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Grade "A" Certified: The First Amendment Significance of Grading by Public University Professors

Jennifer L.M. Jacobs

Note

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After twenty-eight years of teaching at a public university, Robert Brown, a tenured professor, was dismissed.[1] Brown claimed he was suspended for refusing to change a student's grade from an "F" to an "Incomplete" at the request of the university president and was then fired for criticizing the president.[2] He alleged that this violated his right to free speech.[3] *Brown v. Armenti* raises the issue confronted by several circuit courts over the past two decades: whether the grades that professors give their students are constitutionally protected speech under the First Amendment.[4]

This Note focuses on the lack of uniformity in the circuit courts' jurisprudential approaches to this issue. Which First Amendment doctrines apply, and how they apply, are unclear. This Note first agrees with the circuit courts that grades are ultimately the speech of the university rather than the professor. This is supported not only by First Amendment case law, but also by policy rationales, which possess heightened persuasiveness and relevance because of the nebulous nature of the law of academic freedom. Beyond that initial determination, however, this Note addresses the avenues the courts should use to analyze professors' First Amendment claims regarding the grades they assign students.

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1. Brown v. Armenti, 247 F.3d 69, 72 (3d Cir. 2001).
2. *Id.*
3. *Id.* at 73.
4. *Id.*

Part I of this Note introduces the relevant Supreme Court jurisprudence: the development of academic freedom; the public concern test; and the compelled speech doctrine. Part II articulates the crucial policy considerations supporting the circuit courts' conclusion that grades are the speech of the university. Part III details the different approaches taken by the circuit courts in dealing with the First Amendment implications of the grades a professor gives, focusing on their decisions of whether to use the public concern test and compelled speech doctrine. Finally, Part IV proposes which of these First Amendment doctrines a court should consider when presented with a factual situation like that in *Brown v. Armenti*.

This Note concludes that grades should be treated as the speech of the university rather than the individual professor. Current jurisprudence and scholarship in this area fail to adequately articulate and consider the important interests of students and overrate those of professors. Professors' academic freedom need not be broadened to encompass the grades they assign students. This Note argues that application of the public concern test is nonsensical in this context, but the compelled speech doctrine must be considered in cases where a professor and the administration disagree about a grade. This Note also explains the manner in which a student's transcript can reflect a professor's disagreement with the ultimate grade given by the university in order to avoid compelling the professor to speak in a certain manner. This proposed approach would better address the realities of the university context, balance the interests of the university, the professor, and the student, and honor the vision of academic freedom expressed by the Supreme Court.

I. FIRST AMENDMENT JURISPRUDENCE AND GRADING

Three areas of First Amendment case law particularly pertain to the issue of professors' speech interest in the grades they give students—decisions addressing academic freedom, the public concern test, and the compelled speech doctrine.

A. THE SUPREME COURT'S RECOGNITION OF ACADEMIC FREEDOM

To understand the circuit courts' treatment of professors' speech interest in grades, it is first important to grasp the underpinnings of academic freedom. Although the doctrine was

introduced in cases dealing with state restrictions on professors' political views,[5] the Supreme Court's definition of academic freedom has evolved to embrace universities' ability to control their educational missions.

The Supreme Court first recognized academic freedom in the 1950s.[6] In *Adler v. Board of Education*, Justice Douglas, in his dissent, spoke of the contested statute's impact on academic freedom.[7] He wrote, "What happens under this law is typical of what happens in a police state.... A pall is cast over the classrooms. There can be no real academic freedom in that environment."[8] Justice Douglas referred to a broad, nebulous freedom—presaging continual difficulty in defining the freedom's bounds.

Academic freedom was first mentioned by the Supreme Court in a majority opinion in *Sweezy v. New Hampshire*.[9] Writing for the majority, Chief Justice Warren extolled the virtues of academic freedom.[10] He observed,

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.[11]

The Court found academic freedom entangled in notions of political freedom.[12] Justice Frankfurter, concurring in *Sweezy*,

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5. *See* Adler v. Bd. of Educ., 342 U.S. 485, 489-92 (1952) (determining the constitutionality of New York's Feinberg Law, which prohibited employment of any member of an organization that supported overthrowing the government with forceful, violent, or illegal means in the public schools), *overruled by* Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589 (1967).

6. Richard H. Hiers, *Academic Freedom in Public Colleges and Universities: O Say, Does That Star-Spangled First Amendment Banner Yet Wave?*, 40 WAYNE L. REV. 1, 3 (1993). The first American definition of academic freedom came from the American Association of University Professors (AAUP) in its 1915 Declaration of Principles. Linda S. Lovely, Comment, *Beyond "The Freedom to Do Good and Not to Teach Evil": Professors' Academic Freedom Rights in Classrooms of Public Higher Education*, 26 WAKE FOREST L. REV. 711, 714 (1991); *see also* AM. ASSOC. OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 3-4 (7th ed. 1990) (providing the AAUP's complete definition of academic freedom).

7. 342 U.S. at 508-11 (Douglas, J., dissenting).

8. *Id.* at 510 (Douglas, J., dissenting).

9. 354 U.S. 234, 250 (1957).

10. *Id.* at 249-50.

11. *Id.* at 250.

12. *Id.*

referred to the importance of "the exclusion of governmental intervention in the intellectual life of a university."[13] He also discussed the "four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[14] According to Justice Frankfurter, academic freedom is enjoyed not only by teachers, but also inheres in educational institutions.[15]

In *Keyishian v. Board of Regents of the University of the State of New York*,[16] the Court "specifically linked academic freedom to the [F]irst [A]mendment,"[17] proclaiming academic freedom "a special concern of the First Amendment, which does

13. *Id.* at 262 (Frankfurter, J., concurring).

14. *Id.* at 263 (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10-12 (internal quotation marks omitted)).

15. *Id.* at 261-63. Not all scholars have accepted this assertion; the debate over whether academic freedom is a right that academic institutions as well as professors possess continues to be debated vigorously. *See, e.g.*, Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 818 (1983) ("Institutional autonomy and academic freedom are related but distinct ideas."); Rachel E. Fugate, *Choppy Waters Are Forecast for Academic Free Speech*, 26 FLA. ST. U. L. REV. 187, 188-95 (1998) (acknowledging only a professor's right to academic freedom); Hiers, *supra* note 6, at 55 ("The notion that academic institutions are somehow endowed with an 'academic freedom' to restrict or punish the exercise of academic freedom by their faculty is aberrant."); Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1310-22 (1988) (suggesting that although the Supreme Court has not given the concept of institutional academic freedom a strong root in the Constitution, it has recognized the right in several cases dealing with academic freedom); Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom"*, 45 STAN. L. REV. 1835, 1837 (1993) ("[Academic freedom] protects quite expansively the scholarly enterprise from outside interference . . . . but only grants limited protection to professors' intramural speech or classroom activities against *institutional* interests."); Harry F. Tepker, Jr. & Joseph Harroz, Jr., *On Balancing Scales, Kaleidoscopes, and the Blurred Limits of Academic Freedom*, 50 OKLA. L. REV. 1, 1 (1997) (describing the freedom a professor has as "academic freedom" and the rights of the university as "institutional academic autonomy"); Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 834, 848, 851 (1987) (characterizing academic freedom as having three faces: personal autonomy, government expression, and institutional authority); David M. Dumas et al., Comment, Parate v. Isibor*: Resolving the Conflict Between the Academic Freedom of the University and the Academic Freedom of University Professors*, 16 J.C. & U.L. 713, 713-23 (1990) (stating without argument that both the university professor and the academic institution possess a right to academic freedom).

16. 385 U.S. 589 (1967).

17. Lovely, *supra* note 6, at 719.

not tolerate laws that cast a pall of orthodoxy over the classroom."[18] Justice Brennan, writing for the majority, noted, "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."[19] The difficulties of defining academic freedom and its bounds can be attributed at least in part to the reverential distance with which opinions such as this have treated it.

In *Regents of the University of California v. Bakke*, a majority of the Court for the first time indicated that academic freedom applies not only to professors, but also to universities themselves.[20] Writing for the majority, Justice Powell stated, "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body."[21] Moreover, he reemphasized the nation's commitment to protecting the four academic freedoms enunciated in Justice Frankfurter's concurring opinion in *Sweezy*.[22]

The Court confirmed that universities themselves have an interest in academic freedom in *Regents of the University of Michigan v. Ewing*.[23] In a footnote, Justice Stevens stated for the majority, "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and *somewhat inconsistently*, on autonomous decisionmaking by the academy itself."[24] While establishing that the university possesses some form of academic freedom itself, Justice Stevens also acknowledged the

18. *Keyishian*, 385 U.S. at 603.

19. *Id.*

20. *See* 438 U.S. 265, 269-70 (1978).

21. *Id.* at 312.

22. *Id.*; *see supra* note 14 and accompanying text (listing the four freedoms).

23. 474 U.S. 214 (1985). Justice Frankfurter referred to the interest in a concurring opinion in *Sweezy*. 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *cf.* Julius G. Getman & Jacqueline W. Mintz, *Foreword: Academic Freedom in a Changing Society*, 66 TEX. L. REV. 1247, 1247 (1988) (arguing that at the core of academic freedom is "the right of faculty members to seek, teach, and write the truth as they see it").

24. *Ewing*, 474 U.S. at 226 n.12 (citations omitted) (emphasis added). Many pages of legal scholarship have been dedicated to unraveling this inconsistency. For a discussion of this inconsistency, see the sources cited *supra* note 15.

inherent conflict in the notion that both the individual professor and the institution share the freedom.[25]

The Supreme Court's decisions that address academic freedom introduce an important concept: Both professors and universities possess an interest in academic freedom. While recognizing that professors must be allowed to engage in the "uninhibited exchange of ideas,"[26] the Court has also indicated that in order to encourage the free flow of ideas, universities must be autonomous and allowed to develop educational missions as they see fit.[27]

B. USE OF THE PUBLIC CONCERN TEST TO ANALYZE GOVERNMENT EMPLOYEES' SPEECH

To analyze free speech issues that arise in the context of public employment, the Supreme Court has developed the public concern test.[28] The Supreme Court developed this test in *Pickering v. Board of Education*[29] and *Connick v. Myers*[30] and clarified the state interest element of the test in *Rankin v. McPherson*.[31] Courts have used the public concern test to analyze issues of academic freedom.[32]

In *Pickering v. Board of Education*, a public school teacher was dismissed after writing an editorial criticizing the Board of Education's handling of a bond issue.[33] The Court stated that in analyzing whether a public employee's First Amendment rights have been violated, it must "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[34] Courts must strike a balance between the interest of the public employer and the

25. *Ewing*, 474 U.S. at 226 n.12.

26. *Id.*

27. *See id.*

28. *See* Connick v. Myers, 461 U.S. 138, 146-47 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

29. 391 U.S. at 568.

30. 461 U.S. at 146-47.

31. 483 U.S. 378, 388 (1987).

32. *See* Chris Hoofnagle, *Matters of Public Concern and the Public University Professor*, 27 J.C. & U.L. 669, 669 (2001) ("The 'matter of public concern' test . . . is now used to determine the First Amendment value of professors' expression . . . .").

33. 391 U.S. at 566.

34. *Id.* at 568.

public employee.[35] The Court held that "teachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of public schools in which they work."[36]

Connick v. Myers involved a public employee who was dismissed after distributing a questionnaire regarding the internal affairs of her office.[37] The Supreme Court held that because the employee's speech did not involve a matter of "political, social, or other concern to the community,"[38] her superior did not violate the First Amendment by firing her.[39] The Court noted that public employees speaking on matters of public concern, on the other hand, are entitled to protection.[40] The Court stated, "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[41] The determination, this suggests, is case-by-case and not strictly defined.[42]

The public concern test was further refined in *Rankin v. McPherson*.[43] In *Rankin*, the Court established that the focus of the state interest element of the *Pickering-Connick* balancing test should be the effective operation of the activity in which the public employer is engaged.[44] The Court observed, "public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions."[45] The Court noted, however, that "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employee's speech."[46] In *Rankin*, while the Court suggested that public employers must

35. *See id.*
36. *Id.*
37. 461 U.S. at 140-41.
38. *Id.* at 146.
39. *Id.* at 146-47.
40. *Id.* at 147.
41. *Id.* at 147-48.
42. *See id.*
43. 483 U.S. 378, 388 (1987).
44. *Id.*
45. *Id.* at 384.
46. *Id.*

not be allowed to quiet their employees' speech simply because they dislike it, the Court also indicated respect for public employers' ability to manage their operations and recognized that personnel decisions factor into that control.[47] In the context of a dispute between a university and a professor, the state interest is ensuring that its public university students receive fair grades.[48]

Because public university professors are government employees, if they speak on a matter of public concern, that speech would be subject to the *Pickering-Connick* balancing test. In the context of the grade a professor gives a student, the issue becomes whether that grade is a statement on a matter of public concern. As will be discussed in Part III, at least one circuit court has confused the First Amendment significance of a professor's criticism of the grading policies of a university (likely a matter of public concern) with the First Amendment significance of a grade assigned by a professor with which the administration disagrees (not a matter of public concern).[49]

C. THE COMPELLED SPEECH DOCTRINE

The government's inability to force citizens to speak in a particular way affects whether universities can require professors to change students' grades. The Supreme Court condemned state compulsion of speech in its 1943 decision *West Virginia State Board of Education v. Barnette*.[50] The Court found a state regulation requiring schoolchildren to salute the flag to be unconstitutional because saluting the flag was a form of speech.[51] The Court observed, "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[52] The Court established that not speaking receives as much protection as speaking does.[53]

The Court, in *Wooley v. Maynard*, affirmed the unconstitutionality of a state compelling the speech of its

47. *Id.*

48. *See* Keen v. Penson, 970 F.2d 252, 258 (7th Cir. 1992) (defining the university's interest as ensuring fair grades for its students).

49. *See infra* Part III.D.

50. 319 U.S. 624, 633 (1943).

51. *Id.* at 632.

52. *Id.* at 634.

53. *See id.*

citizens.[54] In *Wooley*, Jehovah's Witnesses challenged their obligation to display New Hampshire license plates reading "Live Free or Die" as abhorrent to their religious beliefs and in violation of the First Amendment.[55] The Court found that the state could not require its citizens to convey a message with which they disagreed.[56] The Court held, "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[57]

The issue of compelled speech has arisen in the context of public university grades when a professor wishes to refrain from speaking in a certain manner, unwilling to assign a grade that he or she does not believe the student has earned.[58] As such, it is important that refraining from speaking has been acknowledged as a First Amendment right by the Supreme Court.

II. BALANCING UNIVERSITY, PROFESSOR, AND STUDENT INTERESTS IN GRADES

The circuit courts basically agree that grades are the speech of the university, not the professor.[59] Their opinions,

54. 430 U.S. 705, 717 (1977).

55. *Id.* at 707.

56. *Id.* at 717.

57. *Id.* at 714 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

58. *See, e.g.*, Parate v. Isibor, 868 F.2d 821, 828 (6th Cir. 1989).

59. Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001) ("[A] public university professor does not have a First Amendment right to expression via the school's grade assignment procedures."); Wozniak v. Conry, 236 F.3d 888, 891 (7th Cir. 2001) ("No person has a fundamental right to teach undergraduate engineering classes without following the university's grading rules."), *cert. denied*, 533 U.S. 903 (2001); Keen v. Penson, 970 F.2d 252, 257 (7th Cir. 1992) ("This Court has recognized the supremacy of the academic institution in matters of curriculum content . . . .'[W]e do not conceive academic freedom to be a license for uncontrolled expression . . . internally destructive of the proper functioning of the institution.'" (quoting Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972))); *Parate*, 868 F.2d at 829 ("Parate . . . has no constitutional interest in the grades which his students ultimately receive."); Lovelace v. Southeastern Mass. Univ., 793 F.2d 419, 426 (1st Cir. 1986) (finding that "matters such as . . . grading policy are core university concerns"); Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 553 (5th Cir. 1982) (holding that an administration requiring a professor to assign a certain grade to a student did not "cast a pall of orthodoxy" over professor's class, and therefore did not violate the First Amendment) (quoting Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967)).

however, do not fully articulate the policy implications supporting their consensus. This Part raises important policy arguments that support this conclusion. Because of the nebulous nature of academic freedom, these policy rationales provide a necessary anchor to the conclusion that grades are the speech of the university.

Placing the ultimate control over grades in the hands of the universities clearly benefits universities, as they are able to control their academic identity. How this affects professors and students, however, is less clear and therefore forms the focus of this section. First, this Part establishes that professors do not deserve more First Amendment protection than other citizens. Next, it argues that professors' ability to determine how and what to teach is only minimally affected by not having the final say on what grades their students receive. Finally, it finds that students benefit a great deal from placing grading control in the hands of the administration rather than professors. These conclusions support the circuit courts' determination that universities, rather than individual professors, should possess control over students' grades.

A. PROFESSORS' FIRST AMENDMENT RIGHTS AND INTELLECTUAL INTEREST IN GRADES

Academic freedom holds a "near-sacrosanct" place among many academics.[60] Scholars writing about academic freedom tend to favor broad protection for professors.[61] This is not

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In reaching this conclusion, the courts relied most heavily on two cases—*Keyishian* and *Bakke*. *See Armenti*, 247 F.3d at 75 (citing Edwards v. Cal. Univ. of Penn., 156 F.3d 488, 492 (3d Cir. 1998) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978))); *Keen*, 970 F.2d at 257 (citing *Keyishian*, 385 U.S. at 603); *Parate*, 886 F.2d at 826 (citing *Keyishian*, 385 U.S. at 603; *Bakke*, 438 U.S. at 312); *Lovelace*, 793 F.2d at 426 (citing *Bakke*, 438 U.S. at 312); *Hillis*, 665 F.2d at 553 (citing *Keyishian*, 385 U.S. at 603; *Bakke*, 438 U.S. at 311-14).

Parate goes the farthest, finding that professors have some First Amendment interest in grading; but even that case concedes that professors possess no speech interest in the ultimate grade students receive. 868 F.2d at 827, 829.

60. Richard H. Hiers, *New Restrictions on Academic Free Speech:* Jeffries v. Harleston II, 22 J.C. & U.L. 217, 218 (1995).

61. *See, e.g.*, Fugate, *supra* note 15, at 213 ("Academic freedom concerns professional freedom, enjoyed in a limited, professional capacity, and not necessarily shared with the public at large."); Olivas, *supra* note 15, at 1857; David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, LAW & CONTEMP. PROBS., Summer 1990, at 227, 244; Ailsa W. Chang, Note, *Resuscitating the*

surprising, considering that the authors of law review articles addressing the issue are generally professors themselves, who clearly possess an important self-interest in maintaining a broad freedom.[62] Professor David M. Rabban argues that academic freedom gives more protection to professors than the First Amendment provides for other public employees.[63] Similarly, Professor Matthew W. Finkin argues that institutional academic freedom, which the Supreme Court mentioned in *Bakke*, gives too much protection to a university at the expense of the academic freedom of its professors.[64]

In this vein, one suggested way to deal with the treatment of grades is by insulating professors' grades from judicial, administrative, or peer review.[65] This broad protection provides for no evaluation of professors' grading practices, essentially establishing a complete shield around professors in how they choose to grade their students.[66] The grade a particular professor assigns to a student would be deemed appropriate merely by its issuance from the pen of a member of the academe.[67] Surely the argument that no one but the actual professor can fully understand the reasons behind the grades he or she assigns applies to decisions made by many employees in many jobs around the world; yet somehow in the vast majority of employment settings, supervisors manage to oversee the work of their employees without the benefit of full

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Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond Pickering *and* Connick, 53 STAN. L. REV. 915, 964 (2001) (arguing that "speech that gives rise to academic freedom rights is presumptively more deserving of protection [because] academic freedom is not solely an interest of the professor-employee" but also of the university).

62. In the interest of full disclosure, the author of this Note is a student, clearly possessing an important self-interest in receiving fair grades.

63. *See* Rabban, *supra* note 61, at 244.

64. *See* Finkin, *supra* note 15, at 817. *But see* Mark G. Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finkin*, 66 TEX. L. REV. 1351, 1356 (1988) (suggesting that providing extra protection to professors "lends itself to a kind of unbridled libertarianism for academicians").

65. *See* Thomas A. Schweitzer, *"Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?*, 41 AM. U. L. REV. 267, 364 (1992) (arguing that "a third party without knowledge or expertise in the subject matter of the course is generally incapable of assessing a student's performance on an examination in that course" and suggesting that "not only an outside jurist but *even a colleague of the professor* teaching the same course and using the same textbook is not completely qualified to evaluate such a student's performance" (emphasis added)).

66. *See id.*

67. *See id.*

knowledge of the intricacies of every choice made.[68] There is something distasteful about the amount of protection some professors are willing to provide themselves.

Moreover, academic freedom is not a separate constitutional right reserved for academics.[69] Rather, it is an area of law that has developed in the process of dealing with the wealth of First Amendment issues that arise in the classroom.[70] There is no constitutional support for the proposition that professors are entitled to more freedom than other citizens,[71] and the suggestion that they are raises questions of equal protection.[72]

Furthermore, professors' intellectual interest in grades is not tremendous, especially compared with their intellectual interest in other areas.[73] Class curriculum, topic, and subject presentation are all areas in which it is easy to see the importance of a professor's interest.[74] A professor's ability to determine what and how he or she instructs and researches is paramount to the notion of academic freedom and to a professor's ability to define him or herself as a scholar and teacher.[75] Grades, on the other hand, are evaluations of third parties and should not play as much of a role in self-

68. *Cf.* CYNTHIA D. FISHER ET AL., HUMAN RESOURCE MANAGEMENT 485 (3d ed. 1996) ("In most organizations, subjective ratings of employee performance are provided by supervisors.").

69. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) ("Academic freedom, *though not a specifically enumerated constitutional right*, long has been viewed as a special concern of the First Amendment." (emphasis added)); *see also* Dumas et al., *supra* note 15, at 717 (noting that the Supreme Court has not "grant[ed] independent constitutional status to academic freedom").

70. *See Bakke*, 438 U.S. at 312.

71. U.S. CONST. amend I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *see also* Dumas et al., *supra* note 15, at 716 (observing that "the United States Constitution does not specifically mention academic freedom").

72. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

73. *Cf.* Olivas, *supra* note 15, at 1836 ("The search for truth requires that scholars receive the protection of academic freedom in posing new, controversial, or unpopular ideas in their teaching and research.").

74. *See id.*

75. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident.").

definition.[76]

Proponents of a broader First Amendment right for professors might argue that although professors do not have a strong interest in the actual grades themselves, the control a professor has over grades may affect how he or she chooses to teach. For example, a professor who requires class participation from students may take that into account when determining students' grades, perhaps not allowing students to earn anything above a "B" if they did not participate in class. If the administration can raise the grade from a "B" upon request of the student, one could argue that the university is, in effect, not allowing the professor to require class participation.

The changing of a grade by the administration, however, may reflect factors other than a rejection of the professor's teaching style.[77] Moreover, the infrequency with which administrative grade changes appear to actually occur suggests that a professor's desire to require class participation will not be thwarted by the administrative change of one student's grade.[78] Concerns about academic freedom would be presented if a university administration routinely revised the grades given by a certain professor as a way of moderating that professor's teaching techniques, e.g., expressing its disapproval of requiring class participation by raising the grades of all students who, because they did not participate in class, received no higher than a "B," to an "A." This extends beyond the realm of grades and into the area of autonomy of one's own teaching style. The professor in that situation has a stronger academic freedom argument than the professor who disagreed with the administration over the appropriate grade one student should receive.

Ideally, grades are objectively accurate representations of

76. *Cf.* John O. Mudd, *Academic Change in Law Schools*, 29 GONZ. L. REV. 29, 43 (1993) ("Examinations are not generally considered as part of the curriculum, but they do have a significant influence on the learning process.").

77. These alternative factors may not be laudable either. *See* Press Release, NCAA, NCAA: Standards Protect Students from Exploitation, (Jan. 8, 1997), http://www.ncaa.org/releases/makepage.cgi/miscellaneous/199701080 1ms.htm [hereinafter NCAA Press Release] (last visited Nov. 2, 2002) (noting the "possibility of grade inflation and fraud due to a student's athletics status"). The fact that other bad motivations may be present, however, suggests that the university may not be trying to control professor's teaching style but perhaps achieving another questionable goal.

78. *See* Olivas, *supra* note 15, at 1840 (noting that "there are few cases arising from student objections to professorial prerogatives").

the work a student has done over the duration of the course.[79] Viewed as such, it is difficult to see the speech value in them at all.[80] If they are instead a mode of expression for the professor who gives them, students have little assurance of receiving fair, accurate grades.

The most practical argument militating against a version of professorial academic freedom that encompasses the grades professors give their students is that, simply, they do not need it. A university has a strong self-interest in hiring top faculty and establishing, or maintaining, prestige in its field.[81] In order to achieve that, they must respect the views of their faculty.[82] Susan Pedersen, Dean of Undergraduate Education at Harvard University, when responding to a question about Harvard's apparent grade inflation, explained, "We are concerned about it. We think it's important that we give grades that support our pedagogical mission and so we are having a faculty review and a faculty discussion about this right now."[83] Most universities, like Harvard, surely consider the views of their faculty members integral to the creation of their pedagogical missions.[84] Moreover, competition for top-notch students drives educational institutions to retain academic credibility. Universities will not be able to attract and retain excellent students if they do not attract and retain excellent faculty, which is unlikely to occur if professors believe their ability to grade fairly is compromised by the university's

79. *Cf.* Robert C. Downs & Nancy Levit, *If It Can't Be Lake Woebegone . . . A Nationwide Survey of Law School Grading and Grade Normalization Practices*, 65 UMKC L. REV. 819, 822 (1997) (suggesting that universities should use "a normative structure to help systematize irregularities in what is now an excessively subjective process").

80. *See Keen*, 970 F.2d at 257 ("It is difficult to see what matters of public concern are implicated . . . by the 'F' grade he eventually gave her . . . .").

81. *See* Sam Tanenhaus, *The Ivy League's Angry Star*, VANITY FAIR, June 2002, at 200 (describing the brouhaha that surrounded Afro-American studies professor Cornel West's recent move from Harvard to Princeton and its impact on the department, particularly the tension between West and Harvard's president).

82. *See* Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991) ("University officials are undoubtedly aware that quality faculty members will be hard to attract and retain if they are to be shackled in much of what they do."); Tanenhaus, *supra* note 81, at 200; *All Things Considered: Dean Susan Pedersen Talks About Harvard's Grade Inflation* (National Public Radio broadcast, Nov. 21, 2001) [hereinafter *All Things Considered*], *available at* 2001 WL 9437361.

83. *All Things Considered*, *supra* note 82, *available at* 2001 WL 9437361.

84. *See id.*

practices.[85] The market of higher education self-regulates enough that an expanded version of professorial academic freedom is not only inappropriate given other considerations, but also unnecessary.[86]

B. GRADES MATTER: UNIVERSITY CONTROL OVER GRADING BEST SERVES STUDENTS' INTERESTS

Placing the ultimate responsibility for and control over grading in the hands of the university administration, rather than professors, guarantees universities the ability to control their own academic missions. It also better protects the interests of students. Combined with the minimal impact on professors discussed above, this weighs heavily in favor of the conclusion reached by the circuit courts, and supported by the Supreme Court's First Amendment opinions, that grades are ultimately the speech of the universities who issue them. Moreover, with students as their consumers, universities are understandably interested in protecting their interests, so that a scheme that benefits students will likely also benefit universities.

Students want their grades to "*mean* something," suggests Dean Pedersen of Harvard.[87] As Professor E. Edmund Reutter observed, however, "Most discussions of . . . academic freedom center on the teacher as source or purveyor of the knowledge, ideas, and viewpoints that are to be explored, developed, and disseminated . . . . The student, however, is an integral part of the process, and 'freedom to learn' warrants attention along with 'freedom to teach.'"[88]

Unfortunately, not all professors exercise their grading discretion properly in all circumstances.[89] Professors Robert C.

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85. *See* Wozniak v. Conry, 236 F.3d 888, 891 (7th Cir. 2001) (noting that "competition among systems of evaluation at different universities, not federal judges, must settle the question which approach is best"), *cert. denied*, 533 U.S. 903 (2001); *see also supra* note 82 and accompanying text.

86. *See Wozniak*, 236 F.3d at 891; *see also* Olivas, *supra* note 15, at 1840 (noting that "there are few cases arising from student objections to professorial prerogatives").

87. *All Things Considered*, *supra* note 82, *available at* 2001 WL 9437361.

88. E. Edmund Reutter, Jr., *Academic Freedom Rights of Students: Some Recent Cases*, 108 EDUC. L. REP. 1, 1 (1996).

89. *See* Downs & Levit, *supra* note 79, at 825-26 (stating that random factors such as a student's handwriting or a professor's mood can affect the outcome of a grade). Professors Downs and Levit analyzed grade normalization practices by surveying all American Bar Association accredited

Downs and Nancy Levit observed that academic freedom rests on the presumption that "professors will appropriately exercise their responsibilities."[90] The academy, however, is not immune from erroneous judgment; therefore, some form of accountability is necessary to assure legitimacy to students.[91]

Moreover, students receive degrees from an institution, not from each professor from whom they took a class. When students agree to attend a certain university, they expect to be judged according to the university's standards.[92] A student

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law schools. *Id.* at 821. Not surprisingly, Downs and Levit found that different graders respond differently—in some cases, dramatically so—to the same student's essay. *Id.* at 827. Moreover, they found that professors often "fiercely defend" their own grading methods. *Id.* at 852. Downs and Levit concluded, "grade normalization policies should not be thought of as punishment for bad faculty behavior but as a normative structure to help systematize irregularities in what is now an excessively subjective process." *Id.* at 822.

Grade normalization, at least in law schools, often takes the form of grading on a curve with a predetermined center point. *Id.* at 837. This practice is not without flaws. If the administration can set the center point of the curve, and each professor must conform his or her grades to that curve, professors have less control over the grades they give their students. *Id.* at 849. Simple mathematical distribution suggests that a professor can choose to weigh the curve heavily toward the middle, giving most students average grades, or give many high grades and many low grades. A professor cannot account for a particularly excellent or a particularly poor class, however, as he or she must always give somewhat equally distributed grades. *See, e.g.*, UNIV. OF MINN. LAW SCH., RULES OF SCHOLASTIC REQUIREMENTS, R. 12.4 (1999), *found in* UNIVERSITY OF MINNESOTA LAW SCHOOL STUDENT HANDBOOK & CALENDAR, 2002/2003, at 185 (2002) (on file with author) (requiring the mean grade for each first-year class to be between 11.4 and 11.8 on a 16-point scale and the mean grade of each upper class course with more than twenty-five students to be between 11.5 and 12.5 on a 16-point scale).

90. Downs & Levit, *supra* note 79, at 851.

91. *See supra* note 89 (describing inappropriate grading variances observed in law schools). This accountability need not take the form of a purely administrative review board. In fact, a university might well prefer to address grading issues through a committee comprised of faculty members, rather than (or as well as) deans or other administrators. *See, e.g.*, Keen v. Penson, 970 F.2d 252, 255 (7th Cir. 1992) (describing the subcommittee, comprised of five faculty members, that addressed the questionable grading of the plaintiff).

92. Some universities may have standards that many people find offensive, such as the status of a student's parents as donors or the student's position on a sports team. *Cf.* NCAA Press Release, *supra* note 77, http://www.ncaa.org/releases/makepage.cgi/miscellaneous/1997010801ms.htm (noting that a student-athlete's grade point average is not the best indicator of his or her graduation expectancy, because of the "possibility of grade inflation and fraud due to" student-athlete status). This suggests, however, that a professor considering joining a certain faculty or a student choosing a school should consider the particular academic mission of the school before making a

who enrolls in an elite private school understandably might have dramatically different expectations of the school than would a student who attends a community college.[93] Students are entitled to make decisions on where to gain post-high school education based on the academic mission of a school.[94] If each professor determined his or her own academic mission at the expense of the university's own goals, chances of disappointment and unfair treatment of students would abound.

Professor Michael A. Olivas, after suggesting that professors are entitled to a broader range of First Amendment protection than non-professors, evaluates the implications for students.[95] He suggests, "Any comprehensive theory of professorial authority to determine 'how it shall be taught' must incorporate a feedback mechanism for students to take issue, voice complaints, and point out remarks or attitudes that may be insensitive or disparaging."[96] He then offers a minimally satisfactory system: a professor encourages students to come to him or her and voice concerns.[97] This suggestion falls far short of guaranteeing fairness to students, thereby belittling the importance of grades to them. For most students, being able to complain to their professor would provide little comfort and again, no assurance of ultimately receiving a fair grade.[98]

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decision. A university should have the option of determining its academic mission to be, for example, "Providing Excellent Education for Our Star Athletes at Any Expense." Competition among the universities for professors and students should ensure a variety of missions acceptable to the majority of faculty and students.

93. *See* STUDY IN THE USA, INC., CHOOSING A COLLEGE OR UNIVERSITY (2002), *at* http://www.studyusa.com/articles/choosing.htm (last visited Oct. 13, 2002) (noting that some colleges have higher academic standards than others).

94. *Cf.* U.S. DEP'T OF EDUC., PREPARING YOUR CHILD FOR COLLEGE: A RESOURCE BOOK FOR PARENTS (2002), http://www.ed.gov/pubs/Prepare/pt3.html (suggesting that when considering colleges, prospective students should inquire about the philosophy of the college) (last visited Oct. 13, 2002).

95. Olivas, *supra* note 15, at 1857.

96. *Id.*

97. *Id.*

98. One suggested way to ensure fairness involves viewing a student's relationship with his or her university as a contract between the two parties. Schweitzer, *supra* note 65, at 361. *Compare* Hahn v. Vt. Law Sch., 698 F.2d 48, 51 (1st Cir. 1983) (holding that a law school had "transacted business" with a law student who brought a breach of contract claim against the school and the professor who gave him an "F"), *with* Lyons v. Salve Regina Coll., 565 F.2d 200, 202 (1st Cir. 1977) (noting that commercial contract law should not

If a grade merely indicated students' comprehension of a certain topic, perhaps students' interest in the fairness and accuracy of those grades would be of less concern. Particularly in graduate and professional programs, however, grades represent far more than how much a student has learned.[99] Grades can quickly open or shut doors.[100] That students fret over grades can be no surprise considering the myriad ways grades are used to differentiate between them.[101]

Ultimately, it is in the best interest of the faculty to consider the interests of the students central to their goal of academic freedom.[102] Professors can only hope to gain respect from students if their grading practices accord with the reasonable expectations of the students, based on their decision to attend a particular university.[103] The American Association of University Professors included in its definition of academic freedom the assertion that a person cannot be "a successful teacher unless he enjoys the respect of his students, and their confidence in his intellectual integrity."[104] Although perhaps in general professors grade reasonably, in order to protect the weighty interest of students in receiving fair and accurate grades, academic institutions must be allowed to oversee professors' grading practices. As Professors Downs and Levit asserted, "Sweeping claims of academic freedom fall when they run up against legitimate concerns that students are not being treated fairly."[105]

University professors should not, under the auspices of academic freedom, receive more First Amendment protection than any other citizen.[106] Professors' academic freedom interest in the grade a student ultimately receives is

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be rigidly applied to the relationship between a college and a student).

99. *See* Wozniak v. Conry, 236 F.3d 888, 891 (7th Cir. 2001) (noting that "class rank may be vital to a student's future"); *see also* Marsha J. Ferziger, *All I Know About Teaching One-Ls I Learned in Sixth Grade*, 3 GREEN BAG 2D 279, 280 (Spring 2000) ("In law school, academic performance in general can have an astounding effect on a student's future.").

100. *See supra* note 99.

101. *See id.*

102. *See* Am. Ass'n of Univ. Professors, *Declaration of Principles* (1915), *reprinted in* ACADEMIC FREEDOM & TENURE app. A, at 164 (Louis Joughin ed., 1969).

103. *See id.*

104. *Id.*

105. Downs & Levit, *supra* note 79, at 851.

106. *See supra* notes 69-72 and accompanying text.

minimal.[107] Competition for faculty will constrain universities from infringing on professors' autonomy.[108] Moreover, consideration of the important interest in students receiving fair grades suggests that the grade a student receives should be treated as the speech of the university.[109] These policy considerations support the circuit courts' decision that grades are the speech of the university. This Note next analyzes the six circuit court decisions on point and the courts' jurisprudential approaches to the issue.

III. THE CIRCUIT COURTS' HANDLING OF THE SPEECH VALUE OF GRADES

Grading is a "gray area" of academic freedom.[110] The circuit court decisions in the area reflect this. The courts are split over the relevance of the compelled speech doctrine to this area of cases and the application of the public concern test to professors' grading. Moreover, the courts disagree about the extent of the academic freedom that professors enjoy. The six opinions on grades from five circuits illustrate the confusion in this area. The decisions fall into five broad jurisprudential categories: (1) applying a high standard to find a violation of academic freedom; (2) recognizing the university's academic freedom as outweighing the professor's in the realm of grades;[111] (3) struggling to fit the issue of grades into the public concern doctrine; (4) applying the compelled speech doctrine; and (5) rejecting the compelled speech doctrine.

A. TREADING LIGHTLY: "CAST[ING] A PALL OF ORTHODOXY"[112] ANALYSIS

In *Hillis v. Stephen F. Austin State University*, the U.S. Court of Appeals for the Fifth Circuit analyzed grades as speech.[113] The head of the university art department ordered a

107. *See supra* notes 73-80 and accompanying text.

108. *See supra* notes 81-86 and accompanying text.

109. *See supra* notes 87-94 and accompanying text.

110. Hiers, *supra* note 6, at 74-75 (discussing the uncertain application of the public concern doctrine to grades).

111. *Brown v. Armenti*, categorized under "rejecting the compelled speech doctrine," also ultimately reaches this conclusion. 247 F.3d 69, 75 (3d Cir. 2001).

112. Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967).

113. 665 F.2d 547, 552-53 (5th Cir. 1982).

professor to assign a certain student a "B," but the professor chose instead to give the student "grade withheld."[114] The head of the art department then reassigned the professor to inferior teaching positions.[115]

The court first acknowledged the murkiness of the area of academic freedom, agreeing with the professor's attorney's description of academic freedom as "'an amorphous field about which a great deal has been said in esoteric law journal articles and academic publications, but little determined in explicit, concrete judicial opinion.'"[116] Academic freedom springs from the First Amendment as it protects professors' freedom to determine classroom content, the court stated.[117] In this case, because the department head did not intend to "cast a pall of orthodoxy" over the professor's classes, the court, quoting *Keyishian*, found that the assignment of a grade was not a teaching method and therefore not protected by the First Amendment.[118]

Hillis, decided in 1982, is the earliest of the six cases discussed in this section. Perhaps the court's wariness of venturing into new First Amendment territory restrained it from delineating a clearer definition of academic freedom. Regardless, its reliance on the language from *Keyishian* brought the court full circle—after acknowledging the dearth of "'explicit, concrete judicial opinions'" in the area of academic freedom,[119] the court concluded its opinion without taking the opportunity to clarify the area itself.

B. DEEMING GRADES THE SPEECH OF THE UNIVERSITY, NOT THE PROFESSOR

The First Circuit and the Seventh Circuit reached similar conclusions on the speech value of grades in *Lovelace v. Southeastern Massachusetts University*[120] and *Wozniak v. Conry*,[121] respectively. In *Lovelace*, Southeastern Massachusetts University did not renew Matthew Lovelace's

114. *Id.* at 549.

115. *Id.*

116. *Id.* at 553 (quoting Hillis's attorney).

117. *Id.*

118. *Id.* (quoting Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967)).

119. *Id.* (quoting Hillis's attorney).

120. 793 F.2d 419 (1st Cir. 1986) (per curiam).

121. 236 F.3d 888 (7th Cir. 2001).

contract to teach.[122] Lovelace alleged that this was due to his refusal to lower his teaching standards or inflate his grading system.[123] He claimed the university violated his First Amendment rights when it threatened not to renew his contract unless he acquiesced to students' complaints that the classes he taught were too difficult and the assignments too time-consuming.[124] The court noted that Lovelace's First Amendment claim was based not on his advocacy for change in the university's grading standards, but his refusal to change his own standards.[125] In fact, the administration had determined that raising the grading standards in a lower-level computer course was appropriate, in part due to Lovelace's advice.[126] This, the court suggested, indicated "a spirit of receptivity to faculty concerns."[127]

The court's holding regarding Lovelace's First Amendment claim hinged on the university's right to establish and maintain its own educational mission: "Whether a school sets itself up to attract and serve only the best and the brightest students or whether it instead gears its standard to a broader, more average population is a policy decision which, we think, universities must be allowed to set."[128] Therefore, grading policies, as well as homework load and course content, are matters in which the university necessarily is concerned.[129] If each professor's grading standards were protected and beyond the reach of the administration of a university, the university's ability to define itself would be hindered.[130]

According to the First Circuit, "The [F]irst [A]mendment does not require that each nontenured professor be made a sovereign unto himself."[131] The court thus found Lovelace's claim that his grading standards did in fact conform to university standards to be a determination for the university, not the judiciary, to make.[132]

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122. 793 F.2d at 421.
123. *Id.* at 425.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 425-26.
129. *Id.* at 426 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)).
130. *See id.*
131. *Id.*
132. *Id.* at 426 n.2.

In 2001, the U.S. Court of Appeals for the Seventh Circuit addressed the speech value of grades in much the same way as the *Lovelace* court did.[133] In *Wozniak v. Conry*, a professor at the University of Illinois at Urbana-Champaign violated the school's grading policy by refusing to turn in the materials he used to determine students' grades at the end of the semester.[134] Wozniak maintained his title and corresponding salary but asserted that the dean impeded his research and did not allow him to teach any further classes.[135]

Although Wozniak's First Amendment argument came in the form of a claim regarding students' rights, rather than his own right to academic free speech,[136] Judge Easterbrook, writing for the court, commented on the interrelationship between a university and its professors.[137] The court noted that other universities give professors more discretion regarding grades than the University of Illinois had in this instance, and even acknowledged that more discretion might be preferable.[138] The court emphasized, however, that schools, rather than courts, must determine which system is in fact better:[139] each university can "decide for itself how the authority to assign grades is allocated within its faculty."[140] This process, the court suggested, leads to competition between schools for the best faculty.

The court viewed the grade a student receives as a message from the university, not the individual professor.[141] The court noted that, "It is the University's name, not Wozniak's, that appears on the diploma; the University, not Wozniak, certifies to employers and graduate schools a student's successful completion of a course of study."[142] Moreover, the court noted that professorial autonomy in grading does not best serve the interests of students: "By insisting on a right to grade as he pleases, Wozniak devalues his students' right to grades that accurately reflect their

133. *See* Wozniak v. Conry, 236 F.3d 888, 891 (7th Cir. 2001).
134. *Id.* at 889.
135. *Id.*
136. *Id.* at 891.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *See id.*
142. *Id.*

achievements."[143] The view of grades as a mode of expression for professors, the court suggested, undermines the importance of the objectivity of grades for students.[144] As the *Lovelace* court had, the *Wozniak* court focused on allowing educational institutions the latitude to determine their own educational mission and deemed grades to be the speech of the university.[145]

C. EMBRACING THE COMPELLED SPEECH DOCTRINE

In 1989, the U.S. Court of Appeals for the Sixth Circuit faced the issue of grades as speech in *Parate v. Isibor*.[146] Tennessee State University did not renew a nontenured professor's contract after an extended conflict that stemmed from disagreement over a student's grade.[147] Parate at first refused to change a student's grade at the request of the administration.[148] After being pressed, however, he did change the grade, making a notation on the grade-change form signifying his disagreement.[149] The university refused to allow him to indicate his disapproval in any way.[150] The administration subjected Parate to intensely critical and abusive treatment over the rest of the year and did not renew his contract.[151]

The court found that by forcing Parate to change the grade himself rather than changing the grade administratively, the university unconstitutionally compelled Parate's speech in a

143. *Id.*

144. *See id.*

145. *See id.*

146. 868 F.2d 821 (6th Cir. 1989).

147. *Id.* at 823-25.

148. *Id.* at 824. Parate gave a "B" to a student who had cheated on the final examination and given incredible, and in some circumstances, clearly falsified, medical excuses. *Id.* Parate explained his grading practice in detail at the beginning of the semester, and willingly changed a different student's grade when the other student provided credible explanations for a downward trend in test performance. *Id.*

149. *Id.* Parate made two attempts to indicate his disapproval of the grade. He first noted on the grade-change form that the change was "per instructions from Dean and Department Head at meeting," and, when that was rejected, he altered his signature in protest. *Id.* at 823-24. University administrators rejected both efforts. *Id.* at 824.

150. *Id.*

151. *Id.* at 824-25. For example, the department head berated Parate's teaching ability in front of his students. *Id.* at 825.

manner that was "unduly burdensome."[152] By not allowing him to express his disagreement with the grade, the court held, the university "compelled Parate to conform to a belief and a communication to which he did not subscribe."[153] *Parate*'s definition of the right of professors is not a strong assertion of a broad right; the court held that "[b]ecause the assignment of a letter grade is symbolic communication intended to send a specific message to the student, the individual professor's communicative act is entitled to *some measure of* First Amendment protection."[154] The court was careful to distinguish this case from one in which a university is working to control its own educational mission, noting that Tennessee State "did not try to alter Parate's pedagogical style, but compelled his speech."[155] The court thereby suggested that a university's ability to dictate the educational mission of its institution remains intact.[156]

D. WRESTLING WITH THE PUBLIC CONCERN TEST

In 1992, the U.S. Court of Appeals for the Seventh Circuit considered academic freedom in the context of a bizarre professor-student interaction in *Keen v. Penson*.[157] A student enrolled in a class taught by Keen criticized some aspects of the class, including spot quizzes and a book report that was deemed optional in the syllabus, yet accounted for ten percent of each student's overall grade in the course.[158] Keen took offense to this criticism and believed it created a negative classroom atmosphere.[159] Their disagreement intensified, resulting in Keen refusing to issue a grade until the student adequately apologized to him and the class.[160] Keen eventually gave the student, who repeatedly tried to satisfy his

152. *Id.* at 830.
153. *Id.*
154. *Id.* at 827 (emphasis added).
155. *Id.* at 830.
156. *See id.*
157. 970 F.2d 252, 257-59 (7th Cir. 1992).
158. *Id.* at 253.
159. *Id.*
160. *Id.* The student and Keen met once and scheduled a second conference. *Id.* The student did not attend the second conference because she had returned to Keen's office after the first meeting and before the scheduled second, and therefore thought that the second meeting was no longer necessary or expected. *Id.*

requirements via extensive correspondence, an "F."[161]

The court found that it was "difficult to see what matters of public concern are implicated . . . by the 'F' grade [Keen] eventually gave" the student.[162] Even if the First Amendment applied, the court stated it would engage in a balancing test between Keen's First Amendment right and the university's interest in fair grades for its students.[163] The Seventh Circuit quoted the Sixth Circuit's suggestion in *Parate* that "'the individual professor may not be compelled, by university officials, to change a grade that the professor previously assigned to her student,'"[164] but emphasized that it "express[ed] neither approval nor disapproval of the Sixth Circuit's somewhat broad statement."[165] Ultimately, the *Keen* court concluded, "The First Amendment does not shield Keen's conduct from sanctions."[166]

E. REJECTING *PARATE*'S COMPELLED SPEECH ANALYSIS

Brown v. Armenti is the most recent circuit court decision dealing with professors' interest in the grades they assign to students.[167] Brown refused to change a student's grade from an "F" to an "Incomplete" at the request of the president of the university and later was terminated.[168] The court addressed whether the university violated Brown's First Amendment rights,[169] noting that "the Supreme Court has held that the

161. *Id.* Keen's role in the communication included calling the student's criticisms "hit-and-run accusations," sending one letter that included a list of twenty facts regarding the class, fourteen comments about the student, and twenty-six questions for her to address, suggesting that she would not be a good candidate for a teacher, her career goal, and referring to her efforts at apologizing as "unscholarly" and "objectionable." *Id.* at 260-62. The Seventh Circuit found that the full force of the inappropriateness of the communication could not be evoked without reprinting much of the letters, and it did so in an appendix to its opinion. *Id.* at 253, 259-62. Reviewing university faculty members deemed Keen's communication to Johnson at least unprofessional and, according to some reviewers, inappropriate. *Id.* at 254-56.

162. *Id.* at 257.

163. *Id.* at 257-58.

164. *Id.* at 258 (quoting Parate v. Isibor, 868 F.2d 821, 828 (6th Cir. 1989)).

165. *Id.*

166. *Id.*

167. 247 F.3d 69 (3d Cir. 2001); *see supra* notes 1-3 and accompanying text.

168. *Armenti*, 247 F.3d at 72.

169. *Id.* Defendant Armenti argued that he was entitled to the defense of qualified immunity, which applies only if, among other requirements, no constitutional rights have been violated. *Id.* Therefore, the court had to delve into First Amendment analysis before reaching this determination. *Id.*

university setting is one in which First Amendment free speech protections . . . are of particular importance."[170] The *Armenti* court, however, emphasized that there are limits on free speech in universities.[171] Moreover, the court made a distinction between professors' rights inside and outside of the classroom.[172] Inside the classroom, the university's own academic freedom must be considered.[173] The court found that "[b]ecause grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught."[174] The court therefore concluded that Brown did not have a First Amendment right "to expression via the school's grade assignment procedure."[175] The *Armenti* court agreed with the *Lovelace* and *Wozniak* courts on this point.[176]

Although the *Armenti* court cited *Parate v. Isibor*, it did not elaborate on *Parate*'s implications for *Armenti*.[177] Rather, it simply stated the facts and holding of *Parate* before declining to follow it, noting instead that an earlier Third Circuit case "applies to the present case and offers a more realistic view of the university-professor relationship."[178]

The court seemed concerned with the idea of the judiciary entering into the field of student evaluation and second-guessing the determinations of the university.[179] It observed that "[w]hether the school registrar is told that a student's performance rates an 'F' or an 'Incomplete' is not a matter that warrants the 'intrusive oversight by the judiciary in the name of the First Amendment.'"[180] Therefore, the court deferred to the university's evaluation of Brown's grading.[181]

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170. *Id.* at 74.
171. *Id.*
172. *Id.* at 75.
173. *Id.*
174. *Id.*
175. *Id.*
176. *See supra* notes 120-145 and accompanying text.
177. *Armenti*, 247 F.3d at 75.
178. *Id.*
179. *Id.*
180. *Id.* (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)). The court proceeded to analyze Brown's claim regarding retaliation to his critical evaluation of Armenti, finding that the evaluation was not of public concern, therefore not entitled to constitutional protection. *Id.* at 79.
181. *Id.*

IV. UNRAVELING THE CURRENT JURISPRUDENCE AND FASHIONING A MORE WORKABLE SCHEME

The circuit court decisions leave several issues unresolved. How the matter of public concern doctrine relates to the analysis of professors' speech interest in grades is confused. Furthermore, the circuits are split over whether the compelled speech doctrine applies when university administration requires a professor to change a grade. This Part analyzes the current jurisprudence in the area and suggests the following approach to the topic.

First, courts must consider the compelled speech doctrine, as the *Parate* court did. University administrators should not be allowed to force professors to speak in a particular way by compelling them to give a grade with which they disagree. Second, the grading system of a public university is a matter of public concern, and if a professor—or any other citizen—chooses to criticize it, that speech should be protected under the First Amendment. The courts, however, should stop wrestling with the public concern test in cases such as those described in Part III and recognize that the grade that one professor gives one student does not represent that professor commenting on a matter of public concern. Clarifying the use of these two doctrines in cases arising from a grade dispute would resolve much of the confusion about the First Amendment implications of public university professors' grading.

A. A CRUCIAL CONSIDERATION: THE COMPELLED SPEECH DOCTRINE

The Seventh and the Third Circuits, addressing the issue after *Parate*, offered a cautious "no comment" to *Parate*'s compelled speech discussion and rejected the *Parate* analysis, respectively.[182] The issue of compelled speech, however, as addressed in *Parate*, must play a role in an analysis of the proper treatment of professors' grades. If a university administration disagrees with the grade assigned by a professor, it is then faced with resolving the matter, by either accepting the grade the professor has given, forcing the professor to change the grade, changing the grade itself, or changing the grade and acknowledging the professor's disagreement with, for example, a notation on the grade report

182. *See supra* notes 164-165, 177-78 and accompanying text.

or transcript.[183]

Parate v. Isibor is the only circuit court decision addressing a professor's First Amendment interest in grades that adopts the compelled speech doctrine.[184] This is likely due to the extreme circumstances in that case—the university clearly mistreated the professor.[185] In no other case was a court confronted with the situation of a university forcing a professor to change the grade in such a way as to disallow the professor to express his disagreement with the grade.[186]

Because the *Armenti* court did not face a university exercising such strong control over one of its professors, it did not have to address the relevance of the compelled speech doctrine to the issue of professors' First Amendment interest in the grades they assign students.[187] As it declined to follow *Parate*, however, the *Armenti* court suggested that it doubted the relevance of that doctrine.[188] In fact, the *Armenti* court asserted that *Parate* represented an unrealistic view of the relationship between a professor and a university.[189]

The *Parate* court's determination that in the grade he or she gives a student, a professor should have "some measure of" protection under the First Amendment is not a ringing endorsement of a strong right inhering in professors.[190] As one commentator noted, "*Parate* does carve out a new niche in the area of constitutional protections for professors, but does little to extend substantive constitutional law or to predict future constitutional protections."[191] *Parate* is a necessary but tentative step toward recognizing that professors have some speech interest in the grades they give their students.

Applying *Parate*'s compelled speech approach to the realm of grading is essential. If grades are the university's speech, rather than the professor's, as suggested by the circuit court decisions, the university ultimately should be willing to present itself as the speaker. Of course, in the vast majority of cases,

183. This Note subsequently uses "transcript" to refer to all means by which a university communicates a student's grades.

184. *See supra* notes 152-56 and accompanying text.

185. *See supra* notes 147-51 and accompanying text.

186. *See supra* notes 149-50 and accompanying text.

187. *See supra* note 168 and accompanying text.

188. *See supra* notes 177-78 and accompanying text.

189. *See supra* note 178 and accompanying text.

190. *See supra* note 154 and accompanying text.

191. Dumas et al., *supra* note 15, at 728.

university administrations will accept without question the grading of its professors, so the speech of the two will be one and the same. In essence, then, the university will have allowed the professor to speak on its behalf. In extraordinary cases like *Parate*, where the university rejects the speech of the professor, however, the university must allow for the divergence in the speech of the professor and itself. As *Wooley v. Maynard* and *West Virginia State Board of Education v. Barnette* established, the right to refrain from speaking is as important as the right to speak.[192] In these cases, the university should issue the grade itself and neither force the professor to give the grade nor require the professor to affirm the grade.

Grading on a curve raises another issue of compelled speech. The ability of the administration to set the center point of the curve is problematic.[193] Universities that choose to set their center point particularly high, requiring a professor to give nearly half the class at least an "A-," for example, thereby force those professors who do not believe that half the class deserves an "A" to misrepresent their evaluation of the students in their class.[194] In these situations, along with those in which the university changes the grade given by the professor, professors should be able to elect not to have their name appear on the transcript next to the grade.

In most circumstances, a student's transcript lists a grade after the names of the course and the instructor. Therefore, on the rare occasion when a university and a professor overtly disagree, a special notation on the transcript may be appropriate. Students understandably might object to a lengthy explanation that would draw the curious attention of potential employers or graduate school admission committees. For this reason, the most appropriate notation may simply be replacing the professor's name with "University" or "Administration." It is possible that a student might protest even a subtle notation such as this, but this argument falls short when considered alongside professors' important interest

192. *See supra* Part I.C.

193. *See All Things Considered*, *supra* note 82, *available at* 2001 WL 9437361.

194. *See id.* (explaining that ninety percent of Harvard University's 2001 undergraduate graduating class received honors, and about half of the students generally receive "A"s).

in not being compelled to speak in a certain fashion.[195] Moreover, a student would probably choose to suffer the notation if he or she received a higher grade from the administration than from the professor, which, if the circuit cases accurately represent the phenomenon, is the more common occurrence.[196]

B. DIFFICULT TO SEE: THE (IR)RELEVANCE OF THE PUBLIC CONCERN TEST TO THE DISCUSSION OF GRADES AS SPEECH

The circuits are split over whether the analysis of grades as speech must fit into the framework of the public concern test.[197] The *Armenti* court, for example, did not use the test as a framework to analyze whether Brown's grade had First Amendment protection.[198] It did, however, use it in analyzing one of Brown's other claims,[199] which suggests that the court deemed the public concern test irrelevant to a determination of whether Brown's grades were protected by the First Amendment. The only circuit that has struggled to apply the public concern test in this context is the Seventh Circuit, in *Keen v. Penson*.[200] The court wrote that "[i]t is difficult to see what matters of public concern are implicated . . . by the 'F' grade [the professor] eventually gave" the student.[201] It then proceeded to suggest that the balancing process that would determine whether the interests of the teacher outweighed the

195. *See supra* note 192 and accompanying text.

196. *See* Brown v. Armenti, 247 F.3d 69, 72 (3d Cir. 2001) (noting that the professor gave an "F" and the administration ordered it changed to an "Incomplete"); Keen v. Penson, 970 F.2d 252, 253, 255 (7th Cir. 1992) (noting that the professor gave an "F" and the administration ordered it changed to a "C"); Parate v. Isibor, 868 F.2d 821, 824 (6th Cir. 1989) (noting that the professor gave a "B" and the administration ordered it changed to an "A"); Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 549 (5th Cir. 1982) (noting that the professor gave a "grade withheld" and the administration gave a "B").

197. *See* Hiers, *supra* note 6, at 77 ("Neither the Fifth nor the Sixth Circuit opinions considered whether the speech in question addressed a matter of public concern."); *compare Keen*, 970 F.2d at 257-58 (applying the public concern doctrine to a case involving grades), *with Armenti*, 247 F.3d at 75-76 (declining to apply the public concern doctrine), *and* Wozniak v. Conry, 236 F.3d 888, 889-91 (7th Cir. 2001) (same), *and Parate*, 868 F.2d at 826-31 (same), *and* Lovelace v. Southeastern Mass. Univ., 793 F.2d 419, 425-26 (1st Cir. 1986) (same), *and Hillis*, 665 F.2d at 552-53 (same).

198. *See supra* Part III.E.

199. *See supra* note 180.

200. *See supra* notes 162-66 and accompanying text.

201. *Keen*, 970 F.2d at 257.

interests of the university would come out in favor of the university.[202]

The Seventh Circuit's admitted difficulty in analyzing grading through the auspices of the public concern test is understandable. The balancing test from *Pickering v. Board of Education* commands a court analyzing the First Amendment protection of a state employee "to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[203] In the context of a professor and his or her university employer's disagreement about a student's grade, the professor's interest is difficult to quantify while the state's is fairly easy to see. The interest of the state in "promoting the efficiency of the public services it performs"[204] is ensuring that students receive grades that accurately represent their performance; the university desires to produce students who have fulfilled its academic requirements, as the university defines them to be. Moreover, *Rankin v. McPherson* clarified that the state interest half of the balancing test focuses on public employers' ability to manage their operations.[205] In order for universities to achieve their educational mission, they must maintain ultimate control over the grades their students receive.

Unlike the university's interest in this context, the professor's interest is difficult to articulate. *Pickering* requires a determination of the teacher's interest "in commenting upon matters of public concern."[206] The professor's assignment of a grade to a student should not be a comment on anything other than the student's performance, and even if it is an effort to convey a broader message, it should not be acknowledged as anything other than that.[207] Moreover, this is not the type of situation the Supreme Court considered when it articulated the balancing test for analyzing First Amendment protection in *Pickering*.[208] The teacher in *Pickering* spoke out about an issue

202. *See supra* note 163 and accompanying text.

203. 391 U.S. 563, 568 (1968).

204. *Id.*

205. *See supra* notes 43-44 and accompanying text.

206. 391 U.S. at 568.

207. *Cf. Keen*, 970 F.2d at 259 (observing that "a professor could properly be disciplined for assigning grades on the basis of hair color").

208. *See supra* note 33 and accompanying text.

that, while connected to the school and, thereby, his employment, might concern a citizen regardless of his or her employment.[209]

If a public university professor criticizes the university's overall grading policy, that speech would be protected.[210] The facts of the six cases discussed in Part III do not suggest, however, that the professors intended to express an overall critique of the university grading policy via student grades.[211] This is a critical distinction: A professor's criticism of the grading practices of the university is a comment on a matter of public concern; a professor's grade that clashes with the grading practices of the university is not a comment on a matter of public concern.[212] The confusion expressed in *Keen* may stem from the fact that those professors whose grades the administration questions are often the same professors who criticize the grading practices of the university.[213] Future courts addressing a professor's First Amendment interest in the grades he or she has given, however, need not engage in the *Pickering* balancing process.[214] A university that disagrees with a professor's grade is not "silenc[ing] discourse" but

209. *See id.*

210. *See supra* note 36 and accompanying text; *see, e.g.*, Lindsey v. Bd. of Regents, 607 F.2d 672, 673-74 (5th Cir. 1979) (holding that an assistant professor's distribution of a questionnaire to the faculty regarding the university administration was protected speech).

211. *See supra* Part III.

212. *See* Brown v. Armenti, 247 F.3d 69, 79 (3d Cir. 2001) ("Had the plaintiff been reprimanded for speaking regarding, for example, grade inflation, a specific subject about which there is demonstrated interest, he might have satisfied this [public concern] test."); Eisen v. Temple Univ., No. CIV.A. 01-4165, 2002 WL 1565331, at *1 (E.D. Pa., July 9, 2002) (finding that the plaintiff professor's speech regarding alleged grade inflation and academic fraud was arguably protected); *see also* William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 239 (1999) ("Applying the *Pickering-Connick* test to the teacher in the classroom as the communicator of a curriculum to students is a classic example of trying to use a tool designed for one purpose in the performance of an entirely different task—and one for which it is not suited.").

213. *See supra* notes 125-126 and accompanying text (explaining that the professor in *Lovlace v. Southeastern Massachusetts University*, 793 F.2d 419, 426 (1st Cir. 1986), advocated for change in the university's grading policy).

214. Of course, in cases such as *Lovelace*, where a professor not only disagrees with the administration about the grade given to a particular student, but also criticizes the overall university grading policy, the public concern test would be pertinent in the court's analysis of the professor's criticism of the broader policy. *See supra* notes 36, 125-126 and accompanying text..

controlling its academic mission.[215]

Professor Richard H. Hiers notes, "At this point in Supreme Court jurisprudence, it remains uncertain how the Court's lines of academic freedom and general public employee speech case law will intersect."[216] The irrelevance of the public concern test to cases involving professors' assignment of grades suggests that it is inappropriate for academic freedom and general public employee speech law to intersect at this particular point, regardless of its possible interrelatedness with other areas of academic freedom.[217]

CONCLUSION

The grade that a student receives in a class is the speech of the university that he or she has chosen to attend, rather than the speech of the professor from whom he or she took a class. The circuit courts essentially reach the same conclusion on this point from the First Amendment case law, and policy rationales advocate this result as well. Universities have a strong interest in the grades their students receive and should have the right to control the academic mission of the institution. The grade a professor gives a student is not a statement on a matter of public concern, and therefore courts need not wrestle with that test's confused application to these cases. Professors have a First Amendment interest in the grades they assign to students; their interest extends to protection from being compelled to give a grade that they do not believe is appropriate. In order to protect this interest, universities should be willing to make a notation on a student's transcript that reflects this. Finally, students' interest in the grades they receive is tremendous, and they should be afforded the ability to choose a university based on its academic philosophy.

Justice Stevens described academic freedom as "thriv[ing] . . . on the independent and uninhibited exchange of ideas among teachers and students."[218] Academic freedom is

215. *See* Rankin v. McPherson, 483 U.S. 378, 384 (1987).

216. Hiers, *supra* note 60, at 277.

217. *Compare* Hoofnagle, *supra* note 32, at 669 ("The 'matter of public concern' test . . . . is now used to determine the First Amendment value of professors' expression . . . ."), *with* Hiers, *supra* note 6, at 106 (suggesting a rejection of the doctrine as it relates to academic free speech, deeming it "entirely out of place in academe").

218. Regents of the Univ. of Cal. v. Ewing, 474 U.S. 214, 226 n.12 (1985).

central to the American idea of higher education.[219] The university's ability to determine the grades its students receive, however, does not inhibit the exchange of ideas that is the essence of professorial academic freedom. Clarifying the relevance of key First Amendment doctrines will help refine academic freedom jurisprudence and bring more definition to a murky area. Placing the ultimate control over a student's grades in the hands of the institution rather than each individual professor removes little from the professor and promises much to the student.

219. *See id.*