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Abstract

Since the early twentieth century, academics have urged universities to recognize robust protections for the freedom of professors to speak in public on matters of political, social, and economic controversy—so-called "extramural speech." The U.S. Supreme Court eventually recognized First Amendment protections for government employees, including state university professors, who express themselves about matters of public concern. The Court has indicated that the state should be especially solicitous of the speech of government employees in an academic context, but it has not adequately elaborated on the nature of those protections and how courts and government employers should assess the state's interests relative to the extramural speech of professors employed at public universities.

This Article describes the state of the existing principles and doctrine surrounding extramural speech and examines the factors that private and public universities can reasonably take into consideration when responding to such speech—and what rationales for suppressing such speech or sanctioning faculty for engaging in such speech are inappropriate. Controversies surrounding the public speech of university faculty have only become more common and more intense in recent years, and both public and private universities need to be more self-conscious about the risk of stifling the intellectual environment of universities and chilling unpopular speech when responding to such controversies. If First Amendment values are particularly weighty in the context of the marketplace of ideas on university campuses, then many of the rationales for disciplining government employees for controversial speech that may make sense in some governmental workplaces should be rejected if applied in the university context.

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INTRODUCTION

Professors are most vulnerable when they speak in public. When professors step out onto the public stage, they leave behind some of their comfortable and familiar professional environment. Their words reach a different audience, in a different context, no longer sheltered by the peculiar expectations of a seminar room or scholarly workshop. The controversies that can arise out of their public speech can be particularly intense and unusually visible. Universities can find themselves under exceptional pressure to sanction members of the faculty who have drawn this unwanted attention. University leaders sometimes buckle under that pressure.

Public speech by university professors, generally known in the academic freedom literature as "extramural speech,"[1] has always been a source of controversy and vulnerability, but the dangers are heightened in our current age. Extramural-speech disputes once revolved around professors expressing themselves in letters to the editor in a newspaper or speaking at a local political rally or demonstration. They now routinely arise in the context of the internet. Blogs, social media, and podcasts have all given professors new means for connecting with new and wider audiences. The results are often positive for the dissemination of expert opinion in the public sphere. But the new media comes with new risks. Professors have lost the gatekeepers that might once have restricted access to their more unvarnished and controversial thoughts. Their passing thoughts are more often memorialized in a more permanent form. Their words can find their way to unexpected audiences and unforeseen contexts. Extramural speech is more pervasive and more accessible than it has ever been.

1. Ruth Starkman, *Extramural Speech Is Free, but Schadenfreude Is Expensive: When Academics Trash Talk on Social Media*, ETHICS OR EQUITY? WHY NOT BOTH? (Feb. 22, 2021), https://ruth.substack.com/p/extramural-speech-is-free-but-schadenfreude [https://perma.cc/5X7A-B2DC].

Expressing oneself in public is also more treacherous in our time of polarized politics. It can be easy to view the past through rose-colored glasses and assume that current levels of political polarization are historically unique. It seems more likely that we are reverting to something like the historical norm.[2] Even so, the "liberal consensus" of the mid-twentieth century was accompanied by systematic efforts to purge far-left professors from the faculty.[3] In the current political and media environment, it is relatively easy for members of the elite and mass public to take offense at the political opinions of university professors. Political views that might be completely mainstream, or only slightly outré, on a college campus can be viewed as extreme or intolerable when conveyed beyond the campus gates. Societal partisan and ideological sorting have fostered "affective polarization," or partisan animosity, that rivals or exceeds other sources of division in contemporary American life.[4] Even ordinary political disagreements can lead to outsized emotional reactions, and efforts to purge or "cancel" the offender.[5] Extramural speech comes with risks of stirring up political controversy.

2. *See generally* NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2006); David A. Bateman, Joshua D. Clinton & John S. Lapinski, *A House Divided? Roll Calls, Polarization, and Policy Differences in the U.S. House, 1877–2011*, 61 AM. J. POL. SCI. 698 (2017).

3. ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES 76 (1986); MARJORIE HEINS, PRIESTS OF OUR DEMOCRACY: THE SUPREME COURT, ACADEMIC FREEDOM, AND THE ANTI-COMMUNIST PURGE 6, 10 (2013); LIONEL S. LEWIS, COLD WAR ON CAMPUS: A STUDY OF THE POLITICS OF ORGANIZATIONAL CONTROL 12, 79–80 (1988); MATTHEW C. EHRLICH, DANGEROUS IDEAS ON CAMPUS: SEX, CONSPIRACY, AND ACADEMIC FREEDOM IN THE AGE OF JFK 2 (2021).

4. James N. Druckman, Samara Klar, Yanna Krupnikov, Matthew Levendusky & John Barry Ryan, *Affective Polarization, Local Contexts and Public Opinion in America*, 5 NATURE HUM. BEHAV. 28, 28 (2021); Kristin N. Garrett & Alexa Bankert, *The Moral Roots of Partisan Division: How Moral Conviction Heightens Affective Polarization*, 50 BRITISH J. POL. SCI. 621, 621 (2018); NOAM GIDRON, JAMES ADAMS & WILL HORNE, AMERICAN AFFECTIVE POLARIZATION IN COMPARATIVE PERSPECTIVE 1 (2020).

5. Pippa Norris, *Cancel Culture: Myth or Reality?* 71 POL. STUD. 145, 148–49 (2023); *see also* James H. Kuklinski, Ellen Riggle, Victor Ottati, Norbert Schwarz & Robert S. Wyer, Jr., *The Cognitive and Affective Bases of Political Tolerance Judgments*, 35 AM. J. POL. SCI. 1, 1–3 (1991) (explaining bipartisan political tolerance and its impact on personal judgments); Nicole M. Lindner & Brian A. Nosek, *Alienable Speech: Ideological Variations in the Application of Free-Speech Principles*, 30 POL. PSYCH. 67, 70 (2009) (elaborating on political tolerance); James L. Gibson, *Enigmas of Intolerance: Fifty Years After Stouffer's* Communism, Conformity, and Civil Liberties, 4 PERSP. POL. 21, 23 (2006); Mark J. Brandt, Christine Reyna, John R. Chambers, Jarret T.

The combination of polarization and the internet has created a particular minefield for professors in the form of self-appointed campus watchdogs. In recent years, a cottage industry has formed—primarily on the political right—that is concerned with amplifying, and sometimes misrepresenting, objectionable political opinions and activities on college campuses.[6] Specialized advocacy groups like Turning Point USA and its "Professor Watchlist" are aimed at exposing college professors who "advance leftist propaganda in the classroom."[7] Online media outlets like Campus Reform[8] and College Fix[9] position themselves as "conservative watchdog[s] to the nation's higher education system" that expose "liberal bias and abuse on the nation's college campuses."[10] This specialized ecosystem is designed to systematically uncover potentially controversial statements by university professors. Extramural speech that might easily have passed unnoticed will now be more likely to be identified and made visible to a hostile audience. The more sensational examples might well be taken up by right-leaning mass media outlets or national political personalities. The result is often the targeted harassment of professors at the center of these controversies, and sometimes campaigns to terminate the employment of those professors.[11]

Contractual and constitutional protections for extramural speech seek to prevent retaliation by university employers against professors

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Crawford & Geoffrey Wetherell, *The Ideological-Conflict Hypothesis: Intolerance Among Both Liberals and Conservatives*, 23 CURRENT DIRECTIONS IN PSYCH. SCI. 27, 27 (2014).

6. This is not to say that only professors on the political left are subject to hostile reactions to their extramural speech. Professors on the political right are likewise attacked for their extramural speech, but such attacks are often more likely to come from other members of the campus community.

7. *Professor Watchlist: About Us*, TURNING POINT USA, https://www.professorwatchlist.org/aboutus [https://perma.cc/3LP9-QMVL] (last visited Feb. 4, 2023).

8. *Mission*, CAMPUS REFORM, https://campusreform.org/about [https://perma.cc/F78T-HBVY] (last visited Feb. 4, 2023).

9. *See generally* THE COLLEGE FIX, https://www.thecollegefix.com/ [https://perma.cc/N8VG-6HXH] (last visited Feb. 4, 2023).

10. CAMPUS REFORM, *supra* note 8.

11. Periwinkle Doerfler, Andrea Forte, Emiliano De Cristofaro, Gianluca Stringhini, Jeremy Blackburn & Damon McCoy, *"I'm a Professor, Which Isn't Usually a Dangerous Job": Internet-Facilitated Harassment and Its Impact on Researchers*, 5 PROC. ACM ON HUMAN-COMPUTER INTERACTION 1, 1–2, 19 (2021); Gloria C. Cox, *Dear Professor, Be Careful with Those Tweets, OK? Academic Freedom and Social Media*, 53 PS: POL. SCI. & POLS. 521, 523–24 (2020); Samantha McCarthy & Isaac Kamola, *Sensationalized Surveillance: Campus Reform and the Targeted Harassment of Faculty*, 44 NEW POL. SCI. 227, 227–28 (2022).

for saying controversial things in public. Even in principle, those protections are recognized to be qualified, however.[12] In practice, those protections do not always prove to be adequate to prevent sanctions from being imposed on unpopular speakers. The current environment is putting those principles under new strain. There is value in revisiting those protections, both to clarify the nature of the commitment to protecting extramural speech and to patch some cracks in the edifice. To that end, this Article considers both constitutional and contractual protections for extramural speech and the lessons that can be carried between them and recent controversies arising from this type of professorial speech.

This Article focuses on how courts and employers should engage in the so-called *Pickering* balancing that weighs the interest of the university employer against the interests of a professor speaking in public on matters of public concern. The First Amendment analysis that courts have applied to government employee speech is useful for understanding how free speech protections should be understood in the context of private employers as well. But courts have not been sufficiently careful in thinking about the legitimate interests that a university employer might have in regulating the extramural speech of members of the faculty, and if those interests are not correctly specified there is a great risk that universities will suppress speech that ought to be properly protected. There are few circumstances that would justify a university sanctioning a professor for saying controversial things in public.

In Part I, I examine how the protection for extramural speech fits within the broader framework of contractual protection for professorial speech in the United States. In Part II, I locate the protections for extramural speech within the Supreme Court's First Amendment jurisprudence and the considerations affecting these protections for professors at state universities. In the subsequent Parts of the Article, I consider interests that a state university might claim to set against a professor's First Amendment interest and argue that such interests should either be set aside or read quite narrowly to safeguard First Amendment values. In Part III, I examine claims about the best interest of the university and how the extramural speech of members of the faculty might damage the institution. In Part IV, I examine claims about disruption to the educational enterprise caused by reactions to offensive professorial speech. In Part V, I examine claims about a lack of professional fitness that might be revealed by extramural speech.

12. AM. ASS'N OF UNIV. PROFESSORS, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, *in* POLICY DOCUMENTS AND REPORTS 11–12 (11th ed., 2015) [hereinafter AM. ASS'N OF UNIV. PROFESSORS, *1915 Declaration*].

I. ACADEMIC FREEDOM, FREE SPEECH, AND EXTRAMURAL SPEECH

> [W]hatever may or may not have happened in other universities, in the University of Chicago neither the Trustees, nor the President, nor anyone in official position has at any time called an instructor to account for any public utterances which he may have made.
>
> —William R. Harper, President of the University of Chicago, 1901[13]

At the beginning of the twentieth century, professors at American universities enjoyed no significant protections from being fired for controversial speech. Scholars were generally understood to be at-will employees and had no expectation that they could keep their job if they angered their university employers.[14] Professors were routinely dismissed from their positions for offending students with their teaching, offending alumni and donors with their scholarship, or offending anyone with their political activities.[15] J.W. Alexander, a turn-of-the-century trustee of Princeton University, summed things up simply: "The board of trustees [are] the ultimate authority . . . In case there should be any differences the authority of the board would have to prevail. The professors would have to walk the plank."[16]

Examples of professors coming under fire for expressing controversial ideas are myriad. Not long after arriving at the University of Wisconsin, the pioneering political economist Richard T. Ely survived a much-publicized "trial" by the board of regents for being too

13. William R. Harper, *The Thirty-Sixth Quarterly Statement of the President of the University: Freedom of Speech*, 5 U. REC. 370, 376 (1901).

14. *See, e.g.*, Hartigan v. Bd. of Regents, 38 S.E. 698, 700–01 (W. Va. 1901) ("The university is a corporation, and, considering it merely in that light, it is clear that the board can remove its employés at pleasure; for the officers or employés of a corporation have no franchise or property in their offices, but are simply ministerial agents to carry out its corporate business, and, unless its by-laws otherwise provide, may be removed at the pleasure of the corporation."); Devol v. Bd. of Regents, 76 P. 737, 737 (Ariz. 1899) ("By that act, the full power of hiring and discharging any member of the faculty is given to the board of regents, to be exercised in their own wise discretion. The university is a public institution, placed under the control of the board of regents, with full powers to manage the same, subject only to the will of the legislature.").

15. MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 24–27 (2009); HENRY REICHMAN, UNDERSTANDING ACADEMIC FREEDOM 9–10 (2021).

16. Thomas Elmer Will, *The Value of Academic Opinions on Economic Questions*, 24 INDUSTRIALIST 600, 602 (1898).

friendly to unionization and socialism.[17] Ely was relatively fortunate and enjoyed the benefit of having friends in high places at Wisconsin. Perhaps more representative was the fate of Ely's star student, John R. Commons. Commons eventually found refuge at Wisconsin with Ely, but only after being run out of Indiana University and Syracuse University for having "radical tendencies."[18] Similarly, the Progressive political scientist J. Allen Smith was dismissed from Marietta College for being too vocal about his hostility to the gold standard,[19] and the prominent sociologist Edward A. Ross was pushed out of Stanford University after his public advocacy on behalf of William Jennings Bryan and restrictions on Chinese immigration angered Jane Stanford.[20] The newly famous, and independently wealthy, historian Charles Beard resigned from Columbia University after it fired an English professor and a psychologist for "disseminat[ing] doctrines tending to encourage a spirit of disloyalty" as the United States entered the Great War.[21] As a trustee at Northwestern University observed, a professor "must of necessity be an advocate, but his advocacy must be in harmony with the conclusions of the powers that be."[22] The trustees were, he thought, "only a little less qualified to be the final arbiters as to what should be taught" than the faculty were, and they should take swift action when professors start "preaching" the wrong doctrines.[23]

Establishing employment protections for professors who express controversial ideas initially came through the organization and advocacy of the faculty. In 1913, three of the still-new social science professional associations began a collaborative effort to consider the state of academic freedom in the United States.[24] In 1915, those discussions bore fruit in the form of a new organization dedicated to advancing academic freedom.[25] The American Association of University

17. Stanley R. Rolnick, *An Exceptional Decision: The Trial of Professor Richard T. Ely by the Board of Regents of the University of Wisconsin, 1894*, 8 J. ARK. ACAD. SCI. 198, 200 (1955) (describing the "trial" of Richard T. Ely).

18. JOHN R. COMMONS, MYSELF 58, 92 (1934).

19. Thomas C. McClintock, *J. Allen Smith, A Pacific Northwest Progressive*, 53 PAC. NW. Q. 49, 50 (1962).

20. LAURENCE R. VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY 400–02 (1965).

21. Clyde W. Barrow, Realpolitik *in the American University: Charles A. Beard and the Problem of Academic Repression*, 36 NEW POL. SCI. 438, 451 (2014).

22. Will, *supra* note 16, at 601.

23. *Id.*

24. WALTER P. METZGER, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY 200–01 (1955).

25. *Id.* at 202–04.

Professors (AAUP) was launched under the leadership of some of the most prominent scholars in the country at the time. Their 1915 Declaration on Principles of Academic Freedom and Academic Tenure called for a new understanding of the relationship of scholars to universities.[26] Academia was a "calling," and the "professorial office should be one both of dignity and of independence."[27] Professors were "appointees" of the university trustees, "but not in any proper sense the employees" of those trustees. University leaders had "neither competency nor moral right to intervene" in how scholars performed their professional functions. If the public were to be well served by the expertise and objectivity that professors could develop, a professor should answer only "to the judgment of his own profession," not to the donors and alumni who provided the financial support for maintaining the universities.[28] Contrary to the view of the Northwestern University trustee, the presupposition of the AAUP was that nonexpert outsiders were not, in fact, just as qualified as the faculty to determine what should be taught at a university or whether scholarship was meritorious.

The philosophical principles first laid out in 1915 were given more concrete form in the influential 1940 Statement of Principles on Academic Freedom and Tenure, which was jointly agreed to by the AAUP and the Association of American Colleges.[29] In addition to urging the adoption of systems of tenure to provide some measure of practical independence for professors from university officials, it identified three core principles of academic freedom. Professors were to enjoy "full freedom in research and in the publication of the results," "freedom in the classroom in discussing their subject," and freedom from "institutional censorship or discipline" when "they speak or write as citizens."[30]

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26. *See id.* at 133–38.

27. AM. ASS'N OF UNIV. PROFESSORS, *1915 Declaration*, *supra* note 12, at 6.

28. *Id.*

29. *See generally* AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), https://www.aaup.org/file/1940%20Statement.pdf [https://perma.cc/37CU-C45V] [hereinafter AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT].

30. *Id.* The 1940 statement includes a qualification of that freedom of expression, noting that the "special position in the community" of professors

> imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

It is this third principle, the freedom to speak and write "as citizens," that covers what would become known as extramural speech. It is an odd fit in the trio of academic freedom commitments embodied in the 1940 statement and anticipated in the 1915 declaration.[31] The freedom of teaching and scholarship require, as William Van Alstyne put it, a "specific theory" of "vocational liberties," but the protection of "purely aprofessional pursuits" falls much more simply within a generalized theory of civil liberties and freedom of speech.[32] As Robert Post has emphasized, the freedom to engage in scholarship and teaching without outside interference is grounded in a claim about the social value of professional expertise and how best to develop and exploit that expertise.[33] The right to speak in public as a citizen turns on a completely different set of claims, however.[34] The general civil liberty to speak freely does not depend on a citizen's competence or skill or accuracy, but only on their equal right to have and express an opinion, no matter how misguided and uninformed that opinion might be. As Harvard President A. Lawrence Lowell noted in the "troublous times" at the start of World War I, "[T]he right of a professor to express his views without restraint on matters lying outside the sphere of his professorship. . . . is not a question of academic freedom in its true sense, but of the personal liberty of the citizen."[35]

There is long-standing disagreement over whether, why, and to what degree professorial extramural speech should be protected by universities. President Lowell recognized that such extramural speech, sometimes "extreme, or injudicious," could "shock public sentiment" and "do great harm to the institution to which [the professor] is connected."[36] Even so, Lowell worried that universities would be assuming even greater institutional risk if they claimed a power to censor what professors might say in public. If a university exercises such an authority, then it "assumes responsibility for that which it permits

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The AAUP has understood this addendum to be hortatory and aspirational rather than a condition upon the freedom to speak as a citizen and retain university employment.

31. AM. ASS'N OF UNIV. PROFESSORS, *1915 Declaration*, *supra* note 12, at 4 ("[W]e shall consider the matter primarily with reference to freedom of teaching within the university, and shall assume that what is said thereon is also applicable to the freedom of speech of university teachers outside their institutions . . . .").

32. William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, 404 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 146 (1972).

33. ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM 61 (2012).

34. *Id.* at 22–23.

35. A. Lawrence Lowell, *President's Report*, 15 OFF. REG. HARV. U. 5, 18 (1918).

36. *Id.* at 19.

them to say."[37] Better for universities to insulate themselves from the political fallout by being able to honestly say that any individual professor speaks only for him or herself and that their personal opinions are not necessarily held by anyone else at the university, let alone by the institution as such. Others would emphasize that the personal liberty to participate in political life without fear of employer reprisal should be accepted as a universal principle of American republicanism.[38]

There are often real costs to universities from tolerating extramural speech by university employees.[39] There can be financial and political fallout when members of the faculty say unpopular things in public. Parents and students might worry about whether professors will treat all their charges fairly if those professors act as strident partisans and engage in emotional political tirades in public. We might think it awkward—or worse—when a university dedicated to the pursuit of truth retains on its faculty a professor who, in his or her free time, traffics in conspiracy theories or promulgates obvious falsehoods. Extramural speech can do real harm, and yet academic freedom organizations continue to defend the right of professors to engage in such speech and universities, on the whole, remain committed to respecting that.[40] Extramural speech is not free in the sense of being costless to others. Nonetheless, it should be free from censorship by university employers.

Protections for extramural speech are best thought of as prophylactic rules.[41] Such rules in general in constitutional law are "risk-avoidance rules that are not directly sanctioned or required by the Constitution, but that are adopted to ensure that the government follows constitutionally sanctioned or required rules."[42] They "build a fence around the Constitution" to reduce the risk that core constitutional commitments are violated by discouraging behavior that might be innocent in itself but that unacceptably increases the probability

37. *Id.* at 20.

38. *See, e.g.*, J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment*," 99 YALE L.J. 251, 264–65 (1989); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 243–45 (1990).

39. The following paragraphs build on and borrow from Keith E. Whittington, *Academic Freedom and the Scope of Protection for Extramural Speech*, 105 ACADEME 20, 22 (2019).

40. In its short history, the Academic Freedom Alliance has already intervened in several extramural speech controversies. *See Public Statements*, ACAD. FREEDOM ALL., https://academicfreedom.org/public-statements/ [https://perma.cc/625E-SXUW] (last visited Feb. 8, 2022).

41. *See also* FINKIN & POST, *supra* note 15, at 139–40.

42. Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926 (1999).

that constitutional violations will occur.[43] The free speech context has particularly invited the generation of such rules.[44]

If members of the faculty could be dismissed for what they said in public, then the core mission of the university to advance and disseminate knowledge would come under pressure and be subverted. If higher education institutions were to construct a regime to monitor social media for professors making controversial statements or adopt the view that professors could be dismissed if students or alumni objected to statements that a professor made in public, the practical scope of free inquiry on campus would be diminished.

Consider the easiest case for insisting on such protections, when the extramural speech is about matters closely related to the scholarly expertise of the speaker. Even some of those early academic freedom advocates who were uncomfortable with protecting the political expressions of professors generally understood that they needed to at least be protected when they were sharing their scholarly expertise with members of the public.[45] If society is to benefit from the development of scholarly expertise, then professors should be encouraged to bring their expertise to bear on matters of public concern and express their informed judgments to public audiences when doing so might be relevant to ongoing public debates. No doubt the first task of professors is to communicate the fruits of their scholarly labors to the scholarly community and to their students, but the public interest in maintaining universities as bastions of free inquiry is that the pursuit of truth might ultimately be useful to society at large. If we are to make the most of scholarly knowledge, we need to design institutions and practices that facilitate the diffusion of that knowledge.

If extramural speech is unprotected, however, faculty will be discouraged from sharing what they have learned and will be subject to sanctions that arise from their scholarly pursuits. Professors are properly subject to discipline if their teaching and research do not meet professional standards, and on first impression we might think it unobjectionable if scholars were held to the same high standards when they speak publicly about issues that fall within their expertise. But professors are likely to fall short of our normal expectations for scholarly discourse when engaging in public debate. There are some venues, such as legislative hearings or judicial trials, in which scholarly standards might be reasonably maintained. But in many contexts in which public arguments take place, scholarly corners will almost unavoidably be cut. A short newspaper op-ed will not provide the author with enough space to add the necessary qualifications, supporting evidence, and

43. *Id.* at 927.

44. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195–98 (1988).

45. Rabban, *supra* note 38, at 241–42.

consideration of opposing points of view that might be expected in scholarly writing. A Twitter thread will certainly fall short of what we expect from a responsible scholar speaking in an academic forum.

The exigencies of public debate not only truncate academic arguments, but they also frequently necessitate rhetorical moves that we would appropriately criticize if they were made within an academic context. Professors often participate in public debates as passionate advocates and not merely as detached experts. We can reasonably hope that professors will be responsible and sober-minded participants in public discussions when they talk about their areas of expertise, but we cannot reasonably expect that those contributions to public debate would hold up to the scrutiny of a tenure file. What is worse, if professors are being drawn into public debates about matters relating to their research, then that would suggest that their research is necessarily going to be seen as controversial. Pressuring colleges and universities to sanction those professors because of the controversial content of their extramural speech would be tantamount to pressuring them to sanction professors for the controversial content of their scholarly research.

If extramural speech were unprotected, faculty members could secure a refuge for pursuing their scholarship about controversial topics unmolested only if they assiduously refrained from bringing that scholarship to public attention. Among my own areas of scholarly inquiry have been such controversial and publicly relevant topics as originalism,[46] the politics of judicial independence,[47] the impeachment power,[48] and campus free speech.[49] Such writing is protected by traditional principles of academic freedom, even if students, alumni, donors, or politicians were unhappy with such writing and wanted my university employer to sanction me for producing it. If extramural speech were left unprotected, however, those same angry critics could pressure the university to sanction me for holding and expressing those views if I were to give a public lecture about them, discuss them on the radio or television, write an op-ed or blog post about them, or serve on a presidential commission or as an expert witness to report on them. It would hardly be a productive use of university resources to shelter scholars to develop expertise on such matters but then prohibit them from sharing that expertise with anyone other than fellow scholars or

46. *See* generally KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION (1999).

47. *See* generally KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007).

48. *See* generally KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

49. *See* generally KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH (2018).

students. Moreover, announcing that it is open season on professors who discuss their work in podcasts would quickly encourage pressure campaigns against professors who discussed those same ideas with students in the classroom. It would be unlikely in the long term that universities could hold the line against punishing professors for expressing controversial ideas on campus while allowing punishment if those selfsame ideas are discussed off campus. If the expression of the ideas is punishable, it will matter little to critics as to where those ideas are expressed. Indeed, it will not be hard for critics to spin such speech as even worse and more harmful if it is being communicated to students within the privacy of a classroom.

Controversial extramural speech on topics distant from the scholarly expertise of the professor in question is more difficult to justify protecting. Universities, and society generally, have an interest in encouraging the development of scholarly expertise and the deployment of that expertise when relevant to aid in public deliberation. Universities, and society generally, have much less interest in encouraging professors to pontificate in public about matters on which they know little. Why should professors not suffer sanction from their employers if they embarrass the university in public by indulging in ill-tempered political diatribes?

One concern with not protecting extramural speech unrelated to scholarly expertise is that it would leave professors vulnerable to being dismissed from their positions for pretextual reasons. It is all too easy to imagine unscrupulous administrators leaping on the excuse of a potentially controversial public comment to rid themselves of a faculty member who has crossed them in other ways. Public statements that would be unremarkable if made by a professor in good standing with the administration might be held out as intolerable if made by a professor otherwise at odds with university leadership. And indeed, many examples of professors punished by universities for their speech involve professors who were otherwise difficult or disliked on their campuses.[50] Extramural speech would become a loophole by which administrators could circumvent tenure and gut academic freedom, requiring that unpopular members of the faculty take extraordinary precautions not to provide an excuse to dismiss them. If a professor working at the Ohio State University could be fired for publicly rooting for the success of the University of Michigan football team, it would not have direct consequences for scholarly activity on campus, but there is little doubt that the intellectual climate on campus would be worsened and professors would be more tentative in speaking freely about matters of real concern.

But we should worry about leaving extramural speech unprotected even if administrators are not nefarious. Colleges and universities strive to foster creative intellectual environments in which it is possible for

50. VEYSEY, *supra* note 20, at 394–96.

members of the campus community to explore difficult questions and see where they lead. They do not try to confine those explorations to the classroom, the library, or the laboratory. Professors and students alike are allowed to stretch boundaries, float new ideas, and probe unconventional ways of thinking. Flights of fancy on the quad or in the pub might well inspire new angles of research or innovative approaches to teaching. To be sure, many such undisciplined conversations will lead nowhere and plenty of hobbyhorses will remain nothing but a diversion, but the openness of a campus to such provocative exchanges helps provide the setting for important academic work.

If extramural speech distantly related to scholarly inquiry is held to be wholly unprotected, then professors will find the intellectual environment chilled. They would appropriately be less willing to say what they think is true and embark on new paths of discovery if they worried that an unguarded public remark that generated controversy could become the basis for dismissal. The censorial structures needed to monitor, investigate, and punish extramural speech would dampen freedom of thought more generally. If universities hold that professors who engage in controversial speech can be fired for doing so, political activists will be emboldened to pursue professors with whom they have disagreements and pressure the universities that employ them. A faculty intent on self-censorship to avoid the possibility of becoming a source of public controversy is unlikely to be able to pursue research confidently or facilitate lively classroom discussions. Students who can see that professors do not dare to speak truthfully in public will have little faith that those same professors will speak truthfully in the classroom. We should be concerned with protecting the ability of biology professors to express ill-informed opinions about politics not because the ability to express ill-informed opinions about politics is part of academic freedom, but because the kind of stultifying intellectual environment in which one is wary of expressing a political opinion is not likely to be conducive to the voicing of bold new ideas and the rigorous exploration of them or arguing to the department chair that his life's work is built on flawed foundations.

Institutions of higher education should be presenting themselves as places where people voice controversial ideas, where competing ideas are welcome, and where ideas can be fearlessly debated, defended, and rejected. They should want to construct a vibrant intellectual ecosystem in which members of the campus community are unafraid to propose unconventional ways of thinking about the world and explore a trail of ideas wherever it might lead. Ultimately, we should want those ideas to be subjected to the disciplined scrutiny of careful scholarship, and it is the process and product of scholarship that colleges and universities should be most zealous in protecting. But intellectual ecosystems are fragile, and we should be cautious not to disrupt them. Academic freedom is more likely to thrive if professors do not have to worry that an incautious remark that lands them in hot water will be

parsed by university officials to determine whether the controversy resulted from their teaching and research or involves merely their extramural speech. We should be comfortable giving the faculty freedom to engage in idle speculation and boisterous public debate because we want to give them the freedom to speak their minds and to develop the habits of thought that allow them to think in ways that are creative and unorthodox, sometimes ingenious but sometimes just wrong. Cultivating a professoriate willing to speak its mind on any topic and in any forum is a necessary precondition for intellectual progress. Extramural speech might not contribute much to that progress but failing to protect such speech might well hamper the kind of advancements in human knowledge that we most care about.

II. *PICKERING* AND THE FIRST AMENDMENT

> [A] constitutional right to talk politics.
>
> —McAuliffe v. Mayor of New Bedford, 1892[51]

As the AAUP was urging American universities to adopt a set of norms and rules that would protect professors from being sanctioned or fired by their employers for saying controversial things in public, they were swimming against the current of American law of the early twentieth century. Private employers in general could dismiss their employees at will and had no expectation that they should tolerate their employees generating public controversies or publicly advancing political ideas that were detrimental to the interests of their employers.[52] Likewise, government employees enjoyed little constitutional protection for their speech, or at least little right to retain their government employment after engaging in free speech.[53] As Oliver Wendell Holmes famously quipped while serving on the Massachusetts high court, "The petitioner may have a constitutional right to talk

51. 155 Mass. 216, 220 (Mass. 1892), *abrogated by* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 716–17 (1996).

52. The statutory protection of labor organizing carved out an important exception to this general assumption. *See, e.g.*, Paul L. Herzog & Howard A. Rikoon, Note, *The Employer and the First Amendment*, 22 ST. JOHN'S L. REV. 109, 109–10 (1947); Myron Gollub, *The First Amendment and the NLRA*, 27 WASH. U. L.Q. 242, 247–52 (1942).

53. Thomas I. Emerson & David M. Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1, 2–8 (1948); Henry V. Nickel, *The First Amendment and Public Employees—An Emerging Constitutional Right to Be a Policeman?*, 37 GEO. WASH. L. REV. 409, 409–13 (1968); William W. Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 UCLA L. REV. 751, 763–65 (1969).

politics, but he has no constitutional right to be a policeman."[54] What is more, the judicially recognized scope of the freedom to speak about radical ideas was relatively limited when professors were first agitating to have their radical ideas protected from reprisals by their university employers.[55] Saying the wrong thing in public could not only get you fired; it could get you jailed.

That legal environment changed. Most significantly, in 1968, the U.S. Supreme Court decided *Pickering v. Board of Education*,[56] which recognized free speech rights for government employees.[57] Marvin Pickering was a secondary school teacher and not a university professor. The issues raised in *Pickering* were not unique to the educational context, however, and unlike a set of academic freedom cases[58] and student speech rights cases[59] that the Court had considered in the same period, the Court did not in *Pickering* spend much effort thinking about the particular implications of speech disputes for the educational environment.

Pickering involved a straightforward example of what the academic freedom literature has characterized as extramural speech, and thus fits neatly within what Van Alstyne would characterize as the "aprofessional political liberties" of academics, or their "general civil liberties" shared by any other similarly situated individuals.[60] In the midst of a public political dispute over whether the voters should approve a bond issue for the school district for which Pickering worked, Pickering wrote a letter to the editor of the local newspaper questioning whether a bond issue was needed and criticizing how the schools had managed their existing financial resources.[61] In doing so, Pickering was countering the public position of the school board, the school superintendent, and the local teachers' organization.[62] Pickering was then fired for implicitly questioning the "integrity" and "competence" of the school board and the school administration and for creating

54. *McAuliffe*, 155 Mass. At 220.

55. On the state of First Amendment freedoms in the early twentieth century, see, e.g., MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 77–81 (1991); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 129–35 (1999).

56. 391 U.S. 563 (1968).

57. *Id.* at 574–75.

58. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 609–10 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 249–52 (1957); Shelton v. Tucker, 364 U.S. 479, 487–90 (1960).

59. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504–06, 511–14 (1969); Healy v. James, 408 U.S. 169, 171–74, 194 (1972).

60. Van Alstyne, *supra* note 32, at 141.

61. *Pickering*, 391 U.S. at 566.

62. *Id.*

"dissension" on the faculty.[63] In upholding Pickering's dismissal, the Illinois state supreme court focused on the key issue as it understood it, which was whether "the teacher's conduct [was] detrimental to the best interests of the schools."[64] The state supreme court took the then-conventional view of the free speech issue that Pickering sought to raise in his defense.

> Whatever freedom a private critic might have to harm others by the use or misuse of speech, the plaintiff here is not a mere member of the public. He holds a position as teacher and is no more entitled to harm the schools by speech than by incompetency, cruelty, negligence, immorality, or any other conduct for which there may be no legal sanction. By choosing to teach in the public schools, plaintiff undertook the obligation to refrain from conduct which in the absence of such position he would have an undoubted right to engage in. While tenure provisions of the School Code protect teachers in their positions from political or arbitrary interference, they are not intended to preclude dismissal where the conduct is detrimental to the efficient operation and administration of the schools of the district.[65]

By publicly undermining the political goals of the school superintendent, the high school teacher had displayed disloyalty to his employer, and disloyalty could get you fired.

In *Pickering*, the U.S. Supreme Court countered that the state supreme court's assumption that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest" was no longer consistent with the Court's understanding of the requirements of the First Amendment.[66] Nonetheless, the Court recognized that the state "as an employer" had some degree of interest "in regulating the speech of its employees."[67]

Pickering created a two-part approach to such examples of extramural speech by government employees, including members of the faculty at state universities. First is a threshold question. The First Amendment is implicated when a government employee speaks on "matters of public concern."[68] To the extent that a government employee's speech might contribute to the "free and open debate" that

63. *Id.* at 567.

64. Pickering v. Bd. of Educ., 225 N.E.2d 1, 6 (Ill. 1967).

65. *Id.*

66. *Pickering*, 391 U.S. at 586.

67. *Id.*

68. *Id.*

is "vital to informed decision-making by the electorate," then it merits some First Amendment protection.[69] In a later case, the Court elaborated that government employees had the right "to participate in public affairs."[70] By contrast, if a government employee's speech "cannot be fairly considered as relating to any matter of political, social, or other concern of the community," then it would be inappropriate for the courts to exercise "intrusive oversight" over ordinary workplace grievances.[71] The Court has subsequently added a further layer to the threshold analysis. When government employees speak "pursuant to their official duties," the First Amendment does not intrude, regardless of the substantive content of the speech in question.[72] (Significantly, the Court carved out a potential exception for professorial speech that is made pursuant to the professor's job responsibilities and is related "to scholarship or teaching."[73]) At the threshold of a judicial inquiry, *Pickering* instructs judges to determine whether the speech in question is what the AAUP would characterize as extramural speech if made by a professor—personal opinions expressed in public about matters of public concern. If a government employee is engaged in such extramural speech, then he or she enjoys some measure of First Amendment protection.

For government employee speech that passes the threshold question and can claim First Amendment protection, the Court laid down a balancing test to determine whether workplace discipline of that employee for such speech was justified. The interest of the government employee "as a citizen, in commenting upon matters of public concern" must be weighed against the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[74] The government has distinctive interests "in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[75] The state had a legitimate interest in regulating speech that impedes the employee's "proper performance of his daily duties" or interferes "with the regular operation" of the government office

69. *Id.* at 571–72.

70. Connick v. Myers, 461 U.S. 138, 144–45 (1983).

71. *Id.* at 146.

72. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

73. *Id.* at 425. I have tried to elaborate on the implications of this exception in *Garcetti* in Keith E. Whittington, *Professorial Speech, the First Amendment, and Legislative Restrictions on Classroom Discussions*, 58 WAKE FOREST L. REV. 463 (2023).

74. *Pickering*, 391 U.S. at 568.

75. *Id.*

generally.[76] The Court later embraced the suggestion of Justice Powell that the government had an appropriate interest in regulating employee speech that "hinders efficient operation" of the government office or involves a "disruptive or otherwise unsatisfactory employee" who can "adversely affect discipline and morale in the work place" and "foster disharmony."[77]

In sum, *Pickering* and its progeny establish that the extramural speech of state university professors can claim some measure of First Amendment protection. When that extramural speech addresses matters of public concern, it is potentially constitutionally shielded from reprisal by the university employer. The state university might be able to overcome that presumption, however, when that speech impedes the university's own interest in realizing its ability to deliver the educational services for which it was established by the state. But the state acting through its role as a government employer must have "an adequate justification for treating the employee differently from any other member of the general public."[78] The state cannot suppress speech of its government employees simply because it has an undifferentiated interest in preventing that kind of speech from circulating in the public sphere.

The factors that might weigh in the state's favor when balancing its interests against the employee's remain somewhat hazy. One prominent circuit court opinion identified no fewer than nine factors to be considered:

> [W]hether the employee's speech (1) "impairs discipline by superiors"; (2) impairs "harmony among co-workers"; (3) "has a detrimental impact on close working relationships"; (4) impedes the performance of the public employee's duties; (5) interferes with the operation of the agency; (6) undermines the mission of the agency; (7) is communicated to the public or to co-workers in private; (8) conflicts with the "responsibilities of the employee within the agency"; and (9) makes use of the "authority and public accountability the employee's role entails."[79]

76. *Id.* at 572–73.

77. Connick v. Myers, 461 U.S. 138, 151 (1983) (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

78. *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568).

79. McVey v. Stacy, 157 F.3d 271, 278 (4th Cir. 1998) (quoting Rankin v. McPherson, 483 U.S. 378, 388–91 (1987)). The Ninth Circuit "listed five factors for use in the *Pickering* balancing analysis: (1) whether the employee's speech disrupted harmony among co-workers; (2) whether the relationship between the employee and the employer was a close working relationship with frequent contact which required trust and respect in order to be successful; (3) whether the employee's speech interfered with

Courts have observed, often to the detriment of police officers, that "[i]n analyzing the weight to be given a particular job in this connection nonpolicymaking employees can be arrayed on a spectrum, from university professors at one end to policemen at the other."[80] The "special character" of police departments as "para-military organizations" gives them particularly weighty interests to be balanced against the speech rights of an officer.[81] But vague references to the general principle that "[s]tate inhibition of academic freedom is strongly disfavored" only go so far in resolving disputes over extramural speech.[82] Ultimately, "*Pickering* balancing is never a precise mathematical process,"[83] requires a "sensitive ad hoc" judgment,[84] and is "a highly fact-specific inquiry into a number of interrelated factors."[85]

Like all balancing tests, the *Pickering* test leaves a great deal unresolved. What is worse, the Court itself has mostly elaborated on *Pickering* in the context of very different types of governmental agencies, such as government attorney offices,[86] the Treasury,[87] police departments,[88] or public hospitals.[89] For better or worse, the Court has

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performance of his duties; (4) whether the employee's speech was directed to the public or the media or to a governmental colleague; and (5) whether the employee's statements were ultimately determined to be false." Bauer v. Sampson, 261 F.3d 775, 785 (9th Cir. 2001).

80. Jurgensen v. Fairfax County, 745 F.2d 868, 880 (4th Cir. 1984).

81. *Id.*

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

83. Shahar v. Bowers, 114 F.3d 1097, 1106 (11th Cir. 1997).

84. Moran v. Washington, 147 F.3d 839, 845 (9th Cir. 1998).

85. Gustafson v. Jones, 290 F.3d 895, 909 (7th Cir. 2002). The Seventh Circuit identified seven factors in the *Pickering* balancing:

> (1) whether the speech would create problems in maintaining discipline or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her responsibilities; (4) the time, place, and manner of the speech; (5) the context within which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision-making; and (7) whether the speaker should be regarded as a member of the general public.

Id. (citing Greer v. Amesqua, 212 F.3d 358, 371 (7th Cir. 2000)).

86. Connick v. Myers, 461 U.S. 138, 140 (1983); Garcetti v. Ceballos, 547 U.S. 410, 413 (2006); Rankin v. McPherson, 483 U.S. 378, 380 (1987).

87. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 461 (1995).

88. San Diego v. Roe, 543 U.S. 77, 78 (2004).

89. Waters v. Churchill, 511 U.S. 661, 664 (1994).

also given more guidance on the threshold question of whether there is some First Amendment interest at stake in a government employee's speech than it has on how courts should balance the employee's interest against the employer's interest once the threshold has been crossed.[90] The higher education context poses some unique considerations when weighing the balance between professors speaking as citizens and state universities acting as employers. Moreover, the environment surrounding modern campus speech controversies highlights the need to clarify what interests the university employer legitimately has in sanctioning controversial members of the faculty.[91] Courts, and state officials, have been tempted to draw from the context of other government agencies or primary and secondary education when assessing the protections due to the extramural speech of professors. The university setting should more properly be distinguished from such cases.

III. EXTRAMURAL SPEECH AND THE BEST INTEREST OF THE UNIVERSITY

> [Professors'] primary professional obligation . . . is to act in the best interest of the University.
>
> —University of Florida Policy No. 1-003[92]

90. *Connick*, 461 U.S. at 147 (speech on "matters only of personal interest" receives less protection); *Rankin*, 483 U.S. at 384–85 (content, form, and context of speech are relevant to determining whether speech is on a matter of public concern); *Garcetti*, 547 U.S. at 424 (speech pursuant to official duties receives less protection).

91. I bracket here the question of what should count as speech addressing matters of public concern in a university context. Both *Pickering* and the AAUP offer protection for state university professors speaking "as citizens." *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1967); AM. ASS'N OF UNIV. PROFESSORS, *supra* note 29 at 14. Neither the First Amendment nor professional norms offer protection for faculty speech regarding ordinary workplace grievances. *See, e.g.*, *Connick*, 461 U.S. at 147 (speaking "as an employee upon matters only of personal interest" is generally unprotected); Swank v. Smart, 898 F.2d 1247, 1251 (7th Cir. 1990) ("Casual chit-chat . . . is not protected."). Some faculty speech about campus affairs may be of broader public interest. *See, e.g.*, Savage v. Gee, 665 F.3d 732, 739 (6th Cir. 2012) (committee deliberations not part of academic freedom); Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014) (pamphlet on organization of communications school deemed a matter of public concern); *see also* Keith E. Whittington, *What Can Professors Say on Campus? Intramural Speech and the First Amendment*, J. FREE SPEECH L. (forthcoming).

92. *Conflicts of Commitment and Conflicts of Interest*, UNIV. FLA. POL'Y HUB (Oct. 13, 2022), https://hub.policy.ufl.edu/s/article/Conflicts-of-Commitment-and-Conflicts-of-Interest [https://perma.cc/JXF6-CTDB].

A central concern of the *Pickering* balancing analysis is that government agencies be able to perform their function. In *Pickering* itself, the Court noted the state's interest as an employer "in promoting the efficiency of the public services it performs through its employees."[93] In a subsequent case, the Court characterized the government's interest as "the effective and efficient fulfilment of its responsibilities to the public."[94] The Court has suggested that the state has an interest in barring employees from "discredit[ing] the office."[95] The government may "restrain" an employee who "begins to do or say things that detract from the agency's effective operation."[96] The government has an interest in "achieving its goals as effectively and efficiently as possible."[97] It is a long-standing justification for the actions of university administrators that they are advancing the "best interests of the University."[98] And, of course, such considerations are not foreign to the broader professional norms surrounding academic freedom. Universities have a legitimate interest in being able to carry out their educational mission.

Unfortunately, extramural speech can genuinely damage the institution. Things would be easier if it were not so. The University of Chicago was unusual in its strong commitment to freedom of speech from its very beginning.[99] In 1899, the "congregation of the University" adopted resolutions stating that "the principle of complete freedom of speech on all subjects has from the beginning been regarded as fundamental in the University of Chicago."[100] Its first president, William R. Harper, was notable in insisting:

> [W]hen an effort is made to dislodge an officer or a professor because the political sentiment or the religious sentiment of the majority has undergone a change, at that moment the institution has ceased to be a university, and it cannot again take its place

93. *Pickering*, 391 U.S. at 568.

94. *Connick*, 461 U.S. at 150.

95. *Rankin*, 483 U.S. at 389.

96. Waters v. Churchill, 511 U.S. 661, 675 (1994).

97. *Id.*

98. Franklin v. Atkins, 409 F. Supp. 439, 446 (D. Colo. 1976), *aff'd*, 562 F.2d 1188 (10th Cir. 1977) (citing *Pickering*, 391 U.S. at 571).

99. The university even highlights how "[f]reedom of expression is a core element of the history and culture of the University of Chicago" on its website. *A History of Commitment to Free Expression*, UNIV. OF CHI.: FREE EXPRESSION, https://freeexpression.uchicago.edu/history/ [https://perma.cc/7DWT-GD6A] (last visited Feb. 5, 2023).

100. Harper, *supra* note 13, at 376.

> in the rank of universities so long as there continues to exist any appreciable extent the factor of coercion.[101]

But Harper did not attempt to hide the costs of this stance. Even though "an instructor in the University has an absolute right to express his opinion," Harper recognized that a professor might exercise "this right in such a way as to do himself and the institution serious injury."[102] If professors abused their freedom of speech in this way, "the University must suffer."[103] But the "injury thus accruing to the University" from such unpopular professorial speech would be "far less serious than would follow" if the professor were forced to resign or were terminated.[104] "Freedom of expression must be given the members of a university faculty[,] even though it be abused[;] for, as has been said, the abuse of it is not so great an evil as the restriction of such liberty."[105] A professor who "undertakes to instruct his colleagues or the public concerning matters in the world at large in connection with which he has had little or no experience," or who "fails to exercise that quality, (ordinarily called common sense), which, it must be confessed, in some cases the professor lacks," or "makes an exhibition of his weakness so many times that the attention of the public at large is called to the fact," or "in any way seeks to influence his pupils or the public by sensational methods" abuses his freedom of expression and potentially damages both himself and the university by doing so, and yet "the greatest single element necessary for the cultivation of the academic spirit is the feeling of security from interference" and only scholars secure from interference "are able to do work which in the highest sense will be beneficial to humanity."[106] Universities will only thrive in the long term if they refrain from acting on the immediate temptation to sanction a professor who has said the wrong thing in public. But taking the long view should not obscure the fact that in the short run the university will suffer an injury when professors make a spectacle of themselves. The reality of this risk of injury is why the 1940 Statement of Principles on Academic Freedom and Tenure admonishes professors that "they should remember that the public may judge their profession and their institution by their utterances" and behave accordingly.[107]

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101. *Id.*

102. *Id.*

103. *Id.* at 376–77.

104. *Id.* at 377. Harper was less protective of professors who had only temporary appointments at the university. It was "the privilege of the University to allow [such] appointment to lapse at the end of the term for which it was originally made." *Id.* at 376.

105. *Id.* at 377.

106. *Id.*

107. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 29, at 14.

Both the First Amendment and professional norms surrounding academic freedom make the bet that the long-term gain from tolerating wrongheaded or unpopular speech is worth the short-term costs that might arise from that speech. Adequately protecting those academic freedom values requires that university employers be willing to suffer some immediate degradation of their ability to effectively operate. In the context of *Pickering* balancing, this means that some institutional interests should be given little or no weight when pitted against the speech of a private individual on a matter of public concern.

Two cases illuminate the problem of taking an expansive view of the university's interests when it comes into conflict with the extramural speech of faculty. The first involves social media policies. The second involves conflict of interest policies.

In 2013, the Kansas Board of Regents adopted a new policy on "improper use of social media."[108] The policy followed an incident at the University of Kansas, in which the university suspended Associate Professor David W. Guth for reacting to a mass shooting at the Washington Navy Yard by posting on Twitter: "[T]he blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters."[109] Amidst a public firestorm, the university soon departed from its initial recognition that the professor "has the right under the First Amendment to express his personal views and is protected in that regard."[110] The chancellor announced that "[i]n order to prevent disruptions to the learning environment for students," Guth was to be put on an "indefinite administrative leave."[111] Guth made a public apology and was eventually reinstated.[112]

A few weeks after the Guth controversy, the Kansas Board of Regents proposed a new social media policy. Regents Chairman Fred Logan thought the earlier controversy had demonstrated that "social

108. *See generally* Fred Logan & Julene Miller, *Discussion Agenda*, KAN. BD. OF REGENTS 84, 84–85 (Dec. 18, 2013), https://worldonline.media.clients.ellingtoncms.com/news/documents/2013/12/18/discussion_agenda_socialmediapolicy.pdf [https://perma.cc/X8HM-NUCU].

109. Colleen Flaherty, *Protected Tweet?*, INSIDE HIGHER ED (Sept. 23, 2013), https://www.insidehighered.com/news/2013/09/23/u-kansas-professor-suspended-after-anti-nra-tweet [https://perma.cc/9G2H-TC7U].

110. *University of Kansas Decries Offensive Comments*, UNIV. OF KAN. (Sept. 19, 2013), https://news.ku.edu/2013/09/19/university-kansas-decries-offensive-comments [https://perma.cc/YS62-WZ47].

111. *Guth Placed on Administrative Leave*, UNIV. OF KAN. (Sept. 20, 2013), https://news.ku.edu/2013/09/20/guth-placed-administrative-leave [https://perma.cc/LBR4-NSPL].

112. Dylan Lysen, *Guth Apologizes for Controversial Tweet upon Return to University of Kansas*, UNIV. DAILY KANSAN (Oct. 24, 2013), https://www.kansan.com/news/guth-apologizes-for-controversial-tweet-upon-return-to-university-of-kansas/article_f44e35f3-7e28-551b-a6e7-ba881e6d77ba.html [https://perma.cc/KN6T-PZ4V].

media can lead to extraordinary damage very quickly."[113] Appealing directly to *Pickering* and its progeny, the policy specified that professors could be fired for posting any "online publication and commentary" that, among other things, was "contrary to the best interests of the University" if it was either made pursuant to the "employee's official duties" or created the appearance that it was "connected to the university in a manner that discredits the university" or "interferes with the regular operation of the university, or otherwise adversely affects the university's ability to efficiently provide services."[114] A state legislator who had called for Guth's firing declared: "I support free speech 100 percent, but there can be consequences for your words. Universities need the flexibility to address the actions of staff that tarnish their institution's image."[115]

Despite the fact that the Kansas social media policy was designed to track the Court's doctrine on government employee speech, advocates of academic freedom vociferously objected.[116] The AAUP worried that the policy would give teeth to the past suggestion by university leaders that members of the faculty were "not to criticize the governor for fear it might hurt the university."[117] Professors suggested that blog posts about their own current scholarly research, if it ran counter to the political and policy preferences of the political leadership of the state, could be viewed as against "the best interests of the university."[118] The board subsequently adopted a revised policy affirming the importance of academic freedom and explicitly carving out protections for teaching and research, but retained the broad interest in curtailing extramural speech that might adversely affect the

113. Scott Rothschild, *University Employees Could Be Fired for Tweets*, LAWRENCE J.-WORLD, Dec. 19, 2013, at 2A.

114. Logan & Miller, *supra* note 108, at 85.

115. Ben Unglesbee & Scott Rothschild, *Faculty, Staff Respond to Policy*, LAWRENCE J.-WORLD, Dec. 20, 2013, at 2A (quoting State Rep. Brett Hildabrand).

116. *See, e.g.*, Letter from Will Creeley, Dir. Legal & Pub. Advoc., FIRE, Joan Bertin, Exec. Dir., NCAC & Doug Bonney, Chief Couns. & Legal Dir., ACLU, to Fred Logan, Chair, Kan. Bd. of Regents (Dec. 20, 2013) (on file with author); Am. Ass'n of Univ. Professors, AAUP Statement on the Kansas Board of Regents Social Media Policy (Dec. 20, 2013) (on file with the *Case Western Reserve Law Review*). I have referenced the Kansas incident as showing the risks to academic freedom of professorial use of social media. WHITTINGTON, *supra* note 49, at 152–53.

117. Am. Ass'n of Univ. Professors, *supra* note 116, at 4.

118. Erik Voeten, *Kansas Board of Regents Restricts Free Speech for Academics*, WASH. POST (Dec. 19, 2013, 12:22 PM), https://www.washingtonpost.com/news/monkey-cage/wp/2013/12/19/kansas-board-of-regents-restricts-free-speech-for-academics/ [https://perma.cc/3TUF-MW6T]; Logan & Miller, *supra* note 108, at 85.

university.[119] The regents declined to adopt the tightly specified list of improper social media that was proposed by a faculty working group.[120] One Kansas faculty member began his AAUP journal article about the academic freedom implications of the new policy by noting that because the article was also published online and involved his scholarly writing, it fell within the policy's provision that writing made within "[the employee's] official duties" could result in sanction if it is "contrary to the best interest of the [employer]."[121] Within the terms of the policy, a tenured professor could be fired for writing such an article.

The situation in Kansas attracted unusual attention, but it was not unique. A recent study of eighty-two American research universities found that the vast majority had social media policies in place that included restrictions on what could be posted online and focused on "reputation management" for the institution.[122] The policies were often identified as originating from and being managed by university marketing and public relations offices,[123] with the result being that university social media policies privileged "reputation and brand management over academic freedom."[124] Relatively few universities included any recognition of free speech or academic freedom concerns in their social media policies.[125] University social media policies put faculty in a "double bind" of insisting that professors declare that they post only in their personal capacity while "also remind[ing] them that they represented the institutions even in their private lives."[126]

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119. *Use of Social Media by Faculty and Staff*, KAN. BD. OF REGENTS (May 18, 2014), https://web.archive.org/web/20140518080013/http://www.kansasregents.org/policy_chapter_ii_f_use_of_social_media.

120. Susan Kruth, *Kansas Faculty Workgroup Drafts Social Media Policy Affirming First Amendment and Urging Best Practices*, FIRE (Mar. 4, 2014), https://www.thefire.org/kansas-faculty-workgroup-drafts-social-media-policy-affirming-first-amendment-and-urging-best-practices/ [https://perma.cc/R3F7-PFLX].

121. Dan Colson, *On the Ground in Kansas: Social Media, Academic Freedom, and the Fight for Higher Education*, J. ACAD. FREEDOM, 2014, at 1, 2. It is likely writing articles for a scholarly journal would be characterized by the courts as within the scope of employment duties for these purposes. *See, e.g.*, Renken v. Gregory, 541 F.3d 769, 773 (7th Cir. 2008) (finding that "teaching, research and service" all fall within the duties that professors are employed to perform).

122. Melanie Kwestel & Elizabeth Fitzpatrick Milano, *Protecting Academic Freedom or Managing Reputation? An Evaluation of University Social Media Policies*, 10 J. INFO. POL'Y 151, 166–69 (2020).

123. *Id.* at 166.

124. *Id.* at 170.

125. *Id.* at 167.

126. *Id.* at 168.

The Court has indicated that "[a] public employer has a strong interest in preserving its reputation with the public."[127] Courts have been particularly open to the argument that a governmental entity's interest in its "reputation and the public's trust" counterbalanced a government employee's speech rights in the context of law enforcement.[128] But they have also found, for example, that a part of a firefighter's job "is to safeguard the public's opinion of them"[129] and that public school teachers required a high degree of "public trust" that could be undermined by extramural expression.[130] Public speech of government employees that incites hostility from the general public has less effective First Amendment protection than speech that is met with public approval.

It is not hard to imagine a court and a university employer similarly concluding that part of a professor's job is to safeguard the public's opinion of them and to refrain from "impairing the school's reputation" or "compromis[ing] the competitive position" of a selective school in the eyes of parents.[131] Doing so, however, would significantly infringe on the freedom of expression that universities should be attempting to foster. Even if the state has a particular interest in community perception of government employees when those employees exercise a peacekeeping function or act *in loco parentis* for minor schoolchildren, it has much less of a legitimate concern with the community perception of university professors. Courts have discounted the concern that "community reaction" might "dictate whether an employee's constitutional rights are protected" when the community is understood to be an essential partner in the government agency's operation.[132] When the community reaction matters for the functioning of a government agency, courts have been willing to find that government employee speech can be sanctioned precisely because it is unpopular speech.

Such justifications should have significantly less force in a university context where the government agency's clientele consists of adult students and the discussion of controversial ideas is the very purpose of the government agency.[133] The reputation that universities

127. Rankin v. McPherson, 483 U.S. 378, 400 (1987) (Scalia, J., dissenting).

128. Duke v. Hamil, 997 F. Supp. 2d 1291, 1302 (N.D. Ga. 2014); *see also* Grutzmacher v. Howard County, 851 F.3d 332, 346 (4th Cir. 2017) (stating that "community trust" in the Maryland Department of Fire and Rescue Services "is vitally important to its function").

129. Locurto v. Giuliani, 447 F.3d 159, 178 (2d Cir. 2006).

130. Melzer v. Bd. of Educ., 336 F.3d 185, 198 (2d Cir. 2003).

131. *Id.* at 199.

132. *Id.* (citing McMullen v. Carson, 754 F.2d 936, 940 (11th Cir. 1985)).

133. Healy v. James, 408 U.S. 169, 197 (1972) (appendix to opinion of Douglas, J., concurring in the judgment) ("Students—who, by reason of the

should seek to uphold is one distinctively connected with the freewheeling exchange of ideas. "The 'brand' to be protected in the case of the university should be the one reflected in its institutional mission of facilitating the pursuit of knowledge through vigorous debate and open inquiry."[134] The presence of professors with controversial ideas on a college campus should be a feature, not a bug. If universities do not prioritize their truth-seeking mission but instead set as their lodestar other values, such as the fostering of a sense of student belonging, the satisfying of a demand for professional credentials, or the promulgation of political orthodoxies, then state officials might more reasonably say that a professor who offends members of the general public on social media is damaging the school's reputation in a way that might justify that professor's termination.[135] How the "best interest" of a state university is understood and the government's legitimate concerns with its "reputation" depend on the function that the university is supposed to be performing. If that function is, above all, the free exploration of ideas, then courts should echo Chicago's President Harper when performing a *Pickering* balancing. If it is something else, then universities might properly demand that faculty make sure that their "social media presence be consistent and complementary to [the university's] overall brand."[136]

In 2020, the University of Florida (UF) adopted a new policy on "Conflicts of Commitment and Conflicts of Interest."[137] The policy requires members of the faculty to report outside activities to the university and seek approval before engaging in those activities.[138] Three members of UF's political science department were retained as paid expert witnesses by parties filing suit to challenge the legality of Florida's new election law, known as Senate Bill 90.[139] When they

Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community.").

134. WHITTINGTON, *supra* note 49, at 153.

135. *See also*, Keith E. Whittington, *Academic Freedom and the Mission of the University*, 59 HOUS. L. REV. 821, 829 (2022).

136. *Social Media Guidelines*, U.C. SANTA CRUZ, https://communications.ucsc.edu/social-media/social-media-guidelines/ [https://perma.cc/A54L-T5MY] (Oct. 19, 2022).

137. Austin v. Univ. of Fla. Bd. of Trs., 580 F. Supp. 3d 1137, 1148 (N.D. Fla. 2022).

138. *Conflicts of Commitment*, *supra* note 92.

139. Michael Wines, *Florida Bars State Professors from Testifying in Voting Rights Case*, N.Y. TIMES, https://www.nytimes.com/2021/10/29/us/florida-professors-voting-rights-lawsuit.html [https://perma.cc/XFV9-FGSV] (Nov. 4, 2021); Jaclyn Diaz, *Florida Governor Signs Law That Limits Voting by Mail and Ballot Drop Boxes*, NPR, https://www.npr.org/2021/04/30/992277557/florida-legislature-approves-election-reform-bill

reported that outside activity to the university, it refused to approve their participation in the lawsuit, stating, "As UF is a state actor, litigation against the state is adverse to UF's interests."[140] The dean of the college of liberal arts and sciences further clarified that "outside activities that may pose a conflict of interest to the executive branch of the state of Florida create a conflict for [UF]."[141]

Serving as an expert witness in a lawsuit is an example of extramural speech, of a professor speaking "as a citizen" to provide their personal opinion about a matter of public concern in a public setting. In this case, that extramural speech is related to and reflects the scholarly expertise of the professors who are engaged in it.[142] But it is precisely because serving as an expert witness is outside their duties as university employees that UF required faculty to seek "approval to provide [paid or unpaid] professional services to an outside [e]ntity" and the professional services relate to their UF expertise.[143] The Supreme Court has specifically held that "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen."[144] The university explicitly recognized such activities were in the professor's "capacity as a private citizen and not as an employee of [UF]."[145]

In essence, UF acted on the assumption that a government employer's interest in the *Pickering* balance included an interest in preserving government policies against court challenges, adhering to the government's legal posture in litigation, and avoiding political fallout with powerful government officials. As the university's assistant vice president for conflicts of interest posited in an email exchange in a

-that-includes-restrictions [https://perma.cc/8SHB-BFCT] (May 6, 2021, 2:31 PM).

140. Andrew Jeong, *University of Florida Bars Faculty Members from Testifying in Voting Rights Lawsuit Against DeSantis Administration*, WASH. POST (Oct. 30, 2021, 4:25 AM), https://www.washingtonpost.com/nation/2021/10/30/florida-voting-rights-desantis-lawsuit/ [https://perma.cc/W79Z-SQ88].

141. Wines, *supra* note 139.

142. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 18, Austin v. Univ. of Fla. Bd. of Trs., No. 1:21-cv-00184-MW-GRJ (N.D. Fla. 2021) ("Plaintiffs' outside expert witness work has a lot to do with their UF employment. . . . They want to deploy, against their employer, expertise and reputations developed, at least in part, from their employment at UF and the resources and opportunities UF makes available to them.").

143. *Conflicts of Commitment*, *supra* note 92.

144. Lane v. Franks, 573 U.S. 228, 238 (2014). It does not matter that the testimony might draw on scholarly expertise acquired through government employment. *Id.* at 240.

145. Austin v. Univ. of Fla. Bd. of Trs., 580 F. Supp. 3d 1137, 1169 (N.D. Fla. 2022) (quoting ECF No. 31–12, an excerpt of a professor's disclosure statement).

different case, "it would be important to know where the governor and the state legislature stood on this. If taking this position were adverse to UF's interests (i.e., adverse to the interests of the State of Florida) it would not be something we'd want them doing."[146]

Meanwhile, the dean of the law school was informing professors that filing an amicus brief in an action against the state could be deemed a conflict of interest that would trigger sanctions against a professor were he or she to fail to disclose it or participate after approval was denied. University officials responsible for government relations were asked to weigh in on whether to approve the expert witness request.[147]

The mere fact that the government disagrees with the content of a professor's speech is not a constitutionally valid reason for restricting the private speech of a government employee.[148] The Court in *Rankin v. McPherson*[149] warned that "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."[150] The Fifth Circuit has previously assessed a state's claim that when "[b]oiled down to its core, the State is simply arguing the State's interest is in preventing state employees from speaking in a manner contrary to the State's interests":

> Whatever else we might say about that "justification", the State's amorphous interest in protecting its interests is not the sort which may outweigh the free speech rights of state employees under *Pickering*. The notion that the State may silence the testimony of state employees simply because that testimony is contrary to the interests of the State in litigation or otherwise, is antithetical to the protection extended by the First Amendment. The scope of state interests which may outweigh the free speech rights of state employees is much narrower than that. Indeed, the only state interest acknowledged by *Pickering* and its progeny, which may outweigh the right of state employees to speak on matters of public concern, is the State's interest, "as an employer,

146. Emma Pettit & Jack Stripling, *Inside the Academic-Freedom Crisis that Roiled Florida's Flagship*, CHRON. OF HIGHER EDUC. (Sept. 6, 2022), https://www.chronicle.com/article/inside-the-academic-freedom-crisis-that-roiled-floridas-flagship [https://perma.cc/MU6B-BSJ5] (quoting UF faculty member Gary Wimsett Jr.).

147. *Id.*

148. *See* Letter from Keith E. Whittington, Chair, Acad. Freedom All., to Kent Fuchs, President, Univ. of Fla. (Oct. 31, 2021).

149. 483 U.S. 378 (1987).

150. *Id.* at 384.

> in promoting the efficiency of the public services it performs through its employees."[151]

In a later case, the Fifth Circuit similarly found that such efforts to impose a "code of silence" under the rubric of avoiding conflicts of interest "sweep[] so broadly as to undermine its status as a *legitimate* government interest that can properly weigh in the *Pickering* balance."[152] In the case of a board of regents blocking a state university from hiring a politically controversial professor, a district court concluded,

> A refusal to hire . . . may not be cloaked with the justification that the refusal is in the best interests of the University, if the true underlying rationale is personal disagreement with the applicant's viewpoints and associations for . . . the Board members' own interests are not necessarily identical to the best interests of the school. . . . [Likewise,] it could not base it upon a concern that the appointment would generate controversy on campus, if the cause of that controversy were merely the political views and associations of [the] plaintiff. Neither could the decision be grounded upon a fear that a Regent's constituency would not approve of the appointment of a Marxist, or that the state legislature or certain alumni would reduce the financial support received by the University.[153]

If an important part of the value of a public university is its ability to foster scholarly expertise that can then be deployed to inform members of the broader public and policymaking and adjudicative bodies of the fruits of their knowledge, then it is perverse to assert that the university's legitimate interest includes the ability to suppress scholarly expertise that is contrary to the immediate preferences of incumbent politicians. In the specific context of service as an expert witness, a court's admonition that "[it] would compromise the integrity of the judicial process if [it] tolerated state retaliation for testimony that is damaging to the state" has particular salience.[154] More broadly, a democratic society has an interest in taking advantage of the knowledge accumulated by scholarly experts.

If the state's interest in suppressing a government employee's speech is in preventing the revelation of flaws in its policies or conduct or in avoiding the political fallout from embarrassing political leaders,

151. Hoover v. Morales, 164 F.3d 221, 226 (5th Cir. 1998).

152. Kinney v. Weaver, 367 F.3d 337, 365 (5th Cir. 2004) (emphasis added). The court added in a footnote, "The *Pickering* balance takes account of legitimate interests only." *Id.* at 365 n.33.

153. Franklin v. Atkins, 409 F. Supp. 439, 446 (D. Colo. 1976).

154. Johnston v. Harris Cnty. Flood Control Dist., 869 F.2d 1565, 1578 (5th Cir. 1989).

then it can hardly be said that that interest is peculiar to the employment context. The state's interest, such as it is, in muzzling such speech is the interest it feels as a political sovereign rather than as an employer per se. The Court has recognized a government employer's interest in "controlling the operation of its workplaces,"[155] not its interest in controlling the public sphere. First Amendment values are paramount in restraining the state from silencing speech for political reasons. Punishing speech that criticizes the government while allowing speech that praises the government is the very type of viewpoint discrimination that is most disfavored under the First Amendment. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[156] The specifics of an employment context do not mitigate the constitutional problem with viewpoint discrimination.

In the distinctive context of universities, the government cannot, consistent with First Amendment values, identify the best interests of the institution with the interests and preferences of government officials. Justice Frankfurter approvingly quoted University of Chicago President Robert Hutchins in asserting that "a university is a place that is established and will function for the benefit of society, provided it is a center of independent thought. . . . [N]o totalitarian government is prepared to face the consequences of creating free universities," but a liberal democratic government should welcome the independent scholarly thought that will sometimes call into question the acts of the government itself.[157] A university might suffer short-term damage from the unpopular extramural speech of a member of the faculty, but it is the suppression of speech that is adverse to the true interests of a real university. It is not a legitimate interest of a state university to sanction the extramural speech of professors because it tarnishes the university's public image or is contrary to the political positions of incumbent government officials.

For universities to punish professors for their extramural speech precisely because such speech is controversial or critical of incumbent government officials annihilates the very purpose of protecting speech. It is precisely when professors express views that are unpopular or impolitic that real universities must shelter them from retaliation. Defining the best interest of the university as one in which professors never say things that might run contrary to the desires of politicians or electoral majorities subverts the most basic purpose of scholarly institutions. Admitting such a rationale into the calculus for

155. Lane v. Franks, 573 U.S. 228, 236 (2014).

156. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

157. Wieman v. Updegraff, 344 U.S. 183, 197 (1952) (Frankfurter, J., concurring) (quoting University of Chicago President Robert Hutchins).

determining whether extramural speech is to be punished sacrifices rather than advances the university's "fulfillment of its responsibilities to the public."[158]

IV. MATERIAL DISRUPTION AND THE HECKLER'S VETO

> [T]his serious distraction to the important academic mission of the university.
>
> —M. Brian Blake, Provost of Drexel University[159]

The state's interest *as an employer* is much more evidently real when it comes to preventing employees from disrupting the operations of governmental agencies and the delivery of governmental services. In the government employee–speech context, the Court has pointed out, "[W]e have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even . . . when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential."[160] The "[g]overnment, as an employer, must have wide discretion . . . . to remove . . . . a disruptive or otherwise unsatisfactory employee . . . ."[161]

The government's need to overcome the disruption of its operations is as true in the educational context as it is in other spheres of government activity. In the context of student speech rights, the Court has accepted as an adequate justification for government action that "the students' activities would materially and substantially disrupt the work and discipline of the school."[162] Regulation of student speech is permissible "when the speech would substantially disrupt or interfere with the work of the school or the rights of other students."[163] Disruption of the educational environment is likewise a concern when it comes to the speech of instructors.[164] The government has a legitimate

158. Connick v. Myers, 461 U.S. 138, 150 (1982).

159. Colleen Flaherty, *Looking into Tweets*, INSIDE HIGHER ED (April 18, 2017) https://www.insidehighered.com/news/2017/04/18/documents-show-drexel-investigating-professors-tweets-its-unclear-whether-faculty [https://perma.cc/242Y-T9L8] (quoting correspondence from Provost M. Brian Blake to Professor George Ciccariello-Maher).

160. Waters v. Churchill, 511 U.S. 661, 673 (1994).

161. *Connick*, 461 U.S. at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

162. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

163. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3rd Cir. 2001).

164. *See, e.g.*, Melzer v. Bd. of Educ., N.Y., 336 F.3d 185, 198–99 (2d Cir. 2003); Dougherty v. Sch. Dist. of Phila., 772 F.3d 979, 992 (3d Cir. 2014); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 478 (7th Cir. 2007).

interest that employee "expression not disrupt an employer's business unduly"[165] and that it not disrupt the "harmony among coworkers"[166] in the workplace. "Comments which adversely affect close working relationships or disrupt the maintenance of discipline or cause disharmony among coworkers may tip the balance" in the government's favor.[167]

It is worth emphasizing that in the government employee–speech context, the courts have been willing to tolerate restrictions on expression that fall far short of what would be acceptable in the context of the government as sovereign regulating the general citizenry. Offensive speech that might alienate coworkers or members of the public can be regulated by a government employer even when it cannot be regulated outside the employment context. A police officer who engaged in racist diatribes can be dismissed because the "effectiveness of a city's police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias."[168] Police officers and firefighters who wore blackface in a Labor Day parade could be fired out of concern for "the public's perception of the employee's expressive acts."[169] The Court has posited that a government employer could "prohibit its employees from being 'rude to customers.'"[170] Government employees who are "disrespectful, demeaning, rude, and insulting" or "embarrassing" and "vulgar" need not be tolerated.[171] In order to protect the "comradeship that makes a fire-fighting unit successful," the government employer could reasonably worry about "[t]he baleful glance, the hostile look, and the positive distaste for the trouble-maker."[172] An off-duty firefighter who drunkenly hurled racial insults at an on-duty police officer was not arrested but was fired for conduct unbecoming of a public employee because the city has "a compelling interest in avoiding the consequences of strained relationships within and between the [police and fire] departments."[173] A sheriff's deputy who, in a public meeting of community activists, compared the department to a "septic tank" where "the really big chunks always rise to the top" could be fired in part because "employees complained" to the sheriff and the union president "had 'literally

165. *Mayer*, 474 F.3d at 478.

166. Pickering v. Bd. of Educ., 391 U.S. 563, 570 (1968).

167. Isibor v. Bd. of Regents, No. 88-6286, 1989 WL 150756, at *4 (6th Cir. 1989).

168. Pappas v. Giuliani, 290 F.3d 143, 146 (2d Cir. 2002).

169. Locurto v. Giuliani, 447 F.3d 159, 182 (2d Cir. 2006).

170. Waters v. Churchill, 511 U.S. 661, 673 (1994).

171. Morris v. Crow, 117 F.3d 449, 458 (11th Cir. 1997).

172. Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 27 (2d Cir. 1979).

173. Karins v. City of Atlantic City, 706 A.2d 706, 716 (N.J. 1998).

hundreds of conversations' with upset corrections and law enforcement employees about the incident."[174] And a court suggested that "complaints from bus riders or the public" about city bus drivers wearing Black Lives Matter masks would be probative evidence of a disruption under *Pickering*.[175]

In an employment context, courts have generally not been concerned with the threat of a "heckler's veto." Although courts "acknowledge the truism that community reaction cannot dictate whether an employee's constitutional rights are protected," that is less true when an employee and his or her employer are "beholden to the views" of community members.[176] If a government employee's speech causes members of the public or his or her coworkers to complain, that is a "disruption" of the workplace that an employer can seek to ameliorate by sanctioning the employee who caused the offense. The negative reaction of a hostile audience to a government employee's speech can itself be a disruption to the workplace sufficient to justify the termination of that government employee. It may well be true that in a democratic society free speech might "best serve its high purpose when it induces a condition of unrest" and "even stirs people to anger,"[177] but courts have not thought government employers need

174. Pool v. Vanrheen, 297 F.3d 899, 904–05 (9th Cir. 2002).

175. Amalgamated Transit Union v. Port Auth., 513 F. Supp. 3d 593, 613–14 (W.D. Pa. 2021). In this case, there were no such complaints, and thus the court thought little evidence of an actual or likely disruption. *Id.* at 606.

176. Melzer v. Bd. of Educ., N.Y., 336 F.3d 185, 199 (2d Cir. 2003); Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 475–76 (3d Cir. 2015) (finding that it is "generally appropriate to consider the reactions of students and parents to an educator's speech under the *Pickering* balancing test"); Dible v. City of Chandler, 515 F.3d 918, 928–29 (9th Cir. 2007) ("[H]eckler's veto . . . . worries do not directly relate to the wholly separate area of employee activities that affect the public's view of a governmental agency in a negative fashion, and, thereby, affect the agency's mission."); Bennett v. Metro. Gov't, 977 F.3d 530, 544 (6th Cir. 2020) ("The public—as the consumers of the [Emergency Communication Center's] services—and Bennett's colleagues with whom she must work collaboratively can hardly be said to be 'a hostile mob.'"). *But see*, Flanagan v. Munger, 890 F.2d 1557, 1566 (10th Cir. 1989) ("The department cannot justify disciplinary action against plaintiffs simply because some members of the public find plaintiffs' speech offensive and for that reason may not cooperate with law enforcement officers in the future."); Berger v. Battaglia, 779 F.2d 992, 1001 (4th Cir. 1985) ("[W]e think this sort of threatened disruption by others reacting to public employee speech simply may not be allowed to serve as justification for public employer disciplinary action directed at that speech."); Battle v. Mulholland, 439 F.2d 321, 324 (5th Cir. 1971) (expressing skepticism that a city's desire to "'stay in the middle of the road' because of racial tensions resulting from school desegregation and other matters" could justify firing a Black police officer as a result of the complaints from white community members about his off-duty conduct).

177. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

tolerate such speech from their employees. If a government employee's speech stirs people to anger, that employee generally can be fired. But is that equally true for university employees?

The key question is what should count as disruptive speech in the university context. If academic freedom values are going to be adequately protected, the government employer's concern with fostering workplace harmony needs to be sharply cabined when it comes to the extramural speech of university faculty. The demand for harmony in academia can easily become a demand for "[s]upineness and dogmatism."[178] Reconciling academic freedom with the university employer's interest in preventing disruption requires more guidance than the Court has thus far provided. Protecting academic freedom means protecting "the freedom to teach and write without fear of retribution for expressing heterodox ideas."[179] Universities should foster intellectual disruption, but they need not tolerate "interfer[ence] with the work of the school."[180]

Courts need to be sensitive to the unusual working environment of university professors when evaluating the disruptive potential of extramural speech. Government employers can generally factor in a concern with "harmony among coworkers,"[181] "workplace morale,"[182] and "detrimental impact on close working relationships for which personal loyalty and confidence are necessary."[183] University professors are notorious for their relatively solitary and independent working conditions. In most circumstances, harmony among university professors is not a necessary condition for their being able to perform their job functions. Faculty morale is not entirely irrelevant to the functioning of a university,[184] but universities seem capable of tolerating myriad pressures on faculty morale.[185] Worse, there is likely a tension

178. Adler v. Bd. of Educ., 342 U.S. 485, 510 (1952) (Douglas, J., dissenting).

179. Grimes v. E. Ill. Univ., 710 F.2d 386, 388 (7th Cir. 1983).

180. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001).

181. McVey v. Stacy, 157 F.3d 271, 278 (4th Cir. 1998) (citing Rankin v. McPherson, 483 U.S. 378, 388 (1987)).

182. Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 293, 318 (4th Cir. 2006).

183. *Rankin*, 483 U.S. at 388.

184. *See, e.g.*, Linda K. Johnsrud & Vicki J. Rosser, *Faculty Members' Morale and Their Intention to Leave*, 73 J. HIGHER EDUC. 518 (2002) (stating that faculty morale can affect faculty retention).

185. *See, e.g.*, Mary "Ski" Hunter, Joe Ventimiglia & Mary Lynn Crowe, *Faculty Morale in Higher Education*, 31 J. TEACHER EDUC. 27, 29 (1980) (faculty job satisfaction high even when morale is low); Michael L. Seigel, *On Collegiality*, 54 J. LEGAL EDUC. 406, 407 (2004) (universities manage to tolerate noncollegial professors); Kerry Ann O'Meara, *Beliefs About Post-Tenure Review: The Influence of Autonomy, Collegiality, Career*

between the demand for collegiality and the protection for freedom of thought. As the AAUP argued, "Politically controversial academics are frequently found to be abrasive individuals who are difficult to work with. Consequently, lack of collegiality or incivility may easily become a pretext for the adverse evaluation of politically controversial academics."[186] At least in some contexts, judges have been less concerned than academics in protecting "truculent professors" from adverse employment outcomes,[187] but troublesome extramural speech can be distinguished from a refusal to participate in departmental activities.[188] There are institutional roles in senior university administration that demand personal loyalty and confidence and necessarily constrain personal expression, but the ordinary professional responsibilities of university professors do not.[189] Further, "conflict is not unknown in the university setting given the inherent autonomy of tenured professors and the academic freedom they enjoy."[190]

Critically, courts need to take seriously the threat of a heckler's veto in the context of professorial extramural speech. Harry Kalven coined the term "heckler's veto" to point to the problem of authorities silencing a speaker because some members of the audience "do[] not like what the [speaker] is saying and wish[] to stop it," effectively transferring "the power of censorship to the crowd."[191] The civil rights

Stage, and Institutional Context, 75 J. HIGHER EDUC. 178, 196–97 (2004) (importance of autonomy to faculty).

186. Ernst Benjamin, Debra Nails, Ellen W. Schrecker, Cary Nelson, David M. Rabban, Gary D. Rhoades & Anita Levy, *Ensuring Academic Freedom in Politically Controversial Academic Personnel Decisions*, 97 BULL. AM. ASS'N UNIV. PROFESSORS 88, 100 (2011).

187. Mary Ann Connell & Frederick G. Savage, *Does Collegiality Count?*, 87 ACADEME 37, 37–38 (2001); *see, e.g.*, Chitwood v. Feaster, 468 F.2d 359, 361 (4th Cir. 1972) ("A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously."); Stein v. Kent State Univ. Bd. of Trs., 994 F. Supp. 898, 909 (N.D. Ohio 1998) ("The ability to get along with co-workers . . . is a legitimate consideration for tenure decisions.").

188. *See* Simard v. Bd. of Educ., 473 F.2d 988, 990–92, 995–96 (2d Cir. 1973) ("A school system may justifiably demand more from its teachers than competent classroom instruction; a chronic refusal to comply with reasonable administrative obligations can surely have a disruptive effect on students, fellow teachers and administrators alike and consequently poses a distinct threat to an optimum learning environment.").

189. *See* Jeffries v. Harleston, 21 F.3d 1238, 1247 (2d Cir. 1994) (finding that the role of department chair is "an essentially ministerial role" that "does not call for the level of institutional fidelity that would justify the lesser interference burden").

190. Hulen v. Yates, 322 F.3d 1229, 1239 (10th Cir. 2003).

191. HARRY KALVEN, JR., A WORTHY TRADITION 89–90 (Jamie Kalvin ed., 1988).

movement particularly highlighted the danger of empowering "hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve."[192] When authoring his famed "Kalven Report" on the role of the university in political controversies, Kalven emphasized that "a good university, like Socrates, will be upsetting."[193] For a university to serve its social function and "to be true to its faith in intellectual inquiry," it "must embrace, be hospitable to, and encourage the widest diversity of views within its own community."[194] Justice William O. Douglas celebrated the idea that free speech "invite[s] dispute," "induces a condition of unrest," and "even stirs people to anger."[195] What professors say in public can do just that. Universities would be sacrificing their core values if they took the position that universities could silence professors who stir people to anger by expressing their controversial ideas.

Universities can all too easily become the instruments for shrinking rather than expanding the range of social and political debate if they are willing to punish professors for instances of extramural speech that generate public controversy. It has become commonplace for those offended by the public speech of university professors to demand that the faculty member be fired or otherwise sanctioned for speaking in public. Politicians, political activists, donors, students, and even other professors have pushed for universities to retaliate against professors who have offended their sensibilities by something that they have said.

This form of "disruption" to the university campus cannot, consistent with academic freedom and free speech values, be the basis for employer punishment of a member of the faculty. "Community reaction" to controversial ideas should be expected on a university campus. A controversial social media post by a professor might spur angry phone calls or student protests, but universities have a responsibility to protect the space for free speech rather than become instruments for silencing speech. University operations may be inconvenienced by individuals moved to anger by something a professor said, but that consequence of freedom of speech should be absorbed by universities if they are to live up to their responsibility to be "First Amendment institutions," socially important and distinctive places "where ideas begin."[196] They are places that have and can serve as refuges for intellectual dissidents who might not be tolerated so well in

192. HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140 (1965).

193. KALVEN COMM., REPORT ON THE UNIVERSITY'S ROLE IN POLITICAL AND SOCIAL ACTION 1 (Univ. Chi. 1967), https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf [https://perma.cc/KWV5-8WBH].

194. *Id.*

195. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

196. PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 107 (2013).

society at large. Professors have a duty not to set their sights by what is popular but by what they think is true. If universities were to become tools of popular majorities, whether those majorities are found on campus or in the broader polity, then we would fail in our aspiration to give "diversity of opinion . . . the fullest possible measure of freedom of conscience and thought" and instead give way to "enforced orthodoxy."[197] When a professor's racially charged postings on a university forum set off wide-ranging controversy and condemnation, the Ninth Circuit questioned whether "a college professor's expression on a matter of public concern, directed to the college community, could ever constitute unlawful harassment," given First Amendment protections:

> The right to provoke, offend and shock lies at the core of the First Amendment.
>
> This is particularly so on college campuses. Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities—sheltered from the currents of popular opinion by tradition, geography, tenure and monetary endowments—have historically fostered that exchange. But that role in our society will not survive if certain points of view may be declared beyond the pale.[198]

If it is a legitimate interest of universities to fire members of a faculty if the critics of their extramural speech are sufficiently numerous or fervent, then universities will have a similar interest in responding to such a campus disruption in the case of controversial scholarship or teaching. Indeed, it was precisely when professors at the State University of New York at Fredonia and Old Dominion University spoke in interviews about their scholarly research on adults who are sexually attracted to minors that their ideas created public controversy, leading to demands that they be fired.[199] The extramural speech eventually reached an audience that was stirred to anger by the professors' ideas, but the ideas about which members of the public became angry were produced in the context of scholarship. Universities

197. Martin v. City of Struthers, 319 U.S. 141, 150 (1943).

198. Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist., 605 F.3d 703, 708, 710 (9th Cir. 2010).

199. Colleen Flaherty, *SUNY Fredonia Reviewing Professor's Comments on Pedophilia*, INSIDE HIGHER ED (Feb. 3, 2022), https://www.insidehighered.com/quicktakes/2022/02/03/suny-fredonia-reviewing-professor%E2%80%99s-comments-pedophilia [https://perma.cc/3LJP-SDXS; Colleen Flaherty, *Controversial Scholar Resigns*, INSIDE HIGHER ED (Nov. 29, 2021), https://www.insidehighered.com/news/2021/11/29/controversial-scholar-pedophilia-resigns-old-dominion [https://perma.cc/74GZ-KJEU].

that are responsive to such reactions will be governed by the strength of passionate mobs rather than by reasoned deliberation.

A key consideration here is whether a given instance of professorial speech in fact expresses ideas and addresses a matter of public concern. For *Pickering* analysis, this is a threshold question for determining whether an utterance is entitled to any First Amendment protection at all. Private universities might likewise look to those considerations in determining whether a professor is speaking "as a citizen." But employers need not tolerate employees who demean and abuse their coworkers, and professors are no more entitled to demean and abuse those around them than anyone else. Professors who incite anger by expressing unpopular ideas or making use of inflammatory rhetoric are a byproduct of fostering a vigorous intellectual environment, and universities have no legitimate interest in disciplining them for ruffling feathers by speaking their minds. Professors who incite anger by being verbally abusive to students or staff, however, are not speaking as citizens or advancing ideas. They are not disrupting their workplace by challenging conventional wisdom but by bullying those around them. Professors who are *merely* "demeaning, rude, and insulting" give universities good cause to take action to curb their behavior.[200] The Court has said that the "manner, time, and place" of a government employee's speech should weigh in the *Pickering* balance.[201] Professorial speech that is directed to the broader community or to an audience and addresses a matter of public concern will always deserve a high degree of constitutional protection, even when members of the audience take offense, but the face-to-face hurling of personal insults at a student or fellow employee is much less likely to weigh in favor of a professor in a *Pickering* balancing.[202]

It is not a legitimate interest of a university to sanction professors for controversial speech with which people disagree, even if those disagreements are expressed in ways that create burdens and injuries for the university. There are, however, other forms of disturbance that universities can appropriately take into account in a manner that is

200. Morris v. Crow, 117 F.3d 449, 458 (11th Cir. 1997).

201. Connick v. Myers, 461 U.S. 138, 150, 152 (1983).

202. Unfortunately, Dean Ted Ruger erases these important distinctions in his referral of the case of Professor Amy Wax to the University of Pennsylvania for disciplinary action. He expressly includes "her public commentary espousing derogatory and hateful stereotypes" among his reasons for seeking her termination. Such public commentary is different in kind than telling an individual student, for example, that she had only been admitted to the school "because of affirmative action." Letter from Theodore W. Ruger, Dean of Univ. of Pa. L. Sch., to Vivian L. Gadsden, Chair of the Univ. of Pa. Fac. Senate, at 5, 7 (June 23, 2022) (available at https://www.thefire.org/research-learn/university-pennsylvania-law-deans-report-regarding-amy-wax-june-23-2022 [https://perma.cc/3VRP-Z3SM]).

consistent with their responsibility to foster free inquiry and intellectual disputes.

Universities, as with any other employer, need not tolerate genuine personal harassment of members of the campus community by a professor. Traditional *Pickering* balancing sweeps much more broadly than conduct that might be covered by harassment policies, but government employers clearly have a substantial interest in remedying harassing conduct. Universities have repeatedly demonstrated that "overbroad harassment policies can suppress or even chill core protected speech and are susceptible to selective application amounting to content-based or viewpoint discrimination."[203] Universities must take care since "'[h]arassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections."[204] The Court's guidance that harassing speech is "so severe, pervasive, and objectively offensive" as to "so undermine[] and detract[] from the victims' educational experience" that it "effectively den[ies] equal access to an institution's resources and opportunities" delimits the legitimate interest that universities have in addressing abusive conduct by a professor directed at a student.[205] Similarly, the Court has emphasized that abusive workplace environments depend on factors such as the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[206] Even "where the speech of college professors [involved] derogatory comments about persons of certain racial or ethnic groups," such speech is protected when it is "found to serve the purpose of advancing viewpoints, however repugnant, which had as their purpose influencing or informing public debate."[207]

There may be circumstances in which a professor's extramural speech can meet such a standard of demonstrably interfering with the rights of others on campus, but the bar is quite high. It certainly cannot turn, as Georgetown University has recently suggested, on whether a large number of students signed a letter condemning the speech, attended a public meeting to express "their outrage, concern, and hurt," or resolved not to take a course from a professor.[208] Such reactions may

203. DeJohn v. Temple Univ., 537 F.3d 301, 314 (3d Cir. 2008).

204. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001).

205. Davis v. Monroe Cnty. Bd. of Ed., 526 U.S. 629, 651 (1999).

206. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

207. Bonnell v. Lorenzo, 241 F.3d 800, 820 (6th Cir. 2001).

208. Eugene Volokh, *What Are Georgetown Professors Forbidden to Say?*, REASON: THE VOLOKH CONSPIRACY (June 7, 2022), https://reason.com/volokh/2022/06/07/what-are-georgetown-professors-forbidden-from-saying/

"adversely affect[]" a university's environment, but acting on that sort of "profound" "actual impact" would be indistinguishable from effectuating a heckler's veto.[209] If universities were to characterize extramural speech as harassing whenever enough students vociferously object, the First Amendment protections for the extramural speech of professors would be nugatory.[210] The fact that individuals upset by a professor's extramural speech are willing to disrupt the activities of the university must be laid at the feet of the hostile crowd, not the professor. The university's responsibility under the First Amendment is to address the disruption caused by the crowd, not to suppress the speech to which the crowd objects.

Additionally, universities may, and indeed should, take action when the expressive conduct of a faculty member is intended to and has the effect of obstructing university operations. At one time, this was exactly the kind of "disturbance" that courts weighed in the *Pickering* balance. When a professor led disruptive student protests on campus to fulminate against the Vietnam War, the court found that "[h]is acts caused a substantial and material disruption of a duly constituted university function which created a danger of violence."[211] The professor had gone "beyond the mere advocacy of ideas and counselled a course of action, interfered with the regular operation of the school, and consequently was outside the protection of the First Amendment."[212] Similarly, college students could be suspended "*not* for expressing their opinions on a matter of substance, but for violent and destructive interference with the rights of others" through "an aggressive and violent demonstration."[213] A professor joining in such a "disruptive" protest that "substantially interfered with the rights of the other students and faculty to use the building for educational purposes" could justify his termination.[214] A professor's incitement of the "immediate material disruption of the University's work" by directing students to

[https://perma.cc/YA7C-HJS8] (quoting Office of Institutional Diversity, Equity, and Affirmative Action, Report on Ilya Shapiro).

209. *Id.*

210. Harassment in the context of classroom speech, where students are a "captive audience," would raise different concerns, but among those concerns would be whether the speech served an "academic purpose." Martin v. Parrish, 805 F.2d 583, 586 (5th Cir. 1986) (finding in-class profanity directed at students served no legitimate purpose); Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 675, 679 (6th Cir. 2001) (finding in-class mention of racial epithets was not gratuitous or abusive and served an academic function).

211. Adamian v. Lombardi, 608 F.2d 1224, 1228 (9th Cir. 1979).

212. *Id.*

213. Esteban v. Cent. Mo. State Coll., 415 F.2d 1077, 1087 (8th Cir. 1969).

214. Rozman v. Elliott, 467 F.2d 1145, 1149 (8th Cir. 1972).

occupy and shut down a building can appropriately lead to his dismissal.[215] A university could not decline to hire a professor because he would be politically controversial, but it could decline to hire him because he had demonstrated through past conduct that he would take "actions disrupting University activities materially and substantially, perhaps even bringing injury to persons at or the property of the University which was to hire him."[216] A professor can criticize university officials in "strident" terms and engage in peaceful picketing (subject to appropriate time, place, and manner regulations), but cannot hold a disruptive protest in a classroom and prevent a colleague from teaching.[217] The "[r]obust intellectual and political discussions" on college campuses need "not always be models of decorum," and "momentary stridency" that briefly interrupts a meeting should not be understood to meet a "'substantial and material' disruption standard,"[218] but professors who engage in *conduct* that impedes university operations can be disciplined for doing so.

It is not consistent with the First Amendment principles that should govern a university for professors to be disciplined because they give voice to unpopular, offensive, or controversial ideas or express themselves in passionate or discomforting ways. The AAUP's 1915 Declaration of Principles on Academic Freedom and Academic Tenure emphasized that

> [t]he tendency of modern democracy is for men to think alike, to feel alike, and to speak alike. Any departure from the conventional standards is apt to be regarded with suspicion. Public opinion is at once the chief safeguard of a democracy, and the chief menace to the real liberty of the individual. . . . [I]n a democracy there is political freedom, but there is likely to be a tyranny of public opinion.
>
> An inviolable refuge from such tyranny should be found in the university. It should be an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world.[219]

But professors have no First Amendment right to incite others to obstruct university operations or to personally interfere with

215. Franklin v. Leland Stanford Junior Univ., 218 Cal. Rptr. 228, 230, 241 (Cal. Ct. App. 1985).

216. Franklin v. Atkins, 409 F. Supp. 439, 451–52 (D. Colo. 1976).

217. Trotman v. Bd. of Trs. of Lincoln Univ., 635 F.2d 216, 225–26 (3d Cir. 1980).

218. Mabey v. Reagan, 537 F.2d 1036, 1050 (9th Cir. 1976).

219. AM. ASS'N OF UNIV. PROFESSORS, *1915 Declaration*, *supra* note 12, at 8–9.

educational or administrative activities at the school. Controversial professors may be distractions and take up a disproportionate amount of the time and energy of university officials, but that is to be expected on a university campus. Only when a professor engages in materially disruptive conduct that prevents others from making use of university facilities and opportunities should the balance of interests tilt in favor of the government employer.

V. A QUESTION OF FITNESS AND CHARACTER

> [S]he was lowering the dignity of the teaching profession.
>
> —Professor Howard A. Key, North Texas State University[220]

Government employers have a legitimate interest in ensuring that governmental functions are effectively and efficiently performed through government employees. That interest necessarily means that government employers can direct the conduct of government employees in myriad ways, evaluate their performance in conducting their duties, and sanction or terminate employees who fail to perform their duties adequately. It also has implications for government employee speech, as the *Pickering* Court recognized. Pickering's own letter to the editor of the local newspaper was "neither shown nor can be presumed to have in any way . . . impeded the teacher's proper performance of his daily duties in the classroom."[221] But an employee's First Amendment rights can be restricted if doing so is necessary "to insure effective performance by the employee."[222]

This raises the possibility that a professor might be sanctioned for extramural speech if the form or content of that speech calls into question the professor's professional fitness and ability to perform employment duties.[223] This might be true because the speech reveals

220. Duke v. N. Tex. State Univ., 469 F.2d 829, 839 (5th Cir. 1972) (quoting testimony of Professor Howard A. Key).

221. Pickering v. Bd. of Educ., 391 U.S. 563, 566, 572–73 (1968).

222. Childers v. Indep. Sch. Dist. No. 1, 676 F.2d 1338, 1341 (10th Cir. 1982).

223. Presumably, extramural speech could also interfere with the efficient performance of a professor's duties if it created a "conflict of commitment." Off. of Exec. Vice President & Provost, *Conflicts of Commitment and Interest*, pt. II, ch. 18, *in Operations Manual*, UNIV. OF IOWA, https://opsmanual.uiowa.edu/community-policies/conflicts-commitment-and-interest#18.4 [https://perma.cc/CPE5-JF68] (Jan. 14, 2021). For example, the University of Iowa explains a conflict of commitment as "a situation in which a faculty member engages in an 'external activity,' which requires time and/or effort such that the activity interferes, or appears to interfere, with fulfillment of the faculty member's obligations to the University." *Id.* If UF had determined that a professor serving as an expert witness was cancelling classes in order to prepare for and deliver

either a lack of scholarly expertise or a lack of appropriate character or ethics. In either case, universities should tread very carefully in drawing sweeping conclusions about the professional fitness of a member of the faculty on the basis of extramural expression.[224]

State universities obviously have a legitimate interest in ensuring that the members of their faculty are professionally competent. Hopefully due diligence during the hiring and promotion process can satisfy this interest. In an academic context, assessing professional competence necessarily involves evaluating professorial speech. What professors say in the classroom and what they write in their scholarship are scrutinized and judged in order to determine at the very least whether professors are competent, and preferably whether they are exceptional. The First Amendment bars the government from sanctioning citizens for disseminating bad ideas, but the First Amendment does not hinder government employers from making judgments about the quality of their employees' ideas and their communicative skills and taking negative employment actions on the basis of those judgments.

Academic employment depends on judgments that university employers reach about professional speech, but employers should not make judgments about extramural speech. Certainly, extramural speech unrelated to a professor's area of scholarly expertise should be entirely irrelevant to their employment status. This is true under both academic freedom and First Amendment principles. The AAUP issued a special report in 2011 decrying "political intrusions into academic personnel

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testimony, this would present a problem of extramural speech interfering with the performance of core job responsibilities. If a professor neglects to grade the exams of his students because he is too busy posting on social media, his university employer has a legitimate concern. In such cases, however, the professor's extramural *speech* is largely beside the point. The university would have equal grounds for complaint if the professor were missing classes because he was golfing or napping. *See supra* notes 137–47 and accompanying text.

224. Of course, questions about the First Amendment rights of government employees have also arisen in the context of on-the-job speech. The concern with extramural speech in this Article largely sets those issues aside, but within *Pickering* analysis such speech might well impede the performance of job responsibilities. *See, e.g.*, Goldwasser v. Brown, 417 F.2d 1169, 1171 (D.C. Cir. 1969) (Air Force could fire a language instructor for raising controversial and non-germane issues during his classes); Ferguson v. Thomas, 430 F.2d 852, 853–55 (5th Cir. 1970) (university could fire professor for using "classroom periods for discussions with students unrelated to the subject matter required to be taught," which resulted in "inferior instruction"); Birdwell v. Hazelwood Sch. Dist., 491 F.2d 490, 492–96 (8th Cir. 1974) (school district could fire a high school math teacher who spent his class time urging students to physically attack military recruiters on the campus in a manner that "interfered with the educational process" and "diverted the time and attention of both students and teacher from the prescribed curriculum").

decisions."[225] Disagreements "over political ideology, religious doctrine, social or moral perspectives, corporate practices, or public policy" have no place in the evaluation and treatment of faculty.[226] Principles of academic freedom require that those making employment decisions limit themselves to the "scholarly evaluation of the applicant's professional competence and performance" and entirely set aside "disagreement with the applicant's views" regarding "extra-university societal controversies."[227] Conditioning employment in state universities on expressed political views is likewise inimical to the First Amendment. The Court has repeatedly held that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[228] Government employees cannot generally be told that they can only "hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party."[229] It is only "if an employee's private political beliefs would interfere with the discharge of his public duties" that the government employer may take notice of those beliefs.[230] "None would deny," said the Court, that Congress may not adopt a law declaring that "no Republican, Jew or Negro shall be appointed to federal office."[231] Likewise, no state university can punish a member of the faculty for being a Republican or Democrat or Socialist or Libertarian or for holding and expressing those beliefs. It would be a clear violation of these constitutional principles were a board of trustees of a public university to act on the view expressed by a trustee of Florida Atlantic University that the board needed to know about a professor's "political affiliations and donations" when deciding whether to award tenure.[232]

Extramural speech relating to a scholar's area of expertise has the potential to be relevant to questions of professional competence, but it should never be determinative. The 1940 AAUP Statement of Principles noted that a university might come to believe that "the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position," consistent with

225. Benjamin et al., *supra* note 186, at 90 (2011).

226. *Id.*

227. *Id.*

228. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

229. Elrod v. Burns, 427 U.S. 347, 359–60 (1976).

230. Branti v. Finkel, 445 U.S. 507, 517 (1980).

231. United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947).

232. Joseph Acosta, *"It's Unworkable." FAU Faculty Senate, United Faculty of Florida Push Back on Proposed Tenure Rule*, UNIV. PRESS (June 9, 2021), https://www.upressonline.com/2021/06/its-unworkable-fau-faculty-senate-united-faculty-of-florida-push-back-on-proposed-tenure-rule/ [https://perma.cc/3Y9P-UHE9].

the understanding that "teachers are citizens and should be accorded the freedom of citizens."[233] In 1964, the AAUP further emphasized that

> [t]he controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness to serve. Extramural utterances rarely bear upon the faculty member's fitness for continuing service. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar.[234]

Only "weighty evidence of unfitness" should justify negative employment actions.[235] If a philosopher were to mistranslate a classical text during testimony in a court case or a law professor were to advance widely rejected constitutional arguments in an election dispute, such extramural speech would draw upon and, as a consequence, shed light on the scholar's professional competence and expertise. No matter how incompetent those particular expressions of scholarly judgment might be, a university should not consider them standing alone but should put them in the context of the scholar's overall portfolio of teaching and scholarship. It would be remarkable if a professor's extramural speech tipped the scales in assessing whether that scholar was professionally competent. Extramural speech might raise a red flag about professional competence, but the proper assessment of that professional competence should be grounded in the professor's record of teaching and scholarship.

Moreover, examples of extramural speech cannot stand in for more direct evidence of whether a professor is competently performing his or her professional duties. A law professor who misstates the law in a social media post might give university officials cause for concern as to whether he also misstates the law in his classroom teaching, but university officials cannot properly infer that his classroom teaching is necessarily incompetent simply based on a reading of a social media post. If a professor is to be sanctioned because of his professional incompetence in scholarship or teaching, the sanction should be based on actual evidence drawn from his scholarship and teaching.

There is potentially a second dimension to professional fitness, and that is one that focuses less on the substantive quality of a scholar's expertise than on the professor's character and bearing. The AAUP's 1940 statement made note of the responsibility of scholars not to discredit their profession or their institution when they speak in public.

233. AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT, *supra* note 29, at 14 n.6.

234. AM. ASS'N OF UNIV. PROFESSORS, *Committee A Statement on Extramural Utterances*, *in* POLICY DOCUMENTS AND REPORTS, *supra* note 12, at 31.

235. *Id.*

Professors should strive "at all times [to] be accurate, should exercise appropriate restraint, [and] should show respect for the opinion of others."[236] Certainly, we would expect professors to meet such standards in the course of their classroom teaching. But as with questions of professional competence, questions of professional character should rest on a professor's entire record and not on isolated extramural utterances. It is of no concern to the government employer what the personal or private character of an employee might be except to the extent that such character has consequences for how they perform their professional duties as a government employee. A professor might be a rabble-rouser on the public square but a model of decorum at the lectern. A professor might be an intemperate partisan on social media but treat all his students with equal dignity and respect in the classroom. If a government employer seeks evidence that a teacher is not properly performing her duties in the classroom, the proper place to look is at her classroom behavior, not her behavior on social media.

The use of extramural speech to assess the character of a college instructor is particularly troublesome and invites abuse. There is arguably some governmental interest in the general temperament and character of an elementary school teacher, since such a teacher acts *in loco parentis* for small children and serves a public function of educating and socializing children into becoming responsible citizens. Such concerns are much less credible in a university context with adult students. The government's legitimate interest in holding university professors to a standard of being community role models is negligible.

To the extent that state universities might once have credibly contended that they had an interest in the private character of professors, the changing mores of American society have eroded the viability of such claims. College authorities once stood in the place of parents "concerning the physical and moral welfare, and mental training of the pupils" and exercised authority over the lives of students for the "betterment of their pupils that a parent could for the same purpose,"[237] and as a consequence needed instructors who could plausibly exercise such a role. That vision of university authority did not survive the 1960s, however.[238] Students were constitutionally to be treated as adults, and by implication professors were no longer to be treated as parental figures.

The societal expectations regarding the proper comportment of both professors and students on and off campus were quite different at a time when students were expected to wear ties and sports coats to

236. AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT, *supra* note 29, at 14.

237. Gott v. Berea Coll., 161 S.W. 204, 206 (Ky. 1913).

238. Philip Lee, *The Curious Life of* In Loco Parentis *at American Universities*, 8 HIGHER EDUC. REV. 65, 70–76 (2011).

class and women's dorms had curfews.[239] In 1973, the Court made explicit that a state university could not expel a graduate student for distributing on campus a newspaper "containing forms of indecent speech" that were "offensive to good taste" and violated "conventions of decency."[240] The Court held that the "First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech," and adults on campus were allowed to be just as offensive as adults off campus.[241] The revolution in expectations was also evident in a Fifth Circuit case the year before, but that court had not yet gotten the message. In 1970, a graduate student at North Texas State University had her position as a teaching assistant revoked by campus authorities.[242] She lost her teaching job because she had spoken at a public meeting in a park on campus and in addressing the crowd, which included current and prospective undergraduate students, "used profane and obscene language," "discredited the University administration," and was "critical of the manner in which the University [was] operated and maintained."[243] In doing so, she had impaired "her efficiency as a teacher and her judgment as a scholar" and had demonstrated a "lack of professional integrity" by failing to appreciate how the public might judge the university as a result of her actions.[244] In a disciplinary hearing, her supervising professor confessed that by using "language of this kind" in front of undergraduate students, she was "lowering the dignity of the teaching profession" and showed such a "lack of judgment" in using "the lowest kind of words" that she "should not teach."[245] The chair of her department declared that if he had used such language in front of students, he "would have considered [himself] ill fit for [his] profession." Although the district court thought the university had not demonstrated "the scope of its interests" in regulating the teaching assistant's private speech, the circuit court disagreed and thought it "evident that the interests the University sought to protect were to maintain a competent faculty and to perpetuate public confidence in the educational institution."[246] The teaching assistant "owed the

239. On the changing collegiate fashion, see generally DEIRDRE CLEMENTE, DRESS CASUAL: HOW COLLEGE STUDENTS REDEFINED AMERICAN STYLE (2014). On changing collegiate sexual mores, see generally BETH BAILEY, SEX IN THE HEARTLAND (1999).

240. Papish v. Bd. of Curators, 410 U.S. 667, 667, 670 (1973) (quoting Papish v. Bd. of Curators, 464 F.2d 136, 139, 145 (8th Cir. 1972)).

241. *Id.* at 671.

242. Duke v. N. Tex. State Univ., 469 F.2d 829, 831–32 (5th Cir. 1972).

243. *Id.* at 832.

244. *Id.*

245. *Id.* at 839.

246. *Id.*

University a minimal duty of loyalty and civility to refrain from extremely disrespectful and grossly offensive remarks aimed at the administrators of the University."[247] That was the last gasp of the old order. Modern First Amendment jurisprudence and professional norms would not demand such refinement in the extramural expressions of professors. Professors can no longer be faulted for being "offensive to good taste" in their extramural speech.[248]

The demand that professors have a duty of "civility" in their extramural speech is a recurrent one and often has a political valence. A federal district court observed in the context of a student civility code at a state university,

> Civility connotes calmness, control, and deference or responsiveness to the circumstances, ideas, and feelings of others . . . . [A] regulation that mandates civility easily could be understood as permitting only those forms of interaction that produce as little friction as possible, forms that are thoroughly lubricated by restraint, moderation, respect, social convention, and reason. The First Amendment difficulty with this kind of mandate should be obvious: the requirement "to be civil to one another" and the directive to eschew behaviors that are not consistent with "good citizenship" reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. Similarly, mandating civility could deprive speakers of the tools they most need to connect emotionally with their audience, to move their audience to share their passion.[249]

A federal court similarly rejected the application of a university's workplace violence policy to a professor's mocking the appointment of the new university president.[250] The court found that the professor's

247. *Id.* at 840.

248. Matters might be different in a classroom context with a captive audience and heightened expectations of professionalism. *See, e.g.*, Martin v. Parrish, 805 F.2d 583, 586 (5th Cir. 1986) ("[S]tudents in Martin's classroom . . . paid to be taught and not vilified in indecent terms."); Bonnell v. Lorenzo, 241 F.3d 800, 811–12 (6th Cir. 2001) (finding that the "use of classroom language considered to be obscene and not germane to the course content" is unprotected); Buchanan v. Alexander, 919 F.3d 847, 853 (5th Cir. 2019) ("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.").

249. Coll. Republicans at S.F. State Univ. v. Reed, 523 F. Supp. 2d 1005, 1019 (N.D. Cal. 2007).

250. Bauer v. Sampson, 261 F.3d 775, 780, 787 (9th Cir. 2001).

expression might be "adolescent, insulting, crude and uncivil,"[251] but "the vigorous exchange of ideas and resulting tension between an administration and its faculty is as much a part of college life as homecoming and final exams." Uncivil speech by members of the faculty might offend the sensibilities of the powers that be, but the university must be able to demonstrate that it actually has a negative impact on a professor's "teaching or other professional responsibilities" to properly question a professor's professional fitness.[252]

Through the lens of temperament, political disagreements are transformed into questions of professional fitness. On the campaign trail in 2020, Joe Biden promised that if elected President he would appoint a Black woman to any vacancy on the Supreme Court.[253] When Justice Stephen Breyer announced his intention to leave the Court during President Biden's term, Ilya Shapiro took to Twitter to pronounce his disappointment that Biden had limited his pool of candidates to Black women and thus excluded the potential nominee that Shapiro thought best qualified for the job (Judge Sri Srinivasan). As a consequence, in Shapiro's view, Biden was appointing a "lesser black woman."[254] Shapiro quickly deleted the tweet and apologized, but it nonetheless generated a heated controversy at Georgetown University Law Center, where Shapiro was soon to begin an appointment as an administrator and lecturer. His soon-to-be colleague Paul Butler argued that professors should "be fired for a tweet if that tweet reveals you do not have the ability to do your job."[255] For Butler, Shapiro's extramural speech had demonstrated that he did not possess the character necessary to teach a diverse set of students. He was unfit to be a college professor, not because he was incompetent or had treated students unfairly (he had not yet taught any students), but because students might, on the basis of his extramural speech, think he would treat them unfairly. Setting aside the question of whether Butler was correctly interpreting Shapiro's tweet by characterizing it as "racist," Shapiro had at least shown a lack of judgment that was unbecoming of a professor. But there is no shortage of university professors who show such a lack of judgment when given access to social media, or just a microphone. College

251. *Id.* at 783 (quoting Bauer v. Sampson, No. 98-cv-10686, slip op. at 9–10 (C.D. Cal. Nov. 1, 1999)).

252. *Id.* at 785.

253. Joan Biskupic, *Joe Biden's Pledge Could Change the Look of the Supreme Court*, CNN (Mar. 16, 2020, 1:36 PM), https://www.cnn.com/2020/03/16/politics/joe-biden-supreme-court-african-american-woman-nominee/index.html [https://perma.cc/HP5D-SP3B].

254. Paul Butler, *Yes, Georgetown Should Fire an Academic for a Racist Tweet*, WASH. POST (Feb. 20, 2022, 8:00 AM), https://www.washingtonpost.com/opinions/2022/02/20/georgetown-should-fire-ilya-shapiro-tweet-supreme-court-lesser-black-women/ [https://perma.cc/5AUK-DJLH].

255. *Id.*

Republicans thought a history professor's tweet expressing hostility to the Republican Party showed that conservative students could not feel welcome in her class.[256] The attorney general of Montana declared that the teaching of critical race theory "creates a racially hostile environment" for white students.[257] The trustees of the University of Illinois blocked the appointment of Steven Salaita to its faculty because of his inflammatory tweets about Israel, which led the chair of the board to declare that "[d]isrespectful and demeaning speech" had "no place . . . in [the] university."[258] Free-floating charges that professors are temperamentally unfit to teach students or might be prejudiced against some class of students because of something that they said in public quickly devolve into efforts to exclude individuals with unpopular views from the halls of academe.

If professors, or prospective professors, are unfit for the job and incapable of performing their duties, their extramural speech is the wrong place to look for evidence of it. They should be disqualified for something that they have done professionally, in the classroom or in their scholarship, not for something controversial that they said in public. Universities can reasonably expect professors to maintain high scholarly standards in their research and treat their students with fairness and respect in the classroom, and when professors fail to perform according to those expectations, they can be appropriately sanctioned for it. Neither academic freedom principles nor the First Amendment, however, can tolerate governmental employers monitoring the extramural speech of faculty members for saying stupid, foul, or hateful things.

CONCLUSION

University professors say controversial things in public. A democratic society benefits from giving ample protection to such speech. Universities are storehouses of information and foster the

256. Connor Murphy, *JMU History Professor Publicly Claims Republican Party Can "Die for All I Care*," THE BREEZE (October 14, 2020), https://www.breezejmu.org/news/jmu-history-professor-publicly-claims-republican-party-can-die-for-all-i-care/article_ddf2bb30-0e25-11eb-a4fc-57151a21b524.html [https://perma.cc/H5NH-7MA8].

257. *Attorney General Knudsen Issues Binding Opinion on Critical Race Theory*, MONT. DEP'T OF JUST. (May 27, 2021), https://dojmt.gov/attorney-general-knudsen-issues-binding-opinion-on-critical-race-theory/ [https://perma.cc/W7WT-6XHZ].

258. Memorandum from Univ. of Ill. Bd. of Trs. on Steven Salaita Case (Aug. 22, 2014) (on file with the University of Illinois), https://cfaillinois.files.wordpress.com/2014/08/civility-massmail.pdf [https://perma.cc/9UD7-YH5G]; Robert Shibley, *U. of Illinois Totally Blows It on Salaita Defense*, FIRE (Aug. 22, 2014), https://www.thefire.org/news/u-illinois-totally-blows-it-salaita-defense [https://perma.cc/KE46-LM9W].

development of scholarly expertise and the advancement of human knowledge. If society is going to fully benefit from the existence of such institutions, it needs to support and tolerate the free exchange of ideas not only in scholarship and in the classroom but also in the public sphere. A polity should want professors to share their expertise with the broader world and to contribute the fruits of their labors to public deliberations on socially and politically contested issues. Doing this effectively will often mean tolerating the expression of many dubious and bad ideas in order to create the intellectual space necessary to properly generate, test, identify, refine, and communicate good ideas. A liberal democratic society should strive to tolerate the expression of controversial ideas in a wide range of contexts, but it is especially important to do so in the context of institutions of higher education, whose stock-in-trade is critical inquiry on the frontiers of human knowledge. Professors have a responsibility "to impart the results of their own and of their fellow-specialists' investigations and reflection, both to students and to the general public, without fear or favor."[259] It is

> highly needful, in the interest of society at large, that what purport to be the conclusions of men trained for, and dedicated to, the quest for truth, shall in fact be the conclusions of such men, and not echoes of the opinions of the lay public, or of the individuals who endow or manage universities.[260]

The U.S. Supreme Court has repeatedly emphasized that the First Amendment has particular salience in the context of public universities and that First Amendment values require that government officials tolerate the free expression of ideas in the university context. Even so, the Court has not adequately clarified the scope of those protections or the precise nature of the government's obligations when it comes to professorial speech. In our current polarized political environment, it has become all the more important that courts stand prepared to enforce First Amendment protections surrounding university campuses. That requires, among other things, protecting the ability of professors at state universities to say controversial things in public without fear of retaliation from their governmental employer.

The Court has appropriately acknowledged that government employees have First Amendment rights but also that government employers have distinctive interests that affect and limit the free expression of government employees. Many of those interests are inapt when applied to the peculiar context of universities. The nature of the intellectual work that professors do and the manner in which university workplaces are organized mean that university officials have far fewer

259. AM. ASS'N OF UNIV. PROFESSORS, *1915 Declaration*, *supra* note 12, at 6.

260. *Id.*

legitimate interests in curtailing the private expression of ideas and opinions by university professors. The risk of university officials becoming the puppet of the crowd to enforce a heckler's veto on professors voicing unpopular opinions is extremely high. If university officials give in to such demands, they threaten to cast the "pall of orthodoxy" over university campuses, which the principles of the First Amendment and academic freedom do not countenance.[261]

Unfortunately, there are many pressures on university officials to stifle controversial speech on college campuses, and courts cannot rely on university leaders to always protect academic freedom values when doing so requires defending unpopular and controversial individuals or the expression of offensive and disturbing ideas on campus. Judges need to be sensitive to the threat of the "tyranny of public sentiment" and restrain university officials from silencing dissenters in the name of maintaining harmony and preventing disturbance.[262] The First Amendment requires that intellectual disagreements on college campuses be resolved through deliberation and debate, not through the application of coercive force. The groves of academe should be sheltered from the turbulent winds of politics, but we should not expect them to be tranquil. They should be home to sometimes uncomfortable and passionate disputes, and those disputes should not be cut off prematurely by the hectoring throng. Not every expression of opinion will be welcomed, but they should all be tolerated.

There are very few occasions when university officials can properly sanction a university professor for his or her extramural speech. If professors violate confidences,[263] defame individuals,[264] interfere with university operations,[265] neglect their duties or display professional incompetence,[266] engage in research fraud,[267] deprive students of educational opportunities,[268] or threaten colleagues,[269] then administrators can and should act to rein in a wayward scholar. Professors may say things in public that are mistaken, offensive, or even repugnant and vile—or they may simply say things that threaten the interests of powerful groups and individuals or run contrary to prevailing

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

262. David Spitz, *On the Abuses of Power in Democratic States*, 1 MIDWEST J. POL. SCI. 225, 231 (1957).

263. Pickering v. Bd. of Educ., 391 U.S. 563, 582 (1968) (White, J., concurring).

264. Feldman v. Bahn, 12 F.3d 730, 733 (7th Cir. 1993).

265. Rozman v. Elliott, 467 F.2d 1145, 1149 (8th Cir. 1972).

266. Churchill v. Univ. of Colo. at Boulder, 293 P.3d 16, 28 (Colo. App. 2010), *aff'd*, 285 P.3d 986 (Colo. 2012).

267. Pugel v. Bd. of Trs., 378 F.3d 659, 668 (7th Cir. 2004).

268. Trejo v. Shoben, 319 F.3d 878, 890 (7th Cir. 2003).

269. Bauer v. Sampson, 261 F.3d 775, 783 (9th Cir. 2001).

sentiment—but general principles of free speech protect their right to say such things and university employers should refrain from penalizing them for such speech. When universities claim that firing professors who say controversial things is justified, courts should stand ready to closely interrogate such claims. When the extramural speech of professors is weighed in a *Pickering* balance, the university's legitimate interest should not include an interest in suppressing speech because it is unpopular or uncivil or gives rise to the commotions that unpopular or uncivil speech can trigger.