



EXTRAMURAL ABSOLUTISM

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As battles over academia escalate, an area of intensifying concern is the speech faculty engage in outside their professional functions—what is often called “extramural” speech. Professors have been criticized, disciplined, pressured to resign, and even terminated for extramural speech that is deemed offensive by individuals inside and outside university communities. And yet, academics generally remain committed to a principle that this Article identifies as extramural absolutism.

The Article explains extramural absolutism’s unpopularity outside academia as a reasonable consequence of the way supporters have presented and justified it. Contrary to widespread scholarly portrayal, extramural absolutism is not a moderate concession justified by the intrinsic value of academics’ speech: It is a stark deviation from standard employment practices obtaining in the general labor market.

Nevertheless, the Article shows that extramural absolutism makes sense and is, in fact, the only practical solution. The work academics do (and are expected to do) and the way academics work (and are expected to work) make principled line-drawing impossible. Attention to the dynamics and demands of academic labor shows why an absolutist approach remains both reasonable and necessary.

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INTRODUCTION

Free speech absolutism has seemingly had its day, inasmuch as scholarly and public (if not judicial) opinion are increasingly hostile to the idea that more speech is invariably better.¹ Yet, within academia, a close cousin of free speech absolut-

¹ E.g., R. George Wright & Chris Rowley, *Creative Jurisprudence: The Paradox of Free Speech Absolutism*, 95 U. COLO. L. REV. F. 28, 28–51 (2024); Alexander Tsesis, *The Free Speech Clause as a Deregulatory Tool*, 153 DAEDALUS 208, 209, 219 (2024); Eugene Volokh, *Should the Law Limit Private-Employer-Imposed Speech Restrictions?*, 2 J. FREE SPEECH L. 269 (2022); ULRICH BAER, WHAT SNOWFLAKES GET RIGHT: FREE SPEECH, TRUTH, AND EQUALITY ON CAMPUS (2019). On changes in

ism—a principle of university management that this Article calls *extramural absolutism*²—remains alive and well.³ Many academics and their supporters still champion the idea behind this principle,⁴ which is that speech undertaken by professors who are acting in a personal capacity should invite few if any adverse employment consequences.⁵ Academic disagreement with the principle, when it arises, lies more in its application to specific incidents than with the principle itself.⁶

the thinking of strong speech advocates, see Colleen Flaherty, *A Free Speech Purist Opts Not to Use the N-Word*, INSIDE HIGHER ED (Mar. 7, 2019), <https://perma.cc/5L7T-Y9RH>. On critiques of free speech absolutism, see, for example, the powerful objections raised by Critical Race Theorists like Richard Delgado and Jean Stefancic. RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS? WHY THE FIRST AMENDMENT SHOULD NOT PROTECT HATE SPEECH AND WHITE SUPREMACY* (2018).

² I first used the term extramural absolutism in an opinion piece where I began working out these ideas. Deepa Das Acevedo, *The Extraordinariness of Extramural Absolutism*, INSIDE HIGHER ED (Nov. 5, 2024), <https://perma.cc/6Z58-8KC7>. I continue to use the term despite its nod to Free Speech jurisprudence and the widespread view—with which I agree—that Free Speech and Academic Freedom should not be conflated. This is partly rhetorical—the term is punchy—but it is also principled. Intramural speech must be subject to norms of intellectual/disciplinary/expert competence: We *must* be able to discipline someone who says the Earth is flat in a class lecture or in a journal article. But the messiness of the intramural/extramural distinction, which I explain via this article’s focus on labor dynamics, is why we shouldn’t punish that person if they say the Earth is flat on, say, social media. Instead, for speech that is not *clearly* intramural, universities should provide the type of protection that First Amendment law grants against the sovereign power of the state—namely, protection for speech that doesn’t fall within predetermined exceptions like for true threats, defamation, and other actions that I refer to below as “exceptions sounding in generally applicable law.”

³ E.g., Brian Leiter, *Academic Freedom Does Not Include Lawful Extramural Speech at the University of New Hampshire*, LEITER REPS. (Dec. 15, 2021, at 12:51 PM), <https://perma.cc/P5PM-QFLT>.

⁴ My characterization of extramural absolutism as a principle of university management closely resembles Archana Sridhar’s argument that academic freedom is productively viewed through the lens of content moderation. Archana Sridhar, *Academic Freedom as Content Moderation: A Framework in Favor of Individual Rights and Institutional Autonomy*, 50 INNOVATIVE HIGHER EDUC. 743 (2025).

⁵ E.g., Muhlenberg’s Firing Puts All Tenured Professors at Risk, AM. ANTHRO. ASS’N (Oct. 4, 2024), <https://perma.cc/BVZ4-NY3V>.

⁶ E.g., Vimal Patel, *UPenn Accuses a Law Professor of Racist Statements. Should She Be Fired?*, N.Y. TIMES, Mar. 24, 2023.

But extramural absolutism is deeply unpopular outside academia as well as among many stakeholders *inside* the university community.⁷ This Article explains extramural absolutism's unpopularity and proposes a way forward. The problem, I argue, is not with extramural absolutism itself but with how it is presented and justified.⁸ The answer, moreover, is not to insist on distinguishing between speech that warrants protection and speech that does not: It is to acknowledge that academic labor and the way it is managed make a policy of extramural absolutism the only *feasible* approach.

Supporters of extramural absolutism have failed to be convincing for two reasons. First, they often imply that speech by academics merits an exceptional level of protection because academic speech is uniquely valuable to society. In this respect, they are like supporters of academic freedom writ large. "[T]he pursuit of *truth* without interference," argue William Tierney and Vicente Lechuga in their defense of academic freedom, "is in the best interest of society."⁹ Similarly, Matthew Finkin and Robert Post affirm the AAUP belief that universities are "instruments of the common good" and that the "roots of academic freedom" have "internal connections to emerging needs for knowledge and intellectual mastery."¹⁰

These lines of commentary presume a shared belief that academic speech is uniquely valuable because expert knowledge and expert pedagogy are better than

⁷ Richard Amesbury & Catherine O'Donnell, *Stop Defending Amy Wax*, CHRON. HIGHER EDUC. (Oct. 22, 2024), <https://perma.cc/53KP-ERXA>; Anita L. Allen, Henry R. Silverman Professor of L. & Professor of Phil., Univ. of Pa. Carey Sch. of L., *The Limits of Free Speech, Conduct, and Academic Freedom in a System of Faculty Tenure, Diversity, and Inclusion: A Proposed Framework*, Remarks at the University of Pennsylvania Faculty Senate Executive Committee Meeting (Feb. 16, 2022).

⁸ To be sure, not all supporters of extramural freedom repeat the patterns I describe in this Article. Keith Whittington has made arguments that, more than most, emphasize employer-employee dynamics with an attention to labor dynamics. See, e.g., Keith E. Whittington, *What Can Professors Say in Public? Extramural Speech and the First Amendment*, 73 CASE W. RES. L. REV. 1121, 1121–75 (2023); Keith E. Whittington, *Academic Freedom and the Scope of Protections for Extramural Speech*, 105 ACADEME 20 (2019). This Article extends many of the arguments Whittington has made through a greater focus on the work of academia and the regulation of work, and without distinguishing between public and private university contexts.

⁹ William G. Tierney & Vicente M. Lechuga, *The Social Significance of Academic Freedom*, 10 CULTURAL STUD. & CRITICAL METHOD. 118, 120 (2010) (emphasis in original); MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 6 (2009).

¹⁰ FINKIN & POST, *supra* note 9, at 6–8.

their opposites. That is, academic speech deserves special protection because it contributes more to societal well-being than do other types of speech or speakers: Academic speech informs, instructs, challenges, and clarifies in addition to expressing opinion.

But, as Keith Whittington observes, *extramural* academic speech rarely contributes so much to intellectual progress or societal well-being—yet “failing to protect such speech might well hamper the kind of advancements in human knowledge that we most care about.”¹¹ This Article offers an argument grounded in labor realities that complements Whittington’s argument, which is keyed to academic freedom. By drilling down into the realities of academic training and job performance, I show that identifying the boundaries of individual expertise is a surprisingly difficult task.¹² Consequently, a connection to expertise *cannot* be used to distinguish between deserving and undeserving extramural speech in a way that is conceptually coherent.

Supporters of extramural absolutism also underestimate the magnitude of the workplace exception they are claiming. Extramural absolutism asks us to remove employment consequences from all speech by some speakers, with only very few exceptions sounding in generally applicable law. (Extramural absolutism could not immunize professors from any legal consequences because it is a principle of organizational management rather than a legal claim.) But even if a policy of extramural absolutism would not immunize faculty from civil claims or criminal prosecution, it *would* protect them from negative employment consequences arising from all other types of expressive activity. This makes extramural absolutism a momentous deviation from general employment practices and the ultimate claim to

¹¹ Whittington, *Academic Freedom*, *supra* note 8.

¹² Moreover, a growing percentage of Americans are skeptical about the functional value of expertise. Supporters of extramural absolutism who appeal to the unique contributive potential of academic speech thus begin with a goodwill deficit that is difficult to overcome. Polling reveals simply that Americans have complicated feelings about higher education, viewpoint diversity, and academic freedom. See, e.g., AM. COUNCIL ON EDUC., MAKING THE CASE FOR ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY IN A CHALLENGING POLITICAL ENVIRONMENT: A RESOURCE GUIDE FOR CAMPUS LEADERS 2 (2023), <https://perma.cc/GM4W-XCDE> (reporting that “there is sentiment among some Republicans, as well as a fair number of Independents and Democrats, that taxpayers should have a say in what is taught at public colleges and universities”). See also Kim Parker, *The Growing Partisan Divide in Views of Higher Education*, PEW RSCH. CTR. (Aug. 19, 2019), <https://perma.cc/8VMH-BDDZ>.

academic exceptionalism, but supporters rarely acknowledge it as such.¹³ Part II draws on existing case law regarding extramural expression by employees working in public and private contexts outside academia to show why a policy of extramural absolutism vastly exceeds the legal rights and organizational practices experienced by workers elsewhere.

Despite the magnitude of the exception it represents and many shortcomings in how it has been articulated and defended, this Article argues that extramural absolutism is both *reasonable and necessary* as a principle of organizational management. And, somewhat ironically, the best defense of extramural absolutism also rests on an appeal to academic exceptionalism. As I show, academia *is* unique—but in its labor dynamics, not in the intrinsic value of its practitioners' speech. What academics do (and are expected to do) and how academics work (and are expected to work) makes it impossible to engage in any principled boundary-drawing regarding extramural speech, including the boundaries of the category itself. Reframing the debate in terms of *employment* rather than *expression* allows supporters of extramural absolutism to justify unrivaled speech protections without resorting to unappealing and counterproductive elitism.¹⁴

¹³ Actually, the appearance of special treatment is a complicated matter. As Eugene Volokh has argued, state statutory protections for private employee speech abound—but as Volokh's survey also shows, these protections are often narrowly tailored in the extreme and are frequently tied to political expression (at the broadest) or the electoral process (at the narrower end). Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012) (showing that a minority—albeit a nontrivial minority—of states, 14 in total, are potentially broadly protective of private employee speech). See also Volokh, *supra* note 1. State protections are often limited to things like signing a referendum or making a political contribution or being affiliated with a political party. Extramural absolutism in the academic context thus *is* and *isn't* as momentous a deviation from general labor market practice as it is perceived to be.

¹⁴ See, e.g., Deepa Das Acevedo, *Tenure as a Labor Protection*, 26 EMP. RTS. & EMP. POL'Y J. 109 (2023) (undertaking a similar reorientation of debates over faculty tenure). Despite their shared attention to professional practices, my approach is distinct from Robert Post's argument that academic freedom should be rooted in the relationship between expertise and democratic competence. Post's normative justification for academic freedom was novel in its logic but still sounded in the value of expressive liberty; my arguments below justify a subset of academic freedom—extramural speech—using logic that sounds in employment practices. See generally ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012).

Part I of this Article surveys selected recent incidents where the extramural speech of tenured professors has triggered adverse employment consequences. I show that both the professors in question and their supporters consistently appeal to a principle best understood as “extramural absolutism.”

Part II contextualizes extramural absolutism within the broader landscape of employee speech rights to show that extramural absolutism is indeed a stark deviation from standard employment practice. Neither nonacademic employees in the private workforce nor public employees (including in academics) enjoy *legal* protections approaching the *institutional* protection afforded under a policy of extramural absolutism.

Part III shows why the exceptional protection required by extramural absolutism is necessary through a granular analysis of academic labor practices and constraints. I draw on social science and higher education scholarship to show that academic training and working conditions render an absolutist approach necessary. It is impossible to distinguish between types of extramural speech such that we can protect some extramural remarks but not all.

Finally, Part IV considers and refutes a few of the most common objections to extramural absolutism. Most important among these are the worries that extramural absolutism will open the floodgates for bad-acting professors by allowing them to easily evade employer discipline (IV.C) despite those professors’ articulation of opinions that exhibit manifest unfitness (IV.B). To preview the argument: These instances are neither so straightforward nor so common as the news cycle suggests and, consequently, they should not drive our approach to university management.

Ultimately, this Article finds common ground with both critics and supporters of extramural absolutism. Alongside critics, I argue that extramural absolutism is indeed a singular exception from standard practices and laws regarding employee speech rights. I further agree with critics that the inherent value of speech by academics cannot, by itself, justify this exception.

Nevertheless, alongside supporters, I argue that extramural absolutism is an exception that is made unavoidable by dynamics, constraints, and expectations that are, in fact, peculiar to academia. For better *and* for worse, the structure and purpose of academia depends on an absolutist approach to extramural speech.

I. TROUBLE “OUTSIDE” THE IVORY TOWER

There is no shortage of news or scholarship bemoaning the state of academic freedom in the United States. At least 910 law review articles on academic freedom have been published since 2020, and few of them are uplifting.¹⁵ Much of this coverage emphasizes the intensifying pressures on “intramural” speech—the writing, speaking, and other activities that professors undertake while fulfilling their job duties.¹⁶ But there is also growing concern about the “extramural” speech that professors engage in as private persons, which is what was at issue in the three recent controversies described below.

All three incidents were widely described and analyzed in the media. All three incidents involved tenured professors at four-year institutions in the United States: the organizational gold standard for matters pertaining to academic freedom and tenure. And all three professors, along with their supporters, argued that the speech in question was extramural and, for that reason among others, that it should not have triggered any adverse employment consequences.

I chose these incidents in part because they share those qualities.¹⁷ But I also chose them because the professors involved, as well as their speech acts, differ in other ways that are similarly important. They differ ideologically, they differ in the format and venue of their speech, and they differ in how readily their speech can be characterized as extramural. Differences of this sort are useful for chalking out the potential stakes of an absolutist position.

¹⁵ These results were produced by a search conducted in late 2024 for “academic freedom” in WestLaw’s database of Law Review Journals and Articles, filtered for publications after 01/01/2020.

¹⁶ See, e.g., Jerry C. Edwards, *Safeguarding the Search for Truth: Carving Out Academic Freedom’s Place in a Domain Dominated by Government Speech*, 19 HARV. L. & POL’Y REV. 93, 153 (2024); Lawrence Rosenthal, *Does the First Amendment Protect Academic Freedom?*, 46 J. COLL. & U.L. 223, 229 (2022); Jonathan Turley, *The Unfinished Masterpiece: Compulsion and the Evolving Jurisprudence over Free Speech*, 83 MD. L. REV. 145, 188 (2023).

¹⁷ To be sure, I could have chosen others. For instance, in January 2025, Katherine Franke left her position as a tenured full professor and named chair at Columbia Law School after a long dispute that was in important part linked to her extramural speech activities. E.g., Emily Pickering, *Law Professor Katherine Franke, BC ’81, Departs Following Investigation into Alleged Discriminatory Harassment*, COLUM. SPECTATOR (Jan. 18, 2025, at 10:34 AM), <https://perma.cc/V3Y4-NKA4>.

A. Amy Wax

Until September 2024, Amy Wax was the Robert Mundheim Professor of Law at the University of Pennsylvania.¹⁸ As of this writing, she is still a full professor at Penn but she no longer holds a named chair, and she is subject to other institutional and financial disciplinary measures.¹⁹ What led Wax from one point to the other was largely—though *not* solely—her extramural speech.

Wax is a dual-credentialed academic, with a JD from Columbia and an MD from Harvard. Her MD comes with a distinction in neuroscience, and her residency at New York Hospital-Cornell Medical Center (now known as Weill-Cornell) was in neurology.²⁰ Despite this training, Wax seems to believe in, among other things, the inherent intellectual and cultural superiority of certain races,²¹ of one gender,²² of one sexual orientation,²³ and of just a handful of nations.²⁴ She's written articles,²⁵

¹⁸ J. Larry Jameson, *Final Determination of Complaint Against Professor Amy Wax*, U. PA. ALMANAC (Sept. 24, 2024), <https://perma.cc/WZV9-CEME>; Amy L. Wax, Curriculum Vitae (May 19, 2018) (on file with author).

¹⁹ These include a one-year suspension at half pay, the loss of summer pay, a public reprimand, and a requirement that henceforth she note during public appearances that she does not speak on behalf of the University. See M. Elizabeth Magill, *Decision of the President in the Matter of Professor Amy Wax*, U. PA. ALMANAC (Aug. 11, 2023), <https://perma.cc/ATK2-JNRF>.

²⁰ Wax, *supra* note 18; *About Us*, NEWYORK-PRESBYTERIAN, <https://perma.cc/YHL7-X54U>.

²¹ Jared Mitovich, *Amy Wax Repeats Racist Rhetoric on National Television Amid Ongoing University Investigation*, DAILY PENNSYLVANIAN (Apr. 11, 2022, at 11:30 PM), <https://perma.cc/6JUV-VTCA>.

²² Letter from Members of the Hearing Board in the Just Cause Matter Regarding Professor Amy Wax, Off. of the Fac. Senate, Univ. of Pa., to M. Elizabeth Magill, President, Univ. of Pa. (June 21, 2023), <https://perma.cc/X7VL-J4GN>.

²³ Amy Wax, *Diverging Family Structure and "Rational" Behavior: The Decline in Marriage as a Disorder of Choice*, in RESEARCH HANDBOOK ON THE ECONOMICS OF FAMILY LAW 15 (Lloyd R. Cohen & Joshua D. Wright eds., 2011).

²⁴ For example, Wax sighed "finally, an American" after listening to a group of students with "exotic" names introduce themselves, and in defense of this comment, stated "American universities should primarily educate American citizens." Jared Mitovich, *Amy Wax Defends Accusations of Inflammatory Remarks to Audience of College Professors*, DAILY PENNSYLVANIAN (Apr. 16, 2023, at 11:30 PM), <https://perma.cc/23PD-MKFG>.

²⁵ Amy Wax & Larry Alexander, *Paying the Price for Breakdown of the Country's Bourgeois Culture*, PHILA. INQUIRER (Aug. 9, 2017, at 4:01 PM), <https://perma.cc/CZ4Q-6UHJ>; Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621 (2011).

opinion pieces,²⁶ and at least one book expressing these views,²⁷ and she's given more talks and interviews discussing them than can be named here.

It is worth reiterating that not all of Wax's problematic speech may, in fact, have been *extramural*. For instance, she has been accused of declaring, in class, that Mexican men are predisposed towards committing domestic violence.²⁸ (Wax rejects that characterization of her comments and sent me transcripts of her Faculty Senate Hearing, which include a discussion of contemporaneously written student notes that arguably support her position.²⁹) To the extent that any of her disputed comments were made in class, they lie outside the scope of this Article because there is simply no way—and no reason—to characterize in-class speech as extramural. Moreover, Wax has made plenty of problematic statements in contexts that are clearly extramural.³⁰ Those are the comments informing my discussion here.

B. Maura Finkelstein

Until May 2024, Maura Finkelstein was a tenured associate professor at Muhlenberg College in Allentown, Pennsylvania. As of this writing, she has been terminated from Muhlenberg.³¹ A sociocultural anthropologist with a PhD from Stanford, Finkelstein's early work explored textile mill labor in Mumbai, India, while her more recent scholarship has concerned equine therapy in the United States.³²

²⁶ Glenn Loury, *Amy Wax Redux*, GLENN SHOW (Jan. 2, 2022), <https://perma.cc/H3KM-HPK2>.

²⁷ AMY L. WAX, *RACE, WRONGS, AND REMEDIES: GROUP JUSTICE IN THE 21ST CENTURY* (2009).

²⁸ Amesbury & O'Donnell, *supra* note 7.

²⁹ Because the hearing transcripts are not publicly available and, although redacted, they still contain identifiable information, I am not providing extensive details or verbatim quotations from them here. The notes were written contemporaneously during a class session by a student who later testified against Wax. Based on my review of the hearing transcripts provided to me by Wax's attorney, I believe the student notes as discussed during the hearings do seriously cast doubt on the accuracy of this particular accusation against Wax. At the same time, my limited knowledge and distant position mean that I cannot speak definitively about either the accusation or the rebuttal.

³⁰ *E.g.*, Magill, *supra* note 19, at app. A (referencing "Professor Wax's . . . public comments, including the statement that America would be 'better off with fewer Asians and less Asian immigration'").

³¹ Natasha Lennard, *Meet the First Tenured Professor to Be Fired for Pro-Palestine Speech*, INTERCEPT (Sept. 26, 2024, at 5:00 AM), <https://perma.cc/H4YK-6MQV>.

³² *About*, MAURA FINKELSTEIN (Nov. 3, 2024, at 12:19 PM), <https://perma.cc/6223-KFNB>. See also AM. ANTHRO. ASS'N, *supra* note 5.

Finkelstein has long been a vocal supporter of the Palestinian cause: “I have always had an ethical practice of making sure that I include Palestine in my teaching. . . . It was never outside the bounds of what I do.”³³ Despite this longstanding commitment and the occasional tensions it has generated at a college where more than thirty percent of students are Jewish,³⁴ one specific extramural act became the proximate cause of Finkelstein’s termination. In January 2024, Finkelstein reposted on her Instagram account a poem by the Palestinian poet Remi Kanazi that read, in part: “Do not cower to Zionists. Shame them. Do not welcome them in your spaces. Do not make them feel comfortable.”³⁵ A Muhlenberg student (not registered in any of Finkelstein’s classes) started a petition that, after many weeks and several developments, resulted in Finkelstein’s termination.³⁶

The substantive content of Finkelstein’s and Wax’s ideological commitments matter because those commitments are not equally acceptable within 21st-century American academia.³⁷ This unevenness is partly why Finkelstein’s academic critics have written op-eds with relatively measured titles like “Zionists are students too: University professors should take heed,” while Amy Wax’s critics have written op-eds bluntly commanding readers to “[s]top defending Amy Wax.”³⁸ (Another reason for this tonal difference is, no doubt, the difference in their outcomes: Amy Wax remains a tenured full professor, while Maura Finkelstein is no longer employed by a university.) Nevertheless, it remains true that Finkelstein, like Wax, experienced adverse employment consequences because her extramural speech angered parties both inside and outside her university community.

³³ Lennard, *supra* note 31.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ As evidenced by their colleagues’ statements, Finkelstein’s views are decidedly within the mainstream of contemporary academic anthropology, while Wax’s are not within the mainstream of contemporary academic law. See, e.g., AM. ANTHRO. ASS’N, *AAA Membership Endorses Academic Boycott Resolution* (July 24, 2023), <https://perma.cc/K8HZ-UAEY>; AM. ANTHRO. ASS’N, *supra* note 5; Sophia Z. Lee et al., *Notions of ‘Bourgeois’ Cultural Superiority Are Based on Bad History*, DAILY PENNSYLVANIAN (Aug. 20, 2017, at 7:24 PM), <https://perma.cc/C5AG-EDKF>.

³⁸ Steven Lubet, *Zionists Are Students Too: University Professors Should Take Heed*, HILL (Oct. 14, 2024, at 7:00 AM), <https://perma.cc/WUB6-BA85>; Amesbury & O’Donnell, *supra* note 7.

C. Joe Gow

Joe Gow, the former chancellor of the University of Wisconsin-La Crosse, might seem markedly different from Wax and Finkelstein—and, in a sense, he is. Unlike them, Gow was not fired for speech in any literal sense, but rather for having publicly shared pornographic videos that he made with his wife, Carmen.³⁹ The couple released at least half a dozen of these videos under the name “Sexy Happy Couple” on publicly accessible sites including LoyalFans, Pornhub, and xHamster.⁴⁰ In January 2024, Gow was fired from the chancellorship he had held for seventeen years; eight months later, he was fired from his position as a full tenured professor in UW-La Crosse’s Department of Communication Studies.⁴¹

But while Gow’s objectionable extramural speech may be meaningfully different, his circumstances are meaningfully similar. He, too, experienced adverse employment consequences because his extramural speech angered parties inside and outside his university community. He, too, argued that the speech in question was linked to his scholarship, pointing to two e-books on the subject that he had published with his wife.⁴² And, as with Wax and Finkelstein, Gow’s opponents also argued that even if Gow’s speech was readily characterizable as extramural, it impacted his professional activities enough to render him “unfit” and thereby justify his termination.⁴³ In Gow’s case, these elements of the argument against him centered on a 2018 incident in which he invited an adult film actress to speak on campus and paid her a \$5,000 speaking fee (which he was later required to reimburse),⁴⁴

³⁹ Josh Moody, *UW La Crosse Chancellor Fired After Appearing in Adult Videos*, INSIDE HIGHER ED (Dec. 28, 2023), <https://perma.cc/9LNB-RTTL>.

⁴⁰ Corrinne Hess, *New Documents Allege Former UW-La Crosse Chancellor Used University Time, Resources for Porn*, WIS. PUB. RADIO (Oct. 23, 2024), <https://perma.cc/3N7P-KWKV>.

⁴¹ Josh Moody, *Fired UW La Crosse Chancellor Weighs Legal Action*, INSIDE HIGHER ED (Jan. 3, 2024), <https://perma.cc/6WBP-WU2K>; Josh Moody, *Universities of Wisconsin Fires Joe Gow Again*, INSIDE HIGHER ED (Sept. 27, 2024), <https://perma.cc/QZZ4-QSC6>; Joe Gow, Curriculum Vitae (on file with author).

⁴² Todd Richmond, *Former UW-La Crosse Porn-Making Chancellor’s Tenure Revoked*, FOX 6 MILWAUKEE (Sept. 27, 2024, at 9:12 AM), <https://perma.cc/K8D8-YNVD>.

⁴³ On “unfitness” as a grounds for terminating tenured professors, see Part IV.B below.

⁴⁴ Karen Herzog, *UW System President Reprimands UW-La Crosse Chancellor for ‘Poor Judgment’ in Inviting Porn Star to Speak*, MILWAUKEE J. SENTINEL (Nov. 28, 2018, at 3:04 PM), <https://perma.cc/WP5D-924H>.

and on the University's claims that Gow declined work calls in order to arrange porn shoots.⁴⁵

D. *Apples to Apples*

Despite their differences, the events surrounding Wax, Finkelstein, and Gow evoked similar patterns of argumentation from three key constituencies: the professors involved, their critics, and their supporters. To be sure, not all disputes over extramural speech will follow these patterns. Nevertheless, their manifestation in three such different circumstances suggests both that these are dependable fault lines and that we need new ways to traverse them.

In all three cases, the professors involved advanced two seemingly contradictory arguments.⁴⁶ First, they argued that their objectionable speech was unconnected to their work—that it *was* extramural—and that it should therefore not be the basis of workplace discipline.⁴⁷ But, second, they argued that their speech was inextricable from their identities as scholars and as members of university communities.⁴⁸

⁴⁵ Hess, *supra* note 40 (noting that Gow disputes these claims).

⁴⁶ To be sure, they also made other arguments, not all of which apply beyond their own circumstances and are therefore not discussed in this Article.

⁴⁷ See, e.g., FIRE, *Amy Wax and the Limits of Academic Freedom*, at 6:23 (YouTube, Apr. 14, 2023), <https://www.youtube.com/watch?v=icpnjF5MES8> (in which Wax states, “my law school and my dean . . . are trying to hang me almost entirely on my extramural speech—that is 95% of the charging indictment that has been filed against me”); NEWS 8 NOW, *Watch Live: Joe Gow Tenure Disciplinary Hearing Day Two*, at 1:31:30 (YouTube, June 20, 2024), <https://www.youtube.com/watch?v=X04V6vI1GDg> (in which Gow asks the University of Wisconsin disciplinary board to “decline to participate in the university’s conspiracy to take away my tenure. After all, tenure is based on the quality of one’s teaching, research, and service; this fruitless exercise has nothing to do with that.”); Ryan Quinn, *Tenured Jewish Professor Says She’s Been Fired for Pro-Palestinian Speech*, INSIDE HIGHER ED (Sept. 27, 2024), <https://perma.cc/R8RK-CQ5K> (in which Finkelstein asserts, “I wasn’t fired for anything I said in the classroom. I was fired because of a charge brought by a student I had never met, let alone taught, who had been surveying my social media account for months.”).

⁴⁸ See, e.g., FIRE, *supra* note 47, at 16:42 (in which Wax says her criticism of same-sex relationships while speaking on an academic panel should not have contributed to her censure because it was a claim made in an academic setting: “And you know, here I am, labeled a homophobe and a bigot based on my academic activities, and [my panel discussion] is listed as one of the grounds for sanctioning me to the point of taking away my job.”); Kyle Farris, *Joe Gow Says He Was ‘Naive’ in Booking Porn Star; Chancellor Says He’ll Reimburse UW-L for Appearance Fee*, MILWAUKEE J. SENTINEL (Nov. 28, 2018), <https://perma.cc/CS5D-ZTYA> (citing Gow’s argument that he invited the

Critics of the professors also made two arguments regarding the extramural nature of the speech. First, they claimed that the speech in question was not really extramural because of its impact on members of their university communities.⁴⁹ For instance, Muhlenberg's Title IX Director determined that Finkelstein's reposting of the Kanazi poem "could violate EO Policy since it 'arguably targets Zionists and calls for excluding them from spaces, which could include the Professor's classes.'" ⁵⁰ Second, critics argued that, even if the speech *was* extramural, it "clearly demonstrate[d] the faculty member's unfitness to serve" and consequently met the AAUP's high bar for deserving punishment despite its extramural nature.⁵¹ For instance, the letter of reprimand issued to Joe Gow by the President of the University of Wisconsin System stated:

[A]s Chancellor, you need to exercise better judgment when dealing with matters such as these . . . [N]either you nor your staff briefed us prior to it becoming public. . . . This incident has prompted many to question the sources and uses of the Chancellor's Discretionary Fund. . . . [Y]ou are being reprimanded for exercising poor judgment and for a lack of responsible oversight with respect to the use of state funds.⁵²

porn star to campus because it taught healthy human sexuality and raised First Amendment questions, and that people should "come with an open mind, engage in critical thinking and then make up their mind about what a speaker has to say"); Landon Gourov, "Zionism and Judaism Are Not the Same": An Interview with Muhlenberg College Professor Maura Finkelstein, *Fired for Opposing the Gaza Genocide*, WORLD SOCIALIST WEB SITE (Oct. 17, 2024), <https://perma.cc/FFR3-TAHG> (in which Finkelstein states that her termination was "a huge violation of what it means to be an intellectual, be a teacher," and claims that she was fired for "actually teaching about the world and what is happening in the world").

⁴⁹ E.g., Letter from Students & Alumni of the Univ. of Pa. Carey L. Sch. to Theodore W. Ruger, Dean, Univ. of Pa. Carey L. Sch., *Re: Amy Wax* 2 (Jan. 3, 2022), <https://perma.cc/ZBX2-YAR5> (asserting that "it is impossible to fathom" that Wax will treat "non-conservative, non-white students fairly" in her courses).

⁵⁰ Letter from Beth Gellman-Beer, Off. of C.R., U.S. Dep't of Educ., to Kathleen E. Harding, President, Muhlenberg Coll. 13–14 (Sept. 30, 2024) (on file with author).

⁵¹ AM. ASS'N UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, <https://perma.cc/E8DR-5JBD>.

⁵² Letter from Ray Cross, President, Univ. of Wis. Sys., to Joe Gow, Chancellor, Univ. of Wis.-La Crosse, *Re: Letter of Reprimand* (Nov. 6, 2018), <https://perma.cc/QT3B-8XHH>.

Similarly, the chair of the department to which Gow would have returned worried that his “notoriety ‘would follow him into that classroom,’”⁵³ while the faculty panel that denied Gow’s appeal declared that:

“[Gow’s] private conduct is entangled with his professional role as a UWL faculty member. . . . It would be impossible for Prof. Gow to continue in his position as a tenured faculty member at UWL without also continuing to benefit from the conflict of interest he has created by placing himself in the public eye, in opposition to UWL’s interests, for his private gain.”⁵⁴

Finally, supporters of the targeted professors—or, at least, supporters of extramural absolutism—argued that there would be dire consequences if this sort of speech was allowed to trigger employment discipline, much less termination. These commentators differed as to the seriousness of the consequences they predicted, but “manifest betrayal of” the overarching commitment to freedom from censorship,⁵⁵ “egregious trampling of academic freedom protections,”⁵⁶ and “over the top” disciplinary measures⁵⁷ are representative critiques. Overall, they suggested that an expansive—indeed, *absolutist*—approach to protecting faculty speech is integral to the pursuit of knowledge and even to the health of American democracy.⁵⁸

Some readers may wonder whether these examples aren’t too easy. What about professors whose problematic statements are manifestly unconnected to their expertise or just manifestly *wrong*—the business professor who posts online that

⁵³ Josh Moody, *Faculty Panel Recommends Firing Joe Gow*, INSIDE HIGHER ED (July 15, 2024), <https://perma.cc/VZ9H-PNKA> (quoting Linda Dickmeyer, UW-La Crosse Communication Studies Department Chair).

⁵⁴ *Id.* (quoting the panel’s decision).

⁵⁵ AM. FREEDOM ALL., *AFA Statement on Penn’s Suspension of Amy Wax* (Sept. 25, 2024), <https://perma.cc/7CKU-L56V>.

⁵⁶ Academic Advisory Council of Jewish Voice for Peace, *On the Firing of Tenured Faculty Member Maura Finkelstein by Muhlenberg College*, JEWISH VOICE FOR PEACE (Oct. 10, 2024), <https://perma.cc/8ASG-PEC8>.

⁵⁷ Dave Cieslewicz, *In Defense of Joe Gow*, ISTHMUS (Dec. 29, 2023, at 11:00 AM), <https://perma.cc/ZH6E-RGWC>.

⁵⁸ Regina Austin et al., *Open Letter to the University of Pennsylvania Community*, DAILY PENNSYLVANIAN (Aug. 30, 2017, at 6:31 PM), <https://perma.cc/X5XX-UGB2> (rejecting Wax’s views about cultural superiority but affirming her right to state them); Patel, *supra* note 6 (quoting Wax’s colleague who had organized the open letter as saying “I view Amy as both a scholarly embarrassment and a toxic presence at Penn She is nevertheless a tenured faculty member at a university, and I do not support university sanctions for public expressions of horrible views.”).

“anyone who believes in God should be shot” or the English professor who gives a public speech in which she insists that “the earth is physically the center of the universe”? Extramural absolutism may seem like a poor fit for these cases if you think that they appear even clearer on the merits than the circumstances surrounding Wax, Finkelstein, and Gow.

To begin with, what counts as a truly hard case is profoundly subjective and variable. A previous reader of this Article suggested that there was “a plausible (if not persuasive)” argument that the Wax controversy represented a tricky case—unlike, for instance, the seemingly easy case of the geocentric English professor, whose speech this reader viewed as clearly undeserving of protection.⁵⁹ But many other observers have considered the Wax dispute to be unarguably self-evident on the merits.⁶⁰ In a profession dedicated to nuanced and creative thinking, agreement even on seemingly extreme cases is likely to be elusive and, consequently, seemingly easy sorting mechanisms like “expertise” (Part III.B) and “unfitness” (Part IV.B) turn out to be surprisingly unreliable aids. Just as importantly, as Part IV observes, the hardest cases should no more guide our approaches to organizational management than they should guide our approach to law.⁶¹ Here, as elsewhere, hard cases make for bad rules.

E. *Extramural Speech Disputes in Context*

Extramural freedom has long been viewed as both intellectually and politically essential: It was behind the 1915 founding of the American Association of University Professors (AAUP) and it is thus, indirectly, behind the AAUP’s articulation of faculty tenure.⁶² In fact, during the first decades of the 20th century, the type of scholarly activity that was *most* at risk—and that most clarified the need for academic freedom as protected by the contractual constraints of tenure—was *extramural*, not intramural, speech.

⁵⁹ Anonymous Reviewer 1 (on file with author).

⁶⁰ Michael BÉRUBÉ & JENNIFER RUTH, IT’S NOT FREE SPEECH: RACE, DEMOCRACY, AND THE FUTURE OF ACADEMIC FREEDOM 14–15 (2022); Amesbury & O’Donnell, *supra* note 7.

⁶¹ See *infra* note 138.

⁶² See *infra* notes 63–65.

The most famous of these early-20th-century disputes was the 1900 termination of the economist Edward A. Ross by Stanford University.⁶³ But even though the Ross incident would have significant downstream consequences—one of his colleagues, Arthur Lovejoy, quit Stanford in protest and went on to found the AAUP from his new position at Johns Hopkins—Edward Ross was neither the first nor last academic to be punished for extramural speech during this period. Edward Bemis was terminated by the University of Chicago in 1895, William Fisher was terminated by Wesleyan University in 1913, Scott Nearing was denied reappointment by the University of Pennsylvania in 1915, and Charles Beard resigned from Columbia University in 1917 to protest the termination of other Columbia faculty.⁶⁴ Not all these instances involved high-profile matters like presidential politics either: Fisher, for instance, was asked to resign after giving a speech in which he argued for less rigid observations of the Sabbath and the importance of good works over church attendance.⁶⁵

Extramural speech continued to be a major source of concern and contention well into the 20th century, even if the speech in question had occurred *before* an individual became a professor. Universities' willingness to cooperate with governmental authorities during the McCarthy era may be the most severe and well-known of these moments, but extramural speech remained controversial after Senator McCarthy's death and after the Red Scare had abated. Scholars continued to be punished for their extramural speech well into the onset of what is often consid-

⁶³ Much of this history borrows and loosely paraphrases prose from my forthcoming book, DEEPA DAS ACEVEDO, *THE WAR ON TENURE* (2025).

⁶⁴ Harold E. Bergquist Jr., *The Edward W. Bemis Controversy at the University of Chicago*, 58 AAUP BULL. 384 (1972) (discussing Bemis); Walter P. Metzger, *Academic Tenure in America: A Historical Essay*, in FACULTY TENURE: A REPORT AND RECOMMENDATIONS BY THE COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION 93, 115 (William R. Keast & John W. Macy Jr. eds., 1973) (discussing Fisher); Daniel H. Pollitt & Jordan E. Kurland, *Entering the Academic Freedom Arena Running: The AAUP's First Year*, 84 ACADEME 45, 50–51 (1998) (discussing Nearing); Clyde W. Barrow, *Realpolitik in the American University: Charles A. Beard and the Problem of Academic Repression*, 36 NEW POL. SCI. 438 (2014) (discussing Beard).

⁶⁵ Metzger, *supra* note 64, at 146.

ered to be American academia's "golden age": the post-War era when higher education was both well-funded and well-regarded.⁶⁶ During this period, for every Clinton Jencks who was able to distance themselves from their prior public activities, there were also others like Elias Snitzer and David Fine (both fired from the Lowell Technological Institute), Howard Zinn (fired from Spelman College) and Angela Davis (denied reappointment at UCLA), who lost their jobs because of their prior public activities.⁶⁷

Jencks was a former labor activist most famous for organizing miners in New Mexico who was serially hounded out of blue-collar jobs by the FBI but ultimately managed to find a foothold in the academy. His speech occurred before he ever entered the academy.⁶⁸ But this was also true of Snitzer and Fine, who were Lowell Technological Institute professors with varying degrees of prior communist affiliation. Snitzer had been a member of the Communist Party but left along with many others in 1956, two years before his professional ordeal began, while Fine "had participated in the CP's youth movement and in a number of the so-called 'front groups' in the party's penumbra."⁶⁹ Both were targeted by the House Un-American Activities Committee and fired by Lowell after "a cursory hearing before the board of trustees" that was run by an assistant state attorney.

Zinn was fired for his involvement during the civil rights movement with the Student Nonviolent Coordinating Committee (SNCC). Davis, meanwhile, was both a communist and affiliated with the Black Panthers through the Che-Lumumba Club of Los Angeles; although she is probably better known for having been charged with—then acquitted of—providing the guns used during a prison breakout (and of going on the run before her trial), she was denied reappointment to her position at UCLA before those events took place. Instead, Davis was also

⁶⁶ ELLEN SCHRECKER, *THE LOST PROMISE: AMERICAN UNIVERSITIES IN THE 1960S*, at 1 (2021) ("Once upon a time . . . American higher education got a lot of respect. From the mid-1950s through to the early 1970s, colleges and universities were at the center of American life.").

⁶⁷ *Id.* at 36–41 (discussing Snitzer, Fine, and Davis); Kate Donovan, *The Archive Speaks: Howard Zinn and the Spelman Dismissal*, BACK TABLE (Apr. 16, 2014), <https://perma.cc/X2A6-JVQ5> (discussing Zinn).

⁶⁸ SCHRECKER, *supra* note 66, at 36–41.

⁶⁹ *Id.* at 37.

targeted because of her prior (open) affiliations, the “inflammatory language”⁷⁰ of her speeches, and—ultimately—for the blatantly pretextual reason that her dissertation had not progressed enough.

Disputes like those involving Wax, Finkelstein, and Gow are thus simply the most recent iterations of longstanding tensions. There has always been both a desire and an inability to identify speech by academics that is “extramural” (as opposed to being intramural) because there has always been both appreciation for and fear of what that speech might achieve. But as the next Part shows, strong feelings about extramural speech by academics are not just about the speech itself or even about academia: They are also a reflection of the weakness of expressive safeguards available to workers outside academia.

II. SPEECH AND SECURITY OUTSIDE THE IVORY TOWER

If extramural absolutism is so vital to academia and to democracy, as both targeted professors and their supporters have claimed for decades—indeed, for centuries—why is it also so unpopular?

In a word: It is unpopular because it is unique. Not “unusual”—*unique*. This uniqueness is what drives even professors themselves to ask why “members of our profession [should] be insulated against the consequences of such speech, if members of other professions are not?”⁷¹ As the analysis in this Part shows, extramural absolutism outstrips the speech rights of private sector and public sector employees alike in both breadth and depth.

A. . . . as Compared to Private Sector Employees

Private sector employees have no federal constitutional rights to free speech at, or in connection to, their work.⁷² They have some statutory protections—for instance, they may not be retaliated against for “extramural”⁷³ speech that is part of

⁷⁰ Avishay Artsy, *Dancing to the Words of Angela Davis*, UCLA NEWSROOM (Mar. 2, 2022), <https://perma.cc/UUZ3-P548>.

⁷¹ Amesbury & O'Donnell, *supra* note 7.

⁷² SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014).

⁷³ The NLRA does not use the term “extramural,” which is particular to the educational context. Extramural, in this context, means occurring during “non-work time.” CHARLOTTE GARDEN, ECON. POL’Y INST., *WAS IT SOMETHING I SAID?: LEGAL PROTECTIONS FOR EMPLOYEE SPEECH* (2022), <https://perma.cc/UN9T-JLZL>.

“concerted activity” under the meaning of the National Labor Relations Act.⁷⁴ Whistleblower laws, anti-discrimination laws, and other statutory protections, as well as a few common law claims, give workers some additional coverage. So do some state laws, although they vary widely in their protectiveness as well as their scope.⁷⁵ All these protections are spotty in their applicability and their potency, and they operate against a default rule that the speech of private sector employees is fair grounds for discipline or termination.

For example, Emmanuel Cafferty was fired after a stranger posted a photo of him to Twitter in which Cafferty could be seen driving home from work with an arm dangling out the window of his pick-up truck.⁷⁶ To some viewers, Cafferty’s fingers appeared to be curled in a loose “okay” sign. According to Cafferty himself, he was cracking his knuckles.⁷⁷ But according to the person who posted the photo—and who tagged Cafferty’s employer—Cafferty was making a gesture in support of white supremacy. Later that day, Cafferty was suspended without pay; within the week, he had been fired.

Similarly, in May 2020, Amy Cooper was fired by the investment firm Franklin Templeton after her encounter with a Black birdwatcher in New York City’s Central Park.⁷⁸ The birdwatcher, Christian Cooper (no relation), asked Amy to follow park rules by leashing her dog; Amy retaliated by calling 9-1-1 to report that “[t]here is a man, African American . . . recording me and threatening myself and my dog.”⁷⁹ The next day she was fired by Franklin Templeton and eventually, after unsuccessfully suing the firm for emotional distress, she returned to Canada.

Incidents like these are made possible by several factors, two of which bear mentioning here because they reflect relatively straightforward legal rules rather than debatable social dynamics. First among these is the State Action Doctrine,

⁷⁴ National Labor Relations Act §§ 7, 29 U.S.C. § 157. Regarding state statutory protections for private employee speech rights, see *supra* note 13.

⁷⁵ See, e.g., CAL. LAB. CODE §§ 1101–1102 (prohibiting adverse consequences for political engagement and political activity, among other things, by private workforce employees).

⁷⁶ Yascha Mounk, *Stop Firing the Innocent*, ATLANTIC, June 27, 2020.

⁷⁷ Complaint at 3, *Cafferty v. San Diego Gas & Elec. Co.*, No. 37-2021-0024195-CU-DF-CTL (San Diego Cnty. Super. Ct. June 2, 2021).

⁷⁸ Sarah Maslin Nir, *White Woman Is Fired After Calling Police on Black Man in Central Park*, N.Y. TIMES, May 26, 2020.

⁷⁹ *Id.*

which limits the scope of constitutional protections to actions undertaken by the state. The First Amendment's guarantee of free speech only protects those whose speech is constrained through government action, and that kind of action is missing when a private employer disciplines or fires an employee because of her speech.

The second legal factor is the At-Will Rule, which dictates that employment relationships are terminable with no notice and no payment in lieu of notice, for good reason, bad reason, or no reason at all.⁸⁰ (An illegal reason for firing someone—whether the illegality is constitutional or statutory in nature—*does* violate the At-Will Rule.) The Rule can be cabined through explicit or implied contracts to only terminate for “just cause” and it can also be cabined by limitations sounding in contracts and torts. Nevertheless, in general, the At-Will Rule establishes a strong and widespread presumption in favor of employment *insecurity*.

Together, the State Action Doctrine and the At-Will Rule ensure that most private sector employees enjoy minimal—in fact, virtually nonexistent—expressive rights vis-à-vis their work. This somewhat contrasts with the circumstances of public sector employees as described below, but it stands markedly apart from the expressive freedom claimed by most academics and, especially, by anyone advancing an absolutist approach to extramural speech.

B. . . . as Compared to Public Sector Employees

Public employees in the United States do have constitutional rights to free speech with regard to their work but those rights depend on there being virtually no connection between any objectionable speech they make and their work. Under the Supreme Court's *Pickering-Connick-Garcetti* line of cases, an employee must *not* be speaking pursuant to her job duties to claim First Amendment rights (*Garcetti*), yet *must* be speaking on a matter of public concern *and* her speech interests must outweigh her employer's interest in an efficient, undisrupted workplace (*Pickering-Connick*).⁸¹ Not only are these requirements inherently restrictive, but the constraints they impose on public employee expression are exacerbated by the

⁸⁰ *Employment At-Will Doctrine*, LEGAL INFO. INST., <https://perma.cc/7E7R-2ED3>.

⁸¹ *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

varied ways circuit courts have interpreted key phrases like workplace “disruption”⁸² and “pursuant to duties.”⁸³

For instance, in *Bennett v. Nashville and Davidson County*, the Sixth Circuit ruled that in disputes involving speech below “‘the highest rung’ of public concern, less of a showing of disruption is required.”⁸⁴ Bennett, an emergency dispatch center employee, repeated a racial slur in a Facebook exchange on the evening of the 2016 U.S. presidential election. Her part of the exchange was reported to her employer and her offer to apologize to offended coworkers was rejected. Bennett argued that her involuntary leave and termination were unlawful on statutory and constitutional grounds, and her claims not only survived summary judgment but prevailed with the jury. On appeal, however, the Sixth Circuit reversed because “the harmony of the office was disrupted, and the district court erred in discounting the importance of harmonious relationships” at Bennett’s workplace.⁸⁵

Meanwhile, in *Barone v. City of Springfield*,⁸⁶ the Ninth Circuit ruled that a Community Service Officer hired to liaise between city police and the local Latinx community was speaking “pursuant to duties” when she spoke at a *non*-Latinx civic event and acknowledged awareness of increasing racial profiling complaints within the community. Barone was placed on administrative leave one week later, and then terminated when she refused to sign a last-chance agreement that would have,

⁸² E.g., Madyson Hopkins, Note, *Click at Your Own Risk: Free Speech for Public Employees in the Social Media Age*, 89 GEO. WASH. L. REV. ARGUENDO 1, 10 (2021) (discussing varied approaches to applying a “plausible,” “potential,” or “actual disruption” standard to the balancing test); Jerry C. Edwards, *Safeguarding the Search for Truth: Carving Out Academic Freedom’s Place in a Domain Dominated by Government Speech*, 19 HARV. L. & POL’Y REV. 93, 120 (2024) (summarizing circuits’ approaches to determining whether speech was made pursuant to official duties).

⁸³ *Garcetti*, 547 U.S. at 421. See also Randy J. Kozel, *Government Employee Speech and Forum Analysis*, 1 J. FREE SPEECH L. 579, 580 (2022) (arguing that the Supreme Court’s approach to public employee speech is, “within the world of free speech, exceptional” because of its restrictiveness and yet that those restrictions may be reasonable).

⁸⁴ *Bennett v. Metro. Gov’t of Nashville & Davidson Cnty.*, 977 F.3d 530 (6th Cir. 2020).

⁸⁵ *Id.* at 540.

⁸⁶ *Barone v. City of Springfield*, 902 F.3d 1091 (9th Cir. 2018).

among other things, “prohibited her from reporting on racial profiling and discrimination.”⁸⁷ Barone argued that her involuntary leave and termination were unlawful retaliation for her speech at the civic event because that speech was not conducted “pursuant to duties”—but the Ninth Circuit disagreed.

When it was issued, *Garcetti* sounded alarms about the future of academic freedom at public institutions because of the boundary drawing required by the majority’s “duties” analysis. Justice Souter observed in dissent that university professors “necessarily speak and write ‘pursuant to . . . official duties’” and would be especially vulnerable under the new framework.⁸⁸ His worries seem to have resonated enough that some circuit courts have responded by returning to *Pickering-Connick* analysis for disputes implicating academic freedom.⁸⁹

But *Pickering-Connick* analysis is itself hardly a perfect fit for the university environment. It does not protect critical speech directed at university-employers that is nevertheless *necessary* speech given the ideal of shared governance.⁹⁰ It also places considerable value on an employer’s interest in avoiding “workplace disruption,” which is differently (and arguably less) compelling in the university context. Ultimately, and even with partial and varied workarounds of the type that have emerged after *Garcetti*, the expressive safeguards available for public university professors are minimal and the safeguards for public (nonacademic) employees are worse. But, spun as positively as possible, public employees’ constitutional speech rights are greater than the rights enjoyed by private sector employees because they are greater than zero.⁹¹

⁸⁷ *Id.* at 1097.

⁸⁸ *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)).

⁸⁹ *E.g.*, *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014).

⁹⁰ Andrew Squires, *Garcetti and Salaita: Revisiting Academic Freedom*, 6 AAUP J. ACAD. FREEDOM 1, 9 (2015). *See also* *Sadid v. Idaho State Univ.*, 154 Idaho 88, 97 (2013) (holding that academic freedom was not implicated by a professor’s statements as published in a newspaper because the professor was “not speaking about political or ideological issues” but rather was making “broad allegations of corruption and ‘empire building’ based merely upon his disagreement with administrative decisions”).

⁹¹ Kermit Roosevelt III, *Not as Bad as You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631, 637 (2012) (“If we compare public employees to private *employees*, rather than to private *citizens*, the public employees actually look better off in terms of protection for speech.” (emphasis in original)).

C. *Extramural Absolutism in Context*

Part II.A showed that private sector employees have no constitutional work-related speech rights and only have specific—and spotty—statutory speech rights. Part II.B showed that public employees have some constitutional speech rights but that they have been narrowed into virtual nothingness. These are the workplace realities with which extramural absolutism must contend. Academics, meanwhile, are claiming for themselves and their friends (if not always for their differently-minded colleagues) an absolute right to speak extramurally without facing repercussions at work. This is no small demand. In fact, extramural absolutism is a far more significant concession to professors than the practice of faculty tenure, even though tenure is widely treated as the paradigmatic example of unwarranted academic privilege.

Tenure, as I have argued elsewhere, exists on a spectrum of just cause carveouts from the At-Will Rule.⁹² The elements of tenure that make it feel so unusual—the requirement that employers show adequate cause for termination, that employees be afforded pre-termination hearings, and that employees be judged partly or wholly by their peers—also apply in varying combinations to other types of workers.⁹³ Tenure’s unusualness lies in the way it combines these features, but that means that it differs from other types of contractual relationships in degree, not in kind.

We cannot say the same of extramural absolutism. Extramural absolutism means having the right to post anything on social media, to say anything (non-criminal and non-tortious), and to say anything in interviews, op-eds, and conferences, demonstrations, and similar expressive contexts. And extramural absolutism means having those freedoms regardless of the connection between one’s speech and any scholarly expertise one has developed. This is why the question posed by external critics—and by some internal ones—is reasonable and deserves a response.⁹⁴ Why *should* members of one profession be insulated against the consequences of extramural speech, if members of other professions are not? Why,

⁹² Das Acevedo, *supra* note 14, at 128; Deepa Das Acevedo, *The War on Tenure*, 91 TENN. L. REV. 1, 26 n.120 (2024).

⁹³ DAS ACEVEDO, *supra* note 63, at 130 (discussing peer-dominated disciplinary committees for lawyers and doctors by state).

⁹⁴ Amesbury & O’Donnell, *supra* note 7.

moreover, should universities adopt a bright-line approach to a task—the regulation of speech—that law has traditionally approached with balancing tests and fuzzy standards?

To take the second question first: The fuzzy standard-setting approach that law has taken to the regulation of both public and private-employee speech is not merely unsatisfying (although it certainly is that). Normatively, *Pickering-Connick* as modified by *Garcetti* is both widely criticized and specifically unsuited to an employment context centered on the ideal of shared governance. Logistically, even that dubiously desirable framework requires a great deal of technocratic parsing to be implemented: Lawyers and judges struggle to interpret and apply First Amendment tests and other nonconstitutional doctrines to specific facts despite their legal training and expertise. How can we expect those same complex and unsatisfying approaches to be implemented, as managerial principles, by professors who not only lack training in such technocratic parsing but who have full-fledged jobs *aside* from any such parsing. This, more than the supposed infringement of academic freedom, is the real problem with proposals for university-wide faculty committees dedicated to either the promotion of anti-racism (demanded in the 2020 open letter issued by Princeton faculty and staff) or the preservation of academic freedom (suggested by Michael Bérubé and Jennifer Ruth).⁹⁵ They are reasonable but impractical ideas.

Perhaps this means that we need a new model of the university altogether. In other words, perhaps the complexity of modern university management and the challenges of engaging in it pursuant to a model of shared governance—including the difficulty of pursuing law-like approaches to speech regulation—shows that pre-existing models of shared governance must evolve. That question is beyond the scope of this Article. My point here is simply that, just as there are reasonable grounds to be concerned about a university administrator’s ability to evaluate “the nuances and complexities involved in teaching and research,”⁹⁶ there are *also* grounds to worry about a faculty committee’s ability to engage in procedurally fair and technically challenging lawyerly analysis.⁹⁷ As long as we adhere to the ideal of

⁹⁵ Tracy K. Smith et al., *Faculty Letter* (July 4, 2020) (on file with author); BÉRUBÉ & RUTH, *supra* note 60, at 212–13.

⁹⁶ BÉRUBÉ & RUTH, *supra* note 60, at 216–17.

⁹⁷ Although I do not want to belabor the point, while it may be true that “even the most libertarian faculty member should have sympathy for the people working in these [diversity] offices”

shared governance, we cannot hope to solve the problem of extramural speech by adopting law-like approaches that are unsatisfying even when interpreted and implemented by legal experts.

Now, what about the first question—namely, why should members of one profession be insulated against the consequences of extramural speech when members of other professions are not? Most defenses of extramural absolutism go no further in answering this question than to say that their approach is necessary for the protection of academic freedom. This defense is half-finished at best: *Why* is it necessary?

Some scholars, most notably Keith Whittington, answer this further question by arguing that extramural absolutism is needed as a “prophylactic” protection because punishing extramural speech chills free inquiry on campus and, additionally, chills any impulses to disseminate the fruits of that inquiry beyond campus.⁹⁸ Whittington’s response is certainly adequate to the task of establishing a *Why* for extramural freedom, provided that you think scholarly insight is valuable enough in the aggregate to warrant tolerating specific remarks that might be deeply objectionable. (If you don’t share that prior, you may want to skip the rest of this Article.) Most importantly, Whittington avoids the weakness common to other variations of the argument from academic freedom because he does not make an affirmative case for an extreme position. Instead, he presents extramural absolutism as a necessary if not always appealing precondition for things that *are* intrinsically desirable: “intellectual progress” and the “diffusion of knowledge” beyond campus communities.⁹⁹

In the rest of this Article, I offer arguments grounded in academic labor dynamics to complement Whittington’s argument. Like him, I am agnostic about the inherent value of the extramural remarks that professors make: The constraints and conventions applicable to extramural speech mean that such speech is likely to be less rigorous and less detached than scholarly discourse. But, unlike Whittington, I focus on the *practicability* rather than the *desirability* of regulating extramural speech. An absolutist approach to extramural speech is an awesome concession to

because of the complexity of their work and the frequency with which they are “overridden by university administrators,” doing that work is *the primary job function* of those officers. That is not true of the professors who would staff those proposed university-wide committees. *See id.* at 220.

⁹⁸ Whittington, *What Can Professors Say in Public?*, *supra* note 8. *See also* FINKIN & POST, *supra* note 9, at 140.

⁹⁹ Whittington, *What Can Professors Say in Public?*, *supra* note 8.

a particular type of worker, and it is also the only practicable one. The next Part explains why this is so.

III. ACADEMIA SANS FRONTIÈRES

The circumstances of academic labor preclude the use of any sorting mechanism to distinguish between extramural speech that *should* and *should not* be allowed to trigger adverse employment consequences. I show why the two most seemingly objective sorting principles—true extramural status and a connection to scholarly expertise—are both impracticable. The nature of academic labor rules out the possibility of categorizing academic speech acts along either of these axes. As a result, critics of extramural absolutism are left with sorting mechanisms that are self-evidently undesirable because they are not neutral as to content, intent, or outcome.

A. *Everything, Everywhere, All at Once*

Why not just say that *truly* extramural speech—what a professor says or does in her personal capacity—should not trigger adverse employment consequences? This approach would give professors far more latitude and more protection than private sector employees who can be disciplined or fired for any reason that has not been explicitly prohibited. It would also mimic but exceed the First Amendment standard applied to public employees, since speech that is extramural under *Garretti* (because it is not “pursuant to duties”) would be flatly protected instead of having to undergo the balancing analysis established by *Pickering-Connick*. And, finally, protecting speech that is truly extramural would not prevent universities from attaching consequences to the kind of *intramural* speech that seems, after all, more likely to directly harm students, coworkers, and the university itself. So why not simply draw a protective circle around extramural speech that is truly extramural while leaving the rest amenable to employer discipline?

The answer is simple: This can’t be coherently done.

Importantly (if also self-evidently), speech cannot be characterized as personal or professional based on whether it literally occurs *extramurally*—that is, whether it takes place inside or outside university walls. This type of crude sorting probably would never have made sense, since scholars have for centuries been asked to give off-campus lectures and have for decades participated in professional networks defined by off-campus conferences and associational meetings. But it is worth reiterating that it would be impossible to identify “genuinely” extramural speech accord-

ing to its place of utterance given the rise of electronic communication: Email, social media, television, live-streaming erase any possibility of interpreting the label literally.

Perhaps, instead, speech can be characterized as truly extramural or not according to whether it resembles a predetermined job function. That is, a lecture is a lecture whether delivered on- or off-campus, just as a tweet is a tweet whatever the topic and wherever the sender is physically located. There are two problems with this approach.

First, academic job functions are rarely spelled out in a way that would be remotely useful to a professor who is debating whether or not to issue a controversial statement or to a court tasked with adjudicating a wrongful termination claim. The *Barone* plaintiff argued that her speech was not “pursuant to duties” because the civic event she spoke at was outside her job description. After considering the eight “essential duties” ascribed to the position she had held, the court decided that “Barone’s job entailed more than communicating with the Hispanic community about domestic violence issues.” Consequently, her speech did not even trigger *Pickering-Connick* analysis and was ineligible for constitutional protection.

The eight-part job description that was held to be inadequate, or at least inexact, in *Barone* appears luxuriously detailed when compared to the job descriptions of tenure-stream faculty positions. The offer letter I received from my current institution was scrupulously explicit about my start date, salary, and research leave schedule, but contained only two sentences about my job duties.¹⁰⁰ The offer letter from my previous institution contained double the prose, but this only amounted to a four-sentence paragraph saying, in large part, that my “broad duties will include teaching in the School of Law, conducting scholarly research and publishing the results of such research, engaging in service within the Law School and the Uni-

¹⁰⁰ Letter from Mary Anne Bobinski, Dean & Asa Griggs Candler Professor of L., Emory Univ. Sch. of L., to author at 1 (Dec. 22, 2022) (on file with author) (“We look forward to supporting your work as a leading scholar who is actively engaged with issues of great importance to our society.”); *id.* at 2 (“The current standard teaching load for tenured faculty members at Emory Law is three (3) courses (or two courses and a seminar) per year.”)

versity, serving on Law School and University committees, and advising and mentoring students.”¹⁰¹ This type of language is standard yet hardly enough to facilitate the task of distinguishing between intramural and extramural speech.

Additionally, speech that might once have been reasonably characterized as extramural (regardless of what an offer letter said or left unsaid) is now often *also* intramural because it is a required job function. To understand why, consider the kind of information shared via faculty handbooks, which are more helpful sources of information about professorial responsibilities than job ads or offer letters.¹⁰² Those handbook statements demonstrate just how difficult it would be to demarcate speech as being outside a professor’s duties (and thus truly extramural) because so many of the activities that professors undertake have been incorporated into internal evaluation processes.

Below are the “types of scholarly and professional contributions” considered by my prior institution when evaluating a candidate for tenure—types which, it should be noted, are subcategories under just one of four considered factors (teaching, scholarship, service, professional reputation):

- articles published in refereed journals in the candidate’s discipline;
- books and book-length research monographs;
- invited or juried or reviewed exhibitions, presentations, or performances;
- chapters in books and edited collections of readings;
- research reports submitted in connection with research grants or contracts;
- participation in research contract or grant activities;
- papers published in the proceedings of meetings of professional associations;
- articles in non-refereed periodicals;
- papers presented at professional meetings;

¹⁰¹ Letter from Mark E. Brandon, Dean & Thomas E. McMillan Professor of L., Univ. of Ala. Sch. of L., to author at 2 (Dec. 29, 2017) (on file with author).

¹⁰² These handbooks, moreover, occupy a different—and arguably far more important and legally significant—role than traditional employee handbooks, which courts do not always view as indications of employer intent. *See, e.g., Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985).

- appointment as a referee, as a member of an editorial board, or as an editor of a scholarly academic or professional journal;
- any other types of scholarly publications and creative efforts that contribute to the candidate's fields of specialization; and
- important professional activities that contribute materially to the individual's professional stature and to the University's mission.¹⁰³

The first two bullet points describe traditional scholarly publication outputs and are therefore clearly intramural. But the final three points considerably expand the scope of “scholarly and professional contributions” that must *also* be considered intramural—or, at least, that are *not clearly extramural* because they may be used to evaluate an applicant for tenure. These three final points would encompass leadership positions on academic publications, giving interviews to or speaking on background with journalists, and appearing as an unpaid guest speaker on a podcast about academic hiring. And those tasks themselves frequently involve the kinds of activities—social media activity, blogging, interviews—that seem most like extramural speech.

For instance, as the Editor-in-Chief of a peer-review journal, I must rely on my Associate Editors to perform routine social media work for our publication because I have never had a presence on any platform. My lack of social media presence is, in other words, an obstacle (albeit not a very serious one) to performing a wholly traditional scholarly task—one that falls squarely within the category of activities that “contribute materially to the individual's professional stature and to the University's mission.” Similarly, my colleagues and I are frequently encouraged to provide expert opinion to journalists because doing so improves the brand visibility of our institutions. It can *also* improve career outcomes for us as individual scholars. Having a recognizable name can encourage influential scholars to agree to write reference letters for your tenure portfolio, or to nominate you for “[a]ppointment . . . as a member of an editorial board,” or to invite you to give lectures—all of which may, in turn, impress the senior colleagues within your own institution who will ultimately sit in judgment of you at tenure and promotion. And, finally, one of the reasons I know all this—besides my longstanding study of tenure practices—is that

¹⁰³ UNIV. ALA., FACULTY HANDBOOK 33–34 (2020) (on file with author).

I am currently doing research pursuant to a university fellowship that is designed to improve the public engagement of faculty at my institution.¹⁰⁴

All of this is to say that for many junior and mid-career professors today, professional growth mandates reaching outside the activities that have traditionally been considered core to the job. This point goes beyond the simple observation that professors are increasingly *likely* to be (and, thanks to the rise of electronic communication, increasingly *can* be) “public intellectuals.” Public intellectualism is not new: Elite scholars at elite institutions have long influenced societal attitudes and government action.¹⁰⁵ But the idea that such public engagement and outreach may constitute a routine form of scholarship is recent,¹⁰⁶ and requirements that professors engage in this type of public scholarship if they want to achieve job security and professional advancement are more recent still.¹⁰⁷

There are now “public scholarship academies” to “equip faculty with the tools and expertise needed to communicate their academic work to diverse audiences.”¹⁰⁸ Doctoral programs now encourage “students to engage the public through innovative and non-traditional PhD formats.”¹⁰⁹ Professional associations develop toolkits to help “departments that want to begin the process of revising their tenure and promotion guidelines/requirements to better recognize and reward community-engaged scholarship.”¹¹⁰ There is even research about the value of publicly impact-

¹⁰⁴ This project was determined to be “not human subjects research” by Emory University’s institutional review board on January 30, 2025.

¹⁰⁵ John R. Thelin, *Professors Proceeding at Their Own Risk: The Limited Protections of Academic Freedom for Public Intellectuals*, 200 NEW DIRECTIONS FOR HIGHER EDUC. 71 (2022); RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* (1963).

¹⁰⁶ ERNEST L. BOYER, *SCHOLARSHIP RECONSIDERED: PRIORITIES OF THE PROFESSORIATE* (1990); Ernest L. Boyer, *The Scholarship of Engagement*, 1 J. PUB. SERV. & OUTREACH 11, 11–12 (1996).

¹⁰⁷ John Saltmarsh et al., *Rewarding Community-Engaged Scholarship*, 147 NEW DIRECTIONS FOR HIGHER EDUC. 25 (2009); David Weertz & Elizabeth Hudson, *Engagement and Institutional Advancement*, 147 NEW DIRECTIONS FOR HIGHER EDUC. 65 (2009).

¹⁰⁸ Center for Public Scholarship and Engagement, *Public Scholarship Academy*, EMORY UNIV., <https://perma.cc/WAC8-DZHE>.

¹⁰⁹ Hannah Liddle, *The Rise of Public Scholarship*, UNIV. AFFS. (Nov. 9, 2023), <https://perma.cc/7UVY-SDEL>.

¹¹⁰ AM. SOCIO. ASS’N, *INCLUDING COMMUNITY-ENGAGED SCHOLARSHIP IN TENURE AND PROMOTION IN SOCIOLOGY: A GUIDE FOR DEPARTMENTS 3* (May 6, 2025) (on file with author).

ful research—not to society itself, but to the scholars who experience “greater public exposure” as a result of such nontraditional engagement compared to “traditional dissemination mechanisms.”¹¹¹ For decades now, and particularly in the wake of the federal defunding of lab science and DEI initiatives, academia as an industry—and universities as employers in that industry—have felt that “[c]ommunicating the myriad ways that universities’ research benefits and changes society has never been more important.”¹¹² But universities cannot directly or indirectly oblige professors to build a public platform as a condition of their employment only to then characterize that speech as meaningfully extramural.

Beyond any formal requirements imposed by university-employers, students are also transforming extramural speech into an informal factor in assessing a professor’s intramural performance. A 2016 study showed that “[n]et of other differences, publicly engaged scholars appear to students to be more knowledgeable compared with scholars who do not engage with public issues”—and, furthermore, that “gains in credibility associated with community group participation are greater than the gains associated with media involvement.”¹¹³ This may be good news for faculty who *want* to be publicly engaged scholars, but it undermines claims that extramural speech is ever solely extramural.

These are just two reasons why the quality of “being extramural” is too difficult to discern and therefore cannot be the basis on which academic speech is exempted from adverse employment consequences. Speech that occurs off-campus or in non-campus spaces is still often speech that is part of a professor’s teaching and research duties. And speech that is directed towards non-scholarly audiences, written in non-scholarly styles, or associated with administrative tasks (like running a scholarly journal) is still speech that is both officially and unofficially factored into a professor’s career progression. For decades now, universities, students, and the public at large have called for academics to blur the boundary between the ivory tower and

¹¹¹ Shannon M. Sliva et al., *Introduction to the Special Section on Public Impact Scholarship in Social Work: A Conceptual Review and Call to Action*, 10 J. SOC’Y FOR SOC. WORK & RSCH. 529, 537 (2019).

¹¹² *From the Lab to Life: How to Demonstrate Research Excellence*, TIMES HIGHER EDUC., <https://perma.cc/RVH9-2FSE>.

¹¹³ Timothy L. O’Brien & Oren Pizmony-Levy, *Going Public, Gaining Credibility: Student Perceptions of Publicly Engaged Scholars*, 59 SOCIO. PERSPS. 246, 257, 263 (2016).

the world outside—and academics have obliged. We must all live with the consequences.

B. *Because I Said So*

Why not, on the other hand, simply say that extramural speech should not trigger adverse employment consequences when it is linked to a professor's area of expertise? There is an intuitive appeal to this approach.¹¹⁴ If we think that expertise is what distinguishes professorial speech—what makes it more nuanced, more thought-provoking, more rooted in knowledge than in opinion, and for all these reasons makes it more potentially beneficial to its audiences (whether or not they agree with its content)—then it seems sensible to protect extramural professorial speech only when it is informed by expertise. Expertise seems to rescue us from having to adopt an absolutist position, and seems to do so in a way that appealingly relies on earned rather than intrinsic merit. Why not use *expertise* as our sorting principle?

The answer, once again, is that this cannot be coherently done.¹¹⁵

First, expertise is surprisingly hard to identify but many commentators have misunderstood the nature of that difficulty. For instance, Finkin and Post declare that “[i]t may be difficult to draw lines in particular cases, but surely we are not utterly incapable of distinguishing between speech that does and does not express

¹¹⁴ BÉRUBÉ & RUTH, *supra* note 60, at 71–78 (noting that the “relationship between disciplinary expertise and academic freedom is unstable” as has been the AAUP’s understanding of that relationship—and noting that even thoughtful commentators like Finkin and Post have mistaken the AAUP’s views on this point).

¹¹⁵ The argument I outline here may seem at odds with expertise-related defenses of “intramural” academic freedom exemplified, for instance, by Brian Leiter in his 2018 essay on academic freedom and his 2024 speech at Providence College. See Brian Leiter, *Why Academic Freedom*, in THE VALUE AND LIMITS OF ACADEMIC SPEECH: PHILOSOPHICAL, POLITICAL, AND LEGAL PERSPECTIVES 16–26 (Donald Alexander Downs & Chris W. Surprenant eds., 2018); PROVIDENCE COLLEGE, *The Law and Philosophy of Academic Freedom* (YouTube, Oct. 4, 2024), <https://www.youtube.com/watch?v=nHwkTOdPLzE&t=2s>. Even overlooking the difference in analytic focus—extramural versus intramural speech—there is no necessary clash. Expertise-led arguments about extramural speech, which also usually appeal to the need for expressive freedom to ensure learning about the world, merely provide a normative justification for an approach that I am supporting on logistical grounds.

scholarly expertise.”¹¹⁶ That is, identifying expertise-driven speech is generally doable if occasionally hard. But their formulation has it exactly upside-down: Identifying expertise-driven speech is generally hard but occasionally easy. Most cases are not like the atheistic business professor or the geocentric English professor I mentioned earlier—and yet what we need to make expertise a viable sorting mechanism is a definition that works across most cases.

If we define expertise in binary terms, meaning that you either *are* an expert on something or you *are not*, what demarcates the boundary between the two?¹¹⁷ Perhaps the boundary is represented by a credential, like a research doctorate. In many fields, however, research doctorates are uncommon or even unavailable. A boundary defined by the possession of a research doctorate would mean that most law professors, whose highest degree is a professional doctorate, would not qualify as experts on law, just as most medical doctors would not qualify as experts on medicine.¹¹⁸

Perhaps, instead, the boundary is merely advanced coursework. Self-evidently, this requires several additional boundary-demarcation decisions about the courses involved (*How many? How subject-specific? At what level? With what assessment requirements?*) that make it an unworkable limiting principle.¹¹⁹

Perhaps, finally, the boundary could be located at the existence of scholarly publications: After all, if you have written something that your peers deem worthy of publication, presumably you know a great deal about it regardless of how you

¹¹⁶ FINKIN & POST, *supra* note 9, at 136.

¹¹⁷ If we define expertise in *non*-binary terms, or on a spectrum from “very expert” to “very inexpert,” we face all the same quantification issues *plus* the additional burden of identifying and justifying the zone of sufficient expertise.

¹¹⁸ For instance, my colleague Matthew Sag—whose expertise on intellectual property has led Congress to request his testimony—would nonetheless not count as an “expert” using this rubric because he does not hold a PhD. *Matthew Sag*, EMORY UNIV. SCH. L., <https://perma.cc/YHZ7-4B2H>.

¹¹⁹ For instance, my colleague John Acevedo—who completed advanced coursework in English literature as a doctoral student in history—*might* qualify as an expert using this rubric even though he, as he himself would admit, probably should not. *John Acevedo*, EMORY UNIV. SCH. L., <https://perma.cc/T5NH-JD95>.

came by your knowledge. But publications, too, are unworkable as a proxy for expertise.¹²⁰ I have published exactly one article on retirement benefits in the United States,¹²¹ and exactly one article on widow immolation in India.¹²² While there is a passing fair argument to be made that I am an expert on *sati*, it would be ludicrous to consider me an expert on the fascinating and labyrinthine statute that defines retirement regulation in this country—even though I know enough about it to teach a class on it.¹²³

The sum total of these difficulties is what Michael Bérubé and Jennifer Ruth call “the Noam Chomsky phenomenon”: People with formal training in one field (linguistics) can become so learned and influential in another field (American foreign policy) as to be experts without possessing any predetermined markers of expertise.¹²⁴ What Bérubé and Ruth do not note, but what follows from their analysis, is that such predetermined markers are necessary for any organizational approach to extramural speech that falls short of absolutism. That is because predetermined markers are what allow busy and harangued decision-makers to make decisions under duress. Most of the frontline work of university management is done by the faculty members of disciplinary committees and the mid-level university administrators they work with. Neither type of worker is so flush with spare time or mental resources that they can reconsider the meaning of expertise from scratch each time a professor’s extramural speech draws fire from irate alumni or parents or government officials. So predetermined markers are necessary—but, unfortunately, they are also impossible to establish at a pan-disciplinary level.

Now, most of us do not become exemplars of the Chomsky phenomenon. Nevertheless, there is a second and more widely relevant reason why expertise provides

¹²⁰ Not least, it bears mentioning, because some fields—most relevantly, law—are not defined by norms of peer review in scholarly publication.

¹²¹ Deepa Das Acevedo, *Addressing the Retirement Crisis with Shadow 401(k)s*, 92 NOTRE DAME L. REV. ONLINE 38, 38–54 (2016).

¹²² Deepa Das Acevedo, *Changing the Subject of Sati*, 43 POL. & LEGAL ANTHRO. REV. 37, 37–53 (2020).

¹²³ The literature and available knowledge on *sati* is limited, and so I can say with a reasonable degree of confidence that I have read every piece of scholarship on the topic published in English, whether that scholarship is best disciplinarily slotted into the disciplines of archeology, history, gender studies, religious studies, or law.

¹²⁴ BÉRUBÉ & RUTH, *supra* note 60, at 71.

a poor basis for sorting between protected and unprotected extramural speech: Expertise is extraordinarily fluid even in ordinary cases. Very few scholars retain a single narrowly defined research and teaching focus for the three to five decades that constitute an average academic career span.

My mother, for instance, began her career teaching classes like Introduction to Marketing and Consumer Behavior but, around the time of her retirement, was most often teaching Business Ethics (by choice). Her most cited article is about gender roles in Indian advertisements, but some of her most recent research has explored World War I memorial tourism.¹²⁵ Academia, as academics love to say, attracts people who enjoy being lifelong students. But this means academics are constantly on their way to becoming experts in something new and losing expertise in something they studied years ago but have long since stopped thinking about. Where along that path will they have earned or lost protection from adverse employment consequences on the grounds that their offensive speech was *expert* speech?

The fluidity of expertise is, moreover, something that professors are not solely responsible for and that consequently cannot be unproblematically weaponized against them. As new areas of study emerge and stakeholders inside and outside the university community—students, employers, policymakers—clamor for cutting-edge educational opportunities, professors must frequently become short-order experts to meet demand. The scramble going on right now for legal scholars knowledgeable about artificial intelligence was, less than a decade ago, a scramble for scholars knowledgeable about environmental law. Neither scramble has met with an adequate supply of scholarly experts yet because expertise takes time to grow.

As a result, current faculty are often encouraged or pressured to learn enough of the newly popular topic to develop courses or, at least, to be able to adjust their existing courses. Along the way to learning just enough that they can provide basic instruction to someone else, professors are quite likely to become genuinely interested in a topic that they must make interesting to their students. But where along that path—a path that was not even wholly of their own choosing—will they have earned or lost protections that are tied to expertise?

¹²⁵ Mallika Das, *Gender Role Portrayals in Indian Television Ads*, 64 SEX ROLES 208 (2011); Mallika Das & E. Wanda George, *American and Canadian Perspectives on the First World War: Similarities and Differences Between Neighbours*, 13 J. HERITAGE TOURISM 320 (2018).

The third and most important argument against using expertise as a sorting mechanism between protected and unprotected extramural speech is that doing so presupposes our ability to identify speech that is *truly* extramural. Without that step—the step that Part III.A revealed to be markedly difficult, if not impossible—there is no distinguishing between types of extramural speech based on expertise (or any other consideration). Expertise isn’t a better sorting mechanism than the quality of being “truly” extramural: It’s worse.

IV. ARGUMENTS AGAINST EXTRAMURAL ABSOLUTISM

It is, admittedly, not easy to adopt an absolutist position. Readers within academia will have been conditioned to avoid absolutist arguments because they allow none of the nuance and qualification that is a scholar’s stock-in-trade. Meanwhile, readers outside academia may well be conditioned to expect and to reject absolutism *particularly* when articulated by academics. There are, indeed, several lines of critique against extramural absolutism. This Part considers and refutes such objections.

A. Unevenness

The COVID-19 pandemic powerfully problematized the assumption that science is apolitical,¹²⁶ but that assumption nonetheless underlies public conversations in which the humanities (and, to a lesser degree, the social sciences) are characterized as *hyper*-political.¹²⁷ Such priors about the relative politicization of disciplinary clusters suggest two possible—and inverse—objections to extramural absolutism.

On the one hand, critics might argue that an absolutist approach unfairly *advantages* STEM disciplines. In this view, STEM scholars’ personal speech is less likely to be linked to their expertise and, consequently, more of that personal speech will qualify as “truly” extramural and therefore will be protected under an absolutist approach. Conversely, however, critics might argue that an absolutist approach unfairly *advantages non*-STEM disciplines. In this view, non-STEM scholars will be more likely to discuss contentious social and political issues when they speak extramurally, and will rely more on their expertise to do so, which will afford them greater protection under an absolutist approach.

¹²⁶ Danielle M. McLaughlin, Jack Mewhirter & Rebecca Sanders, *The Belief that Politics Drive Scientific Research & Its Impact on COVID-19 Risk Assessment*, 16 PLOS ONE (2021) (showing that COVID-19 changed public perceptions about whether science was apolitical).

¹²⁷ Tyler Austin Harper, *The Humanities Have Sown the Seeds of Their Own Destruction*, ATLANTIC, Dec. 19, 2023.

Both variations of this critique present extramural absolutism as a facially neutral approach that, in practice, protects scholars unevenly based on their disciplinary affiliations. Both variations rely on crude caricatures of individuals and disciplines that fare poorly under any examination. Cluster designations like “STEM” may provide a vocabulary for everyday conversation and even for scholarly analysis, but they conceal—not too well—profound disciplinary differences. Despite both being STEM fields, theoretical physics is not only markedly different from immunology, it is also likely to trigger different critical responses from lay audiences.

But even for critics who do believe that a theoretical physicist *is* more like an immunologist than she is like, say, an analytic philosopher, there remain two other challenges. These final challenges exist at the granular level of implementation and, consequently, they rarely surface in debates over academic freedom or tenure, which occur at the level of norms and laws. The “unevenness” critique depends on our ability to clearly demarcate the boundaries of expertise, because only then can we know if, for instance, extramural absolutism protects STEM scholars far better than their peers. Simultaneously, the critique requires that we clearly distinguish between intramural and extramural speech so that we can know if non-STEM scholars are receiving a greater benefit. The “unevenness” critique thus relies on sorting mechanisms—expertise and genuinely extramural status—that Part III revealed to be conceptually incoherent.

B. *Unfitness*

If you think the earth is flat, perhaps your opinions—whether on geography, physics, or ethnomusicology—should not receive above-average protection because they are self-evidently wrong. Put differently: A scholar opposing opinions that are substantiated by the best knowledge we have today seemingly demonstrates her unfitness to serve in an educational role—and, by extension, she seems to relinquish any protections for her extramural speech, even by the supportive lights of the AAUP.

The problem, once again, lies in implementing this standard rather than in defending it.

Accepted opinion and *reasonable-enough-to-be-expert* opinion do not always coincide. When a colleague of mine first argued that the Salem witch trials were procedurally fair by the standards of the day, and that the negative outcomes often associated with the trial were in fact not what they were depicted as being, established academic opinion disagreed with him. This was even though an “objective”

source was available (court records of the Massachusetts Bay Colony) as were “objective” comparators (then-current and preceding criminal codes and conviction rates). Cross-referencing those sources showed that similar crimes elicited similarly harsh punishments, and similar offenses triggered similar procedural protections. Established academic opinion was simply wrong and had been confidently wrong for decades.¹²⁸

Bérubé and Ruth note—building on Joan Wallach Scott—that “[t]oo reverent a conception of disciplinary expertise . . . ‘may end by barring those most likely to have remade the field.’”¹²⁹ As with expertise as a sorting mechanism, many situations—perhaps most of them—are likely to be tricky, while only a few will be easy calls. Several are likely to be easy calls in one direction right until the day that they become easy calls in another direction.¹³⁰ Academic opinion must always leave room for the possibility that it is wrong because advances in knowledge may soon show that it was. How, then, are we to decide what knowledge is sufficiently substantiated that people who oppose it should lose their jobs? Intellectual hubris is a poor basis for intellectual freedom.¹³¹

The “unfitness” critique is also troubling because the decision to terminate a full-time academic—and, particularly, the decision to terminate a tenured professor or to deny tenure to a tenure-track professor—is more than ordinarily momentous. Academia demands high threshold investments of time and money for low odds of employment, an intense work environment, poor wages, poor exit options, and involuntary “auto-depreciation” of a practitioner’s human capital.¹³² The odds of getting a tenure-track job are increasingly like the odds of achieving success in

¹²⁸ John F. Acevedo, *Crime Fantasies*, 46 AM. J. CRIM. L. 193, 216–22 (2019).

¹²⁹ BÉRUBÉ & RUTH, *supra* note 60, at 70 (quoting JOAN WALLACH SCOTT, KNOWLEDGE, POWER, AND ACADEMIC FREEDOM 52 (2019)).

¹³⁰ Alice Callahan, *How Red Wine Lost Its Health Halo*, N.Y. TIMES, Feb. 17, 2024.

¹³¹ To be sure, the academy runs on this kind of hubris inasmuch as some scholarship gets designated as real scholarship or as real history, psychology, etc. See Joan Wallach Scott, *Academic Freedom & the Politics of the University*, 5 J. FREE SPEECH L. 311, 313 (2024). But the inevitability of this dynamic does not mean we should amplify it.

¹³² See DAS ACEVEDO, *supra* note 63, at ch. 8 (describing the academic job market as “quasi-monopsonistic”); *id.* at chs. 7 & 14 (discussing job expectations and debunking stereotypes of laziness); *id.* at ch. 10 (using federal statistics to compare wage outcomes for academics and practitioners in comparable nonacademic industries); *id.* at ch. 11 (articulating and defining the concept of “auto-depreciation” among academics).

the celebrity professions: Higher education scholars estimate that “any given PhD graduate probably has a 10–25% chance of landing a tenure-track job”¹³³—and this estimate is likely *too high*. Getting a tenure-stream academic job is so difficult that losing one can be career-ending.¹³⁴

The trauma of forced industry exits, in turn, is so great that it has given rise to a new genre of writing, “Quit Lit,”¹³⁵ that already has a robust corpus and canonical texts. In just one of these now-canonical texts, historian and former academic Erin Bartram writes:¹³⁶

I don’t know what I’m going to do. I don’t know what I’m good for. I don’t know how to come to terms with the fact that I have so much in my head, and so much in my Google Drive, that is basically useless right now. I don’t know how to come to terms with the fact that the life I imagined is not going to happen. I’ve already stopped doing my scholarship, other than editorial work for forthcoming pieces. In a few months, I’ll be done teaching. I don’t know how to come to terms with never doing those things again.¹³⁷

The “unfitness” critique of extramural absolutism invites more of this heart-ache into a profession that is already cutthroat. It may be tempting to believe that this harshness would be mitigated by a practice of reserving negative employment consequences for only the most severe scenarios. But severity, as I have argued throughout, is a deeply subjective determination. Moreover, it makes little sense to develop a policy for extreme scenarios when most faculty speech, as Part IV.C below discusses, is *not* extreme. Exceptional circumstances, lawyers well know, rarely generate good rules of general applicability.¹³⁸ Academia and speech by academics are no different.

¹³³ DAS ACEVEDO, *supra* note 63, at 62; H. Lorne Carmichael, *Incentives in Academics: Why Is There Tenure?*, 96 J. POL. ECON. 453 (1988); Andrew Jacob Cuff, *An Academic Lottery or a Meritocracy?*, INSIDE HIGHER ED (May 2, 2017), <https://perma.cc/G9EJ-JUVE>.

¹³⁴ DAS ACEVEDO, *supra* note 63, at 62 (discussing literature on faculty mobility).

¹³⁵ Colleen Flaherty, *The Rise of “Quit Lit,”* SLATE (Sept. 11, 2015, at 12:33 PM), <https://perma.cc/T77F-TCQR>.

¹³⁶ *About*, ERIN BARTRAM, <https://perma.cc/3CRA-6BVA>.

¹³⁷ *The Sublimated Grief of the Left Behind*, ERIN BARTRAM (Feb. 11, 2018), <https://perma.cc/959N-5ZJP>.

¹³⁸ N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) (“Great cases, like hard cases, make bad law.”).

C. *Floodgates*

The critiques centered on “unevenness” and “unfitness” both raise the specter of scholars gone wild. The underlying concern, which is that unfettered extramural speech will lead to unfettered expressive offense, is a powerful one—but it is also wholly unnecessary. There are two reasons why universities that adopt a policy of extramural absolutism will not open the floodgates for offensive and hurtful speech.

First, controversies of the Wax, Finkelstein, and Gow varieties may draw headlines, but they are not representative of the daily work of teaching and research. Like all other workers, professors engage in hundreds of thousands of actions every single day that raise no concerns whatsoever: They teach classes, mentor students and colleagues, conduct research, produce and evaluate scholarship, and perform countless other tasks that unproblematically educate students and advance our collective knowledge.

Most academics are not in the business of studying or declaring controversial matters.¹³⁹ Most scholarship is a refinement—not an upending—of received knowledge. And most scholars do not want to speak outside their job duties on topics they lack expertise in, *whatever* way we define expertise. In fact, academic coaches agree that they are more likely to encounter “newly tenured faculty members [who] show up in the fall with no agenda of their own” than those who take to the streets, social media, or scholarly publications with controversial ideas.¹⁴⁰ But, once again, policies other than extramural absolutism are keyed towards exceptional circumstances in which academics *do* study controversial matters, upend received knowledge, or want to speak outside their expertise and job duties. Policies other than extramural absolutism at most address the extraordinary, and they do so at the certain cost of the ordinary.

Second, while I have devoted much of this Article to showing that academic speech often exists in a gray zone—that it is often not *only* extramural or *only* intramural—some speech is certainly intramural and there are already practices in

¹³⁹ Frank Farley, *The Untouchables: Benefits, Costs, and Risks of Tenure in Real Cases*, 29 BEHAV. & BRAIN SCI. 574, 574–75 (2006) (“Most academic disciplines have few extremely controversial or politically or values charged issues. Most scholarship even in the social sciences involves little earth-shaking controversy. It is usually straightforward technocratic parsing of variance.”).

¹⁴⁰ Kerry Ann Rockquomore, *Advice for the Newly Tenured*, INSIDE HIGHER ED (June 7, 2016), <https://perma.cc/CAR7-XBEX>.

place to govern it. For instance, discriminatory or biased speech in a classroom setting is professionally and legally considered to be fair grounds for discipline: The question is not whether to punish that kind of speech but whether it occurred and, assuming it did, how to punish it.

What are the odds that a professor will evade workplace discipline by engaging in extramural speech that is offensive enough to invite complaint while abstaining from similarly offensive intramural conduct? Greater than zero—but not by much. The seemingly hard(er) cases I introduced in Part I.D—the aggressively atheistic business professor and the perversely geocentric English professor—are hard in part only if one assumes that the troublemaker carefully cabins their vehemence to unquestionably extramural contexts, never allowing it to seep into their teaching or research in any way whatsoever. We must assume, in other words, that limits on extramural speech are needed because individual professors are capable of pre-termining the boundaries between extramural and intramural speech that generations of their colleagues (including those at the AAUP) have viewed as tricky and unstable. We must also assume that these professors—who are either so passionate or so prejudiced or so careless as to offend others with their extramural remarks—will be equanimous, unbiased, and scrupulous in their intramural behavior. Those types of assumptions may make sense in classical economics or in law school exams, but they poorly approximate reality.¹⁴¹

If, as I suggest, we do not operate using these assumptions, we do not need to worry so much about the specter of professors strategically gone wild because their offensive behavior is quite likely to also emerge in intramural contexts where universities are already ethically and legally empowered to act. Admittedly, this is not a principled argument in favor of extramural absolutism. It does not rely on neutral categories and sorting principles and the sort of Rawlsian analysis that academics—legal academics perhaps above all—love to champion. But it is nonetheless worth acknowledging.

¹⁴¹ A once-popular joke about economists posits that “a physicist, a chemist, and an economist were stranded on a desert island with no implements and a can of food. The physicist and the chemist each devised an ingenious mechanism for getting the can open; the economist merely said, ‘Assume we have a can opener!’” KENNETH E. BOULDING, *ECONOMICS AS A SCIENCE* 101 (1970) (cited in Deepa Das Acevedo, *Sweet Old-Fashioned Notions: Legal Engagement with Anthropological Scholarship*, 73 ALA. L. REV. 719, 723 n.7 (2022)).

D. *Disingenuousness*

A final objection to extramural absolutism comes not from those who worry that it will embolden faculty but from those who worry that it will *endanger* them. How might a principle that is by its very name “absolutist” in its approach to protecting speech nevertheless instead create greater risk for the very people it is meant to protect? The answer rests on the distinction between rules and standards and the means of circumventing either.

A well-established approach to distinguishing between rules and standards is to say that rules give content to law *ex ante* (and thereby leave only factual determinations for the adjudicator) while standards require at least some of the law’s content to be determined *ex post* (such that the adjudicator must both decide the law’s scope and make factual determinations).¹⁴² A rule, in other words, may prohibit driving above 55 miles per hour while a standard would forbid driving at excessive speeds. A rule is triggered—or circumvented—by virtue of factual determinations that can be known in advance: in this case, by a determination that one was or was not driving above 55 miles per hour. A standard, on the other hand, may be circumvented in at least two ways: by arguing over the scope of the law and by disputing the facts of the circumstances.

Extramural absolutism is a standard. Because it is absolutist in its approach to safeguarding expression, the burden of defining its scope rests on the party arguing that certain remarks should not be immunized from negative employment consequences. And because it is much harder to establish what is “extramural” than it is to establish what is “intramural” (despite their names, the two are not simply opposites of each other), the burden created by this standard is considerable. Put simply, extramural absolutism places the onus of identifying a speech act as extramural *and* the obligation of showing that the speech act merits workplace discipline squarely on the critic rather than on the professor.

This might sound advantageous to the professor—and, as this Article has argued, it generally is. But it is not *inevitably* advantageous. That is because, when faced with this kind of analytical and evidentiary burden, accusing parties may be more likely to disingenuously proffer other, possibly pretextual, justifications for

¹⁴² See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992) (discussing the difference between rules and standards using the example given above).

the same employment consequences that do not rely on the difficult task of categorizing and evaluating faculty speech. But even in these hard cases, extramural absolutism is better than line-drawing because it forces university-employers to focus on the availability of legitimate reasons to discipline or terminate faculty and—where these do not exist—to forego the kind of censorship they might otherwise choose to engage in. In other words, the possibility of disingenuous punishment under an absolutist framework may not be a positive, but it is also not necessarily negative.

Consider the example of James Tracy, a conspiracy theorist and formerly a tenured associate professor of communication at Florida Atlantic University.¹⁴³ Tracy has argued that several mass tragedies were hoaxes perpetrated by the United States government, but his termination was most closely linked to statements he made regarding the Sandy Hook Elementary School shooting and his insistence that the parents of one of the murdered children prove that the child had existed and was, in fact, their son.¹⁴⁴

Florida Atlantic required Tracy to post disclaimers on the personal blog where he explored his conspiracy theories and also obliged him to report the blog and his other writings as outside activities that, according to the university's interpretation of an applicable collective bargaining agreement, had to be disclosed.¹⁴⁵ Tracy posted the disclaimers but refused to report his writing activities despite repeated institutional warnings that his refusal could be construed as insubordination and thus grounds for termination. Eventually, Florida Atlantic terminated Tracy on precisely those grounds¹⁴⁶—insubordination, *not* objectionable speech—and it also won summary judgment on Tracy's First Amendment retaliation claim.¹⁴⁷

Tracy is not a sympathetic character. Florida Atlantic did not—*technically*—fire Tracy for the objectionable nature of his extramural speech. And yet, it is hard

¹⁴³ Richard Peña, *Newton Conspiracy Theorist Sues University that Fired Him*, N.Y. TIMES (Apr. 27, 2016).

¹⁴⁴ Lenny Bernstein, *Sandy Hook Massacre 3rd Anniversary: Two Parents Target FAU Conspiracy Theorist*, SUN SENTINEL (Dec. 10, 2015), <https://perma.cc/H9XY-QU8U>.

¹⁴⁵ Tracy v. Fla. Atl. Univ. Bd. of Trs., 980 F.3d 799, 803 (11th Cir. 2020).

¹⁴⁶ *Id.* at 811.

¹⁴⁷ *Id.* at 804.

to be confident that the outcome in this scenario was definitively correct. Did Florida Atlantic enforce disclosure rules with unusual stringency to avoid formally terminating Tracy for his extramural speech? Was Tracy's speech really part of his "professional practice," as both his union president and the Eleventh Circuit maintained, or was it simply so horrific that it was characterized that way in order to bring it within the scope of the university's disclosure rules?¹⁴⁸

These are hard questions. In the most difficult cases, including that of James Tracy, it may not be possible to answer them with confidence or respond to them with consistency. But that is as it should be. The regulation of scholarly speech, whether intramural or extramural, is no simple thing and there should be few cases with simple answers. That is true whether the professor in question retains their job or whether, as with Tracy, they do not—and, importantly, extramural absolutism allows for both outcomes.

CONCLUSION

This Article has been concerned with explaining the necessity of extramural absolutism. As a principle of university management, extramural absolutism acknowledges the challenges of defining and regulating academic labor and academic expertise, and it responds to the fact that academic labor is boundaryless in ways that nonacademics *want* but may not want to *recognize*. It also acknowledges that administrators and faculty participating in shared governance are unlikely to be capable of the kind of technocratic parsing that can be reasonably expected of lawyers and judges working the law. Collectively, this means that extramural absolutism recognizes how knowledge is gained and how educational labor is performed, as well as the constraints under which all relevant actors operate.

These are good and valid reasons to support an absolutist approach to extramural speech regulation, but they do not mean that this approach lacks unforeseen or undesirable outcomes or is immune to abuse. As with less alarming proposals (such as those sounding in expertise), some cases, including some hard cases, may fall through the cracks and escape discipline. Extramural absolutism is not a perfect

¹⁴⁸ Tracy's own union president argued against the extramural nature of his blog speech. *Id.* at 808 (noting the union president's testimony that "the blog clearly constituted 'professional practice' because Plaintiff was a media expert who taught courses such as 'The Culture of Conspiracy,' and the blog closely mirrored what he did professionally"). Note how this replicates one of the disciplinary "unevenness" concerns mentioned in Part IV.A—but, as the discussion above suggests, such concerns may not always be deeply troubling.

solution to the problem of offensive or unsubstantiated academic speech because there is no perfect solution. What extramural absolutism offers is an approach that is *more workable than others*—and the instances in which it does not work are likely so rare as to form a poor basis for generalized principles of university management.

I have argued throughout this Article that nonacademics must acknowledge the necessity of extramural absolutism. But I want to close by saying that academics, for our part, must articulate our defenses of extramural freedom without feeling obliged to clothe necessity as desirability, and without minimizing the enormity of the concession we are requesting. Put simply, we must acknowledge that, by advocating for a policy of extramural absolutism, we are asking for a lot—but we are asking because we need it, and because we are expected to operate in ways that depend on having it.

Finally, academics must acknowledge that with great freedom comes great responsibility.¹⁴⁹ The ability to say almost anything and the existence of technology that facilitates saying everything does not mean that anything and everything should be said. Extramural absolutism simply places the burden of sorting speech on the shoulders of the only actor capable of carrying it: the academic speaker herself. If she does not, someone else will—and, as this Article has argued, they will do it poorly.

¹⁴⁹ Cf. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 465 (2015). Yes, this is a Spider-Man reference.