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A “COMPARATIVE” ANALYSIS OF THE ACADEMIC FREEDOM OF PUBLIC UNIVERSITY PROFESSORS

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One of the topics we have been asked to address at this symposium is the academic freedom enjoyed by faculty at public universities. Now is a good time to be discussing this topic, and the University of North Carolina (“UNC”) is a particularly apt place at which to be discussing it. As would two other places I’ve spent professional time at recently—the University of Illinois at Urbana-Champaign (“U of I”), where I became the Dean of the College of Law this year, and the University of California system (“UC”), where I spent my academic career until this fall. Indeed, given the dust-ups here at UNC,¹ the controversy surrounding the (non)hiring of Steven Salaita at the U of I,² and the UC Office of the President’s guidance concerning, and possible definitions of, microaggressions,³ it is fair to say these three

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¹ The University and the state’s elected leaders have been at odds over a variety of programs and policies in recent years. For one perspective criticizing the politicians’ review of university operations, see Gene Nichol, *Gene Nichol’s Response to Recommendation by Board of Governors’ Group to Close UNC Poverty Center*, NEWS & OBSERVER (Feb. 18, 2015), <http://www.newsobserver.com/opinion/op-ed/article10876403.html>.

² For background on the Steven Salaita controversy (involving the University’s 2014 decision not to follow through with a tenured appointment for Professor Salaita based on controversial tweets and other social media utterances he made), see Report on the Investigation into the Matter of Steven Salaita, Univ. of Ill., Urbana-Champaign’s Comm. on Academic Freedom & Tenure (CAFT), <http://www.ais.illinois.edu/documents/CAFTReport.pdf> (last visited March 12, 2016) [hereinafter CAFT Report].

³ “Microaggressions,” which can lead to a legally actionable hostile learning environment, are defined for these purposes as “the everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, that communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership.” For the

great public universities lie at the epicenter of the conflict between freedom of expression and the orderly operation of public higher education.

In my (necessarily) abbreviated contribution on this topic, I'd like to examine the breadth of so-called "academic freedom" enjoyed by (even fully tenured) faculty at public universities by comparing the scope of liberties of public professors with relevant counterparts. For these purposes, I focus primarily on the liberties enjoyed by virtue of the federal Constitution—freedoms that arise from state constitutions or contract law are important to be sure, but they fall largely outside of my remarks today.

The first relevant comparison I'd like to draw is between public university faculty and public university students. It seems clear that the First Amendment, at least, protects students far more than it protects faculty. The reason for this is relatively simple—students are regulated individuals (campuses are operated like small municipalities), whereas faculty are government employees. Settled (albeit somewhat vague) First Amendment doctrine gives the government far more latitude to regulate the speech of its workers than the speech of its citizenry, both because the smooth functioning of government departments is an interest that is weighed against freedom of speech, and (in some settings) because government itself speaks through the actions of its employees. These basic notions, which find expression at the U.S. Supreme Court in modern cases in the *Pickering/Connick/Garcetti* line⁴ are captured, albeit somewhat flippantly, by the quip of Oliver Wendell Holmes, who (while serving as a state appellate judge at the time) remarked: "[A person] may

guidance the University of California Office of the (System) President (UCOP) had been giving on recognizing microaggressions and the messages they send, see the following chart that UCOP had disseminated: http://academicaffairs.ucsc.edu/events/documents/Microaggressions_Examples_Arial_2014_11_12.pdf [hereinafter, Microaggression Avoidance Guide].

⁴ The seminal case remains *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). The Court explained and refined the *Pickering* doctrinal framework in *Connick v. Myers*, 461 U.S. 138 (1983) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Taken individually and together, these rulings (and others in the same line) illustrate the latitude the government has to regulate the expressive activity of its employees in different government employment contexts.

have a constitutional right to talk politics, but he has no constitutional right to be a policeman."⁵

We need look back to Holmes's quip to see the basic point. Consider the aforementioned UC's microaggression guidance document. While vague as to the implications of noncompliance, the UC guidance memo certainly intimates that when faculty and staff use a phrase like "America is a melting pot" they are engaging in a microaggression that may be creating a legally actionable hostile learning environment. No public university could even intimate to a student (as opposed to a faculty member) that there could be punishment for using such a phrase, no matter the context in which that phrase was invoked.⁶ Nor could any public university visit negative consequences on any student for posting on social media the intemperate (and in the minds of many people anti-Semitic) things that Steven Salaita tweeted.⁷

Let us next compare public professors to professors at private higher education institutions. Here too, it seems that the public professoriate is entitled to less in the way of First Amendment protections. Again, think about the microaggression memo or the Salaita affair: Can anyone imagine government trying to directly sanction Duke University (to pick a nondescript private school up the road) professors for saying, regardless of context, "I believe the most qualified person should get the job" (another specific example of potential microaggression according to the UC) or for extreme and offensive tweets about deeds of Israelis? Or, go back a few generations—it is no surprise that the flashpoint over state-imposed loyalty oaths at universities tended to occur at public institutions.⁸ Even in the 1950's, my guess is that government-mandated loyalty oaths at Harvard would have been a tough sell. And once more, the reason for the

⁵ *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

⁶ See *Microaggression Avoidance Guide*, *supra* note 3.

⁷ See *supra* note 2 and accompanying text.

⁸ See *Vikram Amar & Alan Brownstein, Academic Freedom*, 9 *Green Bag 2d* 17, 22–23 (2005).

asymmetrical treatment is the related doctrines of public-employee speech and government speech.⁹

Now consider the First Amendment protections of public professors compared to other public employees. At first blush, it would seem that here, public professors are at least on equal terms with the group (other public employees) to which they are being compared. After all, if the employer/employee relationship gives government certain leeway to regulate, that would seem to apply to non-professorial employees too. True enough, but closer inspection reveals that under the *Pickering/Connick/Waters* line of cases,¹⁰ professors may fare more poorly than many other government employees, for two reasons. First, government discrimination concerning the content of public professor speech is inevitable and necessary (in a way that is not true for other public employees). Public employers (whether they be Boards of Governors or University Presidents or Deans) invariably must make decisions about hiring, promotion, and retention of public professors based on the content (even the viewpoint) of what these professors say and write. The questions asked at hiring and promotion stages—are the professor's expressed views scientifically plausible, supported, rigorously reasoned, adequately attentive to counterargument, etc.—are, at their core, content-based. Perhaps a line could be drawn between decisions based on academic rigor and decisions based on partisan politics, but this is a hard line to hold. For example, many people think that the initial constitutional challenge to Obamacare was weak analytically (even though it ultimately got four votes at the Supreme Court).¹¹ If, five years ago, I (assuming I were at that time a high-level

⁹ *Id.* Notice that saying private professors enjoy more freedom than public ones does not mean that private professors enjoy more freedom than other private individuals. It is often asserted that “academic freedom” gives special rights to academics, but it is far from clear whether judicial doctrine backs that claim up, at least as a First Amendment matter.

¹⁰ See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); and *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (illustrating the latitude the government has to regulate the expressive activity of its employees in different government employment contexts).

¹¹ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). For one essay (before the court's ruling) explaining the weakness of the plaintiffs' challenge,

administrator) decided not to go forward with someone's tenure because I thought her article laying out what she thought was a forceful constitutional challenge to Obamacare was poor scholarship, would I be guilty of violating her academic freedom?

Some lines can be drawn. For an administrator to attach negative career consequences to a faculty member's political lobbying efforts against Obamacare undertaken after the workday is a different matter. A dean cannot punish faculty for giving money to Donald Trump or to Hillary Clinton. That is private expressive activity, and even public professors are entitled to it.¹²

But (and this is the second reason that public professors may enjoy less latitude than other public employees) out-of-school speech can sometimes affect credibility in school, and the *Pickering/Connick/Waters* line of cases recognizes that government may sometimes take account of "off-the-job" expression in deciding whether a person is fit to perform a public job.¹³ If a street cleaner is a leader in the local chapter of the KKK outside of school, he is not (by virtue of his KKK activities alone) incapable of being an effective street cleaner. But if a public university professor is a KKK leader, can he really be effective in teaching black students in a public university school? Even the report by the University of Illinois Committee on Academic Freedom and Tenure on the Salaita matter (which contained significant criticism of the U of I administration) tried to distinguish between "civility," which was too vague a basis on which to rescind a faculty job offer, and "professional fitness," on which off-the-job and private expressive activities could reasonably bear.¹⁴ If this is so, given the inherent nature of a professor's job as having to deal with a wide range of students in settings of mutual trust, public

see Vikram D. Amar, *Reflections on the Doctrinal and Big-Picture Issues Raised by the Constitutional Challenges to the Patient Protection and Affordable Care Act (Obamacare)*, 6 FLA. INT'L U. L. REV. 9 (2010).

¹² Even under the restrictive Hatch Act (which limits certain off-hours political activities of federal employees), campaign contributions are permitted. See Political Activity and the Federal Employee, U.S. Office of Special Counsel, http://www.cdc.gov/about/ethics/pdf/lunch_and_learn/haflyer.pdf (last visited Feb.28, 2016).

¹³ See, e.g., *Pereira v. Comm'r of Soc. Servs.*, 733 N.E.2d 112 (Mass. 2000).

¹⁴ See CAFT Report, *supra* note 2, at 23–29.

professors must be more careful than many (or perhaps even most) other public employees in what they say and do, even when they are away from the worksite.

Given the three comparisons I have offered in which public professors fare worse than their counterparts, the very term “academic freedom” as applied to the public professoriate may seem inapt—usually we think of “freedoms” as especially generous liberties or licenses, not watered-down versions. Yet, there are at least three important ways in which public professors do enjoy special “academic freedoms” that are worth mentioning before I conclude.

First, even within the federal Constitution, there may be protections that arise not from the First Amendment, but from due process/notice principles. Most people talk about academic freedom in terms of a freedom to express, but perhaps the better approach is to think about it as a freedom to know what you can and can’t express. Vagueness and notice protections do have special applicability to the public education setting (both at universities and at secondary schools—think about K-12 teachers who get in trouble for teaching controversial topics in ways later deemed improper by local authorities). Courts do and should make sure that public professors are not misled into expressing themselves in ways that later could result in their demise. We need (and the Constitution may require) clear ex-ante standards that eliminate chilling effects for public academics if the public academy has any meaningful role to play in democracy.

Thus, as Eugene Volokh has pointed out, one of the most troubling aspects of the UC’s microaggression guidance document (even if the UC can constitutionally define and punish microaggressions quite broadly) is the chilling effect the inscrutability of the document creates.¹⁵ Even if government has the authority to control the expression of its public professors, it should have to do so clearly to avoid due process problems and also so that it takes the political heat for its censorial decisions. In a related vein, in the Salaita affair,

¹⁵ See Eugene Volokh, UC Teaching Faculty Members Not to Criticize Race-Based Affirmative Action, Call America “Melting Pot,” and More, Wash. Post (June 16, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/16/uc-teaching-faculty-members-not-to-criticize-race-based-affirmative-action-call-america-melting-pot-and-more/>.

putting aside the First Amendment, one of Mr. Salaita's strongest claims may have arisen from implicit promises made in the offer letter he received about the extent to which his freedom of expression would be allowed.¹⁶ There may be a freedom to know the consequences of speech even when there is no freedom to speak.

Coming back to the actual right of expression, both episodes may suggest yet another important kind of academic freedom—freedom that is grounded not in free speech or clear notice principles, but in non-constitutional sources altogether. As I mentioned earlier, state constitutions, contract law, industry practice, and the like may give rise to legally binding rules that protect public professors, even as the contours of such rules are going to vary by state and by university and perhaps also by campus or even department. Academic freedom may be an important idea even apart from any constitutional footing it enjoys.

Finally, public professors enjoy "free" speech in a very powerful sense of that term—the speech they undertake is free in that it is publicly subsidized, and they don't have to pay for it themselves. Most often, when we think about free speech we mean freedom from government intrusion, not freedom from market pricing (as when we refer to a "free lunch"). But, in today's real world, market constraints are often more meaningful than government limits. This is true in electoral politics, and also true in academic research and discovery. In the latter half of the twentieth century, state governments (and also the federal government through various federal agencies) accounted for a huge share of the necessary financial support for the expressive work done by America's public universities and colleges.¹⁷ Alas, that seems to have changed over the last few decades (especially with respect to funding at the state level, where costs have been shifted to students and their families),¹⁸ and if our ultimate goal

¹⁶ The offer letter could be read to have incorporated academic freedom principles embodied in the policies of the American Association of University Professors.

¹⁷ See National Science Board, Trends and Challenges for Public Research Universities (National Science Foundation 2012), <https://www.nsf.gov/nsb/publications/2012/nsb1245.pdf>.

¹⁸ *Id.*

is a high volume of creative, provocative and cutting-edge discovery and expression, the fiscal element is as or more important than the regulatory.