ESSAY

THE DEMOCRATIC MISSION OF THE UNIVERSITY

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The university is a self-governing institution dedicated to the discovery and dissemination of knowledge.[1] As a historical matter, universities were not borne of the democratic impulse and many of their grandest achievements are wholly unrelated to the furtherance of democracy. Yet today they function in such a way in the United States so as to enhance and strengthen the quality of its democratic system.

Democracy is a system of collective self-governance in which the people shape their public life. The leaders of government are chosen by citizens and then held accountable for their actions through a series of periodic elections. In this way, democracy exalts popular choice. It also presumes, however, that this choice is enlightened. Citizens need to understand the nature of the choices that they face, and must possess the capacity to evaluate the policies and practices of the government and its leaders. Although unenlightened choice is still a choice, that kind of choice and the democratic character of the political system that it supports are not especially inspiring or worthy of our admiration.

The university plays an important role in the process of enlightenment that democracy presumes. Some branches of the university, for example, the departments of political science, sociology, and law, are dedicated to discovering and disseminating knowledge that has a direct bearing on public policies. These departments routinely study the promises of those running for office and the programs that the winners eventually implement. Other

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[1] *See* KARL JASPERS, THE IDEA OF THE UNIVERSITY 1–2, 46–47 (Karl W. Deutsch ed., H.A.T. Reiche & H.F. Vanderschmidt trans., 1959).

departments, like philosophy and literature, or the humanities in general, are concerned with the formation of the moral and political values that will guide citizens in the exercise of their choices. Even the hard sciences play a vital role in informing this process of self-determination. Scientific knowledge is essential for evaluating many government policies, such as those related to the environment, the development of alternative sources of energy, and bio-medical research. Even more, the physical and biological sciences, much like the other branches of the university, are responsible for the intellectual and cultural development of society and enhance citizens' capacity to understand themselves and the world around them.

Professors are the ones primarily responsible for the discovery and production of knowledge. Some of this knowledge is made available to the public through books, articles, public lectures, and the occasional op-ed. Most of it is imparted to students in their classes. Students enter the university at an early age and are enrolled in it for only a few short years. They should be viewed not as passive vessels but rather as active participants in the process through which opinions and beliefs are tested and knowledge revealed. They speak back in class, often challenging the day's lecture, and they also undertake research projects. Admittedly, students engaged in research are guided and supervised by their teachers, but this does not lessen the importance of their research and the discoveries that it may yield.

The contribution of the university to the nation's democratic life is not measured solely by the storehouse of knowledge that it produces. The university also enhances the practice of democracy by instilling in students and faculty a critical frame of mind.[2] Ideally, faculty members are hired and promoted not just on the basis of what they discover, but also on the basis of their capacity to sift through evidence, detect logical flaws, and distinguish a good argument from a bad one. The faculty teach these skills to the students, sometimes only by example, and these lessons are reinforced by the so-called informal curriculum of the university—the many activities and programs that students engage in outside of class, such as working on a student journal or participating in a debate society. Rational inquiry and independence of judgment are

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[2] *See, e.g.*, Ira Harkavy, *The Role of Universities in Advancing Citizenship and Social Justice in the 21st Century*, 1 EDUC. CITIZENSHIP & SOC. JUST. 5, 6 (2006).

virtues that govern all facets of university life.

I can imagine an election or a series of political practices that we might deem democratic in a society that lacks universities. The 1960 election in the Congo, for example, that brought to power Patrice Lumumba—he was the first elected Prime Minister of the country—could fairly be described as democratic. You do not need a university education to tell an honest man or to know when you have been exploited. But given the paucity of educational institutions in the Congo at that time—there were only thirty university graduates in a country of around sixteen million persons[3]—it is hard to be especially admiring of the character of that democratic exercise. Granted, the Congolese exercised a choice, and may have made the right choice, but our willingness to applaud the result of that election derives more from our substantive moral commitments (our hostility to colonial exploitation) than from the intrinsic quality of the process of selection itself—its democratic character. In all, the critical issue is not whether an election is democratic or not, but rather the quality of the choice exercised by the populace, which in my view depends in part on the enlightened character of society.

Even in the most developed societies of the West, including the United States, not all people attend a university. Although every democratic society should be committed, as Ortega y Gasset once argued, to universalizing the opportunity for a university education,[4] democracy can flourish even if only a large number—"a critical mass"—of citizens have attended a university. The knowledge generated by universities will constitute a public resource available to all who participate in the public life of the nation, as will the questioning frame of mind instilled by a university education. Not all may have that quality of mind, but the hope is that those who do will shape public opinion and become the leaders of the nation.

At the heart of the university is speech, either the spoken or written word. Professors communicate their views to students and

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[3] *See* CH. DIDIER GONDOLA, THE HISTORY OF CONGO 117 (2002); *Population (1960) by Country*, NATIONMASTER.COM, http://www.nationmaster.com/graph/peo_pop-people-population&date=1960 (last visited Dec. 27, 2012). Another account puts the number of university graduates even lower, at nine. Thomas Fessy, *DR Congo: Celebrating 50 Years of Chaos*, BBC NEWS (June 30, 2010), http://www.bbc.co.uk/news/10449507.

[4] *See* JOSÉ ORTEGA Y GASSET, MISSION OF THE UNIVERSITY 52 (Howard Lee Nostrand trans., 1944).

colleagues, and then to the wider world through lectures, publications, and informal conversations. Students speak up in class, write papers, and also participate in the informal curriculum through a wide variety of communicative activities, some of them quite ingenious. It is not, however, the words themselves, what might in ordinary parlance be denominated "speech," but rather the activity of generating and disseminating knowledge—the core activities of the university—that is protected by the Constitution and the principle of academic freedom.

By its very terms, the First Amendment prohibits Congress from passing a law that abridges the freedom of speech. Some have proposed that in applying the First Amendment, a judge should strictly follow the words of the law and evaluate whether a particular activity is ordinarily considered "speech." Only then would it be constitutionally protected. This method of interpretation, essentially a form of textualism, was heralded by Justice Hugo Black,[5] but in truth, followed by few others.[6] The more dominant and, in my view, the more persuasive method of interpretation, is purposive rather than textual.[7] According to the purposive method, a judge must, through an examination of the text and its history, identify the fundamental purpose of the relevant constitutional provision and then determine whether the protection of a particular contested activity would significantly further that purpose. Safeguarding democracy has long been regarded as the fundamental purpose of the First Amendment, and the body of judicial doctrine that has evolved should be understood as the product of systematic reflection on the meaning and requirements of democracy.[8]

Over the last century, the purposive method of interpretation has led the Supreme Court to protect activities not ordinarily regarded

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[5] *See, e.g.*, NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 77 (1964) (Black, J., concurring) (citations omitted) (dividing the act of "picketing" into argumentation, which constitutes "speech" and is protected by the First Amendment, and "patrolling," which constitutes "conduct" and is not protected by the First Amendment).

[6] For a comparison of Justice Black's approach to free speech issues with that of Justice Scalia, a self-proclaimed textualist, *see generally* Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 36, 46 (1994).

[7] *See* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 88, 220–21 (Sari Bashi trans., 2005).

[8] *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 14–15 (2012).

as "speech," for example, the sale of books, [9] financial contributions to political campaigns,[10] labor picketing,[11] and public demonstrations.[12] The purposive method also led the Court to view the First Amendment as giving rise to freedoms only tangentially connected to communicative activity, such as freedom of association, and used it to protect membership in political parties[13] and social action groups.[14] Purposivism is also the method, I contend, that brings the core activities of the university—not just lectures, but also research activities and the selection of faculty and student—within the protection of the First Amendment and that gives constitutional status to the principle of academic freedom.

One branch of the principle of academic freedom—let's call it the external one—confers upon the university a measure of autonomy from government regulation.[15] It is based on the epistemological premise that such autonomy is most conducive to the attainment of knowledge and the truth that it necessarily implies. Autonomy from government regulation does not leave professors or students free to do or say whatever they wish, but rather makes the norms of the academic discipline of which their activities are a part the exclusive standard for evaluating performance. The principle of academic freedom declares that those norms, not politics or other factors extraneous to those norms, should govern the search for knowledge.

The scope of the autonomy conferred by the Constitution on the university from government regulation is limited. Some state regulations—for example, health and safety regulations—do not

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[9] *See* Smith v. California, 361 U.S. 147, 150 (1959) (applying First Amendment protections to a retail bookseller).

[10] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898, 917 (2010) (holding that a federal statute which limited a corporation's ability to make campaign contributions was an unconstitutional abridgement of speech).

[11] Thornhill v. Alabama, 310 U.S. 88, 102–03 (1940) (including peaceful labor picketing within the scope of First Amendment protection).

[12] Snyder v. Phelps, 131 S. Ct. 1207 (2011) (holding that a protest staged on a public sidewalk and directed at a military funeral was protected speech under the First Amendment).

[13] Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000) (holding that a statute prohibiting discrimination in primary voting violated political membership groups' right to free association).

[14] NAACP v. Alabama, 357 U.S. 449 (1958) (protecting the membership lists of the NAACP). *See also* NAACP v. Button, 371 U.S. 415, 444 (1963) (protecting the litigation program of the NAACP).

[15] *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 311 (1989).

ever threaten the autonomy that properly belongs to the university. Put another way, such regulations do not even trigger a constitutional inquiry. On the other hand, laws that seek, for example, to control the curriculum or the appointment of faculty, threaten the autonomy that rightly belongs to the university because these regulations, in fact, seek to control and limit the pursuit of knowledge in the university. They trigger a constitutional inquiry. So do laws regulating the admission of students. These laws deny the faculty the authority to determine who will participate in the knowledge seeking process and in that way, shape the outcome of that process.

As a general matter, the First Amendment does not place an impenetrable shield around a protected activity—it only structures the justificatory process for allowing government interferences with that activity by requiring what has become known as "strict scrutiny."[16] The First Amendment does not ban all laws regulating the press or political parties or social action organizations or even the street corner speaker—long thought to be the principal subject of constitutional protection—but only places on the government a heavy burden of justification for its interfering with the autonomy of these institutions. Such interference is allowed if, but only if, that regulation serves a compelling state purpose and is the least restrictive means for achieving that purpose. Accordingly, laws interfering with the pursuit of knowledge within the university are not necessarily barred, but rather should be scrutinized in the same way. For example, a law that requires the university to increase the number of students from disadvantaged backgrounds (e.g., the "Texas Ten Percent Plan")[17] most certainly interferes with the university's autonomy, but might well be sustained on the ground that the egalitarian purpose it serves is compelling and the method by which it achieves that end entails the least sacrifice of protected values.

An especially troublesome controversy arose in the United States in 2006 when an enterprising member of the conservative movement, one David Horowitz, hit upon a scheme that would, in effect, place the leading universities of the United States in

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[16] *See* OWEN M. FISS, *Silence on the Street Corner*, *in* LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 47, 51 (1996).

[17] TEX. EDUC. CODE ANN. § 51.803 (West 2011) (requiring the admission of an applicant to an undergraduate institution, if such applicant graduated from high school in the top ten percent of his or her class).

receivership.[18] He claimed that these universities had been hijacked by left-wing ideologues and proposed that a legal duty be imposed on all universities to employ ideologically balanced faculties, which meant, according to Horowitz and his supporters, hiring more professors from the right. Bills were introduced into Congress and in many state legislatures to achieve this end, and these measures were defended in the name of a compelling state purpose, specifically academic freedom itself. Indeed, the federal measure was called the "Academic Bill of Rights." The thought was that students had a right to hear both sides of important public issues and that this right was required by the principle of academic freedom.

In the end, none of these measures were enacted. Yet, we must be clear about why they failed or, more properly, why they should have failed. Some opposed these measures on the ground that they lacked a factual predicate—the alleged takeover of the universities by left-wing ideologues did not, in fact, exist. Others claimed that Horowitz's remedy—wholesale governmental oversight—would cause more harm than good. They believed that self-corrective measures are to be preferred and could be trusted to produce the desired ideological balance. My objection is of another character all together: for me, the production of knowledge, not ideological balance, is the goal of faculty appointments and a balance requirement would interfere with the achievement of that end and thus would violate rather than further the principle of academic freedom. Much less than a compelling purpose, I maintain that balance is not even a permissible purpose for government regulation of the university.

As I stressed at the outset, the university properly conceived is dedicated to the discovery and dissemination of knowledge. Professors are appointed to further that end and their work is to be judged solely in terms of its truthfulness and importance, without regard to achieving ideological balance among the views represented on the faculty. Sometimes balance is achieved, but this occurs in the university only as an incidental consequence or by-product of an appointment process dedicated entirely to other purposes. Although the risk is great that the norms that govern a

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[18] *See generally* Robert M. O'Neil, *Bias, "Balance," and Beyond: New Threats to Academic Freedom*, 77 U. COLO. L. REV. 985, 998 (2006). *See also* DAVID HOROWITZ, REFORMING OUR UNIVERSITIES: THE CAMPAIGN FOR AN ACADEMIC BILL OF RIGHTS (2010).

discipline might be misapplied and someone might be hired or fired because of his political views rather than academic promise or achievement, this risk is not to be corrected by imposing on the university a requirement of ideological balance; for in my view, that will compromise its dedication to truth and the advancement of knowledge.

This rejection of a balance requirement may seem odd coming from someone, such as myself, who views the press as another source of the public enlightenment presumed by democracy and, in that context, has defended a "balance" requirement.[19] According to this view, the press fulfills its constitutional duty when it presents conflicting or antagonistic views on issues of public importance. From this perspective, I have defended regulatory measures, such as the Fairness Doctrine, as constitutionally consistent—maybe even constitutionally required. It seeks to counter managerial censorship and for that purpose requires broadcasters to cover issues of public importance and to do so in a balanced way. There is, however, a crucial difference between the press and the university and it would be a mistake to treat them, for constitutional purposes, as the same.

The press in the United States is largely controlled by commercial enterprises and these enterprises are constrained by the very forces that govern all economic activity—the desire to minimize costs and maximize revenue. Newspapers and television broadcasters claim that their factual reports are true, not just conjecture, but out of a desire to minimize costs, the process of fact-checking that they employ is often less elaborate and less thorough than it should be. Responding to market pressure, the press inevitably skimps on checking the facts. Market forces also shape the coverage of the press. Anxious to maximize revenue, the managers of the press seek to enlarge their audience or define their target audience in ways that skew what they cover and how. Over time, the managers of the press become more attentive to the desires of their would-be readers or listeners than to the needs of society.

Admittedly, the university is always in search of more funds, and in that sense, has its own material needs, but properly conceived, the university is not embedded in an economic market and

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[19] *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 50–78 (1996); OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 24, 149 (1996).

constrained by the forces that govern the market. Some educational institutions are market driven, but they are not properly regarded as universities, and thus are not endowed with the protection of the principle of academic freedom. Ideally, the university is dedicated exclusively to the pursuit of knowledge, not the maximization of profits, and it is constituted, almost defined, by the critical processes that seek to distinguish knowledge from opinion and to respond to the intellectual needs of society. Imposing a balance requirement on the university, in contrast to the press, would interfere with, indeed undermine, those critical processes, and thus be at odds with the very purpose of the institution.

Some of the most distinguished universities in the United States—for example, the University of Michigan, the University of California, or the State University of New York System—are primarily government-funded. They are, in my opinion, entitled to the same measure of institutional autonomy, as are the so-called private universities such as Yale or Stanford. Similarly, I deny that a specific grant from the government to a so-called private university, such as Yale or Stanford, gives the government any more authority to govern the core activities of the university. Whatever conditions might be imposed on the grant are to be judged by the same standard that should be applied to all direct governmental regulations of the university, unconnected to any grant.[20] Economic power should not be turned into a power to control the curriculum, faculty appointments, or student admissions.

From a property perspective, such a rule may seem anomalous, for we often think, especially these days, that the wealthy are entitled to give their money to whomever they please and to subject their gifts to whatever conditions they might insist upon. Yet this very understandable impulse must be tempered by an appreciation of the imperatives of the Constitution. In establishing the university and funding it, the state is building an institution that in fact will strengthen the democratic system. We endow this institution with autonomy from external control or manipulation as a way of furthering that project. Although the creation of a state university may not be required by the Constitution, such action is,

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[20] *But see* Burt v. Gates, 502 F.3d 183 (2d. Cir. 2007) (denying an injunction that would have barred the Department of Defense from terminating funds to Yale because military recruiters had been denied access to campus).

in my view, constitutionally favored and once a university is endowed by the state, democracy requires that it be operated as a self-governing institution devoted to the discovery and dissemination of knowledge.

In the 1991 decision of *Rust v. Sullivan*,[21] the Supreme Court conceived of the grant of funds by the federal government as a lever that permitted the government to control activities of grantees. The Department of Health and Human Services issued a regulation prohibiting doctors who work for family planning clinics that had received federal funds from counseling patients to have an abortion or, even more, to engage in public advocacy on behalf of abortion as a method of birth control. Doctors charged that these restrictions interfered with their free speech rights. In a five to four decision with an opinion for the majority by Chief Justice Rehnquist, the Supreme Court upheld the power of government to impose such conditions on those receiving federal grants. Yet Rehnquist's opinion carefully acknowledged the limits of its decision and in so doing paid special tribute to the principle of academic freedom. After dismissing the doctors' First Amendment claim, Rehnquist disclaimed any intention of making government funding "invariably sufficient to justify Government control over the content of expression,"[22] and, by way of elaboration, said: "we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted . . . ."[23]

In fact, one of the most powerful affirmations of the principle of academic freedom in the annals of the Supreme Court occurred in the context of a wholly-funded state university.[24] The case arose during the McCarthy period and involved the University of New Hampshire, a wholly state-funded university. Paul Sweezy, a well-known Marxist economist and lecturer, was hauled before an investigative committee of the New Hampshire legislature and questioned about lectures he gave at that university. In the end, the Court resolved the case in favor of Professor Sweezy on a theory that complained of the investigative committee's lack of proper

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[21] 500 U.S. 173 (1991).

[22] *Id.* at 199.

[23] *Id.* at 200 (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603, 605–06 (1967)).

[24] Sweezy v. New Hampshire, 354 U.S. 234 (1957).

authorization, but not without first giving a ringing endorsement to academic freedom, which was not qualified in any way because the university was state-funded.[25]

The investigative committee challenged in this case interfered with the autonomy that properly belonged to the university. Rather than object to this investigation, however, the university chose to remain silent and leave it to Professor Sweezy to defend himself. It was he, not the university, who claimed that the legislative inquiry violated the principle of academic freedom and I see no difficulty in proceeding this way. Sometimes, university officers may choose, either out of indifference or perhaps complicity with political agents, not to assert the autonomy that properly belongs to the university. However, such autonomy from government interference endures as a protection for students and faculty in their pursuit of knowledge, and accordingly may be invoked by them.

In a case such as Sweezy's, the individual teacher claimed the autonomy of the university and used it to resist the interference of the state. Through Professor Sweezy's eyes, the state was seen as the enemy of freedom. In many cases, however, professors or students may be locked in a struggle with the officers or governing authorities of the university. In these cases, the university officers, not the state, can be seen as the enemy of freedom. These officers may, in response to an academic publication or position taken in class, threaten to dismiss a professor or expel a student. In such cases, the professor or student cannot claim a right to say whatever he wishes, nor can he claim the right not to be judged on the basis of the content of what he says. In the context of the university, there are no such rights. All speech is subject to professional evaluation and such an evaluation invariably focuses on content.[26] Still, in the struggle between the professor or student and the university, there is a First Amendment right that belongs to the individual and that properly falls within the bounds of the principle of academic

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[25] *See id.* at 250 ("The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."); *see also id.* at 263 (Frankfurter, J., concurring) ("It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 11 (1957))).

[26] *See* Byrne, *supra* note 15, at 283–84.

freedom. It is the right to be judged exclusively on the basis of professional standards—the norms of the discipline—not on the basis of political allegiances or personal predilections. Let's call this the internal branch of the principle of academic freedom.

Some see this branch of academic freedom at odds, or at least in tension, with the very notion of the university as a self-governing institution and the autonomy conferred on that institution by the Constitution.[27] But I do not see it that way. The claim of the university to autonomy from state interference is predicated on its dedication to the pursuit of knowledge. When the university's governing authorities—who, in fact, may be professors themselves—use the power at their disposal to punish or rid themselves of students or professors with whom they have political or personal disagreement, those governing authorities betray the purpose to which the university is dedicated.[28] The aggrieved student or professor making a claim against the university's governing authorities may have a lot at stake as a personal matter, but he is also protecting the knowledge-seeking activities of the university that give rise to its demand for autonomy. Although the help of state authorities (the courts) may now be sought, it is still the freedom of the university that is being protected; only now it is being protected from an internal threat—the governing authorities of the university who might be acting pursuant to outside pressure or on the basis of their own politics or sense of propriety.

The internal branch of the principle of academic freedom serves the very same purpose as does the external branch, but in fact encounters a unique problem—the so-called "state action" requirement, which views the Constitution as a constraint on the activities of the state, not private parties. In the external context, the state action requirement is easily met because the principle of academic freedom is used to shield the university from state intrusion. In *Sweezy*, for example, the principle of academic freedom was being used to stop a New Hampshire legislative committee from harassing a Marxist professor. Even in the context of the internal branch, the state action requirement will be easily satisfied where the university is wholly funded by the state because the court can regard the university and its officers as

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[27] *Id.* at 306–12, 339 (depicting the tension that exists between academic freedom of the individual and the constitutional protection of the institution's academic freedom).

[28] *See* POST, *supra* note 8, at 77–78.

instrumentalities of the state. As is true when police are charged with brutality, this linkage with the state will not be denied merely because the university officials may be contravening the official policies of the state. [29] These officials can be accused of abusing the powers that had been conferred on them by the state.

The state action requirement may, however, pose more of a problem for the internal branch of the principle of academic freedom when it is applied against a so-called private university. The courts may be reluctant to treat the officers of such a university as agents or instrumentalities of the state. Once you scratch the surface, however, you can readily see the manifold ways the state might be involved in these so-called private universities.[30] Not only are private universities the beneficiary of all sorts of public services, such as fire and police protection, but they often operate under a specific state charter that exempts them from state and municipal taxation. They may also receive significant annual income from government grants and contracts—for example, Yale received more than five hundred million dollars of federal funds in 2010.[31] Most private universities hold themselves open to all who meet its academic requirements. They all purport to serve a public purpose—education. This is not to deny any difference whatsoever between state-funded universities and ones primarily funded by private donors, but rather to emphasize the entirely public dimensions of these privately funded universities. They serve public purposes and receive public benefits and wield enormous public power. They should be seen as hybrids and should be subject to those constitutional norms, such as academic freedom, that constitute an essential part of the nation's public morality.

In this context, the state action requirement of the First Amendment should be treated as merely a technical challenge, devoid of any moral significance, and should be interpreted accordingly. Recall that although the First Amendment is stated as a prohibition only on Congress, over the years the judiciary, guided by the purposive method of interpretation, has extended it to state, county, and municipal governments, as well as the executive and

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[29] *See, e.g.*, William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 9–22 (1961) (discussing the basic principles governing state action in police brutality cases).

[30] State v. Schmid, 423 A.2d 615, 619 (N.J. 1980), *appeal dismissed*, 455 U.S. 100 (1982).

[31] *See, e.g.*, *Yale Financial Report 2009–2010*, YALE UNIV. 19 (2012) [hereinafter *Yale Financial Report*], http://www.yale.edu/finance/controller/resources/docs/finrep09-10.pdf.

judicial branches of government.[32] The judiciary understood that given the purposes of the provision, there is no reason to draw distinctions among all the units of government. In the same spirit, the state action requirement of the First Amendment should be construed, I maintain, to reach all public entities that possess the power and prestige that the great private universities of the nation do. The officers of Yale, for example, should be subject to the principle of academic freedom rooted in the Constitution as are the officers of the University of Connecticut.

In recent decades, the fear of a decision by the Supreme Court banning affirmative action by universities under the Equal Protection Clause has led many to embrace an understanding of the state action requirement of that provision that would make a sharp distinction between government-funded universities and the great private universities of the nation. Even if the Supreme Court denied the University of Michigan the right to engage in affirmative action, so the argument ran, that ruling should not bar affirmative action by Yale. This argument had enormous appeal as a purely strategic matter, but it should not obscure the public, state-like quality of the so-called private universities such as Yale and lead one to think that these universities are not required by the Constitution to respect the right of professors and students to be judged exclusively on the basis of academic criteria.

Ascertaining whether this right of professors and students has in fact been violated by university officers is no easy endeavor. Oddly, some may admit that non-academic or political criteria are being used to judge performance, in which case the only task that remains is to determine whether the use of such criteria is justified by a compelling purpose (which I believe is the case with admission or hiring policies that give a preference to racial minorities). In most instances, however, the officers or governing authorities of the university are likely to claim that the decision to dismiss a professor or to expel a student is based entirely on academic criteria. In such a case, the burden must fall on the judiciary to sort out the facts.[33]

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[32] *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (applying the First Amendment to bar the executive branch from obtaining an injunction against the press).

[33] *See* David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, *in* FREEDOM AND TENURE IN THE ACADEMY 286–87 (William W. Van Alstyne ed., 1993) ("The judiciary is more deliberative and less political . . . [and] likely to be more sensitive . . . to the need for independent critical inquiry in universities and to their democratic role as sanctuaries . . . .").

Admittedly, such a factual inquiry is indeed treacherous, but it is not unlike the inquiry in the typical employment discrimination case, which requires a court to determine whether the stated reason is the real reason for denying someone a job.

In a case involving the First Amendment claim of a candidate for Congress who had been excluded from a television debate that was to be held among three other congressional candidates, Justice Stevens, writing for himself in dissent, argued that public television stations should be required to announce in advance the criteria governing the selection of participants in such debates.[34] Such a rule might be implemented in the academic context too, for it would help a court to determine whether university officials departed from academic criteria in a particular decision discharging a professor or expelling a student. Failure to satisfy the stated criteria leads to an inference that the authorities acted on the basis of a constitutionally impermissible reason.

Sometimes professors are dismissed or not hired on the basis of statements or actions that fall wholly beyond their professional expertise—such statements or actions are sometimes referred to as "extramural speech."[35] A professor of astronomy or, to take a less fanciful example, a professor of linguistics might be discharged because he made a public speech or wrote an op-ed criticizing President Bush's or Obama's conduct of the so-called War on Terror. Or a student might be expelled, not because he does not satisfy the ordinary academic requirements of the university, but rather because he had participated in a protest, as indeed occurred on a wholesale basis in Iran following the presidential election held there in June 2009.

A committee of the American Association of University Professors has taken the position that extramural speech of faculty is protected under its rules regarding academic freedom.[36] The committee reasoned that in order to establish trust in students, professors must be free to fully express their views on matters of public importance. This line of argument of course offers no protection to the student who is expelled or denied admission on the basis of his extramural speech. Even in the case of professors, it seems strained

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[34] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 694–95 (1998) (Stevens, J., dissenting).

[35] *See* MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 73 (2009).

[36] *Id.* at 130–31.

and artificial. In any event, the committee's decision does not set aside or override the decision of the university—nor should a guild such as the American Association of University Professors have such power. Such a decision merely registers the disapproval of the professional organization and at best shames the university into changing its ways.

My conception of academic freedom makes claim to the authority of the Constitution, not just the code of a guild. As such, it empowers the judiciary to set aside a university decision. Yet I do not believe that dismissal or expulsion on the basis of extramural speech is a breach of the constitutionally-based principle of academic freedom. That principle protects the knowledge-seeking activities of the university, and thus offers the aggrieved individual no protection when the professor or student is sanctioned for action or speech that falls beyond the knowledge-seeking activities of the university, as extramural speech does, almost by definition. That individual stands before the court as a citizen and has rights as a citizen, but he is not acting as a professor or student and thus receives no protection from the principle of academic freedom.

Viewed as a citizen, the professor or student sanctioned for extramural speech should be protected in much the same way as the street corner speaker is protected. Granted, the student or professor is not being criminally prosecuted, as the street corner speaker might be, but he is being denied an opportunity to work or study in a university. The denial of that opportunity may well have harsh consequences for the individual, sometimes as harsh or severe as a few weeks or days in jail. His entire career and means of livelihood may be put in jeopardy and the courts must therefore be ever vigilant to protect against abuses of power in such cases, regardless of whether the offending institution is the Massachusetts Institute of Technology or the University of Massachusetts.

Of course, extending the principle of academic freedom to reach such cases would provide the individual with an additional measure of protection, but only at the risk of severing the principle from its foundational purpose—the protection of the knowledge-seeking activities of the university. The Constitution privileges the pursuit of knowledge, not professors and students as individuals. Academic freedom is an important source of individual freedom, but not the only one, and the recognition of its jurisdictional limits; to confine it to the freedom to teach and the freedom to learn might strengthen its force when the free university comes under threat.

In the 2006 decision of *Garcetti v. Ceballos*,[37] the Supreme Court drew a sharp distinction between the rights of citizens and the rights of employees. The case involved an employee in a prosecutor's office who was allegedly demoted on the basis of a memorandum that he had filed criticizing the police. The Supreme Court held that statements made by government employees as part of their ordinary duties are not protected by the First Amendment. Employees retain their right to speak as citizens, but only, according to the Court, when they are speaking as citizens, not employees.

My account of extramural speech emphasizes the upside of the *Garcetti* decision: stripping an individual of First Amendment rights for official speech does not deprive this individual of his First Amendment rights when he speaks as a citizen. Professors are not only employees, but also citizens and they remain free to exercise their rights as citizens to speak about matters of public importance without fear of punishment, even when that punishment consists of a loss of a job as opposed to a criminal conviction. The linguistics professor who writes an op-ed criticizing Bush's or Obama's policy regarding the War on Terror is speaking as a citizen, not as a professor and like any citizen, cannot be punished for such an activity. I also insist, however, that even as employees, professors enjoy certain rights that other employees may not have. The law professor who gives a lecture criticizing Bush's or Obama's counter-terrorism policies is acting as a professor and even though his lecture may be regarded as official or employee speech, it is protected. The official speech of the law professor, unlike that of an individual working in a prosecutor's office, is protected by the First Amendment and this extra measure of protection derives from the unique and essential role that the university plays in the democratic system.

The Court had no occasion in the *Garcetti* case to pass on this last proposition, but much as in the manner of *Rust v. Sullivan*, it expressed an anxiety about the ramifications of its decision for academic freedom.[38] As Justice Kennedy, the author of the Court's opinion in *Garcetti*, said: "[t]here is some argument that expression

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[37] 547 U.S. 410 (2006).

[38] *See id.* at 425 ("Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value . . . . 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.") (citations omitted).

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."[39]

Justice Kennedy did not pause to explain what the "additional constitutional interests" might be present when a professor is discharged on the basis of his scholarship or classroom instruction. Yet the Justice's willingness to acknowledge that in such a case there are "additional constitutional interests" is itself remarkable, especially in this age of retrenchment. As with *Rust v. Sullivan*, the acknowledgement in *Garcetti* limits the defeat of First Amendment values and at the same time testifies to the continuing vitality of the principle of academic freedom in our constitutional tradition. Such an acknowledgement reflects an intuitive understanding of the unique role that the university plays in democratic practice and the essential linkage between enlightenment and democracy. Once again, in its own hesitant way, the Supreme Court understood that a free society requires free universities.

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[39] *Id.*