

LESSONS ON POLITICAL SPEECH, ACADEMIC FREEDOM, AND UNIVERSITY GOVERNANCE FROM THE NEW NORTH CAROLINA

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Things don't always turn out the way we anticipate. Almost two decades ago, I came to the University of North Carolina at Chapel Hill (UNC) after a long stint as dean of the law school in Boulder, Colorado. I was enthusiastic about UNC for two reasons. First, I'm a southerner by blood, culture, and temperament. And, for a lot of us, the state of North Carolina had long been regarded as a leading edge, perhaps *the* leading edge, of progressivism in the American South. To be sure, Carolina's progressive habits were often timid and halting, and usually exceedingly modest.¹ Still, the Tar Heel State was decidedly not to be confused with Mississippi, Alabama, South Carolina, or my home country, Texas. Frank Porter Graham, Terry Sanford, Bill Friday, Ella Baker, and Julius Chambers had cast a long and ennobling shadow.

Second, I have a thing for the University of North Carolina itself. Quite intentionally, I've spent my entire academic career—as student, professor, dean, and president—at public universities. I have nothing against the privates. But it has always seemed to me that the crucial democratizing aspirations of higher education in the United States are played out, almost fully, in our great and often ambitious state institutions. And though they have their challenges, the mission of public higher education is a near-perfect one: to bring the illumination and opportunity offered by the lamp of learning to all. Black and white, male and female, rich and poor, rural and urban, high and low, newly arrived and ancient pedigreed—all can, the theory goes, deploy education's prospects to make the promises of egalitarian democracy real. Having come from something of the wrong side of the tracks myself, I am an admitted believer. Because the University of Texas had, over many generations, worked to develop and support a nationally distinguished law school, and assured access even for young women and men, like me, without any money, students could enjoy opened doors that would have otherwise been

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¹ See generally ROB CHRISTENSEN, *THE PARADOX OF TAR HEEL POLITICS: THE PERSONALITIES, ELECTIONS, AND EVENTS THAT SHAPED MODERN NORTH CAROLINA* (2d ed. 2010).

conclusively sealed to them. And also, for me, the University of North Carolina was the country's greatest public university—or at least the greatest state university that actually wanted to be a public university. Michigan and Virginia are terrific universities, to be sure. But they had long before enthusiastically cast aside their public missions in order to emulate the fanciest privates.² Berkeley didn't long, existentially, to be private; but perennial California state budget crises effectively forced privatization upon it.³ UNC, on the other hand, was decidedly public. And proud to be so.

I open an essay on freedom of speech and the essential independence of academic liberty with these two brief biographically driven asides because both presuppositions have, over the last decade, been dramatically, and perhaps even permanently, eroded. If North Carolina was once a beacon of southern moderation, a political earthquake over the last decade—effectively moving all branches of government into Republican hands for the first time in a century—has resulted in what Senator Ralph Hise now correctly boasts to be “the most conservative record of any state legislature in the nation.”⁴ The New York Times refers to the altered Tar Heel track record, more bluntly, as North Carolina's pioneering work in bigotry.⁵ And a proud and accomplished university system has appeared, in recent years, to become a partisan political playground.⁶

² See Richard Vedder, *Is the University of Virginia Going Private?*, MINDING THE CAMPUS (Sept. 12, 2013), http://www.mindingthecampus.org/2013/09/is_the_university_of_virginia/; see also Amy Sullivan, *Cash Strapped State Schools Being Forced to Privatize*, TIME (Apr. 23, 2009), <http://content.time.com/time/business/article/0,8599,1893286,00.html>.

³ See *Excellence For Fewer*, THE ECONOMIST (Sept. 10, 2011), <http://www.economist.com/node/21528635> (“An alternative to worse public universities, however, is quasi-privatised [sic] ones. That seems to be the route taken in California.”).

⁴ Gene Nichol, Opinion, *What is the NC Republican Party's Agenda on Race?*, NEWS & OBSERVER (June 29, 2017), <http://www.newsobserver.com/opinion/oped/article158801504.html#storylink=cpy>.

⁵ See *Transgender Law Makes North Carolina Pioneer in Bigotry*, N.Y. TIMES (Mar 25, 2016), <https://www.nytimes.com/2016/03/25/opinion/transgender-law-makes-north-carolina-pioneer-in-bigotry.html>.

⁶ See Zoe Carpenter, *How a Right-Wing Political Machine is Dismantling Higher Education in North Carolina*, THE NATION (June 8, 2015), <https://www.thenation.com/article/how-right-wing-political-machine-dismantling-higher-education-north-carolina/>.

With the governing board recast in strongly ideological terms,⁷ a widely admired university president fired because he wasn't Republican,⁸ campus research centers (including, as I will explain, my own) shuttered in steps of political retaliation,⁹ perceived acts of faculty and curricular academic suppression occurred, and direct legislative manipulation of the University's research capacities and agenda followed¹⁰. Traditions of student access, as well, have been severely eroded—through deep cuts in state funding, both officially mandated and indirectly coerced tuition increases,¹¹ and notable and unforeseen restrictions on the use of University funds for need-based financial aid.¹² The University of North Carolina no longer seeks to set path-breaking standards for a bolstered and searching public mission. It seems instead to aim, as quickly as feasible, to abandon any “public” side of its mission.¹³

It is not my purpose, here, to re-litigate these bold and, I think, unfortunate trends. It is, rather, as advertised, to explore some notable challenges and restrictions of academic freedom, free speech, and university independence which have occurred as the crusade toward a “New North Carolina” has lurched forward. As I will explain, sometimes this has led to old-fashioned, straightforward, unsophisticated, bare-knuckled,

⁷ See Richard Fausset, *Ideology Seen as Factor in Closings in University of North Carolina System*, N.Y. TIMES (Feb. 19, 2015), <https://www.nytimes.com/2015/02/20/us/ideology-seen-as-factor-in-closings-in-university-of-north-carolina-system.html> (“[C]ritics say the moves by a panel whose members were appointed by a Republican-dominated Legislature reflect the rightward tilt of state government.”); see also Carpenter, *supra* note 7 (“What began as isolated ideological attacks is looking more and more like a wholesale gutting of the state’s public colleges.”).

⁸ See *More Proof Firing of UNC President Ross Purely Partisan*, NEWS & OBSERVER (Mar. 21, 2016), <http://www.newsobserver.com/opinion/editorials/article67391192.html>.

⁹ See Nick Roll, *Litigation Ban Advances, and Controversy Escalates*, INSIDE HIGHER ED (Aug. 2, 2017), <https://www.insidehighered.com/news/2017/08/02/unc-system-edges-closer-shutting-down-civil-rights-litigation-chapel-hill>; see also Carpenter, *supra* note 7 (drawing attention to the fact that there was no financial motivation behind closing the centers).

¹⁰ See Carpenter, *supra* note 7 (“Boger, the law school dean, alerted Nichol that legislators were threatening to find a way to close the center or remove him as director if he didn’t stop writing his column.”).

¹¹ See *id.* (commenting on funding cuts, tuition increases, and increased administrator salaries).

¹² See *id.* (“In August, after less than 10 minutes of discussion, the board voted to cap the amount of tuition revenue that universities can direct to need-based financial aid at 15 percent.”).

¹³ See *id.*

government actions of coercion—or, at least attempts at it.¹⁴ Such moves carry the odd character of the overseer, with political figures maintaining, in essence, that University faculty members work for them and, by God, they will do what they are told.¹⁵ And that will not include, by definition, criticism of the present governmental regime or its leadership. The most interesting thing about these overt steps, designed directly to punish core political expression, is not any fanciful effort to provide for their constitutional justification, but, rather, the fact that they would occur in twenty-first century American government in the first place. Just because a practice has been explicitly deemed unconstitutional for at least a half century triggers no assurance that it will not be pursued aggressively by government officials in North Carolina.¹⁶

Other challenges, though, present greater, and thus more interesting, analytical difficulties: the ready and enthusiastic abuse of the open records process to penalize and discourage constitutionally protected speech and publication;¹⁷ the use of non-profit advocacy groups to harass and intimidate university critics of government policies and actors, especially when tied to office-holders in ways that might be seen to constitute quasi-governmental coercion of expression;¹⁸ and the unfolding deployment of the carrot, as well as the stick, by legislative actors to tamper with university independence in both teaching and research. Here, I will identify dangers and patterns of worrisome overreach and suppression, but answers will, no doubt, be more difficult to proffer.

Finally, I will also explore what these variegated challenges might teach, more broadly, about practices of university governance and administrative leadership in modern

¹⁴ See Robert Christensen, *The GOP Crafts a Message to UNC, With a Chain Saw*, NEWS & OBSERVER (May 19, 2017), <http://www.newsobserver.com/news/politics-columns-blogs/rob-christensen/article151560512.html>; see also Michael A. Cooper Jr., *The War on the War on Poverty*, NEW REPUBLIC (Feb. 15, 2015), <https://newrepublic.com/article/121062/north-carolina-republicans-battle-unc-gene-nichol-poverty-center>.

¹⁵ Carpenter, *supra* note 7 (mentioning legislative threats against Nichol).

¹⁶ Milton Ready, *Is North Carolina Really a Progressive State?*, MOUNTAIN XPRESS (July 2, 2013), <https://mountainx.com/opinion/070313is-north-carolina-really-a-progressive-state/> (“Although the [Pearsall Plan] was ruled unconstitutional in 1968 and 1969, N.C. did not repeal it until 1995.”).

¹⁷ See Charles Huckabee, *Chapel Hill Professors Question Group’s Public-Records Request*, CHRON. OF HIGHER EDUC. (Nov. 27, 2013), <http://www.chronicle.com/blogs/ticker/chapel-hill-professors-question-groups-public-records-request/69735>; see also Cooper, Jr., *supra* note 15 (“Civitas filed a public records request for six weeks of Nichol’s emails, phone calls, and text messages from the fall of 2013, obtaining 1180 pages of correspondence.”).

¹⁸ See Cooper, Jr., *supra* note 15 (describing the John W. Pope Foundation); see also Carpenter, *supra* note 7 (elaborating on the Pope family and its affiliations).

public universities. Threats to the independence of state educational institutions will, no doubt, always be with us—so long as public schools are dependent upon legislatures (and hence politicians) for their budgets. Still, present patterns of university decision-making and the growing reliance on administrative leaders and governing boards who are decidedly unlikely to assure fidelity to core values of academic independence and integrity, I’m convinced, render state universities significantly more imperiled than might have been the case traditionally. If so, public universities may prove to be more highly jeopardized than generally assumed. Leaders who speak glowingly of academic freedom and unfettered expression on Constitution Day,¹⁹ can fold like a cheap suit when the perils of government bullying and overreach actually appear. That seems especially true when presidents and chancellors are selected principally for perceived fund-raising prowess or because they have managed to ascend the administrative career ladder by never taking a position on anything controversial or offending anyone. You don’t necessarily want to share the bunker with a shoe salesman.

I add, by way of preface, only that I will examine these pressing issues through my own lens, relating, perhaps unfortunately, perhaps not, to experiences that are my own. My principal focus, to be sure, will be on political interference with free speech and academic freedom, and the challenges of university governance in North Carolina. That means, of course, that there is a wide array of critical expression issues, even ones concerning direct censorship on university campuses, that I will not explore. They include issues that we currently read much of in public fora: the suppression of unpopular or conservative or hateful speech at university facilities and in university programs.²⁰ I do not deny that these are vital concerns. I do not deny that they present potent First Amendment challenges. I am an old-fashioned free speech liberal myself—sort of a Justice Black type—so I don’t like speech codes or trigger words or the regulation of expression

¹⁹ See *Whitney Will be Featured as Guest Speaker on Constitution Day*, UNIV. OF N.C. (Sept. 15, 2016), <http://www.unc.edu/campus-updates/whitney-will-featured-guest-speaker-constitution-day/> (“Constitution Day presents an opportunity to reflect upon the deeper meanings of the Constitution and the hopes it embodies for the future of the country and the world.”).

²⁰ See, e.g., Brian Grasso, *I’m a Duke Freshman. Here’s Why I Refused to Read ‘Fun Home,’* WASH. POST (August 25, 2015); Camila Molina, *UNC Chancellor Denies White Nationalist Richard Spencer’s Request to Speak at Campus*, NEWS & OBSERVER (August 30, 2017), <http://www.newsobserver.com/news/local/article170243417.html>.

based on audience discomfort.²¹ And I don't like riots or violence aimed at running controversial speakers off campus.²²

But I'm going to write here about other things. I do so mainly because I have been heavily involved in most of them. Still, I don't make the argument that what I will consider is more important than these purported "correctness" matters (I hate that term). I hope, to be frank, that what I will discuss is less important than some of these challenges, believing that, perhaps, North Carolina is an outlier on the political suppression front, as we are on voting restrictions,²³ transgender humiliation,²⁴ and the waging of war on poor and black people.²⁵ I hope that the academic independence threats so potently in play in this state are dormant in most of the rest of the country. I pray that's the case.

But whether or not what I'm going to explore is widespread, it does present a direct challenge to core, central, protected political expression—the heart of free speech in a democracy. It addresses the ability of powerful political leaders to limit, punish, and constrain criticism of their policies. So the concerns I'll discuss go deep even if, as I hope, they don't go wide.

I. A POVERTY CENTER AND FREE EXPRESSION

It is hard to know where to start. It's like Lily Tomlin once said, "No matter how cynical you become, it's never

²¹ See Emily Deruy, *After Ann Coulter Controversy UC Berkeley Rolls Out New Policy For Inviting Speakers*, MERCURY NEWS (July 19, 2017), <http://www.mercurynews.com/2017/07/19/after-ann-coulter-controversy-uc-berkeley-rolls-out-new-policy-for-inviting-speakers/>.

²² See *Violent UC-Berkeley Protests Force Cancellation of Breitbart Writer's Talk*, WALL ST. J. (Feb. 2, 2017), <http://www.wsj.com/video/violent-uc-berkeley-protests-force-cancellation-of-breitbart-writer-talk/A7714828-A8E9-4595-ADE4-E6FBF1F528AB.html>.

²³ See *Voter Suppression in North Carolina*, N.Y. TIMES (Sept. 8, 2016), <https://www.nytimes.com/2016/09/08/opinion/voter-suppression-in-north-carolina.html> ("[E]lection officials in dozens of counties are taking up new ways to make it as hard as possible for blacks, and others who tend to support Democrats, to vote.").

²⁴ See *Transgender Law Makes North Carolina Pioneer in Bigotry*, N.Y. TIMES (Mar 25, 2016), <https://www.nytimes.com/2016/03/25/opinion/transgender-law-makes-north-carolina-pioneer-in-bigotry.html> ("Proponents of so-called bathroom bills, which have been introduced in state legislatures across the country, have peddled them by spuriously portraying transgender women as potential rapists.").

²⁵ See Gene Nichol, Opinion, *Given NC History, GOP's Black Suppression the Gravest Sin*, NEWS & OBSERVER (Sept. 17, 2016), <http://www.newsobserver.com/opinion/oped/article102292057.html>; see also Ezgi Ustundag, *Gene Nichol: In North Carolina, a War on the Poor*, DUKE TODAY (Nov. 5, 2014), <https://today.duke.edu/2014/11/poverty>.

enough to keep up.”²⁶ Actually, though I am perhaps uncertain about just how to launch, it is clear where I am supposed to begin. My Chancellor and Provost ask that I first explain, to any audience, in explicit and emphatic terms, that “I do not speak for the University of North Carolina.”²⁷

To be candid, after several years of struggle with University leaders, a board of governors, a governor, and a General Assembly, to me, such a disclaimer hardly seems necessary. I’m barely allowed to speak *at* the University of North Carolina, much less *for* it. And since this piece is written for a First Amendment journal, I feel compelled to concede that I know of no free expression theory that would allow a university to demand that one—but only one—of its otherwise unencumbered thousands of faculty members is required to register, orally and in print, that he doesn’t speak for his institution. Still, I have felt modestly honored to be thus singled out. And the rough truce is, on some level, fair enough to me—I don’t speak for the University of North Carolina and, as it deals dishonestly with athletic and academic scandal after scandal,²⁸ it doesn’t speak for me.

I am a constitutional lawyer by trade. In that capacity, I have published books and academic journal articles, for many years, on judicial review,²⁹ civil rights,³⁰ constitutional theory,³¹ and the power of the federal courts.³² But for the past two decades, I have concentrated heavily on America’s wrenching challenges of poverty and economic justice.³³ And, over that same period, I have elected to publish not only in traditional law reviews,³⁴ but also in the public press.³⁵ I’ve written for

²⁶ *Lily Tomlin Quotes*, BRAINYQUOTE, <https://www.brainyquote.com/quotes/quotes/l/lilytomlin383212.html> (last visited Nov. 14, 2017).

²⁷ See e-mail from John C. Boger, Dean, Univ. of N.C. Sch. of Law (2006-2015), to Gene R. Nichol, Boyd Tinsley Distinguished Professor of Law, Univ. of N.C. Sch. of Law (Oct. 21, 2013, 4:07 PM EST) (on file with author).

²⁸ See Chris Chavez, *Here's What's on the Line at UNC's Committee on Infractions Hearing*, SPORTS ILLUSTRATED (Aug. 15, 2017), <https://www.si.com/college-basketball/2017/08/15/unc-academic-scandal-ncaa-investigation-infractions-hearings>.

²⁹ See generally Gene Nichol, *Trumping Politics: The Roberts Court and "Judicial" Review*, 46 TULSA L. REV. 421 (2001).

³⁰ See generally Gene Nichol, *Race, Poverty, and "Current Conditions"*, 49 WAKE FOREST L. REV. 791 (2014).

³¹ See generally Gene Nichol, *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993).

³² See generally Gene Nichol, *Is There A Law of Federal Courts?*, 96 W. VA. L. REV. (1993).

³³ See generally GENE R. NICHOL, *SEEING THE INVISIBLE: PUTTING A FACE ON POVERTY IN NORTH CAROLINA* (2014) (documenting a series of articles the author wrote for a North Carolina newspaper about poverty in North Carolina).

³⁴ See *supra* notes 30–33.

some national publications, but, far more extensively, I've chosen to work close to home. While I taught at the University of Colorado, I became a columnist for the Rocky Mountain News. And, for fifteen years in Chapel Hill, I have regularly published articles in the Raleigh News & Observer and, less frequently, in the Charlotte Observer and the other major papers of North Carolina.³⁶ I have sought, intentionally, to address issues of constitutional magnitude—typically involving questions of equality—in the public arena of the state which I love and in which I reside. I doubt that I'll shake the habit.

That has meant that, with some frequency, I have written articles and essays that challenge or criticize public policies and practices launched in Raleigh or Washington, DC (or earlier, Denver, Colorado).³⁷ This has, on occasion, caused some predictable annoyance in both University and governmental quarters.³⁸ But, beginning in 2010, with the already-noted Republican Party capture of the North Carolina General Assembly,³⁹ tensions notably increased. I study and write about the challenges of poverty in the Tar Heel State.⁴⁰ Seven years ago, our state government initiated the most

³⁵ See, e.g., Gene Nichol, Opinion, *Lincoln's Words Haunt N.C. Law Protecting Confederate Monuments*, NEWS & OBSERVER (Aug. 17, 2017, 12:12 PM), <http://www.newsobserver.com/opinion/op-ed/article167729352.html> (exploring the debate over Confederate monuments in North Carolina).

³⁶ See, e.g., Gene Nichol, Opinion, *Poor Die Without N.C. Medicaid Expansion*, CHARLOTTE OBSERVER (Oct. 27, 2016, 5:38 PM), <http://www.charlotteobserver.com/opinion/op-ed/article110900762.html>; Gene Nichol, Opinion, *Urban Poverty's Depth*, CHARLOTTE OBSERVER, <http://www.charlotteobserver.com/opinion/op-ed/article10435427.html> (last updated Feb. 17, 2015, 7:43 PM); Gene Nichol, Opinion, *Gene Nichol: Refusing Medicaid Expands Suffering*, STARNEWS, <http://www.starnewsonline.com/opinion/20161026/gene-nichol-refusing-medicaid-expands-suffering> (last updated Oct. 26, 2016, 2:14 PM); Gene Nichol, Opinion, *Gene Nichol: Crushing Impoverished Tar Heels by Denying Medicaid*, NEWS & RECORD (Oct. 30, 2016), http://www.greensboro.com/opinion/columns/gene-nichol-crushing-impoverished-tar-heels-by-denying-medicaid/article_7a611fbd-5ed0-5819-bda3-97a7d68aedb8.html.

³⁷ See, e.g., Gene Nichol, Opinion, *What Did Poor Kids Do to Sen. Ralph Hise?*, CHARLOTTE OBSERVER (May 26, 2017, 10:15 AM), <http://www.charlotteobserver.com/opinion/op-ed/article152799524.html> (criticizing a North Carolina state senator for inserting an amendment to kick poor people off of a food supplement program); see also, e.g., Gene Nichol, Opinion, *Trump, Lies, and the Peace Corps*, NEWS & OBSERVER, (July 21, 2017, 2:00 PM), <http://www.newsobserver.com/opinion/op-ed/article162953253.html> (arguing that “[t]here is a brutal existential discordance when one as base as Donald Trump can threaten and wound something as ennobling as the Peace Corps”).

³⁸ See Gene Nichol, *Courage on the Bench*, NEWS & OBSERVER December (Dec. 28, 2009), <http://uncnewsarchive.unc.edu/2009/12/28/carolina-in-the-news-monday-december-28-2009-2/> (aggressively criticizing Governor Beverly Perdue for demagogic criminal justice policies).

³⁹ See Cooper, Jr., *supra* note 15.

⁴⁰ See e.g., Nichol, *supra* note 34.

aggressive war on low-income people in modern American history.⁴¹ It included (to be absurdly brief) eliminating 460,000 poor people from the Medicaid rolls, ushering in the largest cut to an unemployment compensation program ever, abolishing the state earned income tax credit, slashing child care and housing subsidies, kicking hundreds of thousands of eligible recipients off of food stamps, abolishing the state appropriation for legal aid, dramatically reducing available subsidies for childhood dental services, requiring drug tests for public benefits, and raising sales taxes substantially so that poor residents pay proportionally more to the tax man—as taxes were dramatically reduced for the wealthiest two percent of taxpayers.⁴² I wrote an extensive, year-long series of articles for the News & Observer documenting the challenges of poverty in North Carolina communities throughout 2013.⁴³ And, both before and after the series was published, I wrote a (long) cascade of articles and essays criticizing the policies and practices of North Carolina’s governor and General Assembly, especially as they related to poor people and persons of color.⁴⁴ Officials in both Raleigh and Chapel Hill seemingly noticed.

On at least a half-dozen occasions between 2012 and 2015, the dean of the UNC School of Law, Jack Boger, who was strongly supportive of my right to freely publish, felt

⁴¹ See Gene Nichol, Opinion, *From Silence to Savagery, Pain for the Poor intensifies*, NEWS & OBSERVER (Dec. 28, 2013) <http://www.newsobserver.com/opinion/oped/seeingtheinvisible/article10288403.html> (documenting the evolution of public policy regarding indigent North Carolina residents since 2013); see also Spencer Woodman, *A Perfect Storm of Cuts Batters North Carolina’s Unemployed*, THE NATION (Aug. 16, 2013)

<https://www.thenation.com/article/perfect-storm-cuts-batters-north-carolinas-unemployed> (North Carolina’s “unprecedented cuts to benefits for the jobless are leaving families stranded without money for food, transportation and housing.”).
⁴² See *Altered State: How Five Years of Conservative Rule Have Redefined North Carolina*, NC POLICY WATCH (Dec. 2015), <http://www.ncpolicywatch.com/wp-content/uploads/2015/12/NC-Policy-Watch-Altered-State-How-5-years-of-conservative-rule-have-redefined-north-carolina-december-2015.pdf> (documenting the changes made in North Carolina policy from 2005 to 2010).

⁴³ See Gene Nichol, Opinion, *As Poverty Pervades, We Evade*, NEWS & OBSERVER (Jan. 26, 2013, 8:00 PM), <http://www.newsobserver.com/opinion/oped/seeing-the-invisible/article10344581.html>. To view these articles as part of a collection, see GENE NICHOL, *SEEING THE INVISIBLE: PUTTING A FACE ON POVERTY IN NORTH CAROLINA* (2014).

⁴⁴ For a very limited, but perhaps tonally representative, set of examples, see Gene Nichol, Opinion, *NC GOP Pushes Ideology over Democracy*, NEWS & OBSERVER (Dec. 10, 2016, 5:00 PM), <http://www.newsobserver.com/opinion/oped/article120179038.html>; Gene Nichol, Opinion, *The Cold Cruelty of NC Leaders is to Tax Poor to Render to Rich*, NEWS & OBSERVER (July 23, 2016, 5:45 PM), <http://www.newsobserver.com/opinion/oped/article91364952.html>; Gene Nichol, Opinion, *Nichol: Making the Case that Lawmakers Are Destroying North Carolina*, NEWS & OBSERVER (June 25, 2016, 6:00 PM), <http://www.newsobserver.com/opinion/oped/article85842807.html>.

compelled to call me to his office and inform me of threats he had received from leaders of the North Carolina General Assembly or the governor's office concerning my publications. The proffered legislative coercion was straightforward, unambiguous, and direct. If I didn't stop publishing articles in Raleigh's *The News & Observer* and *The Charlotte Observer*, I would either be removed as the director of the University's privately funded Center on Poverty, Work and Opportunity, the Center would be closed outright, or I would be fired. They demanded, it was reported to me, that I agree, formally, not to write articles for the two largest newspapers in the state. The "ban" would apply to no other faculty member or administrator of the university system. I refused. Repeatedly.

Additionally, in August, 2013, it was reported that I would speak at a large Moral Monday protest, to be held two days later, in the Queen City.⁴⁵ As I drove into Charlotte, I received a call from the dean's office explaining that legislative leaders had, that morning, informed him that if I were to speak, big consequences would follow. Dean Boger, though, made no request that I refrain. I spoke⁴⁶ as I had at dozens of other Moral Monday protests. I'm old and tenured and, by now, somewhat thick-skinned. The sun still rose the next morning.

In October, 2013, I published an article in *The News & Observer* criticizing the governor's decision to sign what has been described as the most restrictive American voting access law passed in a half-century.⁴⁷ Three days later, Francis DeLuca, director of the Civitas Institute—a right-wing non-profit advocacy organization funded principally by Art Pope, then Budget Director for Governor McCrory—posted an article saying, "Nichol's nastiness and increasingly unhinged partisanship reflects an arrogance and radicalism that have been building for years."⁴⁸ A few days later, De Luca and Civitas

⁴⁵ See Nick Wing, *'Moral Monday' Returns to North Carolina as Thousands Gather to Denounce State GOP Agenda*, HUFFPOST (Aug. 20, 2013, 3:19 PM), https://www.huffingtonpost.com/2013/08/20/moral-monday-north-carolina_n_3786358.html; Greg Lacour, *Thom Tillis is the Strategist*, CHARLOTTE MAGAZINE (Oct. 17, 2013, 1:24 PM), <http://www.charlottemagazine.com/Charlotte-Magazine/November-2013/The-Strategist/> ("In August, during the Moral Monday protest in Marshall Park in Charlotte, UNC Professor Gene Nichol included Tillis in what he called 'the Mecklenburg trio,' along with Gov. Pat McCrory and N.C. Sen. Bob Rucho of Matthews.").

⁴⁶ See Lacour, *supra* note 46.

⁴⁷ See Gene Nichol, Opinion, *Point of View: McCrory's Stands Strain His Ties*, NEWS & OBSERVER (Oct. 15, 2013), <http://www.newsobserver.com/opinion/article15494720.html>.

⁴⁸ Francis X. De Luca & Jane S. Shaw, *Academic Freedom or Shrill Partisanship?*, CIVITAS INSTIT. (Oct. 18, 2013), <https://www.nccivitas.org/2013/academic-freedom-shrill-partisanship/>.

filed a public records request seeking all of my emails, phone call records, text messages, appointment calendars and correspondence from much of the fall of 2013 (regardless of the subject matter or personal nature of the emails).⁴⁹ Over one hundred professors signed an open letter to the governor and Mr. Pope calling the records request an abuse of the statute because “a sitting administration is using a private, tax-exempt nonprofit organization funded by one of its leading officials to retaliate for criticism of its policies and intimidate future dissent.”⁵⁰ I complied with the open records request, turning over some 1,200 pages of emails, after culling out messages—over Civitas’ objection—from my students, my wife, and my daughters. As I’ll explain below, other harassing Civitas open records requests continued.

Shortly after the open records request was made, UNC Provost James Dean called and emailed me explaining that Chancellor Carol Folt “has been under a lot of pressure” at the state house because of my articles.⁵¹ He requested that I include a disclaimer on my publications indicating that I do not speak for the University. A few days later, I was informed by my university supervisor, in writing, that my publications had “caused great ire and dismay among the Governor’s staff and close supporters.”⁵² It stated, among other things, that though

there is no present intent within the University to require an end to your tenure as the Director of the Center[,] . . . [t]he Chancellor, the Provost, and the Board of Trustees must necessarily be alert . . . to the prospect of real injury to the University. . . . I earnestly hope that external forces will not combine in coming days to circumscribe UNC’s institutional

⁴⁹ E-mail from Francis DeLuca, President, Civitas Inst., to Human Resources Dep’t, Univ. of N.C. (Oct. 25, 2013, 3:24 PM EST) (on file with author).

⁵⁰ See *Open Letter from North Carolina Scholars to Governor McCrory and Art Pope* (Dec. 14, 2013) (available at <http://www.nccivitas.org/wp-content/uploads/2013/12/SNCF-Letter1.pdf>) (original letter on file with Civitas Inst.).

⁵¹ E-mail from James Dean, Jr., Former Executive Vice Chancellor and Provost, Univ. of N.C., to Gene Nichol, Boyd Tinsley Distinguished Professor of Law, Univ. of N.C. Sch. of Law (Oct. 15, 2013, 4:18 PM EST) (on file with author).

⁵² E-mail from John C. Boger, Dean, Univ. of N.C. Sch. of Law (2006-2015), to Gene R. Nichol, Boyd Tinsley Distinguished Professor of Law, Univ. of N.C. Sch. of Law (Oct. 21, 2013, 4:07 PM EST) (on file with author).

autonomy or its tradition of faculty freedom[,] . . . [but] some of the forces in play lie beyond our control.⁵³

Accordingly, I was notified that I should deploy a disclaimer and give the University a “heads up” before publishing anything in the state’s papers.⁵⁴ Subsequent newspaper stories, based on their own open records requests, indicated that Governor McCrory had expressed to a number of members of the UNC Board of Governors his intense displeasure with my writings.⁵⁵ Some of the Board members expressed doubts that a disclaimer would be enough to satisfy the powers that be.⁵⁶ The prediction soon proved true.

But first, a lighter aside. When the disclaimer was implemented, I asked the University how it was supposed to work, how broad was it? I had, not long before, published articles in the *Harvard Journal of Law and Policy* and the *Duke Journal of Constitutional Law & Public Policy*. Another piece was soon scheduled for release in the *Wake Forest Law Review*. I asked, “Am I supposed to put a disclaimer on those?” Of course not, it was explained to me. No one cares in the slightest what I write in some Harvard journal, nobody in North Carolina reads that. Apparently, it’s only when I publish in *The News & Observer* or *The Charlotte Observer* that I need to explain that my employer detests me.

To no one’s surprise, the disclaimer provided only temporary solace. The real annoyance was that I kept writing articles in the local papers. In August, 2014, Governor McCrory signed a budget bill directing the UNC Board of Governors to review all “centers” within the expansive university system (there were 237) to find \$15 million in savings.⁵⁷ Newspapers across the state reported that, whatever else might occur in the review process, there was no doubt that the Poverty Center would be closed,⁵⁸ even though shuttering

⁵³ *Id.*

⁵⁴ *Id.*; see also Jane Stancill, *Gene Nichol Speaks Loudly, Just Not for UNC*, NEWS & OBSERVER (April 12, 2014), <https://blog.ecu.edu/sites/dailyclips/blog/2014/04/14/gene-nichol-speaks-loudly-just-not-for-unc-the-news-observer/>.

⁵⁵ See Long a Critic of Spending at UNC, Pope Now Holds Sway Over School’s Budget, WASH. POST (July 20, 2014), <http://www.pressreader.com/usa/the-washington-post-sunday/20140720/281728382640012>.

⁵⁶ See Stancill, *supra* note 55.

⁵⁷ Cooper, Jr., *supra* note 15.

⁵⁸ *UNC Board of Governors Committee Slaps Nichol – and Free Speech*, NEWS & OBSERVER (Feb. 19, 2015), <http://www.newsobserver.com/opinion/editorials/article10880669.html>.

an entirely privately-funded center would generate no savings whatsoever. After going through a massive and costly charade, the Board of Governors voted to close the Poverty Center and NC Central's Institute of Civic Engagement, also a privately funded venture and a frequent partner of the Poverty Center.⁵⁹ Neither UNC-Chapel Hill Chancellor Carol Folt nor Provost Dean objected to the closing of the Poverty Center.⁶⁰ The days of courageous university leadership in Chapel Hill are long, long gone.⁶¹

The chair of the Board of Governors, John Fennebresque, explained, amazingly, that after his benefactors in the General Assembly had slashed Medicaid coverage for a half-million people, enacted the steepest cut to an unemployment compensation program in history, ended the earned income tax credit, raised sales tax burdens on low income citizens, ended legal aid appropriations, and kicked hundreds of thousands of Tar Heels off of food stamps, the privately funded, 2.3 FTE⁶² poverty center had not significantly reduced poverty in North Carolina, requiring its closure.⁶³ Newspapers, national academic organizations, students,

⁵⁹ The Board of Governors also closed a largely inactive Center on Biodiversity at East Carolina University. See Richard Fausset, *University of North Carolina Board Closes 3 Centers*, N.Y. TIMES (Feb. 27, 2015), https://www.nytimes.com/2015/02/28/us/university-of-north-carolina-board-closes-3-academic-centers.html?_r=0.

⁶⁰ See Valerie Strauss, *No More Poverty in North Carolina? UNC Panel Wants to Close School's Poverty Center*, WASH. POST (Feb. 18, 2015), https://www.washingtonpost.com/news/answer-sheet/wp/2015/02/19/no-more-poverty-in-north-carolina-unc-panel-wants-to-close-schools-poverty-center/?utm_term=.1250c326c11e (describing how Chancellor Folt supported the closing of the Center and merely expressed her disappointment in the Committee's recommendation, as well as how Chancellor Folt and the Provost Dean promised other interdisciplinary work to combat poverty).

⁶¹ See generally, Sarah Ovaska-Few, *Dean of UNC's Law School Stepping Down*, N.C. POLICY WATCH (May 19, 2014), <http://pulse.ncpolicywatch.org/2014/05/19/dean-of-uncs-law-school-stepping-down/#sthash.xCgn2NBt.dpbs>.

⁶² The abbreviation of "full time equivalents," FTE is a common way of referring to level of staffing (*i.e.*, number of staff positions). So, for example, if a business employed two half-time employees, that would be 1.0 FTE. For further information, see *Full Time Equivalent (FTE)*, BUSINESSDICTIONARY, <http://www.businessdictionary.com/definition/full-time-equivalent-FTE.html> (last viewed Jan. 18, 2018).

⁶³ John C. Fennebresque, Opinion, *Where UNC Board of Governors is Coming From*, CHARLOTTE OBSERVER (Mar. 11, 2015, 6:26 PM), <http://www.charlotteobserver.com/opinion/op-ed/article13572110.html>.

faculty, and accrediting agencies howled.⁶⁴ Senator Bob Rucho, who played a major role in appointing the Board of Governors and, oddly, sat in the audience as the Board voted to close the Poverty Center, keeping a close eye on his charges, told the local papers it was necessary to close the Center “because Nichol was advocating anti-poverty measures . . . that we’re opposed to.”⁶⁵ Sensible enough. Candid. Rucho may be old school, but at least he’s straightforward. Fennebresque and his colleagues didn’t make censorship any more tolerable by absurdly lying about its occurrence. Republican leaders had said, very explicitly, for almost three years, that unless I stopped publishing articles in *The News & Observer* and *The Charlotte Observer*, the Poverty Center would be closed.⁶⁶ I didn’t stop writing. In February, 2015, they made good on that persistent promise. They punished me (and the Poverty Center’s students and employees)⁶⁷ because I refused to stop publishing clearly constitutionally guaranteed expression. I’ve been teaching constitutional law for forty years and, I’d say with a good deal of confidence, no First Amendment lawyer in

⁶⁴ See Igor Bobic, *Tea Party Legislature Targets University of North Carolina in Major Assault on Higher Learning*, HUFFPOST (Feb. 11, 2015), https://www.huffingtonpost.com/2015/02/11/poverty-north-carolina-gene-nichols_n_6641450.html; John Charles Boger, Opinion, *UNC Poverty Center Maneuver a Betrayal of University’s Past and Its Promise*, NEWS & OBSERVER (Feb. 19, 2015), <http://www.newsobserver.com/opinion/op-ed/article10880426.html>; Carpenter, *supra* note 7; Rob Christensen, *Christensen: Nichol Is Only the Latest Academic Freedom Case*, NEWS & OBSERVER (Feb. 21, 2015), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/rob-christensen/article11302841.html>; Michael A. Cooper, Jr., Opinion, *Poverty of Integrity: UNC BOG Could Silence Critic*, CHARLOTTE OBSERVER (Feb. 5, 2015), <http://www.charlotteobserver.com/opinion/op-ed/article9514253.html>; Cooper, Jr., *supra* note 15; Richard Fausset, *Ideology Seen As Factor in Closings In University of North Carolina System*, N.Y. TIMES (Feb. 23, 2015), https://www.nytimes.com/2015/02/20/us/ideology-seen-as-factor-in-closings-in-university-of-north-carolina-system.html?_r=0; Fausset, *supra* note 60; Jane Stancill, *UNC Panel Recommends Eliminating Poverty Center, Two Others*, NEWS & OBSERVER (Feb. 18, 2015), <http://www.newsobserver.com/news/local/education/article10876544.html>; Steve Ford, *Doomed UNC Centers Sang Wrong Songs*, N.C. COUNCIL OF CHURCHES (Mar. 2, 2015), <https://www.ncchurches.org/2015/03/doomed-unc-centers-sang-the-wrong-songs/>; Jane Stancill, *National Group Joins Chorus Opposed to Closing UNC’s Poverty Center* (Feb. 14, 2015), <http://www.newsobserver.com/news/local/education/article11309357.html>; Strauss, *supra* note 61.

⁶⁵ Ned Barnett, Opinion, *The World According to Rucho*, NEWS & OBSERVER (Feb. 28, 2015, 3:00 PM), <http://www.newsobserver.com/opinion/opn-columns-blogs/ned-barnett/article11628902.html>.

⁶⁶ See Cooper, Jr., *supra* note 15.

⁶⁷ Gene Nichol, *Voices: UNC Poverty Center Closes, NC Poverty Research Fund Opens*, FACING S. (July 3, 2015), <https://www.facingsouth.org/2015/07/voices-unc-poverty-center-closes-nc-poverty-resear.html> (arguing that efforts by the UNC Poverty Center to “push back against policies that foster economic injustice . . . have led the UNC Board of Governors to close the Poverty Center”).

the United States thinks that particular set of government interactions is even arguably permissible. Stop writing core, protected, First Amendment speech or we'll use state power to punish you was the explicit threat. Then they carried out, methodically, precisely, and exactly, what they had said they would do. It's legal to regulate universities and professors in many ways. But not that one.

A. An Addendum

The Poverty Center was closed by the Board of Governors on July 1, 2015.⁶⁸ That same day, with the help of a supportive dean (Jack Boger), we opened the UNC School of Law's new North Carolina Poverty Research Fund.⁶⁹ Donors who had supported the initial poverty center transferred grants and donations to the Research Fund.⁷⁰ Thankfully, many new unsolicited contributions were received from North Carolinians outraged by the acts of legislative censorship.⁷¹ So the work of the original poverty center was continued, with the same staff and students, with modestly more insulation from the overreach of the Board of Governors, and with additional resources.⁷² I also, of course, kept publishing articles in the News & Observer and the Charlotte Observer.

Two weeks earlier, in the closing days of the legislative session, Senate Republican leaders, without notice or debate, inserted an amendment into the final senate budget cutting \$3 million from the UNC School of Law.⁷³ Democrats protested from the floor that the move was political payback for the school's "employment of legislative critic Gene Nichol."⁷⁴ When one dissenter asked whether any other schools or agencies should be prepared for such arbitrary reductions, the senate sponsor said, simply, "No."⁷⁵ Senator Mike Woodard objected that this was nothing more than "the Gene Nichol transfer amendment."⁷⁶ The budget cut passed easily, along

⁶⁸ See generally *id.* (describing the generosity and support received from North Carolina foundations and citizens from across the country).

⁶⁹ *Id.*

⁷⁰ Jane Stancill, *Gene Nichol's New Poverty Fund at UNC Generates Same Controversy*, NEWS & OBSERVER (July 09, 2015), <http://www.newsobserver.com/news/local/education/article26912845.html>.

⁷¹ Laura Leslie, *Nichol Opens New Research Project at UNC Law*, WRAL (July 3, 2015), <http://www.wral.com/nichol-opens-new-center-at-unc-law/14753021/>.

⁷² Stancill, *supra* note 71.

⁷³ Laura Leslie, *Senate GOP Docks UNC Law \$3M*, WRAL (June 17, 2015), <http://www.wral.com/senate-gop-docks-unc-law-3m/14722786/>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

party lines.⁷⁷ It was, however, removed in conference with the House.⁷⁸

In June, 2017, legislators took more wounding steps. Again, at the close of the budgeting process, the Senate introduced a previously undisclosed cut to the UNC School of Law's budget—this time of \$4 million, about 30% of the total state appropriation.⁷⁹ Papers across North Carolina said the revision was seemingly aimed “squarely” at legislative critic Gene Nichol.⁸⁰ They argued that the General Assembly should “have nothing to fear from a professor who speaks his mind.”⁸¹ The dean of the state's political columnists said the Republican legislators were sending a message carved with a “chain saw.”⁸² The message, unsurprisingly, was that they “[don't] like Gene Nichol.”⁸³ In conference with the House, the cut was reduced from \$4 million to \$500,000, and then passed.⁸⁴ Newspapers opined that the arbitrary cut was outrageous, but “could have been worse.”⁸⁵ Expectations are now very low in North Carolina.

⁷⁷ Colin Campbell, *NC Senate Votes 30-19 for \$21.47 Billion Budget*, CHARLOTTE OBSERVER (June 17, 2015), <http://www.charlotteobserver.com/news/politics-government/article24819166.html>.

⁷⁸ Rebecca Ayers, *NC House Preserves Law School Funding*, DAILY TAR HEEL (June 3, 2017), <http://www.dailytarheel.com/article/2017/06/nc-house-preserves-law-school-funding>.

⁷⁹ *Cutting the UNC Law School Budget is a Clumsy Attempt to Quiet a Critic*, NEWS & OBSERVER (June 13, 2017, 9:05 PM), <http://www.newsobserver.com/opinion/editorials/article155831004.html>.

⁸⁰ *Id.* See also Leslie, *supra* note 74.

⁸¹ See *Cutting the UNC Law School Budget is a Clumsy Attempt to Quiet a Critic*, *supra* note 80; see also Joe Patrice, *Just Checking In—Yup, North Carolina Politicians Still Stupid*, ABOVE THE LAW (June 14, 2017), <http://www.abovethelaw.com/2017/06/just-checking-in-yup-north-carolina-politicians-still-stupid/>; Jane Stancill, *UNC Law School Rallies as Legislators Consider Big Budget Cut*, NEWS & OBSERVER (June 9, 2017, 7:25 PM),

<http://www.newsobserver.com/news/local/education/article155390594.html>.

⁸² Christensen, *supra* note 15.

⁸³ *Id.* See also Rob Christensen, *UNC is Losing Ground in Budget and Reputation. Whose Fault is That?*, CHARLOTTE OBSERVER (July 21, 2017), <http://www.charlotteobserver.com/news/politics-government/article162945273.html>.

⁸⁴ Jane Stancill, *UNC Law School's Budget is Cut—But it Could Have Been Worse*, NEWS & OBSERVER (June 20, 2017), <http://www.newsobserver.com/news/local/education/article157121589.html>.

⁸⁵ *Id.*; see also Rob Christensen, Opinion, *The Budget has Good, Bad and Ugly*, GREENVILLE REFLECTOR (July 2, 2017), <http://www.reflector.com/Op-Ed/2017/07/02/The-budget-has-good-bad-ugly-parts.html>; John Newsome, *The UNC Law School Remains Under Siege*, NEWS & RECORD (July 14, 2017), http://www.greensboro.com/blogs/the_syllabus/the-syllabus-unc-s-law-school-remains-under-siege/article_d2ca8f54-a424-5736-9f08-76bf15b08c74.html; Chris Fitzsimon, Opinion, *Budget Big on Vindictiveness*, THE ROBESONIAN, (June 29, 2017), <http://www.robsonian.com/opinion/100446/budget-big-on-vindictiveness>.

Almost concurrently with the budget cut, the North Carolina General Assembly passed “An Act to Restore and Preserve Free Speech on the Campuses of the Constituent Institutions of the University of North Carolina.”⁸⁶ The bill, somewhat enticingly, indicates that the “primary function of each constituent institution is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate.”⁸⁷ And, more telling, “[to] fulfill this function [universities] must strive to ensure the fullest degree of intellectual freedom and free expression.”⁸⁸ On first reading, I thought that perhaps, at long last, the North Carolina General Assembly was riding to my rescue. I then read on:

The University of North Carolina System Board of Governors shall establish the Committee on Free Expression and appoint 11 individuals from among its membership to the Committee. . . . Each . . . member shall serve . . . at the pleasure of the Board of Governors. . . . In the event of a vacancy on the Committee, the Board of Governors shall appoint a replacement from among its membership. . . . All employees of the [University System] shall cooperate with the Committee on Free Expression by providing information requested by the Committee.... [The Committee] shall, [annually, provide assessments, criticisms, commendations or recommendations [on the handling of free speech issues on campuses]].⁸⁹

⁸⁶ Sam Killenburg, *Does The Campus Free Speech Bill Protect First Amendment Rights—or Restrict Them?*, NEWS & OBSERVER (July 28, 2017, 1:45 PM), <http://www.newsobserver.com/news/local/article164138247.html>.

⁸⁷ H.B. 527, Gen. Assemb., Reg. Sess. (N.C. 2017).

⁸⁸ *Id.*

⁸⁹ *Id.* The Campus Free Speech Act was apparently drafted by a national organization worried about political correctness on American university campuses. See Killenburg, *supra* note 87. Direct legislative suppression of core political expression was apparently thought less worrisome. *Id.*

I thought, perhaps, that I had read a link to The Onion⁹⁰ by mistake. There are, surely, no two institutions in the state of North Carolina, based on behavior, less appropriate to be trusted with the determination of free expression rights than the General Assembly and the University's Board of Governors. I would rather have Joe McCarthy and J. Edgar Hoover cast lots to decide my First Amendment liberties.

II. BEYOND POVERTY—THE VIRUS SPREADS

I would be less alarmed by these surprising steps of state-initiated, content-based suppression of core political expression—old-fashioned, First Amendment--violative punishment of university speakers for criticizing the government—if they only related to me and my tiny band of colleagues. I'm old, thick-skinned, tenured, ambitionless, somewhat battle-scarred, easily able to raise money, with ready access to many publication fora. Silence, in my case, is unlikely. And there was a glint of hope, at the outset, that a regime of special restraints for me might be the end of it. Hanna Gage, former chair of the UNC Board of Governors and present ex-officio member, told *The Nation* when the poverty center was closed that, of course the entire episode was political: “[I]f it looks like a duck and quacks like a duck, it's probably a duck.”⁹¹ Still, she believed, the retrenchment of academic freedom was likely idiosyncratic: “I think folks got a bad case of ‘genenicholitis,’ have gotten most of it out of their system, and are sensitive to overreaching.”⁹² But a heady spirit of suppression, like a spreading climate of fear, can be hard to contain.⁹³

Earlier, in 2014, as I was being treated to a regime of university and legislative coercion, Omid Safi, a highly accomplished religion and politics scholar at UNC, left Chapel

⁹⁰ The Onion is a parody website that publishes a wide array of satirical “news” pieces ranging from banal observations of daily life to politically charged commentary. See THE ONION, <https://www.theonion.com/>.

⁹¹ Carpenter, *supra* note 7.

⁹² *Id.*

⁹³ Peter St. Onge, Opinion, *The Biggest Cut Facing UNC*, CHARLOTTE OBSERVER (Feb. 19, 2015), <http://www.charlotteobserver.com/opinion/opn-columns-blogs/peter-st-onge/article10704065.html> (reporting that UNC faculty were “worried that higher education in North Carolina continues to become a tool a Republican interests. They’re even worried about saying something. Not one I spoke to would go on the record. That’s just how the Board of Governors—and the Republicans who appointed them—seem to want it.”).

Hill to become the director of Islamic Studies at Duke.⁹⁴ He told local newspapers that his departure was a reaction to political censorship by the UNC administration.⁹⁵ He said:

We started to see a very chilling impact on the ability of professors and intellectuals and universities to do the kinds of things we ask our students to do all the time, which is to connect the dots and to scrutinize injustice, not at an individual level, but at a systematic and institutional level.

I study the intersection of religion and politics and no one at UNC had ever objected to anything I had to say about human rights violations in Iran, in Saudi Arabia, in Turkey, in Israel, in any other country. When I started to write about the North Carolina human rights violations and injustices, and the ways that the Republican state legislature was characterizing things like the Moral Monday movement as ‘outside agitators,’ I was told in no uncertain terms that while people in the UNC administration individually agreed, . . . they were afraid that these kind of comments would lead the GOP to cut UNC’s budget So ironically, although Duke is an elite, private, privileged school, I found it easier to do this kind of political truth-telling at Duke than I did at Carolina.⁹⁶

⁹⁴ Leah Moore, *Former UNC Faculty, Staff Explain Reasoning For Taking Offers at Duke*, DAILY TAR HEEL (Mar. 9, 2017), <http://www.dailytarheel.com/article/2017/03/unc-has-a-net-faculty-gain-despite-offers-faculty-cannot-refuse>.

⁹⁵ *Id.*

⁹⁶ *Id.*

Last year, Jay Smith, a tenured history professor and noted critic of the University of North Carolina's handling of its famed NCAA/athletic scandal, taught a course entitled, "Big Time College Sports and the Rights of Athletes 1956 to the Present."⁹⁷ Smith had written a book, with the formidable Mary Willingham, entitled "Cheated"—which dealt pointedly with the unfolding crisis and UNC's stumbling, persistent attempts to hide and excuse it.⁹⁸ Smith's course offering was approved by the department through the regular order. Students signed up in droves. The classroom was filled. They also apparently loved it.⁹⁹ On their evaluations, almost 80 percent said the course was "excellent," 85 percent said they had learned a great deal, and many indicated that it was the best class they had taken at UNC.¹⁰⁰ Unsurprisingly, the class (History 383) was scheduled again for the following year. Then, suddenly, the University decided to cancel it, at least for the near future.¹⁰¹ Dr. Smith told the *New York Times*, "It's very disillusioning to live through the last six years here. The university is operating like a crime family, and it shows the lengths to which they will go."¹⁰²

Forty-five members of the history faculty wrote a letter of protest calling the cancellation "a serious infringement of freedom of inquiry, a fundamental feature of intellectual life in every authentic university."¹⁰³ Newspaper reports indicated that history department administrators were worried about "blowback" if the class were to be made a regular part of the curriculum.¹⁰⁴ The chair of the department told Smith:

I am more than willing to fight for your right to teach this course, . . . [b]ut I suspect that there will be resistance. . . . I have no idea about on what basis the higher administration can interfere in

⁹⁷ Michael Powell, *North Carolina's Dominance Fails to Cover Cheating's Stain*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/sports/ncaabasketball/north-carolina-final-four-cheating-fake-classes.html>.

⁹⁸ JAY M. SMITH & MARY WILLINGHAM, CHEATED (2015).

⁹⁹ Jane Stancill, *A UNC Course That Dealt With Athletics Scandal Is Cancelled. Now Some Want To Know Why*, NEWS & OBSERVER (Jun. 2, 2017), <http://www.newsobserver.com/news/local/education/article154031604.html>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Powell, *supra* note 98.

¹⁰³ See Stancill, *supra* note 100.

¹⁰⁴ *Id.*; see also Colleen Flaherty, *A Course Too Hot to Handle?*, INSIDE HIGHER ED (June 5, 2017), <https://www.insidehighered.com/news/2017/06/05/why-did-unc-call-course-based-chapel-hill-athletic-academic-scandal>

course scheduling, but I anticipate they will try to do so [we'll have a] fight on our hands.¹⁰⁵

The letter from the professors claimed that their chair, Fitz Brundage, felt pressured by the campus administration to cancel the course out of concern for “adverse consequences for the department.”¹⁰⁶ Apparently one of the Arts & Sciences leaders wanted the course put off for at least a year to give everyone time to prepare, “to know where to take cover.”¹⁰⁷ It was also revealed that the athletic director had expressed disapproval of both the course and its instructor. When Smith had asked for permission for his students to visit the academic and training center, Bubba Cunningham denied the request.¹⁰⁸ He explained his objection and suggested, instead, that he, as athletic director, should be assigned to teach the course:

Given that I have an MBA and 20 years of relevant, practical experience in inter-collegiate athletics I believe I would be better suited to teach this class The divisive nature of your public comments has made some of our students and staff uncomfortable and I am not willing to assist in furthering such an environment for them.¹⁰⁹

Smith's course remains in dry dock. Dr. Brundage explains that “[n]o department wants to be in a situation in which they're at loggerheads with an administration; There are very high risks.”¹¹⁰ Now, of course, Smith's treatment is distinct from the intrusions described above, since there is no indication that legislative pressure led to the cancellation. The “outside” interference likely proceeds from closer to home. Still, the legacy of History 383 again reveals the blueprint of a university administration with only the most tepid embrace of academic freedom. Fear, even in university communities, seeps.

¹⁰⁵ Stancill, *supra* note 100.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

The law school itself, over the past two years, has begun to experience free expression tensions within the building that it has likely never before encountered. A new dean upbraids faculty members for writing articles in the newspapers that he dislikes, or that he worries legislators, Board of Governors members, or university administrators will dislike.¹¹¹ (Now, to be clear, I'm not referring to myself here—I have long ago been given up, on this front, as a hopeless case). The dean also scans the law school website and, on at least one occasion, has unilaterally removed a publication that he worried would cause offense in important quarters.¹¹² These can be seen, one supposes, as relatively small matters. Still, I'm inclined to believe that at no other moment in the UNC School of Law's long history—a history marked by special dedication to freedom of expression—would an administrator chide faculty members for publishing articles thought to be displeasing to powerful figures. Governing through timidity leads in odd directions.

The UNC Board of Governors returned to its formal censorship efforts in 2017 by directing its focus on the law school's Civil Rights Center.¹¹³ The Center, founded in 2001 with Julius Chambers¹¹⁴ as its director, first came under scrutiny of the Board of Governors as part of the wide-ranging review of all university institutes and centers in 2014 and 2015 that resulted in the closure of the poverty center. Raleigh lawyer and Civitas board member Steve Long complained of the Civil Rights Center's lack of "diversity of opinion" since it didn't pursue cases on gun rights or suits representing religious claimants who sought to discriminate against gays and lesbians.¹¹⁵ Long was unable to convince enough of his Board

¹¹¹ Affidavit from Gene Nichol, Boyd Tinsley Distinguished Professor of Law, Univ. of N.C. Sch. of Law, to Editorial Bd., *First Amendment Law Review* (Jan. 22, 2018) (on file with author and editors).

¹¹² *Id.*

¹¹³ See Martha Waggoner, *UNC Civil Rights Center Faces Conservative Ire*, CHARLOTTE OBSERVER (Apr. 23, 2017), <http://www.charlotteobserver.com/news/state/north-carolina/article146321819.html>; see also Jane Stancill, *UNC Board to Decide this Summer Whether Civil Rights Center Will Have Litigation Ban*, NEWS & OBSERVER (May 18, 2017), <http://www.newsobserver.com/news/local/education/article151417422.html>; Jane Stancill, *UNC Board Takes Aim at Civil Rights Center's Legal Powers*, NEWS & OBSERVER (Feb. 27, 2017), <http://www.newsobserver.com/news/local/education/article135316094.html>; Rick Seltzer, *Silencing Advocacy That Irritates State Leaders*, INSIDE HIGHER ED, (Feb. 28, 2017), <https://www.insidehighered.com/news/2017/02/28/proposed-unc-policy-would-keep-academic-centers-taking-part-lawsuits>.

¹¹⁴ I was dean of the law school when the Civil Rights Center was begun and I hired Mr. Chambers to create and run it. For additional information, see Waggoner, *supra* note 112.

¹¹⁵ Stancill, *supra* note 100.

of Governors colleagues to close the Center in 2015.¹¹⁶ The Board, nevertheless, conducted a close audit of the Center's activities the following year, deciding, once again, not to shutter it.¹¹⁷ But Long was persistent and, in 2017, he and fellow Board of Governors member Joe Knott filed a motion to prohibit the Center from engaging in litigation.¹¹⁸ The proposed policy change would stop any "UNC center or institute" from filing a "complaint, motion, lawsuit or other legal claim" against any individual, entity or government.¹¹⁹ Nor could any "center" act as legal counsel or employ legal counsel for any party under the proposal.¹²⁰ The Civil Rights Center was barred from accepting any new cases while the proposal was under consideration.¹²¹ The resolution was amended to formally exclude law school clinics at UNC and NC Central, the state's two public law schools.¹²² Proponents wanted to be clear that they were only gunning for the Civil Rights Center.

Again, students, faculty, the law school, various campus leaders, civil rights organizations, alumni groups,¹²³ hundreds of deans and law professors from across the nation, the American Association of University Professors,¹²⁴ and even the University of North Carolina's accrediting agency¹²⁵ objected. Chancellor Carol Folt, notorious for never taking a position on anything,¹²⁶

¹¹⁶ *Id.*

¹¹⁷ Waggoner, *supra* note 112.

¹¹⁸ *Id.*

¹¹⁹ Stancill, *supra* note 100.

¹²⁰ *Id.*

¹²¹ Jane Stancill, *Litigation Ban to be Studied for UNC Civil Rights Center; No New Lawsuits in Meantime*, NEWS & OBSERVER (Mar. 2, 2017), <http://www.newsobserver.com/news/local/education/article136052678.html#storylink=cpy>.

¹²² Jane Stancill, *Key Vote on UNC Center for Civil Rights Scheduled for August*, NEWS & OBSERVER (July 12, 2017), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article160886504.html>.

¹²³ Wade Smith, Editorial, *A Great and Valuable Legacy in Danger*, NEWS & OBSERVER (July 29, 2017, 3:55 PM), <http://www.newsobserver.com/opinion/editorials/article164316012.html>; *see also* Leah Asmelash, *Community Protests Litigation Ban against Center for Civil Rights*, DAILY TAR HEEL (Aug. 2, 2017), <http://www.dailytarheel.com/article/2017/08/center-civil-rights-protest>.

¹²⁴ Rudy Fichtenbaum & Michael Decesare, Opinion, *UNC Board Should Remember UNC Mission*, NEWS & OBSERVER (July 31, 2017, 11:00 AM), <http://www.newsobserver.com/opinion/opn-columns-blogs/opinion-shop/article164519777.html>.

¹²⁵ Jane Stancill, *A Message to UNC Board: Don't Micromanage and Avoid Undue Political Influence*, NEWS & OBSERVER (July 14, 2017, 6:26 PM), <http://www.newsobserver.com/news/local/education/article161494878.html>.

¹²⁶ Bradley Saacks, *Folt Believes She Should Keep Her Opinions Private*, DAILY TAR HEEL (Apr. 24, 2015, 12:45 AM), <http://www.dailytarheel.com/article/2015/04/folt-and-race-0424>; *Souring on Sam, but Where is Folt?*, NEWS & OBSERVER (Sept. 1, 2017), <http://www.newsobserver.com/opinion/editorials/article170800582.html>.

overtly opposed the ban.¹²⁷ Belle Wheelin, president of the Southern Association of Colleges and Schools Commission on Colleges, warned the Board of Governors not to micromanage the campus or yield to political influence.¹²⁸ Julius Chambers had warned that if the Civil Rights Center “did its job” North Carolina conservatives would move to close it.¹²⁹ He proved prescient. A former law school dean and American Association of Law Schools executive director pressed the case, persuasively, that if the Civil Rights Center was closed, the UNC School of Law’s accreditation would be threatened.¹³⁰

Unmoved, Long and Knott pushed the litigation ban forward.¹³¹ In August, 2017, the reviewing committee of the

¹²⁷ J. Clara Chan, *U. of North Carolina Chancellor Criticizes Boards Proposal to Hamstring Civil Rights Center*, CHRONICLE OF HIGHER EDUC. (July 31, 2017), <http://www.chronicle.com/blogs/ticker/u-of-north-carolina-chancellor-criticizes-boards-proposal-to-hamstring-civil-rights-center/119483>.

¹²⁸ Stancill, *supra* note 120.

¹²⁹ Gene Nichol, Opinion, *Opinion, Julius Chambers Warned That Conservatives Would Oppose Civil Rights Center*, NEWS & OBSERVER (April 12, 2017), <http://www.newsobserver.com/opinion/op-ed/article144264019.html>.

¹³⁰ Judith Wegner, *Accrediting Process Can Strengthen UNC*, NEWS & OBSERVER (May 25, 2017), <http://www.newsobserver.com/opinion/op-ed/article152735759.html>; Jane Stancill, *Could Proposed Litigation Ban put UNC’s Accreditation at Risk?*, NEWS & OBSERVER (May 23, 2017), <http://www.newsobserver.com/news/local/education/article152245127.html>.

¹³¹ Jane Stancill, *He’s the Driving Force Who Wants to Ban UNC’s Civil Rights Center from Litigating*, NEWS & OBSERVER (July 27, 2017), <http://www.newsobserver.com/news/local/education/article163931277.html>; Elizabeth M. Haddix, Opinion, *The Ideological Attack on the UNC Center for Civil Rights*, NEWS & OBSERVER (July 31, 2017), <http://www.newsobserver.com/opinion/op-ed/article164531612.html>.

Board of Governors voted 5-1 to endorse it.¹³² Long again denied that the constraining move was political.¹³³ Civil Rights Center Director, Ted Shaw, was candid to say, “I don’t think that [the ban] is politically motivated, I know it is. This is an ideological hit on the Center for Civil Rights. I think everybody knows it.”¹³⁴

On September 8, 2017, the full Board of Governors voted, 24-3, to pass the permanent litigation ban, in effect, closing the Civil Rights Center.¹³⁵ Shaw said he wasn’t surprised by the vote: “Shame on these folks, shame on them, but they’re on the wrong side of history.”¹³⁶ Steve Leonard,

¹³² Chris Fitzsimon, Opinion, *Latest in an Ideological Crusade*, YOUR DAILY JOURNAL (Aug. 3, 2017), <http://www.yourdailyjournal.com/opinion/columns/74983/latest-in-an-ideological-crusade>; Chris Fitzsimon, *UNC Board Vote on Civil Rights Center the Latest Move in an Ideological Crusade*, N.C. POLICY WATCH (Aug. 2, 2017), <http://www.ncpolicywatch.com/2017/08/02/unc-board-vote-civil-rights-center-latest-move-ideological-crusade/>; *Committee Oks Plan to End Pro Bono Legal Work by UNC Center*, WRAL (Aug. 1, 2017), <http://www.wral.com/committee-oks-plan-to-halt-pro-bono-legal-work-by-unc-center/16852604/>; Dave Dewitt, *Panel OKs Litigation Ban for UNC Civil Rights Center*, WUNC (Aug. 1, 2017), <http://wunc.org/post/panel-oks-ligation-ban-unc-civil-rights-center>; Karen Sloan, *University Moves to Block Law School’s Center from Litigating*, LAW.COM (Aug. 1, 2017), <http://www.law.com/sites/almstaff/2017/08/01/university-moves-to-block-law-schools-center-from-litigating/>; Nick Roll, *Litigation Ban Advances, and Controversy Escalates*, INSIDE HIGHER ED (Aug. 1, 2017), <https://www.insidehighered.com/news/2017/08/02/unc-system-edges-closer-shutting-down-civil-rights-litigation-chapel-hill>; Ray Gronberg, *Panel Votes 5-1 Against Litigation for UNC Civil Rights Center*, THE HERALD-SUN (Aug. 1, 2017), <http://www.heraldsun.com/news/local/counties/orangecounty/article164667507.html>; Steve Ford, *Attack on UNC Center Civil Rights: Even Worse Than it Looks*, N.C. POLICY WATCH (Aug. 7, 2017), <http://www.ncpolicywatch.com/2017/08/07/attack-unc-center-civil-rights-even-worse-looks/>; *Yes, By a Long Shot, UNC BOG Committee Undercuts Civil Rights*, NEWS & OBSERVER (Aug. 1, 2017), <http://www.newsobserver.com/opinion/editorials/article164853927.html>.

¹³³ Dewitt, *supra* note 131.

¹³⁴ Roll, *supra* note 131.

¹³⁵ Jane Stancill, *Board Bans Legal Actions at Civil Rights Center*, NEWS & OBSERVER (Sept. 8, 2017), <http://www.newsobserver.com/news/local/education/article171979707.html>; *Board of Governors Muzzles UNC Center for Civil Rights* WRAL (Sept. 8, 2017), <http://www.wral.com/board-of-governors-muzzles-unc-center-for-civil-rights/16934934/>; Nick Roll, *North Carolina Board Bars Civil Rights Litigation*, INSIDE HIGHER ED (Sept. 11, 2017), <https://www.insidehighered.com/news/2017/09/11/north-carolina-board-bars-unc-center-civil-rights-litigating>; Elie Mystal, *University of North Carolina Bans Civil Rights Center From Protecting Civil Rights*, ABOVE THE LAW (Sept. 11, 2017), <http://abovethelaw.com/2017/09/university-of-north-carolina-bans-civil-rights-center-from-protecting-civil-rights/>; Debra Cassens Weiss, *Law Schools Civil Rights Center is Barred From Litigating*, ABA J. (Sept. 8, 2017), http://www.abajournal.com/news/article/law_schools_civil_rights_center_is_barred_from_litigating_cases.

¹³⁶ Jane Stancill, *Board Bans Legal Actions at Civil Rights Center*, NEWS & OBSERVER (Sept. 8, 2017), <http://www.newsobserver.com/news/local/education/article171979707.html>.

former UNC system faculty chair, said, “we’ve now reached a point where the Board of Governors is acting in ways that interfere with faculty prerogative on curriculum, on research and on service ... if we don’t stand up now and try to at least maintain the authority we have over these things, we’re going to be in rough shape going forward.”¹³⁷

A right-wing stacked Board of Governors had examined hundreds of university centers statewide and determined, coincidentally, to close or cripple the UNC School of Law’s privately funded Poverty Center and its Civil Rights Center.¹³⁸ That, oddly, was just the way things had turned out. Good lord. The dishonesty grows as tiresome as the overreach. UNC President Margaret Spellings issued a rambling statement.¹³⁹ No one could tell if she was for or against the ban, or if she had anything comprehensible to say whatsoever.¹⁴⁰ Once more, the Board stepped far beyond its jurisdictional authority to work potent harm to the vulnerable citizens of North Carolina, and to institutions attempting to serve them, in order to march to harsh ideological mandate. If poor black and Latino victims of civil rights violations were crushed, and the law school’s accreditation was sacrificed in the process, no worries. All falls before partisanship.

III. LESSONS CONTINUED (OPAQUE)

If the largest free expression lesson of the first decade of the New North Carolina is the revelation that previously thought consensus-based, foundational First Amendment norms can now, fifty years after their traditional resolution, be re-opened in an American state, free speech, to be candid, is not the only terrain in which such a re-focus has appeared. Since 2010, the North Carolina General Assembly has moved very aggressively to deny and diminish access to the ballot, overtly and repeatedly embraced racial discrimination against African-Americans, rejected core components of judicial independence, crushed long-standing notions of separation of powers, and annihilated traditional prerogatives of local government.¹⁴¹ This is not the place to re-enter those battles. My point, instead, is

¹³⁷ *Id.*

¹³⁸ Sarah Ovaska-Few, *UNC System Looking at Campus Centers, Cuts May Follow*, N.C. POLICY WATCH (Nov 6, 2014), <http://www.ncpolicywatch.com/2014/11/06/unc-system-looking-at-campus-centers-cuts-may-follow/>.

¹³⁹ See *Committee Oks Plan to End Pro Bono Legal Work by UNC Center*, *supra* note 131.

¹⁴⁰ *Id.*

¹⁴¹ See generally *Altered State: How Five Years of Conservative Rule Have Redefined North Carolina*, *supra* note 43.

that the greatest surprise triggered by North Carolina's recent governmental experimentations has been the thin embrace apparently enjoyed by what I had long thought to be uncontested (and treasured) constitutional values—like the right to vote, the right to racial equality, the essential nature of independent judicial review, and a necessitated commitment to balanced and separated powers. It is not really that these challenges pose unfathomable legal complexities. It is, rather, the revelation that they are on the table at all. Willing steps, by the state, to limit the power of citizens and institutions to criticize the government are not beyond the ken of our constitutional theories and practices. Most of us just thought, perhaps, that they would, in 2017, be less readily needed. Some things, most supposed, were settled—like the central, defining features of the First, Fourteenth, and Fifteenth Amendments. It turns out that was wrong.

It is also true, however, that some constitutional expression challenges have arisen here that are less susceptible to apparent and traditional doctrinal resolution. These issues touch more opaque frontiers of academic freedom, university independence, and protected speech. I find some of them sufficiently troubling that I choose, below, to outline components of them. I offer, though, no ready and confident proposals to solve their challenges. Wiser heads than mine will, perhaps, grapple with some of them. I only know that they threaten, not that they can be easily resolved.

A. The Open Records Process

The studied abuse of the open records process is one example. After I had written several articles criticizing decisions made by the governor in 2013 and 2014, and calls had come my way from the state capital and the Chancellor and Provost making various sorts of threats, several publications and websites funded by Art Pope spread the word—aggressively—that this business with Nichol was no longer to be tolerated.¹⁴² The professor had gone over the top. Enough was enough. This, in my view, is perfectly kosher. In fact, it is to be expected.

Here's the stickier point. These critical articles were immediately followed by aggressive public records requests by some of the same outfits (Civitas and company).¹⁴³ I had dealt

¹⁴² See, e.g., DeLuca & Shaw, *supra* note 49.

¹⁴³ See, e.g., Letter from Regina J. Stabile, Dir., Institutional Records and Reporting Compliance, to Colonel Francis X. DeLuca, President, Civitas Inst. (Nov. 22, 2013) (providing UNC records pertaining to Gene Nichol as requested by DeLuca pursuant to the North Carolina Public Records Act) (on file with author); e-mail