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ACADEMIC FREEDOM AND POLITICAL CORRECTNESS IN UNCIVIL TIMES

RODNEY A. SMOLLA*

I. IMAGINE...

Imagine that the editors of First Amendment Law Review ("FALR") at the University of North Carolina School of Law ("UNC Law") decide to hold a symposium on the current state of academic freedom on American university campuses. This is an imaginary, fictional group of editors, not the actual current editors of FALR who have organized this symposium.1

The editors of FALR already have preconceived views on the state of academic freedom in America. They believe it is in a precipitous and perilous decline. University campuses, the editors believe, have become slavish devotees of political correctness. In making their case, the editors point to recent campus episodes in which university presidents and members of university boards have come under withering attack, and in some instances been forced to resign, because they allegedly failed to show appropriate sensitivity to countering manifestations of prejudice on their campuses. The editors point to newly adopted campus policies at various universities requiring "trigger warnings." The editors describe directives emanating from administrative offices describing phrases or ideas to be

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* Dean and Professor of Law, Delaware Law School, Widener University. This Essay is adapted from remarks delivered at the FALR Symposium held at the University of North Carolina on October 30, 2015. I am most grateful to FALR for the opportunity to participate.

1 I want to reinforce this sentence by emphasizing that this point is entirely sincere, not intended as any kind of sly wink-and-nod subtly implying an "innuendo of a different sort." Frohwerk v. United States, 249 U.S. 204, 207 (1919). The actual real-life editors of The First Amendment Law Review responsible for this symposium issue convened a very balanced and even-handed symposium, with speakers representing a wide and representative range of viewpoints on the spectrum of opinions regarding academic freedom.
avoided by university employees, including faculty members, which might be perceived as advancing politically incorrect views antithetical to the values of the university. An especially raw point for the editors is their dismaying over the evolution of Title IX,\textsuperscript{2} which the editors believe has morphed into a strident legal vehicle for imposing shrill left-wing political correctness on American higher education, contrary to both the original intent of Congress and the limits imposed by the Constitution. The editors believe that Title IX has been hijacked by the executive branch of the federal government. They are disturbed by what they describe as the "ubiquitous culture of victimization" in American higher education. They claim that this culture is invoked to intimidate university employees on American campuses, including faculty members, from criticizing the processes or rules by which allegations of sexual assault or sexual harassment are adjudicated in any manner that suggests respect for the rights of those who are accused and a lack of empathy for their accusers.

\textit{FALR} has a faculty advisor.\textsuperscript{3} She is somewhat disturbed by the lack of balance on the panel of speakers the editors propose to invite. She expresses her disquiet with the editors, and they have a civilized and cordial but still pointed discussion. In the end, the professor, a former journalist herself, acquiesces. She is reluctant to impose her own professional preferences, which would have been for a more balanced line-up, upon the student editors.

The speakers recruited for the symposium and conference are duly invited and signed-up. Academics and lawyers from around the country will attend, including an untenured, outspoken assistant professor from UNC Law's nearby law school neighbor, Duke. About a month before the scheduled event, posters and other publicity describing the upcoming conference are launched. This is when the troubles commence.

\textsuperscript{2} 20 U.S.C.A. § 1681 (1972) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .").

\textsuperscript{3} Once again, not any current member of the UNC Law faculty, but a fictional character to be imagined here for educational purposes only.
Various members of both the University of North Carolina at Chapel Hill ("UNC") and Duke University communities express alarm and dismay at the one-sided nature of the planned symposium. The backlash against the symposium and its manifest agenda goes viral. Attesting to the strength of the negative reaction to the program, students, student organizations, and academics on the UNC and Duke campuses suppress their usual reflex toward rivalry (born of the two schools' storied competition in athletics and academics), and join forces. A petition bearing the signatures of members of both campuses demands that the conference be cancelled. The superheated rhetoric of protest includes a charge that the very holding of the conference may constitute racial and sexual harassment and retaliation. Several students on both the UNC and Duke campuses who had filed complaints alleging student-on-student harassment in violation of Title IX in the past year threaten to file new Title IX complaints for retaliation if the conference proceeds as planned. Pressure is brought on the Chancellor of UNC and the Dean of UNC Law to take remedial action. Adding to the stress on FALR, a number of prominent scholars and lawyers representing points of view in opposition to the views of those currently represented at the symposium come forward and volunteer to participate, at their own expense, as additional panelists. They offer to write articles for FALR as well.

At a tense consultation two weeks before the symposium date, the student editors of FALR appear in a meeting called by the University Chancellor and the UNC Law Dean. The students attend the meeting with a prominent First Amendment attorney from Washington, D.C.—a litigator who has frequently represented students, student organizations, and student publications in suits claiming violation of free speech rights against universities. He has volunteered to represent FALR, pro bono publico. The student editors and their lawyer are respectful and thoroughly professional, yet unyielding. They are unwilling to accept the offers of others who have volunteered to participate in the symposium, they explain, because they do not want the general message of the symposium and its accom-

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4 Once again, these are fictional characters.
5 Again, a fictional character.
panying articles diluted. Any attempt to interfere with the symposium, they assert, would violate their First Amendment rights.

The symposium proceeds, and so do the troubles. As the doors are about to open to the campus conference center facility at which the symposium is scheduled to be held, the student editors and FALR staff are stunned to see hundreds of people lined up for entry. Such a line is highly unprecedented; for this, after all, is an academic symposium at a law school, not the opening of Star Wars. The Editor-in-Chief looks to the Symposium Editor and remarks, “We’re going to need more coffee and donuts.”

The masses yearning for entry, it turns out, are not friendly forces. Several hundred students and faculty members from across various schools and disciplines at UNC and Duke, who are passionately opposed to the symposium, have descended upon it. They are brandishing signs and chanting. This is plainly a well-orchestrated protest, and local media have been tipped off. Film crews and reporters from television stations in the Raleigh-Durham-Chapel Hill market are present to capture the event. Although it is not entirely clear whether the protestors’ agenda is discourse or disruption, the FALR editors fear the worst.

So many protestors are present that the scheduled room will not accommodate everyone who has shown up for the event, including FALR's speakers and other invitees. Arrangements are made to move to a larger auditorium. As the conference is called to order, actual disruption begins. Hundreds stand up and brandish their signs, chanting protests. Campus police, who had already been summoned to the scene, look for clues of what to do from various university administrators, who have also now arrived. Two faculty members, one from UNC and one from Duke, along with a handful of students from each school, are identified as the leaders of the protest coalition. In hurried negotiations, it is agreed that all will be permitted to stay, but they must remain silent and seated during presentations. Once question-and-answer periods begin at the end of each speech or panel session, they will be permitted to participate, provided they abide by principles of civility and professional academic discourse. With this impromptu working treaty in place, the symposium moves forward.
About one hour into the event, an exceptionally provocative symposium speaker raises the temperature in the room. This speaker is an untenured assistant professor of law at Duke Law School, in his second year on the Duke faculty. The professor directly addresses and attacks the protestors seated before him. His talk is entitled, "Why Title IX Should Be Repealed," and his driving argument is that Title IX has damaged American higher education and should be scrapped. Personally addressing the protestors, he says that they are wallowing in a culture of self-indulgent victimhood and coddling. He admonishes them that a university is a place of robust exchange of ideas, often vehement and caustic, and not a safe haven from views that one may deem offensive or unsettling. They are cultivating a culture of politically correct oppression and censorship, he asserts, and should be ashamed of themselves.

When the speaker finishes, the moderator for this session looks up at the clock with dread. Would that the time for the panel had expired, but no, fifteen minutes for questions from the audience remain. Knowing the words she is about to utter could trigger disaster, she says: "Well, we now have some time for questions from the audience."

A law student from UNC (an opponent of, not a member of, FALR) in the front row leaps to her feet, points angrily at the last speaker from Duke, and screams at him: "You are nothing but a fucking racist and sexist pig! Who the fuck hired you and made you a professor?" The professor from Duke immediately jumps up from his seat and shouts back at her: "You are exactly the kind of person I am talking about. You do not belong at a university, and I'd like to know who the fuck admitted you as a student!"

Sensing that this is not the civilized discourse contemplated earlier, the moderator jumps in and says, "I think we ought to take a break and adjourn this session now, and give everyone a chance to cool off and reflect before we reconvene." The formal session is adjourned, but the room now descends into chaos. As shouting and personal attacks laced with graphic vulgarity reach a pitch bordering on riot, UNC administrators order the remainder of the event cancelled and the room cleared.
II. YOUR ASSIGNMENT, IF YOU CHOOSE TO ACCEPT IT...

In the aftermath, a plethora of investigations, hearings, and disciplinary actions are commenced on both the UNC and Duke campuses, leading to later litigation. All of the various claims and counter-claims of the various contestants land before one federal judge.6

You are a recent law school graduate who has the good fortune to be serving as a law clerk to the Judge before whom all these proceedings will be tried. The Judge says to you that she often decides cases by brooding over the submissions of the parties, and reaching an “initial intuitive hunch” about the proper resolution of the conflicts. She then often has one of her clerks carefully research the case to see if the intuitive leanings of the Judge stand up to rigorous legal analysis. Your Judge explains that she has been influenced in this approach by an essay written by Judge Joseph C. Hutcheson, Jr., who once wrote:

I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.7

The Judge then shares with you her working intuitions: The weakest claims are those brought by the outside scholars and lawyers who sought to participate in the symposium, but were denied. They argue that the symposium was a limited-purpose public forum, and that to exclude their perspectives constituted impermissible viewpoint discrimination. The FALR symposium, however, is not best understood as any kind of public forum. It is either an exercise in “government

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6 As may happen from time-to-time in the administration of justice, it was decided that all the various legal actions brought would be best consolidated and tried in one court before one judge.
speech,\textsuperscript{8} in which FALR is an arm of the state of North Carolina speaking in its own voice, or it is the private speech\textsuperscript{9} of the FALR editors and staff. Either way, the First Amendment challenge fails. The Judge says she is more inclined to think the speech is the private speech of FALR. Seen that way, the FALR editors would be akin to the organizers of the televised political debate in \textit{Arkansas Educational Television Commission v. Forbes},\textsuperscript{10} in which the Supreme Court held that a public television station had not created a public forum when it broadcasted a political debate, and thus maintained independent editorial control over which candidates qualified for participation.\textsuperscript{11} If FALR is engaged in its own independent speech, then decisions on what viewpoints to include or exclude belong to FALR, much like the decisions of parade organizers in \textit{Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston},\textsuperscript{12} in which the Supreme Court held that a state could not force a group that had been granted a parade permit to include parade participants expressing views antithetical to those of the organizing group.\textsuperscript{13} The outside scholars and lawyers are not entitled to rain on FALR's parade.

Although it is likely that the auditorium on the UNC campus was a public forum, that merely means that the University could not engage in viewpoint discrimination in decisions as to what student organizations to grant or deny access to the auditorium, principles

\textsuperscript{8} See \textit{Pleasant Grove City v. Summum}, 555 U.S. 460 (2009) (holding that the placement of a permanent monument in a public park is government speech and is therefore not restricted by the First Amendment); \textit{see also} \textit{Walker v. Tex. Div., Sons of Confederate Veterans, Inc.}, 135 S. Ct. 2239 (2015) (holding that Texas specialty license plate designs were government speech and therefore not restricted by the First Amendment).


\textsuperscript{10} 523 U.S. 666 (1998).

\textsuperscript{11} Id. at 669.

\textsuperscript{12} 515 U.S. 557 (1995).

\textsuperscript{13} Id. at 559.
established in cases such as *Widmar v. Vincent*, and *Rosenberger v. Rector & Visitors of the University of Virginia*.

Moving to the actions of UNC officials in shutting down the symposium once matters appeared to get out of hand, there is some concern by the Judge that the University may have given in to the "heckler’s veto," by allowing those who came to disrupt the proceedings to effectively shut it down. Perhaps the University should have cleared the room of only the disruptive members of the audience and allowed the event to continue.

A number of complaints were brought by students at both UNC and Duke, alleging that the content of the symposium, including the remarks of the Duke professor who touched off the vehement confrontation, constituted violations of Title IX. Although there is no question that Title IX reaches both verbal harassment and retaliation, violations of the statute that are triggered by speech, the Judge suggests—and most surely, the intellectual views advanced by a professor regarding issues such as race and gender, sexual harassment, and Title IX itself—cannot themselves be Title IX violations, for that

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14 454 U.S. 263, 267–77 (1981) (holding the denial of access to a university facilities to a student group that sought to use the facilities for meetings and events expressing religious viewpoints violated the First Amendment).

15 515 U.S. 819, 837 (1995) (holding the denial of funding to a Christian student group because its publication expressed strong religious messages violated the First Amendment).

16 See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997) (rejecting a mens rea requirement that "would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child . . . would be present"); *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004) (striking down state’s refusal to allow Knights of the Ku Klux Klan to participate in Adopt-A-Highway program, noting that the state "may not censor AAH applicants' speech because of the potential responses of its recipients. 'The first amendment knows no heckler's veto,' and the State's desire to exclude controversial organizations in order to prevent 'road rage' or public backlash on the highways against the adopters' unpopular beliefs is simply not a legitimate governmental interest that would support the enactment of speech-abridging regulations.") (citing *Lewis v. Wilson*, 253 F.3d 1077, 1081–82 (8th Cir. 2001)); see also Erica Goldberg, *Must Universities "Subsidize" Controversial Ideas?: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEO. MASON U. CIV. RTS. L.J. 349, 359 (2011).
would raise Title IX above the First Amendment, inverting our funda-
mental constitutional structures.\textsuperscript{17}

The UNC law student who precipitated the shouting match by
dropping the “f-bomb” in her accusatory statement against the Duke
professor was disciplined by a law school hearing board for vi-
olatng rules governing student conduct at curricular and co-
curricular events. The sanction was a one-semester ban from partic-
ipation in student-organizations and symposia, a ban that would be
lifted if the student voluntarily agreed to seek anger management
counseling. In a First Amendment challenge to this disciplinary ac-
tion, the Judge is of the view that a law school is entitled to enforce
norms of professionalism on its students akin to those that would
govern lawyers admitted to practice.\textsuperscript{18} Courts would not tolerate

\textsuperscript{17} See H. ex rel. Hawk v. Easton Area Sch. Dist., 725 F.3d 293 (3d Cir. 2013) (en
banc), cert. denied, 134 S. Ct. 1515 (2014). The Third Circuit rejected a school’s pro-
fered defense under Title IX in sustaining a § 1983 action challenging a ban on the
wearing of breast-cancer awareness bracelets that used an “I love boobies” motif (with a
heart symbolizing “love”). \textit{Id.} at 297–98. The court held that the ban violated the
First Amendment rights of the students, reasoning that the
bracelets involved commentary on an important political and cultural issue.
They were not lewd, and posed no substantial disruption of school activities. \textit{Id.}
at 298. Title IX, the court ruled, did not offer the school district any shelter. \textit{Id.} at
322. Even assuming that protecting students from harassment under Title IX
would satisfy First Amendment standards permitting schools to protect
the rights of other students, the wearing of the bracelets would not breed the sort
of environment of pervasive and severe harassment required to state a claim
under Title IX. \textit{Id.} at 322–23.

\textsuperscript{18} See, e.g., Brown v. Li, 308 F.3d 939, 953 (9th Cir. 2002) (reasoning that defer-
cence was owed to the university’s enforcement of academic and professional
norms and rejecting a First Amendment challenge to such actions). The case in-
volved a graduate student, Christopher Brown, who had his scientific thesis ap-
proved on its academic merits by his thesis committee. \textit{Id.} at 943. After obtain-
ing the approval signatures, he added a section, labeled as "Disacknowledgements," which began: "I would like to offer special \textit{Fuck You’s}
to the following degenerates for of being an ever-present hindrance during my
graduate career . . . ." \textit{Id.} Brown then identified the graduate school’s dean and
staff, library managers, former California Governor Pete Wilson, the Regents of
the University of California, and "Science" as “having been particularly obstruc-
tive to his progress toward his graduate degree." \textit{Id.} Brown “later explained that
he had not revealed the section to the members of his committee because he
feared that they would not approve it." \textit{Id.}
such outbursts and vulgarity in a courtroom.\textsuperscript{19} On the other hand, one instance of vulgar shouting by one lawyer to another in the heat of a tense negotiation would not normally rise to a level warranting discipline by bar authorities—but that is probably more a matter of administrative discretion than First Amendment principle.

The untenured assistant professor at Duke who gave the provocative speech and responded to the student’s vulgar accusation with his pointed counter-attack, which also used the “f-bomb,” was denied retention by Duke. The Law School Tenure and Promotion Committee, with the support of the law school dean,\textsuperscript{20} cited the incident at the symposium as among the reasons for reaching the judgment that the professor was not making “reasonable progress” toward tenure and or promotion, and ought not be retained. That professor sued Duke, claiming both violations of his First Amendment rights and breach of contract. He claims that his contract with Duke effectively imports by reference First Amendment standards and traditional norms of academic freedom in American higher education, and that the actions of Duke and UNC were sufficiently intertwined to satisfy the state action requirement necessary to support his pure First Amendment claim. The Judge is quite sure Duke’s actions are not state action, and is inclined to dismiss that claim as all but frivolous. The Judge does deem it plausible that Duke has effectively incorporated First Amendment principles and academic freedom traditions into its contract with the professor.\textsuperscript{21} It is far from

\textsuperscript{19} See Rodney Smolla, Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession, 66 FLA. L. REV. 961, 968 (2014); see also Sacher v. United States, 343 U.S. 1, 5 (1952) (upholding the power of courts to use their contempt authority to sanction a lawyer for his expression within a courtroom and observing that “[t]he nature of the [lawyer’s] deportment was not such as merely to offend personal sensitivities of the judge, but it prejudiced the expeditious, orderly and dispassionate conduct of the trial”).

\textsuperscript{20} All fictional characters and not actual professors or the Dean of Duke Law School.

\textsuperscript{21} See Philip Lee, A Contract Theory of Academic Freedom, 59 ST. LOUIS U. L.J. 461, 462 (2015) (“As an alternative to an exclusively First Amendment foundation for this freedom, I argue for a contract law-based conception specifically for professors. Contract law allows courts to protect the rights of professors at both public and private universities. It also allows for the recognition of professional
clear, however, that the professor's outburst against the student was protected under the First Amendment (as incorporated by contract), or protected under traditions of academic freedom. The matter is perhaps more complex because the incident occurred at a symposium on the UNC campus (an "away game," so to speak) and did not involve a Duke law student, but a student from UNC. Even so, the Judge suspects that Duke may demand of its faculty members certain measures of decorum and civility and respect for students in all their professional endeavors, and that the law school as an institution is entitled to considerable deference by courts in the exercise of its discretion on these matters. The professor has alleged that the outburst was not the real motivating factor behind the denial of tenure, but rather that Duke was motivated by a more sinister and illicit motive—its disagreement with the professor's outspoken and controversial views on Title IX and his ideas about "the culture of victimization" on American university campuses. The professor was denied tenure, he claims, because he was not politically correct, a form of viewpoint discrimination that would be impermissible at a state university, and is impermissible at a private university if those same norms are imported into the contractual arrangement between the professor and the university. Although this claim is colorable, the Judge concludes, it is really a state-law based claim involving an interpretation of the nature of the "academic freedom" component of the professor's contract with Duke, and in the absence of a viable claim arising under the First Amendment, ought to be dismissed, perhaps to be litigated in state court, where the professor's case really belongs.

The Judge has also decided to dismiss for failure to state a cognizable First Amendment claim a suit brought by UNC against the state of North Carolina, arising from a state law passed in direct response to this entire episode, barring all public universities in the state from using state funds to support conferences and symposia that do not attempt to present multiple perspectives and balanced norms and academic custom in interpreting the rights and duties of professors and their universities."
presentations on issues of public concern. This law, modeled after the “Fairness Doctrine” that the Federal Communications Commission once enforced against television and radio broadcasters,\textsuperscript{22} was challenged as unconstitutionally vague, overbroad, and contrary to the First Amendment academic freedom rights of the state’s public universities. On this point, the hunch of the Judge is that a state agency (such as UNC) cannot have First Amendment rights enforceable against the state that created it. This is the creature suing the creator, or the state suing itself, and simply can’t be sound.\textsuperscript{23}

The Judge says to you that in reading all of the various pleadings and papers of the parties, she has been astonished at how all the various claimants and all the various defendants from both the UNC and Duke campuses have invoked the phrase “academic freedom” as the major mantra of their claims and defenses. The Judge expresses her suspicion to you that they can’t all be right, and asks for you to research the matter, and share your results. Your assignment is not to exhaustively research all of the issues with supporting authorities at this point—that will come later. What the Judge first wants is some research on what she anticipates will be the opening “preamble” segment of the opinion (or opinions) she must write, setting the stage generally for what to make of this notion of “academic freedom” as it impacts her legal analysis on specific questions.

\section*{III. THE CONUNDRUMS…}

Enthusiastically, you dive in. This is good stuff, not the run-of-the mill drug cases you so often work on when assisting the Judge with her docket. Diving in, however, you are increasingly confounded. The landscape is terribly muddled, filled with complexity and uncertainty.

You start, as the Judge asked you to start, with a handful of her fundamental questions. Is “academic freedom” a legal doctrine—is it law in the sense that courts know law—or is it more in the nature of a colloquial phrase with no load-bearing legal engineering

\textsuperscript{23} See \textit{infra} note 59 and accompanying text.
power, something more like “artistic freedom?” If academic freedom is a legal right, what is its source? The Constitution? The law of contracts? Both? If academic freedom does exist as a legal right, who possesses that legal right? Is it an individual right that may be asserted by professors? Do students possess the right? Do student organizations or publications possess it, or is it only possessed by institutions—by universities or law schools as entities? And what if these competing claimants assert the rights in an adversarial fashion against each other? How do the academic freedom rights of the First Amendment Law Review, or its individual student editors, or its faculty advisor, for example, fare in a showdown with the rights of UNC Law or UNC? Who has the trumps? Is the array of rights at a public university the same as at a private? Or do the rights morph as the setting moves up the Route 15-501 highway from UNC to Duke?

IV. Is “Academic Freedom” a Constitutional Right?

Undaunted, you push forward, and begin to make some discoveries. There are plentiful invocations of the phrase “academic freedom” in judicial decisions, including Supreme Court opinions.24 At its most expansive, the Supreme Court has boldly pronounced: “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”25

On closer inspection, however, most references to “academic freedom” as constitutional law in the judicial opinions appear to be applying other standard constitutional provisions—the Free Speech Clause, the Due Process Clause, or the Equal Protection Clause, typically—to academic settings. There is good reason to believe that “academic freedom” is not a free-standing constitutional right, entirely

24 See, e.g., Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); see also Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (“We believe that there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.”).
25 Keyishian, 385 U.S. at 603.
distinct from, for example, the rights of free expression granted under the Free Speech Clause.

Because the setting for this scenario is North Carolina, a Fourth Circuit case, *Urofsky v. Gilmore*, provides a useful illustration. A group of state university professors from a variety of Virginia colleges and universities brought a suit against the state of Virginia challenging a rule that prohibited all state employees, including state university professors, from accessing sexually explicit materials on their state-owned computers without prior permission from their department supervisors. The professors claimed the restriction violated the First Amendment. The court, sitting *en banc*, rejected the claim. In the course of that rejection, the majority observed, "'Academic freedom' is a term that is often used, but little explained, by federal courts." The majority decided that academic freedom was more in the nature of a professional norm than a constitutional right. To the extent that it was a constitutional right, the majority

26 216 F.3d 401 (4th Cir. 2000) (en banc).
27 Id. at 404.
28 Id.
29 Id.
30 Id. at 410 (citing W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 Neb. L.Rev. 301, 302 (1998) ("[C]ourts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom."); *see also* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment*", 99 *Yale L.J.* 251, 253 (1989) ("Lacking definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles.")).
31 *Urofsky*, 216 F.3d at 410. *See also* Emergency Coal. to Defend Educ. Travel v. U.S. Dept. of the Treasury, 545 F.3d 4, 15 (D.C. Cir. 2008) (Edwards, J., concurring) ("The disposition of the First Amendment issue in this case on grounds other than academic freedom is relatively straightforward and uncomplicated. Therefore, it is unnecessary for us to parse the many difficult issues relating to the concept and scope of 'academic freedom,' including, *inter alia* : whether academic freedom is a constitutional right at all; the breadth of academic freedom; whether academic freedom implicates additional constitutional interests that are not fully accounted for by the Supreme Court's customary employee-speech jurisprudence; whether a professor may assert an individual constitutional right of academic freedom against a university employer; how academic freedom should be enforced in public versus private universities; whether and how we distinguish between the university-as-a-speaker and the university-as-
held, it was a right that rested with institutions, not individuals.\textsuperscript{32} It was true, the court conceded, "homage has been paid to the ideal of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment."\textsuperscript{33} However, the court insisted, "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."\textsuperscript{34}

Judge J. Harvie Wilkinson and Judge Michael Luttig had their own intra-court debate. Judge Luttig chided his colleague for an opinion Judge Wilkinson wrote concurring in the judgment, an opinion that Judge Luttig read as advocating recognition of a new-fangled, illegitimate, and woefully ill-defined right:

First, it is unclear even in whom Judge Wilkinson would create his new constitutional right. For example, from reading his opinion, one cannot discern whether he is creating a right in professors generally, in only university professors, in all academics, in all institutions of learning, in only universities, in all public employees, in some of the above, or in all of the above. All that is clear is that he is emphatic that a new constitutional right must be created.\textsuperscript{35}

Judge Luttig objected to the creation of such a right, arguing that Judge Wilkinson did "not even attempt to support the existence of such a right in either the text of the Constitution or Supreme Court

\textsuperscript{32}Urofsky, 216 F.3d at 410.
\textsuperscript{34}Id. at 412.
\textsuperscript{35}Id. at 417 (Luttig, J., concurring).
precedents, or even through resort to the history or traditions of our Nation.\textsuperscript{36}

Judge Wilkinson, in contrast, appeared to ground his conception of academic freedom in traditions of shared university governance:

> The Commonwealth has made the judgment that universities themselves are best equipped to balance the enormous promise of the Internet against the novel risks that may accompany it. Because the limited restrictions in this Act are administered within the traditional structure of university governance, I do not believe the Virginia statute contravenes the Constitution.\textsuperscript{37}

Judge Wilkinson insisted that it was not his intent to create a new constitutional right. Rather, he argued, the job at hand was to examine the claim of the professors under an existing right—freedom of speech—but taking into account the academic setting.\textsuperscript{38} In that sense, Judge Wilkinson’s opinion might have proved prescient.

Although professors at public universities may not be particularly fond of thinking of themselves as regular government employees, they do get their checks from the state. They are employees of the state, and thus ostensibly, when fired or disciplined for speech related to their employment, would be subject to the general First Amendment test that has evolved governing the speech of government employees. That \textit{Connick} / \textit{Pickering} / \textit{Ceballos} test, named for

\textsuperscript{36} \textit{Id.} at 419.
\textsuperscript{37} \textit{Id.} at 434 (Wilkinson, J., concurring).
\textsuperscript{38} \textit{Id.} at 434 ("I would, however, create no new right of any sort. I would simply review the form, content, and context of the speech at issue—something that the Supreme Court requires us to do in \textit{Connick} and that the majority steadfastly refuses to do. The consequence of the majority’s failure could not be more serious. Under the majority’s view, even the grossest statutory restrictions on public employee speech will be evaluated by a simple calculus: if speech involves one’s position as a public employee, it will enjoy no First Amendment protection whatsoever. My colleagues in the majority would thus permit any statutory restriction on academic speech and research, even one that baldly discriminated on the basis of social perspective or political point of view.")
the three Supreme Court cases that have shaped it, has two parts. A court first determines whether the employee spoke as a citizen on a matter of public concern. If the court determines that answer is no, the case is over, and no First Amendment claim may be brought. If the answer is yes, the court proceeds to part two of the test, a balancing exercise that focuses on the strength of the government employer's justification, taking into account the extent to which the speech may disrupt the functioning and efficiency of the government agency. In Garcetti v. Ceballos, the third case in this trilogy, the Supreme Court engrafted on step one of the test a bright-line rule. If an employee's expression arises from his or her official responsibilities, the Court held, it will automatically be deemed to be speech as an employee, and not speech as a citizen speaking on a matter of public concern. The majority opinion in Garcetti thus essentially adopted the same strict view of government employee speech as the en banc majority in Urofsky in the Fourth Circuit. There was, however, a caveat. Justice Souter, dissenting in Garcetti, was especially troubled by the implications of the Court's new bright line when applied to the speech of public university professors. Justice Souter lamented:

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges

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40 Garcetti, 547 U.S. at 418 ("Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern.").
41 Id.
42 Id.
43 Id.
44 Id. at 421 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").
and universities, whose teachers necessarily speak and write "pursuant to . . . official duties."\textsuperscript{45}

Apparently regarding Justice Souter's point as potentially well taken, the \textit{Garcetti} majority suggested that there might well be an "academic speech" exception to the bright-line rule, a special carve out for professors. The majority thus conceded:

\begin{quote}
There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.\textsuperscript{46}
\end{quote}

This sounds remarkably close to Judge Wilkinson's point in \textit{Urofsky}. Whether the potential exception to \textit{Garcetti} for academic speech is treated as recognition of a separate right of "academic freedom" or simply the application of normal government employee free speech jurisprudence adjusted to reflect the unique context of universities may be mere semantic preference. However phrased, if the potential exception ultimately comes to be realized as settled law, there is a sense in which professors at public universities appear to have free speech rights superior to those of other government employees. At least two federal court of appeals decisions, including one in the Fourth Circuit arising from UNC-Wilmington, have adopted this academic speech exception to \textit{Garcetti}.\textsuperscript{47}

\begin{footnotes}
\textsuperscript{45} \textit{Id.} at 438 (Souter, J., dissenting).
\textsuperscript{46} \textit{Id.} at 425 (majority opinion).
\textsuperscript{47} \textit{See} Demers v. Austin, 746 F.3d 402, 412 (9th Cir. 2014); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 562 (4th Cir. 2011) ("We are also persuaded that \textit{Garcetti} would not apply in the academic context of a public university as represented by the facts of this case.").
\end{footnotes}
Yet to live by the sword is to die by the sword, and to recognize that there may be special considerations in free speech cases when applying constitutional doctrines to conflicts in higher education may require recognition that the “unique setting” of the university may cut in many directions. One of the traditional lodestars of free speech doctrine in the general marketplace is that courts will view with great skepticism any government regulation that discriminates on the basis of content, typically applying strict scrutiny review to content-based regulation. Importing this rule to the arena of higher education, however, is highly problematic, because universities and the professors and administrators and students who comprise them are engaged in content discrimination all the time. It is what they do. The Ninth Circuit has observed:

The nature and strength of the interest of an employing academic institution will also be difficult to assess. Possible variations are almost infinite. For example, the nature of classroom discipline, and the part played by the teacher or professor in maintaining discipline, will be different depending on whether the school in question is a public high school or a university, or on whether the school in question does or does not have a history of discipline problems. Further, the degree of freedom an instructor should have in choosing what and how to teach will vary depending on whether the instructor is a high school teacher or a university professor. Still further, the evaluation of a professor’s writing for purposes of tenure or promotion involves a

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48 Reed v. Town of Gilbert, 135 S.Ct. 2218, 2226 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”); see also Texas v. Johnson, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).
judgment by the employing university about the quality of what he or she has written. Ordinarily, such a content-based judgment is anathema to the First Amendment. But in the academic world, such a judgment is both necessary and appropriate. Here too, recognizing our limitations, we should hesitate before concluding that we know better than the institution itself the nature and strength of its legitimate interests.  

Your research thus far, you realize, is still a long way from definitively resolving many of the cases in front of the Judge. But you are beginning to have some hope that you may be starting to help sweep away some of the underbrush.

“Academic freedom” may or may not be a freestanding constitutional right. To the extent that it has independent force as a constitutional value, it appears to render that force in several directions, some of which may be in tension. Formal legal doctrine appears to place the center of gravity with institutions, meaning that universities as entities, rather than professors or students, are the more compelling claimants to academic freedom as a constitutional right. But that picture is also not entirely clean. The possibility that professors, at least, may possess a kind of “get out of jail free” card exemption from the Garcetti rule appears to make any showdown between a professor and university a closer fight. Yet even that doctrine is qualified by the idea that universities are granted a wide berth of discretion, through traditional systems of peer review and shared governance, to engage in content-based judgments regarding the quality of academic teaching and research.

V. Public vs. Private (Or Tar Heels vs. Blue Devils, By Any Other Name) . . .

Do constitutional doctrines relating to universities play out differently at public and state universities? Are the rules governing

49 Demers v. Austin, 746 F.3d 402, 413 (9th Cir. 2014).
UNC different from the rules governing Duke? Your research leads you to tentatively conclude, “Yes and no.”

When a public university acts to discipline the behavior of faculty and students, it is not simply the university acting, but the state itself. UNC is not simply a university in North Carolina but of North Carolina. When the university chancellor or the dean of the law school makes policy, they act under color of law. Correspondingly, when those university officials act to sanction faculty members or students, they are restricted by the Constitution, because those faculty members or students may claim constitutional rights that may be asserted against government authority.

Private universities are different. As a matter of constitutional law, a professor at Duke does not have the same constitutional protections as a professor at UNC, because when Duke administrators or boards take action against the professor, that action is not governmental, and thus not restricted by the Constitution.

The plot again thickens, however, when we consider the institutional rights of universities. When government attempts to regulate the affairs of a private university, the private university is entitled to invoke, in its corporate capacity, the protections of the Constitution. If the state of North Carolina were to try to dictate academic policy to Duke, Duke would have a colorable constitutional entitlement to resist. This notion is as old as the famous Dartmouth College case, and as new as Citizens United v. Federal Election

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50 Corum v. Univ. of N.C., 330 N.C. 761, 413 S.E.2d 276 (1992) (holding that state university officials were state actors for purposes of free speech claim brought by a faculty member of Appalachian State University).
51 Id.
52 Id.
53 Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819). In Dartmouth College, a case traditionally studied in corporate law courses, the Supreme Court refused to allow a hostile takeover of Dartmouth by the state of New Hampshire. In many respects, however, the case is a precursor to modern academic freedom jurisprudence. Chief Justice John Marshall, who was by lore and legend moved to tears by the oratory of Daniel Webster, a graduate of Dartmouth who argued the cause before the Supreme Court, wrote an opinion that, while cast in the formal garb of corporate law, was really an institutional academic
Committee\textsuperscript{54} and \textit{Burwell v. Hobby Lobby Stores, Inc.}\textsuperscript{55} In \textit{Hobby Lobby} the Supreme Court rejected the view that closely-held for-profit corporations could not assert violations of their religious liberty, repudiating the theory that corporations, as artificial for-profit legal fictions, could not possess legally cognizable interests in “religious freedom.”\textsuperscript{56} In a powerful decision, the Supreme Court renounced the argument that the corporate form was itself determinative and instead assessed the underlying human realities:

But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corpora-

\textsuperscript{54} 558 U.S. 310 (2010). The decision in \textit{Citizens United} was predicated in large part on the Supreme Court’s view of the nature of the “personality” of corporations. The Supreme Court in \textit{Citizens United} pointedly rejected any mechanistic limitations on the corporate personality grounded in the superficial truism that corporations are “artificial” and not “natural” beings, observing that “[t]he Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” Id. at 343. As Justice Scalia observed in his concurring opinion in \textit{Citizens United}, non-profit associational entities were a principal concern of “corporations” as known by the framers of the Constitution. \textit{Id.} at 338 (Scalia, J., concurring) (“At the time of the founding, religious, educational, and literary corporations were incorporated under general incorporation statutes, much as business corporations are today.”).

\textsuperscript{55} 134 S. Ct. 2751, 2767 (2014).

\textsuperscript{56} \textit{Id.} at 2759.
tions, the purpose is to protect the rights of these people.\textsuperscript{57}

If a private university such as Duke has constitutional claims that might be interposed against regulation by the state of North Carolina, does the same apply to UNC? At least as a matter of federal constitutional law, the better view is no. There may be odd state constitutional provisions in some states that grant to state universities independence that allows them to resist, as a matter of state law, encroachments by the political branches.\textsuperscript{58} But the standard paradigm

\textsuperscript{57} Id. at 2768. The Court pointed to a decision from decades before, \textit{Braunfeld v. Brown}, 366 U.S. 599 (1961), to illustrate the flaw that inheres in slavish obedience to the corporate form. In \textit{Braunfeld}, five Orthodox Jewish merchants who ran small retail businesses in Philadelphia challenged a Pennsylvania Sunday closing law as a violation of the Free Exercise Clause. \textit{Hobby Lobby}, 134 S. Ct. at 2767. As the \textit{Hobby Lobby} Court explained, if the formality of “incorporation” governed, the law “would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.” Id. The better view, the \textit{Hobby Lobby} Court held, was to discard these legal formalisms; the Court thus repudiated the position, adopted by the Third Circuit, that “[g]eneral business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion.” Id. at 2768. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.” Id. at 2768 (quoting 724 F.3d, at 385). The Supreme Court instead addressed the heart of the matter, which is that corporations can never do anything separate and apart from the humans who constitute them. Id. (“All of this is true—but quite beside the point. Corporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”).

\textsuperscript{58} See, e.g., Regents of Univ. of Minnesota v. Lord, 257 N.W.2d 796, 798-800 (Minn. 1977) (“Historically, the grant of power to the university came in two steps. The original charter of the university was enacted in 1851. Its central purpose was to create a corporation. Among other things it declared that ‘the government of this University shall be vested in a Board of twelve Regents.’ The university functioned under the act of 1851 until a state constitution was adopted in 1857. What was then art. 8, § 3, of the state constitution ‘perpetuated’ to the university ‘all the rights, immunities, franchises and endowments heretofore granted or conferred.’ By so doing, the Board of Regents of the University was invested with a power of management in the area of the governing
is the opposite. State universities are creatures of the state. The creature cannot sue the creator.\textsuperscript{59}

You are struck by this. You are not quite sure whether you are observing symmetry or asymmetry, but either way, it seems a bit odd to you. At public universities, legally enforceable constitutional rights are limited to individuals who populate the university, such as students and faculty. But the state university does not possess legally enforceable federal constitutional rights against the government that created it. In contrast, private universities and colleges clearly possess legally enforceable constitutional rights as institutions in resisting encroachments on their institutional freedom by government agencies, but the students and professors at those private schools do not have constitutional rights that may be asserted against their universities as institutions.

\textsuperscript{59} See Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1636-37 (2014) (rejecting a challenge to the power of the state of Michigan to impose, through constitutional memorandum, a rule banning affirmative action at Michigan state universities, stating: "Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure. Here Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice. That history demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity. Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by university officials or faculties, acting at some remove from immediate public scrutiny and control; or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.").
This makes good logical sense to you as formal legal doctrine, but you find something instinctually disturbing about the picture. Whether or not it is counter-intuitive, it is surely counter-experiential. You doubt that the professors and students at Duke think they have fewer rights than the professors and students at UNC. As to institutional freedom, your intuition is that both public and private universities do enjoy some measure of institutional autonomy. You also wonder, in the end, however, whether that autonomy may ever rise higher than the board of trustees or regents or directors that govern any college or university—public or private. Whether the governing board is a political entity, as in the case of public universities, or a private non-profit corporate entity, as in the case of private non-profit universities, the board ultimately dictates policy. In the general scheme of things, a university cannot prevail against its own board.

So what is it that both intuition and experience are telling you? It may be this: In the world of higher education, the distinctions between public and private institutions, when it comes to norms of academic freedom, may be highly exaggerated. At the individual level, the contractual arrangement between most faculty members and students at private universities effectively imports the First Amendment rights that faculty members and students have at public universities. A Duke professor is thus likely to possess roughly the same bundle of "academic freedom" legal rights against Duke as a UNC professor has against the state of North Carolina. At UNC, the rights stem directly from the Free Speech Clause of the First Amendment. At Duke the same bundle of rights are imported by reference in the contractual arrangements that govern the relationship between Duke and its faculty, including whatever guarantees of "academic freedom" are embedded in the university's regulations and core documents, such as its faculty handbook. Students at Duke are in a roughly parallel position to students at UNC, though for the Duke students the formal source of law is their contract with the university, not the Constitution.
VI. Conclusion

As you are laboring over this seemingly interminable thicket of material, your Judge pops into your small law clerk’s office, located outside the Judge’s capacious chambers. She asks you how it is going. Suddenly a lyric from an Alanis Morissette song pops into your head, and you blurt out, “What it all comes down to, is that I haven’t got it all figured out just yet.”

The Judge smiles and responds, “That’s fine, I don’t blame you! It’s a pretty mixed up area. Why don’t you show me what you’ve got so far, and I will take it from there?”

And so you do.

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60 ALANIS MORISSETTE, Hand in My Pocket, on JAGGED LITTLE PILL (Maverick Records 1995).