities. One element of research may involve applying for and receiving funding").

157. Tepper & White *supra* note 2, at 165 ("Research and publication further a core function of the university: knowledge creation. Teaching involves another core function: knowledge dissemination. These functions suggest that academic professionals are treated differently").

158. *See* Strasser, *supra* note 100 at 608. Explaining why *Pickering* is an insufficient instruction for lower courts in the context of academic scholarship, Strasser explains the issue by explaining the facts of *Adams* and notes that:

> Suppose further that the university had justified its adverse action by saying that while Adams had met the requirements for teaching and research, his manner of expressing his views had undermined workplace efficiency because many of his colleagues now found it too difficult to work with him. It is simply unclear whether *Pickering* would allow the university to impose sanctions in light of this workplace efficiency justification. It is further unclear whether it would matter whether the alleged difficulties in working together were based on the content of his speech rather than the manner in which those contents had been communicated.

the continued development of society.[159] Further, a university should be seeking to promote a professor's quest for knowledge, even if such a quest leads to unpopular places.[160] Thus, any standard crafted must provide adequate protection to allow professors to pursue this quest for knowledge, as this standard would.[161]

Concerns that this standard provides too much protection for professors to say hateful and denigrating things under the guise of scholarship fall flat for several reasons.[162] First, and most importantly, professors will continue to be limited in what they can say in class and publish in scholarship by Title IX and Title VI of the Civil Rights Act, which are federal laws that prohibit discrimination on the basis of sex, race, and national origin, respectively.[163] These laws provide an independent basis for which the university can terminate the professor for espousing hateful views that jeopardize the university's federal funding.[164] Second, professors that espouse hateful and or discriminatory viewpoints in their scholarship open themselves up to significant lambasting and loss of academic credibility, which will swiftly lead to their scholarship being discredited and filtered out of our nation's "marketplace of ideas."[165] It is inherent that professors who endorse such speech will quickly have their opinions cast to the winds.

c. Contextual Approach–Speaking as a Private Citizen

As is shown in *Austin*, universities have recently made efforts to stifle the speech of professors in contexts entirely outside of the campus of the

159. *Academic Freedom Guidelines and Best Practices*, ORGANIZATION OF AMERICAN HISTORIANS (last visited Apr. 15, 2023), https://www.oah.org/about/governance/policies/academic-freedom-guidelines-and-best-practices/ ("[In research and publication] [a] cademic freedom includes the liberty to conduct research and draw conclusions rooted in evidence. Academic freedom defends researchers' right to choose methodologies, draw conclusions, and assert the value of their contributions, but does not protect against critiques of their claims").

160. Phil Cicora, *How Should Universities Handle Controversial Speech?*, ILL. BUS. BUREAU (Aug. 30, 2017, 8:30AM), https://news.illinois.edu/view/6367/549565 ("Universities must remain committed to promoting and protecting a wide-ranging and open exchange of competing ideas, hypotheses, perspectives and values, and such an exchange often will unavoidably involve political controversy. So if you eliminate controversy, you lose important speech").

161. *See generally supra*.

162. *See infra* Part VII(b).

163. Title IX states, in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .." 20 U.S.C. § 1681(a) (1994). Title VI states, in relevant part: "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

164. Garon, *supra* note 143 at 337.

165. *See Pernell,* 2022 U.S. Dist. LEXIS 208374, n. 4-5.

university.[166] This is particularly true in Republican states like Florida and Texas, but Democratic states have also been guilty of the same type of speech suppression for seemingly opposite reasons.[167] Nevertheless, private citizen speech is the type of speech which the interest of the university is at its absolute lowest ebb, as professors are speaking in their capacity as a private citizen wholly outside of their official duties.[168] This notion is not unique to this context. Even under the *Pickering* standard, public employees are granted significantly more latitude to speak as private citizens, outside of the scope of their employment.[169] Therefore, professors should be granted the same latitude to speak as a private citizen as they have to speak on matters of academic publishing and scholarship. The same standard being applied to both contexts is also intuitive insofar as academic scholarship bleeds into opportunities for the professor to be interviewed by media, give expert testimony before courts and legislatures, and produce internet blogs.[170] Applying a different standard to the two aforementioned contexts would unnecessarily complicate this analysis and strip this approach of simple uniformity, even if the *Pickering-Connick* standard would grant sufficient rights to professors in most instances given its broad grant of protection in this context.[171]

VIII. CONCLUSION

We are at a turning point in our Nation's history.[172] Gone are the days when professors occupied a coveted status as intellectual leaders that drove

166. *See generally Austin,* 580 F. Supp. 3d 1137. *See also* Darrell M. West, *Why Academic Freedom Challenges are Dangerous for Democracy*, BROOKINGS INSTITUTION (Sept. 8, 2022), https://www.brookings.edu/blog/brown-center-chalkboard/2022/09/08/why-academic-freedom-challenges-are-dangerous-for-democracy/.

167. Johnathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 HARV. J. OF L. & PUB. POL'Y 571, 571 (2022) (". . . the United States is arguably living through one of its most serious anti-free speech periods, and there are signs that the current period could result in lasting damage for free speech due to a rising orthodoxy and intolerance on our campuses and in our public debate. Where fighting for freedom of speech was once a near-universal rallying cry, opposing free speech has now become an article of faith for some in our society. This has led to a rising movement that justifies silencing opposing views, often on the grounds that stopping others from speaking is, in fact, an exercise in free speech").

168. Madyson Hopkins, *Click at Your Own Risk: Free Speech for Public Employees in the Social Media Age*, 89 Geo. Wash. L. Rev. Arguendo 1, 20 (2021).

169. *Id*. at 3-4.

170. Interview with Joanne C. Brant, Professor of Law at Ohio Northern University Claude W. Pettit College of Law, (April 15, 2023) (notes on file, *Ohio Northern University Law Review*).

171. Interview with Joanne C. Brant, *supra* note 170.

172. John K. Wilson, *Conservatives Have Turned Against Academic Freedom Again. Here's Why*, WASH. POST. (Sept. 26, 2022), https://www.washingtonpost.com/made-by-history/2022/09/26/conservatives-repress-free-speech-campuses/ ("For decades, conservatives charged that free speech on campus allowed leftist academics to run amok, preaching ideas antithetical to American values. . . Today, however, many on the right have begun to see universities as hopeless and are resurrecting the older approach of limiting what they see as dangerous ideas on campuses").

our beloved marketplace of ideas forward.[173] Here are the days where professors are under constant fire from university administrations and state legislatures alike for endorsing unorthodox views.[174] While many courts have shown significant sympathy for professors, granting them heightened speech protection, the courts lack a workable standard from the United States Supreme Court that adequately protects their Free Speech interests given their unique position in our democracy.[175] This has led to very different analyses being utilized by the circuits, meaning that a professor may be reprimanded for their speech in one circuit and be protected in another, a result that simply cannot persist.[176]To this point, many commenters are correct in suggesting that the *Pickering-Connick* standard is ill-suited to analyze the Free Speech claims of university professors.[177] That test provides very little tangible protection to the persons most directly responsible for guiding and training our youth and gives inordinate preference for universities under the guise of an "efficient workplace."[178]

Thus, this comment has sought to propose a new standard, which focuses solely on the context of the professor's speech to determine whether it should be protected.[179] This standard is not only specifically crafted for this situation that occupies a unique constitutional niche in our First Amendment jurisprudence, but it also provides First Amendment protection in the situations where our intellectual leaders need it the most.[180]

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173. Evan Gerstmann, *College Professors are Under Fire*, FORBES (Feb. 7, 2022, 6:26PM), https://www.forbes.com/sites/evangerstmann/2022/02/07/college-professors-are-under-fire/?sh=1956c2f73b52 ("These are challenging days to be a college professor if you want to talk about controversial issues, regardless of where you fall on the political spectrum. For professors who are seen as insufficiently woke on racial issues, they are in danger of being punished by their universities. Meanwhile, many more conservative states are considering legislation that would clearly violate the academic freedom of racially progressive professors").

174. *Id.*

175. *See supra* Part V.

176. *See supra* Part IV.

177. Chang, *supra* note 39 at 917-18; Jon M. Garon, *Beyond the First Amendment: Higher Education's Need for Procedural Safeguards to Mute Social Media Outrage*, 40 QUINNIPIAC L. REV. 327, 353 (2022) ("The *Pickering-Connick* balancing test will allow universities to react to a great deal of unwanted faculty speech").

178. *Sweezy*, 354 U.S. at 245.

179. *See supra* Part VII.

180. *Id.*