

IS THERE A RIGHT TO ACADEMIC FREEDOM?

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INTRODUCTION

Is there a constitutional right to academic freedom? If there is, whose right is it, what is it a right to (or against), and against whom does the right exist?

It is hardly surprising that most American academics believe that academic freedom is important, that there is a right to it, and that the right to academic freedom has constitutional status. After all, we should be no more startled by academics' belief in a constitutional right to academic freedom than we are by the fact that most journalists believe that there is a very strong constitutional right to freedom of the press, or by the fact that criminal defense lawyers—and their clients—believe in a strong Fourth Amendment. In a rights-soaked culture, it is only to be expected that those who most benefit personally and professionally from the existence of some right would be among the most enthusiastic endorsers of that right's existence, and among the most vigorous proponents of the right's normative desirability and expansive interpretation.

Yet the claims of academics about academic freedom are not simply assertions of self-interest, although that factor certainly ought not to be discounted. Most American constitutionalists—who are also academics, to be sure—would agree that there is a constitutional right to academic freedom and would agree that the right exists in, around, or at least near, the First Amendment.¹ But despite this strong academic consensus, the

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1. See, e.g., Vikram Amar & Alan Brownstein, *Academic Freedom*, 9 GREEN BAG 2d 17 (2005); Lee C. Bollinger, *Academic Freedom and the Scholarly Temperament*, 61 CBA RECORD 326 (2005); William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213 (1999); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251 (1989); Burton M. Leiser, *Threats to Academic Freedom and Tenure*, 15 PACE L. REV. 15 (1994); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United*

conclusion that a constitutional right to academic freedom exists is hardly so clear, either as a matter of positive constitutional doctrine or as a matter of normative or prescriptive constitutional theory.² Although it is surely correct that there are robust constitutional rights to freedom of speech, freedom of association, and the free exercise of religion, to take just a small number of pertinent examples, the doctrinal, conceptual, and normative issues surrounding the idea of academic freedom are far murkier. Accordingly, my primary goal in this paper is to explore these problematic dimensions of a putative constitutional right to academic freedom, to examine what it would mean for there to be such a constitutional right, and to evaluate the respective implications of what are generally understood in the literature to be the individual and institutional forms of a right to academic freedom.³

I. THE INDIVIDUAL SIDE OF ACADEMIC FREEDOM

The Supreme Court has been making direct or indirect references to academic freedom at least since the 1950s,⁴ but it is far from clear that the Court's often off-handed pronouncements about the existence and value of a right to academic freedom should be taken entirely at face value. More specifically, it is doubtful that, except in a surprisingly small number of instances, the Supreme Court's references to academic freedom were intended to recognize, or had the effect of recognizing, a genuinely distinct *individual* academic freedom right, as opposed to simply pointing out an important but undifferentiated instantiation of a more

States: An Unhurried Historical Review, LAW & CONTEMP. PROBS., Summer 1990, at 79.

2. Although I focus in this Article on academic freedom as a putative *constitutional* right, much of what I say here is applicable, *mutatis mutandis*, to questions about the desirability of creating certain legal rights to academic freedom by legislation or by common law. Additionally, some of the argument and analysis here is applicable to questions—not legal questions in a narrow sense—about academic policy within academic institutions.

3. See, e.g., Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817 (1983); Elizabeth Mertz, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual*, 82 NW. U. L. REV. 492 (1988); Walter Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, LAW & CONTEMP. PROBS., Summer 1990, at 227; Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987).

4. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 116 (1968) (Stewart, J., concurring); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Wieman v. Updegraff*, 344 U.S. 183 (1952). See generally 1 NORMAN DORSEN, PAUL BENDER & BURT NEUBORNE, *EMERSON, HABER, AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 607–689 (4th ed. 1976); *Developments in the Law – Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

general individual right to freedom of speech.⁵ In most of its alleged academic freedom cases, what the Court recognized and enforced for publicly-employed teachers and professors turned out to be neither more nor less than what it recognized and enforced, or would plainly recognize and enforce if asked, for a host of otherwise similarly situated but non-academic public employees. Thus it is true, as a general proposition, that publicly employed teachers and professors cannot be dismissed or disciplined for criticizing the school board on their own time,⁶ sympathizing with unpopular or controversial causes,⁷ joining the Communist Party,⁸ or (with qualifications) exercising their Fifth Amendment rights against self-incrimination.⁹ Although it is true that teachers and professors possess this right, the same also holds true for those public employees or public licensees whose jobs are not to teach the young, but instead to enforce the law or to pick up the trash.¹⁰ Moreover, much the same conclusion also applies to at least some dimensions of the speech that takes place at, rather than away from, the workplace. Thus, under some circumstances, publicly employed academics may now have, as a matter of existing doctrine, limited rights to criticize or to talk back to their supervisors, even while on the job.¹¹ However, it turns out once again that es-

5. See William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, 404 ANNALS AM. ACAD. POL. & SOC. SCI. 140 (1972); see also Frederick Schauer, "Private" Speech and the "Private" Forum: *Givhan v. Western Line School District*, 1979 SUP. CT. REV. 217, 242-49. It is also possible, as a matter of political theory but not current positive constitutional law, that a right to freedom of speech is difficult to justify except, at one remove, as a structurally similar instantiation of a more general liberty. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 3-14, 47-72 (1982).

6. See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); see also *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) (recognizing First Amendment protection for off-the-job speech activities of federal employees).

7. See *Aurora Educ. Ass'n E. v. Bd. of Educ.*, 490 F.2d 431 (7th Cir. 1974) (upholding right of teacher to sympathize with the right to strike); *Stolberg v. Bd. of Trs.*, 474 F.2d 485 (2d Cir. 1973) (reaffirming professor's protection against being dismissed for engaging in anti-war activism); *James v. Bd. of Educ.*, 461 F.2d 566 (2d Cir. 1972) (protecting teacher's right to wear black armband in protest of Vietnam War).

8. See *Keyishian*, 385 U.S. 589; *Wieman*, 344 U.S. 183. Cf. *Elfbrandt*, 384 U.S. 11 (holding unconstitutional loyalty oath that prohibited any public employee membership in Communist party or subversive organizations); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (striking down on vagueness grounds loyalty oath prohibiting membership in subversive organizations); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961) (same).

9. See *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956).

10. See, e.g., *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996) (trash hauler); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (tow truck operator); *Ran-kin v. McPherson*, 483 U.S. 378 (1987) (clerical employee in law enforcement office); *Baird v. Arizona*, 401 U.S. 1 (1971) (bar membership); *Schneider v. Smith*, 390 U.S. 17 (1968) (merchant seaman); *United States v. Brown*, 381 U.S. 437 (1965) (labor union officials). Cf. *Nat'l Treasury Employees Union*, 513 U.S. at 466 (containing general statement about protection of public employee speech when made outside the workplace).

11. See *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979); *Hillis v.*

entially the same rights exist for non-academic public employees as well.¹² Accordingly, insofar as current doctrine rejects Holmes' canonical statement of the right-privilege distinction,¹³ it rejects it not only for teachers and professors, but for almost all public employees. Because the rights recognized for academic public employees have also been recognized for non-academic employees, therefore, it is a mistake, and at the very least a gross oversimplification, to believe that publicly employed academics have very many, if any, individual rights that are different from those of any other public employee. And if this is so, then it is far from clear that one can find, on the basis of a range of cases that almost fortuitously involve academics and on the basis of the Supreme Court's mostly gratuitous statements about the value of academic free speech contained in those cases, that a genuine individual right to academic freedom is located within existing constitutional doctrine.

Although the stock of Supreme Court cases provides little support for a distinct individual right to academic freedom,¹⁴ the traces of such a right do exist in lower court doctrine. In the lower courts we do see that, with respect to actual in-the-classroom behavior, there is a potential difference between the academic and the non-academic public employee, and thus an area in which a genuine individual right to academic freedom appears to exist. It is worth pausing to consider the subject of in-class conduct by publicly-employed teachers and professors, and thus to consider the contrast between how the courts have treated it with how the courts have treated the on-the-job behavior of other public employees.

Stephen F. Austin State Univ., 665 F.2d 547 (5th Cir. 1982) (following *Givhan* in prohibiting firing of teacher for complaining in the academic workplace). As a result of the Supreme Court's decision in *Garcetti v. Ceballos*, however, such speech would be protected only if it fell outside the "official duties" of the employee. 126 S. Ct. 1951, 1960 (2006). But if the speech did fall outside of those official duties, the fact that it occurred at the workplace would not deprive it of First Amendment protection. *Id.* at 1959.

12. *Connick v. Myers*, 461 U.S. 138 (1983) (protecting right to discuss matters of "public concern" at the workplace). *Connick* is now qualified by *Garcetti*. 126 S. Ct. 1951 (holding that workplace speech is protected only when the speech is not part of the official duties of the employee). Justice Kennedy's opinion for the *Garcetti* Court, responding to a concern expressed by Justice Souter in dissent, *id.* at 1969-70 (Souter, J., dissenting), left open the possibility that "academic scholarship or classroom instruction" might be subject to a somewhat more protective standard. *Id.* at 1962.

13. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."); see William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (telling the subsequent history—and decline in validity—of this proposition); see also Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1994).

14. *Garcetti*, 126 S. Ct. at 1962 (speaking for the majority, Justice Kennedy did leave open the possibility of a differential treatment of academic and non-academic employee speech, but made it clear that the Court was not addressing that issue).

Non-academic public employees may be restricted in their on-the-job activities, including their on-the-job speech activities, as long as the activities do not involve speech on matters of public concern.¹⁵ However, the scope of permissible restrictions is not so clear with respect to academic public employees. In particular, it is often claimed that a teacher or professor has an individual right against her public educational institution to teach (and, *a fortiori*, to write) what she pleases in the classroom, regardless of instructions to the contrary from department chairs, principals, deans, provosts, presidents, and even—or especially—faculty committees.¹⁶ Thus, an employee of the district attorney's office (as in *Connick v. Myers*¹⁷) might be required in the course of her job as a lawyer to make certain arguments and avoid others, and while those receiving public funds may be required to modify their professional practice accordingly,¹⁸ such restrictions may not be constitutionally permissible for academics when engaged in their academic activities, even in the classroom and those scholarly activities that are an essential part of some academic employment.¹⁹

Although the state of the law is far from clear on this point, a trace of just such an individual right to academic freedom appears to exist in the doctrine.²⁰ That is, there may well be, as a matter of existing positive law, a genuine and differentiated right to academic freedom—namely, a limited right to choose classroom content and methodology—held by individual faculty members against at least some instructions by faculty members' supervisors.²¹ Most importantly, this right to resist instructions about how to perform one's job is a right that appears not to exist

15. *Waters v. Churchill*, 511 U.S. 661 (1994); *Connick v. Myers*, 461 U.S. 138 (1983). Cf. *Rust v. Sullivan*, 500 U.S. 173 (1991) (rejecting claim of publicly-funded physicians to dispense abortion advice in violation of funding conditions); *Rankin v. McPherson*, 483 U.S. 378 (1987) (holding that clerical employee's wish for President Reagan's death was speech on a matter of public concern and therefore protected).

16. See Jason R. Wiener, *The Right to Teach, the Right to Speak, and the Right to Be a Valuable Contributor to a Child's Upbringing: Public School Teachers' First Amendment Right to Free Speech and Expression*, 32 W. ST. U. L. REV. 105 (2004); Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693 (1990).

17. 461 U.S. 138.

18. See *Rust*, 500 U.S. 173.

19. See EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 377–78 (2d ed. 2005); Mertz, *supra* note 3; Metzger, *supra* note 3; Rabban, *supra* note 3; Yudof, *supra* note 3. This is the specific question left open by *Garcetti*. 126 S. Ct. at 1962.

20. See, e.g., *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969) (protecting the right of a high school English teacher to assign a reading containing the word “mother-fucker”); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970) (overturning the dismissal of a teacher who had assigned Kurt Vonnegut's *Monkey House*).

21. See *supra* note 20; see also Sheldon Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032 (1971).

for other public employees,²² and thus represents the embodiment of an actual individual right to academic freedom.²³

Although this First Amendment-grounded individual right for an instructor to choose classroom content against the orders of one's academic supervisors appears to have a substantial basis in lower court doctrine, its scope is rather limited. Most importantly, this right appears, unlike in earlier times,²⁴ to be held by college and university instructors alone. Existing lower court doctrine indicates that substantially more restrictions are permissible for primary and secondary school teachers than for those who are teaching at the college and university level.²⁵ In contrast, there is virtually nothing from the Supreme Court giving academic public employees rights against their employers or supervisors that are not also available to non-academic public employees.²⁶ Furthermore, a considerable number of lower court cases have generated the principle that college and university instructors, but not primary and secondary school teachers, may rely on the First Amendment to resist some of the rules and instructions that restrict their ability to autonomously determine how they will do their jobs. The individual right to academic freedom that now exists, therefore, turns out to be far less grounded in Supreme Court

22. *Garcetti*, 126 S. Ct. 1951.

23. *See, e.g.*, *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) (protecting right of instructor to choose sexually oriented teaching methods); *Dube v. State Univ.*, 900 F.2d 587 (2d Cir. 1990) (affirming instructor's right to equate Zionism with racism in the classroom); *Kingsville Ind. Sch. Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980) (holding that use of racially oriented role-playing was part of teacher's protected decision-making domain). *Cf. Scallett v. Rosenblum*, 911 F. Supp. 999 (W.D. Va. 1996) (finding professor's classroom speech to be on a matter of public concern and thus protected by *Connick*); *Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994) (same).

24. *See supra* note 20.

25. *See, e.g.*, *Lacks v. Ferguson Reorganized Sch. Dist.*, 147 F.3d 718 (8th Cir. 1998) (allowing restrictions on classroom profanity); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719 (2d Cir. 1994) (holding that "legitimate pedagogical concerns" are sufficient to justify restrictions on teacher's classroom activities); *Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991) (permitting sanctions based on classroom comments about student sexual activity); *Hetrick v. Martin*, 480 F.2d 705 (5th Cir. 1973) (upholding dismissal based on use of disapproved teaching methods); David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981); Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976); Clarick, *supra* note 16. *Cf. Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding power of high school to control, on pedagogical grounds, the content of high school newspaper); Bruce C. Hafen, Comment, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685. It is noteworthy that Justice Souther's dissent in *Garcetti*, raising the concern that the Court's decision might unduly restrict academic freedom, was limited to those who teach in "public colleges and universities." 126 S. Ct. at 1969-70 (Souter, J., dissenting).

26. *Cf. Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (applying reasonableness standard to restrictions in both academic and non-academic settings).

doctrine than is often maintained, and significantly more limited than is commonly understood and even more commonly promoted.²⁷

II. THE NORMATIVE DIMENSION OF INDIVIDUAL ACADEMIC FREEDOM

That an individual right to academic freedom exists in only such a limited way does not mean that it should not exist, be recognized, or be broadened beyond its existing boundaries. Indeed, once we turn from existing positive doctrine to normative theory, the question can be formulated more precisely. Thus, we are now asking whether academics should, by virtue of their academic employment and/or profession, have rights (or privileges, to be more accurate²⁸) not possessed by others and not otherwise protected by the First Amendment.

In addressing this question, the structure of the argued constitutional rights of journalists under the press clause is instructive because journalists, like academics, frequently claim that the First Amendment grants them privileges to resist requirements—subpoenas, most commonly—legitimately imposed on the bulk of the citizenry.²⁹ Similarly, academics claiming academic freedom are arguing that the First Amendment grants them privileges to resist requirements—rules, regulations, and instructions regarding their employment from their workplace superiors, most commonly—legitimately imposed on other public employees. Although the First Amendment arguments for such journalists' privileges have been largely rejected by the courts³⁰ (not necessarily correctly, in my view³¹), it is clear that the rights that journalists claim are genuinely distinctive rights and not simply instantiations of a larger right. Journalists

27. See James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335 (2000) (an important recent comprehensive overview).

28. "Privilege" is the term more appropriately used to describe a claim of exemption for certain classes of people or acts from otherwise generally applicable, or at least more generally applicable, legal constraints. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (Walter Wheeler Cook ed., 1923); Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919); Max Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141 (1938).

29. See, e.g., C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819, 858 (1980); Donna M. Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829 (1995). Others have expressed more skeptical views. See, e.g., Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979); William W. Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1 (1980).

30. See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005). See also *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

31. See Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1278 (2005).

do have the right to attend trials,³² but so does the public. Thus this "right" of journalists is not a distinct right at all. However, journalists also claim First Amendment rights not held by the public at large, including the rights to attend otherwise closed meetings,³³ to cross otherwise legitimate and enforceable police lines,³⁴ to obtain otherwise unavailable government-created or government-controlled information,³⁵ and, most prominently, to refuse to disclose otherwise properly discoverable or extractable information.³⁶ Apart from the question whether the arguments for recognizing such rights are sound, it is clear that the argued rights of journalists are very much of the same kind of profession-specific privileges with which we are now concerned, and which academics often claim in the name of an individual right to academic freedom.

In order to examine such profession-specific rights in an academic context, it is necessary to focus on those forms of academic activity that remain constitutionally unprotected in other contexts. That is, the claimed academic freedom right only has bite if it protects what would, but for its academic context or an academic right-holder, be unprotected. Yet since the American rights to free speech are very broad and even the free speech rights of public employees are moderately so, it is not so easy to find examples. The domain of such examples, however, is likely to lie less with specific utterances that would be unlawful when made by non-academics, but become lawful when made by academics,³⁷ than with the larger universe of the claimed ability of academics to resist the instructions of their superiors as to how they will actually perform their job.

Such claims of constitutionally-grounded privilege against some dimensions of workplace supervision are often serious ones, but it is worth noting that they have numerous, far-less-serious embodiments. Anyone who has served time as an academic administrator is familiar with the frequency with which academics shout "academic freedom"

32. See *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); G. Michael Fenner & James Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415 (1981).

33. See Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992).

34. See *L.A. Free Press, Inc. v. Los Angeles*, 88 Cal. Rptr. 605 (Ct. App. 1970).

35. See Note, *The First Amendment Right to Gather State-Held Information*, 89 YALE L.J. 923 (1980).

36. See Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629 (1979).

37. The use or distribution in an academic context of legally obscene (and thus constitutionally unprotected) materials may constitute such an example. See *Roberts v. State*, 373 So. 2d 672 (Fla. 1979).

whenever they are confronted with mandatory grade curves,³⁸ grading deadlines, schedule changes, and numerous, even less plausible, assertions of academic freedom. The claimed freedom here is simply the freedom to do one's job as one sees fit, which, of course, is something fervently desired by many employees, whether academic or not. It is not so clear, however, what values might be served by recognizing this right for academics and not for others, just as it is not so clear that the many virtues of job security, including the ability of those with job security to say with impunity things that their supervisors need to hear, are especially related to the academic function. Tenured academics can criticize deans and presidents, and such criticism is often a good thing, but so too is it often a good thing when such criticism is encouraged in any other workplace. Thus, although there are good, or at least plausible, arguments for job security and for immunity for criticism of academic and non-academic supervisors, it is by no means clear that the normative or prescriptive arguments for such rights for academics are arguments plausibly limited to academics.

Things may become different, however, when we turn to the actual instructional and research dimensions of academic employment. With respect to these intrinsically "academic" aspects of the job of an academic, aspects typically not shared with non-academic employment, there now arise strong arguments for giving academics rights protecting them from political or other extra-academic interference—whether directly or indirectly—with their academic judgments, arguments which I discuss below.³⁹ But if, for the moment, we focus instead on the rights of academics to be protected from interference by their immediate academic supervisors, things get a bit murkier. If a law professor employee of a state university (a role I occupied for sixteen years) were to choose to devote all of her or his classes in "Constitutional Law" to discussing baseball, music, or even torts, the question is whether that professor should possess a right against the law school not to be dismissed or dis-

38. A remarkable number of such claims have wound up in court. See *Brown v. Armenti*, 247 F.3d 69 (3d Cir. 2001); *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992); *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419 (1st Cir. 1986); Jennifer L.M. Jacobs, Note, *Grade "A" Certified: The First Amendment Significance of Grading By Public University Professors*, 87 MINN. L. REV. 813 (2003); Kevin A. Rosenfield, Note, *Brown v. Armenti and the First Amendment Protection of Teachers and Professors in Grading Their Students*, 97 NW. U. L. REV. 1471 (2003); Evelyn Sung, Note, *Mending the Federal Circuit Split on the First Amendment Right of Public University Professors to Assign Grades*, 78 N.Y.U. L. REV. 1550 (2003). See also *Simmons v. Budds*, 338 A.2d 479 (Conn. 1973) (rejecting professor's objection to being required to give passing grades to students who had missed final examination because of anti-war protests).

39. See *infra* pp. 923–930.

ciplined for engaging in that behavior. It is true that *Connick v. Myers*⁴⁰ grants some limited protection for any employee who wishes to discuss matters of public concern at the workplace,⁴¹ but it is implausible to imagine that devoting the bulk of a course on corporate law to discussing immigration policy or the war in Iraq, both matters of public concern, would be constitutionally immune from discipline. It is even more implausible to imagine that the evaluation of teaching methods cannot for constitutional reasons be part of the determination of promotion or tenure. Similarly, if what one professor thinks is scholarship consists entirely of writing articles for *People* magazine about celebrity romances or the secret lives of participants in television reality shows, the question becomes whether a plausible argument exists that such an understanding of scholarship is protected against whatever sanctions⁴² are otherwise available against those who engage in no scholarship whatsoever.

Even the example of teaching music or torts in a constitutional law class is not as extreme as some other examples. Some professor might cancel class for the term on the grounds that he honestly believes that constitutional law is better learned from out-of-class contemplation than from a traditional class. Another professor might simply *play* music based on her belief that hearing the right music will generate in students the spontaneous learning of constitutional law, perhaps on the assumption that hearing three-part harmony will foster the appreciation of three-part tests. Yet although we can imagine such extreme examples, the less extreme ones are worth considering. Thus, I assume, although others may not, that academic institutions ought to be able to exercise some sanctions against those who do not make even a passing nod at the subject they are assigned to teach. Even if, *arguendo*, the First Amendment protects a law professor's right to teach constitutional law from a left-wing, right-wing, historical, philosophical, economic, literary, comparative, doctrinal, celebratory, or critical perspective, it cannot plausibly protect his or her right to discard the subject entirely and replace it with torts, or evidence, or art appreciation.

If this assumption is sound, then it is difficult to sustain the argument that something called "academic freedom" grants publicly-employed teachers and professors much of a constitutional right to decide how they will perform the central features of their job. It is almost

40. 461 U.S. 138 (1983).

41. See also *Rankin v. McPherson*, 483 U.S. 378 (1987). In *Garcetti v. Ceballos*, the Supreme Court made clear that the statements protected in both *Connick* and *Rankin* were protected only because they were not part of the official duties of the employees concerned. 126 S. Ct. 1951 (2006).

42. There are precious few sanctions in actual practice, but that is a topic best left for another occasion.

certainly better for the academic enterprise if individual academics are granted considerable leeway in determining what to teach and how to teach it, and so too for the scholarly side of the enterprise. But not everything that is desirable is easily or properly translatable into an enforceable constitutional right, and many of the virtually self-evident examples of entirely permissible content control in the academic environment strongly indicate that recognition of a substantial individual academic freedom right is almost impossible to imagine in practice.

The best response to this argument is one based on a different array of extreme, but hardly unknown, examples. We do not want law school deans, for example, to be restricted in monitoring the extent to which law school courses bear some resemblance to the title of the course, but we do want some constraints on the ability of a public law school dean, who would punish a faculty member for espousing the "wrong" views about affirmative action, the free exercise of religion, or insider trading. Yet although these are dangers worth guarding against, it may be that there is a role here for the distinction between subject-matter-based and viewpoint-based discrimination.⁴³ The existing doctrine is hardly clear about the distinction between permissible and impermissible forms of content discrimination in government-operated enterprises,⁴⁴ but there are at least some suggestions in the cases that government funding for the arts, for example, may constitutionally distinguish between good and bad art, or between art and something else, but may not distinguish between art that is supportive of the President and art that criticizes him.⁴⁵ If this is a

43. See generally Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Geoffrey Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978); Susan Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991).

44. See Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 104-06 (1998).

45. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). A similar distinction is suggested in *Bd. of Educ. v. Pico*, 457 U.S. 853, 863-75 (1982) (Brennan, J., plurality opinion). Indeed, *Pico's* proffered distinction between partisan political content and viewpoint discrimination and other less invidious forms of viewpoint discrimination may have application to a wide range of government enterprises, including universities. See Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15. Sanctioning a professor because he or she teaches, in class, that the Holocaust did not happen (but not the teacher who teaches that the Holocaust did happen), or that Abraham Lincoln was the third President (but not the professor who teaches that he was the sixteenth), or that the Constitution was written by William Blackstone while on a trip to the United States (but not the professor who teaches that the Constitution was written by James Madison, or that Blackstone died in 1780) are all forms of viewpoint discrimination, for viewpoint discrimination includes the fact-based distinction between the proposition that God exists and the proposition that God does not exist, just as it includes the fact-based distinction between the view that the Civil War was caused by slavery and the view that the Civil War was caused by economic differences between North and South. Yet, although the prohibition

plausible statement of existing doctrine, then it may be the case that although a law professor may be sanctioned for teaching torts in her Constitutional Law class, she cannot be sanctioned for teaching that *Plessy v. Ferguson*⁴⁶ was rightly decided or that the First Amendment is a fundamentally bad idea.

Even this narrower, but more conventional, view of the academic freedom of the individual academic (against his or her academic supervisors) is problematic, however, at least as a matter of constitutional law. Consider the case in which, whether in class or in an academic book or article, a professor argues that the decision in *Brown v. Board of Education*⁴⁷ was the product of a conspiracy among the Communist Party, the NAACP, and the Jews.⁴⁸ There should be little doubt that espousing such a viewpoint would be permissible grounds for non-hiring, and permissible grounds for non-tenuring. Perhaps it would be permissible grounds for non-promotion as well.⁴⁹ The question then, one almost totally absent from the doctrine, is whether and how the constitutional law applicable to non-hiring is applicable to non-promotion and whether and how the constitutional law applicable to non-hiring and non-promotion is applicable to dismissal. If a law professor can be not hired or not promoted for teaching conspiracy theories in a Constitutional Law class (or for teaching astrology in Physics, or the existence of flying saucers in Astronomy, or, free exercise questions aside, Intelligent Design in Biology), the question is whether there is a coherent constitutional law account of why the same grounds cannot be used to dismiss a professor from a position he now holds. Questions of contractual tenure aside, the doctrine appears to hint that not granting that which is not possessed is constitutionally easier than withdrawing that which is currently enjoyed,⁵⁰ but it is not clear how such hints could be crystallized into firmer doctrine and not at all clear that recognizing a right to academic

on viewpoint discrimination is implausibly applied to most government enterprises, see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), there may be room for application of a narrower form of prohibition on viewpoint discrimination, the kind that was suggested in *Pico*. Thus, the examples above appear very different from the professor who is told to prefer Republican accounts of the right to private property to Democratic ones, or who is punished for praising Justice Thomas and criticizing Justice Stevens.

46. 163 U.S. 537 (1896).

47. 347 U.S. 483 (1954).

48. A view, I fear, that may not be totally absent from the population at large, even if, in my experience, it is totally absent from the constitutional professoriate.

49. Those who doubt this should consider the case in which someone argues not that *Brown* was the product of a Communist/African-American/Jewish conspiracy, but rather was decided in 1962, or by a six-to-three vote.

50. See *Pico*, 457 U.S. at 863-75 (appearing to suggest some such distinction). See generally Ingber, *supra* note 45; Toni Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 3 (1987).

freedom would help very much in the enterprise. To put the issue differently, the language of academic freedom may be occasionally useful to reinforce the most egregious forms of partisan (or similar) sanctions in public sector employment with an academic dimension, but cases like *Connick v. Myers*⁵¹ and *Rankin v. McPherson*⁵² make clear that these safeguards against excess partisan political (or related) and extreme viewpoint discrimination are by no means restricted to, or even especially important to, academics.⁵³ Once again, therefore, it may be that the best arguments for academic privileges turn out to replicate the best arguments and existing doctrine about the rights of non-academics, and the academic freedom dimension is little more than makeweight. As the examples and argument above indicate, it remains difficult to see how granting academic employees enforceable constitutional academic freedom rights greater than those available to other public employees would or could play out in actual practice.

The strongest argument against creating genuinely distinct individual academic freedom rights, however, is based on the proposition that granting individual academics enforceable rights against their academic supervisors would inevitably restrict the *academic* autonomy of the institution itself. As a result, there is no avoiding the conflict between a view of academic freedom that views individual academics as its primary and direct beneficiaries, and a contrasting view that locates the right in academic institutions, even if doing so limits the individual rights of the employees of those institutions. Because this is the basic conflict, it is to the latter part of that conflict that I now turn.

III. ACADEMIC FREEDOM AS INSTITUTIONAL AUTONOMY

Although all of the foregoing is designed to express some tentative and preliminary skepticism about the extent to which individual academics have enforceable constitutional law rights against their academic supervisors, it is not designed to be skeptical about a quite different kind of academic freedom right. On the contrary, I want to suggest that an institutional understanding of academic freedom, even if it comes at the expense of an individual understanding, is both more faithful to the best account of what academic freedom is all about and more compatible with larger and emerging themes in First Amendment doctrine generally.

51. 461 U.S. 138 (1983).

52. 483 U.S. 378 (1987).

53. Which is not to say that they are not important to academics. It is to say, however, that many of the things that academics claim as important for themselves are often claimed by non-academics as being every bit as important to them.

In speaking of an institutional understanding of academic freedom, I am referring to the putative constitutional right⁵⁴ of an academic institution *qua* institution to have an enforceable right to be protected from external political or bureaucratic interference with its academic judgments. I have argued elsewhere that an institutional account of the First Amendment, in which the primary focus is not on the character of communication taken in isolation but instead on the value of institutional autonomy for certain kinds of institutions that play special roles in the development of ideas and public debate,⁵⁵ may be a descriptively accurate account of much of existing First Amendment doctrine while at the same time providing a normatively attractive understanding of what the First Amendment should be.⁵⁶ And in the immediate context, it may be that such an institutional account provides the foundation for the best explanation, description, and justification for a right to academic freedom.⁵⁷

Under such an institutional understanding, the right to academic freedom would not—or at least need not—be a right of individual academics against their academic supervisors. Those supervisors, after all, are typically themselves making academic judgments, even if often poorly. Indeed, the key to the institutional account, and the reason why such an account is largely incompatible with an individual account, is that the typical individual academic freedom claim is a claim that a court should not interfere with an *academic* judgment made by an academic institution, and it is hardly clear *a priori* that such academic judgments made by academic institutions are further removed from the core con-

54. Much that I say here would also support the creation of a statutory right. But because the right at issue is a right of academic institutional autonomy against political interference, there are good reasons to doubt the durability of (ordinary non-constitutional) political protections against political interference with academic judgments. See Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045 (2004).

55. As opposed to considering the First Amendment value of certain kinds of speech largely divorced from the institutional setting of that speech.

56. See Schauer, *supra* note 31; Schauer, *supra* note 44; Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999).

57. The debate between individual and institutional accounts of academic freedom is by no means my invention. See, e.g., Finkin, *supra* note 3 (discussing the existing debate); Metzger, *supra* note 3 (same); Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom,"* 45 STAN. L. REV. 1835 (1993) (same); Rabban, *supra* note 3; Rachel Fugate, Comment, *Choppy Waters Are Forecast for Academic Free Speech*, 26 FLA. ST. U. L. REV. 187 (1998) (same). What I believe I have to contribute is not only one more vote on the "institutional" side of this debate, but also the situation of this side of the debate within larger and emerging themes about the First Amendment in general, as well as documenting the support that this side of the debate receives from more recent references to academic freedom in cases such as *Grutter v. Bollinger*, 539 U.S. 306 (2003).

cerns of the First Amendment than are the academic judgments of individual faculty members.

Thus, an institutional right to academic freedom is best understood as a right of academic *institutions* against *their* political and bureaucratic and administrative supervisors, whether those supervisors be elected legislators or appointed administrators. Descriptively, this right to institutional academic freedom is somewhat like the right, or privilege, that the Supreme Court obliquely acknowledged for academic institutions in both *Regents of the University of California v. Bakke*⁵⁸ and *Grutter v. Bollinger*,⁵⁹ although in *Bakke* and *Grutter*, the academic freedom privilege was more a privilege against an otherwise applicable constitutional standard—compelling interest, or a compelling interest of a certain magnitude⁶⁰—than against an otherwise enforceable legislative or regulatory command. Still, the basic idea in both *Bakke* and *Grutter* is that the academic judgments about admissions made by the University of California and the University of Michigan have a sufficient First Amendment dimension that they ought to have special force in the compelling interest calculus. In other words, it is the institutional judgment that is entitled to First Amendment-inspired deference, and not the decision made by an individual academic or the claim of an individual right.

The right to institutional academic freedom is also structurally similar to the claimed privilege against discovery of promotion and tenure records that was resoundingly (but arguably incorrectly, to the extent that my argument here is sound) rejected by the Supreme Court in *University of Pennsylvania v. EEOC*.⁶¹ For if the Court is to be taken seriously in its statements that the autonomous decision making of academic institutions counts for something, and if that something is measurable in First Amendment terms, then one might expect that at least a qualified deference would attach to academic institutions making academic decisions,

58. 438 U.S. 265 (1978).

59. 539 U.S. 306 (2003).

60. To be more precise, the structure of *Grutter* was premised on the fact that the standard for justifying race-cognizant affirmative action is now, officially, one of compelling governmental interest. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). But in determining in *Grutter* that the university had satisfied this standard, at least with respect to the law school plan, a significant component of the finding was that the university had constitutional rights to institutional autonomy, in effect a right against the degree of stringency that the compelling interest standard would otherwise have applied. 539 U.S. at 329. The effect of this right might be conceptualized in terms of a *de facto* relaxation of the standard, or instead as treating the constitutional value of institutional university autonomy as part of the collection of values that might satisfy the standard, but the result is the same regardless of the conceptualization: it is the constitutional value of institutional autonomy for university decision making that renders permissible what would otherwise be impermissible.

61. 493 U.S. 182 (1990).

and that such qualified deference might extend to a similarly qualified privilege to protect the materials used in making those decisions. This is not to say that the First Amendment ought to be a powerful protector or enabler of unlawful discrimination. But if academic autonomy has a First Amendment dimension, then the potential for equality-limiting exercises of that autonomy ought to be no more fatal to the recognition of the right than the equality-limiting exercises of core freedom of speech and freedom of association rights are to the existence of those rights.⁶²

Although *Bakke*, *Grutter*, and *University of Pennsylvania* are relevant, perhaps the best analogy comes from the manner in which the Supreme Court and some lower courts have treated issues of library book selection, and, more obliquely, arts funding. When the Supreme Court in *Board of Education v. Pico*⁶³ hinted⁶⁴ that a First Amendment violation might exist were a city council or elected school board to interfere with the library selection decisions of professional librarians, it did not even suggest that public libraries or school libraries violate the First Amendment when they make book selection (or even deaccession) decisions on plainly viewpoint-based grounds, which of course they do all the time.⁶⁵ Libraries do not feel obliged to ignore viewpoint when they are deciding how many books denying the existence of the Holocaust they should have in the collection, nor when they are deciding on the appropriate balance between books for and against child molestation or for and against equality. The absence of *The Protocols of the Elders of Zion* in most library collections is hardly unrelated to the fact that it is a malicious fabrication, however irrelevant that fact would be were the issue one of the state's ability to prohibit the sale of the book in a bookstore or in a public forum. Implicit in the *Pico* plurality's discussion of the issue was thus the assumption that the primary professionals in speech-based institutions will inevitably and entirely permissibly make decisions based on subject matter, style, and point-of-view, and that, except perhaps at the extremes of partisan political viewpoint discrimination, such decisions are immune from constitutional evaluation.⁶⁶ But when *those* decisions

62. E.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

63. 457 U.S. 853, 863-75 (1983).

64. Although the Supreme Court upheld the summary dismissal of the original claim, there was no majority opinion, and the lessons of *Pico* are only the lessons that can be gleaned from Justice Brennan's plurality opinion.

65. See Mark G. Yudof, *Library Book Selection and the Public Schools: The Quest for an Archimedean Point*, 59 IND. L.J. 527 (1984); Robert M. O'Neil, *Libraries, Librarians and First Amendment Freedoms*, 4 HUM. RTS. 295 (1975); Robert M. O'Neil, *Libraries, Liberties, and the First Amendment*, 42 U. CIN. L. REV. 209 (1973).

66. STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT* 481 (3d ed. 2001) ("Every Justice recognizes that some content discrimination is permitted in selecting books

are made by, or subject to, review or interference by external political forces or actors or institutions, then—and only then—does the First Amendment, and especially the First Amendment's aversion to viewpoint discrimination, come into play. At the very least, this appears to be the most plausible reading of what the *Pico* plurality intended to convey.⁶⁷

This distinction between decisions made by primary professionals inside some speech-focused institution and non-professional (in the sense of not being the profession at issue) control, supervision, and interference from outside the institution explains why the Court in *NEA v. Finley* expressed what might best be described as a warning about the constitutional permissibility of congressional interference on viewpoint-based grounds with the often and equally viewpoint-based decisions of arts panels about who should and should not receive funding from the National Endowment of the Arts.⁶⁸ The same distinction explains why the plurality in *Pico* suggested that viewpoint-based interference by elected officials in the often viewpoint-based acquisition and deaccession decisions of professional librarians would be subject to constitutional review, while the equally often viewpoint-based decisions of those primary professionals would not.⁶⁹ And the distinction also explains why, in *Arkansas Educational Television Commission v. Forbes*, the Supreme Court allowed the publicly-funded Arkansas Educational Television Commission to make what looked dangerously like a viewpoint-based decision to exclude a "non-viable" political candidate from a televised debate, while at the same time hinting that the same decision would have been constitutionally impermissible had it been made by the Arkansas legislature or by the Governor of Arkansas.⁷⁰

When this perspective and this distinction between the internal and the external—or between the professional and the non-professional—is applied to colleges and universities, the conclusion emerges that the right of academic freedom, as a component of the First Amendment, may well be the right of a university—whether public or private—to make its own academic decisions, even if those decisions might, when made by a public college or university, constitute otherwise constitutionally problem-

and making curricular decisions.”).

67. See Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000) (arguing that such decisions might, at least in part, be more appropriately made democratically than professionally).

68. 524 U.S. 569 (1998).

69. Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982).

70. 523 U.S. 666, 682–83 (1998). The same goes for a wide variety of other state-run journalistic enterprises. See generally William C. Canby, Jr., *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123 (1974).

atic content-based or even viewpoint-based decisions. If professional librarians acting as agents of the government are permitted to prefer books describing the Holocaust to books denying its existence, or to prefer books favoring racial equality over books scorning it, or to prefer *People* magazine to *Hustler* because of the library's aversion to celebrations of sexual violence and the degradation of women, then so too might academic institutions, even when also acting as agents of the government, be protected in their academic preferences, even if those academic preferences cannot plausibly be understood in any but viewpoint-discriminatory terms.⁷¹

The arguments for recognizing such a privilege for academic or educational institutions are largely arguments about the significant societal advantages⁷² that come when certain institutions are free from political and other forms of external interference, an institutional freedom that serves long-term goals likely to be underserved in the short- and intermediate-term by political institutions. One of those goals is constitutionalism itself, which is why we have an independent judiciary, life tenure, and the institution of politically unreviewable judicial review.⁷³ Another

71. This conclusion appears to be in some tension with *Southeastern Promotion, Ltd. v. Conrad*, 420 U.S. 546 (1975) (invalidating the exclusion of the musical *Hair* from a municipal auditorium). See Kenneth L. Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd v. Conrad*, 37 OHIO ST. L.J. 247 (1976). But although *Southeastern Promotions* has never been formally overruled, it is hard to see how subsequent cases have done anything but embody then-Justice Rehnquist's dissent in *Southeastern Promotions*: "May a municipal theater devote an entire season to Shakespeare, or is it required to book any potential producer on a first come, first served basis? . . . [T]he Court's opinion . . . give[s] no constitutionally permissible role in the way of selection to municipal authorities." 420 U.S. at 573 (Rehnquist, J., dissenting); see, e.g., *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Rust v. Sullivan*, 500 U.S. 173 (1991). Still, insofar as the decision in *Southeastern Promotions* was made by a political body rather than arts specialists (and the relevant board in the case was something of an amalgam of the two roles), it is not necessarily inconsistent with what I argue here.

72. I put it this way to make clear that the right I describe and endorse, like Ronald Dworkin's descriptions of the arguments for press privileges, is a policy argument for creating a right, as opposed to a rights-based argument all the way down. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 373-80 (1985). There are some legal or constitutional rights that are justified in terms of moral rights or human rights, with some of the most obvious examples being the prohibition on cruel and unusual punishments in the Eighth Amendment and the protection of the free exercise of religion in the First Amendment. But other legal or constitutional rights may have the same legal and constitutional force even if their basis is largely policy-grounded consequentialism, and such rights might include, as Dworkin maintains, the First Amendment's protection of freedom of the press, and might also include the Seventh Amendment right to trial by jury in civil cases, and some dimensions of defendants' rights under the Fifth and Sixth Amendments. This distinction may make a difference in practice, especially in terms of the difficulty of overriding, but the basic point is that constitutional rights need not be rights-based, and can instead be based on any of some number of versions of rule-consequentialism, with the right simply serving as the manifestation of the rule.

73. See Schauer, *supra* note 54.

goal, however, is the kind of ability to explore unpopular ideas and challenge the unchallengeable that we associate not only with the First Amendment, but also with the particular mission of the university.⁷⁴ Insofar as it is deemed a valuable First Amendment function to foster such institutions, granting those institutions a considerable degree of autonomy from political supervision in the name of the First Amendment may be both normatively attractive and highly consistent with existing First Amendment doctrine. It is important to emphasize, however, that recognizing this First Amendment-based autonomy of academic *institutions* may also be consistent with the absence of academic freedom rights of individual academics against their academic supervisors.⁷⁵ Indeed, recognizing the constitutional dimensions of the institutional autonomy of academic institutions may even *require* limiting the scope and strength of individual academic freedom rights, for it is a necessary component of such rights that they are typically enforced by a judicial evaluation of, and potential interference with, an academic judgment by an academic institution.

An institutional understanding of the First Amendment is structured around the principle that certain institutions play special roles in serving the kinds of values that the First Amendment is most plausibly understood to protect.⁷⁶ As an explanation of existing doctrine and theory, its power comes from the fact that institutions such as libraries, museums, newspapers, theaters, and the like figure so prominently in the history and doctrine of the American approach to freedom of speech and freedom of the press. Accordingly, an institutional account of the First Amendment would not surprisingly recognize a special place for the country's colleges and universities, whose historical and current mission is to play a central role in challenging conventional wisdom.⁷⁷ Thus,

74. The extent to which such an institutional right to institutional autonomy would extend, if at all, to primary schools, secondary schools, trade schools, junior colleges, and other institutions whose highly valuable social contributions are of a different variety is an important question, but it is one that I do not attempt to answer here.

75. The word "supervisor" is intentionally tendentious, and I make no claim that academic supervision is a good thing or typically exercised wisely. Indeed, the good academic administrator will usually grant to individual academics the same autonomy in academic pursuits that I argue that the Constitution should protect for academic institutions. There is a difference between a constitutional right of academics against their faculties and against deans to say stupid things in the classroom and in their scholarship and the value of allowing academics a wide range of freedom in exploring those ideas that may seem initially stupid. That is one of the values of tenure, but also the value of requiring a demonstration of reliability and performance before granting it.

76. See *supra* note 55.

77. Which is not to say that colleges and universities do not have their own problems with challenging their own conventional wisdom, as Professor Alexander's contribution to this Symposium makes so clear. See Larry Alexander, *Academic Freedom*, 77 U. COLO. L. REV.

colleges and universities serve special and focused First Amendment functions in generating new ideas with no immediate practical application, and with taking seriously ideas that much of the rest of society deems ridiculous. Under the First Amendment, these are functions worth preserving, even if—and this is a crucial point—we cannot imagine all of society's institutions serving them to as great an extent. An institutional understanding of the First Amendment is premised on the idea of institutional *differentiation*, and just as we might not think that our professors are the ones we want fighting our wars or getting the trains to run on time, so too might we not want our military or our bureaucracy to be entrusted with the generation of new ideas, most of which will not stand the test of time but a few of which will provide the seeds for the production of genuinely new knowledge. Insofar as academic institutions⁷⁸ have a special role in this process, the protection of academic institutions as institutions would figure as an important component of First Amendment doctrine. Yet once we recognize the protection as institutional, we can see that such protection is inconsistent with a case-by-case evaluation of institutional academic judgments. Consequently, insofar as academic institutions would find themselves the beneficiaries of just this kind of focused institutional protection, then it is all of their decisions, and at the very least all of their academic decisions, which would enjoy a degree of immunity from interference by those governmental authorities that would otherwise be understood as their superiors.

CONCLUSION

It is worth concluding with a caution and a caveat. It is a commonplace of the First Amendment that it protects people whose contributions to public debate and the marketplace of ideas are silly, obnoxious, dangerous, and wrong;⁷⁹ so too for an institutional right of academic freedom. Academic institutions enjoying the protection of such a right for their internal decisions will often use that right to hire their friends, fire their enemies, and confuse their own opinions with absolute truth. They

883 (2006).

78. I am obviously treating the research university as the paradigmatic institution serving these functions. Important but difficult line-drawing issues are involved when we consider the extent to which a right erected on the paradigm of the research university should apply as well to non-research universities, private foundations, think-tanks, liberal arts colleges, junior colleges, high schools, and primary schools. I cannot resolve this issue here, but it is sufficient to note it, while also noting that the difficulty of drawing lines ought not to be considered a barrier to engaging in the exercise in the first instance. See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

79. See Frederick Schauer, *The Heroes of the First Amendment*, 101 MICH. L. REV. 2118 (2003) (book review).

will even more often treat their own conventional wisdom with an unchallengeable sanctity that they would justifiably find abhorrent in others. Just as with the First Amendment itself, however, the frequency of abuse may be consistent with the importance of the right and consistent with the proposition that non-recognition of the right may be even worse than recognition. Still, recognition of an institutional right to academic freedom is not inconsistent with criticism of instances of its exercise, and nothing I say here should be taken to suggest that academic institutions, even if immune under my account from quite a bit of political interference⁸⁰ with their autonomy, should be immune from criticism when they exercise that autonomy unwisely. A non-absolute First Amendment-inspired institutional autonomy for academic decision making by academic institutions is not only consistent with criticism of the exercise of that autonomy, but indeed may demand it. It is a logical but widespread error to assume that legal rights are necessarily conjoined with legal responsibilities, but it is no error, logical or otherwise, to believe that special legal rights may impose on the right-holder special non-legal responsibilities. If academic institutions demand special treatment on account of the First Amendment functions they serve, they justifiably invite evaluation of the extent to which they are serving those functions, and criticism to the extent that their performance of their uniquely academic functions is found wanting.

80. And maybe financial interference as well, for one task of those who control even private universities is to prevent donors and funders from exercising just the kind of control that they would resist if it came from the government. Indeed, in the modern university, and especially in the modern American private university, the threats to academic autonomy that come from philanthropic donors (I put aside the question of research sponsored by pharmaceutical companies and other similar profit-motivated actors, which is itself a huge problem) who wish to see their philanthropy used to promote ideas with which they largely agree is typically a far greater problem than is the threat to academic autonomy that comes from governmental interference.

