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May Public Universities Restrict Faculty From Receiving or Transmitting Information Via University Computer Resources?

Academic Freedom, the First Amendment, and the Internet

Introduction

The Internet is arguably the most powerful and useful tool ever developed for transmitting and receiving information. Access to the Internet permits a person to educate him or herself on topics as "diverse as human thought." Imposing restrictions on the content a person is able to receive via the Internet denies that person the ability to utilize a priceless tool for acquiring a complete panorama of information on any given topic prior to formulating an opinion which may, in turn, be used to stimulate valuable public discourse. No greater harm is caused by conditioning access to the Internet than in the university setting where, according to the Supreme Court, "[t]eachers and students must always remain free to inquire, to study and to evaluate, to

1. The Federal Networking Council (FNC) defines the term “Internet” to refer to the global information system that
   (i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons;
   (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and
   (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.
FNC Resolution: Definition of “Internet” (Oct. 24, 1995).

2. See Urofsky v. Allen, 995 F. Supp. 634, 638 (E.D. Va. 1998) (describing the Internet as "arguably the most powerful tool for sharing information ever developed"). Even the U.S. Supreme Court acknowledged the power of the Internet in Reno v. ACLU, stating:
   The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called "ARPANET," which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is "a unique and wholly new medium of worldwide human communication."

3. See Reno, 521 U.S. at 852 (discussing the uses and potential of the Internet, and noting the finding of the district court that "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought" (internal quotation marks omitted) (quoting ACLU v. Reno, 929 F. Supp. at 842)).
gain new maturity and understanding; otherwise our civilization will stagnate and die."

The notion of academic freedom has been defined by the Court as being both the freedom of the university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study," and the freedom of individual members of the faculty "to inquire, to study and to evaluate." No specific enumeration of any right to academic freedom appears in the Constitution; nevertheless, the Court has indicated in its decisions that academic freedom is a "special concern of the First Amendment." On the other hand, the Supreme Court has also declared that the government, acting as an employer, has the ability to restrict certain otherwise protected First Amendment rights of its employees if there are legitimate work-related interests at stake. Hence, a conflict arises between the academic freedom of the faculty at a public university and restrictions on access to the Internet via university maintained computers or networks imposed by the institution acting as a public employer.

This Comment explores whether government regulation of faculty Internet access at public universities violates substantial First Amendment rights. In the past, courts have analyzed First Amendment cases involving university faculty and academic freedom from the standpoint of a faculty member's right to disseminate speech on matters of public concern. This Comment approaches the issue in a

5. Id. at 263 (Frankfurter, J., concurring) (citations omitted).
6. Id. at 251.
7. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (discussing the relationship between academic freedom and the First Amendment and emphasizing the importance such a freedom has in preserving the "robust exchange of ideas" which underpins the First Amendment and essence of democracy); see also U.S. Const. amend. I. The First Amendment provides in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Id.
8. See Waters v. Churchill, 511 U.S. 661, 675 (1994) (explaining that the government has the right to restrict the speech of its employees in the interests of achieving its goals as efficiently and effectively as possible, even though the government could not restrict the same speech of the public at large).
9. Private universities can infringe on the speech of their faculty because the right to freedom of speech protected by the First Amendment only applies to government conduct. U.S. Const. amend. I.
10. See Keyishian, 385 U.S. at 591-95 (analyzing the ability of faculty members to speak out in the classroom and university setting under the umbrella law requiring professors to sign a certification that they were not Communists); Burnham v. Ianni, 119 F.3d 668, 674 (8th Cir. 1997) (discussing the First Amendment protection afforded to public university
slightly different manner, arguing that the primary First Amendment right at issue in cases involving faculty access to the Internet is not the right to speak, but rather the right to receive speech. No court has ever explicitly addressed the right to receive speech in a First Amendment case involving government employment. The Supreme Court, however, has established that the right to receive speech is a distinct and wholly separate First Amendment right that enjoys full constitutional protection. Furthermore, not only is the right of faculty members to receive speech implicated by restricting Internet access, the right of the general citizenry to receive speech from public employees for the purpose of stimulating valuable discourse on matters of public concern is likewise implicated.

I. FIRST AMENDMENT PROTECTION AFFORDED TO THE RIGHT TO RECEIVE INFORMATION

The Internet is both a resource for gathering information produced by other individuals and a forum for disseminating one’s own opinions and accumulated knowledge. The right to receive speech or information is a corollary right to the First Amendment guarantee of freedom of speech, and the Supreme Court has afforded it similar constitutional protection. Faculty at higher institutions of learning rely heavily on the right to receive information, since research with an eye toward publication is of primary concern to them. The development of the Internet over the past decade has provided faculty with a new and extremely powerful tool for conducting research, and limiting the right of faculty to access certain information on the Internet directly conflicts with their constitutionally protected right to receive information.

faculty members' ability to place certain controversial pictures in a public display case located within an academic department); Trotman v. Board of Trustees of Lincoln Univ., 635 F.2d 216, 224-25 (3d Cir. 1980) (applying the public employee speech doctrine to professors who claimed that the conduct of administrators "violated their constitutional right to engage in spirited criticism of administrative policies with which they disagree").

11. See Dana R. Wagner, Note, The First Amendment and the Right to Hear, 108 YALE L.J. 669, 673 (1998) (noting, however, that "there have been some cases which have clearly implicated public employees' interests as listeners, most notably those involving restrictions on the provision of information to military personnel" (footnote omitted)).

12. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (stating that "the right of the public [to receive suitable access to speech] ... may not constitutionally be abridged ... by Congress").

13. See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972) (discussing the variety of contexts in which the Court has considered a First Amendment right to "receive information and ideas" and restating the well established proposition that the First Amendment freedom of speech and press "necessarily protects the right to receive").
A. History of the Right to Receive Information

The Supreme Court first considered whether a separate constitutionally protected right to receive certain speech existed in *Meyer v. Nebraska*.\(^{14}\) *Meyer* involved a suit against the State of Nebraska that challenged a state law which prohibited school teachers from instructing students in grade eight or below in any modern language other than English.\(^{15}\) The Court held that the Nebraska law violated the Fourteenth Amendment\(^{16}\) right of citizens to contract freely for the purpose of receiving knowledge.\(^{17}\) According to the Court, parents have the right to select a certain type of instruction for their children that will provide them with an opportunity to acquire knowledge, a fundamental right which is of "supreme importance" to the nation and American people.\(^{18}\) The Court explained that to successfully deny a child the right to learn languages other than English, a state would be required to show some emergency rendering knowledge of other languages substantially harmful.\(^{19}\) Thus, the Court recognized the importance of the right to receive speech by stressing that only proof of substantial harm would justify "its inhibition with the consequent infringement of rights long freely enjoyed."\(^{20}\) A potential listener or recipient of information, under *Meyer*, therefore, has the right to contract with a speaker in order to learn and grow as a contributing member of society.

In *Lamont v. Postmaster General of the United States*,\(^{21}\) the Court specifically recognized the right to receive information as a corollary to the First Amendment right to free speech. The *Lamont* Court addressed a constitutional challenge to the Postal Service and Federal Employees Salary Act of 1962.\(^{22}\) This Act permitted the Postmaster General to withhold mail matter which originated, or was printed, in a foreign country and was determined to be communist political propa-

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15. See id. at 397 (citing Nebraska Laws (1919, c. 249)). The Nebraska law which the Court held to be unconstitutional stated in relevant part, "[n]o person, individually or as a teacher shall . . . teach any subject in any language other than the English language . . . [unless after] the eighth grade." Id.
16. U.S. Const. amend. XIV.
17. See *Meyer*, 262 U.S. at 399.
18. See id. at 400-01.
19. See id. at 403 ("No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.").
20. Id.
21. 381 U.S. 301 (1965).
ganda. Under the statute, the Postmaster General was required to notify the addressee of the mail matter’s existence and was permitted to retain the mail until such time as the addressee indicated that he or she wished to receive the information. The Court concluded that the statute, as construed and applied, was unconstitutional because the requirement of an official act on the part of the addressee (returning a reply card indicating a desire to receive the communist propaganda) served as “a limitation on the unfettered exercise of the addressee’s First Amendment rights.” As illustrated in Lamont, the express free speech guarantee of the First Amendment includes the right of the people to have mail delivered without governmental regulation which impinges upon the flow of ideas.

Lamont stands for the proposition that citizens have the right to send for information even if the federal government has condemned such information as evil communist political propaganda. The statute at issue in Lamont interfered with the “uninhibited, robust, and wide-open debate and discussion that are contemplated by the First Amendment,” and as such, it could not stand. Just as the First Amendment protects the right to disseminate speech, it “necessarily protects the right to receive it.” Were a person’s right to receive publications left unprotected, the right to disseminate speech expressly protected by the First Amendment would be worthless because willing recipients would be unable to receive and consider those protected ideas. As Justice Brennan explained in his concurring opinion in Lamont: “It would be a barren marketplace of ideas that had only sellers and no buyers.”

The “right to learn” recognized in Meyer as a substantive due process right under the Fourteenth Amendment was extended under the rubric of the First Amendment in Red Lion Broadcasting Co. v. Federal

23. See Lamont, 381 U.S. at 302.
24. See id. at 303 (explaining that the Post Office complied with the notification terms of the statute by requiring that the addressee be “mailed a notice identifying the mail being detained and advising that it will be destroyed unless the addressee requests delivery by returning an attached reply card”).
25. Id. at 305.
26. See id. at 306.
27. See id. at 307.
29. Id. at 308 (Brennan, J., concurring) (citing Martin v. City of Struthers, 319 U.S. 141, 143 (1943)).
30. See id.
31. Id. Justice Brennan further stated that the Court cannot sustain an intrusion into First Amendment rights on the ground that the intrusion is only a minor one. See id. at 309-10 (“In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose.”).
Communications Commission. Red Lion involved a constitutional and statutory challenge to an FCC practice known as the “fairness doctrine.” This doctrine required broadcast stations discussing public issues to present such issues in a manner which afforded each proponent fair coverage of its respective position. The case addressed a particular application of the fairness doctrine whereby an individual, who was personally attacked by the Red Lion Broadcasting Company on air, was entitled to free time to reply to the attacks. When the station denied reply time, the party complained to the FCC, which then ordered Red Lion to provide free reply time. The Court held that the FCC did not exceed its authority in requiring Red Lion to provide reply time, and in doing so upheld the fairness doctrine as constitutional.

The First Amendment challenge in Red Lion was that the fairness doctrine abridged broadcasters’ freedom of speech and press. Justice White, writing for the Court, began his analysis of the First Amendment issues by stating that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.” This statement is particularly instructive with respect to the topic of this Comment because not only was the right to receive speech implicated by the case, but technological advances like broadcasting, and by analogy the Internet, were deemed to necessitate new approaches to First Amendment analysis. The paramount First Amendment issue presented in Red Lion, according to the Court, was not the right of the broadcasters to speak, but the right of viewers and listeners to receive speech such that the First Amendment goal of producing “an uninhibited marketplace of ideas in which truth will ultimately prevail” could be preserved. As Justice White wrote: “It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.”

33. Id. at 370.
34. See id.
35. See id. at 371-72.
36. See id. at 372.
37. See id. at 400-01.
38. See id. at 386.
39. Id.
40. Id. at 390.
41. Id.
During the decade after *Red Lion*, the Court began to further recognize specific instances in which the right to learn and receive speech was a necessary corollary to the right to speak. For example, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*\(^{42}\) the Court recognized the right of consumers to receive commercial speech from pharmacists wishing to advertise prescription drug prices.\(^{43}\) The Court held a Virginia law prohibiting pharmacists from advertising the prices of prescription drugs unconstitutional,\(^{44}\) and explained that members of a consumer group had standing to assert their claim because "if there is a right to advertise, there is a reciprocal right to receive the advertising, [which may be asserted]."\(^{45}\) The protection of freedom of speech afforded by the First Amendment presupposes a willing speaker, and where one exists, the Court in *Virginia State Board of Pharmacy* determined that the protections afforded to the communication extends to both the source of the communication and to its recipients.\(^{46}\)

Another case of particular importance to the development of the right to receive speech involved a constitutional challenge to the U.S. Attorney General’s denial of a visa to a foreigner wishing to speak in the United States.\(^{47}\) In *Kleindienst v. Mandel*, the alien speaker had no constitutionally protected right to speak in the United States; thus, the Court focused its discussion and decision on whether members of the American public had the right to sue to enforce their right to hear the speech of the alien speaker.\(^{48}\) The Court firmly reiterated the proposition that the Constitution protects the right to receive information and ideas.\(^ {49}\) In its review of past cases dealing with the right to

42. 425 U.S. 748 (1976).
43. *See id.* at 757. The *Virginia State Board of Pharmacy* Court explained that the general public may have a strong interest in the free flow of certain commercial information. *See id.* at 764. Advertising entails the dissemination of information about products, their sellers, and the price they are being sold at, all of which lead to the formation of intelligent opinions by people as to how they should allocate their resources within a free enterprise economy. *See id.* at 765. Similarly, as discussed in greater detail *infra* text accompanying notes 186-191, members of the general public have a strong interest in the free flow of academic speech to aid them in formulating opinions on a wide range of important social and political topics.
44. *See id.* at 770.
45. *Id.* at 757. The question of standing is relevant to this Comment because the general public, according to the Court’s holding in *Virginia State Board of Pharmacy*, would have standing to assert a challenge to any restrictions imposed on faculty use of the Internet based on the public’s First Amendment right to receive the valuable faculty speech.
46. *See id.* at 756.
48. *See id.* at 762.
49. *See id.* at 762-63 (citing *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)).
receive speech, the Court emphasized once more that the First Amendment right to learn ordained in Meyer holds a place of importance "nowhere more vital" than in the schools and universities of the country. Although First Amendment rights were implicated in Kleindienst, the Court nevertheless held that the longstanding ability of Congress to control the admission and exclusion of aliens outweighed any First Amendment rights. In essence, the Kleindienst Court weighed the First Amendment rights of Americans to receive speech against the plenary power of Congress, delegated to the Executive Branch, to regulate the flow of foreigners into the country. While the Court based much of its holding on a separation of powers rationale and a deference to plenary congressional power, the case is nonetheless significant as it demonstrated the Court's recognition of the right to receive speech as a fundamental guarantee of the Constitution and a right that should be considered in analyzing First Amendment challenges.

B. The Right to Receive Information in Internet Access Cases

The Internet makes a wealth of knowledge accessible to anyone with basic computer equipment and an Internet Service Provider (ISP). Receipt of this knowledge is essential to individuals wishing to educate themselves on current topics of public concern such that they can form their own opinions on issues. Denying or restricting access to certain information on the Internet directly implicates the constitutional guarantee of the right to learn and receive information as established in First Amendment jurisprudence. Undoubtedly, many people depend on their employment to access the Internet; as such, restricting that access infringes upon the First Amendment right to receive information insofar as it hampers a person's ability to hear

50. See id. at 763 (internal quotation marks omitted) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).
51. See id. at 766-70.
52. See id. at 768-69.
53. See id. at 769-70 (holding that courts will not examine the exercise of Congress' plenary power to make policies and rules for exclusion of aliens, nor balance decisions to exclude aliens under such a power against the First Amendment interests of those seeking personal communication with the alien).
54. See supra notes 13-53 and accompanying text (discussing First Amendment protection of the right to receive speech).
55. See Wagner, supra note 11, at 675 (arguing that because many public employees depend on their employment for access to computer technologies, including the Internet, a government statute restricting the access of certain information would impair the ability of public employees to acquire such information not easily obtainable from other sources).
what another speaker exercising a protected right to speak has to say.\textsuperscript{56}

In an educational setting, it is well-established that a public university administration or school board has a right to regulate the curriculum and control the information disseminated to students by faculty.\textsuperscript{57} Consequently, no constitutional rights are violated when a teacher is restricted from disseminating certain materials obtained on the Internet to his or her students. The First Amendment issue with regard to curriculum is the right to speak, and such in-class speech can be regulated when substantial interests of the students and institution outweigh any interests the teacher may have in speaking.\textsuperscript{58} Restricting faculty Internet access in educational settings, however, implicates a substantial First Amendment concern apart from the right to speak to students. This concern, equally important to the right to speak, is the right of educators to receive information for research and self-education purposes.

Limiting, or removing altogether, the right of public employees to access and view "obscene material" on the Internet is constitutionally permissible. In \textit{Miller v. California},\textsuperscript{59} the Court concluded that obscene material may be properly regulated by a state without infringing on First Amendment rights.\textsuperscript{60} Obscene materials were defined by the Court as materials which "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."\textsuperscript{61} When the regulated materials are only

\textsuperscript{56} While a public employer may not have to provide Internet access as a condition of employment, once it does, certain First Amendment protections arguably attach to its use.

\textsuperscript{57} While the Supreme Court has not spoken directly on a level of First Amendment protection afforded to the in-class or curricular related speech of teachers, United States appellate courts have overwhelmingly declared that teachers do not possess a First Amendment right to regulate the curriculum of their students over the wishes of the administration or school board. \textit{See}, e.g., \textit{Boring v. Buncombe County Bd. of Educ.}, 136 F.3d 364, 371 (4th Cir. 1998) (holding that public school teachers do not have a First Amendment right to participate in the makeup of curriculum); \textit{Kirkland v. Northside Indep. Sch. Dist.}, 890 F.2d 794, 802 (5th Cir. 1989) (holding that "public school teachers are not free, under the first amendment, to arrogate control of curricula").

\textsuperscript{58} \textit{See generally} \textit{Boring}, 136 F.3d at 371 (explaining that because a public school's curriculum must be established by someone, it is "far better public policy . . . that the makeup of the curriculum be entrusted to the local school authorities . . . rather than to the teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum").

\textsuperscript{59} 413 U.S. 15 (1973).

\textsuperscript{60} \textit{See id.} at 36-37 (holding that "obscene material is not protected by the First Amendment [and] that such material can be regulated by the States").

\textsuperscript{61} \textit{Id.} at 24.
sexual in nature or are otherwise generally unacceptable yet still possess some redeeming social importance, however, the First Amendment right of citizens to receive speech is implicated. The cases which have arisen in recent years concerning Internet access restrictions have predominantly involved restrictions imposed on Internet access to sexually explicit or deviant materials, which are not necessarily obscene according to the Miller definition. Courts have approached these cases from various directions, but none so far have directly addressed the First Amendment right to receive speech; instead, courts have invalidated Internet access restrictions on other bases, including the First Amendment right to speak.

Assuming a willing speaker exists, Internet access restrictions on the ability of a person to disseminate information through e-mail, postings on web sites, chat groups, and other Internet forums implicate the First Amendment right to receive information enjoyed by the citizenry as a whole. For example, in an educational setting, the opinions of a professor have substantial social value to the general public. Denying a professor the ability to post materials on the Internet undermines the right to receive information and learn of potential recipients of that information, namely the American populace. The First Amendment was intended to encourage discourse on matters of public concern. Restricting the dissemination of materials and speech hampers the ability of other citizens to access valuable speech and, in turn, reflect and form their own opinions and speech on important matters of public concern.

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62. For purposes of this Comment, the non-obscene material would have to be deemed a matter of public concern if it is to be properly considered as a potentially protected First Amendment right under the Court's public employee speech doctrine. See Rankin v. McPherson, 483 U.S. 378, 385 (1987); infra text accompanying notes 92-140 (discussing the public employee doctrine).


64. See, e.g., Reno, 521 U.S. at 874-79 (invalidating a restriction on the transmission of "obscene or indecent" messages to minors via the Internet on the basis of the First Amendment right to speak); cf. Loving, 956 F. Supp. at 955 (upholding restrictions on access to certain Internet news groups by reasoning that a public university's computers and Internet services do not constitute a public forum and the state has the right to restrict use of its facilities to their intended purposes).

65. See, e.g., United States v. National Treasury Employees Union, 513 U.S. 454, 470 (1995) (stating that "large scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said"); Urofsky v. Allen, 995 F. Supp. 634, 638 (E.D. 1998) (involving a state statute restricting Internet access of public employees wherein the district court states that "equally at stake is the right of the public to receive speech of state employees on matters within their areas of expertise").
II. ACADEMIC FREEDOM AS A FIRST AMENDMENT RIGHT

Exploring judicial deference toward academic freedom is important to a discussion of Internet access restriction at public universities because academic freedom should be an important consideration when balancing an academic employer's interest in regulating speech with the employees' and general public's interest in receiving speech.66

While there is no specific enumeration of a right to academic freedom in the United States Constitution, the Court has recognized such a right as a "special concern" of the First Amendment.67 The Court focused on protecting the importance of academic freedom during the 1950s and 60s in response to government efforts to remove allegedly Communist or insurgent teachers from the nation's academic institutions.68 The first mention of the phrase "academic freedom" by the Supreme Court was in the case of Adler v. Board of Education.69 The Adler Court upheld the constitutionality of a New York law which permitted the removal of any public employee who belonged to an organization advocating the overthrow of the government by forceful, violent or illegal means.70 Notwithstanding the Court's holding, Adler is a significant decision because Justice Douglas, in his dissenting opinion, identified the notion that academic freedom is a subset of the First Amendment.71 Justice Douglas wrote that "[t]he Constitution guarantees freedom of thought and expression to everyone in our society . . . [,] and none need[] it more than the teacher."72 Justice Douglas further explained that the New York law would place teachers under constant surveillance for any signs of dis-

66. While the Supreme Court has not resolved how academic freedom plays out in the Pickering balancing test, discussed infra notes 95-107, some lower courts have considered academic freedom an essential component of the balancing test that places a substantial burden on the government to justify any restriction on the speech of academics. See, e.g., Burnham v. Ianni, 119 F.3d 688 (8th Cir. 1997); Trotman v. Board of Trustees, 635 F.2d 216 (5d Cir. 1980); Adamian v. Jacobsen, 523 F.2d 929 (9th Cir. 1975).

67. See Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (recognizing a constitutional commitment to protect academic freedom and holding that the University's requirement that members of the faculty attest and certify to the fact that they were not members of the Communist Party was unconstitutional).


70. Adler, 342 U.S. at 490.

71. See Fugate, supra note 68, at 191.

loyalty, casting a pall over the classrooms. Under such a guise, no real academic freedom could ever exist.

In the same year the Court decided Adler, it also invalidated an Oklahoma statute requiring public employees to take a loyalty oath swearing that they had not associated with particular organizations. In Wieman v. Updegraff, the Court distinguished Adler by noting that the Oklahoma oath statute in question denied state employment to persons solely on the basis of membership in an organization, regardless of whether association existed "innocently or knowingly." The New York law at issue in Adler, in contrast, specified that removal of a public employee was only permissible after a finding that the employee belonged to an organization advocating the overthrow of the government by violent or illegal means. The Wieman Court differentiated the two cases by holding that "[i]ndiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." Justice Frankfurter, in a concurring opinion in Wieman, continued to profess the virtues of academic freedom, stating that teachers "must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma."

The first major case recognizing constitutional protections for academic freedom was Sweezy v. New Hampshire. In Sweezy, a conflict arose when the attorney general of New Hampshire, acting under an authority to investigate subversive activities, subpoenaed Paul Sweezy, a college professor, to answer questions about his past conduct and associations. The following often cited passage in Chief Justice Warren's plurality decision sets forth the virtues and constitutional protections afforded to academic freedom:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of educa-

73. See id. at 510.
74. See id.
76. See id. at 191.
77. See Adler, 342 U.S. at 490.
78. Wieman, 344 U.S. at 191.
79. Id. at 196 (Frankfurter, J., concurring).
81. See id. at 238.
tion is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.82

While mainly dicta, the preceding passage is significant because it provided a foundation for the landmark case involving academic freedom which followed ten years after *Sweezy*.83

The Court ultimately recognized academic freedom as a “special concern of the First Amendment” and, in *Keyishian v. Board of Regents of University of the State of New York*, it repudiated prior jurisprudence upholding restrictions on academic freedom.84 In this landmark decision, the Court revisited the New York law at issue in *Adler* and declared it unconstitutional.85 The *Keyishian* holding was rooted in both the dicta of Justice Warren’s opinion in *Sweezy* and the dissenting opinion of Justice Douglas in *Adler*.86 The *Keyishian* Court expressly recognized academic freedom as a constitutionally protected right:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” The classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to the robust exchange of ideas

82. *Id.* at 250.

83. The concurring opinion of Justice Frankfurter in *Sweezy* is also regarded as important for its articulation of four essential freedoms that a university possesses:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

*Id.* at 263 (Frankfurter, J., concurring). These four essential freedoms constitute the university’s academic freedom. See Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 312 (1978).


85. *Id.* at 609.

which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."  

In addition to preserving First Amendment rights of teachers and academics, *Keyishian* is also important because it emphasized the importance of academic freedom to society as a whole. While not directly addressed, the Court indicated that the First Amendment right to receive speech held by the general public is threatened when faculty are restricted in their ability to critically inquire because academic freedom is of "transcendent value to all of us."  

The *Keyishian* Court also provided a framework for future analysis of public employee speech:  

Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. . . . When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone . . . [f]or the threat of sanctions may deter [ ] almost as potently as the actual application of sanctions. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

Thus, general statutes or policies restricting faculty speech will not be tolerated under the academic freedom rubric.

Academic Freedom as a special concern of the First Amendment and of the Court has recently become an issue as legislatures and public employers have successfully restricted the speech of public employees, including teachers. While the Court has not expressly withdrawn its position regarding the First Amendment protection afforded to academic freedom, its present analysis and mandates concerning public employee speech must be considered when evaluating present academic freedom issues.

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88. See id. at 603 ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . .")
89. Id.
90. Id. at 604 (citations omitted).
91. See *Waters v. Churchill*, 511 U.S. 661, 676-77 (1994) (providing the public employer with the ability to determine itself whether employee speech is protected and holding that a public employee might be fired for disruptive speech based on a reasonable belief of what the employee's speech entailed); see also, e.g., *Jeffries v. Harleston*, 52 F.2d 9, 13 (2d Cir. 1995) (upholding an adverse action taken by public university officials against a tenured professor for certain potentially disruptive remarks made during an off-campus speech).
III. THE UNIVERSITY AS A PUBLIC EMPLOYER

Public universities are public employers, and as such, are subject to the traditional public employee doctrine developed by the Court for analyzing First Amendment cases arising in the workplace. In fact, the public employee doctrine evolved from cases addressing the free speech rights of teachers and was subsequently expanded to incorporate all public employment positions. When evaluating Internet access issues in the public employee domain, the public employee doctrine should be the starting point of any analysis used to resolve such cases consistent with the precedent set forth by the Supreme Court. Applying the doctrine to speech of academics at public universities, however, will require a modified version of the doctrine in order to remain consistent with the First Amendment protections afforded to academic freedom.

A. The Supreme Court Public Employee Speech Doctrine

1. The Pickering Balancing Test: The Court’s Initial Approach to Addressing First Amendment Rights of Public Employees.—The Supreme Court first directly addressed the First Amendment free speech rights of state employees in Keyishian v. Board of Regents of University of State of New York. The Keyishian Court upheld the Second Circuit’s conclusion that, “the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.” While mainly regarded as an “academic freedom” case, Keyishian is also significant with regard to public employee free speech because it was the high court’s first direct attempt to breach the topic. Not until the Supreme Court’s landmark decision in Pickering v. Board of Education, however, did the Court expressly address the issue of public employee speech rights.


93. See Pickering v. Board of Educ., 391 U.S. 563 (1968) (a case involving a public teacher who filed suit against the state for being dismissed based on the content of his speech).

94. See infra notes 185-186 (discussing a modified test which courts should use when addressing speech of academics at public universities).


96. See supra text accompanying notes 84-90 (discussing Keyishian as an academic freedom case).

Pickering established a test for the judicial analysis of alleged violations of public employees' First Amendment speech rights. The Pickering test has been modified and supplemented by subsequent decisions, but the basic tenets still remain good law today.98

The plaintiff, Mr. Pickering, was an Illinois public high school teacher dismissed from his job for writing and sending a letter to a local newspaper speaking out against school bond issues, educational spending proposals, and teachers' ability to participate in the fundraising and spending process.99 The Court held that the question of whether a school system requires additional funds is a legitimate public concern about which teachers should be able to speak freely without fear of retaliatory dismissal.100 The Pickering Court established what has become known as the "Pickering balancing test" in the following passage:

It cannot be said that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balancing between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.101

As applied, the Pickering balancing test weighs matters of public concern that an employee's speech seeks to address against any adverse effects the speech might have on agency efficiency.102 Where the nature of the employee's speech outweighs the speech's adverse effects on agency operations, the employee's First Amendment speech right prevails, regardless of the legitimacy of the employer's interests in regulating the particular speech.103 In Pickering, the Court recognized the teacher's prevailing First Amendment right and held that where "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a

99. See Pickering, 391 U.S. at 564.
100. See id. at 571-73.
101. Id. at 568.
103. See Hiers, supra note 102, at 178-79.
teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.\textsuperscript{104}

The Supreme Court subsequently applied the \textit{Pickering} balancing test to several cases during the course of the 1970s in an effort to further develop the public employee free speech doctrine.\textsuperscript{105} For the most part, however, the original test remained intact.\textsuperscript{106} The emerging line of cases from lower courts indicated that public employees could often succeed in vindicating their speech rights. Moreover, the development of case law suggested that the balancing test, and subsequent modifications thereof, contained no "built-in biases in favor of arbitrary or tyrannical superiors."\textsuperscript{107} As such, it was inevitable that the Supreme Court would eventually revisit the \textit{Pickering} doctrine and modify it further to allow public employers broader authority and discretion to manage their personnel.

2. \textit{Post-1983 Decisions by the Supreme Court Addressing First Amendment Rights of Public Employees.}——The Supreme Court revisited the \textit{Pickering} doctrine in \textit{Connick v. Myers}\textsuperscript{108} and developed a new test for determining when public employee speech addressed a matter of public concern. Ms. Shiela Myers, the plaintiff and respondent, was an assistant district attorney in New Orleans, Louisiana.\textsuperscript{109} Ms. Myers was informed by her superior that she would be transferred to a different division of the Criminal Court.\textsuperscript{110} Myers strongly opposed the proposed transfer and voiced her view to several of her supervisors, including the District Attorney, Mr. Harry Connick.\textsuperscript{111} No alteration was made in the plan to transfer Myers, so in retaliation, Myers formulated and distributed a questionnaire to solicit "the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee," and other office issues.\textsuperscript{112} Shortly after Myers distributed the questionnaire, Connick became aware of what Myers had done and terminated her employment with his office.\textsuperscript{113} Myers subsequently filed suit in federal court claiming that

\begin{itemize}
\item \textsuperscript{104} \textit{Pickering}, 391 U.S. at 574.
\item \textsuperscript{106} See \textit{supra} note 98.
\item \textsuperscript{107} \textit{Hiers}, \textit{supra} note 102, at 233.
\item \textsuperscript{108} 461 U.S. 138 (1983).
\item \textsuperscript{109} \textit{Id.} at 140.
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} \textit{Id.} at 140-41.
\item \textsuperscript{113} \textit{Id.} at 141.
\end{itemize}
she had been wrongfully terminated "because she had exercised her constitutionally protected right of free speech."\textsuperscript{114}

Finding in favor of the petitioner, District Attorney Connick, the Court held that

when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.\textsuperscript{115}

The Connick Court employed the standard set forth in Pickering and its progeny in stating that "if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for [the Court] to scrutinize the reasons for her discharge."\textsuperscript{116} According to the Court, its "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government."\textsuperscript{117} As such, the judiciary should not intrude in the manner in which government officials manage their offices unless "employee expression [can] be fairly considered as relating to any matter of political, social, or other concern to the community."\textsuperscript{118}

The Connick Court further defined the test for determining when or whether public speech addressed a matter of public concern in stating: "[W]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."\textsuperscript{119} This more narrow view on speech of public concern greatly limited the number of public employee free speech cases going to trial because judges served as gatekeepers by examining employees' motivation or purpose in speaking to determine whether speech addressed a matter of public concern.\textsuperscript{120} In limiting the recognition of speech of public concern,

\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id. at} 147.
\textsuperscript{116} \textit{Id. at} 146.
\textsuperscript{117} \textit{See id. at} 147.
\textsuperscript{118} \textit{Id. at} 146.
\textsuperscript{119} \textit{Id. at} 147-48.
\textsuperscript{120} \textit{See} Hiers, \textit{supra} note 102, at 241. Under Connick, judges were permitted to dismiss cases before engaging in a Pickering balancing analysis if, in the judge's opinion, the employee's statement was merely a grievance and not a matter of public concern warranting First Amendment protection. \textit{See} Connick, 461 U.S. at 149 (stating that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs").
the Court shifted the balancing test of *Pickering* to favor an employer's authority to regulate its employees' speech.\textsuperscript{121}

Four years after *Connick*, the Court further clarified the public employee speech doctrine in *Rankin v. McPherson*.\textsuperscript{122} Ms. McPherson, a clerical employee in the constable's office in Harris County, Texas, was fired because she was overheard saying the following words to a co-worker after an attempted assassination of the President of the United States: "I hope if they go for [the president] again, they get him."\textsuperscript{123}

The *Rankin* Court began its analysis by stating that "whether McPherson's speech may be 'fairly characterized as constituting speech on a matter of public concern'" is the "threshold question."\textsuperscript{124} In so stating, the Court closed the door on a question that had been left unanswered by previous opinions and clarified that "absent the most unusual circumstances," a federal court is only an appropriate forum when it is called upon to review a case involving a public employee's speech that touches upon a matter of public concern.\textsuperscript{125}

The *Rankin* Court also established that "[t]he State bears a burden of justifying [an employee] discharge on legitimate grounds."\textsuperscript{126} This justification takes place in the state interest element of the balancing test which "focuses on the effective functioning of the public employer's enterprise."\textsuperscript{127} Given the function of the constable's office, Ms. McPherson's position in the office, and the nature of her speech, the Court concluded that Mr. Rankin's interest in discharging her did not outweigh Ms. McPherson's right to free speech under the First Amendment.\textsuperscript{128}

Two recent cases have added additional elements to the public employee free speech doctrine which require brief consideration. *Waters v. Churchill*\textsuperscript{129} involved the termination of a nurse for engaging in a conversation during which she criticized various aspects of her

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\textsuperscript{121} See Cynthia K.Y. Lee, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 Cal. L. Rev. 1109, 1121 (1988) (arguing that the requirement that public employee speech be on a matter of public concern as a threshold standard demonstrates a disproportionate concern for the government employer's interest in managing the workplace).

\textsuperscript{122} 483 U.S. 378 (1987).

\textsuperscript{123} Id. at 380-81.

\textsuperscript{124} Id. at 385 (citing *Connick*, 461 U.S. at 146).

\textsuperscript{125} Id. at 384-85 n.7.

\textsuperscript{126} Id. at 388.

\textsuperscript{127} Id.

\textsuperscript{128} See id. at 392.

\textsuperscript{129} 511 U.S. 661 (1994).
The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

More importantly, Waters established the proposition that a person has a right to a reasonable investigation prior to dismissal for speech. The government has the burden to investigate and show that the speech would be disruptive in some situation before the speaker may be punished. Hence, Waters added a procedural component to First Amendment analysis of public employee speech cases.

The second important case in recent Supreme Court history dealing with public employee speech is United States v. National Treasury Employees Union. In NTEU, the Court held that a statute disallowing public employees to accept honorariums for engaging in extra-employment activities, such as writing articles and making speeches, was unconstitutional regardless of the activity’s relationship to the person’s official employment duties. The Court determined that the government has a heavy burden in justifying the necessity of a statute restricting the speech of public employees in their private lives outside the scope of employment. In so doing, the Court established criteria the government must meet to successfully defend legislation aimed at speech of employees. The Court specified that when the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply “posit the existence of the disease sought to be cured.” . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regula-

130. See id. at 664-68.
131. Id. at 675.
132. See id. at 682 (stating that “[a] reasonable factfinder” should have the opportunity to hear the case).
133. See id. at 674.
135. See id. at 457-61.
136. See id. at 475-76.
137. See id. at 475.
tion will in fact alleviate these harms in a direct and material way.\textsuperscript{138} Government speculation that serious harm will result absent the suppression of employee speech, therefore, is insufficient to justify a "reasonable burden" on employee expression.\textsuperscript{139} The government must instead affirmatively show that there is a reasonable ground to believe serious harm will result if certain free speech is left unsuppressed.\textsuperscript{140}

**B. Urofsky v. Allen: An Internet Free Speech Case Involving the Public Employee Speech Doctrine**

A prime example of an Internet free speech case involving public employees emerged in the recently decided U.S. District Court case of *Urofsky v. Allen*.\textsuperscript{141} The source of plaintiffs' constitutional concerns in *Urofsky* was Va. Code § 2.1-804 et seq., entitled "Restrictions on State Employee Access to Information Infrastructure" (the Act).\textsuperscript{142} The Act restricts the ability of Virginia state employees to access and view sexually explicit material on state-owned or leased computer equipment.\textsuperscript{143} Section 2.1-805, the central provision of the Act, provides that

\begin{quote}
...except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Such agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act.\textsuperscript{144}
\end{quote}

Section 2.1-804 of the Act defines "sexually explicit" content to include: "(i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is

\textsuperscript{138} Id. (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (dealing with the direct regulation of communication by private entities, but one whose logic, the Court stated, applies equally to "the special burden [which the statute on point in NTEU] imposes on the expressive rights of the multitude of employees it reaches.").

\textsuperscript{139} See id.

\textsuperscript{140} See id.


\textsuperscript{142} Id. at 635; see also VA. CODE § 2.1-804 (Michie Supp. 1998).

\textsuperscript{143} See Urofsky, 995 F. Supp. at 635.

\textsuperscript{144} VA. CODE ANN. § 2.1-805 (1996).
defined in §18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in §18.2-390, coprophilia, urophilia, or fetishism.”

While the Act prohibits unauthorized state employee access to sexually explicit material on state computers, employees retain unrestricted access to such material using their personal or other computers. Furthermore, by the terms of the Act, state employees are free to petition their agency head for permission to access sexually explicit material on state computers if such access is necessary to advance a bona fide research project or other endeavor.

The plaintiffs in *Urofsky* are six professors at various Virginia state colleges and universities. Their primary claim is that the Act unconstitutionally infringes upon their First Amendment right to freedom of expression by hindering their ability to perform their fundamental employment responsibilities: teaching and research. For example, the plaintiffs contend that the Act interferes with their ability to assign students online research assignments on “indecency” law; to post materials on gender roles and sexuality on websites; and to access various research materials related to scholarly pursuits.

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145. Section 18.2-390 of Virginia’s Criminal Code provides further definitions for the Act:

- **Nudity** means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state; **Sexual excitement** means the condition of human male or female genitals when in a state of sexual stimulation or arousal; **Sexual conduct** means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person’s clothed or unclothed genitals, pubic area, buttocks, or if such be female, breast; and **Sadomasochistic abuse** means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

146. *Id.* § 2.1-804 (1996).

147. See *Urofsky*, 995 F. Supp. at 635.

148. See *id.* at 636; see also VA. CODE ANN. § 2.1-805 (1996).

149. *Urofsky*, 995 F. Supp. at 635.

150. See *id.*

151. See *id.* Other particular examples of the Act’s interference with plaintiffs’ First Amendment right to free speech include: concern about the ability to access Virginia’s database of sexually explicit poetry such that research can be continued into the “fleshy school” of Victorian poets; studies of lesbian and gay issues; and the reluctance to use the Internet to continue psychological research on human sexuality. *Id.*
The United States District Court for the Eastern District of Virginia granted summary judgment in favor of the plaintiffs, holding that the Act unconstitutionally interfered with state employees’ protected First Amendment rights. The district court reasoned that while the Act’s broad definition of “sexually explicit” content includes “obscene speech,” which does not enjoy First Amendment protection, the breadth of that definition also includes “speech on matters of public concern entitled to First Amendment protection under the Pickering balancing test.” The district court further concluded that “[g]iven the over-and underinclusiveness of the Act and the existence of content-neutral alternatives, . . . the Act [did] not constitute a ‘reasonable response’ to [Virginia’s] legitimate interests [of workplace efficiency and the avoidance of a hostile work environment] under the Pickering/NTEU standard.”

Moreover, the district court explained that the ability of more than 101,000 public employees at all levels of state government to read, research, and discuss sexually explicit topics within their areas of expertise [is at stake] . . . [and] [e]qually at stake is the right of the public to receive and benefit from the speech of state employees on matters within their areas of expertise.

This evaluation of the stakes involved in restricting Internet access implies that the right of state employees and the general public to receive speech on sexually explicit topics was the underlying concern of the district court in Urofsky. While the district court discussed the statute’s threat to the right of the general citizenry to receive speech produced by government employees, it failed to specifically address the right of government employees themselves to receive sexually explicit

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152. Id. at 644. Subsequent to the district court’s decision in Urofsky, the State appealed to the Fourth Circuit to consider whether the district court properly granted summary judgment for the plaintiffs. See Urofsky v. Gilmore, 167 F.3d 191 (4th Cir. 1999) (decision vacated upon grant of rehearing en banc (June 3, 1999)). Specifically, the Fourth Circuit considered whether the Act restricted state employees in their work-related capacity in a manner inconsistent with the protections afforded by the First and Fourteenth Amendments. See id. at 194.

153. See id. at 636 (citing Miller v. California, 413 U.S. 15, 23 (1973)); see also discussion supra notes 59-64 (discussing Miller standard).


155. Id. at 643.

156. Id. at 638.

157. See id. (explaining that the Supreme Court’s precedents “have focused ‘not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas’” (citing Board of Educ. v. Pico, 457 U.S. 853, 866 (1982) (quoting First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)))).
material based on a First Amendment right to receive information, and how such a right would relate to the public employee doctrine. Instead, the district court focused its attention on the right of public employees to “speak on matters of public concern” incorporating sexually explicit resources from state owned or leased computers, per the terminology of Pickering and its progeny. The problem with this particular approach, however, is that the statute did not restrict the ability of public employees to “speak on” matters of public concern, at least not directly. The court should have realized that the right of state employees to produce speech is secondary to their right to receive that speech; such an ability to speak is only implicated by the statute to the degree that it restricts employees’ access to sexually explicit information and ideas. By blending together the First Amendment interest in producing speech with the First Amendment interest in receiving speech, the interest of the plaintiffs most directly at stake in the case was improperly identified by the court and denied adequate safeguards to protect it from future encroachment.

In order to correctly address Internet access free speech issues similar to those raised by the plaintiffs in Urofsky, it is necessary to reformulate the Supreme Court’s balancing equation to incorporate both the right to receive speech and the constitutional protection afforded to academic freedom, a doctrine ignored by the district court in Urofsky.

IV. A Suggested Form of Analysis for Approaching First Amendment Employee Internet Access Cases in the Public Academic Setting

The Supreme Court has recognized a First Amendment right of Americans to receive a full range of information in order to stimulate well-informed public discourse and of faculty to have academic

158. See id. at 640. The Court did briefly mention that the Act also infringes on employees' ability to inform themselves in stating that “[the Act] inhibits [ ] employees from obtaining the information needed to inform their views,” but the court went no further with this analysis and failed to indicate how it might weigh into the Pickering balancing test. See id.

159. See Wagner, supra note 11, at 675.

160. Even though the plaintiffs were all professors at various Virginia state colleges and universities, the district court may have consciously decided to avoid discussing academic freedom because the statute on point was targeted at all public employees and not just faculty members.

161. See supra text accompanying notes 13-53 (discussing the First Amendment right to receive information).
Analyzing Internet access cases in the academic setting solely under the rubric of the current public employee speech doctrine is illogical because the balancing test derived from *Pickering* and its progeny ignores the protections afforded to academic freedom and focuses on the right of the employee to disseminate certain speech, a right separate from the employee's right to receive the same speech. The balancing test need not be abandoned altogether, but it must be expanded to incorporate into the balancing equation a faculty member's right to receive speech and the general public's right to receive speech of the faculty member.

This Comment proposes that courts begin their analysis of public faculty free speech cases involving the Internet by determining whether the challenged statute, policy, or public employer action involves restrictions on access to or the dissemination of certain speech via the Internet. If a court determines that the case involves the right of faculty to access information, then the burden on the government to justify the necessity of the restrictive measure should be extremely high given the special role of professors and the virtues of academic freedom recognized by the Court. A modified version of the *Pickering* balancing test should be applied in such instances to weigh the content-neutral interests of the government employer in restricting access to certain speech against the faculty employee's right to academic freedom. Cases involving the right of faculty to use public computer resources for the dissemination of speech to other people, however, should activate a more traditional and literal application of the *Pickering* balancing test, since that test was specifically designed for analyzing the protection afforded to the dissemination of public employee speech. Still, any restriction applied in the academic context should be deemed constitutionally proper only if the government puts forth a substantial work-related rationale for overriding First Amendment rights of faculty members to disseminate certain speech or of the general citizenry to receive the speech of faculty.

162. See supra text accompanying notes 66-91 (discussing the First Amendment protection afforded to academic freedom).

163. See *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (explaining the balancing test in terms of balancing the public employee's interest in "commenting" upon matters of public concern with the interest of the government in promoting the efficiency of the workplace).

164. See *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (stating that when a court has determined that the employee's speech addresses a matter of public concern, "[t]he State bears a burden of justifying the discharge on legitimate grounds." (citing Connick v. Myers, 461 U.S. 138, 150 (1983))).
A. The Right of Faculty to Access the Internet Using Public Computer Resources for Purposes of Receiving Speech

The express free speech guarantee of the First Amendment includes the right of the people to make use of the Internet to receive information without unwarranted governmental regulation which impinges upon the flow of ideas. Such a right is unequivocal in situations where the government is acting as sovereign. The Court has left it unclear, however, whether such a right extends to situations where the government is acting as an employer. In its public employee line of cases, the Court never specifically opined on whether the balancing process should afford a greater weight to a faculty member’s interest in academic freedom than to a typical public employee’s interest in speech. As a result, lower courts have adapted the balancing test to fit the academic context without the benefit of Supreme Court guidance. While a public employer does not have to provide Internet access to its faculty-member employees, once an employer makes the forum available, any restriction imposed on its use that curtails a faculty-member’s ability to receive speech activates First Amendment protections, including academic freedom.

165. Cf. Reno v. ACLU, 521 U.S. 844, 874-79 (1997) (explaining that adults have the right to access on the Internet all the offensive materials which they would like, and the government cannot justify broad suppression of speech addressed to adults based on some secondary interest).

166. In Waters v. Churchill, the Court stated that “[t]he Government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as an employer.” Waters v. Churchill, 511 U.S. 661, 675 (1994). While Waters involved an application of the Pickering-Connick balancing test to a non-university setting, it demonstrates the Court’s separation of government into two distinct roles, sovereign and employer, when addressing First Amendment rights of public employees.


168. From a practical standpoint, all public universities should provide computer resources and Internet access to their faculty. See Ray August, Gratus Dictum! The Limits of Academic Free Speech on the Internet, 10 U. Fla. J. L. & Pub. Pol’y 27, 46 (1998) (arguing that universities must provide computers and Internet access to their faculty because it is the responsibility of the faculty to provide students with computer literacy which is a prerequisite to succeeding in modern society).

169. An analogy can be made to the world of federal court jurisdiction. The text of Article III of the U.S. Constitution affords Congress the power to regulate the jurisdiction of the lower courts. Once jurisdiction has been granted to the lower federal courts, however, Congress may not direct the courts on how to exercise their decision-making authority with respect to the particular grant of jurisdiction. See, e.g., U.S. v. Mendoza-Lopez, 481 U.S. 828 (1987) (holding that if a court is given the authority to act against a party, it must also be given the power to hear all constitutional defenses/arguments); U.S. v. Klein, 80
members at public institutions are public employees, they are subject to the traditional public employee doctrine developed by the Court; however, in order to be consistent with the Court's stance on First Amendment protections afforded to the right to receive speech and academic freedom, the balancing formula should be reformulated when addressing faculty Internet access cases arising in public academic institutions.

The threshold question under the Supreme Court's public employee speech doctrine is whether the speech at issue may be "fairly characterized as constituting speech on a matter of public concern." This threshold requirement is necessary, as illustrated by the Court in Pickering, Connick and Rankin, to avoid extending constitutional protection to speech which has a disruptive impact on the workplace environment and to avoid impairing government managerial authority by permitting government disciplinary actions to be reviewed by the judiciary. Determining whether an employee's speech addresses a matter of public concern is made, according to the Court, by looking at the "content, form and context of a given statement, as revealed by the whole record." The public concern requirement as a threshold test to determine whether a federal court is the appropriate forum for reviewing a public employee speech case still applies to the right to receive speech; but, instead of looking to the nature of the speech being disseminated by the employee, a court should look to the speech being received to determine whether it involves a matter of public concern.

It is hard to imagine an example of speech produced by a faculty member in the course of fulfilling his or her employment responsibilities as an academic which "cannot be fairly considered as relating to any matter of political, social, or other concern to the community." U.S. 128 (1871) (if courts are given jurisdiction, Congress cannot tell them how to consider a case). Similarly, once the government extends computer use to faculty members at a public institution, the specific content associated with that use should only be regulated by the tenets of the First Amendment as they exist in the "non-workplace" environment. A government should not be permitted to "puppeteer" academics by providing computers but regulating their use by barring the receipt of otherwise constitutional speech.

171. See Lee, supra note 121, at 1121-24 (discussing the rationale behind the threshold public concern requirement created by the Court); see also Connick v. Myers, 461 U.S. 138, 147 (1983) (holding that "when a public employee speaks . . . as an employee upon matters only of personal interest, . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior").
173. Id. at 146.
Hence, it follows that the speech which a faculty member seeks out to evaluate a subject and form his or her own conclusions prior to speaking out through publication, lecture, or otherwise, must likewise be on a matter of public concern. A court's refusal to review a public faculty free speech case involving the Internet because the speech sought to be researched on the Internet fails to be on a matter of public concern, therefore, would be a rare occasion.\textsuperscript{174} Any such refusal of review in order to avoid the impairment of government managerial authority would be improper because a university would be permitted to arbitrarily dismiss faculty for merely exercising their First Amendment rights without being forced to justify themselves via the second part of the public employee doctrine, namely the \textit{Pickering} balancing test.\textsuperscript{175}

The extent to which government can restrict speech deemed to address a matter of public concern necessitates a consideration on whether the speech is being received in an employee's work-related capacity, or as a private citizen outside the scope of employment. According to the Court, the government has a heavy burden in justifying speech restrictions which touch on the private lives of their employees where the government is acting in the role of sovereign and not employer.\textsuperscript{176} On the other hand, when speech on a matter of public concern relates solely to the employee's work environment or job responsibilities and not in the employee's capacity as a private citizen, the burden imposed on government to justify restrictions on speech is substantially less. Still, the \textit{Pickering} balancing test must be used to determine whether the employment-related speech should be protected under the First Amendment or yield to employer interests.\textsuperscript{177}

\textsuperscript{174} The only obvious area of speech that does not warrant First Amendment protection is obscene speech per the definition and standards established by the Court in \textit{Miller v. California}, 413 U.S. 15 (1973); as such, a court could deem a faculty member's receipt of purely obscene material to not be on a matter of public concern.

\textsuperscript{175} See \textit{United States v. NTEU}, 513 U.S. 454, 466 (1995) (explaining that where a determination has been made by a court that the public employee's speech involves a matter of public concern, "the government bears the burden of justifying its adverse employment action" (quoting \textit{Rankin v. McPherson}, 483 U.S. 378, 388 (1987))).

\textsuperscript{176} See \textit{NTEU}, 513 U.S. at 466-71 (discussing the right of public employees to disseminate speech, and explaining that when public employee speech is made outside the workplace, and involves content largely unrelated to government employment, the government has a high burden in justifying broad restrictions on employee expression). The \textit{Pickering} balancing test would still be used to test the protection afforded to public employee speech being restricted outside of the workplace. \textit{See id.} (applying the \textit{Pickering} balancing test to a restriction on speech outside of the workplace).

In Internet-access free speech cases involving nonacademic public employees, a court should balance the employee’s First Amendment right to receive speech on matters of public concern with the employer’s interests in promoting the operational efficiency of the workplace to determine the constitutional validity of an Internet access restriction. Barring special circumstances, the majority of such cases should favor the government employer’s bona fide interest in preventing employees from using work time to access speech unrelated to the fulfillment of their job responsibilities. The public employee’s constitutional right to receive speech on the Internet, regardless of content, is unquestionably protected outside of the workplace where the government is acting in the role of sovereign; but, in order for the government to successfully and efficiently perform its responsibilities as an employer, the at-work employee speech must give way to the interests of the government employer.

Internet access cases brought by faculty at public institutions should be addressed differently than similar cases concerning other public employees because the constitutional right to academic freedom, in addition to the First Amendment right to receive speech, warrants special consideration during the application of the Pickering balancing test. In attempting to acknowledge the unique role of professors and the value of academic freedom, some jurisdictions have altered the balancing test from the onset to require the government employer to demonstrate that the public faculty member’s speech poses a substantial disruption to the work environment before it may be suppressed. This approach applied to Internet access cases would require courts to view any restrictions on faculty members’ ability to receive speech from the Internet with strict scrutiny prior to engaging in a balancing test analysis. If the government employer cannot establish that a content-based restriction on Internet access involving matters of public concern is necessary to avoid a substantial and pronounceable disruption on the work environment, courts should proceed no further and yield to the academic freedom rights of professors.

Requiring substantial disruption as a threshold standard prior to performing a Pickering balancing test, however, is inadequate to completely protect the academic freedom rights of faculty which the Court in Keyishian v. Board of Regents of University of State of New York labeled a

178. See, e.g., Burnham v. Ianni, 119 F.3d 688 (8th Cir. 1997) (requiring a public university to make an initial showing of disruption before the Pickering balancing test ever comes into play to evaluate whether the speech of faculty can be restricted based on employer interests).
"special concern of the First Amendment." If the virtues of academic freedom are to be preserved, the balancing test itself must favor a faculty member's right to "remain free to inquire, to study and to evaluate." A proposal asserted by one commentator for remedying the inconsistencies between academic freedom and the public employee speech doctrine is to apply the Supreme Court's decision in Boos v. Barry to the speech of public faculty members in place of the Pickering balancing test. This Comment favors a less radical approach and suggests that the Pickering balancing test instead be simply modified to incorporate the standard adopted in Boos.

The standard articulated by the Court in Boos permits the government to impose restrictive measures on speech so long as the justifications for regulation have nothing to do with content. According to the Boos Court, content-neutral regulations which focus on the "secondary effects" of speech are permissible because the regulatory targets have nothing to do with suppression of a certain type of speech; rather, the targets are merely associated activities. For example, a restriction on faculty Internet access to pornography would be acceptable if the target of the regulation was not the pornography itself, but instead the secondary effect of protecting the security of the university's computers and electronic network from computer viruses commonly associated with downloaded pornographic materials. In such an instance, the regulatory target, preventing harm to university computer resources, has nothing to do with the content of the restricted speech. The Boos Court also noted that regulations focusing on the direct impact certain speech has on its listeners are not "secondary effects" because they target the content of the speech and not an associated feature. Hence, a public university could not impose restrictions on faculty Internet access to pornography for the reason that its receipt might offend someone inadvertently looking over the shoulder of a faculty member viewing pornographic materials on their computer.

181. 485 U.S. 312 (1988). The Court in Boos declared a statute disallowing the display of political propaganda within five hundred feet of a foreign embassy to be facially unconstitutional. See id. at 334. It viewed the statute as a content-based restriction on political speech in a public forum which was not narrowly tailored to serve a compelling state interest. See id.
182. See Fugate, supra note 68, at 216-17 (proposing an alternative test to the public employee doctrine when dealing with speech in an academic environment).
183. See Boos, 485 U.S. at 320-21.
184. See id. at 320.
185. See id. at 321.
The proposed test for judicial review of restrictions on Internet access to speech by faculty at public universities, thus, consists of three steps:

*Step One:* Making an initial determination on whether the speech being received via the Internet is on a matter of public concern. Only speech on matters of public concern is subject to First Amendment protection.

*Step Two:* Imposing a threshold requirement to the balancing test that the government employer demonstrate that the targeted speech, left unrestricted, would *substantially disrupt* the efficiency or effectiveness of the workplace. A finding that speech received via the Internet would not substantially disrupt the workplace would invalidate any restriction imposed on faculty Internet access to such speech.

*Step Three:* Applying a modified version of the *Pickering* balancing test that incorporates the standard set forth in *Boos v. Barry* to weigh the interests of the government employer in regulating the "secondary effects" of speech received via the Internet against the First Amendment rights of faculty to academic freedom and to receive speech. Restrictions which target the specific content of Internet speech on matters of public concern accessed by faculty would be per se invalid.

Such a test would serve to uphold the First Amendment protection which the Court has afforded to academic freedom while still permitting universities to effectively perform their duties as an employer and maintain control over the workplace environment.

**B. The Right of the Public to Receive Information Disseminated by Faculty Through Public Computer Resources**

Regulations imposed on faculty which restrict their ability to disseminate speech on the Internet through e-mail, chat rooms, electronic bulletin boards, web pages, and other Internet-based forums, are subject to analysis by federal courts under the traditional public employee speech doctrine.\(^{186}\) Similar to the case of public employer restrictions placed on Internet access to information, the First Amendment protection afforded to academic freedom should be incorporated into the balancing equation analysis to favor the right of faculty to disseminate speech on matters of public concern through the In-

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\(^{186}\) *See, e.g.*, Urofsky v. Allen, 995 F. Supp. 634 (E.D. Va. 1998) (applying the public employee speech doctrine to invalidate a statute which hampered public employees, including faculty members, in their ability to "speak out" using public computer resources).
ternet.\textsuperscript{187} Equally as important, however, is acknowledging a First Amendment right of the general citizenry to receive the speech of public faculty members and considering the interests of such potential audiences in the \textit{Pickering} balancing test.\textsuperscript{188}

Public employees serve an invaluable role in providing the general citizenry with information which can be used to formulate opinions and debate on vital social and political topics. Of all public employees, academics at universities are among the most vital in ensuring that the citizenry is afforded access to all viewpoints on an issue, regardless of their general acceptance or controversial nature, in order to foster the self-expression which lies at the heart of the First Amendment guarantee. Given the fact that the Internet is arguably the most powerful tool for sharing information ever developed, citizens should not be denied access to faculty speech on matters of public concern through that medium barring exigent circumstances.

The interests of potential audiences are an essential component of the public employee doctrine, and they should be considered when balancing employer efficiency interests with the First Amendment right of faculty to disseminate speech on matters of public concern.\textsuperscript{189} In doing so, where the faculty interest in speaking may be small compared with the employer's operational efficiency interests but the general public's interest in receiving the speech of faculty is significant, the public's right to receive information should prevail and afford protection to the faculty speech. As in the Supreme Court case of \textit{Red Lion Broadcasting Co. v. FCC}, the paramount issue in addressing a public faculty member's right to disseminate speech through the Internet is not the right of the faculty themselves to speak, rather it is the right of the citizenry to receive academic speech such that the First Amendment goal of producing "an uninhibited marketplace of ideas in which truth will ultimately prevail" can be preserved.\textsuperscript{190}

\begin{itemize}
\item \textsuperscript{187} See \textit{supra} notes 165-185 (discussing a proposal for how academic freedom should weigh into the balancing portion of the public employee speech doctrine when dealing with restrictions placed on faculty Internet access to information).
\item \textsuperscript{188} The right of the general citizenry to receive faculty speech on the Internet refers to faculty members' out-of-class speech. Public institutions generally have a right to control the curriculum and therefore affect how a professor disseminates speech on the Internet to his or her students (in-class speech). \textit{See, e.g.}, Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 802 (5th Cir. 1989) (holding that "public school teachers are not free, under the first amendment, to arrogate control of curricula"). \textit{See also supra} note 45 (discussing "standing" of general citizenry to bring suit based on a First Amendment right to receive the speech of public faculty members).
\item \textsuperscript{190} \textit{Red Lion Broad. Co. v. FCC}, 395 U.S. 367, 390 (1969).
\end{itemize}
Academic freedom is of "transcendent value to [society as a whole] and not merely to the teachers concerned."191 Such is the reason why the Court has deemed academic freedom to be a "special concern of the First Amendment,"192 and why courts in applying the public employee speech doctrine should pay serious consideration to the citizenry's interest in receiving faculty speech on the Internet.

Conclusion

The Internet is a vehicle for promoting the free exchange of ideas and expression unlike anything the world has ever known. Imposing work-related restrictions on the ability of faculty at public universities to access and disseminate information on the Internet deprives the country of valuable speech for furthering the ideals of democracy. In the past, courts have attempted to protect faculty and university speech using a host of different legal tests and rationales, but all have been rooted in the notion that academic freedom is of constitutional dimension and warrants certain First Amendment safeguards. Internet use-restrictions imposed on universities and their faculty drive at the heart of past concerns over restrictions on academic speech, and such restrictions should be struck down by courts absent a necessary and valid reason rooted in a matter of significant government concern.

The current public employee speech doctrine is inadequate to address the speech of faculty members and should be reformulated. A proper doctrine would favor the academic freedom rights of faculty and the citizenry's constitutional right to receive unrestricted faculty expression. Only then can the country be protected against the suppression of valuable academic speech and ensure a free and open marketplace of ideas which the First Amendment was created to promote.

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192. Id.