AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**McAdams v. Marquette University, 2018 WI 88** (WI 2018)

*John McAdams was a tenured associate professor of political science at Marquette University, a private, religiously affiliated college. His tenured status entitled him to continuing employment at Marquette unless he was dismissed for cause. McAdams was also a well-known political conservative and something of a campus gadfly and maintained a locally notorious blog, the Marquette Warrior, in which he often commented on university affairs.*

*In November 2014, McAdams published a blog post criticizing an instructor in the philosophy department for her interaction with an undergraduate student in her ethics class. The undergraduate approached McAdams with a tape of his conversation with the instructor, Cheryl Abbate, who was also a graduate student in the philosophy department. In the class, Abbate said that “gay rights” was a subject on which everyone agreed and thus there was no need to discuss it. After class, the student approached Abbate about that issue, and she indicated that “you don’t have a right in this class to make homophobic comments” and suggested the undergraduate might want to drop the class. In his blog post, McAdams relayed these events and commented that Abbate was “typical” of contemporary campus liberals and provided a link to her publicly-available website, which included her contact information. Before posting, he contacted Abbate but she declined to comment since he was, she told others, “a flaming bigot” and “homophobic idiot.” Two days later, she filed a complaint with the university about the blog post. Two weeks later, she threatened to sue the university unless it fired McAdams and pay “reparations” to her. At about the same time, both McAdams and Abbate turned to the national media to publicize their side of the story. As the episode gained national attention, Abbate began receiving harassing phone calls and emails from individuals outside the campus community. She eventually received an offer to enter the graduate program at the University of Colorado and left Marquette.*

*In December 2014, McAdams was immediately suspended with pay from his campus duties and was informed that the university would begin the process of revoking his tenure and ending his employment at the university as a result of the blog post. The faculty handbook secured “academic freedom” for faculty in accord with the standards set out by the American Association of University Professors (AAUP). When the university believes that a tenured faculty member can be suspended or dismissed for cause, it must convene a Faculty Hearing Committee (FHC) to consider the case and make a recommendation to the university president. In January 2016, the FHC concluded that the incident demonstrated that McAdams had failed to meet professional standards and showed lack of fitness for his position, but only to the degree that would justify a two-semester suspension without pay. In March 2016, Marquette’s president suspended McAdams without pay and that the suspension would only be lifted once McAdams wrote a letter accepting the conclusion that he had violated the terms of his employment and regretted his actions.*

*McAdams refused to write such a letter but instead filed suit in county court arguing that the university had breached his employment contract by suspending him (or effectively dismissing him) without cause and in violation of the academic freedom secured to him in the faculty handbook. The county court granted judgment in favor of the university, concluding that the court should defer to the academic judgment of university officials. On appeal, the Wisconsin state supreme court ruled in a 4-2 decision that the trial court had erred in deferring to the judgment of the university on whether McAdams had violated the terms of his employment contract. The court’s several opinions provided an important discussion of academic freedom in the context of a private university, the scope of protection for “extramural speech” by faculty, and the extent to which courts should defer to university decisions regarding faculty employment, though rooted in a private contract rather than a constitution.*

JUSTICE KELLY.

. . . .

The most obvious reason we will not defer to the University is simply that the parties never agreed that its internal Discipline Procedure would either replace or limit the adjudication of their contract dispute in our courts. They certainly could have agreed to an extra-judicial resolution of their contract dispute. . . .

Our exhaustive review of the Faculty Statutes reveals no indication that the University and Dr. McAdams agreed the Discipline Procedure would supplant the courts or limit their review of a contractual dispute. Two of the Faculty Statutes acknowledge Dr. McAdams’ right to seek judicial adjudication of his claims. . . .

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The Report and Discipline Letter are not entitled to deference as something comparable to an arbitration award. The Discipline Procedure is an intricate, thorough, and extensive process. . . . But all of this cannot make up for the unacceptable bias with which the FHC was infected, or the FHC’s lack of authority to bind the parties to its decision. . . .

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In this case, the FHC’s impartiality was compromised by one of its members. Prior to her appointment to the FHC, Dr. Lynn Turner made her opinion of Dr. McAdams and his blog post available for all to see and read [by signing an open letter denouncing McAdams and the blog post as a violation of the Faculty Handbook]. . . .

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The Discipline Procedure is not analogous to an arbitration proceeding, as the circuit court assumed, for the further reason that it resulted in mere advice, not in an authoritative decision. . . .

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. . . . Neither the FHC nor the Report decided anything. It was President Lovell, not the FHC, who decided whether Dr. McAdams would be disciplined. It was President Lovell, not the FHC, who decided the nature of the discipline that should be imposed. It was President Lovell, not the FHC, who had the authority to impose the discipline. . . .

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. . . . [T]he efficient cause of Dr. McAdams’ suspension without pay was the Discipline Letter, and there is no evidence that it resulted from any prescribed procedure at all. It was the product of President Lovell’s exercise of unfettered discretion. . . .

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The Milwaukee County Circuit Court here nonetheless determined that the administrative agency deference doctrine required it to defer because “[t]he parties’ contract incorporates a specialized standard for cause that focuses on issues of professional duties and fitness as a university professor.” “Professionalism and fitness in the context of a university professor,” it said, “are difficult if not impossible issues for a jury to assess.” We cannot credit this rationale – judges and juries frequently address themselves to some of the most complex matters in life. When a case presents issues beyond our ken, we turn to expert witnesses. . . .

If academics are capable of discussing university affairs in their cloisters, there is no reason they cannot do so as experts in our courts. The complexity of a contract’s subject matter does not convince us that we must give administrative-agency style deference to one of the disputing parties.

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The documents on which both parties rely . . . provide the analytical structure we are to use in analyzing whether an extramural comment has lost the protection of the academic freedom doctrine. It is a two-step process, in which the first determines whether the comment itself demonstrates the faculty member is clearly unfit to serve. . . . If the comment meets this standard, the second part of the analysis considers the broader context of the faculty member’s complete record before deciding whether the extramural comment is protected by the doctrine of academic freedom. . . .

. . . . It is important to keep the two parts of the analysis separate because the first step serves the critically important function of keeping our focus where it belongs – on the extramural comment itself. The American Association of University Professors [AAUP] says this step provides a stringent standard of proof for dismissal. So strict, in fact, that “[e]xtramural utterances rarely bear upon the faculty member’s fitness for the position.”

The University introduced a second problematic aspect to the analysis when it uncoupled the doctrine of academic freedom from any stable reference points. The University posited that educational institutions assume academic freedom is just one value that must be balanced against “other values core to their mission.” Some of these values, it says, include the obligation to “take care not to cause harm, directly or indirectly, to members of the university community,” “to respect the dignity of others and to acknowledge their right to express differing opinions,” to “safeguard[] the conditions for the community to exist,” to “ensur[] colleagues feel free to explore undeveloped ideas,” and to carry out “the concept of *cura personalis*,” which involves working and caring “for all aspects of the lives of the members of the institution.” These are worthy aspirations, and they reflect well on the University. But they contain insufficiently certain standards by which a professor’s compliance may be measured. Setting the doctrine of academic freedom adrift amongst these competing values would deprive the doctrine of its instructive power; it would provide faculty members with little to no guidance on what it covers.

Combined, these two problematic aspects allow the University to use any extramural comment as an excuse to reconsider a faculty member’s association with the institution, which is what occurred here. The University’s analysis did not begin with an inquiry into whether the blog post, on its face, is so egregious that it clearly demonstrates that Dr. McAdams is unfit to serve as a professor. Instead, it used the extramural merely as a key to open a door onto a broad vista of considerations in which it compared the professor’s entire career and person against the University’s mission to care “for all aspects of the lives of the members of the institution.” The extramural comment is not supposed to be a key to other materials the University may wish to place in the “unfitness” balance. The extramural comment goes in the balance alone. Only if the balance clearly tips to “unfitness” may the University then proceed to a comprehensive review of Dr. McAdams’ career.

. . . . If we adopted the alternative structure now favored by the University, academic freedom would be nothing but a subjective post-hoc analysis of what the institution might find unacceptable after watching how events unfolded. And this would likely chill extramural comments to the point of extinction. It would be a fearless professor indeed who would risk such a comment, knowing that it licenses the University to scrutinize his entire career and assay it against the care of “all aspects of the lives of the members of the institution.”

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. . . . [T]he University did not identify any aspect of what Dr. Adams *actually wrote* to support its charge. Instead, it used third-party responses to the blog post as a proxy for its allegedly contempt-inducing nature. Here again, the University demonstrates that reverse-engineering a conclusion is not the most reliable method of conducting an analysis. In this instance, the University caught itself up in the “*post hoc ergo propter hoc*” fallacy. Just because vile commentary followed the blog post does not mean the blog post instigated or invited the vileness. . . .

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A university’s academic freedom is a shield against governmental interference; the dissent; however, would reforge it as a sword with which to strike down contracts it no longer wishes to honor. But none of the cases on which the dissent relies converts this pacific principle into such a destructive tool. The dissent says that part of an institution’s academic freedom is the right “to determine for itself on academic grounds who may teach.” That is true, as far as it goes – but it does not go far enough to address the circumstances here. When the decision to hire is complete, the relationship is no longer a simple matter of academic compatibility. The employment contract adds a legally enforceable aspect to the relationship. . . .

Operationalizing the dissent’s ode would have disastrous consequences for academic freedom. The outward-facing protection against governmental interference would turn inward, pitting the institution’s academic freedom against the faculty’s academic freedom. The result would be a never-ending pitched battle in which each side tries to expand its own sphere of academic freedom at the expense of the other. . . . [T]here is probably no better way of ending the University’s carefully balanced shared governance than turning a cooperative relationship into an adversarial contest. Therefore, we decline the dissent’s invitation to consider whether the University may excuse its breach of the Contract as an exercise of its academic freedom.

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*Reversed*.

JUSTICE ZIEGLER did not participate.

JUSTICE R.G. BRADLEY, concurring.

In this unprecedented dispute between a university and a professor, academic freedom was put on trial. Would the sacred "right of faculty members to speak as citizens – that is, 'to address the larger community with regard to any matter of social, political, economic or other interest without institutional discipline or restraint'" succumb to the dominant academic culture of micro-aggressions, trigger warnings and safe spaces that seeks to silence unpopular speech by deceptively recasting it as violence? In this battle, only one could prevail, for academic freedom cannot coexist with Orwellian speech police. Academic freedom means nothing if faculty is forced to self-censor in fear of offending the unforeseen and ever-evolving sensitivities of adversaries demanding retribution.

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I write separately because academic freedom, and concomitantly, free speech, is increasingly imperiled in America and within the microcosm of the college campus. A broader discussion of the significance and meaning of academic freedom will benefit universities who contractually extend academic freedom to professors, as Marquette did, as well as courts across the nation tackling these issues.

The United States Supreme Court has discussed the importance of academic freedom in a variety of cases, but has not definitively expounded its meaning. In *Keyishian v. Bd. of Regents* (1967), the Court described academic freedom as being "of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." . . .

. . . . The American Association of University Professors (AAUP) defines academic freedom as the liberty to "speak or write as citizens...free from institutional censorship or discipline." Russell Kirk described academic freedom as a principle that teachers and scholars should be "protect[ed]...from hazards that tend to prevent [them] from meeting [their] obligations in the pursuit of truth."

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The concept appears in American history as early as the eighteenth century in Thomas Jefferson's founding vision of the University of Virginia: "This institution will be based on the illimitable freedom of the human mind. For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left to combat it." Nineteenth century academics did not confine their exercise of academic freedom to the classroom, but understood the principle to protect their "right to express their opinions even outside the walls of academia, even on controversial subjects."

. . . . The AAUP specifically accords extramural statements protections that are coextensive with the First Amendment, noting that a university questioning a professor's fitness should "remove from consideration any supposed rhetorical transgressions that would not be found to exceed the protections of the First Amendment." Academic freedom and free speech are interconnected concepts and frequent companions. I discuss these doctrines synchronously because Marquette guaranteed McAdams both rights and contractually shielded him from discipline for his exercise of either.

The United States Supreme Court has repeatedly recognized the importance of academic freedom and freedom of expression on America's college campuses, without which "our civilization will stagnate and die." *Sweezy v. New Hampshire* (1957). . . .

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Academic freedom, however, is not limitless. Like Marquette, many universities have adopted the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure. With rights come responsibilities and the AAUP guides the exercise of academic freedom in its Statement on Professional Ethics. For example, this ethics code for professors demands the practice of "intellectual honesty," the protection of students' academic freedom, and the avoidance of creating any impression of speaking on behalf of the university.

Courts have also circumscribed some limits around academic freedom. It does not impede a "university's ability to control its curriculum," *Edwards v. Cal. Univ. of Pa*. (3d Cir. 1998), or "to regulate the content of what is or is not expressed" when it is the university that is speaking, *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995). But, the doctrine does preclude universities from punishing academic speakers who publicly discuss matters of public concern beyond the classroom. . . . Just as no citizen could "be punished for writing a book that angers the state legislature——no matter how outrageous or offensive the book might be," professors at universities should not be punished for speaking on matters of public concern even if——especially if——that speech does not conform with mainstream thought.

. . . . The First Amendment protects speech of university employees when it involves "matters of public concern"——speech that can be "fairly considered as relating to" issues "of political, social, or other concern to the community." *Connick v. Myers* (1983). . . .

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In every case presenting the Supreme Court with the issue, it unfailingly declared the importance of academic freedom and freedom of expression in academia. It struck down many laws that undoubtedly had the support of a majority of the people. In the midst of the fear and tension gridlocking American international politics during the Cold War, few would publicly object to ensuring that teachers——entrusted with educating the future leaders of America——would denounce Communism and would not influence students to become Communists. Despite the good intentions underpinning such laws, the Court repeatedly struck them down and continually emphasized the importance of academic freedom, the need for free expression on college campuses, and the significant value that opposing viewpoints play in the advancement of ideas. From Aristotle challenging the then-predominant belief that the Earth was flat to Susan B. Anthony and Elizabeth Cady Stanton asserting the then-preposterous idea that women should vote, the past is replete with examples of unpopular ideas proven right when freely aired and debated. To squelch discussion of any idea jeopardizes our future.

Academic freedom exists to further the search for truth through vigorous open inquiry, discourse, and debate. Permitting debate ensures "the security of the Republic, the very foundation of constitutional government." And, as *Pickering v. Board of Education* (1967) instructs, criticisms of campus administration are part of the public debate.

This court acknowledged the importance of academic freedom, specifically the freedom to criticize university administration, almost sixty years ago when it decided *State ex rel. Ball v. McPhee* (WI 1959). In that case, this court recognized that a university should not be able to discharge a professor on the basis of the professor's expression of philosophical disagreements with administration: "Surely a teacher in a state college is entitled to some academic freedom in criticizing school programs with which he is in disagreement. Such acts of criticism do not qualify as either inefficiency or bad behavior."

. . . .

Marquette subjected a tenured professor to discipline for writing something that triggered an adverse response from third parties over whom he has no control, thereby holding McAdams responsible for the actions of third parties. Allowing this retribution to stand would set a dangerous precedent, leading faculty to self-censor for fear of third-party reactions to speech and post hoc disapproval of it. If universities impose culpability on professors for the actions of others, it will undoubtedly cause the same chilling effect and result in the same stifling of expression that led the Supreme Court to strike down the legal imposition of "not-a-communist" promises, loyalty pledges, and disclosures of association. . . . And academic freedom would be severely wounded, perhaps fatally.

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JUSTICE KELLY, with whom JUSTICE R.G. BRADLEY joins, concurring.

. . . . *[E]veryone* in the disciplinary process was a University employee. Thus, the University (by its designated prosecutor) presented its case to the University (in the form of the Faculty Hearing Committee), which then made a recommendation to the University (in the person of President Michael Lovell). We have long known the problems attendant upon allowing a party to decide its own case. . . .

And yet the University tells us we are to defer to its determination that it did not breach its contract with Dr. McAdams. That proposition threatens the very concept of contract. A contract is supposed to bind the parties to ascertainable obligations. But if in a contract between Mr. Smith and Mr. Brown, Mr. Smith is the unreviewable judge of whether he has himself breached the contract, then his contractual obligations mean nothing but what he wishes then to mean. That, of course, is no contract at all.

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JUSTICE A.W. BRADLEY, with whom JUSTICE ABRAHAMSON joins, dissenting.

At its core, academic freedom is a professional principle, not merely a legal construct. It embraces the academic freedom of the faculty as well as the academic freedom of the institution. “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also . . . on autonomous decisionmaking by the academy itself.” *Regents of University of Michigan v. Ewing* (1985).

Within academic freedom lies the concept of shared governance. It includes the right of faculty to participate in the governance of the institution on academic-related matters. Shared governance in colleges and universities has been forged over decades to address the specific issues that arise in the workplace of higher education.

The majority errs in conducting only half of the academic freedom analysis. It fails to recognize, much less analyze, the academic freedom of Marquette as a private, Catholic, Jesuit university. As a result, it dilutes a private educational institution’s autonomy to make its own academic decisions in fulfillment of its unique mission.

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To manifest this freedom to pursue their ends, educational institutions set their own missions. As a Catholic, Jesuit institution, Marquette University operates according to certain guiding values. These values include the “holistic development of students” and a “commitment to the Jesuit tradition and Catholic social teaching.” It is also a guiding value of the institution to foster “vigorous yet respectful debate.”

. . . .

Private institutional learning environments present unique concerns and a particular need for independence in decision making. If the founding principles of each individual university are to be given life, the institution must possess the freedom to determine the consistency or inconsistency of actions with those principles.

Institutional academic freedom is inclusive of four “essential freedoms”: “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.” *Sweezy v. New Hampshire* (1957). . . .

In determining who may teach at its university, Marquette has academic freedom to uphold its values and principles. It has academic freedom to provide an educational environment that is consistent with its mission as a university.

. . . .

Within the concept of academic freedom lies the right of faculty to participate in the governance of the institution in academic-related matters. The majority errs next in jettisoning the shared governance of colleges and universities that has been forged over decades to address the specific issues that arise in this unique workplace. In the majority’s view, the work of the faculty hearing committee (FHC) is of no import. It instead serves as a mere “distraction.” . . .

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The FHC is a mutually agreed-upon dispute resolution mechanism. It is composed of Marquette faculty members who signed contracts similar to McAdams’ and whose employment relationships are governed by the same faculty statutes. In other words, the members of the FHC live and breathe academic freedom and are in a position to say what the intent of the parties was in signing a contract guaranteeing “academic freedom.”

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The United States Supreme Court has directed that “[w]hen judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty’s professional judgment.” . . . We can realize the Supreme Court’s command by affording the respect due to the FHC’s expertise and specialized knowledge.

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Here, it is . . . the faculty that is in the best position to determine “what behavior on the part of a faculty member [is] so antithetical to its mission that he could not remain a member of the University’s community.” The faculty unanimously determined that McAdams exhibited such behavior that violates the norms of the academic profession so as to call into question his fitness as a member of the university community. . . .

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In his letter to McAdams informing him of the disciplinary action taken, President Lovell is clear that it was not the views expressed in the blog post that led to discipline: “I think it is important to state that the sanctions being brought against you are solely based on your ACTIONS as a tenured faculty member at Marquette University, and have nothing to do with the political or ideological views expressed in your blog.” President Lovell’s letter thus makes clear that McAdams was disciplined for his *actions*, and not the blog post’s viewpoint. Thus, the question is not “whether [the blog post’s] contents remove the doctrine’s protections.” It is whether McAdams *actions* are worthy of protection.

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. . . . I agree with the FHC that “where substantial harm is foreseeable, easily avoidable, and not justifiable, it violates a professor’s obligations to fellow members of the Marquette community to proceed anyway, heedless of the consequences.”

. . . .

[C]onveniently omitted from the majority opinion are any facts related to McAdams’ active promotion of the blog post to local and national media outlets. . . .

These omitted facts indicate that McAdams indeed did “instigate” or “invite” the vileness that followed his blog post. He knew what would happen, and he actively ensured that it would happen.

. . . .

. . . . If it is indeed the case that the protections granted by Marquette Faculty Statute are “coextensive” with the rights afforded to private citizens under the First Amendment, McAdams would be free to teach virtually anything or nothing at all in his classes. Marquette would be unable to discipline McAdams unless his speech fell into one of the few, narrow categories of speech that is not afforded First Amendment protections.

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Accordingly, I conclude that neither academic freedom nor the First Amendment saves McAdams from the consequences of his reckless actions.