BUREAUCRACY AND DISTRUST: GERMANENESS AND THE PARADOXES OF THE ACADEMIC FREEDOM DOCTRINE

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INTRODUCTION

Open up the Federal Reporter to read a typical case involving an individual academic freedom dispute—say, a professor's claim that her public university employer violated her First Amendment rights by interfering with her decisions about what and how to teach or research in a particular field[1]—and one is likely to find the following. First, there will no doubt be a string of platitudes extracted from the McCarthy-era Supreme Court decisions involving loyalty oaths and other government restrictions on the private political activities of people who happen to be academics.[2] These probably will include bold, impassioned defenses of the need for academic freedom to protect our society from the ills of thought control and governmental dogma, and even to promote the ideal democracy.[3] Next, one is liable to find a reference to *Tinker v. Des Moines Independent Community School District*,[4] which addressed the

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1. *See, e.g.*, Brown v Li, 299 F.3d 1092, 1095–96 (9th Cir. 2002); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 489 (3d Cir. 1998).

2. *See, e.g.*, Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 680 (6th Cir. 2001) (citing Supreme Court decisions describing academic freedom as a transcendent value and recognizing the special place of academic institutions in First Amendment jurisprudence); Brown v. Armenti, 247 F.3d 69, 74 (3d Cir. 2001) (citing Sweezy v. State of New Hampshire, 354 U.S. 234, 250 (1957), which claimed that limiting freedom of academic leaders would imperil the nation's future); Bonnell v. Lorenzo, 241 F.3d 800, 822–23 (6th Cir. 2001) (citing Supreme Court decision characterizing academic freedom as self-evident); Dube v. State Univ. of N.Y., 900 F.2d 587, 597–98 (2d Cir. 1990) (same).

3. *See, e.g.*, *Hardy*, 260 F.3d at 680–81; *Dube*, 900 F.2d at 597–98.

4. 393 U.S. 503, 514 (1969).

rights of students to engage in silent, symbolic protests in a public secondary school, at least in the absence of any specific disruption to the educational environment.[5] This is true, although the professor in my hypothetical but typical case is neither a student, nor at the secondary education level, nor engaged in silent, symbolic expression. The court will then surely invoke from *Tinker* the bromide of all bromides of academic freedom law—Justice Fortas's assertion that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[6] Further, chances are, one might find a reference to the American Association of University Professors' (AAUP) published statements on academic freedom and tenure,[7] which are, of course, articulations of professional best practices, not legal precedents.[8]

Indeed, the one thing a reader is unlikely to find is a coherent explanation of why and how the First Amendment applies to this dispute at all. I do not argue that there is no such explanation. In fact, I believe a substantial justification for constitutional protection of academic freedom for both institutions and professors is entirely defensible. However, as commentators have long observed, the Supreme Court has failed to clarify foundational principles underlying the constitutional aspects of academic freedom.[9] Accordingly, the law of constitutional academic freedom has not been fully realized in either its theoretical or practical dimensions. At the very least, then, there must be a better understanding of the role of First Amendment theory and doctrine in disputes involving public universities.[10]

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5. *See, e.g.*, Vega v. Miller, 273 F.3d 460, 466–67 (2d Cir. 2001); *Hardy*, 260 F.3d at 680; Vanderhurst v. Colo. Mountain Coll. Dist., 208 F.3d 908, 913 (10th Cir. 2000).

6. *See, e.g.*, *Vanderhurst*, 208 F.3d at 913 (quoting *Tinker*, 393 U.S. at 506).

7. 1915 GENERAL REPORT OF THE COMMITTEE ON ACADEMIC FREEDOM AND ACADEMIC TENURE, *reprinted in* FREEDOM AND TENURE IN THE ACADEMY 393 (William W. Van Alstyne ed., 1993); 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, *reprinted in* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS & REPORTS (1995). These statements represent the genesis of professional, as opposed to constitutional, academic freedom in the United States.

8. J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 85–86 (2004) [hereinafter Byrne, *Constitutional Academic Freedom*].

9. *See, e.g.*, David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (1990) [hereinafter Rabban, *Functional Analysis*]; J. Peter Byrne, *Academic Freedom: A "Special Concern of the First* Amendment," 99 YALE L.J. 251, 253–55 (1989) [hereinafter Byrne, *Academic Freedom*].

10. This paper addresses only constitutional academic freedom, and therefore confines itself to state action that interferes with the speech of academic institutions and persons engaged in academic professions. For a discussion of the distinction between academic freedom and constitutional academic freedom, see Byrne, *Academic Freedom*, *supra* note 9, at 251, 254–55.

This article begins in Part I with the suggestion that two important and, by now, well recognized paradoxes play a large role in perpetuating this confusion. The first, which I label the "positional paradox," arises because various constituents within the public university community may, at times, be state actors, or free speech claimants, or sometimes simultaneously both. The resolution of many academic freedom disputes may depend on the relative positions of the academic freedom claimant and the alleged intruder on that freedom. The second is what I call the "First Amendment paradox." It arises because, while a robust version of constitutional academic freedom would suggest that protection of individual academics' speech is consistent with all of the values most fundamental to the First Amendment, the traditional doctrinal tools designed to protect those values have limited, and sometimes no applicability to most academic freedom disputes.

In Part II of this paper, I argue that in addressing the paradoxes of academic freedom, courts should develop doctrinal tests that require examination of both the academic speech and the government's interest in regulating that speech in relation to their germaneness to the university's central academic mission. In other words, academic freedom claims may better be addressed by inquiring how close the nexus is between the speech (and the countervailing government interests) and the social values that justify the constitutional protection of academic discourse in the first place. Serious consideration of germaneness as an operative concept in the analysis of individual academic speech claims could advance a greater understanding of the First Amendment theory underlying academic freedom and also help courts implement the Constitution meaningfully in academic freedom disputes.[11]

Finally, in Part III of the article, I acknowledge and address several possible limitations likely to be associated with a germaneness-based First Amendment analysis of individual academic freedom claims. This part addresses concerns that a germaneness inquiry might interfere with institutional academic freedom, might be circumvented by an institution's statement of its academic mission at a very broad level of generality, does not necessarily resolve disputes between institutional and individual speech claims, and may not provide an adequate response to pretextual claims of academic freedom by institutions.

I do not pretend that a stronger emphasis on the principle of germaneness will address all of the impediments to understanding or implementing constitutional academic freedom. Nor do I have all of the answers about how such a focus can be plotted on the doctrinal First

11. *See* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 56 (1997).

Amendment map in this area. Rather, my claim is a more modest one. I contend that both courts and commentators have not devoted sufficient attention to incorporating germaneness into the law of academic freedom and that such attention, properly focused, may at least thin the fog.

I. TWO PARADOXES ABOUT CONSTITUTIONAL ACADEMIC FREEDOM

As legal scholars have recognized for many years, there really is no academic freedom doctrine as such.[12] Rather, unlike other aspects of the constitutional law of free expression, academic freedom represents not a doctrine, but a multitude of analytical approaches that vary widely across the spectrum of academic speech. Academic freedom is a highly Balkanized phenomenon within the already Balkanized field of First Amendment law—a constitutional enigma. It is almost as if the only useful enterprise in examining academic freedom is "description by infinite itemization"[13] rather than generalization.

This section first describes the general disarray of First Amendment academic freedom doctrine that arises from this Balkanization. It then provides a detailed description of the two phenomena that I argue lead to even more confusion about the state of constitutional academic freedom for individual speakers: the positional paradox and the First Amendment paradox.

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12. *See, e.g.*, Byrne, *Academic Freedom*, *supra* note 9, at 253. There is a rich and thoughtful body of academic freedom scholarship that offers many insights into this complex area of legal analysis. *See, e.g.*, ROBERT M. O'NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY (1997); Byrne, *Academic Freedom*, *supra* note 9; Byrne, *Constitutional Academic Freedom*, *supra* note 8; Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323 (1988) [hereinafter Finkin, *Intramural Speech*]; Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 846 (1983) [hereinafter Finkin, *Institutional Academic Freedom*]; Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988); David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405 (1988); Rabban, *Functional Analysis*, *supra* note 9; Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); Harry F. Tepker, Jr. & Joseph Harroz, Jr., *On Balancing Scales, Kaleidoscopes, and the Blurred Limits of Academic Freedom*, 50 OKLA. L. REV. 1 (1997); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990) [hereinafter Van Alstyne, *Historical Review*]; William Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L. J. 841 (1970); Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987).

13. CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 14 at 85 (West Group 6th ed. 2002) (1963) (employing this phrase to describe the political question doctrine) (citation omitted).

A. The General Disarray

For nearly fifty years, the Supreme Court sporadically has made compelling statements about the importance of academic freedom, yet, it has been either unable or unwilling to develop a coherent framework for assessing the scope of constitutional academic freedom rights.[14] Indeed, more often than not, its decisions in this area are not even about academic freedom per se.[15] While both the Court and academic commentators acknowledge the important social and constitutional values served by protection of academic freedom, the law remains elusive.[16] Because the Supreme Court has never fully articulated a constitutional doctrine of academic freedom, the extant law can best be described as a set of context-specific legal standards loosely connected by some common princi-

14. Commentators widely regard *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), as the first formal recognition of a constitutional principle of academic freedom. *See, e.g.*, Byrne, *Academic Freedom, supra* note 9, at 289–93. While *Sweezy* did involve a legislative inquiry into a university professor's classroom lectures, other cases from this period addressed state constraints on the private speech and association of academics. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Shelton v. Tucker, 364 U.S. 479 (1960). Earlier opinions by Justices Douglas and Frankfurter, however, may have planted the seeds of the First Amendment approach to academic freedom. *See* Wieman v Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); Adler v. Bd. of Educ., 342 U.S. 485, 508 (1952) (Douglas, J., dissenting). The Court has revisited the idea of academic freedom on multiple occasions since then and most recently invoked it in the context of granting substantial deference to a public university's goal of admitting an educationally diverse class. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003). For thoughtful commentary in the wake of the Supreme Court's invocation of academic freedom concepts in its most recent affirmative action decision, see Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461 (2005); Neal Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 HASTINGS CONST. L.Q. 557 (2003).

15. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 103 (1968) (deciding case on Establishment Clause grounds rather than on basis of academic freedom); *Sweezy*, 354 U.S. at 250 (avoiding First Amendment analysis and instead deciding case on due process grounds). In other cases, the Supreme Court has invoked the rhetoric of academic freedom, but ultimately decided the case on other grounds, such as vagueness or overbreadth. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603–04, 609 (1967); Shelton v. Tucker, 364 U.S. 479, 487–88 (1960).

16. Indeed, in its most recent term, the Court once again touched on the notion of academic freedom without offering any greater clarification about its contours. In *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006), the Court held that when public employees speak in the course of fulfilling their official duties, they are not speaking as citizens within the meaning of the First Amendment. This statement would appear to undermine any future claim for individual academic freedom. In dicta, however, the Court stated:

> 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.

Id. at 1962.

ples. As a consequence, courts and commentators alike find it difficult to articulate the most basic doctrinal precepts of academic freedom law.

A large part of the problem is that academic freedom claims can and do arise in a wide range of distinctive contexts, each implicating different concerns on the part of both the speaker and the state. First, there are problems of constituency. Whom does academic freedom protect? Plausible claims can be made for academic institutions (primarily public universities), individual professors,[17] and sometimes even students (though several scholars have rejected outright the idea that students might enjoy constitutional academic freedom rights).[18]

Second, courts have not thoroughly identified the specific academic freedom concerns and state interests that may attach at different levels of public education. Most case law invoking constitutional academic freedom extends such protection to institutions and individuals at the post-secondary level of education. Is academic freedom constitutionally required, or even relevant, for actors at the elementary and secondary school levels? At least two Supreme Court cases suggest that some constitutional freedoms extend to students and teachers in these settings. In *Tinker v. Des Moines Independent Community School District*, the Court recognized high school students' right to wear black armbands as a silent political protest.[19] *West Virginia Board of Education v. Barnette* held that schools may not compel students to recite the Pledge of Allegiance.[20] These decisions, though, cannot fairly be characterized as academic freedom cases because they do not involve academic speech per se. Furthermore, as some commentators have observed, not all of the rationales for academic freedom in the university context extend to elementary or secondary school teachers and students.[21] There are also col-

17. To be sure, some courts reject the concept of an individual academic freedom doctrine outright. *See, e.g.*, Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) (rejecting challenge to law limiting university professors' access to sexually explicit material on the Internet); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998) (rejecting professor's claim of constitutional academic freedom regarding control of curricular matters).

18. *See, e.g.*, Byrne, *Academic Freedom, supra* note 9, at 262 ("No recognized student rights of free speech are properly part of constitutional academic freedom, because none of them has anything to do with scholarship or systematic learning."). *But see* Van Alstyne, *Historical Review*, *supra* note 12, at 116–17, 120–25 (describing and exploring possible bases of academic freedom rights for students).

19. 393 U.S. 503, 505–06 (1969).

20. 319 U.S. 624, 642 (1943). Although *Barnette* addressed only the rights of students, it has been read to protect teachers' rights not to participate in reciting the Pledge as well. *See* Alan K. Chen, *Forced Patriot Acts*, 81 DENV. U. L. REV. 703, 722 n.144 (2004) (citations omitted).

21. *See* Byrne, *Academic Freedom, supra* note 9, at 288 n.137 (arguing that academic freedom is only relevant to teachers who are also researchers or scholars); Yudof, *supra* note 12, at 844–50 (asserting that a model of academic freedom based on the objective of limiting

orable state interests associated with directing elementary and secondary school teachers to inculcate values in their students, whereas that is not the case at the university level.[22]

Third, the courts have not carefully delineated when speech is protected specifically because it is academic and when speech is protected under generally applicable First Amendment principles in cases when the speaker happens to be a member of the academic community. That is, speech by academics can occur in a myriad of settings, some suggesting the need for distinctive protection and others not. A typical professor might engage in expression through scholarly publications, in classroom lectures and discussions, at faculty or committee meetings, in addresses to public audiences and interest groups, in op-ed pieces in newspapers, on blogs or other internet sites, at public marches or protests, in the context of political campaigns, through participation in litigation (as a party or, in the case of law professors, as a lawyer), by adding her name to a petition, and so forth. Clearly, not all of the speech in these different contexts deserves protection under a constitutional academic freedom doctrine, even if it might otherwise deserve First Amendment protection from government suppression.[23]

Another complication of academic freedom analysis is the identification of the speech's source. Government institutions, including universities, surely have the authority and freedom to deliver a particular message or idea.[24] In some contexts, a university might want to constrain or control the speech of one of its constituents, such as a faculty member, because it considers her expression to represent the university's

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government from abusing its power over the marketplace of ideas does not support academic freedom in elementary and secondary schools, whose goal is in part to indoctrinate children with certain values). Interestingly, one commentator has observed that reported cases on academic freedom suggest that federal courts are more often confronted with academic freedom claims in the secondary school context than in the university context. W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 306 (1998).

22. *See* Byrne, *supra* note 9, at 288 n.137; Yudof, *supra* note 12, at 849–50. *But see Barnette*, 319 U.S. at 645–46 (Murphy, J., concurring) (arguing that inculcation of values of loyalty and patriotism is "not essential to the maintenance of effective government and orderly society").

23. For a discussion of the rights of professors to engage in non-teaching, non-research related speech, see Finkin, *Intramural Speech*, *supra* note 12.

24. *See* Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 606 (1980). Larry Alexander has described this analytical approach as "Track Three," an alternative to Laurence Tribe's First Amendment models that involves circumstances where the "government is using the mechanisms of the affirmative state, not to censor others' messages, but to communicate its own messages . . . ." Larry Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 926–27 (1993). Of course, government speech ultimately can interfere with others' messages if it crowds out or otherwise dilutes other speakers.

speech.[25] That is, the university's interest in regulating the speaker's communication is its fear that the audience will mistakenly understand that speech to be that of the university. However, principles of academic freedom are in tension with the idea that faculty members' speech is the speech of the university.[26] At the same time, in many circumstances the First Amendment forbids the government to force individuals to engage in speech scripted by the state.[27]

From this diverse set of contexts and problems, something called academic freedom law has emerged. Given the fractured nature of these categories of controversy, though, it is difficult to pinpoint the basic outlines of academic freedom law under the First Amendment. What is more, this state of affairs has led to at least two paradoxes that obscure a clear understanding of constitutional academic freedom law.

B. The Positional Paradox

The positional paradox is the problem that the resolution of any particular academic freedom dispute depends substantially on the position of the academic freedom claimant in relation to the alleged intruder on that freedom. Constitutional freedom of expression conflicts ordinarily arise where the monolithic state penalizes a private citizen's speech acts for impermissible reasons. This is often a relatively uncomplicated, binary relationship.

At the post-secondary education level, however, it is harder to identify who the state is, and for what purposes. A public university, for example, can be a defender of its own academic freedom, or the freedom of

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25. The Court allows greater deference to government regulations of speech that represents the government's own message. *See* Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (describing greater First Amendment deference owed to the government where it seeks to promote its policies or advance its ideas). Some lower courts have evaluated academic freedom disputes under the government speech theory. *See, e.g.*, Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491–92 (3d Cir. 1998) (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (upholding a public university's right to control its curriculum based in part on the theory that such a curriculum is government speech)). *But see* Rabban, *Functional Analysis*, *supra* note 9, at 278 (arguing that once a state legislature creates a university, the First Amendment requires the state to respect the expressive functions associated with universities).

26. Shiffrin, *supra* note 24, at 607 ("[T]here must be limits on government's ability to prescribe orthodoxy and to use public property and public funds to support its prescriptions."). Even those who dispute the viability of individual academic freedom have criticized arguments that the university may limit faculty speech on the ground that faculty speech is tantamount to the speech of the university itself. *See, e.g.*, Byrne, *Constitutional Academic Freedom*, *supra* note 8, at 108–12; David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. (2006) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=811022.

27. *Barnette*, 319 U.S. at 642. *See generally* Chen, *supra* note 20, at 705–08 (describing First Amendment values advanced by forbidding forced speech).

its professors or students against the state, but it can also (and sometimes simultaneously) be a suppressor of those constituents' expression. Similarly, a professor may claim that her academic freedom has been violated by the state, the university, or her colleagues, but she is also sometimes in the position of a state actor who may interfere with speech. For example, a professor who sits as a department chair or on a tenure review board might recommend the release of a colleague based on the content of the latter's teaching or scholarship. Moreover, professors regularly discriminate on the basis of content with regard to their students' speech when they provide critical feedback of papers, examinations, or in-class performance.

Most paradoxically, a single player can be in *both* situations in the same matter. A university's effort to drum out a professor because of controversial remarks appearing in her scholarly work raises academic freedom issues for the professor, but a court's interference with the university's efforts to do so, or even its inquiry into the university's processes for evaluating that professor's work, may encroach on the university's autonomy and freedom to control its own academic integrity. Indeed, the tension associated with the positional paradox has been the dominant focus of the scholarly discourse on constitutional academic freedom.[28]

C. The First Amendment Paradox

The First Amendment paradox involves the tension between the underlying free speech values embraced by academic freedom and the limited applicability of traditional First Amendment doctrine to many academic freedom disputes. It is a conflict between the theory underlying constitutional academic freedom and the doctrine actually applied to it. Under most free speech theories, speech is deemed to be protected by the First Amendment where that speech contributes some value to society.[29] To advance these utilitarian theories of speech, the Court crafts legal doctrines that are designed to check government efforts to interfere with valuable speech. In the context of individual academic freedom, First Amendment law does not and cannot operate in this manner.

The core values advanced by the constitutional protection of academic freedom—enhancement of critical discourse, advancement of the search for truth, achievement of self-fulfillment, promotion of tolerance

28. *See, e.g.*, Byrne, *Academic Freedom, supra* note 9, at 257–58.

29. For a general summary of these basic theories, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1047–52 (2d ed. 2005).

for unorthodox viewpoints, and facilitation of democracy[30]—coincide perfectly with the theoretical justifications most often associated with First Amendment protection for all sorts of expression.[31] As others have described more articulately than I could hope to, universities and the people who inhabit them have a unique role in our society.[32] Universities serve a different function than any other governmental institution or any other governmental employer.[33] They exist for the purpose of creating and disseminating knowledge. They are created as institutions of both teaching and research, which advance social interests in producing educated citizens and increasing understanding across multiple academic disciplines. One could argue that universities encourage and develop critical thinking processes in their students and the ability to challenge accepted wisdom, which leads not only to a better educated citizenry but also meaningfully facilitates self-governance in a democratic society.[34]

These functions facilitate the very values underlying the First Amendment by expanding the amount, diversity, and, we hope, quality of speech in the metaphorical marketplace. By protecting and encouraging a diversity of viewpoints and perspectives, universities enhance the search for truth. Indeed, the process of that search is desirable from a societal perspective, even if the truth is never, or cannot ever be, attained.[35] If academic freedom protection belongs in the Constitution, it belongs nowhere else than the First Amendment.[36]

Notwithstanding this *theoretical* harmony, conventional First Amendment *doctrines* do not translate very well, if at all, to the context

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30. *Id.*

31. This is not to say that speakers might not sometimes employ other components of the Constitution to protect academic speech. *See, e.g.*, Vega v. Miller, 273 F.3d 460, 470 (2d Cir. 2001) (procedural due process); Parate v. Isibor, 868 F.2d 821, 831–33 (6th Cir. 1989) (substantive due process). Rather, my claim is that because of these shared values, academic freedom and the First Amendment fit conceptually, if not doctrinally, hand in glove.

32. *See* Byrne, *Academic Freedom, supra* note 9, at 332–39; Finkin, *Institutional Academic Freedom*, *supra* note 12, at 829; Rabban, *Functional Analysis*, *supra* note 9, at 230–31; Van Alstyne, *Historical Review*, *supra* note 12, at 86–87. This is also true of private universities, which are entitled to constitutional academic freedom protection vis-à-vis the state.

33. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

34. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). *But see* Stanley Fish, *Why We Built the Ivory Tower*, N.Y. TIMES, May 21, 2004, at A23 (disputing role of universities in creating good citizens).

35. *See* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 4 (1995) (suggesting that the First Amendment facilitates not "the possible attainment of truth, but rather . . . the existential value of the search itself").

36. Rabban, *Functional Analysis*, *supra* note 9, at 230 (claiming that constitutionalizing academic freedom advances some "[c]ore First Amendment values—such as critical inquiry, the search for knowledge, and toleration of dissent"). *But see* Byrne, *Academic Freedom, supra* note 9, at 259–60 (arguing that values associated with academic freedom are qualitatively different from those that justify protection of speech more generally).

of most academic freedom disputes. Indeed, academic freedom cases sometimes have to throw much standard First Amendment analysis out the window. Federal courts have asked, but not resolved, whether any preexisting First Amendment doctrinal formulations apply to analogous speech in the university setting. Are university professors identical to other government employees, such that courts should analyze their speech claims under the public employee speech doctrine?[37] Alternatively, should the courts treat professorial speech as if it were the government's own speech, as is the case with curricular publications in secondary schools?[38] In the context of students' speech, should courts treat the open spaces at a state university as public forums and therefore assess relevant speech regulations under the time, place, or manner doctrine?[39] The Supreme Court has even asked whether a university's response to concerns about disruptive student speech that might interfere with the educational environment should be governed by the standard developed in *Brandenburg v. Ohio*.[40]

Not only do the various doctrinal categories under the free speech clause not fit comfortably into the context of academic freedom claims, but also the different models of constitutional adjudication that ordinarily apply to government interference with speech often are not applicable. A central component of free speech analysis involves the judicial examination of whether a particular state action discriminates against speech because of its content or whether that action is content neutral.[41] In most contexts, courts treat laws that discriminate against speech because of its content with great suspicion, upholding them only if the government can meet the most exacting scrutiny.[42] As the Supreme Court has stressed:

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37. *See, e.g.*, Urofsky v. Gilmore, 216 F.3d 401, 406–07 (4th Cir. 2000). Many commentators have rightly questioned the applicability of the public employee speech line of cases to individual academic freedom claims. *See, e.g.*, Ailsa W. Chang, Note, *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond* Pickering *and* Connick, 53 STAN. L. REV. 915 (2001).

38. *See* Vanderhurst v. Colo. Mountain Coll. Dist., 208 F.3d 908, 914–15 (10th Cir. 2000) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.")).

39. *See, e.g.*, Kincaid v. Gibson, 236 F.3d 342, 349 (6th Cir. 2001) (holding that student yearbook at public university was a limited public forum).

40. Healy v. James, 408 U.S. 169, 188 (1972) (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), which holds that First Amendment forbids government to punish advocacy of unlawful action unless that speech is "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action").

41. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

42. *Id.* at 642. Content discrimination, in turn, can be divided up into a number of different substrata. The most egregious, and therefore constitutionally unacceptable, version of content discrimination is known as viewpoint discrimination. *See* R.A.V. v. City of St. Paul, 505

> Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions "rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."[43]

For fairly obvious reasons, however, the presumption that content-based restrictions are likely intended to suppress ideas cannot attach to many types of academic freedom disputes. Universities maintain substantial control over the content of other academic speakers. Indeed, content discrimination, a virtual per se violation of the First Amendment in most contexts, is not only often permissible in academic settings, but the exercise of content discrimination is also sometimes *necessary* to facilitating academic freedom, as in the instance of a university's decision regarding its curricular choices.[44] Decisions about what courses to in-

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U.S. 377, 391–92 (1992); Texas v. Johnson, 491 U.S. 397, 413 n.9 (1989). *See also* Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 38 n.42 (2003).

The ideas of viewpoint and content discrimination are sometimes merged, but this merger does not accurately reflect the conceptual differences between the two. In fact, viewpoint discrimination is a subset of content discrimination. Thus, a law cannot be viewpoint-based without also being content-based, but a law can be content-based without being viewpoint-based.

Viewpoint discrimination occurs where the state discriminates against particular speech because of the viewpoint of the speaker, as reflected by the views expressed in her message. *R.A.V.*, 505 U.S. at 391–92; *Johnson*, 491 U.S. at 413 n.9. Other forms of content discrimination, including regulations that distinguish speakers because of the subject matter of their speech, are also reviewed under the most searching judicial scrutiny. While viewpoint and subject matter restrictions are commonly described as the major components of the rule against content discrimination (and, indeed, content discrimination is sometimes wrongly described as limited to these two categories), all forms of content discrimination are suspect. See Chen, *supra* note 42, at 60 n.171 (discussing Justice Scalia's argument that a regulation banning speech of a particular demeanor (e.g., happy speech or sad speech) or mode of delivery (e.g., poetry) would constitute content discrimination even though it does not discriminate on the basis of either viewpoint or subject matter) (citing Hill v. Colorado, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting)). *See also* Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights:* Hill v. Colorado, *the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 206 (2001) (describing examples of content regulation pertaining to neither viewpoint nor subject matter).

43. *Turner Broad. Sys., Inc.*, 512 U.S. at 641 (citation omitted). Exceptions exist where the Court has characterized the relevant speech as falling into a category of speech that is altogether outside of the free speech clause's protection. *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (fighting words).

44. *See, e.g.*, Bishop v. Aronov, 926 F.2d 1066, 1075, 1078 (11th Cir. 1991) (stating that academic freedom requires protection of university's autonomous decision making as well as the speech of individual professors and students); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491–92 (3d Cir. 1998) (same).

clude in a university's curriculum, for example, are clearly content-based. By definition, curricular decisions are a form of subject matter discrimination. A university's requirement that its chemistry professors teach organic chemistry, and not political science, is content based, as is an English department's decision to offer a course in Nineteenth Century Romantic Literature rather than Postmodern Literary Criticism. Yet, the law ought not immediately treat such selectivity as suspect because it is so closely and clearly related to the university's academic mission. We may or may not agree with the decision, but we are not *usually* concerned that the university is trying to prevent students' exposure to political science or postmodern thought.[45]

Universities and professors also regularly engage in all sorts of content discrimination in the evaluation of the work of the faculty and the student body. A university could certainly take adverse employment action against a professor who is inarticulate and confusing in his classroom delivery or whose scholarly arguments are gibberish, illogical, or not based on sound research. That is surely content selectivity—it involves base discrimination against bad teaching, poor research, and incoherent writing. Likewise, professors exercise a form of content discrimination every time they grade a paper or exam.[46]

Thus, despite the fact that the identical values advanced by First Amendment protection of speech in other contexts would be promoted by a law of constitutional academic freedom, the same doctrinal tools that courts use to check other government restrictions on speech do not and cannot apply in the higher education context. In the absence of clear guidance, however, courts continue to be mystified about what tools should apply.

These paradoxes are unlikely to disappear, nor is the confusion they engender in academic freedom analysis. First, they substantially impede the development of a comprehensive understanding of a First Amendment theory for academic freedom analysis. The positional paradox makes it difficult to develop a consistent theory that addresses the underlying tension between institutional and individual academic freedom claims. Similarly, the First Amendment paradox reveals that in the context of individual academic freedom claims, traditional free speech the-

45. In certain contexts, of course, such decisions could become suspect. *See* Rabban, *Functional Analysis*, *supra* note 9, at 286–87.

46. Courts are split on whether a university's interference with a professor's grading decisions compromises the professor's speech interests under the First Amendment. *Compare* Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001) (rejecting professor's academic freedom claim), *with* Parate v. Isibor, 868 F.2d 821, 827 (6th Cir. 1989) (recognizing limited First Amendment protection for professor's assignment of grade).

ory does not support the application of ordinary free speech analysis as it does in other speech contexts.

From a doctrinal perspective, the paradoxes interfere with the actual implementation[47] of First Amendment law in academic freedom disputes.[48] Nearly fifty years after the introduction of the phrase "academic freedom" into the judicial discourse, the Supreme Court still has not carefully delineated the boundaries of a constitutional academic freedom doctrine.[49] As a result of the positional paradox, it is difficult to develop a systematic doctrinal approach to prioritizing claims among different constituencies in the academic community. What is more, the very existence of the First Amendment paradox means that there is little agreement about which doctrine to apply to advance the values protected by constitutional freedom of expression—about how to implement the Constitution.

II. GERMANENESS AS A RESPONSE TO THE PARADOXES

Few would argue with the proposition that the Supreme Court would do well to establish clearer guidance about the existence and scope of a constitutional doctrine of individual academic freedom. Despite the best efforts of lower courts and academic commentators, this area of law remains enigmatic. In the meantime, courts could at least

47. *See* Fallon, *supra* note 11.

48. Some argue that the legal distinction between public and private universities might represent another paradox. *See* Byrne, *Academic Freedom, supra* note 9, at 299–300. While *professional* academic freedom principles ought to be regarded as universal, applying to both public and private institutions, it is not unusual under our constitutional system to recognize greater protection for parties in the public sector than for their similarly situated counterparts in private settings. *See id.* Public employers generally cannot fire someone for engaging in political speech, while private employers are free to do so, at least in the absence of statutory protections. This type of inequality is widely accepted. *See id.* (explaining that a "rigid rule" has developed in which faculty and students at state universities enjoy constitutional rights against institutions while faculty and staff at private colleges do not). If it is assailable, it is from the perspective of the state action doctrine, not the law of free speech.

Moreover, one can make a plausible case that protection of academic freedom is even more important in public institutions than in private institutions. Most, if not all, public universities are governed by boards that are constituted of publicly-elected trustees or governors. *See, e.g.*, COLO. CONST., art. IX, §12 (requiring election of nine regents of the University of Colorado). To the extent such officials are driven by electoral self-interest, greater pressures from voters may be visited upon them to interfere with academic freedom than might be placed upon, say, a private university's board of trustees. *But see* Byrne, *Academic Freedom, supra* note 9, at 299 ("[T]he dean of the University of Virginia Law School does not need to be restrained from instituting an assault against liberty any more than does the dean of the Harvard Law School.").

49. Byrne, *Constitutional Academic Freedom, supra* note 8, at 79 ("[T]he interpretation of academic freedom as a constitutional right in judicial opinions remains frustratingly uncertain and paradoxical.").

better develop the law if they looked to a concept that captured the various concerns manifested by the paradoxes.

In this section, I propose that the law of academic freedom could benefit from the incorporation of a concept that would address the paradoxes and provide a potentially helpful way of looking at individual academic freedom claims. I argue that courts adjudicating individual academic freedom claims ought to closely examine the germaneness of the individual speaker's expression and the state's interest in regulating such expression to a specifically articulated component of the university's academic mission. Although in at least one context the Supreme Court has rejected the idea of judicial inquiry into germaneness,[50] I argue that the Court may have too hastily abandoned this idea as an important element of thinking about academic freedom.

A. Bureaucracy and Distrust

My discussion of germaneness begins with an argument about why universities should not receive complete deference in the context of academic freedom claims by professors. The university, after all, is the professor's employer, and even public employers are permitted to place constraints on their employees that they could not impose on other citizens. A public employer, for example, may require that its employee stay at a particular workstation, even though that is a constraint on physical liberty that would be constitutionally impermissible if imposed on a member of the general public. Of course, under current doctrine, public employees retain limited free speech rights. The main Supreme Court decisions outlining those rights, however, emphasize that they address the rights of public employees as citizens, not as government workers.[51] Accordingly, as others have observed, those cases do not provide useful analogies to academic speech except in the context where academic

50. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 231–32 (2000) (rejecting the argument that the constitutionality of a public university's mandatory student activity fee that was used on viewpoint neutral basis to fund student organizations that engaged in political or ideological speech should turn on whether the student speech was germane to the university's pursuit of higher learning). *But see* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991) (directing that constitutionality of mandatory payment of dues by nonmembers to a public sector union should be evaluated, in part, by whether the activities funded by the dues are germane to collective bargaining activity).

51. Connick v. Myers, 461 U.S. 138, 143 (1983) ("The repeated emphasis in *Pickering* on the right of a public employee '*as a citizen*, in commenting upon matters of public concern,' was not accidental.") (emphasis added) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968), which focuses on interests of the teacher "as a citizen").

speakers are speaking as citizens, as opposed to speaking within an academic institutional setting.[52]

According to one view, most strongly associated with Peter Byrne, protecting the rights of educational institutions is more central to the purpose of academic freedom than guaranteeing the rights of professors or other speakers within those institutions.[53] On this view, judicial deference to internal academic decision making is appropriate because: (1) universities have historically been afforded such discretion; (2) judicial scrutiny of claims of academic value may be beyond the expertise of federal judges and may interfere with academic freedom; and (3) academic institutions ought to have systems in place to assess the academic value of a professor's teaching and scholarship.[54] It is not that Professor Byrne and others who adhere to this view do not believe in the academic freedom of professors; it is that they contend that the optimal way of protecting that freedom is by ensuring the autonomy of universities.[55]

This model relies on a generous amount of trust in the professional academic judgment of the critical decision makers in public university settings. These decision makers include publicly-elected members of boards of regents, university presidents and provosts, department chairs, and internal peer reviewer panels made up of individual faculty members. It assumes that such decision makers, through their professional training and corresponding objectivity, can be trusted in most cases to make decisions about the quality of a professor's teaching or research that are legitimate exercises of their professional discipline.[56] In this professional context, this view suggests that the chances of illicit viewpoint or content discrimination based on non-academic factors, such as a professor's personal political views, are substantially diminished.

The idea of increased judicial deference to professionalized bureaucracies is not limited to academic freedom claims. Constitutional analysis in many contexts has moved in the direction of greater deference to specialized institutions in part on the ground that courts are not well suited to second-guessing the expertise often necessary to operate such institutions. Based on this reasoning, the Supreme Court's decisions

52. *See, e.g.*, Byrne, *Constitutional Academic Freedom*, *supra* note 8, at 108–09. The former category of cases does not involve academic freedom at all, because the speech for which the speaker seeks constitutional protection is not germane to the advancement of an academic mission. *See infra* Part IIB.

53. *See* Byrne, *Academic Freedom*, *supra* note 9, at 312 (arguing that protection of educational institutions, not individuals, is the appropriate concern of constitutional academic freedom).

54. *Id.* at 305–09.

55. *Id.*

56. *See, e.g.*, *id.*

suggest that serious judicial scrutiny ought to give way to the bureaucratic expertise of, for example, military leaders,[57] prison officials,[58] and police departments.[59] Similarly, in an area that may more closely parallel judicial review of academic institutions' decisions, the Court has suggested that it is sometimes inappropriate for federal courts to intrude into the decision making of religious institutions regarding their internal practices.[60]

However, it is also undeniably true that institutions sometimes mask constitutionally impermissible decisions through colorable claims of necessity supported by arguments that their expertise ought not to be reviewable.[61] Moreover, if institutional deference is a compelling reason for watering down constitutional judicial review, there is no limiting principle for defining when courts need *not* defer to government institutions. Complete deference would substantially dilute the role of the federal courts as defined in *Marbury v. Madison*.[62]

In light of these concerns, my views more closely coincide with those who argue that individual academic freedom may be underprotected by complete reliance on institutional academic freedom.[63] Why? Because I offer here a bit of heresy, for which I myself might wish some academic freedom protection. At least in some types of cases, I contend that the legal system ought to place more trust in federal courts than in academic administrators, or even professional colleagues within the academy, when it comes to sorting out academic freedom disputes between universities and professors.

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57. *See* Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (justifying rejection of equal protection challenge to government's decision to place Japanese-American citizens in internment camps on military leaders' fears of foreign invasion).

58. *See* Turner v. Safley, 482 U.S. 78, 89 (1987) (concluding that deferential standard of constitutional review is necessary to allow prison officials rather than courts to make difficult decisions about prison operation).

59. *See* Rizzo v. Goode, 423 U.S. 362, 380 (1976) (rejecting federal judicial intervention into internal disciplinary affairs of local police department).

60. *See* Corp. of Presiding Bishop of Church of Jesus Christ v. Amos, 483 U.S. 327, 336 (1987) (stating that it was Congress's purpose in permitting religious exemptions from employment discrimination statute to minimize government interference with religions' internal decision making).

61. Korematsu v. United States, 584 F. Supp. 1406, 1416–17 (N.D. Cal. 1984) (granting writ of coram nobis to Japanese American citizen who was convicted for failing to report to military detention camp on ground that United States military officials deliberately omitted relevant information and even provided misleading information regarding national security basis for detentions).

62. 5 U.S. (1 Cranch) 137 (1803) (establishing principle that federal courts may engage in constitutional judicial review).

63. Finkin, *Institutional Academic Freedom*, *supra* note 12, at 851; Rabban, *Functional Analysis*, *supra* note 12, at 283-87.

While institutional academic freedom is crucial to the world of ideas, it is not clear why courts ought to trust academic administrators, many of whom are subject to the same political pressures (public and private) as other public officials, particularly where something as vital as speech is concerned. Indeed, I submit that there is less reason to trust the public university today than might have existed at the time of the AAUP's original statement of principles. First, as Matthew Finkin has pointed out, the modern university is not your grandparents' university: "the German idea [of academic freedom] was premised upon the university as a self-governing body of faculty. In America, 'the university' encompasses a lay governing board and its administrative delegates to which the faculty is legally subordinate."[64]

Accordingly, in many university settings, it is not entirely true that decisions to restrict a professor's speech are necessarily being made by experts in her field. One example of the transformation of the contemporary American university is that it is increasingly common for universities to hire presidents from a non-academic background.[65] Also, as Finkin observes, trustees or regents, the ultimate decision makers in the hierarchy of university governance, may not even be professional educators, much less in a position to objectively evaluate a professor's work. Trustees for public universities, moreover, are elected and may be subject to extreme political pressure when reviewing a professor's controversial teaching or scholarship.[66] Another relevant consideration is that some universities are hiring more faculty members on long-term contracts and more part-time faculty, instead of tenure-track faculty.[67] This suggests that internal institutional processes that are relied upon to ensure freedom for traditional faculty may not always be helpful in protecting academic freedom. Finally, there has been a steady decrease in public funding as a source for public university revenue, which will inevitably increase the demand for corporate dollars to make up the difference.[68]

64. Finkin, *Institutional Academic Freedom*, *supra* note 12, at 846.

65. Henry A. Giroux, *Neoliberalism, Corporate Culture, and the Promise of Higher Education: The University as a Democratic Public Sphere*, 72 HARV. EDUC. REV. 425, 439 (2002).

66. *See, e.g.*, COLO. CONST., art. IX, §12 (requiring election of nine regents of the University of Colorado).

67. Giroux, *supra* note 65, at 442–43; Henry A. Giroux, *Academic Entrepreneurs: The Corporate Takeover of Higher Education*, 20 TIKKUN 18, 22 (Mar/Apr 2005).

68. *See* Brian Pusser & Sarah E. Turner, *Nonprofit and For-Profit Governance in Higher Education*, *in* Ronald G. Ehrenberg, ed., GOVERNING ACADEMIA 241–42 (2004) ("In the past two decades, for public institutions, state and local government revenue sources have dropped from 49% of current fund revenues in 1980 to a bit less than 40% in 1995."); Giroux, *supra* note 67, at 20 ("As government grant money dries up, . . . researchers increasingly must turn for support to corporate funders.").

The more beholden universities are to corporate donors, the greater chance that such donors may attempt to wield influence over academic decisions with which they disagree.[69]

It is not that courts are better than academics at determining what is good teaching and what is bad or which scholarship is rigorous and which is shoddy. It is that they have more independence. What is good or bad, rigorous or not rigorous can be sorted out through the use of expert testimony, the same way it is in other fields about which judges know little or nothing. Moreover, while courts may not be experts in academic standards, they are good, or at least more experienced than other institutions, at one thing—applying doctrinal tools and evaluating evidence in cases involving disputes about the underlying motivation of potentially bad state actors.[70] Accordingly, the concern about federal courts intruding on academic freedom through intrusive judicial scrutiny is, at the very least, overstated.[71]

B. Implementing the First Amendment with Germaneness Analysis

Assuming that complete deference to academic decision makers about an individual academic speaker's expression is not warranted, the task becomes designing analytical tools that both advance the values underlying the First Amendment and help sort out legitimate individual academic freedom claims from illegitimate ones. In this section, I further explore the concept of employing an analysis that focuses on germaneness to the academic mission.

In his influential work, Richard Fallon argues that a critical function of constitutional doctrine is to implement the Constitution.[72] Fallon defines constitutional doctrine as the set of analytical tests and frameworks the Court's decisions articulate for application in future controversies.[73] He points out that courts regularly implement the Constitution by opera-

69. Sometimes these influences will affect the publication of scholarship or the direction of research efforts. Giroux, *supra* note 65, at 433, 437–38. In a context unique to law schools, corporate influences may result in interference with the work of clinical law faculty who take on controversial cases. *See* Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971 (2003).

70. *See* Rabban, *Functional Analysis*, *supra* note 12, at 283.

71. As David Rabban has observed, it is possible for courts to engage in meaningful judicial review without completely obliterating the independence of institutions of higher learning. *Id.* at 286–90.

72. RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001); Fallon, *supra* note 11, at 56.

73. Fallon, *supra* note 11, at 56; *see also* McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1639 (1995).

tionalizing broad constitutional principles through workable, if imperfect, tests or methods that assist courts in adjudicating disputes in a manner consistent with the constitutional norms.[74]

Among Fallon's important insights about implementation is that different types of tests serve distinct functions in constitutional adjudication.[75] Some tests serve to trigger the application of other tests, filtering the types of constitutional disputes that ought not to involve great judicial scrutiny from those where the government's conduct is highly suspect.[76] Under the First Amendment, the basic presumption against viewpoint and content discrimination serves this function well. These tests initially serve to distinguish between regulations that are suspect—that have a high potential for interfering with values universally thought to be protected by the First Amendment—and laws where there is a stronger possibility of a legitimate governmental interest in restricting speech. The underlying reason for treating content-based state regulation of speech as suspect is that such regulations suggest that the state has acted with a constitutionally impermissible purpose: blocking speech containing certain types of ideas from public consumption generates presumptive mistrust of the democratic process.[77]

Other types of constitutional doctrine tests require the government to act with great precision in advancing its stated interests in contexts where its actions may jeopardize protected constitutional rights.[78] Thus, once strict scrutiny has been triggered, the courts must examine the closeness of the relationship between the specific speech restriction and the government's stated interests. Unless the restriction is necessary or narrowly tailored to advance that interest, and there is no less restrictive way to promote that interest without burdening speech, the law is invalid.[79] Doctrinal tests requiring the government to regulate with precision also serve a motive-testing function. When a state's actions have a broad sweep, there exists a greater danger that the state might be pursuing an interest other than its stated one. Elena Kagan has observed that strict scrutiny under the First Amendment is:

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74. Fallon, *supra* note 11, at 56.

75. *Id.* at 61-73.

76. Fallon calls these "suspect-content tests." *Id.* at 68.

77. *Id.* at 96; Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 451 (1996); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 127.

78. *See* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 51 (1992).

79. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

> best understood as a device that allows the government to disprove the implication of improper motive arising from the content-based terms of a law. This is true first of the compelling interest requirement: the stronger the state interest asserted, the more likely it is that the government would act to achieve that interest in the absence of antipathy toward the speech affected .... If a restriction applies to more speech than necessary to achieve the interest asserted, the suspicion deepens that the government is attempting to quash ideas as ideas rather than to promote a legitimate interest.[80]

As we have already seen, however, the First Amendment paradox yields a framework in which these typical doctrinal tests cannot operate. Thus, in the context of academic freedom disputes, these traditional devices usually cannot function to distinguish between claims of legitimate institutional autonomy and claims that the university is impermissibly interfering with the protected speech of one of its professors.[81] If these tools are not available to courts adjudicating academic freedom disputes, they have few if any vehicles to test the legitimacy of the state's motives when it tries to regulate an academic speaker. Courts do not appear to know how to even begin to approach such disputes, much less which doctrinal tool is appropriate.

It is therefore worth inquiring how the law *ought* to operate in the realm of academic freedom, where content discrimination is accepted because of the unique environment of higher education. The law needs an alternative doctrinal formulation that offers deference to academic institutions where appropriate while establishing a protected environment for much of the academic speech of individuals. It requires implementation of the Constitution through a test that does the work that the strict scrutiny test does in other realms of First Amendment law, yet is sensitive to the fact that universities can often engage in permissible content discrimination.

Germaneness might serve a useful doctrinal function that addresses this balance.[82] The first step, as Larry Alexander would no doubt hold

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80. Kagan, *supra* note 77, at 453.

81. In extreme cases, the traditional doctrinal tools could certainly apply to limit a university's actions against a professor. For example, if a public university fired a professor because of her membership in the Libertarian Party, this would constitute overt viewpoint discrimination that is unrelated to the university's functions. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 606 (1967) (holding that state university cannot bar a professor from employment because of membership in political party). However, this involves a professor's private speech and association, not her academic expression. These tools therefore still do not help sort out the types of individual academic freedom claims with which this article is principally concerned.

82. Germaneness might also serve another valuable categorical function. It could help us define what types of speech claims are unique to academic freedom and what types are more

me to, and rightly so, is to define what I mean by germaneness.[83] In this context, I define germaneness as the degree or closeness of connection between an individual academic's speech or the state's interests in restricting that speech and a specifically articulated component of the university's academic mission.

To incorporate this concept meaningfully into First Amendment analysis, courts would initially have to assess the germaneness of the speaker's claim to advancing the university's academic mission. The professor claiming First Amendment protection would assert as an initial matter that the state has punished her or put her at a disadvantage because of her speech. At this point, the university could defeat the speaker's claim in one of two ways. First, the university could show that the academic speaker's expression is not germane to a specifically articulated component of the university's academic mission.[84] Thus, for ex-

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conventional speech claims. For example, the McCarthy-era cases addressing the claims of academics are quite arguably not academic freedom claims at all, because most of them involve speech or association that is not germane to the advancement of any component of the academic mission. *See* Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1304 n.101 (1983) ("I pick *Sweezy* because it concerns speech *in the classroom*, albeit indirectly, but still in contrast with all of the supposed 'academic freedom' cases that in fact involve merely the free speech rights of public employees, on their own time, some of whom coincidentally happen to be teachers.") (emphasis added).

83. Larry Alexander, *Academic Freedom*, 78 U. COLO. L. REV. 883 (2006).

84. In describing this scenario, I have assumed that the speaker's expression is taking place in the context of a recognized academic setting and as part of the speaker's professional expression, as in the case of teaching a class or publishing scholarly research. This analysis does not address claims that a university has punished a professor because of her private speech, which would in some cases also not be germane to the university's academic mission. The point is not that in such a case the First Amendment would not provide possible protection to the speaker. It is that the speaker's claim would not be an academic freedom claim, but a more traditional free speech claim that might be analyzed under other aspects of First Amendment law.

In commenting on a draft of this paper, Eric Heinze argued that the scenarios suggested in the body of the text may not be sufficiently illustrative of common academic freedom disputes to demonstrate that the germaneness analysis I propose can resolve a sufficient core set of problems. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) ("If . . . we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use . . . must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.").

I have two responses to this legitimate critique, which I was grateful to receive. First, as described above, there is *no* extant legal standard under current law. That is not to say that any standard is better than none. But even if a germaneness analysis advances the jurisprudence in the direction of a unitary analytical standard, it surely does some of the work I suggest. Second, as I have stated earlier, my ambition is not to propose a legal standard that "resolves" or gives definitive answers to many or most cases (although I certainly argue that it is more definitive than under current law), but rather that there be a uniform concept around which the adjudication of such disputes may be centered and that requires both the speaker and

ample, suppose a public university disciplines an English professor for routinely using her freshman core introductory literature course as a platform for opposing the continuing U.S. military presence in Iraq. The professor's academic freedom claim is likely to be insubstantial in most cases because it will be difficult for her to relate her political expression in any meaningful pedagogic way to the specific goals of her literature course.

In contrast, consider a constitutional law professor at a public university who uses the word "fuck" during the course hour in which he teaches *Cohen v. California*,[85] the case in which the Court overturned the conviction of a man who wore a jacket bearing the words "Fuck the Draft." Upon learning of a student's complaint about the professor's use of profanity, the university places a negative teaching rating in the professor's personnel file. Here, the professor has a much stronger argument about the germaneness of his speech to the pedagogical goals of teaching *Cohen*. First, the case is specifically about the employment of profane, potentially offensive language in a public place.[86] I submit that it is difficult, though not impossible, to discuss the speech's impact and the state's interest in regulating it without ever uttering the offensive word itself. What is more, the professor could make a strong claim that use of the word is valuable in effectively facilitating students' analyses of the possible speech value of profanity by comparing its use in this context with other modes of expressing opposition to the draft.[87]

A second way in which the university could defeat the professor's speech claim is if it can demonstrate the germaneness of its interest in *suppressing* the speech to its specific academic objectives.[88] Thus, under the germaneness analysis, whenever a state legislature or agency, a university, or subdivision of a university takes adverse action against a

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the censor to specifically articulate the speech-related interests protected by their assertions of rights and interests. Legal standards can serve secondary purposes as well as primary ones. If a primary purpose of a legal standard is providing a tool for resolving substantial percentages of disputes, a secondary purpose can be to facilitate and generate judicial discourse that may help more fully inform the body of law. In the case of individual academic freedom, an emphasis on germaneness could serve to enhance a more candid dialogue about the inherent tensions underlying speech claims in academic settings.

85. 403 U.S. 15 (1973).

86. *Id.* at 15.

87. *But see* Martin v. Parrish, 805 F.2d 583, 584 n.2 (5th Cir. 1986) (finding professor's use of profanity in class was not protected by First Amendment where the profanity was not germane to the subject matter of his class or to any educational function).

88. Academic mission, in turn, involves a university's specific ideas about advancing its goals of disinterested scholarship and teaching. *See* Byrne, *Academic Freedom*, *supra* note 9, at 262 ("The term 'academic freedom' should be reserved for those rights necessary for the preservation of the unique functions of the university, particularly the goals of disinterested scholarship and teaching.").

speaker because of the communicative impact of his speech, the relevant state actor would bear the burden of demonstrating that such action is substantially related to the advancement of a specific component of its articulated academic mission.[89] Despite the fact that the same types of suspicions do not necessarily attach to content-based burdens on academic speech as in other areas of First Amendment law, I submit that the burden, whatever it is and however high it is, ought to be placed on the suppressor of the speech. The burden has to lie somewhere, and if there is any value to individual academic speech, normative First Amendment considerations, even under a relaxed standard, suggest that the burden ought to lie with the state.[90]

Returning to our second hypothetical, suppose the university has a blanket rule prohibiting the use of profanity in the classroom. The university's rule is based on goals specifically articulated in its stated academic mission, which include maintaining a "civil and non-hostile teaching and learning environment in all classrooms." At this juncture, the court must address whether the profanity ban is substantially related to the goal of maintaining a civil and non-hostile teaching and learning environment. Under current thinking, this court would probably be powerless to second-guess the university's judgment that banning the professor's speech will advance its pedagogical goals. Without dictating a particular outcome, the germaneness inquiry would at least require the university to justify its decision in relation to its educational goals. Although one student has complained about the profanity, does this necessarily mean that the teaching and learning environment is non-civil, particularly in a scenario where the profanity is not directed at a particular person? It may well be that the university has other motives for disciplining the professor that underlie its decision to forbid his speech. If so, germaneness inquiry would provide an opportunity for the courts to smoke out any possible illicit motive.

In order for germaneness analysis to have any teeth, however, the law would have to require the state to articulate its academic mission interests as specifically as possible. One could imagine, for example, that under a germaneness inquiry virtually any university or state decision could be couched as substantially related to promoting "a good educa-

89. Students of constitutional law will note that I borrow the degree of required germaneness from the Supreme Court's so-called intermediate scrutiny decisions. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (articulating intermediate scrutiny standard for equal protection analysis of explicitly gender-based government actions).

90. At this point, I set aside student speech rights, which implicate different interests. The same burden shifting in the student context would, of course, require every professor to justify every grading decision, classroom remark, etcetera, which, at the very least, would produce intolerable administrative burdens.

tional environment" or "the public good." Empty assertions such as these would need to be tied to specific interests in advancing the teaching, learning, and research environment at the university.

The point of this paper is not to suggest that germaneness solves all of the dilemmas and removes the paradoxes of academic freedom doctrine—only to argue that it is worth considering implementing First Amendment doctrine in a manner that permits courts to conduct this type of inquiry. There will continue to be hard cases and questionable outcomes. However, germaneness would be useful in helping to ferret out motives most would agree should be impermissible.

III. REFLECTIONS ON THE LIMITS OF GERMANENESS

It is worth anticipating a number of different problems that might arise were the courts to develop an academic freedom doctrine that employs germaneness as a central principle. While these issues may suggest limitations to the model, I contend that they would not impede the meaningful administration of a germaneness doctrine. A thoughtful reconsideration of individual academic freedom doctrine, however, must seriously account for these concerns.

All arguments in favor of individual academic freedom must respond to the legitimate concern that broader judicial review of university decisions necessarily endangers institutional academic freedom.[91] Any time the government (in this case, the court) second-guesses a university's decisions on academic matters, this possibility will exist. A germaneness inquiry, however, would not necessarily lead a court to perform a wholesale investigation of a university's internal academic processes. The analysis proposed here would diminish deference to universities in two respects. First, it would shift the burden to the university to justify its speech restrictive action. Second, it would require the university to meet a higher threshold in responding to this burden by demonstrating that its action is *substantially* related to the advancement of a specific component of its articulated academic mission.

The germaneness inquiry, however, would not raise the bar in terms of the weight of the government's interest in advancing its academic mission. That is, while the law would require a tighter fit between the means (restricting speech) and the ends (advancement of a specific component of the academic mission), it would not require the university to show that the interest is an important or compelling one. The importance of the university's advancement of the academic mission is understood.

91. *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 232 (2000); *see also* Byrne, *Academic Freedom*, *supra* note 9, at 312.

So long as the university's interest is legitimate (in the same sense as required under a rational basis analysis)[92] in that it serves to advance the academic mission and is stated at a fairly narrow level of generality, the court would examine only the germaneness of the restriction. Under such a framework, deference to institutional decisions would still exist (although less so than under current doctrine) as long as the university could articulate a clear principle associated with its academic mission as a justification for limiting a professor's autonomy regarding teaching or research. Courts would have to be vigilant about balancing the need for a meaningful inquiry into the university's interference with the professor's expressive interests with proper respect for the autonomy of the institution.

What is more, under the current doctrine, it is not as if the university need not justify its decision at all. Even under a rational basis inquiry, which has been employed by some courts,[93] the university must respond to the individual academic freedom claim by articulating some sort of academic justification.

A second problem that could arise is that in any given case, the university might be able to deflect an individual academic freedom claim simply by stating its interest in advancing its academic mission at a very broad level of generality. To the extent that the university could prevail simply by saying that its speech restriction is substantially related to "maintaining a great university" or "providing a good academic environment," the germaneness inquiry would be worthless. Any restriction could be said to advance such interests. Without some sort of doctrinal restriction on the definition of the university's academic mission, defendants and courts will be able to manipulate the doctrine in ways that undermine serious consideration of an individual's academic freedom. As discussed above, for this reason and others, the law would have to require the university to articulate its interests at a narrow level of generality.

This requirement might also help address a related problem. The germaneness inquiry does not necessarily help to resolve competing claims of germaneness. This is the tension at the center of the positional paradox. Suppose that an individual can articulate a legitimate reason why her speech ought to be protected, but the university also articulates a

92. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 728 n.21 (1997) (providing list of legitimate government interests for state regulation prohibiting physician-assisted suicide under rational basis analysis).

93. *See, e.g.*, Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998) (endorsing standard requiring university to show that its actions were "reasonably related to a legitimate educational interest").

competing, germane reason for limiting that speech. By requiring the university to state its interest at a fairly specific level, it may be easier for courts to weigh the competing claims. Again, it is not as if courts are unfamiliar with balancing competing interests. Much, if not most, of American constitutional law is operationalized through balancing tests in a myriad of contexts.[94]

Requiring the university to state its relevant academic concerns at a narrow level of generality poses a different possible limitation to the germaneness inquiry. To the extent that a public university could evade an individual academic freedom claim by defining its academic mission narrowly, it can position itself to control the speech of its professors without constitutional limitation. For example, Narrow Minded University could define its academic mission as furthering students' knowledge and understanding of a classics approach to history, literature, and the arts, and could be as specific as it likes about what that means. Professors at that university will have less freedom to depart from the endorsed approach to higher education than professors at Open Minded University, which might embrace a broader vision of higher education and state that its goal is to provide students with a wide variety of scholarly approaches to learning in all disciplines. Theoretically, this could lead to a menu of public universities for every intellectual and political taste—Marxist University, Hayekian Conservatives University, Family Values University, and so forth. One could argue that such a system actually diminishes academic freedom for professors at certain schools. While I acknowledge the possibility of this intellectual smorgasbord emerging under a germaneness regime, one response to this concern is that at least this system would require universities to express their academic missions clearly and up front to protect themselves from individual academic freedom claims. This, in turn, would create a sort of macro-marketplace of universities from which professors could make informed decisions about where to teach. Professors at the universities with narrower ranges of acceptable academic approaches would indeed have less academic freedom in the same way that professors at private religious universities might have less academic freedom. As with the latter class of academics, the professors at these narrow-minded public universities would be on

94. *See, e.g.*, Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (applying a Fourth Amendment balancing test); Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (applying balancing test for procedural due process claims). For academic commentary observing the predominance of constitutional balancing tests, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 642 (1994).

notice and be able to make informed professional decisions about where they would be most comfortable teaching and researching.

Finally, germaneness inquiry would not necessarily address a principal problem of academic freedom litigation in the modern era, which arises when a university's adverse action against a professor is defended with an allegedly pretextual justification. Even under the framework of a germaneness inquiry, defendants may be able to come up with pretexts that mask illicit viewpoints or content discrimination.[95] One response is that while pretext can always be an issue in speech cases, at least the germaneness inquiry requires a closer nexus between the university's restriction of speech and its purported academic justification. As discussed above, one function served by heightened fit requirements in constitutional doctrine is that they may help uncover illicit intent.[96]

CONCLUSION

I have argued that rather than abandoning the idea of First Amendment protection for individual academic speakers, free speech doctrine should take into account the connection between the speech and the advancement of the university's academic mission as well as the nexus between the state's interest in restricting that speech and that academic mission. Under a germaneness analysis, the law could require that whenever an individual academic speaker makes a legitimate claim that the state has punished her because of the communicative impact of her aca-

95. In the recent controversy at the University of Colorado involving Professor Ward Churchill, an appointed investigative committee concluded that Churchill engaged in research misconduct in violation of university policies. REPORT OF THE INVESTIGATIVE COMMITTEE OF THE STANDING ON RESEARCH MISCONDUCT AT THE UNIVERSITY OF COLORADO AT BOULDER CONCERNING ALLEGATIONS OF ACADEMIC MISCONDUCT AGAINST PROFESSOR WARD CHURCHILL 3 (May 9, 2006). However, in the report's introduction, the committee acknowledged the implications of the issuance of these conclusions in light of the prior controversy:

> [The Committee] notes its concern regarding the timing and, perhaps, the motives for the University's decision to initiate these charges at this time. . . . [I]t is well known that these charges were commenced only after Professor Churchill had published some highly controversial essays. . . . [T]he Committee reaffirms . . . that Professor Churchill had a protected right to publish his views. . . . [T]he fact that Professor Churchill published those controversial essays was not part of the charge to the Committee and played absolutely no role in its deliberations.

Id.

96. *See* Chen, *supra* note 42, at 31; Fallon, *supra* note 11, at 96; Kagan, *supra* note 77, at 453. For an interesting analysis of the problem of causation and pretext in the context of employment discrimination law, see Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 538 & n.181 (2006).

demically-related speech, the burden would shift to the state to justify its actions in one of two ways. First, the state could argue that the professor's speech is not germane to the fulfillment of a specific component of the university's articulated academic mission. Alternatively, the state could argue that its interest in regulating or restricting the professor's speech is substantially related to the advancement of a specific component of the university's articulated academic mission.

A germaneness inquiry has both theoretical and pragmatic value. First, a meaningful germaneness inquiry moves us closer to a comprehensive understanding of constitutional academic freedom—to move beyond the paradoxes. A serious germaneness inquiry could help focus the doctrine on what should be its central concern—sorting out legitimate individual free speech claims while maintaining sensitivity to the university's own institutional academic freedom. Most critically, it would help address one of the most important theoretical problems in academic freedom: the types of academic speech that deserve *distinctive* protection because they advance the goals of free expression.[97] Second, a carefully defined germaneness inquiry could respond to the failure of current law to implement the Constitution through a doctrinal framework for academic freedom claims. As illustrated by the First Amendment paradox, constitutional academic freedom does not neatly fit in with other established doctrinal models or frameworks, and courts find it difficult to know even where to begin when approaching an academic freedom dispute. The inability to operationalize academic freedom principles into an articulable, analytical structure surely affects the outcome of academic freedom claims. Constitutional doctrine ought to serve functional purposes, including aiding courts in determining when government actions ought to be suspect and when they deserve deference. Where there is no doctrine and there are no tests, these purposes are not served. In particular, the existing legal regime may insufficiently account for the problems that emerge when state actors offer pretextual reasons for punishing academic speakers.

At the same time, there are surely limits to this approach, and I have attempted to address some of them in anticipation of critics of the germaneness model. In searching for meaningful ways to implement the Constitution and value the principles of free expression in the academic community, however, a germaneness approach has a lot to offer.

97. If there is a constitutional academic freedom doctrine, it must provide different (greater, less, or otherwise qualitatively distinctive) protection for academic speech than that available to non-academics under the First Amendment. *See* Van Alstyne, *Historical Review*, *supra* note 12.