“Because The Stakes Are So Small”:
Collegiality, Polemic, and Professionalism
In Academic Employment Decisions

IHELG Monograph

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"Because the Stakes are So Small": Collegiality, Polemic, and Professionalism in Academic Employment Decisions

Gregory M. Heiser*

There was a jolly miller once,
Liv'd on the River Dee;
He work'd, and sung, from morn till night,
No lark more blyth than he
And this the burthen of his song
For ever us'd to be,
"I care for nobody, not I,
If no one cares for me."¹

Introduction

Within the interlocking hierarchies of obligation that characterized medieval England, the miller was proverbial for the independence he enjoyed as the result of his monopoly over indispensable technology and expertise -- and for the irreverent and sometimes truculent attitude

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¹ ISAAC BICKERSTAFF, Song, in THE OXFORD BOOK OF EIGHTEENTH CENTURY VERSE (David Nichol Smith, ed., 1926) (1762).
his independence permitted. Similarly, college professors in our own hierarchical society enjoy (or at least expect) considerable autonomy, as both prerequisite for and perquisite of their equally indispensable pursuits. Some scholars are now arguing that this independence, and by extension the unique value of the professoriate to American society, is being threatened by the use of "collegiality" as a criterion for academic employment decisions.

In the most recent chapter of this controversy, a group of distinguished historians sent an unusual letter of protest in November 2002 to the chancellor of Brooklyn College, objecting to the college's decision not to renew the employment contract of Robert David "K.C." Johnson.

2 Chaucer's miller was recognizably pugnacious, see Prologue, ll. 545-566, Canterbury Tales 29-30 (Paul G. Ruggiers, ed., University of Oklahoma Press 1979). Millers generally occupied an ambiguous and not particularly beloved place in the medieval social order; see Lee Patterson, "No Man His Reson Herde": Peasant Consciousness, Chaucer's Miller, and the Structure of the Canterbury Tales, in Literary Practice and Social Change in Britain, 1380-1530, 113, 125-129 (Lee Patterson, ed., 1990).


4 For additional recent incidents, see Tamar Lewin, "Collegiality" as a Tenure Battleground, N.Y. Times, July 12, 2002, at A12; Piper Fogg, Do You Have to be a Nice Person to Win Tenure? Collegiality Rears Its Pretty Head in a Fight at UNLV, Chron. of Higher Educ., February 1, 2002, at A8.
Johnson was a young prodigy whose admittedly stratospheric scholarship and exemplary teaching had been outweighed in the renewal decision by concerns about "collegiality," i.e., his behavior toward colleagues, which was perceived as arrogant and obstructionist. In their protest, the historians called the “invented” criterion of collegiality a “redundant category” that poses a “grave threat to academic freedom, since the robust and unfettered exchange of ideas is central to the pursuit of truth.” The next month, following a wave of media reports and unfavorable commentary from groups sympathetic to Johnson, Brooklyn College relented and


Letter from Akira Iriye, Harvard University; Alan Brinkley; Columbia University; Philip Zelikow; University of Virginia; Donald A. Ritchie, Associate Historian, United States Senate; Ernest May, Harvard University, Donald Kagan; Yale University; Charles Dew, Williams College; Randall Bennett Woods, University of Arkansas; John Milton Cooper, Jr., University of Wisconsin, Madison; Robert Schulzinger, University of Colorado, Eugene Genovese, University Center of Georgia; James Shenton, Columbia University; Paula Fichtner, Brooklyn College; Frank Ninkovich, St. John's University; Timothy Naftali, University of Virginia; Dennis C. Dickerson, Vanderbilt University; Gertrude Himmelfarb, City University of New York; David Schmitz, Whitman College; Thomas Alan Schwartz, Vanderbilt University; Margaret King, City University of New York; T. Christopher Jespersen, North Georgia University; Leonard Gordon, Brooklyn College; Fredrik Logevall, University of California, Santa Barbara; Martin Burke, City University of New York, to Chancellor Matthew Goldstein, November 12, 2002, *available at*<http://hn.us/articles/1123.html>.
renewed his annual contract, but it deferred the early promotion and tenure decision that Johnson had originally requested.  

Johnson's case is at this writing the most recent skirmish in a longstanding debate over whether collegiality is a legitimate criterion in academic employment decisions. On one side of the debate are college and university administrators and a majority of courts. This side views collegiality as a frequently unspoken but entirely legitimate criterion, without which institutions would be forced to hire, tenure, or retain professors who might be competent scholars but whose personality or behavior threaten the stability and productivity of the department. On the other side are those -- mostly individual scholars and the organizations that represent them -- that view collegiality as inimical to academic freedom and a tool for the enforcement of political and social conformity. Most notable in this latter category is the American Association of University Professors (AAUP), which in 1999 adopted a statement entitled On Collegiality As a Criterion for Faculty Evaluation that on its face is entirely hostile to the concept.  

Previous commentary on this issue has noted the collegiality criterion's overwhelming acceptance by the courts that have considered the matter. However, like the courts themselves,  

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neither collegiality’s defenders nor its detractors have fully discussed what the concept should mean. Collegiality has been generally characterized as a personality trait equivalent to amiability, cooperativeness, or a pleasant demeanor. In that light it is not particularly distinguishable from qualities that might be valued in any employee, if not any human being, and it is on that basis that both attacks and defenses of collegiality tend to proceed. This article suggests that more should be required of both sides in this debate. Collegiality should be considered not a personality trait of individuals, but, as social scientists conceive it, a structural quality of organizations -- specifically, as a defining element of self-governing professional organizations. Once seen in these terms, the decision to discipline or terminate a faculty member on collegial grounds can be articulated in terms of the organization's structure and goals and thereby distinguished from a simple decision about personality. If, furthermore, we recognize that professors, like attorneys, actually share a professional obligation to enter into disputes with their colleagues, it will be possible to articulate the need for special institutional rules or practices to channel the friction that the job necessarily entails.

Adopting an organizational view of collegiality, understanding professorial collegiality as a species of professionalism, and frankly accepting the polemical role of university faculty are, in themselves, unlikely to effect any major change in the outcome of most future cases on academic collegiality. These steps may not even move the opposing sides in this debate closer together.

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However, some salutary consequences may be within reach: de-trivializing the debate about this important aspect of academic life, encouraging a recognition of the antagonists’ shared presuppositions about the nature of academia and academic freedom, and permitting a more stable ground for judicial analysis in these cases, particularly with respect to the flawed but ubiquitous *Pickering-Connick* balancing test for academic speech in public universities.

Collegiality matters most among independent professional equals, least among subordinate employees in a bureaucracy. The dangerous consequence of present criticisms of collegiality is that along with the offending concept, the ideal of faculty self-governance may be discarded as well. To paraphrase Henry Kissinger,\(^{10}\) collegiality's critics may be asking that the organizational stakes remain small so that faculty disputes can remain bitter.

1. **Collegiality and Its Critics**

   One of the first intimations of judicial concern for collegiality appears in *Mabey v. Reagan*,\(^{11}\) where an "essential" although perhaps "subjective" element of a professor's performance is the "ability and willingness to work effectively with his colleagues."\(^{12}\) Later, in

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\(^{10}\) "The disputes [in academia] are so bitter because the stakes are so small." Henry Kissinger, quoted in WALTER ISAACSON, KISSINGER: A BIOGRAPHY 72 (1992).

\(^{11}\) 537 F.2d 1036 (9th Cir. 1976).

\(^{12}\) *Id.* at 1044. *Mabey* involved the First Amendment claim of a junior professor whose teaching contract was not renewed following, among other incidents, a faculty senate meeting in which the professor addressed colleagues and administrators as "jerks" and "older punks." *Id.* at 1040 n.4. As the court noted, the case is best understood in the context of the Zeitgeist of the
Mayberry v. Dees, the term collegiality was defined as "the capacity to relate well and constructively to the comparately small bank of scholars on whom the ultimate fate of the university rests." As the quality of relating well or working well with others, collegiality seems an obviously desirable quality in any employee, one that would probably be universally important in the world of work. Anyone who is not self-employed must work with others, and the ability to do so is therefore an essential component of the employee's overall fitness for the job. Certainly, inability to get along with fellow employees is well-recognized as a legitimate reason for termination in other areas of employment.

From an outsider's perspective, the facts of many published academic collegiality cases


14 Id. at 514.

15 See, e.g., Doeble v. Sprint Corp., 157 F. Supp. 2d 1191, 1211 (D. Kan. 2001) (holding in a disability case that termination of a financial analyst was appropriate where based on inability to get along with coworkers).

16 There is probably no bright-line distinction that can be drawn between cases in which the term "collegiality" is used and those in which it is not. Cf. Babbar v. Ebadi, 36 F. Supp. 2d 1269, 1272 (D. Kan. 1998) (using the term to describe a professor's disruptive and insubordinate behavior) and Sinnott v. Skagit Valley College, 746 P.2d 1213 (Wash. App. 1987) (failing to
tend to support this common-sense view of collegiality. With a few exceptions, most plaintiffs have been untenured professors who were either denied a contract renewal or denied tenure after behavior that was sometimes breathtakingly bad: insulting or ignoring the department chair;\textsuperscript{17} insulting colleagues to their faces,\textsuperscript{18} or to students,\textsuperscript{19} or to the press,\textsuperscript{20} to visiting candidates for positions in the department;\textsuperscript{21} refusing to teach assigned classes\textsuperscript{22} or to collaborate with colleagues;\textsuperscript{23} filing numerous meritless complaints and lawsuits against colleagues;\textsuperscript{24} and displaying traits describable variously as extreme defensiveness,\textsuperscript{25} dishonesty,\textsuperscript{26} or general apply the word to similar behavior).


\textsuperscript{20} De Llano v. Berglund, 282 F.3d 1031, 1033 (8th Cir. 2002).

\textsuperscript{21} McGill v. Regents of the Univ. of California, 52 Cal. Rptr 2d 466, 468 (Ct. App. 1996).


\textsuperscript{23} \textit{Id.}


\textsuperscript{26} Babbar, 36 F. Supp. at 1272.
uncooperativeness.\textsuperscript{27} In some of these cases, the uncollegiality label has been applied to behavior that might ordinarily be called insubordinate,\textsuperscript{28} although it might be noted that no one seems to contest an institution's right to discipline or dismiss a faculty member who simply refuses to comply with institutional directives.\textsuperscript{29}

On the other hand, the label uncollegiality can also be applied to less overt behavior. Occasionally the problem can be, not bad relations with others, but no relations: the "uncollegial" label has also been applied to the professor who is reclusive, lacks "leadership," and cannot establish "straightforward, open, trusting" relationships with colleagues.\textsuperscript{30} The K.C. Johnson case noted above lies in between these extremes: although Brooklyn College officials did not provided an official account of the threatened decision to nonrenew, published reports indicated that the threat to nonrenew Dr. Johnson's contract for uncollegiality occurred after he

\textsuperscript{27} \textit{Mayberry}, 663 F.2d at 505.

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} See, e.g., \textit{On Collegiality}, supra note 8, (acknowledging unacceptability of "unprofessional conduct"); Kelleher v. Flawn, 761 F.2d 1079, 1084-85 (5th Cir. 1985) (distinguishing critical speech from insubordinate conduct and discussing absence of First Amendment protection for the latter); see also Statsny v. Bd. of Trustees of Cent. Washington Univ., 647 P.2d 496, 503-504 (Wash. App. 1982) (rejecting plaintiff's contention that termination of a college professor for insubordination violates the First Amendment unless the institution had a compelling interest in issuing the directive the professor ignored).

\textsuperscript{30} Fisher v. Vassar College, 70 F.3d 1420, 1436 (2d Cir. 1995), \textit{aff'd}, 114 F.3d 1332 (1997) (en banc).
alienated fellow committee members in a hiring search and complaints were raised that he attempted to “bully” committee members and impugned their thoroughness in researching candidates’ backgrounds.\textsuperscript{31}

According to published accounts, it was this incident that led to Brooklyn College's threat of nonrenewal and the historians’ letter, which read in part:

\begin{quote}
Tenure should be judged on the basis of scholarship, teaching, and service. Nobody denies Johnson's outstanding success as a scholar and as a teacher. But in the spring of 2002 opponents of Johnson invented a fourth category -- "collegiality" -- and argued that it should outweigh sterling accomplishments in scholarship, teaching, and service combined.

Introducing a redundant category of collegiality rewards young professors who "go along to get along" rather than expressing independent scholarly judgment. It poses a grave threat to academic freedom, since the robust and unfettered exchange of ideas is central to the pursuit of truth.\textsuperscript{32}
\end{quote}

This passage summarizes the two most often-heard legal arguments against the collegiality criterion: the claim that its inclusion is a breach of contract if not expressly added to the traditional trio of research, teaching, and service; and the claim that it threatens academic freedom.

\textsuperscript{31} Arenson, \textit{supra} note 5.

\textsuperscript{32} Letter from Akira Iriye et al., \textit{supra} note 6.
A. Collegiality and Contract.

The historians' concern that collegiality is an “invented” criterion raises the common, and commonly unsuccessful, argument that considering collegiality in academic employment decisions is a breach of contract. Most colleges and universities explicitly mention only research, teaching, and service to the institution as the criteria for success as a professor. Those which incorporate the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments will also mention that faculty have responsibilities to their colleagues, deriving from common membership in a community of scholars. . . . In the exchange of criticism and ideas, they should show due respect for the opinions of others. They shall acknowledge their academic debts and strive to be objective in the professional judgment of their colleagues.

Although service must be voluntary, faculty members should

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33 The useful article by Connell and Savage, supra note 7, includes a survey of institutions and found that the "great majority" of U.S. institutions of higher education do not mention collegiality or comparable terms in their tenure and promotion guidelines. Id. at 834, n.7. Some institutions do have an express collegiality requirement, see id. and Hooker v. Tufts Univ., 581 F. Supp. 104, 106 (D. Mass. 1983) (noting the institution's use of the term "collegiality" for service to the institution.) Others use the term to denote not an individual criterion, but the principle of shared governance between faculty and the administration, see <http://www.csustan.edu/facultyhandbook/appxh.htm> (employing "collegiality" to denote principle of shared governance at California State University).
accept a reasonable share of the responsibility for the governance of their institution. If driven by his or her conscience into dissent, the faculty member shall take care that this dissent does not interfere with the rights of colleagues and students to study, research, and teach.\textsuperscript{34}

Courts almost invariably reject the contract argument, although there is no single path to that result. In some cases collegiality is held to be more or less an implied covenant, central enough to the employment relationship that it can be inferred if not expressed.\textsuperscript{35} In other cases, collegiality may be held to be an aspect of service.\textsuperscript{36} However, legal approbation for the collegiality criterion is not quite universal. For example, one case notes without further comment that prior to the onset of litigation an arbitrator determined that collegiality could not be considered in an academic employment dispute when it had not been expressly included in the faculty handbook.\textsuperscript{37} In another, unpublished case, a federal district court found a university's assertion of uncollegiality to be illegitimate and a pretext for discrimination because the criterion

\textsuperscript{34} AAUP and American Association of Colleges, \textit{Statement of Principles on Academic Freedom and Tenure (1940) with 1970 Interpretive Comments, reprinted in POLICY DOCUMENTS & REPORTS 3 (8th ed. 1995)}.

\textsuperscript{35} See, e.g., \textit{Mayberry}, 663 F.2d at 513 (applying "generally applicable, nationwide principles" to interpret a university's relationship with a tenure-track professor).


had not been included in published tenure criteria.\textsuperscript{38}

The historians' letter further makes the somewhat perplexing objection that collegiality is "redundant" with respect to the traditional three criteria. Presumably, this means that the collegiality criterion measures nothing other than teaching, research, and service. Yet if it really is implicit in these admittedly legitimate criteria, how can collegiality also be an illegitimate or "invented" category? For example, inability to speak the English language is not one of the three traditional categories either, but to the extent that its effects could surely be borne out in teaching and research, it would be a "redundant" but certainly a legitimate reason for an adverse employment decision.\textsuperscript{39} Can a criterion be both redundant and illegitimate at the same time?

In its 1999 policy statement on collegiality, the AAUP answers as follows:

Relatively little is to be gained by establishing collegiality as a separate criterion of assessment. A fundamental absence of

\textsuperscript{38} Kaplan v. State Univ. of New York at Geneseo, No. 93-CV-6149T (W.D.N.Y. filed Sept. 24, 1998), slip op. at 28-29. In fact the collegiality criterion had been expressly rejected by the institution's faculty senate some time previously, id. at 22. The facts of the case are reported in Robin Wilson, \textit{Citing Bias, Judge Orders SUNY-Geneseo to Rehire Professor, Provide Back Pay, CHRON. OF HIGHER EDUC., September 29, 1998 at A14.}

collegiality will no doubt manifest itself in the dimensions of scholarship, teaching, or, most probably, service, though here we would add that we all know colleagues whose distinctive contribution to their institution or their profession may not lie so much in service as in teaching and research. Professional misconduct or malfeasance should constitute an independently relevant matter for faculty evaluation. So too should efforts to obstruct the ability of colleagues to carry out their normal functions, to engage in personal attacks, or to violate ethical standards. The elevation of collegiality into a separate and discrete standard is not only inconsistent with the long-term vigor and health of academic institutions and dangerous to academic freedom, it is also unnecessary.\(^{40}\)

Thus the AAUP contends that the collegiality criterion becomes illegitimate precisely when it becomes visible itself rather than through its effects in the traditional areas. In this view, there could be no such thing as a professor who excels in these areas, but could also be sanctioned, nonrenewed, or disadvantaged at tenure time because he or she is uncollegial. Some diminution of performance in the traditional categories would always be the wages of a faculty member’s uncollegiality. However, even as the AAUP rejects any independent status for collegiality, it also seems to assert the existence of a fourth category, itself not generally mentioned in faculty evaluation criteria. This category, which might be called professionalism, consists of avoiding

\(^{40}\) *On Collegiality*, supra note 8, at 69.
"professional misconduct," "personal attacks," and the violation of "ethical standards."¹⁴¹

At this point it is easy to get the impression that the two sides in this debate are simply talking past each other. In almost every instance, the reported collegiality cases turn on behavior that could certainly be described in terms of the traditional three categories,⁴² or as "misconduct,"⁴³ or within the loose categories of obstructiveness, ad hominem attacks, or unethical behavior.⁴⁴ Surely if both supporters and critics admit the inclusion of these considerations in employment decisions, what does it matter whether collegiality is considered a separate category or not? And once some legitimate place for collegiality is admitted, what use is there in contending that the criterion is inherently suspect?

One answer lies in the claim that collegiality should not constitute an independent

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¹⁴¹ Id. The AAUP's main statements regarding the duties and ethical standards of faculty are the 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, supra note 34, and the Statement on Professional Ethics, POLICY DOCUMENTS & REPORTS 105, supra note 34. These and other AAUP documents relating to professionalism are discussed at length in Neil W. Hamilton, Academic Tradition and the Principles of Professional Conduct, 27 J. C.&U.L. 609 (2001).

⁴² See, e.g., Bresnick, 864 F. Supp. at 329) (considering collegiality part of service).

⁴³ Supra note 12 and accompanying text.

⁴⁴ These categories are obviously not mutually exclusive, nor can they be defined with the precision applicable to, for instance, criminal codes. The AAUP's point here appears to be that there are standards of professional conduct to which faculty should adhere, but "collegiality" is distinct from these standards.
criterion because, unlike proficiency in the English language for instance, it is an inherently private and ineffable standard. Collegiality has been described,\textsuperscript{45} and assailed as,\textsuperscript{46} a "subjective" criterion. The term "subjective" can mean a number of things. It has been noted that teaching, research, and service are also subjective in the sense that they are not quantifiable and cannot be reduced to a value-free calculation.\textsuperscript{47} However, critics of collegiality probably do and certainly could mean more -- not simply that collegiality defies quantification, but that, unlike estimations of scholarship or teaching, its assessment rests on judgments that are intrinsically emotional and standardless, that a conclusion about collegiality as "cooperativeness" or "likeability" masquerades as a dispassionate assessment of a general trait or ability when in fact it is not meaningfully different from a simple statement about how much one personally likes or enjoys working with that professor.\textsuperscript{48}

Observers unfamiliar with the debate might be forgiven for asking where the harm is in that. In the ordinary at-will workplace, an employee who can "do his job" superlatively but who

\textsuperscript{45} Bresnick, 864 F. Supp. at 328; Mayberry, 663 F.2d at 519.

\textsuperscript{46} Perry A. Zirkel, Personality as a Criterion for Faculty Tenure: The Enemy It Is Us, 33 Clev. State L. Rev. 223 (1984-85).

\textsuperscript{47} Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2d Cir. 1984); Namenwirth v. Bd. of Regents of the Univ. of Wisconsin Sys., 769 F.2d 1235, 1243 (7th Cir. 1985).

\textsuperscript{48} See Duke v. N. Texas State Univ., 469 F.2d 829, 834 (5th Cir. 1972) (acknowledging that relief may be appropriate where substantial evidence exists that a decisionmaker in the tenure process "personalized" the decision to the point that the adverse decision was the result of a "personal vendetta.")
is universally unpopular might still be terminated, and understandably so.\footnote{49} Other things being equal, there is some value in keeping workplace morale high by excluding or removing people nobody likes. Even in academia there is no way of telling how many hiring, renewal, tenure, and promotion votes occur precisely on such personal grounds.\footnote{50} Excluding cases of invidious discrimination,\footnote{51} one might ask, why should they not?

**B. Collegiality and Academic Freedom: Individualism v. Homogeneity**

The classic answer lies in the second element of the historians' critique in the Johnson affair: academic freedom. Academic freedom is famously a "special concern" of the First Amendment,\footnote{52} a necessary condition of the function\footnote{53} of colleges and universities in producing

\footnote{49} Assuming, of course, that there is no disability dimension to such deficiencies; see generally Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans With Disabilities Act?*, 2002 WIS. L. REV. 1139.

\footnote{50} See, e.g., Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMPLE L. REV. 67, 143-147 (1994) (discussing subconscious gender bias masquerading as professional judgment).

\footnote{51} The relation between collegiality and discrimination as an aspect of academic freedom is discussed *infra* notes 63-76 and accompanying text.


\footnote{53} To say the least, an ample amount of commentary generated yearly on academic freedom, its relation to truth, and its value for society. The scholars to which this article is most indebted

It has been argued that academic freedom could be valuable even without producing truth if it furthers values such as tolerance that are valued by society. Byrne, supra note 52, at 296, finds a moderate version of this proposition in Keyishian itself -- despite that case's express reference to academic freedom's truth-function, see infra note 55. A more radical version is suggested by Justice Holmes's "marketplace" metaphor, see Byrne, supra note 52, at 297 n.176, and is also advanced by Richard Rorty in Does Academic Freedom Have Philosophical Presuppositions?, in THE FUTURE OF ACADEMIC FREEDOM 21 (Louis Menand, ed. 1996).

Letter from Akira Iriye et al., supra note 6. The phrase echoes Keyishian, 385 U.S. at 603:

The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide
interaction involves speech; therefore, goes the argument, dismissing uncollegial professors punishes speech. In this view such dismissals may make the work environment more pleasant for everyone else, but amount to a betrayal of academia’s birthright.\(^{56}\)

The AAUP statement as well establishes an opposition between collegiality -- the quality of “genial Babbitts”\(^ {57}\) who purchase academic harmony at the price of conformity -- and the academic freedom that depends not only on “faculty debate and discussion,” but also on “gadflies,” “critics,” and “even the occasional malcontent.”\(^ {58}\) This objection to collegiality rests

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exposure to that robust exchange of ideas which discovers truth

"out of a multitude of tongues, [rather] than through any kind of authoritative selection." [Id. at 603; citations omitted]

\(^ {56}\) See Zirkel, \textit{supra} note 46, at 243; Dyer, \textit{supra} note 9, at 321-22.

\(^ {57}\) \textit{On Collegiality, supra} n.8, at 69. A similarly trenchant epithet for the pointlessly "collegial" colleague was coined by Edgar Dyer, who asked whether academics should be "gladhanding backslappers." Dyer, \textit{supra} note 9, at 310.

\(^ {58}\) \textit{On Collegiality, supra} note 8, at 69. Unfortunately, the annals of academia are replete with examples of academic units that seem to be composed almost exclusively of malcontents. See, e.g. Robin Wilson, \textit{A ‘Fractured’ Department: A fight set off by an off-color memo divides historians on a California campus}, \textit{Chron. of Higher Educ.}, January 13, 1995, at A15; Wilson, Robin, \textit{Bickering Decimates a Department: U. of Cincinnati’s economics professors fight over teaching versus research}, \textit{Chron. of Higher Educ.}, October 18, 2002, at A12; see generally Courtney Leatherman, \textit{Whatever Happened to Civility in Academe? Some say professors have become too rude to each other; others say coarse behavior has been common for centuries},
on the proposition, familiar in Western culture at least since Plato, that honest and fearless thinking exists in uneasy opposition with the ordered polis. Thus the uneasier the opposition, the more ultimately valuable the thoughts (and the thinker) are likely to be. If academic freedom means protecting the professoriate from the pressures of political unpopularity, it also


At his trial, Socrates explains the kinds of conversations that made him unpopular: "I tried to show him [an unnamed politician or "public man"] that he thought he was wise, but was not. As a result, I became hateful to him and to many of those present . . . " PLATO, APOLOGY 21D, 82-83 (H.N. Fowler, trans., Harvard University Press 1982). The Apology also originates the peculiarly self-congratulatory connotations of the term "gadfly":

For if you put me to death, you will not easily find another, who, to use a rather absurd figure, attaches himself to the city as a gadfly [μύωπός] to a horse, which, though large and well bred, is sluggish on account of his size and needs to be aroused by stinging.

Id. at 30E, 112-13.

But see STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO 102-03 (1994), who argues that defenses of free speech usually permit censorship of certain viewpoints perceived as dangerous.

Along with many others, Byrne, supra note 52, Metzger, supra note 53, and Rabban, Functional Analysis, supra note 53, have all noted the AAUP's insistence on academic freedom as a right of individual professors and the divergence of that conception from the related but distinct right of institutions to be free from state control. Both Keyishian, 385 U.S. 589,
means protecting individuals from unpopularity within the professoriate. To the critics the pre-eminent value of academic freedom implies two things for collegiality. First, professors should be as free as possible to say almost anything without fear of adverse consequences. Second, professors should be insulated absolutely from the effects of simple unpopularity even within their own ranks. Thus the less concern for collegiality there is, the better. This individualistic approach to academic freedom is consistent with the AAUP's historical stance, which is based on the paradigm of the individual professor facing punishment by an institutional entity.\textsuperscript{62} "On Collegiality," however, appears to be the first time when the AAUP has conceded that the threat to academic freedom identified in a landmark precedent,\textit{Sweezy v. New Hampshire}, 354 U.S. 234 (1957), involved state attempts to trammel the activities or viewpoints of individual professors. Yet the Court's language in those and subsequent cases was sufficiently muddled that the Fourth Circuit was recently able to conclude that academic freedom has always been vested in institutions and never in individual professors, Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000). In a particularly ironic twist, the \textit{Urofsky} court reached its conclusion partly with the help of Professor Byrne's history of academic freedom cases, \textit{supra} note 52, the point of which had been to urge the judicial rehabilitation of individual academic freedom, not its obliteration. \textit{See} J. Peter Byrne, \textit{Constitutional Academic Freedom in Scholarship and in Court}, \textsc{Chron. of Higher Educ.} (Jan. 5, 2001).\textsuperscript{62}

\textsuperscript{62} The AAUP arose from the activities of Professors John Dewey and A.O. Lovejoy to protect individual faculty from heavy-handed trustees and regents. \textit{See generally} WALTER P. METZGER, \textsc{Academic Freedom in the Age of the University} 194-232 (1955) and AAUP, \textsc{Professors on Guard: The First AAUP Investigations} (Walter P. Metzger, ed.1977).
can come not only from the institution's administration, but also from the professor's own colleagues.

Academic freedom is at the heart of a related concern over collegiality: its potential use as a pretext to hide invidious discrimination. As to discrimination, no critic appears to have gone so far as simply to identify collegiality as inherently discriminatory. Rather, the argument goes that in an academic unit populated largely by professors of one gender or ethnicity, the qualities of “fitting in” or being “comfortable” with each other will inexorably tend to perpetuate that homogeneity. In terms of ordinary employment discrimination jurisprudence, the harm of homogeneity arises when an otherwise qualified applicant is passed over for a job or harassed on account of some perceived difference. However, often the concern for “diversity” in higher education is justified not because of the applicants that a homogeneous environment might unfairly discourage, but because ethnic or gender diversity is a proxy for diversity of viewpoints, and it is the interaction of diverse viewpoints that furthers the search for truth, the academy's sumnum bonum. Justice Powell’s defense of affirmative action in college admissions

63 Paula Dressel et al., The Dynamics of Homosocial Reproduction in Academic Institutions, 2 Am. U. J. Gender & L. 37, 52-54 (1994); West, supra note 50, at 143-147; see generally Amy L. Wax, Discrimination as Accident, 74 Ind. L.J. 1129 (1999).

64 It is axiomatic that Title VII protects an "individual" with respect to "his [sic] compensation, terms, conditions, or privileges of employment." Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U.S.C. § 2000e-2(a)(1).

in *Bakke*, for instance, values diversity for this purpose.\(^{66}\) From this perspective collegiality is dangerous not because it censors unpopular viewpoints, but because in a more subtle and insidious gesture it excludes unfamiliar voices.\(^{67}\)

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\(^{67}\) See Annette Kolodny, "I Dreamed Again That I Was Drowning," in *Women's Writing in Exile* 171, 172-74 (Mary Lynn Broe and Angela Ingram, eds., 1986):

> ... as though the department has not told prospective employers that I'm "abrasive," the new code word for feminist. ... Sometimes I think maybe I am crazy, maybe I have some other personality I don't know about. I've read the testimony of some of the senior members [of the department] and don't recognize the person they describe as me. ... What's so scary is that their testimony is consistent; they all agree with one another. I seem to be the only one with a different version ... They don't have any professional grounds for the denial of tenure -- I've outpublished them all, the department chair concedes that my teaching is "outstanding," and my committee work has always been diligent -- so they're building a case based on personality. They're going to characterize me as "uncollegial," whatever that means. The second time I was denied promotion, the reason given was "collegiality." I went to the department chair to ask what it meant. He said he didn't know, wished they wouldn't use the term, called it a "will o' the wisp."
Observers have noted that in fact defendant institutions typically prevail in cases where collegiality is alleged to have been a mask for discrimination. This result could be explained in at least two ways. First, it may be that the harm occurs "beneath the radar," at a level imperceptible to the legal system. Critics have certainly charged that the special legal status of colleges and universities -- reflected in the twin notions of academic freedom and deference to academic judgments -- can operate as a screen for invidious ethnic, gender, or viewpoint discrimination. Some have extended this criticism to argue that even decisions such as the renewal of yearly contracts for untenured faculty, which are now as close as academia gets to at-will employment, should be subject to greater procedural safeguards. The AAUP has advocated requiring institutions to articulate their reasons for nonrenewal and to permit substantive as well as procedural review of those decisions through an internal appeals process. Although motivated primarily by concerns over the professor's general welfare and academic freedom

But he, too, had voted against me -- always has.

Dean Kolodny later proposed the recognition of "intellectual harassment" as a wrong which, when targeted against those traditionally excluded by the academy, could result in legal remedy and thereby the expansion of traditional and culturally exclusionary academic freedom. FAILING THE FUTURE: A DEAN LOOKS AT HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY 104-06 (1998).

West, supra note 50, at 134-143.

Id.

AAUP, Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, POLICY DOCUMENTS AND REPORTS, supra note 32, at 15, 17-20.
rather than discrimination per se, this proposal echoes the *McDonnell-Douglas* burden-shifting framework, so that the employer's obligation to produce a legitimate justification for the decision would occur not after a lawsuit has been filed but upon request after the employment decision occurs. Like tenure itself, such a mechanism makes particular sense if professors who do their job correctly are likely to become unpopular on that account, and thus likely to need insulation against retaliation, both overt and (more likely) covert.

The second explanation for plaintiffs' consistent failure in collegiality-as-pretext cases is that colleges and universities are consistently able to make collegiality look like a legitimate and nondiscriminatory reason for their employment decisions. As discussed, many of the reported cases in which collegiality is raised involve instances of behavior that is astonishingly bad, in contexts that seem far removed indeed from ordinary intuitions about diversity and academic

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71 *Id.* at 17.

72 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). There is a similar burden-shifting framework for First Amendment cases, *see Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977) (once it is established that exercise of a First Amendment liberty was a "substantial" or "motivating factor" in an adverse employment decision, employer must show that it would have reached the same decision in the absence of such protected conduct).

73 *See supra* notes 17-29 and accompanying text.
freedom.\textsuperscript{74} However, not all do,\textsuperscript{75} and even if they did, it would not blunt the critics' point.

Given the above assumptions about academic freedom, a termination based on nothing more than dislike would be illegitimate even if any reasonable person would dislike the professor as well.\textsuperscript{76}

If collegiality judgments are really assessments of personality, and if such assessments are nothing more than standardless emotional intuitions, and if, as seems likely, the intuition is especially likely as a reaction against unpopular views and voices perceived as "other," then the critics are correct that the collegiality criterion is inherently suspect.

C. Constitutionalizing Collegiality: Academic Freedom and the Pickering-Connick Test

\textsuperscript{74} See infra notes 99 and 106.

\textsuperscript{75} For example Dean Kolodny's anecdote, supra note 64, is highly reminiscent of the accountant in Price Waterhouse v. Hopkins, 490 U.S. 228, 278 (1989), who was denied a promotion for personality judgments based on sexual stereotyping. Although legally significant for different reasons, Fisher, 70 F.3d 1420, similarly involved competing intuitions about personality traits and stereotypes, see David N. Rosen and Jonathan M. Frieman, Remodeling McDonnell Douglas: Fisher v. Vassar College and the Structure of Employment Discrimination Law, 17 QUINNIPIAC L. REV. 725 (1998).

\textsuperscript{76} But see Mayberry, 663 F.2d at 517 n.35. In dicta the court concludes that it is always permissible to consider sheer offensiveness from a strictly objective, impersonal viewpoint: "Is a man who says such things, lacking in taste, if not scurrilous, of me or anyone else, the kind of person, with the requisite degree of collegiality, on whom we want to confer one of our limited number of tenured positions?" (emphasis in original).
The proper role of collegiality is even more obscure in cases where the plaintiff professor asserts that a public college or university has used the collegiality criterion as a pretext to retaliate against speech protected under the First Amendment. Just as in discrimination cases, concerns may be raised that faculty and the administration are likely to prize homogeneity and punish difference. Just as in discrimination cases, such claims employ a burden-shifting analysis in which, once accused of an improper motivation for an adverse employment action, the employer will insist that lack of collegiality can be a legitimate basis for an adverse action. In some such cases the acts alleged by the employer as evidence of uncollegiality and the acts alleged by the plaintiff as evidence of protected speech will be the same. Whatever our general conception of academic freedom may say about protected speech in those cases, extant First Amendment jurisprudence subsumes academic freedom under the two-part legal test enunciated in Pickering v. Board of Education and Connick v. Myers. Applicable generally to all public employees, the Pickering-Connick test has been subject to numerous critiques which mostly

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77 On Collegiality, supra note 8, Letter from Akira Iriye et al., supra note 6.

78 Mt. Healthy, 429 U.S. at 282-284.

79 See, e.g., Watts, 495 F.2d at 389; Stein, 994 F. Supp. at 910.

80 See, e.g., Feldman v. Ho, 171 F.3d 494 (7th Cir. 1999) (unfounded accusations of plagiarism against a colleague); see also Mayberry, supra note 13, at 517 n.35 (stating in dicta that an objective concern for collegiality will always be a legitimate Mt. Healthy factor).


83 See, e.g., Elizabeth Mertz, Comment, The Burden of Proof and Academic Freedom:
deplore the straitened version of academic freedom it produces. The test's relation to the collegiality criterion has been the subject of particular concern.\textsuperscript{84}

\textit{Pickering} and \textit{Connick} themselves do not purport to restrict academic freedom in public colleges and universities; their primary effect was instead to expand dramatically the realm of protected speech for all public employees by sweeping away the vestiges of the old "right-privilege" distinction that had once allowed public employers great leeway in restricting employee speech, and received its pithiest summary in Oliver Wendell Holmes, Jr.'s judicial rejoinder to a policeman fired for his political beliefs: he "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."\textsuperscript{85} The test enunciated in the two cases is essentially a balancing test, the central issue of which is whether the public employee's speech was on a "matter of public concern."\textsuperscript{86} Once that is determined, a court must balance the


\textsuperscript{84} Dyer, \textit{supra} note 9, at 321-22.

\textsuperscript{85} McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892)

\textsuperscript{86} \textit{Pickering}, 391 U.S. at 568.
employee's interest in speaking "as a citizen" against the employer's interest in "promoting the efficiency of the public services it performs through its employees." Speech unrelated to public concerns is more easily subject to discipline (although it still receives some First Amendment protection). Second, even speech on matters of public concern may be subject to discipline if the employee's interest is outweighed by the employer's need to maintain "efficiency." Unfortunately, if the collegiality criterion is indeed suspect, this widespread adoption of this test in college and university speech cases has exacerbated the suspicions.

The Pickering-Connick test has been roundly criticized for its uncertain application in academic employment disputes and its poor fit with traditional notions of academic freedom. The general thrust of the criticisms is that the cause of academic freedom is ill-served by a one-size-fits-all test that includes only public university faculty, then obliterates the distinction

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87 Id.

88 Id. Connick attempts to refine the test further by distinguishing public concerns from merely personal ones, Connick, 461 U.S. at 146-47 and emphasizing that some protection exists even for private speech, id. at 147. The test was further refined, or at least elaborated, in Waters v. Churchill, 511 U.S. 661, 677 (1994) (holding that an employer's reasonable and good-faith belief that the employee's speech was not protected suffices to avoid liability).

89 Connick, 461 U.S. at 147.

90 Pickering, 391 U.S. at 568.

91 Supra note 83.

92 The problems inherent in creating a separate academic-freedom analysis for public institutions were foreseen by the AAUP, which decided not to submit an amicus brief in Sweezy,
between the latter group and all other public employees. Whatever "academic freedom" might have meant within the tradition of academic custom and usage, under *Pickering-Connick* it is subject to the same analysis applied to government attorneys, nurses, and secretaries.

Often plaintiffs discover that under *Pickering-Connick* the "uncollegial" expressive behavior for which they are sanctioned fails the balancing test because the subject matter was not one of "public concern" and is therefore unprotected. As the commentators have amply shown, the distinction can be hazy indeed between what does and what does not fit under the public-concern rubric. But the lack of clarity is not really the problem. Even if the public-concern

354 U.S. 234, in part because it worried that constitutionalizing traditional notions academic freedom could not help and might hurt the special status that that freedom enjoyed. *See* Rabban, *Functional Analysis, supra* note 53, at 238.


*See* Connick, 462 U.S. 138.

*See* Waters, 511 U.S. 661.


concept were susceptible to rigorous definition, the whole attempt to distinguish between
protected and unprotected topics runs athwart the professoriate's traditional claim to freedom to
speak on any subject whatsoever, a claim championed early and often by the AAUP. The
"matter of public concern" test is also difficult to square with the lived experience of faculty. A
professor who vituperatively denounces colleagues or administrators may feel the same sense of
mission, and could well be equally disruptive, whether the topic is the institution's alleged
racism, foolish hiring practices (the point of contention in the K.C. Johnson affair), or
unhappiness with one's boss. The first two concerns are likely to be protected as matters of

98 The traditional distinction in the literature is between topics within the professor's field
and those that are not; the traditional assumption is that academic freedom extends at least to
speech on the subject of the professor's expertise, and the traditional question whether academic
freedom should extend to topics outside that expertise. See, e.g., Metzger, supra note 53, at
1275-76.

99 "Indeed, professors who are most obnoxiously confident in the superiority of their own
views are also most likely to be acting in good faith." Rabban, Functional Analysis, supra note 53, at
291.


101 Id.

102 Supra note 4 and accompanying text.

103 Connick, 461 U.S. at 140-141.
public concern;\textsuperscript{104} the latter is not.\textsuperscript{105} Yet in the mind of many faculty, almost everything in their professional lives is a matter of public concern.\textsuperscript{106} Are faculty simply deluded in their estimation of the relative importance of these topics, or is there really something about the academic environment that changes how the public-concern test should be applied?

Concerns apply as well to the second part of the test: the balancing of the value of the speech against its ability to disrupt the workplace. When professors speak on issues that are of public concern, what counts as disruption? If the mere furor or distraction attendant upon a shocking or unpopular statement counts, then the simple existence of an intense controversy might justify adverse action. Sometimes this has not been the case -- for example, in Levin v. Harleston\textsuperscript{107} the district court was quite solicitous of the faculty member's freedom to state unpopular views when university officials did nothing to stop protesters from disrupting his

\textsuperscript{104} Curtis, 940 F. Supp. at 1076.

\textsuperscript{105} Connick, 461 U.S. at 146.

\textsuperscript{106} See Matthew W. Finkin, Intramural Speech, Academic Freedom, and the First Amendment, 66 Tex. L. Rev. 1323, 1332-45 (1988) (arguing for greater freedom of speech on intramural issues than is normally provided for other public workplaces); see also Rabban, Functional Analysis, supra note 53, at 1410 ("During my tenure as legal counsel to the AAUP, for example, several professors of medicine asserted that universities had violated their academic freedom by limiting their clinical income to 100,000 dollars.")

class\textsuperscript{108} -- but sometimes it has. In \textit{Jeffries v. CUNY},\textsuperscript{109} the \textit{Pickering-Connick} test transmogrified the public furor over African Studies scholar Leonard Jeffries' anti-Semitic remarks (admittedly on matters of public concern)\textsuperscript{110} into the question of whether his speech did or reasonably might have caused the "disruption of the effective and efficient operation of the Black Studies Department, the College, or the University."\textsuperscript{111} In its first review the Second Circuit sided with Professor Jeffries, holding that the evidence did not support a conclusion that public furor ever translated into institutional disruption.\textsuperscript{112} Following the imposition of a new standard by the Supreme Court\textsuperscript{113} under Waters,\textsuperscript{114} the Second Circuit reversed course and decided that the university had reasonably \textit{expected} substantial disruption and therefore acted appropriately in response.\textsuperscript{115} There seems to be no question that the court's solicitude for Professor Jeffries' speech seems to have been nowhere near what it had been for Professor Levin's. One might well wonder what the Supreme Court would say about a university's right to silence a faculty member

\textsuperscript{108} 770 F. Supp. at 919-922 (holding Levin's speech was impermissibly chilled by, inter alia, creation of "shadow sections" in response to public outcry against his allegedly racist views).


\textsuperscript{110} \textit{Jeffries I}, 21 F.3d at 1245.

\textsuperscript{111} \textit{Id.} at 1243.

\textsuperscript{112} \textit{Id.} at 1247.

\textsuperscript{113} Harleston v. Jeffries, 513 U.S. 996.

\textsuperscript{114} \textit{Supra} note 88.

\textsuperscript{115} \textit{Jeffries II}, 52 F.3d at 13.
in the face of massive and admittedly disruptive protest; it is difficult to believe that the Court intended to fashion a First Amendment test that both Socrates and Jesus (had they been professors at public universities) would probably have failed. Perhaps luckily for the professoriate, few cases have been adjudicated in which institutional disruption via third parties has been a real issue.\footnote{116}{See generally Kaplan & Lee, supra 97.}

No matter how cautiously judges apply Pickering-Connick's disruptiveness prong, faculty can be forgiven for worrying about a test which begins by assuming the value of workplace efficiency.\footnote{117}{Pickering, 391 U.S. at 568.} "Efficiency" is not a concept that fits naturally with conflict and dissension, the "robust debate"\footnote{118}{Keyishian, 385 U.S. at 603.} of the "marketplace of ideas."\footnote{119}{Id. Justice Brennan quoted the "marketplace of ideas" phrase but did not provide a citation; it had long before become standard currency in the treasury of legal phraseology. The metaphor is usually traced via Justice Holmes, see Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), to John Stuart Mill, see Central Hudson Gas & Elec. v. Public Serv. Comm'n., 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting) (attributing the marketplace metaphor to Mill and, before that, John Milton).} Moreover, there is a strong argument against the legitimacy of any institutional interests whatsoever that could limit faculty speech. If, contrary to the courts' perhaps-unwitting emphasis on institutional academic freedom,\footnote{120}{See supra, note 61.} one adopts a thoroughgoing version of On Collegiality's individualist approach to academic freedom,
colleges and universities may simply act as a life-support system for individual faculty. This view is by no means irrational. If the goal of academia is to produce ideas for the marketplace, and if idea-production is a function of individual faculty efforts and cannot be centrally directed or controlled, then it is simply an unfortunate necessity that most professors are employees of bureaucracies at all. They might more naturally exist as self-supporting practitioners, or as members of professional confederations as in medieval universities, or self-governing guilds, as attorneys are organized in bar associations. In this view the university governs best which governs least; “service” to the university (viewed primarily as membership on various committees) is an organizational tax on individual effort, and the less tax there is on success, the more that successful individuals will be able to contribute to the organization’s primary goal.

The AAUP statement on collegiality implies as much in its ambivalence about the value of “service” -- “we all know colleagues whose distinctive contribution to their institution or their profession may not lie so much in service as in teaching and research.” And since teaching and

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121 The AAUP's first publication eschewed the "employee" label and insisted that professors should instead be considered appointees, comparable to judges. Declaration of Principles (1915), reprinted in LOUIS JOUGHIN, ed., ACADEMIC FREEDOM AND TENURE, App. A at 160-63 (1969); see generally Rabban, Functional Analysis, supra note 53, at 233.

122 See Sweezy, 354 U.S. at 262-63 (1957) (Frankfurter, J., concurring).

123 Medieval universities were in fact essentially faculty guilds, see Byrne, supra note 52, at 267-68; RICHARD HOFSTADTER, ACADEMIC FREEDOM IN THE AGE OF THE COLLEGE 6-7 (Transaction Publishers 1996).

124 On Collegiality, supra note 8.
research (as opposed to service) are the ultimate ends for which the university exists, this position entails a conclusion that exempting particularly capable faculty from service is the best way to further the institution's goals. This view of service, and of the university's interest in "efficiency," might be characterized as a supply-side economics for the marketplace of ideas. The same individualist logic that rejects the collegiality criterion would also diminish, if not entirely do away with, the second prong of the *Pickering-Connick* test.125

Overall, then, the critics of both *Pickering-Connick* and collegiality argue that academia may be a workplace, but it is one ruled by unique concerns. In terms of the *Pickering-Connick* test, the two claims are that all professorial speech is particularly valuable and that a university's need for institutional efficiency (in the ordinary sense of the term) is particularly negligible. Whether right, wrong, or somewhere in between, these two claims are crucial to the correct application of *Pickering-Connick* in academic freedom cases generally as well as collegiality cases in particular. And we should assume that there can be a correct application: just as the collegiality criterion is unlikely to be rejected, absent new direction from the Supreme Court *Pickering-Connick* is unlikely to be rejected in favor of some more nuanced or specialized test for academic freedom. In fact, except perhaps for the intellectual gratification of commentators, it is not particularly necessary that *Pickering-Connick* should be rejected. As long as the balancing test is applied flexibly and with adequate appreciation of the nature and goal of the academic enterprise, it need not be a rigid or one-size-fits-all affair. Its responsible application does however require a stable and coherent understanding of how faculty operate, and

125 See Chang, *supra* note 83, at 963 (proposing the elimination of the second part of the *Pickering-Connick* test when academic freedom is implicated).
determining, without simply intoning the mantra of academic freedom, how professors are different from other classes of public or private employee.

2. Collegiality and Academic Professionalism

A. Collegiality as a Characteristic of Professional Organizations

If we are to take seriously the critics' assertion that the collegiality criterion as currently employed in the United States threatens academic freedom, then understanding the proper role of collegiality requires understanding what academic freedom is and what it needs to flourish. Unfortunately, as the "speech code" debates of the mid-1990s suggest, theories of academic freedom are susceptible to the same variation and incommensurability as theories of freedom in society generally.\textsuperscript{126} It may therefore be that the debate as to the proper role of collegiality will be a political debate as interminable as any other. In this view, the nature and importance of collegiality in academia would be analogous to the nature and value of citizenship in society as a whole, and as difficult to ascertain.\textsuperscript{127} However, an alternate way forward is to drop the


\textsuperscript{127} In fact the term citizenship is sometimes employed instead of "service" to denote the third traditional criterion of academic evaluation. \textit{See, e.g.}, Weinstein v. Univ. of Illinois, 811 F.2d 1091, 1097 (7th Cir. 1987).
normative debate on academic freedom, to grant the individualist ethic espoused by the AAUP and other opponents of the collegiality criterion, and then to examine what role collegiality plays in organizations built on such individualism. That is, what role does collegiality play in organizations that exist for the sake of aims that can be realized primarily if not solely through the activities of individual members, not the organizations themselves?

This is in fact a question that sociologists have asked for decades, and one that informs the distinction, familiar since Max Weber, between a bureaucracy\textsuperscript{128} and a professional or collegial organization.\textsuperscript{129} For example, doctors form medical associations, sit on medical licensing agencies, and work in hospitals. All three entities exist in the last analysis to promote human health, but none can operate except through individual doctors who must retain a high degree of autonomy in virtue of their training and expertise. Similarly, lawyers form bar associations which function both to promote and to regulate the profession. When they enter into employment relationships for the most part they join partnerships which, however bureaucratic they may sometimes seem, nonetheless are far more like loose confederations of equals than


\textsuperscript{129} See Malcolm Waters, \textit{Collegiality, Bureaucratization, and Professionalization: A Weberian Analysis}, 94 \textit{American Journal of Sociology} 945 (1989). Waters defines collegial organizations as “those in which there is a dominant orientation to a consensus achieved between the members of a body of experts who are theoretically equals in their levels of expertise but who are specialized by area of expertise.” \textit{Id.} at 956.
most business entities are.  

Sociologists have defined the concept of “the professional” precisely in terms of the comparatively high degree of autonomy he or she enjoys as a result of a high degree of specialized knowledge, the extensive training required to acquire that knowledge and exercise the resulting autonomy, and the prestige and salary afforded the position as a consequence. One sociologist summarizes the attributes of a collegial organization as follows:

The main organizational characteristics implied by . . . the principle of collegiality are as follows.

1. Theoretical knowledge: collegiate organization is arranged in terms of the use and application of theoretical knowledge.

2. Professional career: members of collegiate organizations are considered as professionals; careers are differentiated in at least two stages (apprentice and practitioner) and provide security of tenure.

3. Formal egalitarianism: collegiate organizations are performance-oriented systems, but because professionals are specialists it is difficult to compare performances; for this reason, collegiate organizations are formally equal systems.

4. Formal autonomy: collegiate organizations are self-controlling and self-policing.

5. Scrutiny of product: the products of the work done by

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130 Id.
colleagues must be available for peer review (consultation, second opinion, public dissemination of written opinion).

6. Collective decision making: collegiate organization implies the constitution of collective forums in which decisions are made; the committee is the prototypical collegial decision-making body (general committee, specialist committee, delegative committee); collegiate organizations have complex, frequently hierarchical, committee systems.

These idealtypical characteristics differentiate collegial organizations from bureaucratic organizations, even though, in most circumstances, collegiality is not the sole decision-making structure but coexists with bureaucracy. A collegial organization is more or less bureaucratic depending on how it is managed.\textsuperscript{131}

A more value-laden attribute, commitment to the public good, or a "fiduciary" responsibility,\textsuperscript{132} is often emphasized in discussions of professional responsibility,\textsuperscript{133} and is often cited as the true meaning of professionalism by commentators on attorney professional


\textsuperscript{132} \textit{See infra}, note 141 and accompanying text.

responsibility. However, this normative element is controversial and was certainly not universally adopted by all commentators. In fact the professions as a class have been the subject of incisive criticism for behavior that may be viewed as self-protective rent-seeking rather than public-spirited self-sacrifice. Luckily, it is not necessary to see professionals as

134 The classic formulation of this definition in the legal context is Roscoe Pound's: the "primary purpose" of a profession is the "pursuit of the learned art in the spirit of a public service." The Lawyer from Antiquity to Modern Times 5 (1953). See also W. Bradley Wendel, Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities, 54 Vand. L. Rev. 1955, 1970-71 (comparing the fiduciary obligation and the concept of "honor" in the legal profession).


136 One of the most forceful critics of the belief in the ideal of the professional as fiduciary was Ivan Illich, who argued that

[a] profession, like a priesthood, holds power by concession from an elite whose interests it props up. As a priesthood privdes eternal salvation, so a profession claims legitimacy as the interpreter, protector, and supplier of a special, this-worldly interest of the public at large . . . in any area where a human need can be imagined these new professions, dominant, authoritative, monopolistic, legalized -- and, at the same time, debilitating and effectively disabling the individual -- have become exclusive
particularly selfless in order to make an empirical study of the structure of their organizations.

The difference between professionals and other workers in a complex society creates a fundamental, empirically-observable difference in the organizations they belong to.\textsuperscript{137} Weber was the first to call the standard hierarchy in which labor was divided among many supervised workers a "bureaucracy,"\textsuperscript{138} and to contrast it to the organizations called "collegial," "those in which there is a dominant orientation to a consensus achieved between the members of a body of experts who are theoretically equals in their levels of expertise but who are specialized by area of expertise."\textsuperscript{139}

Collegial organizations are therefore a phenomenon accessible to the observational tools of social science, and sociologists have developed a rich literature on them. Law firms,\textsuperscript{140} scientific experts of the public good.


\textsuperscript{137} Lazega, \textit{supra} note 131, notes that organizations can have mixed bureaucratic and organizational features.

\textsuperscript{138} Weber, \textit{supra} note 128.


\textsuperscript{140} LAZEGA, \textit{supra} note 131, see also Edward O. Laumann and John P. Heinz, Specialization and Prestige in the Legal Profession: The Structure of Deference, 1 AM. B. FOUND. RES. J. 155 (1977).
laboratories,\textsuperscript{141} medical clinics,\textsuperscript{142} and numerous other professional organizations\textsuperscript{143} have been studied.

Universities themselves have been the object of study as collegial organizations, and this approach sheds light on the organizational uses of academic freedom incidental to professional autonomy rather than social needs generally. In his landmark work \textit{The American University}, sociologist Talcott Parsons observed a pattern of "institutionalized individualism"\textsuperscript{144} among "professionalized" faculty for whom academic freedom is primarily a support for professional autonomy:

Since tenure and academic freedom in different ways build in exemptions from pressures which operate in other organizational settings, there must be a presumption that the modal incumbent can be trusted to perform his expected function without the detailed controls, for instance, through market competition, bureaucratic enforcement, or democratic accountability to a defined constituency, which operates in other sectors.\textsuperscript{145}

\textsuperscript{141} N. Tilley, \textit{The Logic of Laboratory Life}, 15 SOCIOLOGY 117 (1981).


\textsuperscript{144} Talcott Parsons & Gerald M. Platt, \textit{The American University} 123 (1973).

\textsuperscript{145} Id.
Parsons does not deny that academics have a "fiduciary" relationship to society at large, 146 but the nature of the obligation is quasi-economic rather than moral: it is on account of their social value that the perquisites of academic professionalism can be claimed by professors. 147 The trappings of professionalism extend beyond the tenured faculty: tenure is the "emblem" of membership in the collegium, but "in a sense all members of the academic community enjoy tenure" 148 to the extent that they enjoy professional autonomy.

The principle of professional autonomy, sociologists have also noted, means that conflicts will predictably arise when professionals find themselves working in bureaucracies: "[t]he professional would be likely to resist bureaucratic rules, bureaucratic standards, supervision and the demand of the bureaucracy for unconditional loyalty." 149 Whether or not such conflicts are structurally necessary, 150 the tension between professional and bureaucracy suggests that the AAUP's quest for academic freedom, normally justified in highly idealistic terms, could just as well be understood as a quest for professional freedom within a bureaucratic organizational structure. 151

146 Id. at 133.
147 Id.
148 Id.
150 Davies, supra note 149, at 192, argues they are not.
151 See supra, note 62 and accompanying text.
Sociologists have also noted the need and preconditions for collective action in collegial organizations. Although they are individual, Parsons notes that the members of an academic organization must interact collectively. Academic freedom is therefore "dependent on a complex network of procedural institutions"\(^{152}\) that operate in a "quasi-legal" fashion\(^{153}\) and include the "procedural norms for the conduct of intellectual discourse"\(^{154}\):

The principle of ensuring equality of opportunity for the presentation of communication underlies academic freedom. . . .

There are also limits on acceptable things to say -- for example, direct personal derogation of other participants, as distinguished from disagreement with their intellectual positions, is generally inadmissible.\(^{155}\)

This description of an academic code of civility is strikingly similar to what was described above as "professionalism," the implicit fourth criterion for faculty evaluation contained in the AAUP's statement on collegiality.\(^{156}\) Parsons also describes this as a "quasi-legal" "procedural" obligation arising from the institution's commitment to "cognitive rationality": a sphere of interactions among individuals that requires norms and practices dealing with the conduct of social relations

\(^{152}\) Id. at 156.

\(^{153}\) Id. at 155.

\(^{154}\) Id.

\(^{155}\) Id.

\(^{156}\) Supra note 41.
where cognitive issues are involved, such as the mode of discussing controversial issues. This sphere is related to legal procedures and to the conduct of meetings through such codes as *Robert's Rules of Order*, but special aspects are involved where the content and actual and potential disagreement is primarily intellectual.\(^\text{157}\)

Parsons' emphasis on equality and mutual restraint among academic professionals is dependent in part on the normative concept of the professor as fiduciary, one who may lose or deserve to lose his or her status if these rules are not obeyed. The principles of equality and mutual respect among professional colleagues need not be so described so admiringly, however. In his study of collegiality in a large law firm, Emmanuel Lazega observes that

\[
\text{[i]n many ways a collegial organization replaces an autocrat with a set of oligarchs who prevent each other from accumulating enough resources to be independent. Collegiality (thus called polycracy) presupposes the interdependency of oligarchs. Cohesion in the oligarchy is reached by a balance of powers and integration à la Montesquieu. Maintaining heterogeneity and interdependence of forms of status is often the condition under which rivalry among oligarchs leads to equilibrium.}\(^\text{158}\)
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This equilibrium is particularly important (but not alone sufficient) where bureaucratic,

\(^{157}\) Parsons & Platt, *supra* note 144, at 130.

\(^{158}\) Lazega, *supra* note 131, at 13.
top-down controls are not available to achieve the goods the organization strives for -- in a law firm, for instance, productivity, order, and the the avoidance of "free rider" problems:

... flat [i.e. collegial, non-hierarchical] organizations rely not only on an oligarchy but also on specific social mechanisms that produce certain forms of public good (public within the organization). Members' formal positions and property rights are not enough to guarantee the functioning of such organizations. Among these goods, I include a form of solidarity that comes across as a generalized exchange system, a lateral control regime, and a system stabilizing the renegotiation of rules. These are consistent with individual interests and management of resource interdependencies, but they are also the result of a form of social discipline. Individual returns are guaranteed in this system if returns are conceived of as of many types. Incentives exist to undertake socially desirable activities. Members are compelled to bear their share of risk, their part of the costs of transactions within the organization, because of the necessity to manage several resources at the same time, and the impossibility of accumulating some of them forever. In effect, one can say that they are based on these individual interests, provided that the latter are broadly conceived with regard to many long-term goals and with different types of resources. This assumption about how members behave is
not unrealistic in the institutional context of collegial organizations in which such mechanisms operate. The latter characterize an organization that is embedded in an institutional environment, without being reduced to it. They operate under specific institutional arrangements but they are not identified with them. The organization works because both an institutional arrangement and social mechanisms based on resource dependencies make it worthwhile for members to undertake socially productive activities.\textsuperscript{159}

Overall, these sociological observations suggest that "collegiality" as an individual trait is best understood as citizenship in a professional collective, the ability to collaborate with equals in a non-hierarchical organization in order to maintain the organization's equilibrium, further its goals, and avoid problems such as unproductive members, excessive dominance by one or a few members, and equal access for all members to organizational resources.

It is important to note that an individual who fails to live up to this self-regulatory ideal might be describable with emotionally pejorative words like "unpleasant" or terms like "disruptive" that could also be used in bureaucratic organizations. However, that does not make the judgment itself either an emotional one or the same judgment that a bureaucratic organization could make. To be meaningful in the collegial context, whatever terms are used by the employer to explain an adverse action must be explicable in terms of specific collegial goals. The pyramidal structure and authoritarian, top-down command pattern of bureaucracies make the

\textsuperscript{159} \textit{Id.} at 15-16.
meaning of these terms as different as the meaning of citizenship might be in a democracy and a dictatorship. Bureaucracies maintain order and effectiveness by valuing authority, punishing insubordination, and incentivizing production by a combination of punishments and rewards. Non-hierarchical organizations are also motivated to incentivize production, but this is less of an issue among those, like professionals, who are motivated by the availability of immediate profit from their own activity. With only a rudimentary hierarchy, the obedience/insubordination dichotomy diminishes in importance while the ability of members to achieve cooperative self-governance is prioritized. The collegial model requires personal, social relationships between members in order to permit effective action. Equality and autonomy are central to the effectiveness of organizations with “flat” and democratic structures.

Sociological studies of collegial organizations offer a general framework in which the notion of collegiality might be rescued from the charge of subjectivity or worse. They offer examples of organizations devoted to furthering professional autonomy in which the quality of collegiality is persuasively de-linked from individual personality traits taken in isolation. In

160 Weber himself was among the first to compare collegiality and citizenship, and pessimistically predicted that social bureaucratization was an inevitable, antidemocratic process. See Lawrence A. Scaff, Max Weber and Robert Michels, 86 American Journal of Sociology 1269, 1271 (1981). He also noted the "bureaucratization" of the American academy as early as 1912. American and German Universities, in Max Weber on Universities: The Power of the State and the Dignity of the Academic Calling in Imperial Germany 23, 29 (Edward Shils, ed. and trans. 1973).

161 LAZEGA, supra note 131, at 3.
terms of how people often talk, "collegiality" may continue to mean something like amiability. But as a matter of institutional decisionmaking and judicial review, collegiality should specifically mean the qualities requisite to function as a citizen of a self-governing professional organization, and a judgment of "uncollegiality" should be based on failures with respect to specific and articulable organizational needs. A judgment of collegiality in a collegial organization will not only be articulated differently from an emotional judgment, the substantive decision may be different as well. It may be that an abrasive personality is precisely what is required to perform certain organizational functions. As the AAUP suggests, "gadflies" and "malcontents," possessors of the trait described in one early AAUP report as "professorial gumption,"\textsuperscript{162} might indeed be valuable to a university.\textsuperscript{163} However, from a professional viewpoint their value would not lie in their unpopularity per se, but in the extent to which their unpopular or unpleasant traits can perform a function that is recognizably important to the organization.

Collegiality in a collegial organization is also different from simply "getting along" with coworkers in a traditional hierarchy. For instance, bureaucracies do not handle gadflies well, and in view of their top-down command structure they should not have to. Conversely, as in \textit{Fisher},\textsuperscript{164} the inoffensiveness, ability to follow direction, and personal likeability that might shine in a bureaucracy could well be insufficient to a collegiate organization's needs if not coupled with

\textsuperscript{162} AAUP, \textbf{REPORT CONCERNING THE UNIVERSITY OF PENNSYLVANIA} at 12, in Metzger, ed., \textit{supra} note 62, at 132 (referring to economist Scott Nearing).

\textsuperscript{163} See \textit{supra} note 8.

\textsuperscript{164} 70 F.3d at 1436.
adequately strong participation as a member.

In summary, the work of social scientists suggests that colleges and universities are unusual organizations but by no means unique. "Academic freedom" has historical roots that have been well studied, but it can also be viewed ahistorically in a functional or structural sense as one kind of professional autonomy among others. Understood structurally as an attribute of collegial organizations, the collegiality criterion threatens academic freedom no more than, in other professional contexts, it threatens the practice of medicine or law.

To the extent that the the Pickering-Connick test can take into account the special nature of this kind of self-governing confederation of autonomous professionals, it should be capable of adaptation to the academic “workplace.” Both steps in the test are implicated. With respect to the “matter of public concern" test,\(^\text{165}\) Parsons’s analysis suggests that academics will tend to see themselves and their occupation as intrinsically matters of public concern, in virtue both of their “fiduciary” role as custodians of culture and the professional imperative to take their own role as a topic of consideration and discussion.\(^\text{166}\) In other words, academics are likely to see every matter of private concern as a matter of public concern. To some extent this is nothing more than a confusion of oneself with one’s role, the kind of category mistake to which all professionals might be prone.\(^\text{167}\) However, intramural academic issues can indeed rise to the level of public concern. Many intramural squabbles over hiring, curriculum, or the relative worth of a colleague’s scholarship mirror larger debates within the discipline, and it might be that a more

\(^{165}\) Supra notes 99-106 and accompanying text.

\(^{166}\) Parsons & Platt, supra note 144, at 105.

\(^{167}\) See Rabban, Does Academic Freedom Limit Faculty Autonomy?, supra note 53, at 1410.
expansive view of “public concerns” should sometimes be taken by courts with respect to intramural academic issues.168

The second step of the Pickering-Connick test can also be informed by attention to the nature of academics as professionals. To the extent that a public university is a collegial entity characterized by professional self-governance, what “efficiency” means will be far different than what it means in other, more hierarchical workplaces. Democracy is always more contentious than autocracy, and the interest of a collegial organization is not exclusively in productivity (whether measured in scholarship, successful operations, billable hours, or other social commodity) but also in the healthy functioning of collegial decisionmaking procedures. Were it otherwise, there would be no difference between a university, a law partnership or a hospital medical staff on the one hand and any large corporation or government agency on the other. Thus even without attempting to factor in “academic freedom” as such, the employer’s interest will always be unique in cases involving collegial organizations because the “employer” itself is to a large extent the employees collectively.

C. Judicial Deference for Collective Professional Autonomy

How free should members of a professional collective be to decide what counts as collegiality? In other words, how much deference should a court give to a collegial organization's adverse action against an "uncollegial" member? Overall, courts have been quite deferential to the professions in matters of their expertise. For instance, self-created codes of professional conduct have been accepted as setting the standard of care for negligence

168 See Finkin, supra note 106, at 1332; Chang, supra note 83, at 959.
purposes.\textsuperscript{169} Academics too have received considerable judicial deference for their evaluations of students\textsuperscript{170} although for other reasons the concept of educational malpractice has been universally rejected.\textsuperscript{171}

Courts have recognized professionals' autonomous collective judgment not only in regard to how professionals treat the public, but also with respect to setting the standards for acceptance of new members. Bar examinations, medical residencies, and many other rites of professional passage are overseen by elder members of the profession, and courts are quite deferential to academic expertise not only in professional training\textsuperscript{172} but also of course in academic employment decisions like hiring, renewal, and tenure for professors.\textsuperscript{173} To the extent that the rules for collegiality, Parsons's "quasi-legal" rules of professional engagement, are aspects of the autonomous nature of the collegial organization, there is some reason to believe that the

\begin{footnotesize}
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  \item Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 225 (1985) (holding that the standard of review for genuinely academic decision is for "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment").
  \item See., e.g., Cencor, Inc. v. Toman, 868 P.2d 396 (Colo. 1994); Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992); Squires v. Sierra Nevada Educ. Found., 823 P.2d 256 (Nev. 1991).
  \item Ewing, 474 U.S. at 225.
  \item See Namenwirth, 769 F.2d at 1243 (7th Cir. 1985); Levi v. Univ. of Texas, 840 F.2d 277, 282 (5th Cir. 1988).
\end{enumerate}
\end{footnotesize}
professionals themselves are in the best position to determine them.

There are certainly examples of courts acknowledging professionals’ ability to determine standards for interaction among themselves. For example, “uncollegial” doctors have lost their hospital privileges at the request of their fellow doctors, and these actions have routinely been upheld even where, as in academic cases, there is no express contractual basis for the action—and that result despite the fact that the criteria employed were not only arguably “subjective” but also strictly unrelated to any medical knowledge.\(^{174}\) In another case, a similar dismissal was upheld for a minister considered uncollegial by fellow ministers.\(^{175}\) In these contexts, courts have recognized, as an implied covenant, the ability of self-governing professional organizations to establish standards of collegial conduct. However, as in many collegiality cases the plaintiffs’ conduct was so egregious that it is unclear whether courts are exercising deference in these cases or merely agreeing from a \textit{de novo} review that the decision was justified.

At least one commentator has argued against extension of “academic” deference to collegiality decisions, contending that collegiality, even if legitimate, does not implicate any special expertise, does run the risks of subjectivity and pretextuality discussed above, and should not get the deference that academic decisions get.\(^{176}\) It is certainly true that the kind of expertise an academic uses in grading a student paper or assessing a tenure candidate’s research is not the same variety used in assessing a tenure candidate’s collegiality. All academics,


\(^{176}\) Zirkel, \textit{supra} note 46, at 238-39.
whatever their field, create the rules for collegiality as scholars generally, not as scholars in a particular discipline. There is no reason to believe that collegiality means something different for biologists than it does for historians. However, the fact that this kind of independence does not rest on a discipline-specific expertise does not mean that it is made without special knowledge of any kind. It would beg the question to assert that professionals deserve deference simply because they are autonomous, but there is still the possibility that professionals, and specifically academics, deserve some deference when they create standards of professional interaction simply because they are in a better position to determine the conditions for the functioning of their organization.

An analogous issue, judicially explored at greater length, may shed some additional light: the degree of judicial deference to be afforded student academic and disciplinary cases deserve. The Supreme Court has established that academic deference is nearly complete\textsuperscript{177} (although its exercise is not invariably fatal to the plaintiff student’s case).\textsuperscript{178} Disciplinary cases do not get this deference:\textsuperscript{179} courts view them as simpler matters in which the student’s behavior is assessed against a set of criteria established by contract and due process principles.\textsuperscript{180} In short, they are

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\textsuperscript{177} See Ewing, 474 U.S. at 225.

\textsuperscript{178} See Alcorn v. Vaksmann, 877 S.W.2d 390 (Tex. Ct.App. 1994) (holding dismissal of graduate student for poor teaching habits, unprofessionalism, and inability to conduct scholarly research was actually motivated by personal disagreements unrelated to academic considerations, therefore violating student’s due process rights.)

\textsuperscript{179} Bd. of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 86 (1978).

\textsuperscript{180} Curtis J. Berger & Vivian Berger, Academic Discipline: a Guide to Fair Process for the
the sort of cases that courts are used to dealing with and are thought to involve no particular expertise. On the other hand, the apparent bright-line distinction between academic and disciplinary matters has mattered little in cases where a student's behavior touches on his or her fitness for a profession.\textsuperscript{181} On the academic side of the divide, it is difficult to discern much difference between the process deemed "due" in the straightforwardly academic matters at issue in \textit{Ewing} and the process similarly approved in Board of Curators of University of Missouri v. Horowitz, which was a behavioral case.\textsuperscript{182} There is no greater degree of variation discernible between academic and disciplinary cases involving professional students where the behavior at issue touches on professional fitness. One particularly instructive case in this vein is Lipsett v. University of Puerto Rico,\textsuperscript{183} which involved a surgical resident terminated for behavioral problems with colleagues rather than patients.\textsuperscript{184} The court determined that the termination decision was academic,\textsuperscript{185} but also suggested that the distinction was unimportant: "There may be situations where academic fitness requires evaluation of subjective character traits for these may also be valid components of the characteristics of a certain trade or profession and their

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\textsuperscript{181} \textit{Cf.} \textit{Ewing}, 474 U.S. at 216 (medical student's performance on a test) and \textit{Horowitz}, 435 U.S. at 80-81 (medical student’s behavior toward patients).

\textsuperscript{182} 435 U.S. 85.

\textsuperscript{183} 637 F. Supp. 789 (D. P.R. 1986).

\textsuperscript{184} \textit{Id.} at 808.

\textsuperscript{185} \textit{Id.}
evaluation necessary to determine "academic" fitness for that type of profession. Thus, in this analogous area, courts have concluded that assessing a professional student's collegiality is an academic evaluation and deserves *Ewing* deference.

The approach taken in these student-professional cases may also be the best approach to the question of professorial collegiality. On the one hand, collegiality usually involves behavioral questions -- how appropriate were the plaintiff’s actions to a workplace? what behavior is reasonably understood as disruptive? -- that courts are used to dealing with, and which are amenable to analysis from a “reasonableness” point of view without requiring special expertise. On the other, as we have seen above, the meaning of “disruptiveness” and therefore of “collegiality” can change dramatically depending on whether the organization is a bureaucratic or collegial one. Taking that into account in assessing the validity of a collegiality claim should amount to a kind of deference. As the court in *Lipsett* observed, there is a point at which it is not useful to distinguish between a non-deference case in which elements of expertise are present and a deference case in which the full complement of expertise is lacking. As long as courts are sufficiently sensitive to the self-government imperative of a collegial organization, the extension of full “academic” deference to collegiality decisions may not be necessary to afford respect to the choices a self-governing organization has made.

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186 *Id. See also* Corso v. Creighton Univ., 731 F.2d 529, 532 (8th Cir. 1984) (expulsion of medical student for cheating on test was considered an academic, not a disciplinary offense; operative facts were premised on an academic matter).

187 *Id.*
3. Collegiality, Professionalism, and Polemics

A. Academic Freedom and the Polemical Imperative

Since academic freedom has been constitutionalized courts have not been permitted, or at least have not been particularly eager, to consider what academic freedom means purely as a matter of professional autonomy\(^{188}\) except in cases involving private universities.\(^{189}\) What professional freedoms would academics have to claim in order to fulfill their social function even if the First Amendment did not exist? The question is still valuable with respect to the contractual claims that arise in collegiality cases as well as the "employer interest" prong of the \textit{Pickering-Connick} test.\(^{190}\) But in many ways the tension between a professor's right to individual self-assertion and the collegial organization's right to collective self-governance, even if viewed as a professional or contractual matter, is indistinguishable from the general First Amendment tension between free speech and the social needs that might limit it. Both amount to balancing autonomous free expression against some kind of compelling interest in preserving a social order without which free expression cannot exist, and both struggle with the distinction between speech and behavior. The courts' well-known tendency to assert academic freedom's particular importance without actually analyzing it\(^{191}\) is analogous to the professional academic's belief that academic freedom is free speech, except somehow more so. Even if it is conceded that academic organizations have a particular interest in self-governance, should it not also be

\(^{188}\) Chang, \textit{supra} note 83, at 936.

\(^{189}\) Jackson, \textit{supra} note 93, at 483-487.

\(^{190}\) \textit{Supra} notes 166-168 and accompanying text.

\(^{191}\) Rabban, \textit{Functional Analysis, supra} note 53, at 240-241, 244-245.
recognized that individual academics have a particular interest in freedom from unnecessary restraint -- that the less concern for collegiality there is, the better? Advocates of free speech as well as academic freedom are quick to employ terms that imply considerable conflict -- a "robust" exchange of ideas\(^{192}\) implies that the heat in the academic kitchen may be too much for some sensitive souls, and that civility, however desirable, can never be purchased at the price of censorship. Similar results have been reached in the First Amendment arena, for instance with respect to speech codes or flagburning.\(^{193}\) Even if the issue is analyzed as a question of professional freedom rather than First Amendment freedom, would we not be obliged to reach the conclusion that academics are specially obliged to tolerate organizational disruption?

This point renews the claim that “malcontents” contribute to the richness of academic life, and echoes the ancient Platonic theme, noted above, that the tension between community and outsider is what drives the progress of the university. In economic terms, it might be said that any collective action in restraint of individual expression would be an antitrust violation in the marketplace of ideas. Unlike other collegial organizations, a critic would argue, it is precisely the freedom to be or to seem unpleasant, and the obligation to tolerate the same in colleagues, that constitutes the peculiar glory of the academic profession. But this is a point that the organizational view of collegiality accepts. The fact that an organization is “collegial” does not necessarily imply any particular level of conformity, let alone any level of subjectively-felt pleasantness in its members’ interactions. Collegiality in this sense requires only that its

\(^{192}\) See letter from Akira Iriye et al., *supra* note 6.

\(^{193}\) See Byrne, *supra* note 52, at 259.
members be able to take responsibility for the organization’s governance and operation.\textsuperscript{194} The question is simply to what extent the needs of self-governance are compatible with the imperative of the individual professor, the professional producer of ideas, to say things that others will disagree with, object to, or wish to place outside the bounds of permissible discourse.\textsuperscript{195} The individualist advocate of professional freedom has not abandoned a certain communitarianism. Ideas must be exchanged, so there must be someone to exchange them with. It may be less obvious that the production and testing of ideas presupposes not just exchange but conflict. In the “marketplace” of ideas, sellers struggle against each other not just to make sales to third parties, but to persuade all other sellers to abandon their own products, whether those products are theories of continental drift, readings of Hamlet, or, indeed, understandings of academic freedom. The indulgent rhetoric of “robustness” tends to minimize the seriousness of this conflict.\textsuperscript{196} Taking the individualist point seriously means accepting that a high degree of conflict in the academic enterprise is inherent, not accidental. This means that faculty are best

\textsuperscript{194} Lazega, \textit{supra} note 131, at 13.

\textsuperscript{195} The possibility that the bounds of permissible discourse will be defined on the basis of personal ideology rather than professional judgment is a troubling and real one, see Rabban, \textit{Does Academic Freedom Limit Faculty Autonomy?}, \textit{supra} note 53 at 1411; but as Byrne notes, \textit{supra} note 52 at 308, courts cannot do a better job than academics of determining the validity of academic grounds.

\textsuperscript{196} See AAUP and American Association of Colleges, \textit{Statement of Principles on Academic Freedom and Tenure (1940) with 1970 Interpretive Comments}, \textit{supra} note 34, at 6 (“Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster.”).
viewed not as citizens whose self-expression might incidentally offend other citizens, but as
advocates whose professional responsibility is to fight with others of their own kind. But again,
in this respect academics are not unique.

B. Professionals Who Dispute for a Living: Attorneys and "Civility"

Litigating attorneys are also professionals who fight each other for a living, and it is well-
established that the ideals of mutual respect and respect for the system of justice do indeed place
substantive limits on the polemical lengths to which an attorney may go in pursuing professional
objectives: law is not simply "war by other means."197 Attorneys are limited as advocates by the
reality of contempt citations, Rule 11-type sanctions, and the rules of professional responsibility.
These rules, like a university’s “quasi-legal”198 intramural rules for civil discourse, are the
product of a self-governing profession’s attempt to harmonize individual “freedom” -- perhaps
better termed an individual attorney’s duty of “diligent representation”199 -- with collective,
colloquial responsibility. Attorneys therefore demonstrate that there is a tension but no
inconsistency between “robust” polemical speech and an enforceable ethic of professionalism.
Even under an expanded aegis of First Amendment protection200 attorneys are limited in the ways
they can express themselves to each other.

The rationale for such limitations is clear -- the particular goods achieved by attorney
speech also assume the existence of a set of institutions, and it is not fanciful to assert that

197 David Luban, Lawyers and Justice: An Ethical Study 49 (1988)
198 Parsons & Platt, supra note 144.
200 See infra notes 216-20 and accompanying text.
certain kinds of attorney behavior and speech can do real damage to those institutions even as they might achieve short term ends.201 A highly evolved ethics of civility and mutual respect channels the aggressive behavior of professionals who otherwise could destroy each other or at least degrade the organizational conditions for the possibility of their continued activity. Conversely, such limitations are less necessary where actors are incapable of such behavior, for example because they are less powerful or more highly supervised.202

Acknowledging that professors are necessarily advocates does not mean that they are advocates only.203 The ideal of intellectual honesty requires a certain detachment and openness that advocacy does not always demand. Scholarship "must always be less 'committed' than advocacy; the scholar must be open to permitting her materials to persuade her."204 Thus the

201 LUBAN, supra note 196, at 148-161.
202 LAZEGA, supra note 131, at 13 (noting collegial organizations' need for a balance of power "à la Montesquieu"). This is a point that appears to be valid within social organizations generally, including but not limited to human ones. In the mid-1960's animal behaviorist Konrad Lorenz observed that, with the notable exception of human beings, animals who are physically capable of doing real damage to each other usually refrain from doing so because their instincts limit and channel aggressive behavior. KONRAD LORENZ, ON AGGRESSION 109-138 (Marjorie Kerr Wilson, trans., Harcourt, Brace & World, 1st ed., 1966).
203 Even advocates are not advocates only, if being an "officer of the court" requires some limitation on diligent representation. See LUBAN, supra note 196, at 148-161.
204 Byrne, supra note 52, at 333 n. 327.
academic may be as much judge as advocate, as the AAUP suggested in its 1913 Declaration.\textsuperscript{205} Yet even among judges the role of advocate reasserts itself; dissenters must ask themselves how far they may disagree,\textsuperscript{206} and judges too have been threatened with discipline for exceeding the bounds of acceptable rhetoric in their disagreement with colleagues.\textsuperscript{207} The intertwining of rhetoric and logic, advocacy and impartiality, is a problematic with a deep and venerable history. The "gadfly" Socrates in Plato's dialogues, earlier suggested as the model for the individualist academic,\textsuperscript{208} also moves regularly in between advocacy and exploration, between the sophist's "eristic," rhetorical combat and the philosopher's "dialectic" truth-seeking.\textsuperscript{209} If truth-seeking

\textsuperscript{205} AAUP 1915 Statement, \textit{supra} note 121, at 160.

\textsuperscript{206} See Frederick S. Green, \textit{Dissenting While on a Collegial Court of Review}, 6 \textit{App. L. Rev.} 10, 16 (1994).

\textsuperscript{207} See, \textit{e.g.}, State of Montana ex rel. Shea v. Judicial Standards Commission, 643 P.2d 210 (Mont. 1982) (holding that insulting fellow judges in written opinions does not constitute judicial misconduct).

\textsuperscript{208} \textit{Supra} note 59 and accompanying text.

\textsuperscript{209} See \textsc{Stanley Rosen}, \textsc{Plato's Sophist: The Drama of Original and Image} 325 (1983) (noting that philosophy and sophistry may be indistinguishable from the point of view of the responsible political leader):

\begin{quote}
Socrates dies, not because of an ironical concealment of his positive doctrines from the Athenian people, but because of an exact and explicit statement to them of who (not what) he is.

There is no common agreement between the city and the
\end{quote}
These, along with their putative decline, are perennial topics among bar associations and judicial conventions. It might be said that the reason for the degree of discussion on this topic is the perception that the profession always needs more civility than it can require of its members through sanctions. Sanctioning conduct inevitably carries a certain price that an organization must bear. Therefore, an organization will always have a class of behaviors that it can only address rhetorically; ones that are disfavored but not sanctionable; impolite, reprehensible or unacceptable but not actually illegal. This problem is especially acute in collegial organizations which rely far more heavily on informal disciplinary structures than on formal ones. In attorney disciplinary cases, courts have held on First Amendment grounds that some collective attempts by the profession to sanction objectionable conduct must fail. For example, the landmark Ohrak case limits the degree to which the profession was able to limit advertising deemed predatory or just unseemly. Similarly, courts have also overturned attempts to discipline attorneys for disrespectful speech about judges, but in doing so, there is often an


\footnote{Id.}

\footnote{LAZEGA, supra note 131, at 3.}

\footnote{Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).}

\footnote{See, e.g., Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995), discussed in Caprice L. Roberts, Note, Standing Committee on Discipline v. Yagman: Missing the Point of Ethical Restrictions on Attorney Criticism of the Judiciary? 54 Wash & Lee L. Rev. 817 (1997).}
admixture of exhortation that indicates judges' conviction that "should" goes considerably beyond "must" in these cases. The case of Oklahoma Bar Association v. Porter\footnote{766 P.2d 958 (Okla. 1988)} is particularly instructive. After a session with the press in which he described the federal judge hearing his case as "a racist" who was irrevocably prejudiced against his client, attorney Porter was disciplined by the state bar.\footnote{Id. at 960.} In overturning the sanction, the Oklahoma Supreme Court held that the First Amendment principles enunciated in New York Times v. Sullivan\footnote{376 U.S. 254 (1964).} applied to attorneys' professional speech and prevented the application of the disciplinary rule Porter was accused of violating.\footnote{Porter, 766 P.2d at 968-69.} \footnote{218}{219}{219}{220} The peculiar feature of this case, however, was the pains the court took to engage in its own rhetorical discouragement of Porter's behavior:

At this point it is necessary to remind the profession that First Amendment license to comment is broader than the traditional correct demeanor expected of an officer of the court. Nothing said in this opinion changes those expectations. Remarks of the sort being now considered are indeed disrespectful, exhibiting a definite lack of the polish expected of the true professional and they remain uncondoned. It is expected that counselors will maintain the honor of the profession and the decorum properly expected of an officer of this court. Nothing less than precisely
proper decorum and conduct is expected by this Court of members of the Bar. We view the remarks here examined to be extremely bad form while in the same breath we hold them to be protected. Each member of the Bar should remember that as an attorney, all have sworn: "... to act in the office of attorney of this Court according to best learning and discretion, and with all good fidelity as well to the court and to the client. Therefore it should be a personal point of honor for each attorney to keep faith with himself and the oath he has taken, cognizant of the fact that one's own word and professional pride should be a sufficient principle upon which to base one's conduct.\textsuperscript{221}

"Form," "decorum," "honor" and "pride" -- when professions reach a limit past which they cannot judge and sanction misconduct under the rules, they may still sanction rhetorically, using aesthetic ("form") and moral ("honor") judgments. Similarly, the culture of professionalism in academia is so pervasive that some statements even by collegiality’s opponents suggest a standard of civility arguably higher than anything that courts are likely to find permissible under the Constitution, academic custom and usage, or probably even any standard a defendant institution has dared to propose in past collegiality cases. "On Collegiality" acknowledges without comment that of course faculty cannot engage in “personal attacks.”\textsuperscript{222} A prohibition of ad hominem argumentation was also noted by Talcott Parsons as a "quasi-legal" rule of academic

\textsuperscript{221} \textit{Id.} at 970, footnote omitted.

\textsuperscript{222} \textit{Supra}, note 8.
discourse. Such a prohibition would probably come as news to some faculty who feel that their obligation to speak out against their institution’s grievous errors includes an obligation to call administrators and their colleagues names, but the importance of these standards is undeniable. For academics as for attorneys, the most appropriate response to some lesser forms of incivility will be indignation and censure, not termination or other severe sanctions.

C. Collegiality and the Ideal of Shared Governance

If collegiality has a unique meaning in "collegial" organizations, the legitimacy of the collegiality criterion in academia depends on how real the concept of academic “self-governance” is. In this society it is a reality that teaching and research occur in bureaucratic institutions. If those institutions were impervious to damage by the behavior of faculty, or at least no more susceptible than General Motors or Wal-Mart might be, then there would be no reason to limit behavior that damages working relationships with colleagues. To paraphrase Henry Kissinger, the smaller the stakes, the greater license academics have to be vicious to each other. On the other hand, the more faculty are involved in self-governance, the more they are are responsible for the management of the institutions they inhabit, the more limitations on faculty interactions become meaningful and unavoidable under an organizational collegiality model.

Thus the alternative is maximizing individual academic freedom by moving away from

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223 Supra, note 144, at 155.

224 See, e.g., Mabey, 537 F.2d at 1040 n.4, or in another reported instance, asking a colleague to “step outside,” Denise K. Magner, Nevada Professor Questions Penalty for Argument With Colleague, CHRON. OF HIGHER EDUC., June 30, 1995, at A16.
collegial governance to a bureaucratic institutional model. Many occupations that count themselves as professionals\textsuperscript{225} are predominantly self-employed or employed in organizations where bureaucratic elements predominate over collegial ones: engineers,\textsuperscript{226} for example, or nurses. It might be possible to run a university entirely bureaucratically, with all administrative decisions removed from faculty purview. In such a system, both "service" and "professionalism" would evaporate as a necessary part of a faculty member's job description. While most professors would abhor this proposal,\textsuperscript{227} it is inconsistent not necessarily with individual idea-production per se, but with the professional ideal of autonomy and self-governance.\textsuperscript{228} It is the


\textsuperscript{226} \textit{Id.}


\textsuperscript{228} See AAUP, \textit{On the Relationship of Faculty Governance to Academic Freedom} (1994), in POLICY DOCUMENTS \& REPORTS, \textit{supra} note 32, at 186:

In short, the 1966 \textit{Statement on Government of Colleges and Universities} derives the weight of the faculty's voice on an issue -- that is, the degree to which the faculty's voice should be authoritative on the issue -- from the relative directness with which the issue bears on the faculty's exercise of its various institutional responsibilities.

The organizational ideal of faculty governance was acknowledged on a fact-specific basis in
notion of professionalism and its practical importance, not any logical necessity, that forms the link between institutional academic freedom and individual scholarly endeavor. On the model proposed here, even a bureaucratic system could still support adverse consequences for insubordination and other anti-institutional behavior, but could not legitimately sanction "uncollegiality" strictly construed because the organizational justification for doing so would have vanished.

Finally on the subject of shared governance, it might be noted that a thorough acknowledgement of academic professionalism might also help address legal issues in higher education that are unrelated to collegiality. A number of cases in recent years have dealt with grading and curriculum issues. In all of these cases, faculty have proceeded on the assumption 

_NLRB v. Yeshiva University_, 444 U.S. 672 (1980), both by the majority, _id._ at 684-86, and by the dissent, _id._ at 696-703 (Brennan, J., dissenting). The inclusion of faculty governance as an element of professional academic freedom is quite old. In 1908 Max Weber opposed the practice of institutional hiring without the advice and consent of the entire faculty and called it a "severe danger to the academic profession's sense of corporate solidarity." _The Bernhard Affair_, in SHILS, _supra_ note 160, at 4, 7.

229 See, e.g., Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001) ("the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught"); Edwards v. California Univ. of Pennsylvania, 156 F.3d 488, 492 (3d Cir. 1998) (public university professor does not have a First Amendment right to decide what will be taught in the classroom); Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989) (First Amendment right of public university professor to assign grades is not violated when grade is administratively changed); Lovelace v.
that grading is an aspect of academic freedom, and they have been generally disappointed to find
that the courts disagreed. As the outlier case of Parate v. Isibor illustrates, calling the evaluation
of students an “expressive activity” is at the very least a strange way to talk. (In that case, the
court held that the professor had an academic freedom right to assign a grade, but the institution
had an “academic freedom” right to change it, as long as someone besides the professor actually
did the changing.)230 Like collegiality, grading is much more naturally construed as a question of
professional autonomy rather than free speech, and it is better resolved on that ground than on
constitutional ones. A dean or president changing a professor’s grade is much more like a
hospital administrator overruling a doctor’s choice of treatment than it is like a government
agency censoring free speech. A professional-autonomy analysis also suggests a different and
more satisfying conclusion in more egregious cases. The reported cases have all involved one or
a few grades under unusual circumstances, but the constitutional principles on which they are
decided would justify far more intrusive institutional interference in grading. A professional-
autonomy analysis suggests that such wholesale interference should be invalidated -- not as a
First Amendment violation, but simply as a substantial breach of the institution’s implied
promise of professional autonomy.

Southeastern Massachusetts Univ., 793 F.2d 419, 425-46 (1st Cir. 1986) (public university
professor’s refusal to lower grading standards does not implicate First Amendment); see also
Kelleher, 761 F.2d at 1083-84, and Jennifer L.M. Jacobs, Note, Grade "A" Certified: The First
Amendment Significance of Grading by Public University Professors, 87 MINN. L. REV. 813
(2003).

868 F.2d 828-830; see Byrne, supra note 52, at 253 (calling Parate a "bizarre" case).
4. Conclusion: So What If Professors Really Are Professionals?

In summary, the debate over collegiality can rise above its current superficiality if the participants are willing to consider academic freedom as a structural correlate of academic professionalism, not just a subspecialty of First Amendment law. The logic of professionalism suggests that the following principles should be applicable to collegiality cases:

1. As an individual characteristic on which academic employment decisions are to be made, collegiality is neither a subjectively-assessed pleasant demeanor nor a generalized ability to get along with coworkers. Collegiality is an individual professional’s “professionalism”: the ability to function constructively as an equal in a self-governing collective of autonomous but not self-contained colleagues.

2. As part of this autonomy, academics are required, and arguably entitled, to determine what constitutes successful integration in the professional organization.

3. While these decisions may not deserve the full measure of judicial deference afforded to “academic” judgments, they nonetheless deserve the presumption that they are an exercise of professional discretion and not an airing of standardless personal prejudices or an inherently suspect imposition of uniformity.

4. When First Amendment concerns are raised in a collegiality case (or in other academic contexts), the Pickering-Connick balancing test should likewise take account of professionalism in two respects: the social importance of professional academic decisions about matters within the discipline; and the manner in which the “employer’s interest” must be understood as a collective interest in unfettered but civil academic discourse and not, as in other government workplaces, simply an administrative interest in “efficiency.”
5. Just as in the legal profession, the individualism and inherent polemicism of the academic profession does not prohibit, and indeed requires, the case-by-case enforcement of standards of professional disagreement.

6. There will always be a category of unprofessional behavior that is legitimately deplorable but for various reasons may not rise to the level of sanctionability. The existence of such borderline cases is unavoidable and does not call into question the general legitimacy of the collegiality criterion or sanctions for uncollegial behavior.

These principles will not end the necessary debate over the correct contours of collegiality and the autonomy of professors vis a vis their institutions. Thus neither will they put an end to hard cases, or automatically resolve the question whether a particular scholar deserves a job despite abundant shortcomings in the personality department. However, they do suggest a way around or through the overconstitutionalized thicket of “academic freedom” jurisprudence. Furthermore, they may help clear away some of the overheated rhetoric on this issue and clarify what, hopefully, the two sides agree on: the proposition that the principle of responsible faculty governance is indeed a stake that is not so small, and one worth (decorously) fighting for.