

Easterbrook on Academic Freedom

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INTRODUCTION

Does the First Amendment to the US Constitution protect a distinct notion of “academic freedom”? Of late, courts and commentators have cast doubt on an individual First Amendment right of academic freedom. When federal courts have directed friendly attention to the matter, the result has been bromidic endorsement with scant analytic heft. The goal of this Essay is to identify an organizing principle for a constitutional jurisprudence of academic freedom. For unlike Holmes’s “law of the churn,”¹ an independent constitutional doctrine of academic freedom is plausible. It could find inspiration in recent jurisprudence of Judge Frank Easterbrook, who has penned four opinions touching on the scope of academic freedom in the university setting.²

At first blush, these cases seem unlikely tributaries to follow to academic freedom’s reinvigoration. Unlike other Seventh Circuit case law on academic speech,³ Easterbrook’s opinions leverage academic freedom *against* individual rights claimants. It is the (state-run) educational institution that benefits from a gloss of academic freedom to sanction speakers based on their speech.⁴ The opinions’ claims about academic freedom, moreover, are not framed in constitutional terms. Nevertheless, the cases provide a basis for an imaginative reformulation of academic freedom as a constitutional concept despite, or even because of, their counterintuitive results. They invite a strategy of judicial protection of academic freedom by ensuring that legal or governmental action neither displaces, nor excessively burdens, the profes-

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¹ See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv L Rev 457, 474–75 (1897).

² See *Hosty v Carter*, 412 F3d 731 (7th Cir 2005) (en banc); *Feldman v Ho*, 171 F3d 494 (7th Cir 1999) (“*Feldman II*”); *Webb v Board of Trustees of Ball State University*, 167 F3d 1146 (7th Cir 1999); *Feldman v Bahn*, 12 F3d 730 (7th Cir 1993) (“*Feldman I*”).

³ See, for example, *Clark v Holmes*, 474 F2d 928, 931 (7th Cir 1972) (limiting the scope of “academic freedom” because of the “special characteristics of the environment,” including the existence of a “captive audience”).

⁴ See, for example, *Feldman I*, 12 F3d at 732–33 (“Every university evaluates *and acts* on the basis of speech by members of the faculty.”).

riat's free exercise of professional judgment.⁵ The resulting constitutional norm of academic freedom would be an exercise in Burkean minimalism— aspiring to preserve a professional culture our society values and protects through constitutional precommitment.⁶ This understanding of academic freedom's constitutional status in both private and public institutions would push judges to distinguish between professional and bureaucratic judgments and allow speech to be sanctioned based only on the former.⁷ Judges thus would trim their sails when navigating claims challenging the exercise of professional academic judgment, but closely scrutinize nonprofessional efforts to regulate academic speech.

The core idea is hardly novel. And in elaborating Judge Easterbrook's arguments into constitutional fabric, I make no claim that he himself would endorse my aggressive constitutional reading. Judge Easterbrook might treat the cases discussed below as exercises in statutory interpretation informed by social policy. But the fragmentary and hesitant state of the jurisprudence suggests that this is a propitious moment for reclaiming constitutional ground for academic freedom. Sustenance must be drawn wherever it may be found.

Unsolved doctrinal questions abound even after the analysis. Most obviously, I have nothing here to say about which institutions should receive constitutional solicitude (seminaries? think tanks?), although my insistence on professional boundaries may have some resolving power.⁸ Nor do I have anything to say here about what general normative theory should shape the First Amendment. It is enough that many such theories see value in preserving a tradition of academic production independent of statist control. My modest aspiration is to supply an easily formulated organizing principle for the doctrine that may then be challenged, disregarded, or refined.

I. DOCTRINAL ACADEMIC FREEDOM

Casual perusal of the Federal Reporters today suggests academic freedom is a legal concept in critical condition. Its constitutional status is under siege in the Supreme Court. It is frankly repudiated by leading circuit court judges. Jurists scoff at the prospect of indolent academics—

⁵ Like the argument for free exercise of religion, the argument here is that academic freedom demands both negative liberties and accommodations.

⁶ See Cass R. Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before* 36 (Princeton 2009) ("Burkean minimalists believe that constitutional principles must be built incrementally and by analogy, and with close reference to long-standing practices.").

⁷ See Robert C. Post, *Subsidized Speech*, 106 Yale L J 151, 172 (1996).

⁸ See note 101.

glutted at faculty lunches on oysters, aphorisms, and *amour propre*—being granted constitutional entitlements greater than the riffraff. Commentators, even sympathetic ones, proffer lukewarm defenses.

First, the Supreme Court's record on academic freedom is thin. In 1952, the Supreme Court rejected a freestanding academic freedom right, and wholly subsumed state-employed academics into the law of government employment.⁹ Under then-prevailing law, state employment was a privilege.¹⁰ Professors had “no right to work for the State” but remained “at liberty to retain their beliefs and associations and go elsewhere.”¹¹ Subsequent cases, however, endorsed academics' freestanding constitutional interest in scholarly production.¹² Unlashed from government-employment doctrine, constitutional treatment of academics' speech seemed fated to trace a distinctive arc.

It was not to be. No cases build substantially on the early precedent to explain why or how academic speech is distinct.¹³ In 2006, moreover, the Supreme Court, in *Garcetti v Ceballos*,¹⁴ narrowed First Amendment protection of government employees' speech rights by holding that speech made pursuant to “official duties” warranted no First Amendment shelter.¹⁵ *Garcetti* cast a shadow on state-employed academics' status. As Justice David Souter cautioned in his *Garcetti* dissent, academic production at state universities is necessarily “pursuant to . . . official duties.”¹⁶ Excluding such speech from the First Amendment's compass would, by extension, strip constitutional protection from most of state academics' speech. This would have the peculiar consequence of creating a wide asymmetry between the state-employed professoriat and its private sector counterparts, who benefit from generally applicable First Amendment protection against state intrusions on their speech.¹⁷ Even though the *Garcetti* majority pre-

⁹ See *Adler v Board of Education of City of New York*, 342 US 485, 492 (1952).

¹⁰ *Id.*

¹¹ *Id.*

¹² See, for example, *Keyishian v Board of Regents of the University of the State of New York*, 385 US 589, 603 (1967); *Sweezy v New Hampshire*, 354 US 234, 250 (1957); *id.* at 261–64 (Frankfurter concurring).

¹³ See *University of Pennsylvania v EEOC*, 493 US 182, 198–99 (1990) (rejecting a First Amendment–based privilege for peer-review materials but declining to define the “precise contours” of an academic-freedom right to be unencumbered by government attempts to influence speech); *Minnesota State Board for Community Colleges v Knight*, 465 US 271, 287 (1984) (rejecting a First Amendment right of participation in academic governance).

¹⁴ 547 US 410 (2006).

¹⁵ *Id.* at 423.

¹⁶ *Id.* at 438–39 (Souter dissenting).

¹⁷ *Garcetti* concerns the disciplinary authority of a state employee's supervisors. The analog in the private sector is the university's administration. The asymmetry emerges because in the state university context, an institution's administration is an unmediated conduit for influence by

permitted consideration of academic speech, the circuit courts have divided on whether its logic extends to academic speech.¹⁸

Supreme Court repudiation of academic freedom, moreover, would not entail high stare decisis costs. Foundational opinions concerning academic freedom from the Warren Court can be explained by other doctrines: *Keyishian v Board of Regents of the University of the State of New York*¹⁹ hinges on vagueness.²⁰ *Sweezy v New Hampshire*²¹ turns on overbreadth.²² As the Fourth Circuit Court of Appeals summarized matters, “The Supreme Court has never set aside a state [or federal] regulation on the basis that it infringed a First Amendment right to academic freedom.”²³

In two circuit courts, moreover, constitutional protection of academic freedom is already on the ropes. In the Fourth Circuit, a pre-*Garcetti* en banc court rejected academic freedom “not . . . [as] a professional norm, but . . . as a constitutional right” that is “enjoyed by only a limited class of citizens.”²⁴ Hence, that court suggested, members of a state university’s faculty have no right to determine the contents of their teaching or their scholarship.²⁵ Concurring separately, Judge J. Michael Luttig emphasized the public’s right, correlative with its financial subvention of academic salaries, to direct the content and ends of academic research.²⁶ Notably, in repudiating the constitutional valorization of academic freedom, the Fourth Circuit invoked and relied upon the existence of a robust “professional norm” of academic freedom.²⁷ On this reasoning, existence of a separate professional norm defended by the American Association of University Professors

legislatures, while in a private university, a professor would have a constitutional defense against like legislative interference.

¹⁸ Compare *Renken v Gregory*, 541 F3d 769, 774 (7th Cir 2008); *Hong v Grant*, 516 F Supp 2d 1158, 1167–68 (CD Cal 2007) with *Lee v York County School Division*, 484 F3d 687, 694–95 n 11 (4th Cir 2007). See also *Gorum v Sessoms*, 561 F3d 179, 185–86 (3d Cir 2009) (applying *Garcetti* to governance and administrative speech).

¹⁹ 385 US 589 (1967).

²⁰ See *id.* at 599–600.

²¹ 354 US 234 (1957).

²² See *id.* at 246–47. Other cases are also amenable to recategorization under other First Amendment rules. See *Whitehill v Elkins*, 389 US 54, 59–62 (1967) (holding that a statute that required state employees, including university professors, to take an oath of loyalty was overly broad because it proscribed mere “alteration” of the government and not simply violent overthrow); *Shelton v Tucker*, 364 US 479, 485–86 (1960) (noting that a teacher’s freedom of association can not be limited by forced disclosure to the school board).

²³ *Urofsky v Gilmore*, 216 F3d 401, 411–12 & n 13 (4th Cir 2000) (en banc).

²⁴ *Id.* at 411 & n 13.

²⁵ *Id.* at 414.

²⁶ *Id.* at 424 (Luttig concurring).

²⁷ *Urofsky*, 216 F3d at 410–11, citing J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 Yale L J 251, 262–64, 273–79 (1989).

is a substitute for legal protection.²⁸ In the DC Circuit Court of Appeals, the doctrine has not gone so far. In litigation challenging a ban on travel to Cuba, Judge Laurence Silberman echoed Judge Luttig's concurrence, proposing that a state legislature can control the content of classroom teaching and doubting whether "'academic freedom' is a constitutional right at all."²⁹ While Judge Silberman was writing a concurrence, his stature and influence as a jurist on the DC Circuit signals a reasonable possibility of further doctrinal shifts in that important federal appeals court.³⁰

There are further barriers to academic freedom's legal endorsement. Problems of academic freedom arise at a conflicted nexus of interlocking constitutional doctrines and factual circumstances. This complexity raises the cost of crafting a coherent doctrinal berth for academic freedom. In particular, four lines of constitutional doctrine entangle and impinge upon a clear view of constitutional academic freedom.

First, as explored above, the new rule of *Garcetti* for government employee speech puts into question the relationship between the general law of government employment and the specific status of state-employed academics. With conflicting circuit precedent already coalescing, further litigation or certiorari consideration of the issue seems likely.

Second, and relatedly, the Supreme Court increasingly accords "government speech" its own distinctive treatment. Where government "effectively control[s]" the content of a third party's speech, a majority of the Court in recent cases,³¹ over narrow concurrences and vigorous dissents,³² has treated that speech as "government speech" insulated from First Amendment challenge.³³ It remains unclear what must be the case for speech to be properly attributed to the government such that the speaker is treated as a proxy meriting no constitutional entitlement of her own.³⁴ Judge Luttig, at a minimum, would treat academic production as in effect government speech. But state subsidization of speech alone does not strip a speaker of constitution-

²⁸ By extension, judicial solicitude for the First Amendment should be negatively correlated with revenues of the ACLU.

²⁹ *Emergency Coalition to Defend Educational Travel v Department of the Treasury*, 545 F3d 4, 19–20 (DC Cir 2008) (Silberman concurring).

³⁰ But see *id.* at 14–15 (Edwards concurring) (defending academic freedom).

³¹ *Pleasant Grove City, Utah v Sumnum*, 129 S Ct 1125, 1134 (2009); *Johanns v Livestock Marketing Association*, 544 US 550, 560 (2005).

³² See, for example, *Sumnum*, 129 S Ct at 1139 (Stevens concurring); *Livestock Marketing*, 544 US at 571 (Souter dissenting).

³³ See, for example, *Sumnum*, 129 S Ct at 1134; *Livestock Marketing*, 544 US at 560.

³⁴ See, for example, *Livestock Marketing*, 544 US at 567–68 (Thomas concurring).

al protection.³⁵ Some speakers are constitutionally entitled to state funding.³⁶ The net result of the “recently minted”³⁷ government speech doctrine is thus a web of increasing analytic complexity that the Court has yet to resolve fully.

Third, some speech that might be encompassed by academic freedom arises in contexts that might also be characterized as designated public forums. For example, faculty involvement with student groups may implicate public forum issues.³⁸ Or scholars might claim a right to involvement in governance issues by asserting that some faculty-administration colloquia are public forums.³⁹ The case law to date has generated no organizing rule for the interaction of these concepts.

Finally, the academic environment does not involve mere binary oppositions between constitutional rightsholders and the state. Rather, it is characterized by polycentric conflicts between multiple rightsholders—students as well as professors—and differently situated components of the state. Professors speak in multiple, overlapping contexts ranging from the classroom to the faculty workshop to the increasingly common blog. Students currently can raise constitutional objections to decisions about speech in or around classrooms⁴⁰—including the assignment of required texts⁴¹—or the allocation of intramural speech opportunities.⁴² Decisions about how university dollars are used to fund third-party speech may also be vulnerable to constitutional challenge by fee-paying students.⁴³ The state, too, is polyglot. When a state university’s faculty votes to deny a colleague tenure, they speak in a professional timbre. When a state legislature, perhaps seizing on Judge Luttig’s suggestion, directs scientists to find evidence of global warming, other considerations are in play. Diverse disputes may demand fine judgments to balance the interests of students, teachers, and institutions.

³⁵ See, for example, *FCC v League of Women Voters of California*, 468 US 364, 398–99 (1984) (holding that radio stations cannot be prohibited from editorializing because they receive federal funds); Post, 106 Yale L J at 154 (cited in note 7).

³⁶ See, for example, *Rosenberger v Rectors and Visitors of University of Virginia*, 515 US 819, 828–37 (1995) (holding that denial of funding to a student magazine violated the First Amendment).

³⁷ *Summum*, 129 S Ct at 1139 (Stevens concurring).

³⁸ See *Widmar v Vincent*, 454 US 263, 267–68 n 5 (1981).

³⁹ See *Knight*, 465 US at 281.

⁴⁰ Compare *Widmar*, 454 US at 267–68 n 5 (noting that a university campus operates as a public forum for student speech) with *Board of Trustees of the State University of New York v Fox*, 492 US 469, 475–81 (1989) (upholding a restriction on nonstudent commercial speech on campus).

⁴¹ Consider *Yacovelli v Moeser*, 324 F Supp 2d 760, 764 (MD NC 2004) (rejecting a First Amendment challenge to a book assignment in a mandatory freshman class).

⁴² See *Rosenberger*, 515 US at 828–37. These are not best characterized as “academic freedom” cases, but rather “student speech” cases under a separate line of First Amendment doctrine.

⁴³ See *Board of Regents of the University of Wisconsin System v Southworth*, 529 US 217, 233 (2000).

These doctrinal complexities are compounded by a reticulated and constantly morphing factual backdrop. The role of higher education in American society has changed dramatically in the last century. In the first seven decades of the twentieth century, for example, the size of higher education and its impact on the population grew significantly. Whereas 5 percent of the cohort born in the first decade of the twentieth century graduated from a college, the respective proportion of the cohort born in the late 1960s and early 1970s was almost six times as large.⁴⁴ “Variety and competition,” most significantly between public and private institutions, has also “characterized the U.S. system of higher education almost since its origin.”⁴⁵ The balance of public and private provision remains in flux. The fraction of students in public institutions rather than private colleges rose from 22 to 70 percent between 1900 and 1975.⁴⁶ In public institutions, different mechanisms of legislative control over a university’s administration can be imagined. A legal conception of academic freedom must therefore register both the commonalities and differences between public and private institutions.⁴⁷ It must explain how the generally applicable speech rights of state employees and private actors are either ratcheted down or amplified when it comes to academics.⁴⁸ Protection of faculty against public institutions’ decisions about research and teaching might also create an asymmetry between faculty and teachers at private institutions, who must secure their independence without the aid of constitutional law.

Faced with this fluid complexity, a reasonable judge might note the paucity of publicized incidents of academic freedom’s infringement.⁴⁹ She might be reassured by Robert Post and Matthew Finkin’s

⁴⁴ Claudia Goldin and Lawrence F. Katz, *The Race between Education and Technology* 248–49 (Belknap 2008). After 1980, the growth rate of the proportion of a cohort entering college slowed, and the proportion of freshmen graduating grew. Andrew Hacker, *Can We Make America Smarter?*, NY Rev Books 37, 37 (Apr 30, 2009).

⁴⁵ Goldin and Katz, *Education and Technology* at 257 (cited in note 44).

⁴⁶ Id at 266. Under these circumstances, it is hardly clear what effect constitutional deregulation or its converse has on the private sector. See David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom under the First Amendment*, 53 L & Contemp Probs 227, 268–71 (1990).

⁴⁷ For example, in a public university, faculty members are state actors when they hire and fire colleagues. They are constitutional rightsholders when hired or fired.

⁴⁸ For this reason, it is simply not enough to say, as Stanley Fish has, that “‘constitutional academic freedom’ is a non-topic.” Stanley Fish, *Academic Freedom: How Odd Is That?*, 88 Tex L Rev 171, 183 (2009). At the very least, there is a need to decide whether—and to explain why—generally applicable rules that protect state employees and private citizens in their professional capacities extend to scholars.

⁴⁹ Although this may be the result of a presumed backstop of legal protection; that is, the professional standard only survives thanks to the shadow of legal liability.

recent defense of the professional norm of academic freedom.⁵⁰ She might further be comforted by Stanley Fish's brisk judgment that any "effort to transform the professional concerns of scholars and teachers into constitutional rights" is "doomed."⁵¹ She might draw the conclusion from their analyses that special constitutional solicitude for academic speech is unwarranted given the sedulous defense of the professional norm by civil society. Discrete silence may seem the least costly modality of judicial valor.

II. EASTERBROOK ON THE ACADEMY

Judge Easterbrook's decisions provide a lens for reconsideration of the constitutional salience of academic freedom. Their author, a founding figure in the law and economics movement, is not typically associated with expansive views of most individual constitutional liberties.⁵² In his academic writings, Judge Easterbrook has conceptualized judicial review as constrained by the need to persuade other actors (Congress, the Presidency, the people) of its net benefits. He proposed that the judicial role in constitutional law be circumscribed to "only the portion of the text or rule [in the Constitution] sufficiently complete and general to count as law."⁵³ This is hardly an ample imagining of the judicial role in protecting individual liberties.⁵⁴

Judge Easterbrook's analysis of academic freedom draws the sting from one complaint about its constitutionalization: umbrage sparked by professors' "audacity" in asserting "a constitutional right enjoyed by only a limited class of citizens."⁵⁵ In four cases, Judge Easterbrook has identified and endorsed the protection of academic freedom as an aim of constitutional significance. But that end is accomplished not simply by expansion of individual claims against state-run institutions. Rather, the court of appeals, with Easterbrook writing, has *rejected* individual claims by professors and students in order to preserve academic freedom. On this view, academic freedom is no unmitigated boon for slack-jawed intellectual sybarites. Bivalent, it licenses both judicial hedging of individual rights and forms a basis for individual constitutional rights claims. Elaboration of Judge Easterbrook's

⁵⁰ See Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom* 8–9 (Yale 2009).

⁵¹ Fish, 88 Tex L Rev at 183 (cited in note 48).

⁵² But see *American Booksellers Association, Inc v Hudnut*, 771 F2d 323, 328 (7th Cir 1985) (invalidating and denouncing an Indianapolis antipornography statute as "thought control").

⁵³ Frank H. Easterbrook, *Abstraction and Authority*, 59 U Chi L Rev 349, 372–73, 376 (1992).

⁵⁴ See, for example, Frank H. Easterbrook, *Substance and Due Process*, 1982 S Ct Rev 85, 117 (doubting that legislatures will procedurally underprotect entitlements).

⁵⁵ *Urofsky v Gilmore*, 216 F3d 401, 411 & n 13, 412 (4th Cir 2000) (en banc).

approach to academic freedom hence provides a useful avenue for reconsideration, and eventual doctrinal reconceptualization, of academic freedom.

Three of the four cases touching on academic freedom decided by Judge Easterbrook center on professors contesting adverse employment decisions. A fourth concerns students' speech rights. The first two cases, decided in December 1993 and March 1999, arose from a suit filed by former mathematics professor Marcus Feldman, who upon his dismissal from Southern Illinois University for making an unfounded charge of plagiarism sued "everyone in sight."⁵⁶ In the first round of litigation, Judge Easterbrook rejected as inapposite the then-applicable balancing test for constitutional protection of government employee speech, which hinged on whether the speech was "of public interest."⁵⁷ Investigations of plagiarism accusations such as Feldman's involved "no categorical answers," explained Judge Easterbrook.⁵⁸ Rather, the appropriateness of disciplinary action rested on "a process of investigation and deliberation" as to whether the accuser acted with due care and whether the accused was indeed culpable.⁵⁹ In the university context, the constitutional law of government employee speech furnished an insufficiently granular tool. As a result of the complexity of the situation, Judge Easterbrook held that qualified immunity for Feldman's First Amendment claims was appropriately awarded.⁶⁰

In the second iteration of Feldman's suit, arising after a jury trial based on a recast theory of liability, Judge Easterbrook threw out a jury award against the chair of the mathematics department of Southern Illinois University in his individual capacity.⁶¹ The First Amendment, reasoned Judge Easterbrook, "does not commit to decision by a jury every speech-related dispute [in a university]. If it did, that would be the end of a university's ability to choose its faculty."⁶² Chastising the district court for inattention to his December 1993 opinion, Judge Easterbrook held that the university's denial of continued employment to Feldman was "inevitably concerned with speech and so central to a university's mission that the university's role as employer

⁵⁶ *Feldman v Bahn*, 12 F3d 730, 731 (7th Cir 1993) ("*Feldman I*"). See also *Feldman v Ho*, 171 F3d 494, 495 (7th Cir 1999) ("*Feldman II*").

⁵⁷ *Feldman I*, 12 F3d at 733.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 733-34.

⁶¹ See *Feldman II*, 171 F3d at 498.

⁶² *Id.* at 496.

dominates.”⁶³ In both iterations of Feldman’s case before the Seventh Circuit, the distinctive environment of the university shaped the otherwise-applicable law of government employee speech to the detriment of the plaintiff.

The third case involved another disgruntled faculty litigant, Gary Webb, whose complaint “[laid] blame on almost everyone but himself” for the “collapse in cooperation and decorum” within Ball State’s criminology department.⁶⁴ Webb and coplaintiffs sued on the basis of perceived adverse actions arising out of a complex and protracted intramural dispute.⁶⁵ Again, Judge Easterbrook’s opinion, this time denying the interlocutory relief of reinstatement to plaintiff Webb,⁶⁶ stressed the university’s interest “as employer” in ensuring that its faculty “devote their energies to promoting goals such as research and teaching” unencumbered by collateral internecine disputes.⁶⁷ The analysis in Webb’s case was framed as an application of the “government interest” prong of the generally applicable balancing test then used in government employee speech cases.⁶⁸ Despite coloring within the lines set by doctrine, the opinion again articulates a conception of the university’s role and responsibilities that is distinct from other government employment.

The fourth case involved students’ First Amendment interest in publishing a university newspaper without prior scrutiny by the university’s administration.⁶⁹ The central issue presented by the case—which involved a university administrator’s effort to prescreen the contents of a campus newspaper—was doctrinal: should *Hazelwood School District v Kuhlmeier*,⁷⁰ a Supreme Court decision narrowly reading high schoolers’ speech rights,⁷¹ be extended to the university context? The result of expanding *Hazelwood* and cabining speech rights was the grant of qualified immunity to the defendants.⁷² As in *Webb* and both *Feldman* cases, Judge Easterbrook’s analysis again

⁶³ *Id.* at 497–98. One reading of the case would stress that the same result would arise in other contexts, and that the quoted language is mere verbiage without consequence. Even if that is so, the verbiage provides a useful theoretical basis for constitutionalizing academic freedom.

⁶⁴ *Webb v Board of Trustees of Ball State University*, 167 F3d 1146, 1147–48 (7th Cir 1999).

⁶⁵ See *id.* at 1148–49.

⁶⁶ *Id.* at 1150.

⁶⁷ *Id.*

⁶⁸ *Webb*, 167 F3d at 1150, citing *Connick v Myers*, 461 US 138, 146 (1983).

⁶⁹ *Hosty v Carter*, 412 F3d 731, 732–33 (7th Cir 2005) (en banc).

⁷⁰ 484 US 260 (1988).

⁷¹ *Id.* at 266–67.

⁷² *Hosty*, 412 F3d at 739 (granting qualified immunity because “the implementation of *Hazelwood* means that both legal and factual uncertainties dog the litigation”).

sprang from a distinctive conception of the university's autonomy in conducting its overall mission of "teaching and scholarship."⁷³

A common thread links these opinions: there is a consistent conception of the social function of the university, whether public or private, and the respect owed by federal courts to professional judgments. This conception merits exploration and elaboration as a basis for a robust, independent constitutional doctrine of academic freedom.

This conception of constitutional academic freedom animating Judge Easterbrook's opinions might be reformulated as follows: in academic institutions, a collegial body of professionals both generates and evaluates new knowledge in the form of speech under conditions of shared professional rules and norms. The institutional environment sustains continued production of new knowledge in accord with standards and metrics of quality derived from shared academic traditions. Constitutional adjudication of individual rights claims arising from speech in an academic institution must be sensitive to the effects of government action, whether legislative or judicial in origin, upon the academy's discursive ecosystem. It must protect the ongoing collective application of professional norms within the institutional setting of the university regardless of whether it is private or public. On occasion this means curtailment of individual professors' constitutional rights. Other times it means their expansive vindication.

To elaborate, the university is characterized by a peculiar, perhaps unique, conjunction of two conditions. First, academics not only "speak and write for a living and are eager to protect both public and private interests in freedom to stake out controversial positions," but also "evaluate speech for a living" by, among other things, grading students, editing journals, and rejecting poor-quality scholarly papers.⁷⁴ While most institutional extrusions of government "could not penalize any citizen for misunderstanding the views of Karl Marx or misrepresenting the political philosophy of James Madison, . . . a Department of Political Science can and should show such a person the door."⁷⁵ A university also acts on the basis of speech's content when it polices academic speech for plagiarism⁷⁶ and when it regulates the quality of teaching.⁷⁷ As a result, viewpoint discrimination is both endemic and unavoidable in a university setting.

⁷³ Id at 736.

⁷⁴ *Feldman I*, 12 F3d at 732.

⁷⁵ Id at 732–33.

⁷⁶ See *Pugel v Board of Trustees of the University of Illinois*, 378 F3d 659, 668 (7th Cir 2004) (holding that the First Amendment was not violated by a university's punishment of a graduate student for falsifying results).

⁷⁷ See *Trejo v Shoben*, 319 F3d 878, 884–85 (7th Cir 2003).

Second, power to sanction or reward on the basis of speech is vested *solely* in those with academic credentials or those acting on their behalf in either a public or private setting.⁷⁸ They exercise that authority only on the basis of academic norms and criteria. No other government employees are vested with equivalent power to sanction or reward on the basis of academic speech. To the contrary, Judge Easterbrook explains, it is up to the faculty alone, not nonprofessional legislators or juries, to ascertain whether speech satisfies an “institution’s standards of quality”⁷⁹ and to exercise the privilege of expertise.⁸⁰ Democratic credentials are a positive disqualification when it comes to judging academic speech.

Academic freedom here demands both the protection of individual speech from exogenous (that is, nonprofessional) censoring, and the insulation of a “university’s academic independence” in the exercise of judgment respecting faculty speech from extraneous nonprofessional influences.⁸¹ In this regard, “the faculty’s professional interests . . . cannot be separated from those of the institution.”⁸² The dynamics of academic production differ from the operation of most other institutions of government, where responsiveness to a democratic principal typically is seen as a good.

But is there, in fact, a body of professional norms consistently applied across disciplines that characterizes the American academy and distinguishes it from other state-run institutions? Previous commentators have adduced the history of professional norms of academic freedom as indirect evidence of professional standards.⁸³ A recent empirical study of peer review and evaluative academic panels by Michèle Lamont confirms the existence of “shared rules of deliberation that facilitate agreement” across disciplines in academic judgments.⁸⁴ Belief in peer review’s effective regulatory function, according to Lamont, is “crucial” to institutional coherence, because without it the majority of applicants rejected would “lose faith.”⁸⁵ That is, the persistence of the

⁷⁸ University administrators have broad license in executing others’ professional decisions. They also enforce certain nonprofessional norms against which academic freedom provides no defense (for example, discrimination law).

⁷⁹ *Feldman II*, 171 F3d at 496.

⁸⁰ See Post, 106 Yale L J at 171–72 (cited in note 7).

⁸¹ *Feldman II*, 171 F3d at 495–96.

⁸² *NLRB v Yeshiva University*, 444 US 672, 688 (1980).

⁸³ See, for example, Finkin and Post, *For the Common Good* at 11–27 (cited in note 50); Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 Georgetown L J 945, 953–67 (2009).

⁸⁴ Michèle Lamont, *How Professors Think: Inside the Curious World of Academic Judgment* 6 (Harvard 2009).

⁸⁵ *Id.* at 52. See also Areen, 97 Georgetown L J at 960 (cited in note 83).

university as a going intellectual concern rests partially on sustained and committed application of professional standards.

This view of the academy harmonizes with existing Supreme Court case law. The latter stresses the “background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”⁸⁶ Justice Felix Frankfurter’s concurring opinion in *Sweezy* emphasized the “grave harm” of “government intrusion into the intellectual life of a university,” and insisted that “[p]olitical power,” as distinct from professional judgment, must abstain from intrusion.⁸⁷ The Court recognizes that an academic judgment may “by its nature [be] more subjective and evaluative than the typical factual questions” raised by a government employment decision.⁸⁸ In a recent case about administrative regulation of student civil society, it endorsed a vision of the university as a place of “intellectual awakening” at the cross-currents of plural speech and normative traditions.⁸⁹ Like Judge Easterbrook, Supreme Court precedent further recognizes that judicial interference as much as legislative tampering imperils the continued application of academic norms.⁹⁰

Protection of academic professional norms from external influences has three doctrinal implications, two affirmative and the other negative in nature. The twin affirmative doctrinal manifestations of constitutional academic freedom “are [both] designed to facilitate the professional self-regulation of the professoriat.”⁹¹

First, the conception of academic freedom here advanced rejects the position that an individualized right to academic freedom is *never* necessary. If university professors were no different from the mass of government employees, a state could apply *Garcetti*’s logic to define the “official duties” of, say, state university history faculty to teaching that the Confederacy was not to blame for the inception of the Civil War, or to prohibit scholarship endorsing US interventions into Afghanistan or Iraq. Or a state could prohibit faculty from teaching and research leading to the conclusion that Islam is consistent with de-

⁸⁶ *Rosenberger v Rectors and Visitors of University of Virginia*, 515 US 819, 835 (1995).

⁸⁷ *Sweezy*, 354 US at 261–62 (Frankfurter concurring). See also *Regents of the University of California v Bakke*, 438 US 265, 312 (1978) (Powell concurring); *Board of Curators of the University of Missouri v Horowitz*, 435 US 78, 91 (1978).

⁸⁸ *Horowitz*, 435 US at 89–90.

⁸⁹ *Rosenberger*, 515 US at 836. In *Rosenberger*, the Court invalidated an administrative judgment in favor of free inquiry by students. While the plaintiff was a student, not a professor, the principle of truth-seeking academic discourse is the same.

⁹⁰ See, for example, *Regents of the University of Michigan v Ewing*, 474 US 214, 227 (1985) (Powell concurring).

⁹¹ Robert Post, *The Structure of Academic Freedom*, in Beshara Doumani, ed, *Academic Freedom After September 11* 61, 64 (Zone Books 2006).

mocracy and toleration.⁹² Application of *Garcetti* in this manner would undermine the professional discourse that lies at the heart of the academic enterprise. Thus, a positive doctrinal manifestation of constitutional protection of academic norms is the privately or publicly employed “scholar’s [constitutional] right to express a point of view” that cannot be impinged by the state through direct regulation.⁹³ More complex questions are implicated by selective government funding, now practiced by the National Institute of Justice, the National Institutes of Health, and other government entities. Constraints imposed as conditions of government funding are regulated by the “unconstitutional conditions” doctrine.⁹⁴ While the unconstitutional conditions doctrine remains somewhat contested, it can be read to allow the government to direct that state funds be used to research, say, climate change, but not to dictate the results of that research.⁹⁵

No constitutional right of action would lie, by contrast, against a decision taken on academic grounds by professional peers in either a private or public context. Nor does exogenous government action that neither limits nor mandates academic speech—for example the enforced presence of military recruiters on campus—present a problem.⁹⁶

Second, as a correlative to this individual right, the university, whether part of the state or not, has wide institutional authority “to set a curriculum” as an element of academic freedom.⁹⁷ This part of academic freedom encompasses what the Supreme Court has described as “autonomous decisionmaking by the academy itself.”⁹⁸ Legislative efforts to direct the content of curriculum, on this account, are impermissible. For example, while North Carolina legislators could assail the University of North Carolina at Chapel Hill in 2003 for assigning the work of “self-proclaimed atheist” and “radical socialist” Barbara Ehrenreich, they could not have converted their ire into legislated action.⁹⁹ Michigan’s attempt to regulate speech at its public uni-

⁹² Consider *Yacovelli v Moeser*, 324 F Supp 2d 760, 764 (MD NC 2004).

⁹³ *Webb*, 167 F3d at 1149.

⁹⁴ See, for example, *Rumsfeld v Forum for Academic and Institutional Rights, Inc.*, 547 US 47, 59–60 (2006).

⁹⁵ In another context in which professional role responsibilities have constitutional significance—lawyering—the Court has limited the government’s ability to control the speech of government-funded counsel. See *Legal Services Corporation v Velazquez*, 531 US 533, 542–43 (2001).

⁹⁶ *Forum for Academic and Institutional Rights*, 547 US at 60.

⁹⁷ *Webb*, 167 F3d at 1149.

⁹⁸ *Ewing*, 474 US at 226 n 12. Many scholarly treatments of academic freedom reduce academic freedom to that which does not interfere with the administration’s managerial prerogatives. See Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *Fordham L Rev* 33, 99 n 269 (2008) (collecting examples).

⁹⁹ See Finkin and Post, *For the Common Good* at 2–3 (cited in note 50).

versities raised similar concerns at the margins.¹⁰⁰ Exercise of this institutional authority to sanction or reward individual speech on *professional* grounds, however, is not only legitimate but in practice central to the academic enterprise.¹⁰¹

Third, academic freedom has a negative consequence. It secures the academy's insulation from exogenous pressures by cutting short the exercise of individual rights that interfere with the operation of professional academic norms. That is, while academic freedom yields additional constitutional protection, it also shaves off legal protections for individuals at another margin when these protections conflict with an institution's effort to maintain shared scholarly norms. Judge Easterbrook's opinions in *Webb* and the two *Feldman* cases are illustrative of this dynamic. This doctrinal modification may be justified on the assumption that the academy attracts individualist mentalities so that the incidence of obduracy to the point of incivility and litigiousness is above the mean. Sore losers in academic tournaments or otherwise disgruntled professors might act as holdouts from the collective enterprise of professional deliberation. Generally available litigation may be a device to extract rents (for example, further employment) because litigation erodes the common good of the deliberative culture.¹⁰² Given the steep costs of employment-related litigation to the deliberative professional culture of the academy, Judge Easterbrook's logic suggests, "the only way to preserve academic freedom is to keep claims of academic error out of the legal maw."¹⁰³ Challenges to decisions made by academic decisionmakers on the basis of academic standards, therefore, are presumptively insulated from judicial review.¹⁰⁴

This is not to say that *any* intrusion into the academic workspace displaces professional norms and thereby violates constitutional academic freedom. As often is the case, what crosses the constitutional line depends on case-specific empirical assessments of what constitutes an excessive burden. The Supreme Court can thus conclude that

¹⁰⁰ See *Doe v University of Michigan*, 721 F Supp 852, 854, 860–67 (ED Mich 1989).

¹⁰¹ This illuminates the case of pervasively religious educational institutions that do not follow widely shared academic norms in hiring, tenure, and disciplinary decisions. Such institutions and their employees do not benefit from academic freedom. Rather, they can claim separate freedoms under the religion clauses of the First Amendment.

¹⁰² See *Webb*, 167 F3d at 1150 (describing the costs of litigation upon the university and the academy).

¹⁰³ *Feldman II*, 171 F3d at 497.

¹⁰⁴ There is a debate in the literature about what the result would be if a plaintiff alleges that her peers' academic grounds are a pretense. Should the faculty benefit from a presumption of good faith? Compare Byrne, 99 Yale L J at 308 (cited in note 27) (yes) with Rabban, 53 L & Contemp Probs at 283–86 (cited in note 46) (no). If the doctrine's aim is to insulate academic decisions, with the principal marginal cost being imposed by the sheer fact of litigation, then a good faith standard seems appropriate.

discovery of peer review materials poses no threat¹⁰⁵ without repudiating the general importance of academic professional norms. The same analysis could be extended to the disputed issue of institutional review boards (IRBs), which precertify human-subject research. Dubbed by Philip Hamburger the “New Censorship,” as they “single out one conception of knowledge for constraint,” IRBs impose costly frictions on research.¹⁰⁶ Their validity, however, should not turn on their formal resemblance to prior restraints, but rather on whether they are consistent with, or instead usurp, academic decisionmaking.

Formulating academic freedom in this manner resolves tensions with other constitutional doctrines. *Garcetti* applies only with regard to the judgments of other faculty (the analog to supervisors), and not the state generally. Since academic speech is the product of independent professional norms, it cannot be attributed to the state and hence treated as “government speech.” Public forum doctrine is unnecessary for the protection of academic freedoms. And multipolar disputes should be resolved, following Judge Easterbrook, with an eye to the lodestar of preserving the academy’s autonomy.

This conception of academic freedom repudiates the transubstantive ambitions of First Amendment law in favor of constitutional protection of distinctive professional norms.¹⁰⁷ It is not unique in this regard. In another context, the Court has held that lawyers funded by the state may not be constrained by law from making the full range of arguments demanded by professional norms and standards.¹⁰⁸ Citing earlier precedent, the Court explained that “canons of professional responsibility” bind lawyers in ways inconsistent with viewpoint-based limitations on representation.¹⁰⁹ As Robert Post has underscored, professional norms have proved salient to constitutional analysis in many First Amendment issues.¹¹⁰ Judge Easterbrook’s analysis suggests they should also be dispositive in the academic context.

III. OPEN QUESTIONS

The goal of insulating academic professional norms from legal interference provides a touchstone for judicial consideration of academic freedom. But it does not answer all questions or guarantee the persistence of academic production.

¹⁰⁵ See, for example, *University of Pennsylvania v EEOC*, 493 US 182, 198–99 (1990).

¹⁰⁶ Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 S Ct Rev 271, 309.

¹⁰⁷ Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv L Rev 84, 117 (1998) (noting the “empirical reality of institutional specification”).

¹⁰⁸ See *Velazquez*, 531 US at 540–45.

¹⁰⁹ *Id.* at 542, quoting *Polk County v Dodson*, 454 US 312, 321–22 (1981).

¹¹⁰ See Post, 106 Yale L J at 172 (cited in note 7).

At the threshold, the project of constitutional academic freedom assumes that the First Amendment supplies reasons to care about preserving an academic discourse. One reason may be to preserve the academy's "marketplace of ideas." As Frederick Schauer has observed, this deliberative, truth-oriented ideal may lie at the heart of the First Amendment, but the conditions necessary for its successful operation simply are absent for most of society.¹¹¹ The academy does manifest the necessary properties to permit a functioning "marketplace" of the kind valued by the First Amendment.¹¹² Alternatively, if academic freedom is a tradition that is worthy of constitutional shelter under a Burkean approach to constitutional entitlements, then what other professional norms deserve protection? Under current doctrine, lawyers and (some) journalists are protected but doctors are not.¹¹³ Hard questions may be posed by the cases of journalists employed by the military or religious groups used to supply social services. No clear selection principle has yet emerged for the application of Burkean solicitude to ongoing, private traditions.

Further, there are endogenous risks to academic freedom. There is no guarantee that the university will persevere in its extant form through the immediate future. It can be abandoned from within. Mark Taylor, chair of Columbia University's religion department, argues that universities' "emphasis on narrow scholarship" within disciplinary bounds is already anachronistic, and should be abandoned in favor of career-oriented, problem-solving models deemphasizing individual scholarship.¹¹⁴ Although this change would merely compound a shift begun more than a century ago,¹¹⁵ Taylor's argument might entail that the discursive freedom until now central to the academic project to thrive is no longer necessary. Or the academy may be corroded from the outside: Harvard's current president, Drew Gilpin Faust, expresses

¹¹¹ Frederick Schauer, *Free Speech: A Philosophical Enquiry* 26–27, 33 (Cambridge 1982).

¹¹² Other commentators suggest that academic freedom may channel important political dissent. See Jennifer Elrod, *Critical Inquiry: A Tool for Protecting the Dissident Professor's Academic Freedom*, 96 Cal L Rev 1669, 1687–89 (2008). But the aim of professional standards is not to challenge orthodoxies any more than it is to reinforce them. The truth-seeking effects of professional norms will too often be orthogonal to any political program to found academic freedom's constitutional status on such a basis.

¹¹³ Compare *FCC v League of Women Voters of California*, 468 US 364, 398–99 (1984); *Legal Services Corporation v Velazquez*, 531 US 533, 540–45 (2001) with *Rust v Sullivan*, 500 US 173, 196–99 (1991).

¹¹⁴ Mark C. Taylor, *End the University as We Know It*, NY Times A23 (Apr 27, 2009).

¹¹⁵ Under attack from utilitarian critics, nineteenth-century higher education in England increasingly prioritized the hard sciences and the liberal arts over the fine arts and traditionally prized disciplines such as theology. See Elizabeth Anderson, *John Stuart Mill: Democracy as Sentimental Education*, in Amélie Oksenberg Rorty, ed, *Philosophers on Education: Historical Perspectives* 333, 335–36 (Routledge 1998).

concern that the recent recession has imposed “unanticipated financial constraints” on universities, with the “worrisome impact” of “reinforc[ing] America’s deep-seated notion that a college degree serves largely instrumental purposes.”¹¹⁶ If Taylor proves influential or if Faust’s fears come to fruition, the ensuing instrumental version of higher education may have scant use for the ideals and norms protected in cases such as *Webb* and *Feldman*. Law can do little to staunch inexorable historical change. More likely it will timidly fall into line.

CONCLUSION

These are parlous times for doctrinal academic freedom. Reading Judge Easterbrook’s jurisprudence on the operation of higher education, one finds little enthusiasm for professorial litigants. But one does find a robust understanding of the academy’s social function. That understanding can be leveraged, notwithstanding Judge Easterbrook’s skepticism of individual rights, to underwrite a reinvigoration of constitutional academic protection. Such a project could well fail. It hinges on whether Judge Easterbrook’s understanding of the university’s social function resonates with other federal judges. It also depends on the uncertain trajectory of higher education in the twenty-first century. If it founders, though, that failure cannot be attributed to an absence of insight or intellectual vigor in the generative Easterbrook opinions that set forth new grounds for thinking about constitutional academic freedom.

¹¹⁶ Drew Gilpin Faust, *The University’s Crisis of Purpose*, NY Times BR19 (Sept 6, 2009).