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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES  
JUDICIARY COMMITTEE  
CONSTITUTIONAL AND CIVIL JUSTICE SUBCOMMITTEE

“First Amendment Protections on Public College and University Campuses.”

TUESDAY, JUNE 2, 2015

Chairman Goodlatte and Ranking Member Conyers and Distinguished Members of the Committee:

Thank you for this opportunity to share my thoughts with you about First Amendment protection on public college and university campuses.

As a professor of constitutional law at American University and an author of a book on the rights of students, I take great interest in the subject before us. Higher education has not only been a critical force in advancing free inquiry in our society and it is not only one of America's leading "industries," if you will. It is also the paradigm and exemplar for free discourse, debate, and dialogue generally in our vibrant pluralist and multicultural democracy. If we have no freedom of thought and speech on campus, it is hard to think of where we might have it.

In the few minutes I have, I would like to set forth three major principles that ought to govern political speech on the campus of public universities and colleges. I should add that, although the presence of state action may arguably be missing for most private colleges and universities, there is no reason that these free speech principles should not operate for private colleges and universities as well, from Harvard and Yale to Southern Methodist and Oberlin and Liberty University, at least to the extent that the institutions want to think of themselves as universities as opposed to centers of dogma and propaganda.

First, the political, social, and artistic expression of students should generally be considered to be part of the educational experience rather than any kind of detraction from it. This means that the common areas of the universities and colleges, such as the streets, the sidewalks, the greens, the commons, the parks, the cafeteria seating areas, the atriums, and so on, should all be treated as traditional public fora for the purposes of political and social communication and First Amendment analysis. These areas are paid for, at least substantially, by taxpayers, and they lend themselves to expressive activity and assembly of students, faculty, staff members, alumni, and indeed other members of the public. Of course, public expression and protest on campus must be subject, as everywhere else, to reasonable time, place and manner restrictions; you can have your pro-choice or pro-life rally on the campus green, but not in a hallway immediately outside a calculus lecture in a way that makes it impossible for the class to proceed. This distinction permeates Supreme Court jurisprudence governing student speech. As the Court wrote in the seminal *Tinker v. Des Moines School District*, when a student "is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing)'" with operation of the school and "without colliding with the rights of others." This has become the standard doctrine: all student speech is accepted which does not interfere with the operation of the school and its classes and does not violate the rights of other students to learn.

If this foundational principle is still right, and surely it must be, the current trend of setting up "free speech zones" or what students call "free speech pens" is totally antithetical

to free speech values. Under the First Amendment, the *whole country* is a free speech zone, or at least the public places within it. The doctrine of reasonable time place and manner restrictions presupposes that public places are open for free speech business to the public and can be regulated reasonably and modestly in the interest of sleep hours, preventing scheduling conflicts, limiting the decibel level and so on. But, by sharply restricting the space and time allotted to citizens for expression, the “free speech zone” reverses all of the proper presumptions and makes the exception of reasonable regulation at the margins into a rule of censorship in public places. This is a dangerous trend that you should watch and legislate against if necessary by using your 14<sup>th</sup> Amendment powers to adopt congruent and proportional legislation to protect free speech on campus.

Secondly, it is implicit in, and indeed integral to, the *Tinker* standard that freedom of speech cannot be turned into an effective cover for what the Supreme Court called in *Davis v. Monroe County Board of Education* “severe, pervasive, and objectively offensive” harassment of students by other students or other members of the community. In that case, the Court determined that Title IX is violated by such harassment, which makes it difficult if not impossible for the student victims to learn and thrive. Surely we can all agree that while students and faculty can try out whatever theories they want in the classroom, including discredited theories of racial phrenology or gender differences in cognition, they have no right to engage in personal, face-to-face racial or sexual harassment that is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim’s educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”

This is an essential point, even if sometimes difficult to implement and define. My sense is that the overwhelming number of public universities and colleges know the difference between a serious intellectual debate and a relentless campaign of personal harassment designed to drive another student to leave school or commit suicide. For the sake of all of our children who go to college, it is important for the schools to recognize the difference and honor it.

Finally, when it comes to faculty, administrators at public universities and colleges may not treat the academic research, inquiry, publications, and pronouncements of their professors as government speech which can be regulated or censored under the authority of the *Garcetti* decision. This speech, as the Fourth Circuit found in a decision called *Adams v. Trustees of the University of North Carolina-Wilmington*, 640 F.3d 550 (2011), combines the public authority of the university with the private-citizen expression and ideation of the professor. Or, to put it differently, the professor’s speech, although bolstered by the imprimatur and prestige of the state, is an expression of the citizen-academic and cannot be censored or stifled simply because of disagreement or disapproval of it. However, we also must point out that the rank and tenure process is a professional domain different from a public speech forum. In the rank and tenure process, we advance by virtue of meeting rigorous academic professional standards for research, writing, teaching and service. Academic freedom means you cannot get bounced out of academia because your ideas are unorthodox or contrary to prevailing opinion but you can get bounced out because your research is sloppy, your data is flawed, or your ideas are illogical or unjustified by evidence. Simply calling yourself a victim

of right-wing or left-wing political correctness should not be sufficient to gain tenure if you have not met the independent professional standards for academic advancement.

Within these principles lurk many opportunities for ambiguity and controversy, and I am happy to discuss them.

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