AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**Urofsky v. Gilmore, 216 F.3d 401** (4th Cir. 2000)

*In 1996, the state of Virginia sought to prohibit state employees from watching porn on workplace computers. It did so by prohibiting any “agency employee” from using any “agency-owned or agency-leased computer equipment to access, download, print or store any information . . . having sexually explicit content,” unless that employee had receive written approval from an agency head that the information was part of a “bona fide, agency-approved research project.” Sexually explicit content was defined to include “any” description or visual representation of various things, including lewd exhibition of nudity.*

*A group of professors at various public universities, including Melvin Urofsky, a legal historian at Virginia Commonwealth University who contended that the act interfered with his class assignments on the First Amendment, filed suit in federal district court seeking to have the act struck down as violating their right to free speech. The district court ruled in favor of the professors, but a divided circuit court reversed that decision. The full circuit agreed to hear an appeal* en banc*. At that point, the Virginia legislature modified the statute to specify that the prohibited content must have “as a dominant theme” the “lascivious” descriptions or images. In a divided decision, the full court reversed the district court, holding that the state could regulate the speech of state employees in their capacity as state employees. Significantly, the court concluded that academic freedom was not an individualized constitutional right.*

JUDGE WILKINS.

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. . . . [T]he Act prohibits state employees from accessing sexually explicit materials only when the employees are using computers that are owned or leased by the state and permission to access the material has not been given by the appropriate agency head.

None of the Appellees has requested or been denied permission to access sexually explicit materials pursuant to the Act. Indeed, the record indicates that no request for access to sexually explicit materials on computers owned or leased by the state has been declined.

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It is well settled that citizens do not relinquish all of their First Amendment rights by virtue of accepting public employment. *Pickering v. Board of Education* (1968). Nevertheless, the state, as an employer, undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of the citizenry as a whole. . . . A determination of whether a restriction imposed on a public employee's speech violates the First Amendment requires "`a balance between the interests of the [employee], 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.'" This balancing involves an inquiry first into whether the speech at issue was that of a private citizen speaking on a matter of public concern. If so, the court must next consider whether the employee's interest in First Amendment expression outweighs the public employer's interest in what the employer has determined to be the appropriate operation of the workplace.

The threshold inquiry thus is whether the Act regulates speech by state employees in their capacity as citizens upon matters of public concern. If a public employee's speech made in his capacity as a private citizen does not touch upon a matter of public concern, the state, as employer, may regulate it without infringing any First Amendment protection. . . .

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The Supreme Court has made clear that the concern is to maintain for the government employee the same right enjoyed by his privately employed counterpart. To this end, in its decisions determining speech to be entitled to First Amendment protection the Court has emphasized the unrelatedness of the speech at issue to the speaker's employment duties. *United States v. National Treasury Employees Union* (1995). . . . Thus, critical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is "made primarily in the [employee's] role as citizen or primarily in his role as employee." . . .

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The speech at issue here—access to certain materials using computers owned or leased by the state for the purpose of carrying out employment duties—is clearly made in the employee's role as employee. Therefore, the challenged aspect of the Act does not regulate the speech of the citizenry in general, but rather the speech of state employees in their capacity as employees. It cannot be doubted that in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their positions in a specified way. . . .

Alternatively, Appellees maintain that even if the Act is valid as to the majority of state employees it violates the First Amendment academic freedom rights of professors at state colleges and universities, and thus is invalid as to them. In essence, Appellees contend that a university professor possesses a constitutional right to determine for himself, without the input of the university (and perhaps even contrary to the university's desires), the subjects of his research, writing, and teaching. Appellees maintain that by requiring professors to obtain university approval before accessing sexually explicit materials on the Internet in connection with their research, the Act infringes this individual right of academic freedom. Our review of the law, however, leads us to conclude that to the extent the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by the terms of the Act.

"Academic freedom" is a term that is often used, but little explained, by federal courts. . . .

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The German notion of academic freedom was composed primarily of two concepts: *Lehrfreiheit* and *Lernfreiheit. Lehrfreiheit,* or freedom to teach, embodied the notion that professors should be free to conduct research and publish findings without fear of reproof from the church or state; it further denoted the authority to determine the content of courses and lectures. *Lernfreiheit* was essentially a corollary right of students to determine the course of their studies for themselves.

In 1915, a committee of the American Association of University Professors (AAUP) issued a report on academic freedom that adapted the concept of *Lehrfreiheit* to the American university. . . . In large part, the AAUP was concerned with obtaining for professors a measure of professional autonomy from lay administrators and trustees. . . .

Appellees' insistence that the Act violates their rights of academic freedom amounts to a claim that the academic freedom of professors is not only a professional norm, but also a constitutional right. We disagree. It is true, of course, that homage has been paid to the ideal of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment. *Keyishian v. Board of Regents* (1967); *Sweezy v. New Hampshire* (1957). Despite these accolades, the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom. *Minnesota State Board for Community Colleges v. Knight* (1984).

Moreover, a close examination of the cases indicates that the right praised by the Court is not the right Appellees seek to establish here. Appellees ask us to recognize a First Amendment right of academic freedom that belongs to the professor as an individual. The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.

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Justice Frankfurter, who along with Justice Harlan provided the votes necessary to reverse, relied explicitly on academic freedom in concluding that Sweezy's contempt conviction [for refusing to answer questions from the state attorney general regarding subversive activities] offended the Constitution. The right recognized by Justice Frankfurter, however, was not the individual right claimed by Appellees, but rather an institutional right belonging to the University of New Hampshire: "When weighed against the grave harm resulting from governmental intrusion into the intellectual life *of a university,* [the] justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate." *Sweezy v. New Hampshire* (1957). Justice Frankfurter emphasized "the dependence of a free society on free universities" and concluded by enumerating "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." Significantly, at no point in his concurrence does Justice Frankfurter indicate that *individual* academic freedom rights had been infringed; in his view, the constitutional harm fell entirely on the university as an institution

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Several other cases decided at roughly the same time as *Sweezy* involved restrictions on state employees' rights as private citizens to speak and associate. . . .

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Significantly, the Court has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so. *Epperson v. Arkansas* (1968); *Edwards v. Aguillard* (1987). . . .

Taking all of the cases together, the best that can be said for Appellees' claim that the Constitution protects the academic freedom of an individual professor is that teachers were the first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights. Nothing in Supreme Court jurisprudence suggests that the "right" claimed by Appellees extends any further. Rather, since declaring that public employees, including teachers, do not forfeit First Amendment rights upon accepting public employment, the Court has focused its discussions of academic freedom solely on issues of institutional autonomy. We therefore conclude that because the Act does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors.

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*Reversed*.

JUDGE LUTTIG, concurring.

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. . . . Judge Wilkinson simply, and quite genuinely, believes that the academy has a special contribution to make to society, beyond that that the ordinary citizen is able to make, and that its "speech" should enjoy constitutional protection that other public employees' speech should not.

[A]t the same time that Judge Wilkinson fails to identify even in whom he would vest the constitutional right that he would create, he also never defines the First Amendment right that he so unreservedly would recognize. . . .

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. . . . I agree that the fact that university professors, with no apparent pedagogical reason therefor, are accessing material like this at public taxpayers' expense, on public taxpayer time, and with public taxpayer-purchased computers—all under the auspices of "academic research"—is a matter of public concern, but I believe that it is so for reasons quite different from Judge Wilkinson's.

[E]ven if one takes Judge Wilkinson to hold that it is "academic freedom" or "academic research" that is entitled to "the ancient safeguards of the First Amendment," he does not even attempt to support the existence of such a right in either the text of the Constitution or Supreme Court precedents, or even through resort to the history or traditions of our Nation. He simply asserts that there is (and assumes that there must be) a First Amendment right in such speech, however it is defined. . . .

[W]hen, in all but afterthought, Judge Wilkinson finally does turn to the determinative *Pickering* balance, he ignores the critical aspect of that analysis as set forth by the Supreme Court: the question whether the plaintiffs are speaking in their roles as citizens or in their roles as employees. . . .

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It is unsurprising that Judge Wilkinson would avoid the question whether the plaintiffs here are speaking in their roles as public employees or in their roles as private citizens, because in the answer to that question lies the refutation of the constitutional right that Judge Wilkinson concludes exists. For, when university professors conduct university research on university time, on university computers, and in conduct of their university duties, it is indisputable that they are performing in their role as public employees of the university. . . . The professors' research thus belongs to the public (at least in the only sense that matters here). . . .

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. . . . If one believes, as does he, that the constitutional right of "academic freedom" belongs to the individual university professor, then the fact that the state government, acting through the university's administration, holds the power of censorship cannot possibly be viewed as a feature that *saves* the statute from unconstitutionality. It may be that, if put to the choice, every professor would rather have the power of censorship rest with their academic colleagues than with the state's elected officials. However, no professor would believe that his right of academic freedom is safeguarded merely because it can be denied only by his politically-accountable university administrators, as this litigation—brought by professors *notwithstanding the state's conferral of the waiver authority upon the university*—proves. . . .

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In reality, however, the true academic is in no need of defense. The court holds today, as has been uniformly recognized by the Supreme Court through the years, only that there is no *constitutional* right of free inquiry unique to professors or to any other public employee, that the First Amendment protects the rights of all public employees equally. Neither the value nor the contributions of academic inquiry to society are denigrated by such a holding. And to believe otherwise is to subscribe to the fashionable belief that all that is treasured must be in the Constitution and that if it is not in the Constitution then it is not treasured. But precisely because it is a constitution that we interpret, not all that we treasure is in the Constitution. Academic freedom is paradigmatic of this truism. Academic freedom, however, is also paradigmatic of the truism that not all that we treasure is in need of constitutionalization. No university worthy of the name would ever attempt to suppress true academic freedom—constrained or unconstrained by a constitution. And, if it did, not only would it find itself without its faculty; it would find itself without the public support necessary for its very existence. The Supreme Court has recognized as much—be it through wisdom, prescience, or simple duty to the Constitution—for over two hundred years now. It has recognized that, in the end, the academic can be no less accountable to the people than any other public servant. His speech is subject to the limitations of the First Amendment certainly no more, but just as certainly no less, than is the custodian's. That we should all be accountable to the people, and accountable equally, should cause none of us to bridle.

JUDGE HAMILTON, concurring.

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CHIEF JUDGE WILKINSON, concurring.

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The threshold inquiry in this case is whether the use of the Internet for academic research relates to a matter of "public concern." *Connick v. Myers* (1983). . . .

. . . . As this case was brought by public university professors, I consider the statute's application to academic inquiry as a useful illustration of how the statute restricts material of public concern. The content and context of the speech covered by this statute leave no doubt that the law in question affects speech on matters of public concern.

To take the matter of content first, if the speech at issue were primarily of personal workplace interest to the plaintiffs, it is clear that no First Amendment significance would attach to it. Public employee speech is not entitled to protection if it is of "purely personal concern to the employee—most typically, a private personnel grievance." . . .

By contrast, speech found to be of public concern covers an array of subjects stretching beyond the narrow confines of personal workplace disputes. Courts have focused upon "whether the `public' or the `community' is likely to be truly concerned with or interested in the particular expression." . . .

The statute at issue here addresses speech that is quite unrelated to personal grievances about the workplace. The content of academic inquiry involves matters of political and social concern because "academic freedom is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents* (1967). Academic inquiry is necessary to informed political debate. Academic curiosity is critical to useful social discoveries. One cannot possibly contend that research in socially useful subjects such as medicine, biology, anatomy, psychology, anthropology, law, economics, art history, literature, and philosophy is not a matter of public concern. The content of this research does not involve a professor's wages or working conditions. Rather it concerns an aggregate of subjects with broad social impact—subjects touching our physical health, our mental well-being, our economic prosperity, and ultimately our appreciation for the world around us and the different heritages that have brought that world about. The right to academic inquiry into such subjects cannot be divorced from access to one means (the Internet) by which that inquiry is carried out. By restricting Internet access, a state thus restricts academic inquiry at what may become its single most fruitful source.

Not only does the content of these academic fields support the conclusion that these are matters of public concern, the context of the affected speech is unique. In the university setting "the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of University of Virginia* (1995). . . These plaintiffs are state employees, it is true. But these particular employees are hired for the very purpose of inquiring into, reflecting upon, and speaking out on matters of public concern. A faculty is employed professionally to test ideas and to propose solutions, to deepen knowledge and refresh perspectives. . . .

Furthermore, state university professors work in the context of considerable academic independence. The statute limits professors' ability to use the Internet to research and to write. But in their research and writing university professors are not state mouthpieces—they speak mainly for themselves. . . .

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. . . . To begin and end the public concern inquiry with the signature on plaintiffs' paychecks or the serial number on their computers would be to permit all manner of content and viewpoint-based restrictions on speech and research conducted in our universities. The Commonwealth acknowledges as much. It cannot be true, however, that on university campuses the First Amendment places no limits on the Commonwealth's proprietary prerogative—a prerogative that it claims here in sweeping terms. Under this view, if the Commonwealth were to declare that certain politically sensitive subjects could not be researched on state computers by state employees holding politically objectionable views, the statutory restriction must be upheld.

By embracing the Commonwealth's view that all work-related speech by public employees is beyond public concern, the majority sanctions state legislative interference in public universities without limit. The majority's position would plainly allow the prohibition of speech on matters of public concern. . . .

The majority's reasoning could also be used to uphold statutes that otherwise would fall for overbreadth and vagueness. A prime example is speech codes that have the potential to suppress classroom speech that is unconventional or unorthodox. Courts have repeatedly invalidated these codes for trampling on First Amendment freedoms. . . . Yet under the majority's reasoning, such statutes would not implicate any First Amendment rights because they would regulate university professors only as state employees, and therefore would not involve matters of public concern. The majority provides no way to distinguish the statute at issue here from more intrusive future statutes. . . .

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Because the Act restricts speech on matters of public concern, we must determine whether the burden on speech is justified by the governmental interest at stake. . . .

. . . . There is no question that the General Assembly addressed a real, not a fanciful, problem when it enacted this statute. The record is replete with examples of Internet web sites displaying graphic forms of sexual behavior. . . . The posting of such material on web sites in state offices has led to workplace disruption and complaints that such sexually graphic matter contributes to a hostile work environment. While such abuses may be confined to a small minority of employees, Virginia has an undisputed and substantial interest in preventing misconduct of this sort. Sexual harassment via computer is as objectionable in the university setting as it is in any workplace. The Commonwealth's interest as an employer in workplace efficiency is similarly beyond question.

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[T]hrough the waiver process the Commonwealth also accommodates the various interests at stake—barring employee access to lascivious material generally, but providing a procedure that can be invoked whenever educational institutions determine that academic freedom so requires. The significant state interest here is thus balanced against a minimal intrusion on academic inquiry. . . .

The Commonwealth thus maintains academic freedom by reposing critical authority within the university itself. The Supreme Court has noted that academic 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." . . .

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Were we asked to review *ex post* the judgments of these academic deans and department heads with respect to individual waiver requests, we would thus act with extreme deference. And for good reason. The discretionary choices made by provosts, deans, and faculties in the contexts of hiring, tenure, curriculum selection, grants, and salaries all potentially burden individual academic freedom to some extent, but courts have generally been unwilling to second-guess these necessarily sensitive and subjective academic judgments. . . . We should not presume *ex ante* that those same institutions will discharge their authority under this statute in an irrational or arbitrary fashion. I am thus not prepared to believe, as plaintiffs suggest, that a free academic institution will invade the freedoms of its own constituent members. In fact, the record reflects just the opposite—several professors have received research waivers from their colleges or universities upon request. We have not been made aware of any examples of professors whose requests for exemptions were denied.

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JUDGE MURNAGHAN, with whom JUDGE MICHAEL, JUDGE MOTZ, AND JUDGE KING join, dissenting.

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In *Connick,* the Supreme Court held that, as a threshold matter, if a public employee's speech "cannot be fairly characterized as constituting speech on a matter of public concern," then a court does not balance the employer's interests with those of the employee. The Court broadly defined speech of public concern as speech "relating to any matter of political, social, or other concern to the community." *Id.* The Court also stated that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Nowhere in *Connick,* however, did the Court state that the role of the speaker, standing alone, would be dispositive of the public concern analysis.

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Because speech by an employee in her role as an employee can qualify as speech on a matter of public concern, the issue thus becomes whether, in the instant case, the plaintiffs' speech is on a "matter of political, social, or other concern to the community." The plaintiffs' speech easily meets this test. The Supreme Court has stated that "[s]ex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; *it is one of the vital problems of human interest and public concern.*"

The Act restricts over 101,000 state employees, including university professors, librarians, museum workers, and physicians and social workers at state hospitals, from researching, discussing, and writing about sexually explicit material. As the district court noted, "the Act's broad definition of `sexually explicit' content would include research and debate on sexual themes in art, literature, history and the law, speech and research by medical and mental health professionals concerning sexual disease, sexual dysfunction, and sexually related mental disorders, and the routine exchange of information among social workers on sexual assault and child abuse." These topics undeniably touch on matters of public concern.

The Commonwealth's recent revision to the Act limiting the definition of "sexually explicit content" to materials and descriptions that are "lascivious" does not change the analysis. Many works of public import could be classified as lascivious; in fact, many were specifically intended to have such an effect. . . .

Finally, the form of the plaintiffs' speech, Internet and e-mail communications, makes the speech of special public significance. In the information age, electronic communications may be the most important forum for accessing and discussing topics of concern to the community. This court should be wary of allowing the State to regulate this important medium of communication without requiring a legitimate justification for the regulation.

Because the plaintiffs' speech is on a matter of public concern, we must balance the plaintiffs' interests in speaking on a matter of public concern against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education* (1968). . . .

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The Commonwealth argues that the Act furthers its interest in workplace efficiency. The Commonwealth states that "[a] state employee who is reading sexually explicit material unrelated to his work is not doing the job he was hired to do." he Commonwealth's general interest in workplace efficiency, however, cannot be the basis for the Act's specific prohibition on accessing sexually explicit material on State computers.

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The Commonwealth next argues that the Act furthers its interest in preventing sexual harassment in the workplace. Again, the Act is not tailored to combat this ill in any material way. . . .

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The Act is also impermissibly overinclusive. It prohibits research and commentary by state employees who access this material to advance public discourse, awareness, treatment, and commentary on a variety of disciplines and social problems. The Act thus reaches the legitimate work-related uses of sexually explicit material, uses wholly unrelated to the narrower category of gratuitous sampling of pornographic material that the Act was intended to address. . . .

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The prior approval process does not save the Act even if we could assume that approvals would not be withheld arbitrarily, because the "mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." Thus, even those employees who receive permission to speak will be inclined to engage in self-censorship, ultimately to the detriment of the public in the form of a banal and lifeless discourse on issues of public concern.

The under and overinclusiveness of the Act shows the "obvious lack of `fit' between the government's purported interest and the sweep of its restrictions." The lack of fit between the Act's broad restrictions and the interests the Act allegedly was intended to serve "cast[s] serious doubt," on the Commonwealth's claim that employees' access to sexually explicit material has a "necessary impact on the actual operation of the Government." . . .