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Citation: 65 Ark. L. Rev. 193 2012

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Tue Jul 16 11:50:33 2013

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The Permutations of Academic Freedom

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We are here on this occasion to discuss academic freedom, but at the outset I feel I must caution the audience. And the caution is simple: Listening to academics talk about academic freedom is like listening to Texans talk about oil, or reporters talk about the importance of freedom of the press, or football coaches talk about the character-building opportunities of intercollegiate athletics. Academic freedom is indeed an important topic, as much today as in the past, but none of us here speaking on this occasion is a disinterested observer of the topic of academic freedom. We would like to think that we serve as analysts without having any self-interest, but that is, at least in part, false, because we are, as academics, beneficiaries of academic freedom. And thus the self-interest that is involved in talking about a principle and a right that brings special benefits and privileges to people like us ought to be taken into account in evaluating the soundness of what we have to say. But having offered this caution, I will trust the audience to make their own

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evaluation, and thus proceed to the substance of what I want to say.

My job on this occasion, at least as I understand it, is primarily to engage in conceptual clarification. Regardless of the topic, I believe quite strongly that we cannot begin to think about getting things right unless we start by trying to get things straight. And thus I am going to engage in some ground clearing at the outset without taking strong, or for that matter even weak, normative or prescriptive positions.

I will begin by drawing your attention to three different dimensions of academic freedom. Many of you are no doubt familiar with at least some of the current debates and current controversies that surround the topic of academic freedom. Without rehearsing these debates, however, I want to situate them within three different areas of potential confusion, and within three different relationships that might implicate the academic freedom question.

The first dimension, perhaps following the analysis that for some of you might be familiar as Hohfeldian,¹ is the importance of thinking about rights—all rights—in terms of who has the right to do what against whom. Thus we can inquire in at least soft Hohfeldian terms about the nature of the supposed right to academic freedom. More particularly, let us consider three different kinds of potential players in the game of academic freedom. First, broadly speaking, we have the government. I do not want to be particularly sophisticated or fine-grained about the government; for purposes of this discussion, the government would certainly include the President, federal and state legislators, governors, attorneys general, the administrative bureaucracies of state and federal governments, the police, law enforcement in general, and indeed the full panoply of government in exercising its

1. For the basic and enduring analysis of the structure of rights, their negations, and their correlatives, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). For the application of Hohfeldian analysis to a range of free-speech issues, see Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914 (2008).

force. Obviously there are close cases around the edges in terms of which actors do or do not constitute the state,² but that is not especially germane here. For present purposes, we can simply designate the government as encompassing the initial set of actors.

Our second set of actors is the category of university administrators: presidents, provosts, deans, faculties when acting in their collective governance capacity, human resources officers, and all of the supervisors in an academic environment, a term which I use advisedly and with a verbal footnote. That is, I use the term “supervisors” with a footnote for a reason: back in the early 1950s, Dwight Eisenhower, before he became President of the United States, served a relatively brief stint as president of Columbia University. At some point, Eisenhower was addressing the Columbia faculty. Being a former general and thus someone familiar with the military, military hierarchy, and the chain of command, he started off by addressing the faculty as “employees of the university,” whereupon a senior member of the faculty interrupted, saying, “Mr. President, We are not employees of the university. We *are* the university.”³

The assertion that the faculty simply is the university might have been a plausible thing to say in the early 1950s, and it would be a nice and aspirational thing to say in 2011. But the reality is, especially in the context of controversies about academic freedom, that universities are, in important ways, hierarchical. Universities make decisions that influence people’s careers and make rules and regulations that govern the behavior of others. And universities have

2. Issues of “state action,” of which actions of technically private entities do or do not count as actions of government, arise most frequently in the equal protection context, but there are First Amendment state action cases as well. *See, e.g.,* *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Marsh v. Alabama*, 326 U.S. 501 (1946). Although none of the Supreme Court’s state-action cases has been directly about academic institutions as such, it did find state action in a quasi-academic context in *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 531 U.S. 288 (2001).

3. *See* Hunter R. Rawlings, III, President, Cornell University, State of the University Address (June 7, 2003), available at <http://www.news.cornell.edu/campus/stateofuniv0306.html>.

available to them numerous sanctions for enforcing those rules on faculty, staff, and students. And as a result the second set of players in these debates about academic freedom is the university, or the college, in its supervisory or managerial capacity.

Third, and finally, and in addition to the government and the supervisors of the university, we have the faculty, typically, although occasionally also students. The important point is that these are individuals—individuals operating as teachers, individuals operating as learners, and individuals operating as scholars doing research and disseminating the products of that research.

So we have three different sets of actors—the government, the managerial university, and the students and faculty. And once we recognize that there are these three different sources of interest, we can then understand the way in which many academic freedom controversies involve various different configurations of the three parties or groups of parties that I have just mentioned.

Consider first the controversies involving the attempted control by government of the individual teaching and scholarly activities of faculty members. Indeed, the United States Supreme Court's earliest case explicitly about academic freedom, *Sweezy v. New Hampshire*,⁴ decided in 1957, was of this variety. Paul Sweezy was somewhere between a part-time faculty member and a visiting lecturer at the University of New Hampshire. Bearing in mind that these events took place during, broadly speaking, the McCarthy era, at some point, Sweezy became the subject of an investigation by the Attorney General of New Hampshire regarding his individual writings and some things he had said in class. Importantly, the University of New Hampshire, in its supervisory capacity, was not involved. The academic freedom configuration in *Sweezy* was the direct attempt by government to restrict the activities, in one way or another, of an individual faculty member. Indirectly, *Sweezy* involved the control or

4. 354 U.S. 234 (1957).

attempted control by government of a university and a university's administrative decisions. But the primary configuration was government to individual faculty member with respect to the individual's teaching and writing activities.

In other contexts, however, academic freedom arises with respect to more direct attempts by government to restrict a university *qua* university. Indeed, in a number of recent Supreme Court cases we see that at least some of the explicit mentions of academic freedom by the Supreme Court have come up in the context of just this kind of configuration of the university as an entity as one of the disputants and the government as the other. In *EEOC v. University of Pennsylvania*,⁵ for example, the issue was whether the university, as a university, had an academic privilege to refuse to disclose tenure and related records in an investigation regarding an allegation of discrimination in the hiring, promotion, and tenure process. The University of Pennsylvania lost the case, but why they lost and whether they should have lost is not directly relevant to our discussion. For my purposes here, what is important is the configuration of the case, as part of my attempt to create a map of the issues, one place on the map being those cases in which a university is pitted against the government.

Similarly, albeit with quite different issues, we see the same configuration when the Supreme Court talked about academic freedom, admittedly in passing, in both *Regents of the University of California v. Bakke*⁶ and *Grutter v. Bollinger*,⁷ both cases involving affirmative action in higher education. That is, does the university in its corporate or institutional capacity have some degree of immunity, just because it is a university, from what would otherwise be normal, across-the-board governmental requirements? Is there an academic freedom *privilege*, in the precise sense of "privilege"?

5. 493 U.S. 182 (1990).

6. 438 U.S. 265 (1978).

7. 539 U.S. 306 (2003).

In the first configuration I described, exemplified in *Sweezy*, we have the government versus a faculty member. In the second configuration, as in the *University of Pennsylvania* and *Bakke* and *Grutter* category, we have the government versus the university.⁸ The third and final configuration exists when the question is about control by universities, or by university administrators, or by a faculty acting in its collective managerial capacity of the activities—research, dissemination of research, and teaching—of individual faculty members. Can a university discipline or fire a faculty member because of the content of what she says, in her research, in her publications, and in the classroom? Of course a great deal of the standard and unfortunately shallow rhetoric of academic freedom would say that the answer to this question is, “Of course not.” But on further reflection, the answer seems to be close to the exact opposite. When we think about the question of whether a university can discipline a physicist for espousing astrology in the classroom, or can refuse to promote a historian who denies the existence of the Holocaust or who writes that the American Revolution was a Communist conspiracy, we are compelled to recognize that, even in the university environment, the notion that a university as supervisor cannot control the content and at times even the viewpoints of what faculty members say seems preposterous. Indeed, with some frequency, those of us who are university professors engage, typically every December and every May, in my case, in rampant content regulation when we grade examinations and assign good grades, bad grades, or something in between, based entirely on the content of what the students have said on their examinations.

To point out that content and viewpoint regulation is an intrinsic part of what a university does, and properly so, does not mean there are not some difficult issues. Dismissing a tenured physics professor for cause because he

8. See also *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985) (citing *Sweezy*, among other cases, in support of the freedom of a university to set its grading practices without legal interference).

espouses astrology in the classroom or (perhaps) in published writings is different from dismissing him because he takes a non-mainstream position about a question in string theory or quantum mechanics. Nevertheless, the range of issues involved when universities exercise their managerial control over faculty and students is quite different from the range of issues involving the government versus individual faculty members or the government versus the university. This is not to resolve any of these questions. It is to say, however, that the issues of academic freedom vary widely depending on the configuration of the dispute, and that is why it is important to set out the Hohfeldian structure of all of this. When we think about academic freedom, and when we ask questions about the scope of academic freedom, we should not ignore the importance of asking, at the outset, whose academic freedom against whom to do what we are talking about.

I have been talking largely about United States Supreme Court cases and thus talking about the law. But it is important as well to recognize that the issue of academic freedom should not be contemplated entirely in terms of the law. Academic freedom is not only the law. Academic freedom is also a rhetorical tool. And academic freedom is also a policy, and something that academics and others talk about with some frequency. And thus the role of the discourse of academic freedom's role as a device of debate within universities and as a symbol of what academics are all about is largely a role that is independent of the law. For example, suppose there are dimensions of university supervisory control of individual faculty research and teaching that do raise academic freedom issues, as I think there are, some of my examples notwithstanding. But those academic freedom issues are every bit as important at Yale, which is a private university, as they are at the University of Arkansas or the University of Virginia, which are public universities. Although the state-action doctrine and state-action principles would immunize the former almost entirely from the constitutional review that would be applicable to the latter, the very idea of academic freedom,

and academic freedom as policy and principle, applies more or less in the same way to all. Therefore, it is important, in thinking about the topic, to not be too tied to the law, to not be too tied to constitutional doctrine, and to not think that this is a topic substantially about technical legal doctrine.

Finally there is the question about the implications of university autonomy with respect to the production of knowledge? What is the role of a university in creating knowledge? What is the role of a university in disseminating knowledge? One interesting feature of this question is that, for many people, universities have a significant role to play in the so-called “marketplace of ideas.” In general I have been skeptical of the “marketplace of ideas” metaphor.⁹ Nevertheless, there is an interesting question to be asked here about the marketplace of ideas in the broader sense of the environment for the creation of knowledge, and I will thus close with this: if it turns out that universities have a role in what might loosely be called the “marketplace of ideas,” and what might less loosely be considered as institutions for the production and dissemination of knowledge, what implications, if any, does this premise have for what goes on in a university? That is, if a university is, among other things, a place where accepted orthodoxy can be challenged, does that mean that universities are the ones that should challenge the accepted orthodoxies of society? Or, does it mean that universities should within their domains allow challenges to any accepted orthodoxies? Putting aside empirical issues about the “marketplace of ideas” for the moment, if the university has a role to play in the “marketplace of ideas,” does that mean that the university itself has to be a marketplace of ideas? Thus, there is at least a plausible argument that the university has

9. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); Frederick Schauer, *Facts and the First Amendment*, 57 *UCLA L. REV.* 897 (2010); Frederick Schauer, *Social Epistemology, Holocaust Denial, and the Post-Millian Calculus*, in *THE CONTENT AND CONTEXT OF HATE SPEECH* (Michael Herz & Peter Molnar eds., forthcoming 2012).

a role to play in the larger marketplace of ideas; but that the university plays that role best not by itself being a marketplace of ideas, but rather by having various institutions of content control, including, but not limited to, peer-reviewed journals, promotion, tenure, and academic standards. By being the devices of and dependent on content control, these institutions are inconsistent with standard out-there-in-the-world free speech ideology. Nevertheless, it may be that universities can perform their function, in a world of free speech, by recognizing that within the university, many of the larger ideas about free speech that make universities important are not ideas that universities can be expected or should foster within their own confines.

ARKANSAS LAW REVIEW