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Misunderstood

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Academics must speak on issues of public concern, including issues on which they have not written previously. Indeed, the very reason that academics possess tenure, academic freedom, and the like is so they may speak "truth to power."[1] Consequently, academics who remove themselves from the world of politics fail to live up to their responsibility to shape public discourse through their opinions and scholarship.

Steve Griffin and I agree on these things[2] and, as I will soon detail, some other things that are critical to sorting out the appropriateness of academics signing onto joint letters. I say this not to obscure the ways in which we strongly disagree with each other, but to suggest that much of Griffin's criticism of my earlier work[3] is grounded in his belief that I said things that I

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[1] Arthur Schlessinger, Jr., *Intellectuals' Role: Truth to Power?*, WALL ST. J., Oct. 12, 1983, at A28 (discussing the role of the intellectual in his engagement with political power and concluding that one of the duties of the intellectual is to speak "truth to power").

[2] Stephen M. Griffin, *Scholars and Public Debates: A Reply to Devins and Farnsworth*, 82 B.U. L. REV. 227, 245, 258 (2002) (explaining that the letter opposing the impeachment of President Clinton that was signed by several hundred law professors and submitted to Congress was "part of a public debate in which a clash of arguments promoted the search for the truth," and asserting that "[w]hen constitutional scholars observe public authorities adopting a clearly unconstitutional policy, they have a responsibility to take action" and that "[t]hey should appeal to the public by using their special ability to create and evaluate constitutional arguments").

[3] Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165 (1999). For other critiques of this essay, see Ward Farnsworth, *Talking Out of School: Notes on the Transmission of Intellectual Capital from the Legal Academy to Public Tribunals*, 81 B.U. L. REV. 13 (2001) (discussing the collective action problem created by academics who sign documents on the basis of different levels of expertise by using as a case study the law professors' letter to Congress opposing the impeachment of President Clinton, and proposing a convention for law professors to follow in deciding whether to sign opinions submitted to courts and legislatures); Cass R. Sunstein, *Professors and Politics*, 148 U. PA. L. REV. 191 (1999) (responding directly to my essay in a "Point/Counterpoint" format and arguing that although academics' involvement in partisan causes may indeed be destructive to the pursuit of truth, there is nothing inherently objectionable about their good faith participation in public

do not think I said. And because I think my piece is pretty clear on these matters, I will not use this reply as an opportunity to elaborate on why I think my exposition is understandable.[4] My purpose, instead, is two-fold. First, I

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debates).

[4] At the same time, I do not expect the reader of this Reply—especially after reading Griffin's piece—to take me at my word. For that reason, I will detail a couple of places in which my understanding of what I said dramatically differs from Professor Griffin's understanding. First, Griffin builds much of his argument around the claim that "[f]or Devins, it is almost self-evident that nearly every single scholar who signed the letter was manifestly unqualified to reach any judgment whatsoever on the issue of impeachment." Griffin, *supra* note 2, at 244 (footnote omitted). He believes that the only academics I would consider to be qualified experts on the subject of impeachment would be those who "prior to the Clinton impeachment . . . [were] known as . . . expert[s] on the subject due to a large body of previous work." *Id.* For related claims, see *id.* at 230, 238, 244 (asserting that my standard for qualifications of experts would stifle, and possibly even eliminate entirely, academics' participation in public debates, such as the debate over President Clinton's impeachment). This was not my intent, however, and I do not understand why Griffin accuses me of embracing such an absurd standard. Although I do discuss the need for academics to be able to defend their positions in public and "to read and think about arguments on both sides of the issue" before taking a public position, Devins *supra* note 3, at 168, these assertions surely do not translate into the sweeping claims that Griffin attributes to me. Contrary to what Griffin implies, my desire is not to *remove* academics from the realm of public debate by requiring unreasonable levels of expertise. Rather my desire is to *preserve* academics' valuable presence in that realm by ensuring that their contributions to public debates remain reliable, responsible, and relevant. *See infra* note 10 and accompanying text (calling attention to my strong desire for academics to continue to play a vital role in shaping public discourse).

Second, Griffin suggests that the target of my piece is constitutional law scholars, who, in my view, did not know enough about impeachment to sign onto the anti-impeachment letter. Griffin, *supra* note 2, at 231 (asserting that Farnsworth and I "underwrite the position that only an elite of credentialed scholars should be allowed to speak on matters of public concern"). My principal concern about the anti-impeachment letter, however, was the willingness of letter writers to seek out the signatures of any and all legal academics, regardless of whether those legal academics knew anything about the constitutional standards governing impeachment. *See* Devins, *supra* note 3, at 169-70 (asserting that "it is doubtful that many [of the signatories] had thought seriously about the constitutional standards governing impeachment"); *id.* at 173-75 (criticizing the failure of the organizers and writers of the anti-impeachment letter and a companion letter to establish any required level of expertise for law professors who wanted to sign the letters). Indeed, although I did express concern about the expertise of constitutional law professors who signed the anti-impeachment letter, there was little reason for me to focus my energies on these letter signers. I was far more concerned by the fact that roughly two-thirds of the signatories of the anti-impeachment letter did not teach constitutional law. *See id.* at 170 n.26 (stating that according to biographical data found in the 1998-99 AMERICAN ASSOCIATION OF LAW SCHOOLS' DIRECTORY OF LAW TEACHERS, of the 452 law professors who signed the anti-impeachment letter, only 130 of them listed constitutional law among the courses that they taught).

want to call attention to the ways in which Griffin and I agree on several issues relevant to the assessment of jointly signed letters. Second, and relatedly, I want to engage Griffin on the question that seems to matter most to him, namely whether academic letter-writing campaigns "should be judged ultimately by the quality of the arguments, not the credentials of the signatories."[5]

To start with, it would certainly be wrong to dismiss high quality legal arguments in a joint letter simply because many of its signers lacked the requisite expertise to pass judgment on its merits. Nonetheless, Griffin is naïve in arguing that the law professors' letter opposing the impeachment of President Clinton[6] "did not *assume* expertise; it *demonstrated* expertise."[7] Specifically, one way to attack the message—the substance of the letter—is to attack the messenger—the individuals signing the letter. More to the point, because only one-third of the signatories of the anti-impeachment letter taught constitutional law, this letter—rightly or wrongly—was easily characterized as an exercise in partisanship, not scholarship. Although it would be wrong to reject the arguments made in the anti-impeachment letter merely because of who signed it, it is noteworthy that columnists David Broder and Nat Hentoff savaged a Clinton anti-impeachment letter drafted by historians[8] for precisely this reason.[9]

By saying that the merits of the text and the identities of the signatories are not easily disentangled, I am, of course, calling attention to a real-world cost of enlisting nonexpert signatories to joint letters. In particular, "when a significant number of law professors and historians hold themselves out as experts when they are not, they mislead, and *all* academics pay a price"; namely they risk having their opinions discounted and, ultimately, "becoming irrelevant."[10] Let us assume, however, that my assessment of the costs of

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[5] Griffin, *supra* note 2, at 231.

[6] *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 374-83 (1998) [hereinafter *Impeachment Hearing*] (recording the law professors' letter to the House of Representatives opposing the impeachment of President Clinton); Griffin, *supra* note 2, at 259-74 (reprinting from *Impeachment Hearing* the law professors' letter to the House of Representatives opposing the impeachment of President Clinton).

[7] Griffin, *supra* note 2, at 237 (emphasis in original).

[8] *See Impeachment Hearing*, *supra* note 6, at 334-39 (recording the historians' letter to the House of Representatives opposing the impeachment of President Clinton).

[9] *See* David S. Broder, *The Historians' Complaint*, WASH. POST, Nov. 1, 1998, at C7 (arguing that some activist academics, including organizers of the historians anti-impeachment letter, risk looking "ridiculous" by "heedlessly" plunging into raging political debates); Nat Hentoff, *Breeding Contempt for the Law*, WASH. POST, Nov. 21, 1998, at A21 (depicting the signers of the historians' letter as a "herd" that employed "embarrassingly contorted reasoning").

[10] Devins, *supra* note 3, at 166. This concern, not a desire to quiet academic opinion on politically salient issues, was one of the principal reasons that I wrote my original piece on

nonexpert signatories is off the mark.[11] Does that mean that the merits of the text and the identities of the signatories, in fact, can be disentangled?

I think not. A joint letter makes "two kinds of statements: the statements in [the] text, which are self-explanatory, and the signatures at the end, which can best be understood as implied assertions that each signatory has read the letter, is competent to evaluate it, and believes it is right."[12] Griffin, although emphasizing that the arguments contained in a joint letter are far more important than the credentials of its signatories, admits that this is true. He notes that "[o]ne reason for attaching signatures . . . . [is that] the identity of the author[s][, not simply the substance of the argument,] might have some bearing on our evaluation of the argument or the context in which it is made."[13] Presumably, when deciding to solicit signatures to his letter to the Florida Legislature,[14] Griffin thought that the "evaluation of [his] argument"[15] would be improved if several constitutional law luminaries joined forces with him.[16] Furthermore, admitting that he is "troubled that some who signed [the anti-impeachment letter] did not regularly teach or write about constitutional

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the anti-impeachment letters.

[11] *See* Griffin, *supra* note 2, at 243 (citing with approval Sunstein's criticism of my concern here and asserting that there was little danger that the anti-impeachment letter might endanger academic freedom because the letter advocated an outcome that was consistent with public opinion); Sunstein, *supra* note 3, at 194 (criticizing as "absurd" my concern that this problem might endanger academic freedom).

[12] Ward Farnsworth, *A Reply to Professor Griffin*, 82 B.U. L. REV. 281, 283 (2002).

[13] Griffin, *supra* note 2, at 240-41. This claim seems to conflict with Professor Griffin's assertion that academic letter writing "should be judged ultimately by the quality of the arguments, not the credentials of the signatories." *Id.* at 231. For additional discussion, see Farnsworth, *supra* note 12, at 282-83 (pointing out this inconsistency and arguing that the signatures of those professors who merely read the letter and signed it do not demonstrate expertise).

[14] *See* Griffin, *supra* note 2, at 256 (explaining that he solicited signatures from constitutional law professors on a statement opposing the Florida Legislature's possible effort to designate presidential electors legislatively). For a complete reproduction of this document, see the Letter to the Florida Legislature (Dec. 5, 2000) (reprinted in Griffin, *supra* note 2, at 275-80).

[15] *Cf. id.* at 241 (implying that many of the law professors who signed the letter to the Florida Legislature were experts in creating and evaluating constitutional arguments).

[16] It is also the case that politicians who agree with the outcome advocated in the letter can make better rhetorical use of a letter signed by hundreds of professors than a letter signed by one ore two professors. That is why President Clinton, in explaining why he believed that he had not committed an impeachable offense, emphasized that "nearly 900 constitutional experts say that they strongly felt that this matter was not the subject of impeachment." Remarks Prior to a Meeting with Labor Leaders and an Exchange with Reporters, 35 WEEKLY COMP. PRES. DOC. 46, 47 (Jan. 13, 1999). In calling attention to the ways in which politicians, who are the recipients of these letters, use these letters, I am not taking issue with Professor Griffin's claim that the problem here is "a politicized impeachment process." Griffin, *supra* note 2, at, at 242.

law,"[17] Griffin invests significant energy in sorting out what type of expertise is needed before one can sign onto a joint letter.[18] Thus, in defending the expertise of the signatories of the anti-impeachment letter and the letter to the Florida Legislature,[19] Griffin implicitly supports an essential element of my own argument. Specifically, even though the merits matter—and almost certainly matter most—the identities and relevant expertise of letter signers *also* matter.

Griffin and I, in other words, share much common ground. We agree that attention must be paid to the qualifications of individuals who sign joint letters. We also agree that academics should participate in matters of public concern,[20] and that prior specialized expertise is a nonsensical requisite to academics who want to speak out on political matters. This is not to say, ultimately, that we can harmonize our individual views with each other. As I will now explain, we cannot reconcile them. At the same time, notwithstanding his suggestion that my project was misguided[21] (by calling attention to the need for academic signatories to be well-informed about a topic before offering an opinion about

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[17] Griffin, *supra* note 2, at 238 n.39 (stating that he is so troubled "[b]ecause [he] think[s] that the letter should have been signed by scholars familiar with creating and evaluating constitutional arguments"). Professor Griffin then suggests that I should contact those who did not teach or write about constitutional law and ask them why they believed that they had the necessary expertise to sign the letter, *id.*, rather than assume—as he apparently does—that many of them signed the letter without the requisite expertise. This suggestion, however, is in tension with his assertion that "[t]he letter did not *assume* expertise; it *demonstrated* expertise." *Id.* at 237. After all, if the arguments in the letter itself demonstrated expertise, it is unclear why the signatories should have regularly taught or written about constitutional law.

[18] *See, e.g.*, *id.* at 257 n.128 (recounting the content of his e-mail to the "conlawprof" listserv in which he solicited signatures for the letter to the Florida Legislature).

[19] *See id.* at 237 (asserting that "many of the law professors who signed the letter were experts in creating and evaluating constitutional arguments"); *id.* at 239 (asserting that the kind of expertise that is most useful in "fast-moving situation[s] such as the Clinton impeachment is expertise in evaluating and creating constitutional arguments, not specific subject-matter expertise"); *id.* at 242-43 (describing a hypothetical exchange between Griffin and Senator Hatch about the source of Griffin's expertise on impeachment); *id.* at 248-49 (summarizing Farnsworth's arguments in his original essay and reiterating that the expertise backing the anti-impeachment letter was general expertise and not specific expertise on the Impeachment Clause); *id.* at 238 n.39 (asserting that the kind of expertise required to sign the letter to the Florida Legislature was expertise in "creating and evaluating constitutional arguments" and that no special expertise in the interpretation of Article II was required to see that the scholars advising the Florida Legislature lacked good judgment in interpreting the relevant constitutional clauses).

[20] *See id.* at 230 (stating that it would be a shame if Farnsworth's and my critiques were to discourage scholars from participating in public debates in the future); *id.* at 258 (asserting that constitutional scholars have a responsibility to take action when they "observe public authorities adopting a clearly unconstitutional policy").

[21] *See id.* at 243-48 (explaining where my essay went wrong).

it), I do think that we are fighting on the same battlefield.

Where we disagree, of course, is in sorting out what level of expertise is sufficient before an academic signs onto a letter. In my view, academics "must use reason, thought, and care in defending their positions, whether political or not,"[22] "have an obligation to read and to think about arguments on both sides of an issue,"[23] "should only sign letters that they could (if asked to) defend in public,"[24] and should be able to "defend these positions as academics—i.e., defend the substance of the letter with a commanding knowledge of the relevant sources."[25] In sharp contrast, Professor Griffin—under the view that a joint letter, more than anything, should be judged on its merits and not the credentials of its signatories—makes use of a far looser standard. For him, "the sort of expertise needed before one can sign such statements" is "the ability, common among constitutional scholars, to create and evaluate constitutional arguments."[26] For this reason, so long as they were constitutional scholars, it was not at all necessary that the signatories of the anti-impeachment letter know anything at all about the particulars of impeachment,[27] let alone the original meaning of the Impeachment Clause.[28]

The fault line separating Griffin's understanding of academic expertise from my own is a by-product of our far different understandings of the academic ethic. In soliciting signatures for his letter to the Florida Legislature, Griffin, after claiming that "a background teaching and writing about the Constitution . . . [is] all the expertise you need," wrote: "Sign or not, but don't fail to sign because you feel you are not an expert. That is a formula for the abdication of public responsibility by scholars who ought to know better."[29]

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[22] Devins, *supra* note 3, at 189.

[23] *Id.* at 168.

[24] *Id.* at 189.

[25] *Id.* at 189 & n.109. Ward Farnsworth and Cass Sunstein, in assessing my arguments, both agree that academics must be able to defend the positions they take in public. Farnsworth, *supra* note 3, at 46 (asserting that "[I]f an academic does not know enough to testify orally, he does not know enough to testify in writing; and if he does not know enough to testify in writing, he does not know enough to sign written testimony someone else authored"); Sunstein, *supra* note 3, at 201 n. 32 (agreeing with me that "academics should not sign letters that they could not defend publicly").

[26] Griffin, *supra* note 2, at 231.

[27] *See id.* at 249 ("[T]he letter was backed by general expertise, not so much in the area of the Impeachment Clause . . . but in evaluating and creating constitutional arguments.").

[28] *See id.* at 250 (criticizing Farnsworth's assertion that the anti-impeachment letter did not provide information, such as the original understanding of the Impeachment Clause, by disputing the relevance of original intent in the first place); *but see Impeachment Hearing*, *supra* note 6, at 375 (suggesting in the law professors' letter to the House of Representatives opposing the impeachment of President Clinton the relevance of "history" in sorting out what constitutes an impeachable offense).

[29] Griffin, *supra* note 2, at 256 n.128 (recording this text of Griffin's December 5, 2000 e-mail to the "conlawprof" listserv, in which he solicited signatures for his letter to the

My view, instead, is that academics should adhere to traditional notions of academic expertise. For example, they ought not "see themselves as supercitizens, entitled to speak out on issues by virtue of their status";[30] instead, academics must "be held accountable at a 'professional level for the ethical integrity of [their] work"[31] because "the trust that society has placed in academics, as well as the resources it has provided them, are grounded in certain assumptions about academic conduct."[32] The ways of the scholar, as Alexander Bickel put it, "appeal to men's better natures" because they are about thinking, training, and insulation, not the emotionalism of "the moment's hue and cry."[33]

Griffin does not adequately explain why this baseline is incorrect. It is not enough to say that academics have a "public responsibility"[34] to speak out on political issues. More to the point, if Griffin thinks that traditional notions of academic expertise should give way to this "public responsibility," he must explain why this is so. Alternatively, Griffin should explain how his proposed standard of expertise comports with traditional notions of academics as truth-seekers. Correspondingly, Griffin needs to advance a cogent argument as to why the merits of the letter "demonstrate expertise"—so that the expertise of the signatories is irrelevant. Instead, he distances himself from this provocative claim, suggesting both that signatories should have some expertise[35] and that a letter's credibility may be tied to the identity of its

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Florida Legislature, and giving this text's context).

[30] Devins, *supra* note 3, at 184.

[31] *Id.* at 185 (quoting William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, *in* THE CONCEPT OF ACADEMIC FREEDOM 59, 71 (Edmund L. Pincoffs ed., 1972)).

[32] *Id.* at 168.

[33] Alexander Bickel, THE LEAST DANGEROUS BRANCH 26 (2d ed. 1986). Griffin suggests that my approach might well foreclose scholarly commentary on political matters, arguing that political events may unfold so quickly that "scholars [may lack the] time to research these matters in depth" and that "[a] rapid intervention, one not permitting the leisurely writing of comprehensive articles" sometimes necessitates that scholars prepare "in haste" joint letters on political events, such as in the case of the anti-impeachment letter. Griffin, *supra* note 2, at 237. I have three responses to this important argument. First, nothing in my essay speaks of the need for scholars to write comprehensive articles. Second, with respect to the anti-impeachment letter, political exigencies did not stand in the way of scholars reading and thinking about arguments on both sides of the issue. Third (and most important), when political exigencies prevent scholars from rendering an informed opinion, scholars should not speak as scholars (although, of course, they are free to register their political preferences in some other way). With respect to the anti-impeachment letter, by implication Griffin seems to agree with me on this third response, arguing, for example, that constitutional scholars had sufficient expertise to render a scholarly appraisal of whether President Clinton should be impeached. *See* Griffin, *supra* note 2, at 237-39 (defending the expertise of the law professors who signed the anti-impeachment letter).

[34] Griffin, *supra* note 2, at 256 n.128.

[35] *See id.* at 237 & n.39 (asserting that the signatories were "experts in creating and

author(s).[36] None of this is to suggest that my essay is unblemished.[37] It is to suggest, however, that Professor Griffin's alternative paradigm is not as well developed as it could be.

At the end of the day, I remain skeptical of devices that allow scholars to register positions without first thinking and reading arguments on both sides of an issue. While academics are certainly entitled to speak out on political issues as well as pursue a research agenda consistent with their personal beliefs, academics ought not to claim they are experts on matters about which they know very little. "A well-regulated society needs academics to assess the value of its competing ideals as much as it needs interest groups to reflect the weight of its contending social forces. The ability of such ideas to persuade depends on the perception that scholars are operating on a high moral and professional plane."[38]

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evaluating constitutional arguments" and listing some of the signatories with "great expertise").

[36] *See id.* at 241 (conceding that "[o]n occasion, the identity of the author might have some bearing on our evaluation of the argument or the context in which it is made"); *supra* notes 13-16 and accompanying text (discussing this inconsistency in Griffin's argument).

[37] For example, I think that Griffin and Sunstein are correct in arguing that my essay goes too far in suggesting that most of the anti-impeachment letter signers acted for partisan reasons. *See* Devins, *supra* note 3, at 171-72 (detailing the reasons why I thought that partisanship motivated some of the signatories, including the fact that more than 80% of law professors are registered Democrats); Griffin, *supra* note2, at 232 (criticizing my essay for its insinuations of partisanship and asserting that such insinuations should not appear in law journals), 246 (accusing me of replacing "a commitment to argument . . . with insinuations about the political motivations of the signers"); Sunstein, *supra* note 3, at 196-97 (calling my suggestion an "uncharitable judgment" and cautioning that "it is very hard for [me] or anyone else to have access to the motivations of strangers"). Whether or not my suggestion was correct, I think that it would have been enough for me to say that the letter-writing campaign opened itself up to charges of partisanship. Relatedly, I think Sue Bloch is correct in suggesting that, in sorting out how well-versed constitutional law professors are in the specifics of impeachment, I place too much emphasis on how little attention impeachment receives in constitutional law casebooks. Susan Low Bloch, *A Report Card on the Institutions: Judging the Institutions that Judged President Clinton*, 63 LAW & CONTEMP. PROBS. 143, 161 n.85 (2000) (criticizing as "inaccurate and absurd" my suggestion that most constitutional law professors know little about the subject of impeachment because constitutional law casebooks devote minimal attention to the subject). Finally, although generally sympathetic to my argument, I think that Farnsworth is correct in suggesting that the standard I employ in assessing academic expertise is somewhat vague. *See* Farnsworth, *supra* note 3, at 15 (noting that in my essay I explained what expertise is not, but not what expertise *is*, and criticizing the standard of expertise in my essay as "too vague . . . to have much practical use").

[38] Neal Devins & John McGinnis, *Sign Them Up*, LEGAL TIMES, July 24, 2000, at 62.