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**PROFESSORIAL SPEECH AND ACADEMIC FREEDOM:
Can Hardy v. Jefferson Community College be reconciled with *Urofsky v. Gilmore*, or is there a conflict in the judicial view of in-class and other professional speech?**

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Post-Urofsky Redux

When the Fourth Circuit Court of Appeals handed down its decision in *Urofsky v. Gilmore*, some commentators wrung their hands and lamented the demise of academic freedom. At Stetson University's 22nd annual conference on higher education, I attempted to persuade and to reassure my colleagues in higher education that academic freedom was alive and well and that the Fourth Circuit's decision preserved rather than subverted the *constitutionally recognizable* species of academic freedom. In *Urofsky's* fitful wake, I can assure all naysayers that inspired teaching, meaningful research, free thought, American pie and the university as a unique marketplace of ideas have continued to flourish in Virginia despite all catastrophic predictions.

What then has been the actual impact of this decision and how does the ruling in *Urofsky* compare to cases involving professorial speech in other judicial circuits? The answer to that question is a bit complex and really depends on how one characterizes the holding of the case. A searching analysis of case law before and after *Urofsky* reveals that the notorious *Connick-Pickering* balancing test deployed by courts continues to resemble an art rather than a science. Still, there are some fixed polestars guiding administrators, *wherever they reside*, as they attempt to divine what kinds of faculty speech can be constitutionally sanctioned and what kinds may not be.

While the Sixth Circuit's holding in *Hardy v. Jefferson Community College* came down emphatically on the side of protecting in-class professorial speech, does that case actually conflict with the holding of *Urofsky v. Gilmore*? And what if it does? Are constitutional protections for faculty members in the United States solely dependent on regional happenstance? Are the federal appellate courts handing down conflicting opinions on an important issue of First Amendment law so as to justify intervention by the United States Supreme Court? See S. Ct.

Rule 10; *Braxton v. United States*, 500 U.S. 344, 347 (1991) (a “principal purpose for which we use our certiorari jurisdiction...is to resolve conflicts among the United States courts of appeals”).

There is indeed a conflict and has been for some time. *See e.g.*, Karen C. Daly, *Balancing Act: Teacher’s Classroom Speech and the First Amendment*, 30 J.L. & Educ. 1, 6 (2001) (“The Supreme Court has yet to squarely address what level of protection, if any, should be accorded to teachers’ in-class speech. The Supreme Court’s abstention has fostered divergent approaches in the lower courts, as well as general lack of certainty about the parameters of teachers’ free speech rights.”); Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 Tenn. L. Rev. 597, 602 (1999) (“[T]here is currently a split among the circuit courts on the appropriate test for resolving teachers’ in-class speech issues”); Rachel E. Fugate, Comment, *Choppy Waters are Forecast for Academic Free Speech*, 26 Fla. St. U. L. Rev. 187, 203 (1998) (“Lower courts have not developed a consistent test to be applied to a professor’s speech in the classroom because the Supreme Court has not addressed the level of protection that much such speech demands.”); J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 Yale L. J. 251, 252-253 (1989) (“Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom...generally result in paradox or confusion. The cases, shorn of panegyrics, are inconclusive, the promise of their rhetoric reproached by the ambiguous realities of academic life.”)

When it comes to curriculum control, courts astute enough to characterize the dispute in such terms, have resolved that the public employer has the final word on that. I see no explicit case law to the contrary. On the other hand, there is abundant case law in various federal circuits affirming First Amendment protection for certain kinds of in-class expression. Is there a

significant analytical distinction difference between a university's right to select curriculum and a professor's right to deliver that curriculum in a manner he or she sees fit?

When it comes to speech undertaken *in direct discharge of a public employee's duties*, federal courts are increasingly at odds, but should not be. That issue is *Urofsky*. See also, *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 369 (4th Cir.) (*en banc*), *cert denied*, 525 U.S. 813 (1998) (Selection of controversial play not a matter of public concern); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972) (*per curiam*), *cert. denied*, 411 U.S. 972 (1973) (course content and teacher's in class criticism of his employers not a matter of public concern); *Edwards v. California Univ of Pa.*, 156 F.3d 488 (3rd Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999) (teacher's preferred course materials and class content not of public concern); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3rd Cir. 1990) (teacher's learning methodology known as "Learnball" not matter of public concern); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) (teacher's use of unapproved reading list not matter of public concern). On this point, I can do you no greater service than to commend Judge Kozinski and Judge Kleinfeld's excellent dissent in the labyrinthine case known as *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (*en banc*), *vacated as moot*, 520 U.S. 43 (1997) (discussing "dangerous notion that government employees have a personal stake in the words they utter when they speak for the government"). *Id.* at 962 (Kozinski J. and Kleinfeld, J.) (dissenting).

In the Third, Fourth, Fifth and Seventh Circuits, public school teachers do not have a First Amendment right to carry out their classroom duties in a manner contrary to their employers' pedagogical or other objectives. Those circuits look to the teacher's role at the time of the speech at issue, and hold that First Amendment protection is not warranted where the

speech is within the scope of the teacher’s employment activities. The approach of the Third, Fourth, Fifth and Seventh Circuits – emphasizing that the First Amendment is not implicated unless a teacher’s speech is *unrelated* to the teacher’s duties – is diametrically opposed to the Sixth Circuit’s ruling in *Hardy*. The Sixth Circuit focused on the pedagogical nature of professorial speech, concluding that it warranted protected under the First Amendment precisely because it related to his employment as an instructor. These divergent judicial approaches simply cannot be reconciled.

The First and Second Circuits, like the Sixth Circuit, have concluded that teachers’ classroom speech may warrant First Amendment protection, although these circuits appear internally divided on the issue. The conflict among the circuits is further exacerbated by the fact that several circuits – including the Eighth, Tenth, and Eleventh – evaluate First Amendment protection for teacher classroom speech not under the *Pickering* framework but instead under that established by *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), which permits editorial control over school-sponsored expression so long as the regulation is reasonably related to legitimate pedagogical concerns.¹ Indeed, as the Sixth Circuit has recognized, the circuits are divided on which framework is appropriate. *See Cockrel*, 270 F.3d at 1055 n.7 (“Rather than apply *Pickering*, several circuits have chosen to apply the Supreme Court’s analysis of students’ in-class speech rights in *Hazelwood* . . . to cases in which teachers’ in-class speech rights are at issue.”); *see also California Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d at 1149 n.6

¹ Because *Hazelwood* involved constitutional limitations on **student speech in a k-12 setting**, I find it particularly ill-suited to the task of analyzing professorial speech in higher education. My best guess as to why it is invoked at all is because both plaintiffs and defendants feel that the case affords them far more latitude to argue their respective positions than does the *Connick-Pickering* formula.

(describing “different tests” employed by circuit courts “to analyze the free speech rights of teachers”).²

Mixed Speech Cases

In a fainthearted attempt to avoid head-on the self-evident logic of *Urofsky*, several courts have concluded that some kinds of job-related expression have both a private and a public dimension. A recent example of this is *Bonnell v. Lorenzo*, 241 F. 3d 800 (6th Cir.), *cert. denied*, 122 S. Ct. 347 (2001), in which a professor’s insulting screed, widely circulated in response to a student’s sexual harassment complaint, was treated by the court as having both a private and public dimension) In “mixed speech cases” some courts find mixed expression protected. Others do not. It is very difficult to predict how mixed speech cases will fare. In *Milman v. Prokopoff*, 100 F. Supp. 2d. 954 (S.D. Iowa 2000), a museum curator wrote an NEA grant that was significantly edited by her superior. The curator grieved this action after which her superior postponed a different museum exhibit also funded by grants obtained by the curator. The curator sued, claiming that the postponement of the exhibit was an attempt to unduly interfere with the intellectual content of a publicly funded grant. The Court noted that there was a private dimension to the grievance, (the boss’ edit), and a public dimension (allegations of interference with academic freedom). Calling it a “close case,” the court erred on the side of protecting the speech.

Other courts parse “mixed speech” cases differently. In *Teague v. Burkett*, 179 F.3d 377 (5th Cir. 1999), for instance, police officers in internal affairs began investigating a colleague for suspected perjury. The police chief learned that the two officers were planning to go to the grand

² The circuits that have applied *Hazelwood* in higher education appear to be aligned more closely with the view of the Third, Fourth, Fifth and Seventh Circuits that a university has substantial direction in setting the scope of permitted speech by its employees.

jury. He stopped the investigation and hired an outside investigator who cleared the accused colleague of all wrongdoing. The officers then filed a grievance against their chief for having aborted their investigation, believing he was involved in a cover-up. The chief then began investigating the plaintiffs, concluded they were derelict in their duties, and fired them. The officers sued, claiming that their grievance was protected and had been the target of retaliation.

The Court had a dilemma on its hands. There was Fifth Circuit case law suggesting that speech regarding police misconduct constitutes a matter of public concern. Yet the evidence also showed that the grievance involved conditions of the officers' employment, generally considered to be a private matter. Calling it a "mixed speech situation," the Court examined the whole record attempting to divine whether the officers were speaking in their capacity as citizens or as employees. The Court refused to hold that every personal matter laced with public concern constitutes speech on a matter of public concern within the meaning of *Connick-Pickering*. Declaring that "the mere insertion of a scintilla of speech regarding a matter of public concern would make a federal case out of a wholly private matter fueled by private, non-public interests," *id.* at 382, the court conceded that the *content* of the officers' grievance may have involved issues of public concern, but its *context and form* revealed it to be an ordinary employment dispute and therefore constitutionally threadbare. (Plaintiffs' "focus ...was primarily on clearing their names—not on rooting out police corruption *per se*.") *Id.* at 383.

While *Urofsky* might have fared better if the case had been characterized as a "mixed speech" case involving both the professors' private and public interests, the ACLU foreclosed that possibility by confining their final U.S. Supreme Court appeal to issues involving *research and writing necessary to carry out the professor's professional responsibilities*. By choosing this tact, they inevitably played into the hands of *Rust v. Sullivan*, 500 U.S. 173 (1991) (When

government distributes funds to private parties to convey governmental message, government may control the content of such speech) and *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (“[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”) *Id.* at 833.

So far, “mixed speech” jurisprudence is analytically unsatisfying because it is difficult, if not impossible, to faithfully weigh legal interests whose scope and content are ever changing, much less to predict how your client’s response will fare when placed in ever-shifting scales.

High Court Refuses To Review *Urofsky*

The ACLU’s attempt to undo *Urofsky v. Gilmore* was itself undone when the high court, last December, refused to hear the case, leaving the *en banc* decision of the Fourth Circuit binding precedent in Virginia, Maryland, North and South Carolina, and West Virginia.³ When the ACLU and the six professors sought a writ of *certiorari* in December of 2001, there appeared to be no real conflict between *Urofsky*, narrowly construed, and decisions involving public employee speech in other federal circuits. Now, thanks to the Sixth Circuit’s decision in *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001), and an earlier Fourth Circuit opinion, *Boring v. Buncombe*, 136 F.3d 364 (4th Cir.) (*en banc*), *cert. denied.*, 525 U.S. 813 (1998), a *legally mature* conflict in analysis has emerged. Should this interpretive conflict continue to vex appellate courts, the United States Supreme Court should intervene to further clarify what is meant by “citizen speech” within the meaning of the *Connick-Pickering* balancing test.

No Conflict on Academic Freedom

Before the U. S. Supreme Court, the ACLU’s discussion of academic freedom

³ See Appendix A illustrating what federal appellate circuits bind which states.

exaggerated *Urofsky's* holding. They attributed to the Fourth Circuit the draconian view that “state-employed professors have no first amendment-based right of academic freedom.” *Urofsky* Petition for *Certiorari* at 11. In fact, the Fourth Circuit made no such sweeping pronouncement. Instead, the court focused on a much narrower subject: “The speech at issue here [is] access to certain materials using computers owned or leased by the state for the purpose of carrying out employment duties.” *Urofsky* at 408. Thus, the decision says nothing about the rights of faculty to access materials using their own computers or for their own purposes. Moreover, none of the [petitioners] have ever sought permission to access any materials on the Internet pursuant to the terms of the Act.” *Id.* at 405 n. 7. *Urofsky* therefore says nothing about the rights that a professor might be able to assert if a request contemplated by the Act were unreasonably denied by the institution. Finally the Fourth Circuit ruling says nothing about what rights of academic freedom professors may have as a result of their contracts with their institutions.⁴

Before the U.S. Supreme Court, the “*Urofsky* principle” was further narrowed by limitations found in the questions presented by plaintiffs. Questions pitched to the U.S. Supreme

⁴ See, e.g., Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex. L. Rev. 1265 (1988) (arguing that definition and boundaries of constitutional academic freedom are significantly different from those concepts of academic freedom formulated by the academic profession itself). See also *Cook v. Tadros*, 2000 U.S. Dist LEXIS 21238 (D.C. Neb. 2000) (litigant’s attempt to introduce at trial “expert” testimony from law professor on scope and meaning of academic freedom rejected as improper usurpation of judicial authority.)

Court dealt exclusively with “job-related research and writing.” *None of the plaintiffs’ questions specifically dealt with classroom speech or curriculum, those issues having been tacitly abandoned on appeal.*⁵ In essence, the “academic freedom” issue in *Urofsky* was very narrow and could be phrased as follows:

Do individual academic employees of the state have a First Amendment right to disdain supervision of their institutions and to decide unilaterally what materials and resources are required for their professional, employment-related research and writing needs?

The answer is no. The ACLU failed to show any conflict whatsoever on this question.

High Court Precedent

The ACLU turned to high court decisions extolling the virtues of academic freedom; however, those decisions dealt with issues far removed from the relatively mundane supervision issue presented by *Urofsky*. See e.g., *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (discussing right of institution to decide who may be admitted); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (prohibiting university from discriminating against student publication based on its religious viewpoint); *Sweezy v. New Hampshire*, 354 U.S. 234

⁵ And understandably so in the face of cases like *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) (*en banc*) (high school, not drama teacher, has authority to choose curriculum); *Edwards v. California Univ. of Pa.*, 156 F.3d 488, 491 (3rd Cir. 1998) (“We conclude that a public university professor does not have a First Amendment right to decide what will be taught in the classroom.”); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (University, not professor, determines what is taught and how it is taught to students); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973) (affirming university’s right to control content of biology professor’s health course); *Lovelace v. Southeastern Massachusetts Univ.*, 793 F.2d 419, 426 (1st Cir.) (The first amendment does not require that each non-tenured professor be made a sovereign unto himself.”); *Hetrick v. Martin*, 480 F.2d 705, 708-9 (6th Cir.), *cert. denied*, 414 U.S. 1075 (1973) (University need not renew contract of professor whose pedagogical attitudes and teaching methodologies did not conform to institutional standards); *Megill v. Board of Regents*, 541 F.2d 1073 (5th Cir. 1976) (professors do not escape supervision in the manner in which classes are conducted or in assignment of grades); *Wirsing v. Bd. of Regents of Univ. of Colorado*, 739 F. Supp. 551, 553 (D. Colo. 1990) (“Academic freedom is not a license for activity at variance with job related procedures and requirements.”); *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992) (university did not violate faculty member’s First Amendment rights by directing him to change grade and make written apology to student.)

(1957) (overturning contempt conviction of professor for refusing to answer questions about subversive activities); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (prohibiting state from disqualifying professor from employment based on refusal to take loyalty oath); *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (allowing federal investigative agency to subpoena “confidential” tenure files of private university); *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (curtailing authority of local school board to remove library books based on viewpoint); *Board of Regents v. Southworth*, 529 U.S. 217 (2000) (upholding viewpoint neutral mandatory student activity fee); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985) (upholding authority of state university to dismiss student for academic deficiencies).

Federal Appellate Cases

Failing to massage a direct conflict between *Urofsky* and high court precedents, the ACLU turned to several circuit cases claiming these cases presented a conflict justifying the Court’s attention. Most of those cases, however, involved disputes about classroom speech and curriculum, issues that had lost their vitality in light of *Boring v. Bunscombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) (high school, not high school teacher, decides appropriate curriculum).⁶

⁶ Other cases involving “job-related” speech include *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (racial epithet used by basketball coach during motivational speech to his players); *Cohen v. San Bernadino Valley College*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997) (professor disciplined under new, vague sexual harassment policy for longstanding—and previously accepted—teaching style); *Dube v. State Univ. of New York*, 900 F.2d 587 (2nd Cir. 1990) *cert. denied*, 501 U.S. 2111 (1997) (discussion of controversial topics in class held protected); *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989) (professor’s assignment of grade constitutionally protected); *Blum v. Schlegel*, 18 F.3d 1005 (2nd Cir. 1994) (professor allegedly disciplined for criticizing drug control laws in class and in campus publications). Even in circuits in which professorial in-class speech has been held to touch upon matters of public concern, expression *lacking pedagogical value* may nevertheless be held unprotected. *Vega v. Miller*, 2001 U.S. App. LEXIS 25364 (2nd Cir. 2001) (Sexually vulgar “clustering exercise” was not educationally germane, therefore, unprotected.)

Two cases relied on by plaintiffs involved speech to the university community through campus media, a category of speech that also differs from academic research speech as identified in plaintiffs' questions presented.⁷ Only one of the ACLU's cases dealt with research and writing, *Dow Chemical Co v. Allen*, 672 F.2d 1262 (7th Cir. 1982). Even *Dow*, however, was inapposite because it involved a conflict between state university researchers and *private* parties who sought access to that research through a federal subpoena *duces tecum*. Moreover, in *Dow*, the state employer was aligned on the side of its researchers. Thus, even *Dow* said nothing about what research rights state-employed academics might have *in opposition to their employer*.

Can “Job-Related” Speech Ever Touch Upon Matters Of Public Concern?” Yes.

The ACLU contended that *Urofsky* conflicted with other federal circuit court decisions on whether public employees have a First Amendment right in their “job-related research and writing.” Pl.’s Cert. Pet. at 16. This allegation of conflict was based on a semantic slight of hand that switched back and forth between two fundamentally different meanings of the term “job-related.” In the narrow sense, speech by an employee may be described as “job-related” only if it is made by the employee as part of the performance of his or her employment duties. The question is not whether the employee acts as a “government mouthpiece,” but whether the speech is part of the work the employee was hired to do. The United States Supreme Court has never suggested that government employees have a free speech right to be immune from supervision by their employers. (Were it otherwise, law clerks would not be accountable to the judges who hire them.) In a much broader sense, however, the term “job-related” may be used to refer to speech that is *not* part of any employee’s work, but that is *about* his or her job or *about*

⁷ *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (speech at issue was photography provided by history professors for inclusion in student-organized exhibition appearing in departmental display case); *Blum v. Schlegel*, 18 F.3d 1005 (2nd Cir. 1994) (faculty allegedly disciplined for criticizing drug control policies in class and in campus media).

his employer. Under Supreme Court precedent, such speech may or may not be constitutionally protected, depending on whether it is on a matter of public concern. *Connick v. Myers*, 401 U.S. 138 (1983).

In *Urofsky*, only the narrow type of “job-related” speech was at issue. That is to say, the only category of speech implicated by *Urofsky* is speech made by employees in the performance of their job duties. This was affirmed again and again by plaintiffs’ statement that they based their case “solely” on what they claimed were “professional, employment-related needs.” This point was further underscored by the court of appeals statement limiting “the speech at issue” to certain materials used for “carrying out employment duties,” *Urofsky* at 408, and further highlighted by examples of speech that plaintiffs alleged were impinged by Virginia’s act.⁸ The various professorial tasks described by the *Urofsky* plaintiffs were part and parcel of the scholarly work they were expected to perform.⁹

By contrast, the ACLU attempted to demonstrate judicial conflict by citing decisions that involve the broader type of “job-related” speech. The four U.S. Supreme Court decisions relied on by plaintiffs clearly fell into this second category. In *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), a public school teacher was dismissed for publishing in a local newspaper a letter criticizing how the school board had handled proposals to raise revenues. There was no

⁸ A George Mason University cultural studies professor complained that Virginia’s act “chilled” his “right” to use the university’s server to post lewd photos of Traci Lords, a teen porn star he wanted to write a book about.

⁹ Ironically, we may never know if plaintiffs’ lascivious forays in *Urofsky* were germane. Since none of the “*Urofsky* six” ever availed themselves of the act’s research exemption, their respective universities have not yet had the pleasure of determining, for instance, whether the posting of teen porn pics on the university server is educationally germane.

suggestion in *Pickering* that communicating with news media was part of the teacher's job. He acted solely as a private citizen who happened to be a public school teacher. And he won.¹⁰

In *Connick v. Myers*, 461 U.S. 138 (1983), an assistant district attorney, unhappy with a change of duties, distributed a questionnaire to her co-workers inquiring about a range of subjects. *Id.* at 141. Some of her questions "pertain[ed] to the confidence and trust that [her] co-workers possess[ed] in various supervisors, the level of office morale, and the need for a grievance committee," and were merely extensions of her dispute over her own transfer. *Id.* at 148. Another question asked whether her co-workers ever felt "pressured to work in political campaigns on behalf of office-supported candidates," and was clearly a matter of public concern. *Id.* at 149. While the Court treated these sets of questions differently, none of the speech was in discharge of the duties the plaintiff had been hired to perform. Thus, *Connick* furnished no precedent for restricting the ability of government to control the content of speech forming part of its employees' work.

In *Waters v. Churchill*, 511 U.S. 661 (1994), a public hospital nurse had allegedly criticized hospital policies while conversing on break with a co-worker. What the nurse actually said was disputed; however, no one alleged that her remarks were part of her job. The case is predominantly directed toward resolving what investigative standard should apply when the content of an employee's comments is subject to dispute. The Court concluded that even if one version of the conversation warranted constitutional protection, "the potential disruptiveness of the speech *as reported* was enough to outweigh whatever First Amendment value it might have had." *Id.* at 680 (emphasis added). Thus, even the murky waters of *Waters* were inadequate to

¹⁰ See also *Mt. Healthy Sch. Dist. v. Doyle*, 429 U.S. 274 (1977) (accepting district court's findings that a teacher's remarks *to a radio station* about his school's dress code were protected by First Amendment).

stir up constitutional conflict.

United States v. National Treasury Employees Union (“NTEU”), 513 U.S. 454 (1995), involved a federal honoraria ban that applied to writings and other expressive activities having no nexus to the employees’ federal employment. The majority opinion penned by Justice Stevens took pains to underscore the fact that *NTEU* employees staked no constitutional claim involving their official duties.

They seek compensation for expressive activities in their capacity as citizens, not as Government employees...Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to their employment. *Id.* at 465.¹¹

D.C. Circuit

Similarly, most of the circuit cases cited by the petitioners dealt with the broader category of “job-related” speech. For example, in *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995), two employees of the Environmental Protection Agency wished to travel on their own time to give their own, unofficial views at a public hearing on a proposed hazardous waste incinerator. The private group that organized the hearing offered to reimburse them for their travel expenses. There was, however, a federal ethics regulation that prohibited federal employees from accepting reimbursement for expenses incurred in connection with unofficial speaking engagements *relating* to official duties. Without the reimbursement, the two employees were unable to attend.

¹¹ In contrast, see, *Harrison v. Coffman*, 111 F. Supp. 2d 1130 (E.D. Ark. 2000). In this case, a workers’ compensation commission terminated an administrative law judge (“ALJ”) for an excessively activist role in a particular case that was reversed, requiring managerial intervention. The ALJ sued, claiming retaliation for “expressive exercise of judicial independence.” *Id.* at 1131. Judge Sachs turned to *Urofsky*, but flatly rejecting its categorical “employee speech” defense, commenting that “I believe the Fourth Circuit is at least two steps out of phase with the academic freedom decisions of the 8th Circuit.” *Id.* at 1133. Instead, he adopted Judge Wilkinson’s balancing approach, an approach that appears to conflict with the Eighth Circuit’s ruling in *Buazard v. Meridith*, 172 F.3d 546 (8th Cir. 1999) (police officer demoted for unreliable incident report was simply acting routinely as an employee, rendering the report not a matter of public concern).

Id. at 89. The D.C. Circuit applied the *Connick/Pickering* balancing test and decided that the ethics regulation was invalid. Unlike that regulation, there was nothing in Virginia's act that restricted what state employees could say or do outside the workplace, nor was there anything in Virginia's act that restricted how faculty could use their own computer resources. In the continuing quest for constitutional conflict, *Sanjour* was, therefore, also irrelevant.

2nd Circuit

Harman v. City of New York, 140 F.3d 111 (2nd Cir. 1998), involved a social welfare agency where press policies forbade employees from having media contact without first obtaining their employer's consent. ABC News contacted Harman, an agency employee, about a child allegedly beaten to death by her mother. Harman agreed to speak to ABC and did so off agency premises during her lunch hour. ABC later broadcast footage of her statement criticizing the agency. When the agency suspended her, she sued, claiming the media policy was unconstitutional. Harman's remarks were *about* her employer; they were not, however, in performance of her job. Her duties did not include serving as a media spokesman. Thus, contrary to arguments made by the ACLU, there was no actual conflict between the Second Circuit's ruling in *Harman* and the Fourth Circuit's ruling in *Urofsky*.¹² Similarly, in *Latino*

¹² For other cases invoking the prior restraint doctrine in the context of public employment, see *Kessler v. City of Providence*, 167 F. Supp. 2d. 482 (D.C. R.I. 2001) (Police department policy requiring that all police interviews be pre-cleared through public affairs office impinged on potential citizen speech on a matter of public concern, and was therefore unconstitutional.); *Crue v. Aiken*, 137 F. Supp. 2d. 1076 (D.C. Ill. 2001) (University policy prohibiting faculty, staff or students from discussing with student-athletes ethnically controversial mascot, Chief Illiniwek, without going through athletic director, was likely an unlawful prior restraint.). Prior restraint doctrine is in my view an unsuitable construct in the context of public employment. Nothing in the constitution prohibits the government from restraining itself, i.e., its employees. Moreover, due process may require that employees be *adequately forewarned* of what constitutes sanctionable expression. Most significantly, in none of the high court cases upholding the Hatch Act's limitations on political speech on the job, has the Court ever relied on the doctrine of prior restraint. *Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

Officers Ass'n v. City of New York, 196 F.3d 458 (2nd Cir. 1999), the issue was whether an organization of Latino police officers in New York City could wear their uniforms while marching in various ethnic parades. The court ruled in favor of the officers, based on the police department practice of allowing a competing group of Hispanic officers to wear their uniforms in similar parades. Marching in parades was not, however, part of the job duties of these officers. It was purely private speech by which, the court said, they reminded the community of their longstanding allegations of police department discrimination and misconduct. *Id.* at 466.

7th Circuit

Bonds v. Milwaukee County, 207 F.3d 969 (7th Cir. 2000), involved a *city-employed* fiscal analyst who, while participating in a community forum, was openly critical of the city's proposals on certain block grant programs. Thereafter, because of what it viewed as Bonds' poor judgement, disloyalty, and lack of discretion, a *neighborhood county* withdrew an offer of employment it had previously made to Bonds. Bonds then sued the *county*. Whether his remarks at the forum were viewed as part of his work for the city or as purely private speech, they were not in performance of any work *for the county*. In any event, Bonds lost. The peculiar facts of *Bonds* were too far removed from *Urofsky* to create any meaningful judicial conflict meriting Supreme Court intervention.

9th Circuit

Two cases from the Ninth Circuit, *Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1999), and *Chateaubriand v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996), involved the firing of public employees who objected to instructions that they engage in unconstitutional political reprisals or engage in otherwise unlawful political activity. As such, those cases were best viewed as

‘whistle-blowing’ cases so far afield from the *Urofsky* scenario as to render them weightless in establishing genuine judicial conflict.

5th Circuit

In *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992), the plaintiff was a campus police officer discharged for making a sexual harassment complaint that her employer said contained misrepresentations. While the court concluded that the plaintiff spoke “both as a citizen and an employee,” it also concluded that she did not speak in the performance of her duties as a police officer. *Id.* at 1270. Thus there was no conflict between *Urofsky* and *Wilson*. The ACLU also cited *Wilson* for the proposition that “denying First Amendment protection simply because speech is job-related [in the narrow sense] ‘would permit public employers to remove constitutional protection from speech on certain subjects by including those subjects within an employee’s reporting duties.’ The simple answer to this concern is that courts are likely to see through any such pretext. Moreover, to the extent that there may be a need for special constitutional protection for the “whistle-blower,” it was a concern completely foreign to *Urofsky*’s salacious facts.

In *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216 (5th Cir.), *cert. denied*, 120 S. Ct. 533 (1999), several teachers were reprimanded and transferred to another school as a result of their speech at a committee meeting in which they complained about their school principal. Their sanctions were overturned by the 5th Circuit. What is significant about *Harris* is that the committee where plaintiffs spoke had been empanelled by the Texas legislature for the express purpose of improving the quality of the public schools. The case is best read as standing for the proposition that a state cannot ambush public employees by inviting them to express their concerns and then punishing them if it decides their views are unpleasant. Another apparent

“conflict,” that upon closer scrutiny, bore no similarity to the particular facts presented by *Urofsky*.

Only two circuit court decisions cited by the ACLU involved speech by a public employee in direct performance of job duties. *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir.) (*en banc*), *cert. denied*, 488 U.S. 909 (1988) (fire marshal demoted, in part, for his written report expressing views that according to employer demonstrated lack of professional judgment) and *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (racial epithet used by basketball coach during motivational speech to his players). Note that in neither of these cases did the employee prevail. Why? When protected speech is weighed in the balance against the employer’s legitimate interests in efficiency, expression “close to the job” is far more likely to be found disruptive to the smooth functioning of the workplace than expression undertaken solely in one’s private capacity as a citizen. Thus, despite expansive dicta and language suggesting a different analytical approach than the one followed by a majority of the Fourth Circuit in *Urofsky*, *Koch* and *Dambrot* also failed to furnish the sort of mature conflict that would merit the attention of the United States Supreme Court. See *Black v. Cutter Lab*, 351 U.S. 292, 297 (1956) (“This Court....reviews judgments, not statements in opinions.”). In other words, as long as the high court feels a just result has been reached, it is reluctant to review cases merely to quibble over methodology.

Then Came *Hardy v. Jefferson Community College*¹³

Kenneth Hardy was an adjunct instructor teaching communications at a Kentucky community college where he had taught for three years. In a summer course called “Introduction to Interpersonal Communication,” Hardy “presented his standard lecture on language and social constructivism, where students examined how language is used to marginalize minorities and

other oppressed groups in society.” *Id.* at 674. The lecture focused on language as a means to advance the needs of the dominant cultural elite. Hardy asked the class to give him some examples. Among the students’ responses were “girl,” “lady,” “faggot,” “nigger” and “bitch.” *Id.* at 675. The teacher said he and most of the class found the discussion academically and philosophically challenging, but one black female student objected to use of the words “nigger” and “bitch,” and complained to Hardy and his superiors. Interestingly, Hardy’s course syllabus set forth university policy prohibiting the use of offensive language in class and contained this statement: “In order to make all class members comfortable enough to participate, there will be no abusive (i.e. sexist, racist, otherwise derogatory) language in discussion.” *Id.*

Hardy apologized to the student but the student had tapped a local civil rights activist to voice her objections to the use of racial and gender slurs in class. The student and the reverend met with the college president. The reverend informed the president that he would not “allow our kids to come to an institution and be berated with the ‘N’ word and the ‘B’ word.” *Id.* at 675. Hardy then met with his dean. She apparently dressed him down despite Hardy’s insistence that consistent with his syllabus promise, he had not used the words in an abusive manner but as powerful analytical illustrations.

By the time August rolled around, Hardy was advised that the complaint had been resolved to the student’s satisfaction. At the same time, he found a message on his home answering machine from the dean saying “there were no classes” for him to teach the next semester. There was another meeting that fall, but the college was not saying much and were

¹³ 260 F.3d 671 (6th Cir. 2001).

assigning him no classes. A year later, Hardy sued the college and its officials claiming retaliation for protected speech.¹⁴

The College and several individually named defendants raised Eleventh Amendment and qualified immunity defenses. The district court denied their motions on qualified immunity, saying that Hardy's speech was on a matter of public concern and that his right to speak on such matters was clearly established by the Supreme Court. The individual defendants took an immediate appeal to the Sixth Circuit on the district court ruling denying them qualified immunity. On appeal, the Court decided only whether facts as alleged by Hardy, if proved, showed a violation of a clearly established right. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). This is usually a pure question of law.

The College argued that Hardy's in class exercise involving "racially vulgar words," did not involve a matter of public concern and that reasonable college administrators could disagree on whether, and to what degree, Hardy's speech was constitutionally protected.

Plaintiff ably persuaded the Sixth Circuit that his facts pointed to something more than an ordinary employment dispute. The dean allegedly told Hardy that if plaintiff "were not a white male, this would not be an issue." *Id.* at 677. The Sixth Circuit swept aside the argument that teachers lack first amendment protections while teaching, but interestingly, did not cite *Boring* or any counter-authority on this point. A different panel of the Sixth Circuit had just ruled in *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001), that a professor could be disciplined for "gratuitous" in-class use of words like "pussy," "cunt", and "fuck" because such vulgarity was not germane to the subject matter. The Court spent most of its time attempting to distinguish

¹⁴ The lawsuit also plead several state law causes of action including defamation, conspiracy, breach of contract and interference with business relations.

Hardy's case from *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995), in which a motivational speech by a basketball coach who used the "N" word was found to be unprotected.

Let's face it. The basketball coach lost his case in *Dambrot* because he was a basketball coach. The court, of course, like the university, needed a better reason to leave him hanging. It therefore declared that his racially provocative pep talk failed to "advance an idea transcending personal interest or opinion which impacts our social/or political lives." *Dambrot* at 1189. Whatever that means. Does anyone know what the Court means? I don't. What the Sixth Circuit really meant to say is that some uses of the 'N' word are useful and appropriate, and some are not. Apparently, "motivational" use of the 'N' word in non-academic settings is off-limits, but deconstructing the "N" word in class to dramatize a point about language and culture touches upon a matter of public concern. It's not what you say; it's how you say it. It may strike some as alarming that constitutional rights should turn on such distinctions, but there you have it. Be alarmed.

Having lost the threshold issue, the College then argued that even if protected, Hardy's classroom discussion was outweighed by its interests in avoiding disruption and controlling curriculum. The Court then scrutinized the college's contention that Hardy's behavior was potentially disruptive. It was one lecture, the court noted. Of ten minority students, just one complained. Overall student feedback on Hardy's classroom instruction was positive. There was no evidence that Hardy's lecture damaged working relationships in his department, interfered with his professional duties or impaired discipline. The only "disharmony" cited by the court was ill will stirred up by the meetings between Hardy and college administrators, and the hard fact of Hardy's nonrenewal.

How was the court to get around the holding of *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973), in which the Sixth Circuit said that universities need not renew contracts for faculty members whose pedagogical style and teaching methods did not conform to university standards? No problem. *Hetrick*, the court explained, was “easily distinguishable because the district court had made significant findings of fact related to the administration’s dissatisfaction with Hetrick’s teaching methods and ability.” *Id.* at 706. Numerous students had complained about “their inability to comprehend what [Hetrick] was attempting to teach them or what was expected of them.” *Hetrick* at 706. In other words, Hetrick couldn’t teach, but Hardy apparently could.¹⁵

What about the reverend’s implicit threat to boycott the college? Didn’t that count for something? No, the Court opined, the college’s concerns about community social pressures presented “a classic illustration of ‘undifferentiated fear’ of disturbance, citing *Terminiello v. City of Chicago*, 337 U.S. 1, (1949) (Function of the First Amendment “is to invite dispute...Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance. That is why freedom of speech, though no absolute, is nevertheless protected against censorship or punishment.”) *Id.* at 4. Reaching back to dicta from *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969), the Sixth Circuit observed that

“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, and our history says it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans.”

Id. at 508-09 (internal citations omitted).

¹⁵ The Court strongly intoned that if Hetrick could have proved that her renewal was based on statements she’d made in class about Vietnam, she might have prevailed. *Id.* at 708.

Given the Sixth Circuit’s propensity to embrace the law at its most abstract, and its willingness to sweep aside its own caselaw to entertain cultural double standards for use of the “N” word, things were not looking good for qualified immunity, the college administrator’s first and best defense. Going back to the basketball coach in *Dambrot* whose use of the “N” got him fired, the Sixth Circuit concluded that when parsing the “N” word, “reasonable school officials should have known that such speech, when it is germane to the classroom subject matter and advances an academic message, is protected by the First Amendment.” *Hardy* at 701. Administrators in the great states of Michigan, Ohio, Kentucky and Tennessee; read up. The Sixth Circuit expects you to read, know, distinguish, then accurately apply its nuanced jurisprudence. When it comes to deciding which faculty wielding the “N” word get the boot, and which become constitutional martyrs, only a legally accurate crystal ball can help you now. The “hazardous freedom” extolled by the United States Supreme Court in *Tinker* can be particularly hazardous to college administrators.

For administrators, *Hardy* is a cautionary tale. Even if the defendants consulted and relied on advice of counsel, that would only have helped them if their lawyer saw things the way the Sixth Circuit did, or could astutely advise them that *at least in the Sixth Circuit’s view*, they were violating clearly established constitutional rights. Fortunately, all is not lost for the administrator defendants. Despite two years of high end litigation, causation has yet to be decided. The individual administrators recently petitioned the United States Supreme Court for a writ of *certiorari* on the issue of qualified immunity.¹⁶ This is an excellent opportunity for college counsel to excite judicial sympathy for the individual defendants in this case and to show the high court that half the nation’s faculty, while teaching, are considered to be ordinary

¹⁶ Briefs available from the author upon request.

employees doing their jobs and subject to content-based supervision, while the other half, if engaged in germane provocations, are permitted to avoid institutional supervision.¹⁷ According to counsel for the *Hardy* defendants, if *cert.* is denied, the parties are preparing to take depositions, flesh out the facts, then on to summary judgment or trial and perhaps another appeal on the merits. After all, whether Hardy was fired for protected speech or based on “permissible academic reasons” remains a disputed issue of material fact that the Sixth Circuit remanded for further consideration. *Id.* 701.¹⁸

Conclusion

Administrators awake. Courts that can barely articulate a persuasive rationale for their judicial rulings expect you to be able to make sense of it all. If I were to identify for you one unifying truth that all courts seem to agree upon, it would be this: ***Controversial or profane in class speech that is not germane or that constitutes a significant curricular deviation in content or methodology, is constitutionally speaking, high risk behavior, and professors should not expect judicial protection for such utterances.*** Whether this result is reached by denying such speech any protection in the first instance, or by finding that a university’s rights outweigh a professor’s, this framework satisfies AAUP canons governing professional expectations while preserving the balancing act contemplated by the *Connick-Pickering* test.

¹⁷ A case that **best** illustrates federal appellate conflict is yet another recent case out of the Sixth Circuit, *Cockrel v. Shelby County Sch. Dist.*, 2001 U.S. App. LEXIS 24189 (6th Cir. 2001). In *Cockrel*, a fifth grade teacher decided to invite actor Woody Harrelson, (with CNN camera crew in tow), to her class so he could promote the benefits of industrial hemp, which is illegal in Kentucky. This decision was held to be constitutionally protected. In my view, the case is wrongly decided. It does create an even more direct conflict with *Boring*, *Edwards*, *Kirkland* and *Aronov*, and is therefore, (if appealed), more likely than *Hardy* to pique the interest of the U.S. Supreme Court.

¹⁸ The defendants may contend that faculty seniority for preferred courses, and decreasing student enrollment resulted in their decision not to renew Hardy’s teaching contract.

While *Urofsky* may be characterized as a case whose outcome is; 1) tied to a box, (state owned computer resources); 2) and a public employee; 3) engaged in performing his job, the case is really about preserving democratic values, order, and academic accountability. In the Fourth Circuit, public employees may not unconditionally hijack public resources and eschew university supervision over the content of their academic work. In other circuits, apparently they may, depending on what they say and how they say it. Regardless of whether the faculty member's free speech interests are weighed in the balance and found wanting as Judge Wilkinson's concurrence suggests, or considered to be government's own voice as suggested by the *Urofsky* majority, (and therefore not considered "citizen speech" at all), the Fourth Circuit offers the most intellectually honest approach to parse out the admittedly difficult issue of controversial professorial speech.

Hardy, on the other hand, should strike the U. S. Supreme Court as a miscarriage of justice, not so much because Hardy's speech was found protected, (it was a close call), but because the deans and provosts who had to make that close call were afforded no protection for having misread the Sixth Circuit's scattered tea leaves. As such, *Hardy* may interest the high court as a useful case to shore up the judge-made doctrine of qualified immunity.
