A CASE ANALYSIS OF THE FREE SPEECH RIGHTS OF THE PUBLICLY EMPLOYED PROFESSOR

By

DOUGLAS EARL DRUMMOND

Bachelor of Science
Oklahoma State University
Stillwater, Oklahoma
1984

Master of Science
Oklahoma State University
Stillwater, Oklahoma
1986

Juris Doctor
University of Tulsa
Tulsa, Oklahoma
1991

Submitted to the Faculty of the Graduate College
of Oklahoma State University
in partial fulfillment of
the requirements for
the Degree of
DOCTOR OF EDUCATION
July, 1996

A CASE ANALYSIS OF THE FREE SPEECH

RIGHTS OF THE PUBLICLY

EMPLOYED PROFESSOR

Thesis Approved:

Martin Burlingame

Thesis Adviser

Michael Scott Fox

Michael Burke

Thomas C. Collins

Dean of the Graduate College

PREFACE

What are the free speech rights of a publicly employed professor? That is the question for my study, although I knew before I started that no precise answer would be found. The laws concerning professorial speech are, at best, fluid and, consequently, this study represents only a snapshot of a constantly evolving legal issue. I hope, however, the research is useful in calling attention to what I believe is a significant and growing problem for everyone in higher education.

It also should be noted that no faculty member or administrator should use this study as a substitute for legal counsel. If anything was learned from the study, it was that free speech analysis is a difficult chore at best and each case has a unique set of facts and circumstances. In addition, issues will be viewed differently by the courts in the various jurisdictions. Therefore, educators contemplating litigation should seek specific legal advice from either university counsel or a competent attorney in their area.

ACKNOWLEDGEMENTS

Many special people deserve recognition for my accomplishments and all cannot be named here. However, I would like to express my gratitude to Jim and Mildred Cole, Dr. Vernon and Thelma Jackson and Mary Bea Drummond who have supported my academic efforts no matter what the circumstances. I also would like to thank my grandmother, Leola Akin, for always believing in me as well as my parents, Bob and Jeanne Drummond.

A special thanks also goes to Dr. Martin Burlingame, who as my dissertation adviser, helped guide and coach me through this study. I also would like to thank Dr. Marlan Nelson, who has been an influential factor throughout my academic career. Drs. Scott Fern and Michael Mills, the two remaining committee members, also provided much needed guidance on this project.

Last, but certainly not least, I want to thank Dana Schuler, who is a most positive force in my life. Without her love and support, I would not have finished this degree.

TABLE OF CONTENTS

Chapter

LIST OF TABLES

Table Page

CHAPTER I

"Congress shall make no law...abridging the freedom of speech," reads the First Amendment. The United States Supreme Court also has repeatedly ruled that a publicly employed professor cannot be dismissed or disciplined for exercising constitutionally protected speech and that the First Amendment does not tolerate laws that cast a "pall of orthodoxy over the classroom."

A quick glance at the literature, however, shows neither the law nor the professorial speech issue is as black-and-white as the above language indicates. For example, the University of New Hampshire suspended Donald Silva for "sexually harassing" comments he made to his technical writing class. Leonard Jeffries' term as department chair at the City College of New York was reduced after he made anti-Semitic comments at an off-campus speech. The University of Indiana denied Sociology professors Kenneth Colburn and Robert Khoury tenure after they became embroiled in disputes with their colleagues.

Relevant to this study is the fact that the cases of Silva, Jeffries and Colburn took place in different settings: Silva's comments came in his role as a teacher. Jeffries' statements arguably came in his role as a citizen in an off-campus speech. Colburn and Khoury's letter took place amid a political battle in their department. For each case, however, courts applied a different First Amendment standard. Consequently, not only does the law fail to shield all

professorial speech -- it also safeguards certain kinds of speech more vigorously than others.

Statement of the Problem

If all professorial speech is not safeguarded by the First Amendment, what speech is constitutionally protected? Stated another way, what First Amendment freedom of speech rights does a professor have in the classroom? Outside the classroom? In disputes that can be described as bickering by academicians? Under what circumstances may an administrator legally discipline a faculty member for something he or she says?

No black-and-white answers exist for these questions. Kaplin (1995) says it is unclear what professorial speech is constitutionally protected, noting that it depends on the specific facts of the case, the particular court's view on the First Amendment and the courts' sensitivities to academic freedom.[1] Ryan (1988) writes that "the lesson for the educator is simple and short: Until the system changes, there is simply no way to tell whether certain speech will be protected by the Constitution" (p. 716).

One primary obstacle in defining legal boundaries of professorial speech is the law itself. Analyzing any free speech issue has become a pervasive and complicated regulatory scheme. (Nagle, 1984). Courts, therefore, are generally inconsistent in deciding free speech disputes of all kinds, including those involving professors.

---

[1] Kaplin makes this statement in regards to out-of-class speech, but his summary illustrates that no lucid lines have been drawn by courts in the other arenas as well.

A second quandary is the decision-making process of the federal courts. A difficulty in professorial speech cases, which is discussed more in-depth in this study, is the absence of a clear United States Supreme Court precedent on the question. Without clear guidance from the nation's highest court, lower courts have, in effect, adopted a piecemeal approach to deciding faculty free speech disputes.

The courts' lack of consistency and clarity presents a problem for both administrators and faculty members alike in higher education. On one hand, administrators are unsure when they can censure, discipline or dismiss a faculty member for fear of a First Amendment claim. Professors, on the other hand, may be hesitant to express their thoughts or opinion for fear of retribution.

Definition of Terms

Professor is defined as any faculty member, tenured or non-tenured, who works at a public institution of higher education. This includes any faculty member, including those employed part-time, regardless of rank. Teacher is defined as a teacher in lower education.

Administrator is defined as any official employed at a public institution of higher education in an administrative capacity. Typically, this person is employed as a Department Chair or a Dean, although the term also is used to identify vice-presidents, presidents and regents. It should be noted that administrators, who typically also are professors, may become embroiled in a free speech dispute with their supervisors.

Court decisions are defined as all federal court decisions that are published in a recognized reporter or that appear on Westlaw. A First Amendment Freedom of Speech lawsuit is defined as any published federal case that includes a free speech claim as a part of the cause of action. A win by the professor is defined as prevailing on a First Amendment free speech claim, not necessarily the entire lawsuit. A win by a university is defined as prevailing on a First Amendment free speech claim, not necessarily the entire lawsuit. Precedent is defined as an adjudged case or decision of the United States Supreme Court, considered as furnishing an example or authority for an identical or similar case afterward arising on a similar question of law (Black, 1990).

Speech is defined as either verbal or written expression. Symbolic expression, for the purposes of this study, is not included. In-class speech is defined as speech uttered by a professor (acting in her role as teacher) inside a university classroom. Out-of-class speech is defined as speech expressed outside the classroom. Academic Bickering is defined as speech concerning an individual grievance. It does not imply the bickering is related to a matter of academic importance -- only that the "bickering" takes place in the academic setting.

Limitations of Study

The proposed study is delimited in scope, method and data by the following factors. First, while many studies have focused on the broader concept of a professor's academic freedom, this study examines only the free

speech rights a professor has under the First Amendment of the United States Constitution. Academic freedom will be examined only to the extent it relates to a court's interpretation of the professor's free speech rights.

Second, the free speech rights of teachers in elementary and secondary schools will not be analyzed, although some of the literature may be discussed. In addition, this study does not deal with professorial speech at private universities.

Third, the study used only data from published federal court decisions from 1968 until 1996. Neither unpublished federal decisions nor published state court decisions are analyzed in this study. Much of the reasoning behind this decision is that a professor's claim of retaliatory discharge, denial of tenure, or a failure to have a contract renewed for engaging in an activity protected by the First Amendment is generally brought in a federal court under 42 U.S.C. Section 1983.[2]

Fourth, the study is limited to published federal court decisions from 1968 until January of 1996. The time frame was chosen because the first significant free speech case in the United States Supreme Court took place in 1968. January of 1996 was the last case examined for this study.

Fifth, the study looked at only First Amendment free speech claims, not the entire lawsuit. For the purposes of this review, a professor need only

---

[2] The anatomy of a "free speech' case in federal court is typically as follows. The professor is denied tenure, disciplined (e.g., does not receive a raise, demoted, etc.) or her contract is not renewed and then claims the university action took place because of something she said or wrote. The case is then filed in federal court where the university traditionally argues the personnel decision had nothing to do with the professor's speech. Often times, the university will say its officials should receive "qualified immunity" or make a summary judgment

prevail on the free speech claim and not the entire lawsuit. The same holds true for the university. In effect, the free speech claim was dissected from the rest of the lawsuit for examination.

Finally, the study is not an all-encompassing look at faculty free speech. It should be viewed as a look at only a "slice" of the professorial speech pie. It focuses solely on what transpired in the published federal court decisions and, as a result, does not purport to examine issues, disputes and circumstances which never make it to a federal court house. In particular, it offers no specific assumptions as to the protection afforded faculty members under contract law and AAUP language in faculty handbooks. Furthermore, the numbers (i.e., who won or loss the lawsuit) were not statistically analyzed and are used only to illustrate findings in the study.

Methodology

The methodology used in the study is legal analysis. Ninety-nine cases were identified that involved a professor's claim of a First Amendment free speech violation. The decisions were then examined, briefed and coded. An analysis of the cases then took place to determine how courts collectively dealt with the professorial speech question.

At this point, the personal bias of the researcher needs to be discussed. Observation by individual researchers are sometimes biased toward finding precedent for their own point of view (Ulmer, 1963). In this study, I acknowledge an absolutist First Amendment viewpoint. However, along the

---

motion. The court then renders a decision. If summary judgment is denied, the case proceeds to trial.

same lines, I believe it is imperative that professors realize they should use their position only to espouse speech pertinent to their roles and responsiblities. As a result of these conflicting viewpoints, I have made an effort to remain objective in this study.

Significance of the Study

This study is significant for four reasons. First is the importance of the freedom of speech in academia. A university must transmit existing knowledge and values to coming generations. It also must critically reexamine existing knowledge and search for new knowledge and values in an attempt to facilitate orderly change in society. To perform these functions, professors ought to have broad First Amendment protection for what they say or write. Justice Frankfurter writes:

> To regard teachers -- in our educational system, from the primary grades to the university -- as priests of our democracy is therefore not to indulge in hyperbole. It is the special task of the teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion...they cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas...they must be free to sift through evanscent doctrine, qualified by time

> and circumstance, from that restless enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, or worship guaranteed by the Constitution of the United States against infraction by national or State government. Wieman v. Updergraff (1952, pp.196-197).

Since freedom of speech for professors is important to the academy, it follows that administrators and faculty members alike need a better understanding of a professor's First Amendment free speech rights. If higher education professionals were more aware of legal precedents, fewer controversies would erupt. Thomas Emerson (1970) emphasized that the benefits of the legal system are realized only when the individual knows the extent of his rights and has some assurance of protection in exercising them. To do that, professors must have some precision and clarity in understanding First Amendment rights. First Amendment scholar Chafee agrees: "It is increasingly important to determine the true limits of freedom of expression so that speakers and writers may know how much they can properly say, and government may be sure how much they can lawfully and wisefully suppress" (p. 3).

The third reason supporting such a study is that it is unique. The literature is peppered with a plethora of studies on a professor's academic freedom. Some articles have been written about the faculty member's free speech rights as it relates to one area (i.e., classroom speech) and about public

public school teachers' First Amendment rights. But no project similar to this was found.[3]

A fourth reason for the study's importance is tied to the future. At the time of this writing, Internet is quickly becoming a fixture at colleges and universities worldwide. Also, at this writing, First Amendment issues -- some that deal with professors -- are also surfacing. While legal experts are unsure exactly how courts will deal with these cyberlaw issues, it is likely that the precedents will come, in part, from past professorial speech cases. Therefore, a clearer understanding of legal precedent on today's First Amendment free speech protection for professors will assist future researchers in ferreting out future decisions concerning the Internet.

Issues To Be Examined

A review of the literature shows that the professorial speech question resembles a legal octopus because it reaches into a plethora of areas -- academic freedom, tenure, institutional autonomy, contract law and ethics to name a few. Consequently, any study must focus its effort on one particular area. In this study, that area is how federal courts analyze the First Amendment freedom of speech rights of the publicly employed professor.

With that focus in mind, this study looks at three classifications of professorial speech (i.e., academic bickering, classroom speech and out-of-class

---

[3] According to one informal survey, 252 dissertation projects have been done since 1861 on First Amendment issues. Most of those focused either on religious (i.e. separation of Church-State) questions or on issues involving the media. Only 11 of the 252 (approximately four percent) of the First Amendment studies concentrated on higher education faculty members. Of the 11, nearly half (five) dealt with the broader, yet related, concept of academic freedom. Only two studies of the 252 looked a professorial speech: a 1979 dissertation on out-of-class speech for both teachers and professors and a 1985 study on teachers' "knowledge" of their First Amendment rights. Given the fact that those studies are now 16 and 10 years old, respectively, a more up-to-date and concentrate examination of professorial speech law is needed.

expression). More specifically, the following issues are examined:

1. Are more free speech disputes taking place in federal courts in the 1990s than in the past?

2. Have the courts consistently applied United States Supreme Court precedents to the three types of professorial speech (i.e., classroom, out-of-class and academic bickering)?

3. Are professors today more likely to lose free speech disputes than those in the past? Stated another way, has the First Amendment free speech protection afforded by courts declined in the 1990s?

4. How have the courts examined the different classifications of professorial speech? For example, is classroom speech given more or less constitutional protection than out-of-class speech? Does speech uttered in academic bickering disputes receive less constitutional protection than other out-of-class speech? Has the level of protection for each of these classifications declined in the 1990s?

5. Do federal courts use the concept of academic freedom when deciding professorial speech disputes? What impact does the concept have in free speech questions?

6. Do federal courts offer more First Amendment free speech protection to tenured professors than they do non-tenured ones?

Organization of Paper

The rest of the paper will be divided into four chapters. Chapter 2 will include a literature review of how a professor's rights to freedom of speech have evolved, a discussion of the United States Supreme Court precedents and a review of the different types of speech (i.e, classroom, out-of-class and academic bickering). Chapter 3 will discuss the research methodology used in the study. The research findings as they relate to the aforementioned issues will be examined in Chapter 4 and Chapter 5 will include a summary of those findings, conclusions, recommendations and implications for future research.

CHAPTER II

REVIEW OF SELECTED LITERATURE

Introduction

Since the days of Socrates, a professor's freedom to speak has often times been a controversial issue. It began as a fight for academic freedom and later developed as a battle for First Amendment free speech rights under the United States Constitution. While significant strides have been made in protecting the expression of professors in the classroom as well as outside of it, the literature shows that the free speech dilemma continues to be a Pandora's Box for academicians and judges alike.

Part of the Pandora's Box is the fact that not all professorial speech is analyzed the same. The literature shows that courts place a higher premium on some professorial speech as compared to other types. The legal analysis of speech uttered in the classroom is different than expression spoken or written outside the class setting. Different types of out-of-class speech also require separate standards. While, in some respects, the analysis is not much different than any other First Amendment case, it certainly creates a dilemma for those in higher education.

This chapter provides a selective review of the literature. It starts with a discussion of why federal litigation on professorial speech claims is increasing in the 1990s. The next section shows that problems with

professorial speech have been constant in American higher education history. The third part of the chapter discusses significant United States Supreme Court precedents that, for the most part, have provided the foundation for legal analysis of professorial speech cases. Following the review of important United States Supreme Court cases, the review discusses why professorial speech can be broken into three classifications and reviews the literature for each classification. Finally, the literature discusses how academic freedom and tenure relates to a professor's free speech is examined.

Professors And Free Speech: Courtroom Battles Increasing In The 1990s?

A recent glance at The Washington Post or The Chronicle of Higher Education certainly suggests that free speech disputes are more prevalent this decade than in any other time in United States higher education history. Illustrative of this is a 1994 case where the University of New Hampshire suspended tenured writing professor Donald Silva after he made the following classroom comments to his technical writing students:

> Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and languages. You and the subject become one (Silva v. University of New Hampshire, 1994, p.2).

Silva's comments, which also included the discussion of a vibrator under a plate of Jell-O, prompted some female students to file sexual harassment complaints against him. The university investigated, found

Silva in violation of its sexual harassment policy and suspended the 59-year-old tenured professor. Silva filed suit and, in 1994, a federal court ordered UNH to re-instate Silva.

About the same time, a controversy erupted at the City College of New York. Jeffries, department chair of the CCNY Black Studies Department, gave an off-campus speech in Albany, New York where he made anti-Semitic remarks. Fueled by public complaints by people such as then-New York Governor Mario Cuomo, CCNY officials reduced Jeffries' term as chair to one year.

Jeffries sued, arguing that his off-campus speech should be protected under the First Amendment. The case, which was appealed to the United States Supreme Court, served as a lightning rod to academic freedom and feminist groups alike and received nationwide attention. A federal trial court found that Jeffries' First Amendment rights had been violated, but an appellate court later reversed the decision.

Other examples of free speech disputes in the 1990s between faculty member and institution also are easy to find. A 1996 decision found that a professor's classroom discussion of diversity in the workplace was not protected speech. At the University of Minnesota-Duluth, professors and administrators waged a First Amendment battle in 1994 after a photograph of two gun-toting professors was removed by campus officials (Oakes, 1994). The University of Michigan sociology department precluded professor David Goldberg from teaching a graduate class after students complained about his

"racist" comments in class (Chait, 1993). The University of Nebraska charged a woman graduate assistant with sexual harassment for comments she made during a Human Sexuality course. (Henhof, 1994). At Brigham Young University, English professor Cecilia Konchar Farr's contract was not renewed because she expressed pro-choice views on the abortion issue (Stimpson, 1993).

These cases and others around the nation suggest that the free speech problem is more prevalent today than ever before. Why do professorial speech disputes appear to be increasing? No clear answer emerges, but at least four factors merit discussion.

The first factor, depicted by the Silva case, is an effort by institutions to stop student sexual harassment (Drummond, 1993). Facing potential liability, institutions are attempting to educate professors and students about the consequences of harassment more than ever. This has generated tension between the professor's First Amendment rights and the institution's responsibility to protect its students.

The second factor, portrayed by the Jeffries case, is a result of what some see as "political correctness." Political correctness is defined as "marked by a progressive orthodoxy on issues involving race, gender, sexual affinity or ecology." (Random House, 1991). Institutions are attempting to eliminate "racist" or "sexist" language from campus by using speech codes (Matsuda, 1989). Although these codes, for the most part, are at aimed at students, more and more universities appear to be more vigilant in applying similar

standards to faculty members.

Another factor is the rising costs and dropping enrollments at state universities nationwide. Administrators, searching for short-term solutions to retrenchment issues, are taking a much closer look at permissible grounds for dismissal. Such attempts to dismiss often times end up with the faculty member alleging a First Amendment violation.

The fourth factor as to why professorial speech is a more explosive issue this decade than before may be linked, in part, to changing court attitudes. Several commentators maintain that recent United States Supreme Court decisions such as Hazelwood v. Kuhlmeier (1988) and Waters v. Churchill (1994) have watered down the First Amendment rights of educators.

In sum, the literature clearly shows that a dilemma exists in higher education in the 1990s. But as the next section explains, the problems of professors and free speech surfaced long before this decade. In fact, American higher education has grappled with the issue for centuries.

Academic Freedom, Free Speech and the Professor: 1791-1940

The issue of professorial speech and academic freedom can be traced back as far as Socrates when he was charged and eventually sentenced to death for corrupting the youth of Athens.

For the purposes of this review, however, the discussion picks up in the 1700s. Individual academic freedom was virtually non-existent as the church either controlled or heavily influenced American colleges.

Institutional leaders emphasized traditional subject matter, discouraged debates over controversial issues such as slavery and federalism and gave the faculty members little autonomy.

The tide shifted in 1859 when Charles Darwin published his hypothesis on evolution in the Origin of Species. As more and more scientists (and professors) became interested in Darwin's work, religious opposition grew. Some faculty members began an objective search for the truth (i.e., the "scientific method"), leading to conflict between the traditionally religious-oriented hierarchy and the newly inspired scientific community. Walter Metzger (1955) described the conflict:

> Inevitably as science converted to evolution and the curriculum was converted to science, the heresies broached by Darwin bid for academic acceptance. This was inevitable and not at first far-reaching, but in the catastrophic vision of the faithful, where small things loomed as great and innocuous acts as enormities, the attempt to teach evolution seemed part of a devilish plot. Determined efforts were made in the sixties, seventies and early eighties to hold the line of education by the tactic of exclusion where possible, by threats and tirades where necessary. Synods gave warnings to trustees and trustees instructed presidents to reject the applications of Darwinians. Attacks in the local pulpits, alarms in the religious press, were employed to make colleges toe the mark and professors mend their ways. Once

again, a battle of ideas became a battle for the schools (p. 326).

The second factor influencing more autonomy for American professors came from Germany. The German institutions, which educated several prominent leaders in American higher education, gave professors wider latitude in what they could say and do within the university. When German-trained academicians came home, they brought the idea with them.

The third factor signaling a need for additional professorial freedom was the influence of big business on higher education. At first, the marriage of academia and corporate American worked well as schools strapped financially turned to wealthy businessmen for help.[4] But the influence did not stop with the multi-million dollar donors as boards, once stockpiled with clergyman, now began to recruit businessmen. This soon caused excessive tension between professors -- especially those who dared to publicly express concerns about business -- and the powerful business interests.

As a result of these factors, disputes over professorial speech surfaced. For example, in 1856, University of North Carolina professor Benjamin Sherwood Hedrick publicly opposed slavery and supported the Republican party. His colleagues criticized him, students hung him in effigy and the trustees dismissed him (Plopper et al., 1979). In 1874, Vanderbilt University fired professor Alexander Winchell for writing an article on Darwinism. In

---

[4] For example, during that time frame, John Hopkins University received $3.5 million from a Baltimore merchant; Leland Stanford Junior University received $24 million form the railroad kind and the founder of Standard Oil donated $34 to the University of Chicago. These gifts, unheard of during that era, changed the relationship of donor to recipient. The donor wanted more than a passive role and administrators -- who had a vested interest in keeping the donors happy -- often gave in to their whims (Hofstadter et al., 1955).

1893, the University of Chicago dismissed professor Edward Bemis because he publicly criticized the railroad industry. In 1894, Richard T. Ely, an economics professor at the University of Wisconsin, faced a trial for heretical and social economic writings. In 1900, Stanford University fired professor Edward Ross for his views on coolie labor and silver (Hofstadter et al.,1955).

These disputes between faculty member and institution encouraged professors to seek protection for what they say or write. In 1900, the Academic Economic Association had the first professional inquiry into individual academic freedom. That inquiry fizzled, but it set the stage for the beginning of the American Association for University Professors ("AAUP") in 1915.

One of the first AAUP priorities was to work out the scope and limits of "academic freedom." The Committee A's Report on Academic Freedom and Academic Tenure's fundamental premise called for academic freedom to be a necessary condition for a university's existence. The Committee emphasized that professors, when in the classroom, should be limited only by the norms of neutrality and competence and that, outside the university, professors should have the same rights as other citizens, limited only by the obligation to observe professional decorum.

The early efforts of the AAUP were unsuccessful, but in 1940, the group issued the Statement of Principles, which advocated freedom of speech for a professor both in and outside the classroom. It first emphasized that a "teacher is entitled to freedom in the classroom in discussing [his or her] subject but he should be careful not to introduce into [his or her] teaching

controversial matter that has no relation to [his or her] subject." The Statement also read:

> the college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When [a professor] speaks or writes as a citizen,[he or she] should be free from institutional censorship or discipline, but [his or her] special position in the community imposes special obligations.
>
> As a scholar of learning and an educational officer, 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 he is not an institutional spokes[person].[5]

The Statement helped American professors turn the corner in their struggle to acquire additional autonomy. Today the 1940 document is still considered one of the most influential pieces in academic freedom history and also is significant because the free speech issue eventually made it to the United States Supreme Court.

---

[5] Discussion on the exact meaning of this "professional responsibility" standard has been debated since the 1940 statement. Today, it appears the AAUP considers the standard of academic responsibility to be an "admonition rather than a statement for the application of discipline."

Significant United States Supreme Court Precedents

"Congress shall pass no law...abridging the freedom of speech," reads the First Amendment. Absolute words? Not according to the courts, which offered a constricted interpretation of the language all of the 1800s and through the first half of this century. A 1892 opinion by Massachusetts Supreme Court Judge Oliver Wendell Holmes illustrated this. "There are few employments for hire," Holmes wrote, "in which the servant does not agree to suspend his constitutional right to free speech...The servant cannot complain, as he takes the employment on the terms which are offered him." (McAuliff v. Mayor of New Bedford, 1892, p. 517).

The 1927 Scopes Monkey Trial is a more relevant reference point for educators. The question was whether John Scopes, a Tennessee public high school teacher, could be fined for teaching any theory that denied the story of the divine creation of man as taught in the Bible, in violation of a state statute. The Tennessee Supreme Court said he could, emphasizing that Scopes, as educatorhad no right or privilege to serve the State except upon such terms as the State prescribed.

A few years prior to the Scopes decision, however, the pendelum started moving toward freer speech in the United States Supreme Court. In Abrams v. United States (1919), the Court upheld a conviction against several individuals who had printed and distributed anti-war circulars, but Holmes, in a dissenting opinion, wrote that "it is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting

a limit to the expression of opinion"(p. 618). This idea eventually made its way to the majority's position in the nation's highest court.

Although an extensive historical review of free speech analysis is beyond the scope of this review, it should be noted that, following Abrams, a string of Supreme Court decisions slowly expanded First Amendment protection for individuals. These cases balanced the First Amendment free speech rights of individuals versus other governmental interests.

For academicians, however, the change began in the 1950s and 1960s when a series of cases arose from the widespread efforts of states requiring public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated reached the United States Supreme Court.

The Academic Freedom Decisions: 1952-1966

In Adler v. Board of Education (1952), the Court upheld a loyalty oath requirement for public employees, including teachers, in the New York state school system. But Justice Douglas dissented and warned that the New York procedure to deal with subversive persons raised "havoc with academic freedom." He wrote:

> The law inevitably turns the school system into a spying project. Regular loyalty reports on the teachers must be made out. The principals become detectives; the community becomes informers. Ears are cocked for tell-tale signs of disloyalty. The prejudices of the community come into play in searching out the

disloyal. This is not the usual type of supervision which checks into a teacher's competency; it is a system that searches for hidden meanings in a teacher's utterances (pp. 509-510).

The next significant "academic freedom" case was Sweezy v. New Hampshire (1957). A statute allowed the Attorney General to investigate "subversive" persons. The Attorney General subpoenaed Sweezy, a guest lecturer at the University of New Hampshire, and questioned him about his classroom discussions. The Supreme Court questioned the AG's actions, writing:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot 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 (pp. 1211-1212).

Nine years later, the Supreme Court again discussed academic freedom in Keyishian v. Board of Regents (1966). A New York law required faculty members at a state university to sign a certificate that would help state authorities determine if they were "subversive." Some faculty members refused to sign a certificate that they were not Communists and were dismissed. The Supreme Court struck down the law:

> 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 a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom...The classroom is peculiarly the marketplace of ideas (p. 684).

The Supreme Court's decision in Keyishian gave "academic freedom" an underpinning in constitutional law through the First Amendment. For the purposes of this review, it acknowledged that universities and professors should have institutional freedom from external influences. It also set the stage for a case where the Supreme Court would decide the free speech rights of a public high school teacher.

The Pickering Precedent

In 1964, high school teacher Marvin Pickering sent a letter to a local newspaper that criticized the way the Board of Education and the district superintendent had handled proposals to raise new revenue for schools. The letter also questioned the board's subsequent allocation of financial resources

between the school's educational and athletic programs and charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue. Pickering was dismissed.

Pickering sued, claiming that the letter was protected under the First Amendment "free speech" clause. The Board, however, claimed Pickering's dismissal was justified because the letter was "inaccurate" and because it impugned the "motives, honesty and integrity, truthfulness, responsibility and competence" of both the Board and the school administration. The Board also asserted the letter incited "controversy, conflict and dissension" among teachers, administrators, the Board of Education and the district's residents.

In a landmark decision for teacher speech, the United States Supreme Court rejected the board's argument. The problem in such a case, the Court wrote, was balancing the teacher's interests (as a citizen commenting on matters of public concern) against the State's interests (as an employer promoting efficiency of the school). After analyzing several factors, the Court found that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis of his dismissal from public employment" (Pickering v. Board of Education, 1968, p. 574).

The Tinker Precedent

A year later, the United States Supreme Court decided a First Amendment free speech case involving student speech. In Tinker v. Des

Moines (1969), several students wore black armbands to their schools and were immediately suspended. The Court, however, found that the suspension violated the students' First Amendment rights. "Neither public school students nor teachers," the Court wrote, "shed their constitutional rights at the schoolhouse gates." The fact that schools officials feared some type of disruption was not enough to overcome the students' First Amendment rights. Explained the Court:

> Undifferentiated fear or apprehension is not enough to overcome the right of freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk. (p. 737).

The Mt. Healthy Precedent

The next decision relevant to this review is Mt. Healthy v. Doyle (1977). This time a teacher had made comments on the radio concerning a recently adopted (and controversial) dress code. A month later, his contract was not renewed. Doyle sued, contending the school's actions violated his First Amendment right to free speech.

The Court remanded the case. In order for Doyle to win his First Amendment claim, the court required two things: that his conduct was

constitutionally protected and that the school had failed to renew his contract because of such conduct. Once he established that, the burden shifted to the school to prove that it would have reached the same decision, even in the absence of the protected speech. This additional procedure, the Court reasoned, served two purposes. First, it would remind the employer that she must have a reason other than a constitutional violation to discipline an employee and, second, the analysis discouraged employees from simply raising a First Amendment claim to circumvent just discipline. Wrote the Court:

> A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record (p. 575).

The next significant United States Supreme Court case, Givhan v. Western Line Consolidation School (1979), expanded the Pickering ruling. In Pickering, the letter-to-the-editor was made public, but the Givhan decision said a teacher's private communication (e.g., spoken to a colleague or supervisor), if a matter of public concern, also was protected under the First Amendment.

The Three-Prong Connick Test

The most important case influencing professorial speech came when

the United States Supreme Court decided Connick v. Myers (1983).

District Attorney Connick transferred Myers, an assistant district attorney. Myers then circulated a questionnaire to her colleagues about issues such as transfers, morale, the need for a grievance committee, confidence in supervisors and whether employees felt pressured to work in political campaigns. Connick fired her. Myers sued, arguing that her First Amendment right to speech was violated.

The question for the Court, taking into account the Pickering ruling, was whether the questionnaire was a "matter of public concern." To make this determination, the Court noted that whether an employee's speech addresses a matter of public concern is determined on the **content, form,** and **context** of a given statement as revealed by the whole record.

Of the 14 questions on Myers' questionnaire, the Court found 13 did not address a matter of public concern. However, one question ("Do you feel pressure to work in political campaigns on behalf of office supported candidates?) was viewed by the Court as a matter of public concern. Since question 11 was speech dealing with a matter of public concern, the Court proceeded to the balancing test used in Pickering: Was Connick's interest in having an effective and efficient office outweigh Myers' right to free speech? The Court found for Connick because he reasonably asserted the questionnaire interfered with day-to-day operations of his office:

> Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most

> accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment (pp.1693-1694).

The Connick test thus set forth a three-step analysis to govern speech by public employees, including teachers and professors. First, the court must determine whether the professor's classroom speech implicates a matter of public concern. A matter of public concern, as discussed in Connick and Pickering, is expression that relates to "any matter of political, social or other concern to the community"(p. 1690). Under Givhan, the speech in question does not necessarily have to be made public.

Second, if the speech is deemed to be a matter of public concern, the court then employs the balancing test outlined in Pickering where the professor's First Amendment interests are weighed against the interests of the State in promoting the efficiency of the schools. In making this determination, the court may consider whether the speech impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operations of the enterprise.

Third, if the professor prevails on steps one and two, then the third prong requires, under the Mt. Healthy precedent, the professor to show that her speech was a "substantial or motivating factor" in the employment decision. Once the professor meets that burden, the school must then show that it would have made the same decision in the absence of the protected conduct.

The Hazelwood Precedent

Five years after Connick came Hazelwood v. Kuhlmeier (1988). High school journalists wrote news articles about student pregnancy and divorce for the high school newspaper. The principal believed the stories were not suitable for publication and withheld them. The students sued, accusing the principal of trampling their First Amendment rights.

The Court sidestepped the Tinker analysis, noting the question there involved a school's attempt to silence personal expression that just happens to occur at the school. The Court said the facts in Hazelwood involved "the educator's authority over school sponsored publications...and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" (p. 571). In justifying the principal's actions, the Court fashioned the following test: "educators do not offend the First Amendment by exercising control over the style and content of student speech in school-sponsored expressive activities so long as their action are reasonably related to legitimate pedagogical concerns"(p. 571).

The Waters Precedent

The final United States Supreme Court case relevant to the free speech of professors is Waters v. Churchill (1994). Nurse Churchill criticized her obstetrics department and her supervisor in front of another employee. The conversation, which was overheard, was reported to Churchill's boss and the public hospital discharged Churchill. She sued, claiming her First Amendment free speech rights had been violated.

The Supreme Court did not agree with Churchill, but the import of the case to professorial speech is the procedure a government employer must follow in free speech cases. Prior to Waters, courts typically decided the facts for themselves and then conducted their free speech analysis. In Waters, one of the issues, however, focused on what was actually said. Nurse Churchill's recollection of her speech differed from her employer's version. Churchill's recollection, i.e., complaints about cross-training in her unit, arguably was a matter of public concern. The hospital's version indicated the speech was merely a personal grievance and therefore not of public concern. Thus, the Court had a dilemma: Should the Connick test be applied to the speech as the hospital officials found it to be, or should it apply it to the speech that was actually said?[6]

The Court held that a government employer should not have to be as precise as a jury when deciding what was said. Instead, the state employer

---

[6] Prior to Waters, courts usually determined the facts of the situation themselves. In a non-jury trial, the judge would examine the evidence and a jury would make findings of fact in a jury trial.

need only conduct a reasonable inquiry into the content of the speech before acting.

Therefore, Waters comes into play as a part of the Three-Prong test. When applying the test, courts are to examine the reasonableness of the employee's inquiry into what was said and the other facts in the case. If the inquiry is reasonable, the facts, as the employer found them to be, will govern -- regardless of what actually was said.

Summary of Precedents

In sum, the professor has traveled a long and winding road in seeking First Amendment freedom of speech protection from the United States Supreme Court. It began with Sweezy and Keyshian, which emphasized the need for free expression in the classroom ("academic freedom is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom") .

Next came the Pickering test that balanced the teacher's interests (as a citizen commenting on matters of public concern) against the State's interests (as an employer promoting efficiency of the school.) The Tinker case then reminded administrators that they must reasonably forecast "substantial disruption or material interference" with school activities before punishing students or teachers for their speech.

Following Tinker, Mt. Healthy mandated that the speech in question be a "motivating" or "substantial" factor in the employer's decision to discipline or dismiss the teacher. And, in Connick, the Court framed the

aforementioned Three-Prong test: (1) Is the speech a matter of public concern; (2) Balance the teacher's interests as a citizen commenting on matters of public concern against the State's interests as an employer promoting efficiency of the school; and (3) The speech must be a "motivating" or "substantial" factor in the teacher's discipline or dismissal.

Finally, the Hazelwood precedent allowed schools more control on student expression "so long as their actions are reasonably related to legitimate pedagogical concerns." In Waters , the Court altered the procedure used by employers when handling speech cases.

The next section will discuss one type of analysis that could clear up some of the confusion, although not all of it. Professorial speech traditionally has been divided into separate arenas or categories. Such a classification makes the issue easier to examine.

Types of Professorial Speech

Courts have traditionally treated certain kinds of speech separately from others. For example, political speech is afforded more protection than commercial speech. Commercial speech, in turn, is deemed more worthy than low value expression such as obscenity. No matter what area, courts generally classify speech either in terms of its value to society or in balance with other constitutional concerns. The same situation applies to professorial speech. Ever since the Pickering decision, courts and scholars have divided speech by professors into different categories.

A fairly easy illustration of how professorial speech is divided into classes or categories can be gleaned by simply looking at the titles of articles on the subject. Miller (1973) wrote "Expression Outside the Classroom." Francis (1978) penned "Breach of Responsibility in Extramural Utterances." Eagle (1984) wrote "First Amendment Protection For Teachers Who Criticize Academic Policy" and Barber (1992) authored "No Talking In Class." Jurenas (1990) wrote "Biting The Hands That Feed Them: Can Faculty In Public Colleges and Universities Criticize Their Employers And Survive?"

In addition, the 1940 Statement discussed different classifications of speech. There seemed to be little disagreement among the drafters concerning the importance of protecting intramural or classroom speech ("a teacher is entitled to freedom in the classroom in discussing his subject but he should be careful not to introduce into his teaching controversial matter that has no relation to the subject.")

However, according to Metzger (1990), the same cannot be said for extramural speech. The Statement was co-authored by AAUP representatives and officials from the Association of American Colleges, an organization composed of undergraduate institutions and run by their top administrators. Those pushing for extramural expression had found that professors were more likely to be punished for expressing unpopular ideas in a public forum than for anything they said or did in the lab and thus wanted language protecting such speech. The AAC, on the other hand, wanted institutional loyalty to be placed above the individual professor's freedom of expression.

The two sides eventually settled their differences with the following language:

> the college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations... As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he 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 he is not an institutional spokesman.

The 1940 Statement divided speech into two groups: intramural and extramural. The first is intramural or classroom speech, which is fairly self-explanatory. The other is "extramural" speech. It calls for the professor to be "free from institutional censorship or discipline" when writing or speaking as a citizen. In addition, it notes that, as a person of learning and an educational officer, the professor should be "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 he is not an institutional spokesman."

The number of categories, however, varies in the literature. The

AAUP has a two-tier classification. Katz (1983) divided speech into two categories (classroom and outside class). Jueng (1990) described a faculty member's internal grievances as "academic bickering." Poch (1993) divided his analysis into speech uttered in the classroom, expression as a part of research and publication, speech in their role as citizens and expression involving personal concerns. Kaplin (1995) treatise is similar: (1) classroom speech, (2) the professor's research and publication activities, (3) institutional affairs and (4) private life.

But Emerson (1970) implies that a three-tier classification would work. He wrote that a faculty member is constantly engaged in various forms of expression, not only as a [1] teacher and scholar in the classroom, but [2] as a citizen of the university community and [3] as a citizen of the outside world. Van Alstyne (1970) also arguably talked about three classifications in his distinction between general extramural speech and speech critical of a school or university (along with classroom speech).

The Supreme Court and other federal courts also appear to view speech in one of three categories. Keyshian warned against casting a "pale of orthodoxy over the classroom." Tinker focused on expression outside the classroom as did Pickering and Mt. Healthy. Connick , although not a education-related case, centered on an employee's internal complaints with her boss.

In sum, little question exists that courts, scholars and the institutions themselves define professorial speech in a variety of ways. At a minimum,

professorial speech is divided into at least two categories, intramural (classroom) and extramural (outside the classroom) and as many as four. Yet, for the purposes of analyzing court decisions, a three-tier system seems reasonable: (1) Speech taking place inside the classroom, (2) Speech taking place outside the classroom, which includes research and publication, and (3) academic bickering. This is the classification used for this study.

A Literature Review of Out-of-Class Speech Cases

The diversity of cases in this category complicates the legal analysis. A 1972 dispute concerned anti-war protests by faculty. A professor in a 1976 decision called some of his colleagues "punks" at an academic senate meeting. A 1977 case involved a professor denied tenure because he had talked to the CIA about his research. A dispute in a 1980 decision focused on a faculty member's letter to the state department of finance that turned in the university president for using improper dealer tags. In 1989, a professor publicly accused other faculty members of exchanging grades for sex. In a 1992 case, a sociology professor wrote a journal article questioning the intelligence of African-Americans and the 1995 Jeffries' decision involved an off-campus speech. No clear definition emerges from the literature, although it can be defined generally as when a professor speaks or writes outside the classroom.

Although there is little discussion in the literature, speech that takes place solely in the professor's role as private citizen is the most protected (Kaplin 1995). For example, if a faculty member complained to a state legislator about the environment (if indeed it was wholly unrelated to his job

as a professor) she would be protected much the same as any citizen. Likewise speech that takes place outside the school likely will be constitutionally protected. The more difficult question is the professor who speaks or writes inside the school or in the role of a faculty member.

Historically, the question of out-of-class speech has remained controversial and somewhat inconsistent. Pickering, the first Supreme Court case involving out-of-class speech, involved a teacher's letter that was critical of the school board's actions. The Court engaged in a balancing test where the free speech rights of the teacher were weighed against the State's interest in running the school. Part of the balancing test included evaluating the following factors: Does the speech impair discipline by superiors or harmony among co-workers? Does the speech have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary? Does it impede the performance of the speaker's duties or interferes with the regular operations of the enterprise?" In Pickering's case, none of those factors was present and so the speech was protected.

Miller (1974) examined out-of-class speech cases by whether the expression took inside or outside of school. He concluded that, under Pickering, statements made by teachers outside the school will generally qualify for First Amendment protection, even if "strongly critical" of the school administration. However, he also noted that courts were inconsistent in speech taking place inside the school yet outside the classroom. Some would apply Pickering, others would use Tinker or a combination of the two.

Eagle (1984) examined cases involving teacher criticism of academic or administrative policies. She found that teachers would most likely win the Pickering balancing test unless the school could prove the speech caused a serious disruption or actual, substantial and material interference. Miller (1974) reaches a similar conclusion.

The tables, however, changed considerably with the 1983 Connick decision. As discussed earlier, the decision required courts to first determine whether the speech in question was a "a matter of public concern" prior to advancing to the Pickering balancing and Mt. Healthy substantial factor tests. A matter of public concern, the court wrote, is expression that relates to "any matter of political, social or other concern to the community." To determine what speech is of public concern, the Court instructed lower courts to judge it on the "content, form, and context of a given statement as revealed by the whole record."

Connick, according to the literature, impacted a professor's ability to speak or write outside the classroom. First, it added an additional hurdle to the Pickering/Mt. Healthy test. More importantly, however, the decision did not clearly enunciate what was meant by a "matter of public concern." This has led to a plethora of articles about the inconsistency of lower courts on this issue.

A 1986 article examined teacher speech cases and found that courts had a difficult time determining what was a political or social or other concern to the community. It noted that courts appeared to be influenced not only by

how employers characterized the speech but also by the fact if the speech was broadcast on the media. The article further warned:

> The present status of teacher's free speech rights is alarming ...there is no uniformity among the circuits in their attempts to apply the Connick test, a teacher desiring to speak has no notice of which speech will be beyond the limits....to justify adverse employment action. In effect the teacher's Free Speech Rights are chilled due to uncertainty of when protection is available. The uncertainty is further aggravated by the vagueness of what Connick calls political, social or other concern to the community (p. 247).

Allred (1988) also discussed the inconsistency of the "public concern" prong. His thesis was that certain groups of speech will receive more protection than others. For example, Allred concludes that First Amendment protection is more likely if the speech centers on a matters of current community debate than any other type. This is especially true if such matters have received recent attention in the community through the newspaper or some other public vehicle.

A second category likely to be considered a matter of public concern is speech alleging malfeasance or abuse of public office. "If the speech concerns malfeasance or abuse of office," Allred writes, "and the employee speaks as a concerned citizen, not as an aggrieved employee," (p. 62) the courts appear likely to find that the speech is of public concern.

Allred also suggests that speech on public safety and welfare, speech on the quality of public education and speech on discriminatory practices may be considered a matter of public concern unless the public employee is embroiled in some sort of personal dispute with the employer. But, according to the study, "matters of purely personal interest" generally will not be viewed as a matter of public concern.

Despite his analysis, however, Allred, acknowledges what most legal scholars conclude: the legal definition of public concern, which triggers whether speech will be protected, is far from clear. Following his analysis of Connick and how it influenced teacher free speech rights, Ryan (1988) wrote:

> Rights thought sacred by the First Amendment are, under the current Pickering-Connick test, in jeopardy. Teachers are much more susceptible to government action in violation of the Constitution because they, unlike others, rely on the government for a monthly paycheck. Instead of recognizing the vast influence that governmental action can have on a teacher's communicative activity, courts have chosen to vindicate the rights of the government as employer. Tipping the scales in this fashion assures that our most valuable educational resources, our teachers, will be muzzled (p. 717).

For the most part, Connick and its progeny is the last significant case concerning out-of-class speech by professors, but the 1994 Waters decision could impact professorial speech. Waters appears to make it easier for an

administrator to curtail the speech of an employee for at least two reasons. First, the Court held that the actual facts (as found by a jury or judge) of what was actually said will not be used in the analysis -- only the facts that the employer, after conducting a reasonable inquiry, believed them to be.[7] Second, employers need only substantially show that the speech likely interfered with school operations, not that an actual disruption occurred. Jeffries v. Harleston (1995).

Leas (1994) opined that the Waters decision enhanced institutional autonomy while, at the same time, reduced individual individual freedom of speech. He acknowledges that specific implications of the decision are "far from clear" but said the decision, coupled with the nation's "politically correct" climate, raises a red flag.

In sum, the literature concerning out-of-class speech makes four key points. First, the three-prong test of Connick is the precedent most frequently applied to out-of-class speech cases today. Second, courts historically have protected speech taking place outside the school more than they have inside of it. Third, professors had broader free speech protection for what they said outside of class from 1968 to 1982 -- the time between the Pickering and Connick decisions. Fourth, Connick negatively impacted the professor's free speech rights outside of class and, in any regard, has been applied inconsistently by lower courts. Fifth, while it is too early to tell the

---

[7] As explained in a concurring opinion by Justice Souter "a public employer who reasonably believes a third-party report that an employee engaged in constitutionally unprotected speech may punish the employee in reliance of that report, even if it turns out that the employee's actual remarks were constitutionally protected."

ramifications of the Waters decision, some believe it will further reduce the free speech rights of professors.

Academic Bickering

Academic bickering generally takes place when faculty criticize their employers or colleagues. Such speech may take the form of a dispute with the department head or, in some cases, a professor charged with incompetency may raise a First Amendment claim in this category (i.e., where does free speech leave and insubordination begin?) The standard generally used by courts is the Three-Prong analysis (Kaplin,1995).

In dealing with these cases, the courts "must distinguish valid criticism from academic bickering; the honest critic from the cantankerous malcontent; and the whistleblower's legitimate complaints of administrative malfeasance from the carping of a social misfit" (Jurenas, 1990).

Two studies on this issue merit discussion. A 1984 study examined the First Amendment rights of public school teachers who criticize academic policy. Eagle (1984) found that courts will not grant first amendment protection if the speech can be characterized as "bickering," "running disputes," or a personal grievance. Eagle also noted that her study suggested that courts "appear to give additional although unspoken weight to tenured teaching in retaining their positions."

A study (Jurenas and Zhang, 1990) looked at public faculty members' criticism of employers. It concluded much the same thing that Eagle did:

universities will likely prevail. The Jurenas study noted that the First Amendment will not shield faculty from an institution's adverse employment decision if other valid reasons exist for that decision. In addition, attempts to convert a faculty member's disruptive or antagonistic interpersonal relationship with administrators into a constitutional issue will likely fail.

A final point to make on "academic bickering" cases is that it appears the faculty member has a most difficult time -- similar to the out-of-class cases -- overcoming the "public concern" hurdle. The Court in Connick emphasized "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" (p. 1690).

In sum, the literature suggested that the "academic bickering" category is one where the institution typically will win because the speech in question is not be a matter of public concern. Also, unlike the other two categories, it appears that courts are consistent when dealing with a professor's personal grievance or petty bickering about an administrative decision.

A Literature Review of Classroom Speech Cases

Katz (1983) discussed two ways a dispute over classroom speech may erupt. First, an issue may arise because the professor speaks of controversial public issues extraneous to the particular subject matter assigned. Second, the professor's teaching methods, including topics of classroom discussions, use of certain words, and interjection of personal ideological or philosophical viewpoints may lead to administrative disapproval and reprisal.[8]

The problem in resolving such disputes is based, in part, on a lack of a United States Supreme Court precedent directly addressing a professor's First Amendment freedom of speech rights in the classroom (Clarick, 1990). Consequently, as the literature suggests, as many as four major precedents have been applied to classroom speech cases: The Three-Prong Connick test, Keyshian/Sweezy, Tinker, and Hazelwood. Needless to say, it has often times made the case law inconsistent.

Van Alstyne (1970) said the degree of a teacher's freedom in the classroom was controversial. He based his reasoning on an analysis of Epperson v. Arkansas (1968), a case where the Supreme Court struck down an Arkansas law prohibiting the teaching of evolution. He noted that Epperson placed no reliance upon any constitutional claim of the teacher to some degree of in-class protection and, as a result, did little to clarify the speech issue.

---

[8] The literature also indicates that classroom speech must be linked to the subject matter of the class. Olivas (1993) said "academics who engage in careless teachiung or make major misrepresentations in disseminating

A study by Katz (1983) suggested that the situation had improved little by the 1980s. After reviewing the relevant Supreme Court precedents, she concluded that the courts were much more likely to side with the institution than they were with the professor in a classroom controversy. She summarized her findings as follows:

> Current constitutional doctrine...does not support any superprotected status for classroom utterances. The truth is that classroom speech enjoys less protection than more ordinary speech...Professors...are more vulnerable than the average citizen to be being penalized for speech, even outside the classroom. Rather than providing a sanctuary for the robust, freewheeling expression of views, some which may be unpopular or even dangerous, the classroom, even at a university, provides a forum in which speech may be sharply curtailed (Katz, 1983, p. 859).

A 1992 article painted a similar picture. Barber (1992) examined Bishop v. Aronov (1991), a case from the Eleventh Circuit Court of Appeals that held a University could prevent a professor from discussing his religious beliefs in human physiology class. Bishop had made occasional comments about his beliefs in class and in some after-class meetings. Some students complained and administrators at the University of Alabama ordered him to refrain from

---

ideas may be entitled to less protection than those who teach controversial topics within their area of expertiese" (p. 1844).

making such statements.

The court, in making its ruling, relied on Hazelwood for guidance. "Educators do not offend the First Amendment," the court wrote, " by exercising editorial control over the style and content of student [or professor] speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (p. 1074). The court also emphasized that the university had the "authority to reasonably control the content of its curriculum, particularly the content imparted during class time"(p. 1074).

Barber opined that such a ruling, if followed by other courts, could give students more free speech rights than faculty members and concluded such a decision appeared to hinder free speech in the classroom and "undermine the goals of higher education in this country."

Barber is not the only one criticizing the use of Hazelwood in relationship to classroom speech. One commentator, for example, described the ruling as a "jurisprudential cloud" that could lead to a substantial chilling of the classroom academic freedom of individual teachers in public educational institutions on all levels (Academic Freedom Advisory et al., 1994). By applying such a precedent, the courts further signal that classroom speech in higher education can be governed in much the same way as lower education (Luna 1995).

Kaplin (1995) does not paint quite as bleak a picture as Katz or Barber, but he writes that "courts are generally reticent to become involved in

academic freedom disputes concerning course content, teaching methods, grading, or classroom behavior, viewing these matters best left to the competence of administrators and educators who have primarily responsibility over academic affairs."

The above discussion illustrates a repeated theme in the literature. Classroom speech is often times not protected and the reason courts typically use is that a university should be able to control its own curriculum and content. Stated another way, institutional autonomy prevails over individual autonomy.

Another string of studies worth mentioning in the literature review concerning classroom speech are those focusing on public school teachers. In the past 20 years, several dissertations have examined courts' treatment of public school teachers.

For example, a 1976 dissertation by Sponseller examined 40 cases examined prior to 1974 and concluded that the board of education could dismiss a teacher (without violating the First Amendment) for things such as (1) allowing a vulgar poem to remain on the blackboard, (2) permitting assembly programs to the student body that are obscene and calculated to cause disruption, (3) reading a vulgar story to a class and (4) distributing obscene and improper reading materials to an eighth-grade class.

A 1979 study by Plopper surveyed 46 cases, most of which were decided in the 1970s. He found that courts generally rule in favor of school administrators when teachers have (1) used speech that has disrupted normal

school operations, (2) flagrantly violated reasonable demands of their superiors and (3 used speech of such an offensive nature that it either destroyed interpersonal working relationships or otherwise adversely affected students and other members of the community.

Conversely, Plopper concluded that courts have generally supported teachers when school administrators have (1) overreacted to teachers' private and public criticism of school personnel or policies, (2) failed to provide adequate procedural safeguards during the dismissal process and (3) attempted to limit teachers nondisruptive political speech. Plopper also noted that teachers prevailed about half of the time and concluded that both administrators and teachers alike did not have a clear understanding of the First Amendment issues involved.

A 1986 study by Prichard found that teacher speech is more likely to be protected if it is related to the curriculum, there was no disruption, the class consists of older students and if the teacher otherwise has a good record. He further noted that a teacher's case is strengthened if the teacher's right to communicate correlates with the student's right to receive information and that school administrators will usually lose if they are inconsistent in enforcing rules or acts without knowing the relevant facts.

In 1989, yet another study involving in-class expression by public school teachers was conducted. Among the relevant findings in the legal analysis were: (1) It is more difficult for teachers to prove their First Amendment rights of speech and expression in the classroom have been

violated; (2) the courts have been consistent in not protecting proselytizing in the classroom; (3) courts have protected teachers' rights to determine their teaching methods, within limits and (4) school officials' rights to restrict teachers' speech, and expression in the classroom has become more complex.

The studies involving public school teachers are important for two reasons. First, many of the cases involved an analysis of Pickering and Tinker -- the same standard sometimes used for examining professorial speech by today's courts. Second, it appears the courts treat lower education and higher education similarly.

The studies of public school teachers' right to speak cases suggested that, while First Amendment protection was available, the teacher is more likely to lose than win the dispute. These findings seem consistent with university classroom cases. Concludes one author:

> The extravagant language of the Supreme Court on academic liberty has undoubtedly been sincere and well-meant, but it has created expectations of meaningful individual classroom liberty that cannot be met under either the concrete reality of its jurisprudence or the practicalities of university governance and autonomy. Rather than enjoying hyper-protected status under the first amendment, university classroom speech can be sharply curtailed (Katz, 1983, p. 932).

Therefore, the classroom speech literature is summarized as follows. First, it is the murkiest category of the three. Unlike out-of-class and

academic bickering cases, where the Three-Prong test is most often applied, courts have applied a variety of precedents to classroom speech issues. The Three-Prong, Tinker, Hazelwood, Keyshian and Sweezy all have been used in classroom cases in the past 28 years, making the case law inconsistent. Second, the literature indicates that courts are more likely to side with the institution than the individual professor in disputes over classroom expression. Third, courts appear to treat higher education much the same they do lower education. Finally, along the same lines, it appears that the situation may even get worse for professors in the 1990s. Hazelwood, a case dealing with student speech at a high school, has been applied to the university classroom and, in effect, gives institutions even more control over what takes place in a classroom.

The next section is closely related to the classroom speech issue. Academic freedom, often times described as omnipresent by faculty members, obviously plays a role in professorial speech questions, but it is unclear as to how significant that role is.

Academic Freedom And Its Impact On Professorial Speech

No precise definition exists for academic freedom. The concept encompasses several constitutional rights and includes contract law. The First, Fourth and Fifth Amendments to the United States Constitution fall under the academic freedom umbrella. If the AAUP Principles on Academic Freedom and Tenure or other customs or practices are formally placed into a professor's terms of employment, then contract law also comes into play.

However encompassing academic freedom seems, much of the literature suggests that courts are either confused by the concept or simply do not rely on it as a matter of law. Byrne (1989) wrote "there has been no adequate analysis of what academic freedom the Constitution protects or why it protects it. Lacking definition or guiding principle, the doctrine floats in law, picking up decisions as a hull does barnacles." Feldon (1989) describes the legal meaning of academic freedom as a "hollow phrase" and notes that it is seldom a significant factor in faculty free speech cases. Other articles point out that courts give more legal substance to institutional academic freedom than individual rights of professors. Other commentators such as Emerson (1970) have also questioned whether the concept has any independent existence apart from general free speech precepts:

> The Supreme Court has never undertaken to establish academic freedom as an independent constitutional right, in the same way, as example, as it created the constitutional right of privacy. The Court has simply used the principles of academic freedom for support in the application of traditional legal doctrine. It has resolved issues in terms of freedom of expression, establishment of religion, due process, the rule against vagueness, or similar constitutional principles. Thus academic freedom factors weigh in the balance in determining First Amendment rights under the balancing theory...But it is by no means clear that the results reached in any of the cases would have been different had the

academic freedom element been missing (p. 610).

In 1984, Holbrook conducted a detailed study as to how federal courts treated academic freedom claims. Among Holbrook's most significant conclusions was that litigation associated with faculty academic freedom was precipitated primarily by terminations of non-tenured faculty members. She also found that the litigation was most often initiated by politically liberal faculty at comprehensive institutions. Furthermore, Holbrook discovered that courts have not consistently distinguished faculty academic freedom from institutional autonomy nor recognized either concept as absolute. She wrote:

> Although overall these [courts'] decisions indicated strong support for these [free speech] rights, several decisions implied that institutions need not tolerate vulgarity and obscenity in speech. Some indicated further that such speech should receive greater tolerance in situations which included only professionals than in situations that included students as well. ..overall, this judicial approach implies considerable institutional independence in determining faculty terminations and suggests a claim that the termination violates the faculty member's academic freedom will be difficult to sustain (p. 249).

A study by Zirkel four years later, in 1988, painted a much bleaker picture than did Holbrook. Zirkel 's study encompassed more than just "free speech" issues, but his results are relevant to this study. Of the 59 cases examined between 1977 and

1988, only 16 cases specifically mentioned academic freedom. And in all the cases -- which either "implicitly or explicitly" discussed academic freedom -- educators won nine (32 percent). This prompted Zirkel to describe academic freedom as a "live but limited legal construct" in modern court decisions. One of his closing paragraphs succinctly illustrates his findings:

> The results of the analysis are sobering for the faculty member in higher education who might drink too deeply of the bottle labeled 'academic freedom' as an euphoric cure for various problems with colleagues, administrators and external governmental agencies...Regardless of the faculty member's rank and discipline and regardless of whether she or he is nontenured or tenured, whether the adverse action is the denial of a salary increment or the loss of employment, whether the expressive conduct is within or outside the classroom, and whether the academic freedom is explicit or implicit, the outcomes of the reported court decisions clearly favor the defendant college or university rather than the plaintiff faculty member (p. 811).

In sum, academic freedom, as a legal concept, carries little weight with the federal courts. Courts seem more interested in defending institutional autonomy rather than an individual professor's free speech rights or academic freedom.

Tenure As It Relates To Freedom of Speech

Similar to academic freedom, tenure is not well-defined and can have different meanings depending on the institution and other circumstances. Katz admitted this, but wrote: "Tenure is a concept that does not admit of any one definition, but if it means anything, it means the holder cannot be discharged without cause." The institution of tenure is designed to guard the faculty member against dismissal for political or other inadmissible reasons and to assure an economic security in which the professor can carry on a search for truth in teaching and research. It also has been described as the "chief device for assuring the faculty member freedom as a teacher, scholar and citizen" (Emerson, 1970, p. 594). A tenured professor also is afforded more procedural due process protections (e.g., notice and a hearing) than non-tenured ones.

The issue of tenure and how it may relate to free speech cases is not a new one. In Perry v. Sindeman (1972), a non-tenured junior college professor who was the president of the Texas Junior College Teachers Association publicly disagreed with his school's policies and became embroiled in a variety of disputes with administrators. His contract was not renewed and Sindemann sued, claiming his First Amendment free speech rights had been violated.

The junior college where he worked argued that, since Sindemann's contract was on a year-to-year basis, it had the right to terminate him without a hearing or any additional procedures. The United States Supreme Court

agreed, but stated:

> It [the college] may not deny a benefit to a person on the basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly (p. 2697).

The Perry ruling indicates that professors without tenure should be legally treated the same as those who have tenure, but the question remains as to whether that indeed has been the fact.

Bailey (1987) concluded that her study showed non-tenured professors have the same First Amendment rights as tenured ones. However, Eagle (1984) reached a different result in examining public school teacher cases. She concluded that teachers with tenure are afforded an extra but "unspoken measure of protection." Eagle also noted that her findings indicated it would be much more difficult for administrators to demonstrate that the First Amendment activity has so disrupted his or her employment responsibilities as to warrant discharge. She further explained:

> Without a property interest such as tenure, the non-tenured teacher has no right to a statement of reasons for non-renewal or a hearing on a decision not to rehire. A non-tenured teacher

> is generally not claiming violation of a contractual right since the contract has expired. Therefore, it is considerably easier in such a situation for the school administration to assert, or for a court to hold, that the decision not to renew is within the administration's prerogative to reduce friction among the faculty. (Eagle, 1984, p. 236).

Katz (1983) supports Eagle's conclusions. She notes that a nontenured faculty member cannot be dismissed, denied a contract renewal or denied tenure if the primary reason underlying the decision was an intention to deny the professor's First Amendment rights. However, she adds that, in practice, nontenured faculty members alleging retaliation for protected expressive activity may be unable to meet the burden of proving illicit intent without knowing the reasons for the institution's decision.

Summary

Chapter 2 can be summarized as follows. First, the literature clearly shows that professorial speech is an increasing problem in today's institutions of higher education and has been a controversial issue through American higher education history. Second, while there is no direct United States Supreme Court precedent that specifically focuses on speech by professor, a line of decisions from the 1950s to 1994 guides lower courts on the issue. The results have been both inconsistent and, as a general rule, more favorable to administrators trying to stifle speech than professors seeking to exercise the First Amendment rights.

Furthermore, professorial speech can be classified into three groups: classroom speech, out-of-class speech and academic bickering. The laws surrounding classroom speech appear to be the most murky as courts seem to pick and choose among the various precedents. The laws involving classroom speech and academic bickering seem to be applied more even-handed, although questions remain as to what constitutes a "matter of public concern."

Finally, the literature is unclear as to what impact academic freedom and tenure have on courts' analysis of professorial speech disputes. Academic freedom, while an often cited term by academicians, seems to be ill-defined and has little significant weight in First Amendment analysis. Tenure, on the other hand, also appears to have little weight in the courts' decisions on whether a professor's speech is protected under the First Amendment.

CHAPTER III

METHODOLOGY

Ninety-nine published decisions from 1968 to 1996 were examined to gain more knowledge into how federal courts analyze professorial speech issues to address the six issues stated in Chapter 1: First, are more free speech disputes taking place in federal courts today than in the past? Second, have the federal courts consistently applied United States Supreme Court precedents to the three types of professorial speech? Third, are professors more likely to lose free speech disputes today than in the past. Fourth, How have the courts examined the different classifications of professorial speech i.e., classroom, out-of-class, academic bickering, in the past 28 years? Fifth, do federal courts rely on the concept of academic freedom when deciding professorial speech disputes? Sixth, do federal courts offer more First Amendment free speech protection to tenured professors than they do to non-tenured ones?

Below is a brief explanation of precedents, legal analysis and legal reasoning and a discussion of the specific methodology used to examine the six issues.

Introduction

Jensen and Horvitz (1979) say that legal decisions rest upon the pattern

of facts set before the bar (Danelski, 1966).[9] The judges pick and choose from facts found in legal briefs, facts revealed by the evidence, and facts that originally occurred in nature (Reed, 1970). The facts that the judge considers both "true and important" are used to form the basis for the decision. This is the concept of *ratio decidendi:* a judge applies a rule of law to a combination of facts contained in the set of circumstances presented by the litigants in order to reach a decision.

Legal questions also require an extensive review of precedent. *Stare decisis,* an abbreviation of the phrase *stare decisis et non quieta movere* (to stand by what has been decided and not to disturb settled points), is the Latin term that explains the important of precedence. Legal scholar Roscoe Pound (1922) explains why precedents are important:

> the chief cause of our success of our common-law doctrine of precedents as a form of law is that it combines certainty and power of growth as no other doctrine has been able to do. Certainty is insured within reasonable limits in that the court proceeds by analogy of rules and doctrines in the traditional system and develops a principle for the cause before it according to known techniques. Growth is insured in that the limits of principle are not fixed authoritatively once or all but are discovered gradually by a process of inclusion and exclusion as

---

[9] One of the roles of the legal system is to "mark and guard the line between the sphere of social power, organized in the form of the state, and the area of private right (Emerson, 1970, p. 12). To do this, courts have typically

cases arise which bring out its practical workings and prove how far it may be able to do justice in its actual operation (p. 121).

Another way to explain precedent is as follows: "The previous treatment of occurrence X in manner Y constitutes solely because of its historical pedigree, a reason for treating X in manner Y if and when X again occurs" (Schauer, 1987, p. 571). For the purposes of this study, X is the professor who claims his First Amendment free speech rights have been violated. Y is how courts have resolved these free speech disputes.

Stated another way, to what degree are courts relying on the Connick precedent when deciding whether a professor has First Amendment protection for speech uttered outside the classroom? What precedents are courts relying on when deciding disputes involving in-class speech? Academic bickering? Are the courts consistently following these precedents?

To answer this question, the study discerned the legal reasoning used by judges in all published federal courts cases focusing on a professor's First Amendment free speech rights. To do this, the case method, which requires each case to be briefed or summarized, is used. Once each case is briefed, the researcher can collectively draw conclusions based on the similarities and differences of the court's reasoning. A brief discussion about the "case method" and legal reasoning appears below.

---

served as mediator between the government and the people, including in free speech disputes. The methodology in this study centers on an analysis of the courts' role in the professorial speech question.

The Case Method And Briefing

The "case method" relies on the analysis of judicial opinions to identify the principles of law. The technique, usually used in law schools, has been acknowledged as a valuable dimension of legal research in other fields as well. Case analysis, also called the "case method," is, to some degree, the application of content analysis to court decisions. Holbrook (1984) writes:

> The fundamental aspects are the same; both content analysis and the case method depend on objectivity, system and generality. Although the quantitative approach could be used to assess the frequency of particular content items in a series of court decisions, the common law school briefing technique is primarily a qualitative approach due to its focus on occurrence rather than frequency (p. 80).

According to Llewellyn (1951), case analysis assumes four things about a court's decision. First, the court must decide the dispute before it. Second, the court can decide only the particular dispute which is before it. Third, the court can decide the particular dispute only according to a general rule that covers a whole class of like disputes. Fourth, everything -- big or small -- must be read in past cases with primary reference to the particular dispute.

Legal Reasoning

Legal reasoning refers to the arguments that judges give, frequently in written form, in support of the decisions they render. The researcher uses the case method in an effort to ferret out important and systematic information

on a particular judge's legal reasoning.

> Legal reasoning involves not only, and not primarily, the application of rules of formal logic but also other methods of exposition. To reason, according to dictionary definitions, may mean to give grounds (reasons) for one's statements, to argue persuasively, or to engage in discourse. Law, insofar as it has a distinctive subject-matter and is founded on distinctive principles and purposes, has not only its own kinds of logic, but also its own kind of rhetoric, and its own kinds of discourse, which are, of course, similar to but distinct from the logic, rheortic, and discourse of other social institutions and scholarly disciplines, such as religion, politics, social science, or economic activities (Berman and Greiner, 1972, p. 414).

Berman and Greiner note that legal reasoning is logical in at least three ways. First, legal reasoning strives for consistency of rules and judgments. Second, it strives for continuity with the past and, third, it is dialectical in method. Inherent in all three elements is the most widespread form of logic, reasoning by analogy or the process of comparing and contrasting examples.

The authors, however, point out that "a large area of indeterminacy" exists in reasoning by analogy because "the criteria for selecting similarities and differences are not definitively laid out but are open to debate"(Berman and Greiner et al., 1972, p. 421). On the other hand, however, they explain that analogical reasoning does impose limits on legal results:

> In each society, there are some similarities and differences so strongly felt that the cannot be denied. Moreover, the range within which analogies may be found is often restricted by particular legal doctrines...In addition, each legal system establishes procedures and methods for drawing analogies -- such as adversary and investigative procedures or the method of precedent and the method of codification -- and these procedures and methods are designed to prevent analogical reasoning from becoming arbitrary (Berman and Griener et al., 1972, p. 419).

Edward Levi (1949) identifies a three-step process for how a judge legally reasons. In the first step, the researcher searches for a set of facts in previous case which are comparable to the case in question. Once this similarity is found, the researcher identifies the rule of law in the previous case. She then applies the rule of law to the present case. These steps are inter-related and a large measure of discretion is exercised by the judge in this process. While courts are bound by decisions in previous cases, they are not bound by the *ratio decendi* (reasoning of the decision) -- only the court's holding. Writes Levi:

> Where case law is considered, and there is no statute, [the judge] is not bound by the statement of the rule of law made by the prior judge even in the controlling case...It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent

whole, thinks should be the determining classification. In arriving at his result he will ignore what the past thought important; he will emphasize facts which prior judges would have thought made no difference (Levi et al., 1949, p.2).[10]

Research Procedures In This Study

The Period of Study

This legal study was based on selected published decisions by federal trial and appellate courts from 1968 until 1996. Federal courts were selected because most cases involving faculty free speech are typically brought under Section 1983, Title 42 of the United States Code. The four times frames were selected based on United States Supreme Court precedents. Pickering took place in 1968; Mt. Healthy was decided in 1977; Connick took place in 1983 and the 90s were chosen to find out what was going on in this decade.

Data Sources

This legal study drew exclusively on court decisions, law reviews and journals, academic journals and historical commentaries. The primary sources of data were the court decisions as printed in the Federal Reporters and Federal Supplemental Reporters by West Publishing Company.

The information found in the cases was supplemented by other primary and secondary sources. Dissertation Abstracts International, which is

---

[10] The standard position is that a judge is not bound by everything that was stated in the opinion on the prior case but only its ratio decidendi (the reason for decided the case in a given way). Most commentators also agree that a judge's attitude, experience and other factors may come into play when making a decision.

available on the Pro Quest database, was used to find studies relevant to the issue. The Index to Legal Periodicals also was used to locate law journal articles concerning the professorial speech question. Information found in various reference books and other databases also were used. The secondary sources used in this research included the legal and historical commentaries by both legal and academic scholars alike. In addition, some general publications such as newspapers and magazines were scanned to find the most recent conflicts on the issue.

Data Collection

The identification of potential court decisions for analysis in this study was first made by a computer database search using Westlaw. The search term **"faculty professor teacher instructor employee /p college university & "First Amendment" & "free speech" and date (after 12/31/1968)** was conducted on Westlaw. This was designed to find all federal court decisions from 1968 until 1996 on the issue. This initial search produced 1,084 cases. The search then was cross-checked by looking up cases in the Federal Digests and scanning relevant law journal articles.

Once the initial list was compiled, the cases were examined to determine if they (1) they dealt with a publicly employed professor and (2) whether the court did something more than a perfunctory analysis of the "free speech" claim. The cases were kept if they met both criteria. In addition, if while examining these cases, another decision was discovered, it, too, was added to the list. The final list included 99 cases.

Data Analysis

Each case was then briefed and analyzed as discussed earlier in this chapter. The "briefing" format for the purposes of this study included the following information:

1. Title of the case which indicates the opposing parties.

2. The case citation which indicates the volume and reporting system ,the page number and the year in which the case was decided.

3. The cause of action and procedural history.

4. The facts of the case as they are recorded in the court's opinion.[11]

5. The issues or questions of law decided by the court.

6. The precedent applied.

7. The court's reasoning for making the decision.

8. The disposition or what order was entered by the court as a result of its holdings.

9. Commentary on the decision, which may include concurring and dissenting opinions or personal views by the author (Statsky and Wernet, 1984).

Of particular importance is the fact that the free speech claim was dissected from the remainder of the lawsuit. For example, if a professor had filed a due process claim in addition to a free speech cause of action, only the free speech claim

---

[11] It should be noted that the "facts" as record in the court's opinion should not be viewed as complete or necessarily accurate. "The facts [as found by the courts] are not what actually happens in a case, " Judge Jerome Frank wrote. "The actual events, the real objective acts and words...happened in the past. They do not walk into the court. The court usually learns about these real, objective, past facts only through the oral testimony of fallible witnesses...The court...must guess at the actual facts" (Frank, 1949, p. 15).

was examined. Thus, a "win" or a "loss," for the purposes of this study, deals only with the free speech claim, not the entire lawsuit.

In addition, the following information for each case was noted: (1) Was the faculty member plaintiff tenured?, (2)What type of speech was at issue (classroom, out-of-class, academic bickering)?[12] and (3)Was academic freedom mentioned or a factor in the decision? Once the information was complied from each brief, it was then coded. A table was then set up with the following categories for each case: (1) outcome[13], (2) Name of court, (3) Type of dispute, (4) year the decision was published, (5) whether the professor had tenure, (6) what precedent was applied, (7) whether academic freedom was mentioned. Results were then placed in cross-tables and the analysis done.[14] The analysis for each of the six issues includes numbers. The numbers, however, were not statistically analyzed[15] and should be viewed as illustrative.

Once the results were compiled, the writing began. The writing focused on the issues discussed in Chapter 1 and identified both illustrative cases and trends among the cases as a whole. In addition, tables for each issue (e.g., academic freedom, tenure) were made.

---

[12] For the purposes of analysis, only one type of speech for each case was used in the cross tabulation.

[13] A "win" is classified as prevailing on the First Amendment claim. A "remand" is defined as a case being sent back to the trial court for further review or a decision that the case needs to go to trial. The study did not attempt to track down what happened after a case was remanded.

[14] The tabulations were done on Microsoft Excel.

[15] The decisions of the courts are not "mathematically inevitable" according to Berner and Griener (1972), but "always contingent upon the exercise of [the court's] judgment" (p. 416).

Summary

This chapter has provided the reader with a detailed explanation of the methodology employed in this study including how the cases were selected for examination, the nature of the legal analysis, and a discussion of the issues that will be examined. This leads to Chapter 4, which will give an overall discussion of the findings.

FINDINGS

The study focused on how federal courts treat the First Amendment freedom of speech claims of publicly employed professors. To examine this issue, 99 decisions published between 1968 and 1996 were briefed, coded and analyzed according to (1) outcome, (2) the type of speech at issue, (3) the year of the decision, (4) whether the professor/plaintiff had tenure, (5) what United States Supreme Court precedent was used in making the decision and (6) whether the court mentioned academic freedom or used it as a factor in the decision.

As discussed in Chapter 1, the study is framed by six issues. First, are more free speech disputes taking place in federal courts today than in the past? Second, have the federal courts consistently applied United States Supreme Court precedents to the three types of professorial speech? Third, are professors more likely to lose free speech disputes today than in the past? Fourth, how have the courts examined the different classifications of professorial speech i.e., classroom, out-of-class, academic bickering, in the past 28 years? Fifth, do federal courts rely on the concept of academic freedom when deciding professorial speech disputes? Sixth, do federal courts offer more First Amendment free speech protection to tenured professors than they do to non-tenured ones?

The analysis addressed those questions as follows. First, the numbers show that litigation over professorial speech issues increased in the 1990s as compared to previous years. Second, although the United States Supreme Court has not specifically dealt with the professorial speech issue, the courts were generally consistent in applying the same precedents to out-of-class and academic bickering.

The same cannot be said for classroom speech cases. Third, professors are likely to lose First Amendment free speech lawsuits and it appeared their constitutional protection for freedom of speech has declined. Fourth, federal courts generally found the First Amendment protected a professor's out-of-class speech more than the other kinds of speech: classroom and academic bickering disputes. Fifth, courts seldom relied on the concept of academic freedom when deciding a free speech claim. Sixth, tenured professors fared about the same as their nontenured counterparts in free speech disputes. These findings are more fully explained below.

ISSUE 1: ARE MORE FREE SPEECH DISPUTES TAKING PLACE IN FEDERAL COURTS IN THE 1990s THAN IN THE PAST?

FINDING 1: FREE SPEECH LITIGATION BETWEEN INSTITUTION AND PROFESSOR IS TAKING PLACE MORE FREQUENTLY NOW THAN EVER BEFORE.

The results showed that federal court decisions concerning professorial speech are more prevalent in the 1990s. As shown in Table I, from 1968 to 1976, 24 cases involving professorial speech took place. The number increased to 25 between 1977 and 1982, then dropped to 19 between 1983 and 1989. But 31 decisions have taken place from 1990 to January of 1996 -- a substantial increase.

TABLE I

NUMBER OF CASES BY TIME FRAME

Time Frame	Number of Cases
1968-1976	24
1977-1982	25
1983-1989	19
1990-1996	31
Grand Total	98

Another interesting statistic that emerged was an increase in the number of tenured professors becoming embroiled in free speech litigation. Of the 32 cases involving tenured professors, three took place from 1968-1976, five from 1977-1982, eight in 1983-1989 and 16 from 1990-1996. Therefore, in the past 13 years (1983-1996), 24 tenured faculty members filed suits compared to only eight from 1968 to 1982. Half of the 32 tenured professors filed lawsuits in the past six years. Those numbers suggested that tenured faculty members seeking First Amendment protection are more likely to resort to litigation now than ever before. The statistic also suggested that universities are less hesitant to discipline or dismiss tenured professors today than in the past.

ISSUE 2: HAVE THE FEDERAL COURTS CONSISTENTLY APPLIED UNITED STATES SUPREME COURT PRECEDENTS TO THE THREE TYPES OF PROFESSORIAL SPEECH?

FINDING 2: THERE IS CONSISTENCY IN THE PRECEDENTS APPLIED TO THE FREE SPEECH CASES, ALTHOUGH PROBLEMS STILL EXIST.

As discussed in Chapter 2, the Connick-Pickering-Mt. Healthy Three-Prong test is the precedent most frequently used by courts in the analysis of professorial speech cases. Other precedents such as Tinker, Hazelwood, Keyshian, Sweezy and Waters also have been applied to free speech cases.

TABLE II

U. S. SUPREME COURT PRECEDENTS BY TYPE OF SPEECH

	Type of Speech			
Precedent	Classroom	Outside	Bickering	TOTAL
Three-Prong	8	38	31	77
Tinker	0	6	0	6
Other	8	4	4	16

At first blush, some consistency among the courts was shown as about three-fourths of the decisions relied on either the Three-Prong test, some variation thereof or on the individual precedents of Pickering, Mt. Healthy and Connick. The remaining cases used a variety of United States Supreme Court precedents in resolving the free speech issue, including some not

discussed in Chapter 2.

The more important question, however, is how the "precedent" is applied. In theory, courts should apply the same rules (i.e., precedents) to the same types of cases. For example, the same test would be used for all in-class speech cases or all out--of-class decisions. The courts, for the most part, were consistent in out-of-class and academic bickering cases. Such was not the case for classroom speech. Below is a more detailed explanation, including some illustrations on how the test was applied.

In-Class Speech: A Muddled Picture

Of the 16 classroom speech decisions, there appeared to be little consistency. Eight applied the Three-Prong test (or some variation) but two of those cases dealing with sexually harassing comments had different results. Another series of cases focused on the university's right to control the curriculum, including one that relied on Hazelwood. Four other cases used either Keyshian or Sweezy as a precedent.

Three-Prong Test

An application of the three-prong test is illustrated in is Cohen v. San Bernadino Valley College (1995) where a remedial English instructor used obscenities and pornography as a part of his classroom lectures. The question addressed by the court was whether a state college may limit the classroom speech of its professors to prevent the creation of a hostile, sexually discriminatory environment for its students. The court found that Cohen's subject matter was of public concern, but concluded the university's

right to preclude disruption of the educational mission through the creation of a hostile learning environment was more important than the professor's right to speak on sexual matters in an English class.

A contrasting result was reached in the three-prong analysis in Silva v. University of New Hampshire (1994). Silva, like Cohen, used language alleged to be sexually harassing during his technical writing class. The court, however, found that Silva's comments were matters of public concern and that his right to speech outweighed the university's interest in precluding a sexually harassing environment.

Hazelwood Precedent

A third case in this group also merits discussion. In Bishop v. Aronov (1991), the court relied, in part, on Hazelwood to support the university's decision to reprimand a professor for discussing his religious beliefs in his human physiology class. The rule of law applied by the court stated that "educators do not offend the First Amendment by exercising editorial control over the style and content of student [or professor] speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (p. 1074).

Tinker Precedent

In Cooper v. Ross (1979), a non-tenured professor history professor informed his World Civilization and American Civilization classes that he was a communist, a member of the Progressive Labor Party and that he taught his courses from a Marxist point-of-view. The university, citing some of his

comments, failed to renew his contract. The court cited Tinker for the proposition that Cooper's "bare announcement" of his personal views did not materially or substantially disrupt classes. In fact, the court noted, the incident caused "remarkably little concern until the matter was publicized by the media" and "the subsequent public reaction is not the kind of disruption that can be balanced against a teacher's right to free expression." The court also discussed Keyishian and Sweezy in the decision.

Two-Tier Analysis and Curriculum

In Mahoney v. Hankin (1984), similar to the issues in Bishop and Silva, the court focused on the university's control of the curriculum. While the court cited Keyishian and appeared to rely on the instructor's academic freedom, it applied a two-tier analysis. First, was the professor's speech related to the curriculum? If so, then the court indicated a balancing similar to the one applied in Pickering should be applied, which weighs the state's interest in restricting the in-class speech against the teacher's interests, with a special consideration on the teacher's exercise of academic freedom.[16]

Teaching Style/Grading Practices

The other classroom speech cases involved the professor's teaching style and/or grading policies. In Hetrick v. Martin (1973) and Hillis v. Stephen F. Austin University (1982), the court focused more on the non-tenured status

---

[16] An alternative approach suggested by the court is the test used by the First Circuit: "Free speech does not grant teachers a license to say or write in class whatever they may feel like...and...the propriety of the regulations or sanctions must depend on such circumstances as the age and sophistication of the students, the closeness of the relation between the specific technique used and concededly valid educational objective, and the context and manner of the presentation." Mailloux v. Kiley (1971).

of the instructor and cited Board of Regents v. Roth (1972) for the proposition that a non-tenured teacher does not have a right to have teaching styles or grading policies insulated from review by her superiors.

A similar approach was applied in Lovelace v. Southeastern Massachusetts University (1986) where a non-tenured instructor refused to "inflate" his grades or lower his teaching standards. "To accept plaintiff's contention," the court said, "than an untenured teacher's grading policy is constitutionally protected and insulates him from discharge when his standards conflict with those of the university would be to constrict the university in defining and performing its educational mission" (p. 426).

The Sixth Circuit, however, reached a different outcome under similar circumstances. In Parate v. Isibor (1989), a non-tenured professor gave a "B" to a student, but administrators ordered him to change the grade. The court cited Sweezy and Tinker in finding that "the assignment of a letter grade is symbolic [constitutionally protected] communication intended to send a specific message to the student" (p. 827).

In sum, of the 16 cases, courts used various approaches. Some applied the traditional Three-Prong test, giving no consideration to the professor's academic freedom rights. Some applied the test, taking academic freedom into account. Most required, at a minimum, some link between the speech and the subject matter of the class. One of the cases recognized that a university must establish clear standards or otherwise notify a professor if her teaching methods are unacceptable (Ross ,1979). Other courts gave more weight to

institutional automony than they did freedom of speech.

Supreme Court Precedents As Applied to Out-of-Class Decisions

Overall, 48 of the cases involved questions focusing on out-of-class speech. Thirty-eight (79 percent) of the courts applied the three-prong test, some variation thereof or relied on the individual cases of Pickering, Mt. Healthy or Connick. More significant, however, is the 20 of the 21 cases since the 1983 Connick decision used the Three-Prong analysis or some variation thereof -- an indicator that courts are following similar guidelines when ruling on these types of issues.

Three-Prong

A recent example of the Three-Prong application is Scallet v. Rosenblum (1996). In that case, the court examined the free speech claims of a business instructor who, during faculty meetings, attempted to persuade colleagues to include more classroom discussion about women and minorities in the workplace and "the ways in which issues of social responsibility in business could be incorporated into classroom discussions" (p. 1005).

The court found that the diversity issue related to a matter of public concern, noting that "Scallet's expressed desire to reconstruct cases to reflect the psychology of women and African-Americans in the workplace, although curricular in nature, cannot be said to relate to matters solely of institutional or personal concern since it also speaks to the general debate on multiculturalism that currently thrives in all quarters of American society"

(p. 1014).

Next, the court applied the Pickering balancing test to see if Scallet's exercise of free speech was outweighed by the "countervailing interest of the state in providing public service the teacher was hired to provide"[17] (p. 1015). The court concluded that the university had offered no significant reason as to why its interest would outweigh Scallet's right to speak at the faculty meeting.

Having found for Scallet on the first two prongs, the court shifted to the Mt. Healthy third step. The court ruled that Scallet's comments at the faculty meeting were not the motivating factor for the university's decision. Instead, it was his disruptive teaching style and inability to get along with his colleagues.

Another case along the same lines is Idoux v. Lamar University (1993). The court found that Idoux's complaints about swapping of restricted and unrestricted funds and comments about improper practices by the faculty were of public concern. Second, the court held that Idoux's interests in communicating these matters easily outweighed the university's interest in promoting and administering an efficient university. But Idoux, like Scallet, lost when the court found that the university's decision to remove him from interim president did not involve his protected speech. The evidence showed, the court ruled, that the Board of Trustees was unaware of his

---

[17] The court in Scallet, similar to other courts, changed the wording of the Pickering balancing test in regard to the State's interest.

(p. 1014).

Next, the court applied the Pickering balancing test to see if Scallet's exercise of free speech was outweighed by the "countervailing interest of the state in providing public service the teacher was hired to provide"[17] (p. 1015). The court concluded that the university had offered no significant reason as to why its interest would outweigh Scallet's right to speak at the faculty meeting.

Having found for Scallet on the first two prongs, the court shifted to the Mt. Healthy third step. The court ruled that Scallet's comments at the faculty meeting were not the motivating factor for the university's decision. Instead, it was his disruptive teaching style and inability to get along with his colleagues.

Another case along the same lines is Idoux v. Lamar University (1993). The court found that Idoux's complaints about swapping of restricted and unrestricted funds and comments about improper practices by the faculty were of public concern. Second, the court held that Idoux's interests in communicating these matters easily outweighed the university's interest in promoting and administering an efficient university. But Idoux, like Scallet, lost when the court found that the university's decision to remove him from interim president did not involve his protected speech. The evidence showed, the court ruled, that the Board of Trustees was unaware of his

---

[17] The court in Scallet, similar to other courts, changed the wording of the Pickering balancing test in regard to the State's interest.

(p. 1014).

Next, the court applied the Pickering balancing test to see if Scallet's exercise of free speech was outweighed by the "countervailing interest of the state in providing public service the teacher was hired to provide"[17] (p. 1015). The court concluded that the university had offered no significant reason as to why its interest would outweigh Scallet's right to speak at the faculty meeting.

Having found for Scallet on the first two prongs, the court shifted to the Mt. Healthy third step. The court ruled that Scallet's comments at the faculty meeting were not the motivating factor for the university's decision. Instead, it was his disruptive teaching style and inability to get along with his colleagues.

Another case along the same lines is Idoux v. Lamar University (1993). The court found that Idoux's complaints about swapping of restricted and unrestricted funds and comments about improper practices by the faculty were of public concern. Second, the court held that Idoux's interests in communicating these matters easily outweighed the university's interest in promoting and administering an efficient university. But Idoux, like Scallet, lost when the court found that the university's decision to remove him from interim president did not involve his protected speech. The evidence showed, the court ruled, that the Board of Trustees was unaware of his

---

[17] The court in Scallet, similar to other courts, changed the wording of the Pickering balancing test in regard to the State's interest.

Academic Bickering Precedents

Another remarkably consistent application of U.S. Supreme Court precedents took place in the "academic bickering" category. Of the 17 cases decided between 1983 and 1996, 16 (94 percent) courts applied the three-prong test or some variation thereof. Only Feldman v. Bahn (1993), a case where a professor wrongly accused his colleague of plagiarism, failed to apply some variation of the Three-Prong test.

Little discussion needs to take place as the analysis in most cases was clear-cut. Courts simply found that the speech at issue, typically a personal grievance, did not address as a matter of public concern and, as a result, was not protected under the First Amendment. The second prong rarely came into play and, in other cases, the court concluded that the "speech" in question was not the substantial reason for the university's action.

ISSUE 3: ARE PROFESSORS MORE LIKELY TO LOSE FREE SPEECH DISPUTES TODAY THAN IN THE PAST? STATED ANOTHER WAY, HAS THE FIRST AMENDMENT FREE SPEECH PROTECTION AFFORDED BY COURTS DECLINED IN THE 1990S?

FINDING 3: PROFESSORS WIN FEW FREE SPEECH CASES AND THE FIRST AMENDMENT PROTECTION APPEARS TO BE SHRINKING IN THE 1990S

The most substantiated finding in this study is the fact that professors typically lose free speech litigation in the federal courts. Of the 99 cases examined between 1968 and 1996, professors lost 56 times (58 percent) and prevailed in 22 cases (22 percent). Twenty-one cases (22 percent) were remanded or proceeded to trial.

TABLE III

RECORD OF PROFESSORS IN FREE SPEECH CASES

N=99

Time Frame	Win	Loss	Remand
1968-1976	5	14	5
1977-1982	11	9	5
1983-1989	1	12	6
1990-1996	5	21	5
Grand Total	22	56	21

Issue 3 not only dealt with the overall record of the professors but also focused on the constitutional protection afforded faculty members in the 1970s or 1980s as compared to today. Were courts more likely to rule for professors in the 1970s? In the 1980s? Today? As noted in Table III, the number of remands in each time frame were similar, but the won-loss statistics varied greatly.

1968-1976: The Early Years

As discussed, the Pickering decision instructed the courts to balance the free speech rights of the teacher against the school's need to efficiently function. At this time, neither Mt. Healthy nor Connick had yet been decided.

Twenty-three decisions between 1968 and 1976 were examined. Professors lost 14 of the decisions, won five and five were remanded. Of the 24 cases, 14 disputes involved out-of-class speech, seven focused on bickering and only two dealt with in-

class expression. Twenty of the faculty members who sued during this time did not have tenure.

Of the 24 cases, the courts, for the most part, relied on the Pickering balancing test. Of the five cases where the professor prevailed, courts found that the speech was protected, it was not disruptive and that the university had taken the disciplinary action because of that protected speech. In the cases where the university won, the courts either found that the professor's speech was disruptive or that the speech was not the reason for the discipline or dismissal.

Cases Where Professors Prevailed

In Pickings v. Bruce (1970), a church refused to allow five African-Americans to attend services. Consequently, a student group called SURE (Students for Rights and Equality) sent a letter to the church about the incident. In addition, the student group had invited two militant and controversial speakers to campus. The president of the university suspended SURE's charter and failed to renew the contracts of two faculty advisers. The advisers and students sued in federal court, asserting their First Amendment free speech rights had been violated.

The trial court ruled for the university, but the Fifth Circuit reversed. Relying on Pickering and Tinker, the court reaffirmed that "students and teachers retain their right to freedom of speech...while attending or teaching at a college or university" (p. 598). The court acknowledged that the letter and invitation to the speakers exacerbated tension on campus, but that, in itself, was not enough to justify punishing the students and faculty for their speech. Several other cases during this time frame indicated that professorial speech would be protected unless the

institution could show that the comments significantly disrupted or substantially interfered with university operations.

A similar case to Pickings was Smith v. Losee (1973). A junior college denied Smith tenure for his "anti-administration" attitude and for his role as faculty adviser to a student group that sent out controversial fliers for a local state senate election. The court found the speech to be protected and, as a result, the college erred in denying tenure. Professors also prevailed in Rampey v. Allen (1974) and Phillips v. Puryear (1975). In Rampey, the university president terminated 14 professors, tenured and non-tenured, after they held a press conference criticizing him. He said he believed they were divisive and overly critical. The court, however, concluded that a college president does not have "absolute control" over what a faculty member says. The fact that the president disagrees with the professors' statements is not enough to show it burdened school operations. In Phillips, a professor bitterly complained about the unfairness of a committee report that recommended he not be rehired. The court said such speech, as long as it did not constitute true threats of harm, was protected.[18]

Cases Where The University Prevailed

An example of a case where the university prevailed is Rozman v. Elliott (1972). Rozman and other demonstrators, mostly students, staged a sit-in demonstration at the ROTC Building on the University of Nebraska-Lincoln

---

[18] The court based its ruling, in part, on Chaplinsky v. New Hampshire (1942). In Chaplinsky, the court wrote: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been through to raise any Constitutional problem. These included the lewd, and obscene, the profane, the libelous, and the insulting or 'fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any

campus. Rozman, a non-tenured faculty member, then became involved in tense negotiations with administrators who wanted the building vacated. After an all-night stand-off and an order by the president to vacate the building, Rozman and several others refused to leave for several hours. Rozman's contract was subsequently not renewed for the following year because of his "disruptive" activities in the demonstration.

The court found for the university. It found that Rozman had a First Amendment right to participate in the demonstration, but, once he began openly opposing administrators in the negotiations, he was "intermeddling" in campus operations. Intermeddling, ruled the court, crossed the line between merely expressing an opinion and significantly disrupting campus operations.

Of the remaining cases from 1968 to 1976, the university usually prevailed because the courts believed that the professor's "speech" was not the reason for the personnel decision. In Hetrick v. Martin (1973), a non-tenured English professor, argued that she was dismissed because she told her class that she was an "unwed mother" and discussed the Vietnam war in class. But the court rejected Hetrick's argument and found that the university had a right to terminate a non-tenured professor because her teaching methodology did not conform with the approved curriculum. Her teaching style -- not her speech --was the reason for her dismissal. Wrote the court:

[Academic freedom] does not encompass the right of a

---

exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

> nontenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession. (Hetrick, 1973, p. 709).

Mt. Healthy: 1977-1982

In 1977, the United States Supreme Court decided Mt. Healthy, which required the plaintiff to prove that her speech was the "substantial" or "motivating" factor for the university's actions. Nearly every case during this five-year period cite Mt. Healthy and, from a historical perspective, this time frame proved to be the most prosperous for professors seeking First Amendment free speech protection. Of the 24 cases examined, professors won 10 and lost nine. Five cases were remanded or held over for trial.

Similar to the 1968-1976 era, most disputes surfaced after universities decided not to renew the professor's contract. Thirteen involved out-of-class speech and 19 plaintiffs did not have tenure.

Of the 10 cases where a professor prevailed during this time frame, the common denominator appears to be speech aimed at someone off campus, a situation where a professor "blows the whistle" on an alleged improper or illegal university activity or a discussion about a university's financial practices.

Speech To Off-Campus Audience

An illustration of the former is Aumiller v. University of Delaware (1977). The comments of Richard Aumiller, an instructor and manager of auxiliary

services, concerning his homosexuality appeared in three newspaper articles. Following the publication of the articles, the university decided not to renew his contract for the following year. Aumiller sued.

The court first found, relying on Pickering, that Aumiller's published comments were protected speech and also concluded that the comments served as the university's sole reason for not renewing his contract. "Homosexuality is an extremely emotional and controversial topic, " the court wrote, "but this unpopularity can not justify the limitations of First Amendment rights....the fundamental purpose of the First Amendment is to protect from State abridgment the free expression of controversial and unpopular ideas" (p. 1301).

Whistleblowing/Financial Practice Cases

The "whistleblowing" cases are best illustrated by Hickingbottom v. Easley (1980). Marion Hickingbottom, without consulting his superiors, wrote a letter to the Arkansas Motor Vehicle Department and reported that two cars furnished to the university president had "improper" dealer tags. The Motor Vehicle Department investigated and resolved the problem, but, once the president discovered who wrote the letter, Hickingbottom's contract was not renewed.

The court, relying on Pickering and Mt. Healthy, emphasized that reporting violations of the law is of public concern. "The interests of society in encouraging teachers, as well as other citizens, to speak out and report violations of the law far outweigh the interests of the College in preventing embarrassment" (p. 985). The court also noted that Hickingbottom did not go public with his allegations, but reported it to the proper authorities.

United Carolina Bank v. Board of Regents (1982) involved a professor who had frequently, including to persons off campus, alleged the university had misallocated research funds. Administrators subsequently canceled his travel funds, refused to give him general pay increases and changed his teaching assignments. The professor resigned and filed a lawsuit. The court, noting that the professor's speech was accurate, found that the university failed to prove that his "words so interfered with the operation of the institution as to justify terminating an otherwise competent teacher" (p. 562).

University Prevails

The university generally prevailed during this time frame because courts found that speech in question was not a substantial factor for the discipline or dismissal. In addition, most of these disputes centered on academic bickering. Illustrative of the cases is Russ v. White (1981). Russ, dean of instruction at Garland County Community College, was fired after feuding with the president of his school over who should be hired as basketball coach. A coach was hired, but Russ -- whose responsibilities included the athletic department -- refused to take responsibility for overseeing him. Furthermore, Russ engaged in several heated arguments with his president. At one point, he told the president he needed "psychiatric help" and accused the president of being immoral, dishonest and manipulative. He also told the president to commit suicide.

The court held that such language was not protected under the First Amendment, noting that Russ had no constitutionally protected right to express himself in a "unbusinesslike" and "unreasonable" manner." Dr. Russ was not

terminated for the expression of his opinion but rather the manner in which it was expressed," (p. 897) the court wrote.

Connick: 1983-1989

In 1983, the United States Supreme Court decided Connick v. Myers, a case that many believe watered down First Amendment protection for all public employees, including teachers and professors. As earlier discussed, in addition to applying the Pickering balancing test and the Mt. Healthy substantial factor requirement, Connick provided a more stringent standard on what constitutes a public concern.

The negative influence of Connick seemed easy to spot in the analysis as professors won only one of the 19 cases decided between 1983 and 1989 -- the lowest of the four time frames. For example, in Mahaffey v. Kansas Board of Regents (1983), a tenured professor began to receive negative evaluations and subpar salary increases after he advocated that his parks and areas management program be accredited separately from the Forestry Department -- a view that did not sit well with his supervisor or colleagues. The court, relying on Connick, found such speech concerned an individual or private concern, not a public one. Similar results took place in Martin v. Parrish (1986) and Ballard v. Blount (1983). Neither Martin's profane language in class nor Ballard's salary concerns were a matter of public concern.

The university prevailed in 10 other cases for two reasons. First, the courts found that the speech was not a "substantial factor" in the university's decision to terminate or discipline the professor. In Kellerher v. Flawn (1985), the court found

that a graduate student teacher was reassigned because of insubordination and failure to abide by department regulations. In Lovelace v. Southeastern Massachusetts University (1985), the court found that he had failed to adhere to university academic standards.

The second reason focused on the disruptiveness of the speech. For example, in Maples v. Martin (1985), a group of faculty members were transferred after they conducted a survey of their department and distributed the results to an accrediting board, faculty, students and some alumni. The report, extremely critical of the department head, discussed the need for improvements. The court held that the report was of public concern but then concluded: "The publication of the Review contributed to a lack of harmony among the faculty and interfered substantially with the regular operations of the Mechanical Engineering Department" (p. 1554).

Today's Litigation: 1990-1996

The numbers improved slightly for professors seeking First Amendment free speech protection, but the outcome remained dismal. Of the 31 cases, professors won five and lost 21. Five were remanded.

Professors Prevail

Four of the five cases where professors prevailed involved speech that took place off-campus. In McCann v. Ruiz (1992), an associate Geology professor who also acted as Director of the Seismic Network for the University of Puerto Rico appeared on a radio program. On the program, he questioned the location of a coal-induced power plant and said he believed the plant may represent a danger to Puerto Ricans because it would be too close to a potentially active seismic fault line.

The comments also appeared in a newspaper article. University officials, contending that McCann was a "troublemaker," subsequently denied him tenure and his contract as director was not renewed.

The court found that the speech was of public concern and that the university's argument that his speech was not the reason for their actions was "fanciful." The court also noted that the First Amendment interests of McCann in speaking out on a matter of public concern clearly outweighed the interests in maintaining an efficient department. Similar results took place in Roos v. Smith (1993) where a university attempted to punish a professor for testifying against them in a discrimination case and Barnett v. State of Wisconsin (1991) where the court ruled that a professor could not be prevented from talking to legislators about state funding.

Universities Prevail

In the cases won by universities, eight courts, relying on Connick, found that the professors' speech was not of public concern. Most of these cases, however, were academic bickering disputes. In Colburn v. Trustees of Indiana University (1992), two sociology professors, embroiled in departmental politics and upset over the management of the department, wrote a letter to the dean of faculties. The professors subsequently were denied tenure. The professors' letter, which was a request for external review of the department, was made in the context of a faculty feud, the court reasoned.

A second group of cases indicated the university prevailed because the court found the professor's speech not to be the substantial factor for the demotion or

dismissal. For example, in Idoux v. Lamar University (1993) a faculty member who was serving as interim president refused to consent to what he felt were unauthorized and unethical payments to the former women's basketball coach. He also opposed requests from improper "swapping" of restricted and unrestricted university funds, permitting the faculty to engage in private enterprises at the university's expense and violations of the school's alcohol policy. Idoux was removed from the presidency after these comments.

The court unequivocally held that allegations of mismanagement (such as the ones echoed by Idoux) almost always raises the "imprimatur of public concern." The court noted "the fact that the speech was delivered privately...rather than to Bob Woodward and Carl Bernstein does not necessarily render the speech any less protected" (p. 1257). The court also found that Idoux's rights to speak outweighed those of the university. However, on the third prong, the evidence, concluded the court, did not show that the Board of Regents knew about Idoux' comments prior to their decision to dismiss him. Therefore, the speech was not the cause of the dismissal.

Two other cases, decided after the United States Supreme Court decision in Waters v. Churchill, also favored universities. In the aforementioned Jeffries v. Harelston (1995), a case that had earlier made it to the Supreme Court, a department chair had given an anti-Semitic speech at an off-campus site. His term as department chair was reduced. Jeffries sued and the trial and appellate courts ruled in his favor. The Supreme Court, however, remanded and ordered the lower courts to review the Waters decision in regard to Jeffries' case.

On remand, the Second Circuit ruled that the university's action did not violate Jeffries' First Amendment free speech rights. The court held that the speech in question -- namely comments about the New York state public school curriculum and black oppression -- was a matter of public concern. But it then concluded that Waters required the university only to show a likely interference -- not that an actual disruption took place. Since administrators believed his comments would likely interfere with the operations of the university, their actions were protected.

In sum, the findings indicate that courts were more likely to rule in favor of professors in the time frame between Pickering and Connick. Professors won 15 cases during that era, compared to six from 1983 to 1996. Reasons for the differences are unclear, although it appears that courts before Connick generally put a higher value on the individual's right to speak than on the institutional interests. Moreover, courts in the early days seemed to be more tolerant of a professor's criticism or complaining. That philosophy appeared to shift under Connick's public concern test.

ISSUE 4: HOW HAVE THE COURTS EXAMINED THE DIFFERENT CLASSIFICATIONS OF PROFESSORIAL SPEECH?

FINDING 4: COURTS ARE MORE LIKELY TO PROTECT OUT-OF-CLASS SPEECH BY THE PROFESSOR RATHER THAN CLASSROOM SPEECH OR ACADEMIC BICKERING.

The professorial speech of each case was divided into one of three categories: classroom speech, speech uttered outside the classroom and academic bickering. The findings indicated that out-of-class speech is the most protected; however, classroom speech received less protection than either out-of-class expression or

academic bickering. Table IV illustrates this.

TABLE IV

THE PROFESSORS' WIN-LOSS PERCENTAGE BY TYPE OF SPEECH

N=99

	Outcome Percentage			
Type of Speech	Win	Loss	Remand	Total
Classroom	13%	68%	19%	100%
Out-of-Class	31%	40%	29%	100%
Bickering	14%	74%	12%	100%

Speech Outside The Classroom

Out-of-class speech, the most diverse group, in the three-tier classification is when a professor is speaking or writing to someone outside the classroom. Sometimes, the audience is colleagues or administrators in the department or on campus, but, in most cases, however, the audience is some individual or group located off-campus.

The findings show that courts safeguaded out-of-class speech more than the other two other categories. Of the 48 cases in this category, professors won 15 (31 percent), lost 19 (40 percent) and 14 (29 percent) were remanded. For purposes of discussion, the cases have been divided into four general types of cases: (1) Comments to media, legislature or letters to someone outside the university; (2) Demonstrations or faculty activity in local politics; (3) Public comments aimed at someone off-campus; and (4) comments to

someone on-campus.

Comments To Media, State Agency, Organizations Outside The University

The most protected out-of-class speech was comments to newspapers, radio stations, legislative committees or other organizations outside the university. Of the 10 cases falling in this category, professors prevailed nine times.

In McCann (1995), a director of the Seismic Network for the university (and also an assistant professor of geology), appeared on a radio program and questioned the location of a coal-induced power plant to be located in Mayaguez. The court found that the speech was indeed protected and further concluded that McCann's interests clearly outweighed the State's interests. Similar protection was afforded professors in similar type situations.

The cases involving communications to a state agency or the legislature are best illustrated by D'Andrea v. Adams (1980). A tenured professor traveled to the State Capitol in Montgomery, Alabama and told state officials that his university, Troy State University, improperly used funds. The court found that such comments are protected and did not present a "substantial risk of weakening and undermining the state legislator's support for the university" (p. 476). A 1992 decision in Wisconsin reached the same result, emphasizing that school funding is a matter of public concern and teachers are uniquely qualified to discuss such funding.

One unclear issue, however, was letters to an accreditation agency. In Johnson v. Lincoln University (1985), a professor wrote a letter to an

accreditation agency concerning the low academic standards of his university. The court found that questions of academic standards[19], as was the subject of the letter, were public concern.[20] But in Harris v. Mississippi Valley State University (1995), a professor's letter to an accreditation agency was not of public concern. The reason is that the letter simply informed the agency, pursuant to university policy, about the hiring of another professor. It did not, the court concluded, complain about university misconduct or otherwise communicate an issue of public concern.

Another murky question in out-of-class cases was the filing of a formal grievance or lawsuit. In Grace, a state court lawsuit that complained about the way the university had procedurally handled teaching assignments, leaves of absences and merit raises was not considered to be of public concern. The professors, the court wrote, "presented no evidence that their primary motivation was to aid other faculty members or draw attention to matters beyond their own personal interests" (p. 393).

In San Filippo v. Bongiovanni (1994), a professor who had frequently been in disputes with administrators, filed a grievance that he had been denied promotion through manipulation of his promotion packet. While the grievance was pending, the department recommended he be denied tenure. The court did not analyze the grievance under the freedom of speech

---

[19] A definition of academic standards was not provided by the court.
[20] The case was remanded so the trial court could apply the Pickering balancing test.

but instead examined the First Amendment petition clause.[21] It remanded the case, but noted that a professor's "petition" (i.e., grievance or lawsuit) may enjoy more First Amendment protection than his speech.

Political Activity

The second group of cases involved professors who participated in boycotts, demonstrations or other political activity. Typically, these cases took place during the 1970s as faculty and students alike protested the United States' involvement in Vietnam. Participation in demonstrations or boycotts was generally protected, unless a professor was shown to be an agitator or a significant disruption to university operations. Professors also lost these type of cases when the speech was not a factor in the dismissal.

Comments Generally Aimed At The Public

The third category of out-of-class cases focused on public comments aimed at someone outside the university. Illustrative of this was Peacock v. Duval (1982). Peacock, the head of the department of surgery, vigorously opposed changed in systems for allocating funds received for professional services and publicly criticized administrators about the way medical education should be funded at a public institution. He subsequently was asked to resign.

The trial court found for the university, but the appellate court remanded the case, holding that at least some of the speech was protected

---

[21] The First Amendment reads, in part: " Congress shall make no law...abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

because it concerned questions of policies relating to public medical schools. "Merely because Peacock's speech may have irritated or even harassed the university administration does not mean that such speech is stripped of its First Amendment protection," (p. 647) the court explained.

On-Campus Speech

A fourth group of cases involved communication from a professor to someone on-campus. In Stern v. Shouldice (1983), Stern advised a student to hire an attorney. The student had been suspended by the university for being arrested for marijuana possession by Canadian police. The court found that the advice did not effect his teaching or cause problems with faculty and, therefore, was protected. Conversely, a basketball coach who used the word "nigger" (which was deemed by the court to not be a matter of public concern) in a closed-door locker room session lost his case.

In sum, the cases suggested that, if the speech was aimed at someone off-campus, courts would grant First Amendment protection. If the professor made his comments public, often times that speech would be protected. However, if the professor simply spoke or wrote to another individual with no intent of making the speech public, protection was not forthcoming.

Another significant factor was the courts' interpretation of a "matter of public concern." The ends of the spectrum seemed clear. A purely personal complaint by the professor/employee was not public concern and thus not protected. However, public comments by the professor to the media on a funding issue was usually considered to be of public concern. The more

difficult issues were somewhere in between.

As a general rule, it appeared that the speech would more likely be of public concern if at least part of the audience was off-campus and the subject dealt with something other than a professor's own personal dilemmas. One example was Jeffries' off-campus speech on black oppression. Another was Levin's article in a scholarly journal. In Maples, the court found a critical report of the professors' department (which was distributed to some persons outside the university) was of public concern. Speech aimed at someone on-campus, particularly a department head or colleague, and that involved departmental issues was usually not considered to be of public concern.

Cases Involving In-Class Speech

The findings clearly showed that a professor's classroom speech has rarely been protected by courts. Of the 16 cases, professors prevailed only twice and lost 10 times. Three of the cases were remanded.

The most recent victory came in Silva v. University of New Hampshire (1994). Dr. Donald Silva, a tenured professor, taught a technical writing class where he compared the subject to sexual relationships, described "belly dancing" as like Jell-O on a plate with a vibrator underneath and made other comments believed to be sexually harassing by students and some administrators.

The court, however, did not agree with university officials. In a two-part analysis, the court first found that the university's sexual harassment policy violated Silva's First Amendment rights because it did not take into account the professor's academic freedom interests. The court then proceeded to analyze the claim under

the Connick standard and found that the speech uttered by Silva was a matter of public concern. Silva's comments, the court emphasized, were made for the legitimate pedagogical, public purpose of conveying certain principles related to the subject matter of his course. In addition, the court found that the content, form and contest of his statements were directly related to "the preservation of academic freedom" and whether speech "offensive" to a particular class of individuals should be tolerated in American schools. Consequently, the court concluded that Silva's free speech interests were "overwhelmingly superior" to the university's interest in proscribing the speech.

The other win by a professor came in 1979 in Cooper v. Ross. Cooper, a non-tenured history professor told his World and American Civilization classes that he was Communist, a member of the Progressive Labor Party and taught from a Marxist point-of-view. A student newspaper later published an article about Cooper's classroom comments, prompting considerable newspaper and television coverage. In addition, 23 state legislators filed a lawsuit against Cooper and the University, requesting he be enjoined from further employment.[22] The university later notified Cooper that he would not be given tenure.

The court, however, found that Cooper's announcement to his class was constitutionally protected. Citing Tinker, it noted that the "Supreme Court made clear that some in-class protection of political beliefs by teachers and students alike is protected." The court further reasoned that Cooper's comments did not "materially"

---

[22] At that time, Ark.Stat.Ann. 41-4113(c) stated: "No person who is a member of a Nazi, Fascist or Communist society, or any organization affiliated with such socities, shall be eligible for employment by the State of Arkansas, or by any department, agency, institution, or municipality thereof."

or "substantially disrupt" classes and caused little concern until the incident was publicized by the media.

It appears that Silva and Cooper prevailed, to some extent, because their comments were deemed to have a nexus to the subject matter. The same was true for the other two cases remanded -- Dube v. State University of New York (1990) and Mahoney v. Hankin (1984).

In-Class Speech Cases Remanded

Dube taught a Politics of Race class that included material on Nazism, Apartheid and Zionism. He was accused, however, of teaching his own personal ideology (i.e., that Zionism is as racist as Nazism). The university subsequently denied tenure to Professor Dube. The appellate court, however, noted that academic freedom protected his comments in the classroom, but sent the case back to the trial court because it was unclear as to whether the denial of tenure was related to the speech. Mahoney taught a political science court where he discussed some of the university's controversial issues. The court found such comments to be related to political science and protected but proceeded to trial to determine whether the speech significantly impeded university operations. In nearly every case in this area, the key question was whether the speech was relevant to the subject matter of the class.

Cases Where University Prevailed

One case, however, illustrated the "gray area" in determining whether speech is relevant to the subject matter. In Bishop v. Aronov (1991), a human physiology teacher, was reprimanded after he referred to his religious beliefs during class and in

after-class meetings. The court focused not on the relevance of the speech to the class but on the proposition that a university has the authority to reasonably control curriculum content. Wrote the court: "His [professor Bishop] educational judgment can be questioned and redirected by the University when he is acting under its auspices as a course instructor, but not when he acts as an independent educator or researcher. The University's conclusions about course content must be allowed to hold sway over an individual professor's judgments" (p. 1076). Another case, Lovelace (1986), also concluded that course content, homework load and grading policies are university core concerns.

The cases also indicated that, even where a professor's speech is relevant to the class's subject matter, the university may still prevail. For example, in Cohen v. San Bernadino Valley College (1995), a remedial English professor discussed cannibalism, consensual sex with children and other vulgaries in the classroom. The court found the comments to be of public concern, but decided that the State's interests in educating its students outweighed Cohen's interest in focusing on sexual topics in the classroom. Scallet v. Rosenblum (1996) had similar reasoning. Also, if the court found that the reason for the discipline or termination was for some legitimate reason other than the speech, the university prevailed.

Academic Bickering

Academic bickering is speech that usually arises because of a professor is unhappy about working conditions (i.e., salary, personnel decisions, management decisions). The findings showed this speech to be the most

litigated.

Of the 35 cases in this group, professors won five, universities prevailed 26 times and there were four remands. Perhaps the easiest finding in the study was that speech uttered as a part of a professor's personal grievance will not be protected.

In Dodds v. Childers (1991), a community college instructor who repeatedly complained about the president's sister-in-law did not have her contract renewed. The court found that Dodds' primary concern was the effect of the president's sister-in-law on her own employment, not its potential impact on the public interest. The court also held the issue was not a matter of public concern: "We have previously found that complaints might rise above the purely personal level, but are instead expressed only as issues of employee favoritism, are personal grievances rather than issues of public concern" (p. 274).

In Mahaffey (1983), a tenured professor proposed the parks and recreation management program be accredited separately from the Department of Forestry. In addition, he publicized a student paper in his classes that unflatteringly portrayed certain administrative decisions taken within the department. He also complained about his salary. Mahaffey's teaching load was then reduced to a nine months and a written reprimand put in his personnel file.

The court found that Mahaffey's speech (i.e., concerns about salary, management problems as they related to him) were "quintessentially items of

individual, rather than public, concern." An individual cannot "bootstrap his individual grievances into a matter of public concern by bruiting his complaint to the world," (p. 890) the court wrote.

Examples of Bickering Speech Not Protected

Dodds and Mahaffey illustrated the general consensus of the courts. General complaints about working conditions or personnel matters raised by a professor having problems with a department chair and/or other administrators simply were not deemed to be of public concern. Consequently, speech concerning salaries, petty disputes with administrators, disputes over personnel decisions, criticism over how a department chair is selected and in-fighting among colleagues typically will not be protected. Courts were consistent on this point: Howze v. Virginia Polytechnic (1995)(vocally alleged she was discriminated against), Harris v. Mississippi Valley State (1995)(letter to accreditation board), Harris v. Merwin (1995)(complaints about the hiring of a department head), Dambrot v. Central Michigan University (1993)(used the word "nigger" when speaking to his basketball players), Hartman v. Board of Trustees (1993)(refused to follow instructions she deemed improper) Grace v. Board of Trustees (1992)(complaints about employment of the president's sister-in-law), Keen v. Penson (1992)(letter written to student demanding apology) and Ayoub v. Texas A&M (1991)(upset over salary increase). Moreover, the courts agreed that the First Amendment did not protect speech and conduct amounting to insubordination aimed at school officials (Hillis, 1982).

Some exceptions to the above rule emerged, although the cases took place prior to the Connick decision. In Lindsey v. Board of Regents (1979), a group of professors distributed a questionnaire to all faculty members' mail boxes in the College of Education. The university investigated, attempting to determine if university supplies or facilities had been improperly used and later decided not to renew Lindsey's contract.

The court found that the questionnaire solicited views on a "broad range of issues" involving teaching, administrative-faculty relationships and consequently was protected under the First Amendment. The questionnaire, reasoned the court, was "neither a mere in-house dialogue about administrative details nor an indication of the adequacy of teaching performance of Lindsey" (p. 675). This decision, however, is limited to some extent because it was decided prior to the Connick decision.

Similar facts took place in Honore v. Douglas (1987). Honore had been denied tenure by the dean after he had been "active" and "vocal" in law school affairs. He had protested actions by the dean, signed grievance letters and had expressed a lack of confidence in the dean. Among the controversial issues were the law school admissions policy, the size of the student population, administration of the budget and failure to certify graduates for the Texas bar examination in a timely fashion.

The court found that such issues were of public concern and thus protected free speech. The case, however, was remanded to determine if the tenure denial took place for a reason other than the speech.

Perhaps the most bizarre circumstance occurred in this category. In Luxemberg v. Texas A&M University, a director accused Luxemberg, a Jewish immigrant from Russia, as being a KGB agent. He made the allegations to the FBI, who investigated and could not substantiate the charges. About the same time, Luxemberg had accused the director of fraudulently overstating equipment costs. Subsequently, Luxemberg's salary was reduced and he sued. The court concluded that Luxemberg's accusation was protected by the First Amendment, but found that the professor was disciplined for not doing his job.

In sum, the decisions drew a line (although not a clear one) between personal grievances (e.g., salaries, teaching assignments, personality disputes) and complaints about legitimate issues that touched on the academic performance of a department or university. Another factor that played a role was whether the professor had been in a long-running dispute with supervisors or colleagues.

ISSUE 5: DO FEDERAL COURTS USE THE CONCEPT OF ACADEMIC FREEDOM WHEN DECIDING PROFESSORIAL SPEECH DISPUTES? WHAT IMPACT DOES THE CONCEPT HAVE IN FREE SPEECH QUESTIONS?

FINDING 5: ACADEMIC FREEDOM IS NOT A SIGNIFICANT FACTOR IN MOST PROFESSORIAL SPEECH CASES

About one in every three cases decided discussed academic freedom, but it rarely made a difference in the outcome. Of the 99 cases, 30 courts discussed the academic freedom issue. Of those, however, professors only won six and lost 18. Six were remanded. Sixty-nine of the decisions did not mention academic freedom.

TABLE V

ACADEMIC FREEDOM CASES BY OUTCOME

	Outcome		
Academic Freedom	Win	Loss	Remand
AF Mentioned	2	16	3
AF Factor in Decision	4	2	3
AF Not Mentioned	16	38	15
Grand Total	22	56	21

The decisions discussing academic freedom, typically a factor only in classroom speech cases, can be divided into four groups: (1) cases where the courts appeared to have found that academic freedom was an independent First Amendment right; (2) cases where the court took into consideration the professor's academic freedom as a part of the Pickering balancing test; (3) cases where the court found that the university's academic freedom outweighed the individual professor's academic freedom; and (4) courts that simply said it was unclear as to the constitutional weight of academic freedom.

Academic Freedom As Independent First Amendment Right.

The group of cases giving a professor's academic freedom significant weight generally required that the speech at issue was (1) germane to the subject matter and (2) served an educational function. (Martin v. Parrish (1986). For example, in Silva v. University of New Hampshire (1994), found that the University of New Hampshire's sexual harassment policy was overreaching because it employed an

"impermissibly subjective standard that fails to take into account the nation's interest in academic freedom" (p. 23). The university ruled that Silva had violated the harassment policy after he had made in-class comments in his technical writing course deemed "outrageous" and sexist by six female students.[23] But the court concluded that Silva's comments related to his technical writing course and had an educational function, emphasizing that the classroom is "peculiarly the marketplace of ideas" and noted that "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" (p.21).

Academic Freedom Part of Pickering Balancing Test

Scallet (1996) is an example of the second category of reasoning by courts. There, the court noted that the Pickering test does not "explicitly account for the robust tradition of academic freedom." To remedy that, the court considered a professor's academic freedom rights as a part of the Pickering balancing process and found Scallet's comments on diversity in a business course to be protected speech. As noted, however, Scallet lost the case.

Institutional Academic Freedom More Important

The third group of cases pitted institutional automony against the free speech rights of the professor. In Lovelace (1986), a professor said his contract was not renewed because he refused to lower his academic standards. The court ruled that matters such as course content, homework load, and grading policy are core

---

[23] The university also accused Silva of making other "sexist" and unprofessional comments to students outside the classroom.

university concerns. Another court, Bishop (1991), phrased it as follows:

> We do not find support to conclude that academic freedom is an independent First Amendment right. And , in any event, we cannot supplant our discretion for that of the University. Federal judges should not be ersatz deans or educators. In this regard, we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom. University officials are undoubtedly aware that qualify faculty members will be hard to attract and retain if they are to be shackled in much of what they do (Bishop ,1991, p.1075).[24]

Academic Freedom Unclear

The last line of reasoning concerning academic freedom is best illustrated in Hillis (1982). There, an art professor claimed his contract had not been renewed because he refused to give a "B" to a student as his supervisor instructed. While Hillis said such administrative conduct violated his academic freedom, the court disagreed. Along the way, it discussed the uncertain legal relevance of academic freedom: "While academic freedom is well recognized, its perimeters are ill-defined and the case law defining it is inconsistent"(p. 553).

In closing, the legal weight of academic freedom can be summed up simply: of 99 cases, six decisions mentioning academic freedom assisted the professor. Sixty-nine of the cases did not discuss academic freedom. Of those that did, only a

---

[24] Several cases emphasized that "academic freedom is not a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper function of the university." Clark v.

handful considered the concept to be an "independent" First Amendment right; the rest simply considered it as a part of the overall equation.

ISSUE 6: DO FEDERAL COURTS OFFER MORE FIRST AMENDMENT FREE SPEECH PROTECTION TO TENURED PROFESSORS THAN THEY DO TO NON-TENURED ONES?

FINDING 6: NON-TENURED PROFESSORS FARED BETTER THAN TENURED FACULTY MEMBERS

Non-tenured faculty member fared slightly better in free speech litigation than did the tenured professors. Of the 99 cases, 67 of the plaintiffs were non-tenured professors, either instructors on an annual contract or faculty members who were denied tenure. Of the 67, they won 17 (25 percent) , lost 38 (57 percent) and 12 (18 percent) were remanded. Tenured professors, on the other hand, won five (16 percent), lost 18 (56 percent and nine (28 percent) were remanded.

TABLE IV

OUTCOME OF DECISIONS BY TENURE STATUS OF PROFESSOR

	Outcome		
Tenure Status	Win	Loss	Remand
Tenured	5	18	9
Not Tenured	17	38	12
TOTAL	21	56	21

For the most part, the courts were inconsistent in how they treated the issue of tenure. In some cases, the courts would appear to go out of their way to describe

---

Holmes (1972).

the professor as "non-tenured" but failed to explain whether such status was important to the decision. In yet another line of cases, the courts would note that a non-tenured professor would have the burden of proof in a free speech case while a university would have the burden in a case involving a tenured professor. (Johnson v. Cain , 1977). A third category of cases would simply indicate that tenure played no part in the court's analysis (Mabey v. Reagan ,1976).

Many courts, however, did not want to second-guess universities' decisions on tenure unless a First Amendment violation had occurred. For example, in Keddie , the court wrote:

> This court is powerless to substitute its judgment for that of the University as to whether's Plaintiff's academic credentials are such that tenure should be awarded. The judiciary is not qualified to evaluate academic performance. The courts do not posses the expert knowledge or have the academic experience which should enlighten an academic committee's decision. The courts will not serve as a Super-Tenure Review Committee (p. 1270).

In sum, the findings suggested that tenure carries no obvious weight in the court's decisions and, in fact, non-tenured professors had a slight advantage in the findings. It is unclear whether courts implicitly give preferential treatment to tenured professors.

Summary

The analysis indicated the following. First, the numbers show that litigation over professorial speech issues increased in the 1990s as compared to previous years. The statistics also suggest that the number of published federal court decisions this decade will double the amounts in 1980.

Second, although the United States Supreme Court has not specifically dealt with the professorial speech issue, the courts are generally consistent in applying the Three-Prong test to out-of-class and academic bickering cases. The same cannot be said for classroom speech cases. The findings indicate that courts are still grappling with what rules (and how to apply them) in these type of cases.

Third, professors won only one of every five free speech cases from 1968 to 1996 and the study suggests the outcome for the future does not look any better. The most prosperous time frame for professors seeking free speech protection was from 1977 to 1982; the worst era was from 1983 to 1988.

Fourth, federal courts found the First Amendment protects a professor's out-of-class speech in comparison to speech uttered in the classroom and academic bickering disputes. Courts generally protected professorial speech when it was aimed at someone off-campus such as the media or another state agency. Speech was rarely protected if it involved a personal grievance or petty complaint.

Fifth, academic freedom carried little legal weight in the courts' analysis of professorial speech claims. A few courts viewed academic freedom as an "independent" First Amendment right but most failed to even mention the concept in their decision.

Sixth, the findings showed the non-tenured professors had a better winning percentage than tenured ones. This number suggests that courts give no preferential treatment to tenured professors seeking protection for their First Amendment free speech rights.

CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

The overriding problem undertaken in this study was to determine, within limitations, the constitutional boundaries of a professor's First Amendment freedom of speech rights in three different arenas: in the classroom, outside the classroom and academic bickering. This information is valuable to faculty members and administrators alike because it alerts them to the growing dilemma and offers a better understanding of their respective legal positions.

The data used for the analysis were 99 federal court decisions published between 1968 and 1996. The decisions were found by searching the Westlaw legal database, the Federal Digest and secondary sources such as law journal articles and treatises. Each of the decisions selected included a First Amendment free speech claim by a professor.

Issues addressed in the study were: Are more free speech disputes taking place in federal courts today than in the past? Have the federal courts consistently applied United States Supreme Court precedents to the three types of professorial speech? Are professors more likely to lose free speech disputes today than in the past. How have the courts examined the different classifications of professorial speech i.e., classroom, out-of-class, academic bickering, in the past 28 years? Do federal courts use the concept of academic

freedom when deciding professorial speech disputes? Do federal courts offer more First Amendment free speech protection to tenured professors than they do to non-tenured ones?

The federal court decisions were individually briefed using a case method analysis. The information was then summarized and coded into six categories: (1) outcome, (2) type of speech, (3) time frame , (4) tenure status of professors, (5) precedent applied, (6) whether academic freedom was mentioned. At that point, the results were cross-tabulated and examined. No statistical analysis was used.

The study's findings can be summarized as follows: First, the numbers show that litigation over professorial speech issues increased in the 1990s as compared to previous years. Second, although the United States Supreme Court has not specifically dealt with the professorial speech issue, the courts are generally consistent in applying the same precedents to out-of-class and academic bickering cases. The same cannot be said for classroom speech cases. Third, professors are more likely to lose First Amendment free speech lawsuits, and it appears their constitutional protection for freedom of speech is declining. Fourth, federal courts are more likely to find the First Amendment protects a professor's out-of-class speech in comparison to speech uttered in the classroom and academic bickering disputes. Fifth, courts seldom rely on the concept of academic freedom when deciding a free speech claim. Sixth, tenured professors fare about the same as their nontenured counterparts in free speech disputes.

Conclusions

Three major conclusions emerge from this study. First, it provides a general road map on the professorial speech issue for faculty and administrators alike. Second, the findings in the study paint a bleak picture for professors, but the numbers do not and cannot begin to tell the whole story. Third, despite the overwhelmingly positive numbers for administrators, the news can not be viewed as all good.

The Free Speech Road Map

The First Amendment road map gleaned from this study, while not precise, clearly shows many of the legal contours and dangerous territory in the three speech arenas.

The following parameters emerge for professors' out-of-class speech. If the professor, in a place and context apart from her role as faculty member, speaks or writes off-campus as a private citizen on a clearly public issue, courts will likely determine the speech is protected under the First Amendment. But the closer the speech is, or is linked to, a campus issue and/or the faculty member's on-campus duties, the more likely protection will be denied.

The boundaries for academic bickering speech appear to be as follows. The closer the "speech" relates to an issue solely involving the professor the more likely courts will deny constitutional protection. A common example is a salary dispute but any complaint that is perceived as petty bickering (especially within an academic department) generally will be viewed with

disdain by federal courts. A legitimate dispute over a broad academic issue sometimes is the exception.

The First Amendment contours of classroom speech are more difficult to define, but the study suggests that two factors contribute to the professor's chances of prevailing. First, the professorial speech must have a nexus to the subject matter. Second, the speech must be within the general parameters of the university curriculum. If either or both of those factors are absent, the university probably will prevail. And the chances for constitutional protection narrows the further removed the speech is from the subject matter of the course.

The study further supported a three-tier classification as a logical way to examine professorial speech. The idea behind the classification is to separate the speech in accord with how much First Amendment free speech protection is likely. This would aid educators in analyzing their respective problems. For example, as the literature and study shows, out-of-class speech receives more protection than the other two categories. Thus, the academician has an idea that, if the speech can be classified as out-of-class, it has a better chance of being protected.

One problem in this study, however, is that the definitions proved to be too general. Out-of-class speech was simply defined as speech taking place outside the classroom and therefore leaves a blurry line between what is out-of-class expression and what is academic bickering. A more expansive definition would classify out-of-class speech as "expression outside the

classroom by a faculty member acting primarily in her role as "concerned" citizen or "concerned" faculty member. " This definition would make the category more selective and, as a result, the professor's winning percentage would increase. The term "academic bickering" also is confusing as it suggests that the bickering relates to an academic issue. Perhaps the category could be renamed "personal bickering" or "individual bickering." Along the same lines, professors would fare better in classroom speech cases if they were defined as "expression in the classroom relating to the subject matter." Conversely, the cases that met neither the definition of out-of-class nor in-class would fall to what is considered the least protected category: academic bickering.

The Professor's Gloomy Outlook: Some Possible Explanations

The findings clearly suggest that courts, contrary to the language of the First Amendment and academic freedom rhetoric, provide limited constitutional protection for professorial speech. Professors have won only 22 of the 99 cases since 1968 and the picture seems to get worse in modern times. Therefore, this study concludes much the same way as Zirkel's: "the results are sobering for the faculty member...who might drink too deeply of the bottle labeled 'academic freedom' [or First Amendment] as an euphoric cure for various problems with colleagues, administrators and external governmental agencies."

The simple lesson is obvious: once they are in a federal court, professors expecting constitutional protection for their speech are treading on

a dangerous and slippery slope. Despite a professor's integral role in society, courts do not seem sympathetic. With a few exceptions, they lump professors with police officers, nurses, public school teachers, secretaries, maintenance workers and all other "public employee" in free speech analysis. That should send a strong signal to the professoriate.

Another conclusion, supported by the literature, is the university power base is shifting. Once viewed as a faculty-centered institution, it appears to be more student-centered in the 1990s. That also has increased the power of administrators, who say they act on behalf of the students.

The numbers in this study, however, should be viewed with caution and in the overall context. First, the federal court decisions do not tell the whole story and must only be viewed as a slice of the "big picture." Many faculty members and universities never set forth in a courtroom on a free speech question. This may be, in part, because some universities promote a "free speech" environment where faculty members and administrators alike recognize the need for an uninhibited marketplace. In addition, when a professor's contract includes the language from the AAUP Statement, it helps insulate the faculty member from this problem. Obviously, these type of situations -- which usually do not appear in the literature or in the text of a court decision -- are positive signs for professorial free speech and should not be overlooked.

Another factor that may explain some of the dismal results is a closer look at the circumstances surrounding the case. Not all professorial

accusations of a free speech violation are legitimate or "quality" claims. For example, a professor may lose her job for incompetence or some other legitimate reason. The professor may then sue on other grounds (e. g., procedural due process) and toss in an unsubstantiated or flimsy First Amendment claim after the fact. The court therefore may fail to take the claim seriously.

In addition, a professor's First Amendment claim appears, at least implicitly, to be influenced by his or her past behavior. Courts seem less enthused with the "malcontent" or habitual "troublemaker" -- a professor engaged in a long-running feud with administrators and/or colleagues on a variety of issues. This observation does not advocate banning the free speech rights of those types, but such facts (which were not a variable in this study) may very well taint the court and slant some of the numbers in this study. Conversely, however, professors boasting an unblemished history (e.g., good teacher, able colleague) seemed more likely to prevail.

A third factor deserving a closer look is the number of remands. Approximately one of every five were remanded. In most -- but not all – of the decisions, the remand gave the professor a "second bite of the apple." Typically, the court had either decided more evidence was needed to decide the claim or that a court had improperly analyzed the professor's First Amendment claim. While these cases cannot be counted as victories for the faculty member, they must be taken into account.

Finally, the study did not provide enough information to draw a

detailed conclusion about tenured professors. The cases examined suggested that non-tenured and tenured professors are treated in similar fashion, but a closer look needs to be taken. According to the literature, tenure has been considered the "chief device" for protection of professorial freedom.

A Look From The Administrative Viewpoint

The viewpoint from the university administrator is, at best, described as both "good news" and "bad news." The numbers, while not analyzed statistically, overwhelmingly favor the university. Since 1983, this study shows that professors only won six times in 50 attempts. The university won 33 of those and 11 were remanded. The statistics in classroom speech disputes were even more lopsided.

The good news is that courts seem to champion institutional autonomy, especially when it is pitted against an individual professor's First Amendment free speech rights. Many courts at least mentioned the fact that they were not (and did not want to be) in the business of running the university and, as a result, should, whenever possible, defer to the university's decision-making process. "Federal judges should not be ersatz deans or educators," (p. 1075) wrote the court in Bishop (1991). "The administration of the university rests not with the courts, but with the administrators of the institution," (p. 827) stated the judge in Parate (1989).

What "bad news" can come from this? Historically, the idea of a university has been an educational Mecca -- a sacrosanct destination for students and teachers seeking knowledge and searching for truth.

Suppressing speech or frequently disciplining faculty members does not mesh well with that philosophy. "[T]eachers 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," the United States Supreme Court wrote in 1966. Simply put, the free speech issue should not be staged as a legal tug-of-war between warring professors and institutions. It should be seen as a cancerous threat to the health and well-being of the university's role in society.

A further concern for universities is the fact that the role of a third-party (i.e., the courts) increasingly expands every time a free speech or any other kind of dispute spills over to federal court.[25] Additional litigation only gives the courts more influence on how a public university should be run and this is certainly not a positive factor. In addition, universities, if courts begin questioning their practices more frequently, may find their autonomy being diminished at the expense of outside interference. Therefore, working on in-house solutions to the free speech issue or any other significant problem should be diligently pursued.

Recommendations/Implications For Further Study

If anything can be gleaned from this study, it is the fact that no elixir exists to solve the professorial speech problem. Ever since Socrates was put to

---

[25] Even courts themselves point this out. In Trotmann v. Board of Trustees of Lincoln University (1980), the court's opening paragraph read: "It is unfortunate that resort to the courts has been deemed neccesary...when the controversy arises out of deep divisions in the academic community, as does this one, the judcial process seems inept. The academic process entails, at its core, open communications leading to reasoned decisions. Our society assumes, in almost all cases with good reason, that different views within the academic community will be tested

death for corrupting the youth of Athens, the issue of autonomy for the educator has remained a dilemma.

At least two recommendations, however, are offered. The first is an on-going educational program. In Chapter 1, Emerson noted that the full benefits of the [legal] system can be realized only when the individual knows the extent of his rights and has some assurance of protection in exercising them. Chafee wrote that it is increasingly important to determine the true limits of freedom of expression so that speakers and writers may know how much they can properly say, and government may be sure how much they can lawfully and wisefully suppress.

This most certainly applies to the free speech problem. Like walking around in a dark room, most professors and administrators dealing with the free speech issue stumble around with no specific knowledge of the laws concerning freedom of speech. They have little idea as to the "extent" of their rights or what "assurance of protection" they have. Then, when faced with a conflict, some, if not many, professors invoke "academic freedom" as some sort of super-protective cloak. Some administrators, on the other hand, seem to think they can discipline a professor simply in the name of protecting student rights. Both viewpoints are misplaced.

Consequently, the first recommendation is for a more in-depth education program for academicians. Both the AAUP or the individual institutions should make an effort to better explain the legal ramifications involved in professorial speech issues before a dispute erupts. Armed with

sufficient knowledge, professors and administrators will have a better understanding of their respective positions and, as a result, less conflict will surface. This education program could be set up as a part of a professional development series or perhaps added as a component to graduate studies. In any regard, educating the various parties about the law should be a priority.

A second recommendation is for the universities (perhaps with the assistance of the AAUP) to set up an alternative dispute resolution procedure especially designed for free speech questions. The literature clearly shows that a courtroom battle between professor and institution is seldom a positive experience. Taxpayer money is wasted. Unfavorable publicity takes place. As discussed, the courts take a more significant role in overseeing the university. Suggesting what appears to be yet another bureaucratic procedure for an academic program may seem comical, but resolving the issue in-house should be a priority. Perhaps a university could appoint a "free speech" ombudsman who would investigate, hear the evidence and render a ruling. While the debate may still end up in court, a program -- if perceived as objective -- will most certainly reduce the litigation.

Finally, this study offers several ideas for future research. A more precise look needs to be taken at the three classifications in this study (classroom speech, out-of-class speech and academic bickering). Is there a better way to define them? Is there a more logical classification?

The findings here also suggest that courts lump professorial speech analysis in the same boat as all other types of public employees.

Consequently, a study comparing the rights of other public employees with professors would be helpful as well as a comparison between the First Amendment free speech rights of public school teachers and professors.

Third, this study focused on publicly employed faculty members. What problems, if any, exist in the private institutions of higher education? As a general rule, since there is no "state actor," the First Amendment freedom of speech clause will not apply. Therefore, the issue of academic freedom and contract law become increasingly important.

Fourth, a look at the development of cases at the circuit court level would be interesting. In this study, more than one-third of the decisions took place in the Fifth Circuit, which raises the question of why. Taking a closer look at the circuit decisions also may help elaborate on the precedents used in the various circuits.

Lastly, the next logical study is one dealing with the First Amendment free speech rights of the professor on the Internet. At the time of this writing, Internet is quickly becoming a fixture at colleges and universities worldwide. While legal experts are unsure exactly how courts will deal with these cyberlaw issues, it is likely that the precedents will come, in part, from past professorial speech cases.

Perhaps the most important lesson from this study is that the free speech rights of professors are fluid. The boundaries of protected speech in 1968 changed by 1977. And the 1977 parameters differed from those of 1983 and, in 1988, the law changed again. More importantly, with one United

States Supreme Court opinion, the lines drawn by this study could change drastically. Such is the nature of the law and of free speech analysis.

What does this mean for the academician? It indicates that all educators, professors and administrators alike, must make more of a concerted effort to keep abreast of the law surrounding professorial speech. By having an understanding of past developments and an interest in any new Supreme Court decisions, those in higher education will be better equipped to deal with what is (and will continue to be) a significant issue for colleges and universities nationwide.

A SELECTED BIBLIOGRAPHY

Academic Freedom Advisory: Be Wary of the Long Arm of Kuhlmeier. 89 Ed. Law Rep. 347 (1994).

Allred, S. (1988). From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern. Indiana Law Journal, 64, 43-60.

Bailey. M. & Sindelar, N. (1987). Freedom of Speech And The Incompetent/Competent Teacher. Education Law Reporter, 38, 1151.

Berman, H. & Greiner, W. (1972). The Nature and Functions of Law. Mineola, NY: The Foundation Press.

Byrne, J. (1989). Academic Freedom: A Special Concern. Yale University Law Journal, 99, pp. 251-340.

Carter, L. (1979). Reason in Law. Boston: Little Brown and Company.

Chafee, Zechariah, Jr. (1948). Freedom of Speech. Cambridge: Harvard University.

Chait, J. (1993, December). Bad Examples. Reason, 7-14.

Clarick, G. (1990). Public School Teachers and the First Amendment: Protecting the Right to Teach," New York University Law Review, 65, 693

Drummond, D. (1993) The Lecherous Professor: Suggestions For The Academic Department Chairperson. Unpublished manuscript.

Dziech, B. & Werner, L. (1990). The Lecherous Professor: Sexual Harassment on Campus. University of Illinois Press.

Eagle, J. (1984). First Amendment Protection For Teachers Who Criticize Academic Policy: Biting The Hand That Feeds You. Chicago-Kent Law Review, 60, 229.

Emerson, T. (1970). The System of Free Expression. Random House: New York.

Elza, J. (1993). Liabilities and Penalties For Sexual Harassment in Higher Education. Education Law Review, 78 , 631.

Feldon, D. (1989). The Influence of the First Amendment On Academic Freedom. Unpublished doctoral dissertation, University of North Texas.

Frank, J. (1949). Courts on Trial. Princeton University Press.

Galloway, R. (1991) Basic Free Speech Analysis. Santa Clara Law Review, 31, 883.

Hentoff, N. (1994, January 18). Fear and Deliverance at the University of Nebraska. Village Voice, p. 1.

Hentoff, N. (1993, April 17). Pusillanimous Professors. The Washington Post, p. 23:2.

Hofstadter R. and Metzger, W. (1955). The Development of Academic Freedom In The United States. New York: Columbia University Press.

Holbrook, S. (1984).Faculty Academic Freedom and the Federal Appellate Courts: Legal Dimensions of a Professional Conception. Unpublished doctoral dissertation, University of Minnesota.

Jensen, H. and Horvitz, J. (1979). A Theoretical Framework For Quantifying Legal Decisions. Jurimetrics Journal, Winter 1979.

Jurenas, A. & Zhang, C. (1990). Biting The Hands That Feed Them: Can Faculty In Public Colleges and Universities Criticize Their Employers -- and Survive. Education Law Reporter, 63, 429.

Kaplin. W. (1995). The Law of Higher Education. San Francisco: Jossey-Bass.

Katz, K. (1983). The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth. University of California-Davis Law Review, 16, 857.

Leas T. & Russo C. (1994). Waters v. Churchill: Autonomy For The Academy Or Freedom For The Individual? Education Law Reporter, 93, 1099-1120.

Leatherman, C. (1994, November 23). Supreme Court Acts On Jeffries. The Chronicle of Higher Education. p. A15.

Levi, E. (1949). Introduction To Legal Reasoning. Chicago: University of Chicago Press.

Levit, N. (1989) Listening to Tribal Legends: An Essay on Law and the Scientific Method. Fordham Law Review, 58, 263.

Matsuda, M. (1989) Public Response To Racist Speech: Considering the Victim's Story. Michigan Law Review, 87, 2330.

Metzger, W. (Ed.)(1977). The Constitutional Status of Academic Freedom. New York: Arno Press.

Metzger, W. (1993). The 1940 Statement of Principles On Academic Freedom And Tenure. Freedom and Tenure in the Academy. Durham, North Carolina: Duke University Press.

Mosier, G. (1986). The American Association of University Professors: Their Professional Sanctions For Academic Freedom and Tenure, 1930-1970. unpublished doctoral dissertation, Oklahoma State University, Stillwater.

Nagel, R. (1984). How Useful Is Judicial Review In Free Speech Cases? Cornell Law Review, 69, 302.

Oakes, Larry. (1994, March 27) Intellectual Battleground: Free Speech Debate Adds To Turmoil at UMD. Minnesota Star-Tribune, page 1A.

Olivas, M.(1993). Reflections On Professorial Academic Freedom: Second Thoughts On The Third Essential Freedom. Stanford Law Review, 45, 1835.

Paludi, M. (1990). Ivory Power: Sexual Harassment On Campus. University of New York Press.

Plopper, B. (1979). The Faculty and the First Amendment: An Investigation of Teachers' Out-of-Class Freedom of Expression and Association. Unpublished doctoral dissertation. Southern Illinois University, Carbondale.

Pound, R. (1922). An Introduction To The Philosophy of Law. Yale University Press.

Prichard, J. (1986). A Study of The First Amendment In-Classroom Free Expression Rights of Public School Teachers. Unpublished doctoral dissertation, University of Pittsburgh.

Prokop, D. (1991) Controversial Teacher Speech: Striking A Balance Between First Amendment Rights and Educational Interests. Southern California Law Review, 66, 2543.

Random House Webster's College Dictionary (1991).

Riley, G. (July-August 1993). The Cost of Speech Codes. Academe, pp. 26-30.

Schauer, F. (February 1987). Precedent. 39 Stanford L. Rev. 571.

Shils, E. (1993). Do We Still Need Academic Freedom? American Scholar, 62

187.

Sponseller, E. (1976) Legal Aspects Concerning Teachers' First Amendment Rights of Freedom of Speech and Expression Within The Public Classroom. Unpublished doctoral dissertation, Temple University.

Statsky W. & Wernet, R. (1984). Case Analysis and Fundamentals of Legal Writing. (2nd Ed.). St. Paul: West Publishing.

Stimpson, Catherine R. (1993, September 9). The Farr Case: The Next Chapter in the History of Academic Freedom. Change, 70.

Van Alstyne,W. (1993). Academic Freedom And The First Amendment In The Supreme Court Of The United States: An Unhurried Historical Review. Freedom and Tenure In The Academy (pp. 80-154). Durham, North Carolina: Duke University Press.

Van Alstyne,W. (1970). The Constitutional Rights of Teachers and Professors. Duke Law Journal, 5, 841.

Zimic,L. (1978). Breach of Responsibility in Extramural Utterances. Educational Record.

Zirkel, P. (1988). Academic Freedom of Individual Faculty Members. Education Law Reporter, 47, 809.

CASES EXAMINED

Adler v. Board of Education, 342 U.S. 485 (1952).

Allaire v. Rogers, 658 F.2d 1055 (5th Cir. 1981).

Aumiller v. University of Delaware, 434 F.Supp. 1273 (D. Del. 1977).

Ayoub v. Texas A&M University, 927 F.2d 834 (5th Cir. 1991).

Ballard v. Blount, 581 F.Supp. 160 (N.D. Ga. 1983).

Barnett v. State of Wisconsin Ethics Board, 817 F.Supp. 67 (D. Wis. 1993).

Berg v. Hunter, 854 F.2d 238 (7th Cir. 1988).

Blum v. Schlegel, 18 F.3d 1005 (2nd Cir. 1994).

Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991).

Burnham v. Ianni, 899 F.Supp. 395 (D. Minn. 1995).

Carr v. Board of Trustees of University of Akron, 465 F.Supp. 886 (E.D. Ohio 1979).

Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972).

Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972).

Coats v. Pierre, 890 F.2d 728 (5th Cir. 1989).

Colburn v. Trustees of Indiana University, 973 F.2d 581 (7th Cir. 1992).

Cohen v. San Bernadino Valley College, 883 F.Supp. 1407 (C.D. Cal. 1995).

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

Cooper v. Ross, 472 F.Supp. 802 (E.D. Ark. 1979).

Daly v. Moore, 491 F.2d 104 (5th Cir. 1974).

Dambrot v. Central Michigan University, 839 F.Supp. 477 (E.D. Mich. 1993).

Daulton v. Affeldt, 678 F.2d (4th Cir. 1982).

D'Andrea v. Adams, 626 F.2d 469 (5th Cir. 1980).

Dodds v. Childers, 933 F.2d 271 (5th Cir. 1991).

Dorsett v. Board of Trustees, 940 F.2d 121 (5th Cir. 1991).

Duke v. North Texas State University, 469 F.2d 829 (5th Cir. 1973).

Feldman v. Bahr, 12 F.3d 730 (7th Cir. 1993).

Fong v. Purdue University, 692 F.Supp. 930 (N.D. Ind. 1988).

Franklin v. Atkins, 562 F.2d 1188 (10th Cir. 1977).

Givhan v. Western Line Consolidations School, 99 S.Ct. 693 (1979).

Goss v. San Jacinto Junior College, 588 F.2d 96 (5th Cir. 1979).

Grace v. Board of Trustees, 805 F.Supp. 390 (M.D. La. 1992).

Grimm v. Cates, 532 F.2d 1034 (5th Cir. 1976).

Hamer v. Brown, 831 F.2d 1398 (8th Cir. 1987).

Harden v. Adams, 841 F.2d 1091 (11th Cir. 1988).

Harris v. Arizona Board of Regents, 528 F.Supp. 987 (D.Ariz. 1981).

Harris v. Merwin, 901 F.Supp. 509 (S.D.N.Y. 1995).

Harris v. Mississippi Valley State, 899 F.Supp. 1561 (N.D. Miss. 1995).

Hartman v. Board of Trustees, 4 F.3d 465 (7th Cir. 1993).

Hazelwood v. Kuhlmeier,484 U.S. 260 (1988).

Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973).

Hickingbottom v. Easley, 494 F. Supp. 980 (E.D. Ark. 1980).

Hildebrand v. Board of Trustees, 607 F.2d 705 (6th Cir. 1979).

Hillis v. Stephen F. Austin University, 665 F.2d 547 (5th Cir. 1982).

Hostrop v. Board of Junior College District, 399 F. Supp. 609 (N.D. Ill. 1974).

Howze v. Virginia Polytechnic, 901 F. Supp. 1091 (W.D. Va. 1995).

Huang v. Board of Governors, 902 F.2d 1134 (4th Cir. 1990).

Idoux v. Lamar, 828 F.Supp. 1252 (E.D. Tex. 1993).

Jeffries v. Harleston, 52 F.3d 9 (2nd Cir. 1995).

Johnson v. Cain, 430 F.Supp. 518 (N.D. Ala. 1977).

Johnson v. San Jacinto Junior College, 498 F.Supp. 555 (W.D. Tex. 1980).

Keddie v. Pennsylvania State University, 412 F.Supp. 1264 (M.D. Pa. 1976).

Keen v. Penson, 970 F.2d 252 (7th Cir. 1992).

Keyishian v. Board of Regents, 385 U.S. 589 (1966).

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

Lindsey v. Board of Regents, 607 F.2d 672 (5th Cir. 1979).

Lovelace v. Southeastern Massachusetts University, 793 F.2d 986 (1st Cir. 1986).

Luxemburg v. Texas A&M University System, 863 F.Supp. 412 (S.D. Tex. 1994).

Mahaffey v. Kansas Board of Regents, 562 F.Supp. 887 (D. Kan. 1983).

Maples v. Martin, 858 F/2d 1546 (11th Cir. 1988).

Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986).

Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981).

McCann v. Ruiz, 802 F. Supp. 606 (D. Puerto Rico 1992).

McAuliff v. Mayor of New Bedford, 29 N.E. 517, 518 (1892).

Megill v. Board of Regents, 541 F.2d 1073 (5th Cir. 1976).

Meyer v. Nebraska, 262 U.S. 390 (1923).

Mt.Healthy v. Board of Education, 429 U.S. 274 (1977).

Pickering v. Board of Education, 391 U.S. 563 (1968).

Pickings v. Bruce, 430 F.2d 595 (5th Cir. 1970).

Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974).

Roseman v. Hassler, 382 F.Supp. 1328 (W.D. Pa. 1974).

Rowe v. Forrester, 368 F.Supp. 1355 (M.D. Ala. 1974).

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

Russ v. White, 541 F.Supp. 888 (W.D. Ark. 1981).

Scallet v. Rosenblum, 911 F.Supp. 999 (W.D. Va. 1996).

Scopes v. State, 289 S.W. 363 (1927).

Shaw v. Board of Trustees of Fredrick Community College, 549 F.2d 929 (4th Cir. 1976).

Shields v. Watrel, 333 F. Supp. 260 (W.D. Pa. 1971).

Silva v. University of New Hampshire, No. CIV 93-533-SD, (D.N.H. Sept. 15, 1994).
ehan v. Board of Trustees, 590 F.2d 470 (3rd Cir. 1978).

Smith v. Losee, 485 F.2d 334 (10th Cir. 1973).

Starsky v. Williams, 353 F.Supp. 900 (D. Ariz. 1972).

Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983).

Stone v. Board of Regents, 620 F.2d 526 (5th Cir. 1980).

Tinker v. Des Moines, 393 U.S. 503 (1969).

United Carolina Bank v. Board of Regents, 665 F.2d 553 (1982).

Weinstein v. University of Illinois, 628 F.Supp. 862 (N.D. Ill. 1986).

Wirsing v. Board of Regents of University of Colorado, 739 F.Supp. 551 (D. Colo. 1990).

VITA

Douglas Earl Drummond

Candidate for the Degree

of Doctor of Education

Dissertation: A CASE ANALYSIS OF THE FREE SPEECH RIGHTS OF THE PUBLICLY EMPLOYED PROFESSOR
Major Field: Higher Education

Biographical:

Personal Data: Born in Enid, Oklahoma, August 11, 1959, the son of Mr. and Mrs. Robert E. Drummond, Jr.

Education: Graduated from Enid High School, Enid, Oklahoma, 1977; received Bachelor of Science degree in news-editorial journalism from Oklahoma State University in 1984; received Master of Science degree in Mass Communications at Oklahoma State University in 1986; received Juris Doctor degree from the University of Tulsa in 1991; completed requirements for a Doctor of Education degree at Oklahoma State University in July, 1996.

Professional Experience: Journalism Instructor, Oklahoma State University, 1985-1986, 1987-1988, 1991, 1995-1996; Law Clerk to the Hon. Jeffrey Scott Wolfe, United States District Court for the Northern District of Oklahoma, 1991-1995; The Reporters' Committee For Freedom of the Press, Washington D.C., 1990; Assistant City Editor, Midland Reporter-Telegram, 1986; Beat reporter, The Tulsa Tribune, 1982-1984.