CIVIL LIBERTIES *By Harvey A. Silverglate*

Freedom seems academic

Say "academic freedom" and people think of the right of college professors to pursue knowledge without censorship or penalty. Not so, says the U.S. Court of Appeals for the 4th Circuit en banc. To the extent the First Amendment protects academic freedom at public campuses of higher education, it recognizes "only an institutional right of self-governance in academic affairs." Put more bluntly, academic freedom offers no protection against restrictions imposed by college administrators on intellectual inquiry. Colleges (and college administrators) have academic freedom; professors do not.

The opinion, which understandably has academe buzzing, issued on June 23 in *Urofsky v. Gilmore*, No. 98-1481. Six professors at various public colleges and universities in Virginia had challenged a state statute that restricted them, and all state employees, from accessing sexually explicit material on state-provided computers. No distinction was made between a clerk engaging in lunchtime amusement and a professor doing academic research.

The circuit court first disposed of the primary First Amendment attack, calling the restriction permissible because the statute controlled the plaintiffs qua state employees and the relevant agency heads were acting as employers rather than government officials. It then went on to decide the plaintiffs' backup argument—that the First Amendment has special relevance to college professors, in contrast to other state employees, because of the academic freedom component.

The case was important to academics and civil libertarians, attested to by the presence of amici briefs from the American Civil Liberties Union, the American Association of University Professors, the Thomas Jefferson Center for the Protection of Free Expression and the Authors Guild. The case produced an 8-4 split.

Too little concern

The shock engendered by the decision is a result of the cavalier way the majority treated decades of Supreme Court opinions extolling academic freedom as a component of the First Amendment. In the first case in which the high court adopted that notion, *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the plurality said that the state's efforts to force a professor to discuss his views in a subversive activities investigation "unquestionably" infringed the plaintiff's "liberties in the areas of academic freedom and political expression."

"This paean to academic freedom notwithstanding," wrote the 4th Circuit, "the plurality did not vacate the plaintiff's contempt conviction on First Amendment grounds, but rather concluded that because the attorney general lacked authority to investigate the plaintiff, the conviction violated due process."

Similarly, the Supreme Court ruled 10 years later, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), that a New York statute excluding "subversive" people from state employment was unconstitutional as applied to a college professor. The court called academic freedom "a special concern of the First Amendment." Notwithstanding, the 4th Circuit ruled that the case "involved the right of a professor to speak and associate in his capacity as a private citizen" and hence was not authority for the proposition that academic freedom be accorded a professor acting as an employee.

In another case, the high court invalidated a law prohibiting the teaching of evolution, noting that "the First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom." *Epperson v. Arkansas*, 393 U.S. 97 (1968). This was viewed by the 4th Circuit as dictum, as the Supreme Court invalidated the statute on establishment clause rather than free speech grounds.

Feints and dodges

Thus did the 4th Circuit weave in and out of decades of Supreme Court law. In an odd formulation of populist rhetoric, the majority ruled that the First Amendment pertains to all state employees equally and offers no special protection for those whose job it is to pursue and teach knowledge.

While "public employees, including teachers, do not forfeit First Amendment rights upon accepting public employment," neither do teachers enjoy any extra protection. Rather, college administrators as employers enjoy a power, protected by whatever academic freedom the First Amendment provides, to restrict the intellectual inquiries of the professoriate.

The professors plan to seek Supreme Court review, presumably in the hope that the justices, unlike the 4th Circuit, are more likely to take seriously their predecessors' "paean[s] to academic freedom."

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LAW AND LAUGHTER

"... and furthermore, I don't care what Greta van Susteren said!"