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FIRST AMENDMENT LAW REVIEW

VOLUME 23 **SYMPOSIUM**

ARTICLES

KEYNOTE ADDRESS: UNIVERSITIES AND UNRESOLVED FREE SPEECH CHALLENGES

Mary-Rose Papandrea*

ADDRESS

Since October 7, 2023, university leaders have faced contentious, politically charged, and conflicting demands from faculty, students, alumni, donors, governing bodies, and state and federal politicians.[1] Congressional hearings and other internal and external political pressures have led to the resignation of several university presidents at the nation's top universities.[2] The U.S. Department of Education's Office of Civil Rights has issued multiple "Dear Colleague" letters,[3] and students, faculty, and staff have brought private causes of action under Title VI and related federal and state laws.[4]Institutional neutrality policies have surged

* Samuel Ashe Distinguished Professor of Constitutional Law, University of North Carolina School of Law. Professor Papandrea delivered portions of this Essay on November 15, 2024, as the keynote address at the First Amendment Law Review's symposium "The Quintessential Marketplace of Ideas? Current Free Speech Issues on University Campuses." Professor Papandrea thanks Alex Rivenbark for her outstanding research assistance.

[1] *See* Bob Moser, *Oct. 7 Kicked Off a Difficult Year for Higher Ed. How Should Universities Move Forward Now?*, INSIDE HIGHER ED (Oct. 7, 2024), https://www.insidehighered.com/news/governance/executive-leadership/2024/10/07/how-oct-7-changed-higher-ed-and-how-move-forward.

[2] Josh Moody, *A Year After the First Antisemitism Hearing, What's Become of the Presidents Who Testified?*, INSIDE HIGHER ED (Dec. 5, 2024), https://www.insidehighered.com/news/government/politics-elections/2024/12/05/whats-become-presidents-who-testified-congress (reporting five out of seven university presidents resigned after testifying before Congress, although one of those five left as a result of a planned retirement).

[3] *See, e.g.*, U.S. Dep't of Educ., Off. of Civ. Rts., Dear Colleague Letter on SFFA v. Harvard (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf; U.S. Dep't of Educ., Off. of Civ. Rts., Dear Colleague Letter on Protecting Students from Discrimination, such as Harassment Based on Race, Color, or National Origin, Including Shared Ancestry or Ethnic Characteristics (May 7, 2024), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-202405-shared-ancestry.pdf [hereinafter May 2024 Dear Colleague Letter]; U.S. Dep't of Educ., Off. of Civ. Rts., Dear Colleague Letter on Discrimination, Including Harassment, Based on Shared Ancestry (Nov. 7, 2023), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-202311-discrimination-harassment-shared-ancestry.pdf.

[4] *See, e.g.,* Kestenbaum v. President and Fellows of Harvard Coll., 743 F.Supp.3d 297 (D.Mass. 2024); Gartenberg v. Cooper Union for the Advancement of Sci. and Art, 24 Civ. 2669 (JPC), 2025 WL 401109 (S.D.N.Y. Feb. 5, 2025); Canel v. Art Inst. of Chi., No. 23 CV 17064, 2025 WL 564504 (N.D. Ill. Feb. 20, 2025).

in popularity.[5] As a result of the tumultuous student protests, many universities have made changes to their student conduct policies.[6]

And the reverberations from the protests continue. After taking office in January 2025, President Trump issued executive orders declaring the termination of all "illegal" diversity, equity, and inclusion programs,[7] initiated dozens of Title VI antisemitism investigations,[8] froze research funding,[9] slashed the indirect cost rate for federal research projects,[10] made demands for various changes to university policies and administration,[11] revoked visas and initiated deportation proceedings of foreign students,[12] and threatened to end Harvard's tax-exempt status.[13]

These events have led to a renewed discussion about whether universities are living up to the Supreme Court's vision of higher education as a "marketplace of ideas" where "leaders [are] trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through

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[5] Vimal Patel, *More Universities Are Choosing to Stay Neutral on the Biggest Issues*, N.Y. TIMES (Mar. 11, 2025), https://www.nytimes.com/2025/03/11/us/institutional-neutrality-universities-free-speech.html.

[6] *See, e.g.*, Isabelle Taft, *How Colleges Are Changing Their Rules on Protesting*, N.Y. TIMES (Sept. 14, 2024), https://www.nytimes.com/2024/09/12/us/college-protest-rules.html; Josh Moody, *Colleges Eye Rule Changes in the Wake of Spring Protests*, INSIDE HIGHER ED (May 31, 2024), https://www.insidehighered.com/news/governance/executive-leadership/2024/05/31/protests-are-mostly-over-whats-next-colleges; Laura Mannweiler, *Campus Protests: University Leaders in Their Own Words*, U.S. NEWS & WORLD REP. (May 1, 2024), https://www.usnews.com/news/education-news/articles/2024-05-01/campus-protests-university-leaders-in-their-own-words.

[7] Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025).

[8] Press Release, U.S. Dep't of Educ., Off. for Civ. Rts. Initiates Title VI Investigations Into Insts. of Higher Educ. (Mar. 14, 2025), https://www.ed.gov/about/news/press-release/office-civil-rights-initiates-title-vi-investigations-institutions-of-higher-education-0.

[9] Makiya Seminera, *A Look at the Universities with Federal Funding Targeted by the Trump Administration*, AP NEWS (Apr. 15, 2025), https://apnews.com/article/harvard-trump-federal-cuts-universities-protests-8fa92331b2780394ea171b0b32d5d243.

[10] Ben Unglesbee, *"Self-Inflicted Wound": Widespread Alarm as Trump Administration Slashes NIH Funding*, HIGHEREDDIVE (Feb. 11, 2025), https://www.highereddive.com/news/nih-indirect-cost-rate-cap-funding-cut-ags-lawsuit/739735/.

[11] Sara Weissman, *Trump's Demands of Harvard Escalate His War on Higher Ed*, INSIDE HIGHER ED (Apr. 16, 2025), https://www.insidehighered.com/news/government/politics-elections/2025/04/16/trumps-demands-harvard-escalate-his-war-higher-ed; Jessica Blake & Katherine Knott, *Trump's Demands to Columbia Reflect Assault on Higher Ed, Experts Say*, INSIDE HIGHER ED (Mar. 14, 2025), https://www.insidehighered.com/news/government/politics-elections/2025/03/14/trump-escalates-attack-columbia-his-latest-demands.

[12] Brandon Drenon & Robin Levinson-King, *Anxiety at US Colleges as Foreign Students are Detained and Visas Revoked*, BBC (Apr. 18, 2025), https://www.bbc.com/news/articles/c20xq5nd8jeo.

[13] Andrew Duehren & Maggie Haberman, *IRS Is Said to Be Considering Whether to Revoke Harvard's Tax-Exempt Status*, N.Y. TIMES (Apr. 16, 2025), https://www.nytimes.com/2025/04/16/us/politics/trump-irs-harvard.html.

any kind of authoritative selection.'"[14] Recent surveys indicate that professors and students engage in self-censorship to avoid controversy and criticism from other members of the university community.[15] At the same time, both sides of the political spectrum call for the silencing of speech with whom they disagree. To take just a few examples, litigation continues challenging Florida's "Individual Freedom Act," which bans teachers from expressing disfavored viewpoints in the classroom[16]; the University of Pennsylvania has recently reprimanded Professor Amy Wax for her "discriminatory and derogatory" statements in and out of the classroom[17] (and Wax's lawsuit challenging this reprimand is pending[18]), and the Court of Appeals for the Sixth Circuit controversially held that a professor stated a First Amendment claim when he challenged his university's policy requiring him to use his students' preferred pronouns in the classroom.[19]

In my remarks today, I will highlight just a few of the challenges that higher education scholars and administrators are facing. The constitutional protections for academic freedom and the freedom of speech more generally at public universities are much less clear than one might expect given how important these protections are to the freedom of thought and, more importantly, to an informed democracy. And some of the relevant law that we do have offers inadequate protection.

My remarks begin with an overview about why the University of North Carolina is the perfect place for this symposium. I will then consider three challenges when considering university

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[14] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). Such criticisms are not new. *See, e.g.*, ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES 5 (1998) (arguing that universities are no longer committed to "free and unfettered debate" and instead engage in "censorship, indoctrination, intimidation, official group identity, and groupthink").

[15] *See, e.g.*, NATHAN HONEYCUTT, FOUND. FOR INDIVIDUAL RTS AND EXPRESSION, SILENCE IN THE CLASSROOM: THE 2024 FIRE FACULTY SURVEY REPORT 18 (2024), https://www.thefire.org/facultyreport.

[16] Pernell v. Fla. Bd. of Governors of State Univ. Sys., 641 F. Supp.3d 1218 (N.D. Fla. 2022), *argued*, No 22-13992 (11th Cir. June 14, 2024).

[17] J Larry Jameson, *Final Determination of Complaint against Amy Wax*, 71 UNIV. OF PA. ALMANAC, Sept. 24, 2024, at 1.

[18] Karen Sloan, *Lightning-Rod Law Professor Amy Wax Sues UPenn for Discrimination*, REUTERS (Jan. 17, 2025), https://www.reuters.com/legal/government/lightning-rod-law-professor-amy-wax-sues-upenn-discrimination-2025-01-17/.

[19] Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021). After the Sixth Circuit's decision reinstating the professor's lawsuit, the case settled. Megan Henry, *Shawnee State to Pay Professor $400,000 in Settlement over Student's Preferred Pronouns*, THE COLUMBUS DISPATCH (Apr. 19, 2022), https://www.dispatch.com/story/news/2022/04/19/shawnee-state-pay-professor-400-000-settle-pronoun-lawsuit/7358716001/.

free speech questions: (1) the applicability of the marketplace of ideas theory in higher education; (2) the lack of clear precedent governing the speech rights of faculty and students; and (3) the importance of institutional leadership.

The University of North Carolina at Chapel Hill—the nation's first public university—is the perfect place for us to discuss the many academic freedom and free speech issues confronting universities in modern times. Like many major universities, UNC-Chapel Hill has a lengthy history of student protests and free speech controversies.[20] In the 1960s, the state legislature passed the Speaker-Ban Law prohibiting alleged communists from speaking at public colleges and universities here in the state.[21] Students, faculty, and administrators concerned about academic freedom and the freedom of speech protested this law, which famously culminated with Herbert P. Aptheker and Frank Wilkinson speaking to students from across a stone wall dividing the campus from Franklin Street.[22] Other major protest movements at UNC-Chapel Hill that received national attention include civil rights demonstrations,[23] protests against the Vietnam War,[24] support for striking campus food service workers,[25] and a shantytown built to pressure the university into divesting from South Africa during apartheid.[26] More recently, in 2018, protestors torn down Silent Sam, a confederate monument, after the legislature passed a law prohibiting its removal.[27] Although UNC-Chapel Hill did not experience significant disruptions from

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[20] *See Student Protest Movements at the University of North Carolina at Chapel Hill*, UNIV. OF N.C. UNIV. LIBRS., (Apr. 25, 2025), https://guides.lib.unc.edu/protests-unc/home.

[21] For a colorful history of the Speaker Ban, and the inspiring academic leadership of Chancellor Bill Aycock, see generally Gene R. Nichol, *Bill Aycock and the North Carolina Speaker Ban Law*, 79 N.C. L. REV. 1725 (2001).

[22] *See Student Protest Movements at the University of North Carolina at Chapel Hill: Speaker Ban (1963-1966)*, UNIV. OF N.C. UNIV. LIBRS., (Apr. 25, 2025), https://guides.lib.unc.edu/protests-unc/speaker-ban.

[23] *See Student Protest Movements at the University of North Carolina at Chapel Hill: Civil Rights Protests (1963-1964)*, UNIV. OF N.C. UNIV. LIBRS., (Apr. 25, 2025), https://guides.lib.unc.edu/protests-unc/civil-rights.

[24] *See Student Protest Movements at the University of North Carolina at Chapel Hill: Anti-War Protests (1965-1970)*, UNIV. OF N.C. UNIV. LIBRS., (Apr. 25, 2025), https://guides.lib.unc.edu/protests-unc/anti-war.

[25] *See Student Protest Movements at the University of North Carolina at Chapel Hill: Food Workers; Strike (1968-1969)*, UNIV. OF N.C. UNIV. LIBRS., (Apr. 25, 2025), https://guides.lib.unc.edu/protests-unc/food-workers.

[26] *See Student Protest Movements at the University of North Carolina at Chapel Hill: Anti-Apartheid Activism (1982-1987)*, UNIV. OF N.C. UNIV. LIBRS., (Apr. 25, 2025), https://guides.lib.unc.edu/protests-unc/anti-apartheid.

[27] Jesse James Deconto & Alan Blinder, *'Silent Sam' Confederate Statute is Toppled at University of North Carolina*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/us/unc-silent-sam-monument-toppled.html.

pro-Palestinian protests last spring, images of students trying to protect the U.S. flag after protestors tried to remove it went viral.[28]

I have been a professor at UNC for almost ten years, and it would take the entire time allocated for this symposium to discuss all of the free speech, academic freedom, and faculty governance issues that have occurred at this university even just during my relatively brief time here. I will highlight just two controversies that have garnered national news. One such controversy occurred when the Board of Trustees initially rejected the recommendation of the Hussman School of Journalism and Media to grant tenure to incoming professor Nikole Hannah-Jones, a co-creator of the New York Times's "1619 Project."[29] Hannah-Jones ultimately settled her threatened lawsuit against UNC and accepted an offer at Howard University instead.[30] The second controversy, involving the new School for Civic Life and Leadership (SCiLL), is ongoing. In 2023, the UNC-Chapel Hill Board of Trustees abruptly passed a resolution requiring the university to create this new school; the North Carolina General Assembly then allocated $4 million to support this effort.[31] This new school was founded with the encouragement of Provost Chris Clements but without significant faculty input.[32] SCiLL remains mired in controversy about its mission as well as the alleged undermining of the faculty's role in appointments, and Provost Clements's recent decision to resign appears to be directly related to troubles at the new school.[33] Both the Hannah-Jones affair and the

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[28] Eduardo Medina, *Fraternity Brothers Balk at a $515,000 Party for Defending the Flag*, N.Y. TIMES (Sept. 3, 2024), https://www.nytimes.com/2024/09/02/us/unc-israel-gaza-protests-party-alpha-epsilon-pi.html.

[29] Katie Robertson, *Nikole Hannah-Jones and University Settle Hiring Dispute*, N.Y. TIMES (July 15, 2022), https://www.nytimes.com/2022/07/15/business/media/nikole-hannah-jones-unc-settlement.html. In addition, namesake donor Walter Hussman objected to her hiring. *See* Joe Killian, *One Year Later, Walter Hussman Still Denying Involvement in Nikole Hannah-Jones Tenure Standoff*, NC NEWSLINE: THE PULSE (July 7, 2022), https://ncnewsline.com/briefs/one-year-later-walter-hussman-still-denying-involvement-in-nikole-hannah-jones-tenure-standoff/.

[30] Robertson, *supra* note 29.

[31] Joe Killian, *Budget Sets Tight Timeline, New Specifics for Controversial New School at UNC-Chapel Hill*, NC NEWSLINE (Sept. 25, 2023), https://ncnewsline.com/2023/09/25/budget-sets-tight-timeline-new-specifics-for-controversial-new-school-at-unc-chapel-hill/.

[32] Ryan Quinn, *UNC 'Civic Life' Center Progressing, Over Faculty Objections*, INSIDE HIGHER ED (May 31, 2023), https://www.insidehighered.com/news/faculty-issues/shared-governance/2023/05/31/unc-civic-life-center-progressing-over-faculty.

[33] Matt Hartman, *Before He Quit, UNC-CH's Provost was Involved in Messy Fight at School of Civic Life*, THE ASSEMBLY (Apr. 10, 2025), https://www.theassemblync.com/education/higher-education/clemens-provost-resign-unc-chapel-hill-civic-life/; Ryan Quinn , *Resignations, Disagreements with Dean Chapel Hill Civics School*, INSIDE HIGHER ED (Mar. 18, 2025), https://www.insidehighered.com/news/faculty-issues/shared-governance/2025/03/18/resignations-disagreements-dean-roil-unc-civics.

SCiLL school debacle illustrate the tensions at UNC between and among the faculty, donors, university administrators, the Board of Trustees, and the state legislature.

The UNC School of Law has not been spared political pressures and controversy. In 2015, the Board of Governors shut down UNC's Center on Poverty, Work and Opportunity,[34] and in 2017 it banned the Center for Civil Rights from conducting litigation.[35] The Law School has also fought North Carolina legislature's actual and threatened cuts to the school's budget.[36] During the past ten years, the school has also faced controversies involving its "Free Speech Board,"[37] protests of student-invited speakers,[38] student comments made in the chat during a class taught

[34] Laurie D. Willis, *Governance Issues, Accreditation Downgrade Linked to Hannah-Jones Controversy*, CAROLINA ALUMNI REV. (July 13, 2022), https://alumni.unc.edu/news/bog-votes-to-shut-down-uncs-poverty-center/aaup. The closure prompted Carolina Law School Dean Jack Boger that the closure was based "on no discernible reason beyond a desire to stifle the outspokenness of the center's director, Gene Nichol, who continues to talk about the state's appalling poverty with unsparing candor." *BOG Votes to Shut Down UNC's Poverty Center*, CAROLINA ALUMNI REV. (Feb. 27, 2015), https://alumni.unc.edu/news/bog-votes-to-shut-down-uncs-poverty-center/.

[35] Jane Stancill, *UNC Board Bans Legal Action at Civil Rights Center*, THE NEWS & OBSERVER (Sept. 10, 2017), https://www.newsobserver.com/news/local/education/article171979707.html. In addition, a student government representative survived a recall election after he refused to condemn the challenged Zoom conversation as racist. *See* Jackson Walker, *UNC Student Leader Avoids Recall After Disagreeing with "Go Back to Africa" Interpretation*, THE COLLEGE FIX (Mar. 16, 2021), https://www.thecollegefix.com/unc-student-leader-avoids-recall-after-disagreeing-with-go-back-to-africa-interpretation/.

[36] *See, e.g.*, Joe Killian, *Senate Budget Would Cut Funding to UNC Law School, School of Government, Fund Controversial New School*, NC NEWSLINE (May 17, 2023), https://ncnewsline.com/briefs/senate-budget-would-cut-funding-to-unc-law-school-school-of-government-fund-controversial-new-school/ (reporting that "[t]he UNC law school has frequently been the target of budget cuts, both proposed and realized"); Jane Stancill, *UNC Law School's Budget is Cut, But It Could Have Been Worse*, THE NEWS & OBSERVER (Jun. 20, 2017), https://www.newsobserver.com/news/local/education/article157121589.html (reporting that in 2017, the NC legislature cut the Law School's budget by $500,000 budget cut, after threatening a $4 million cut).

[37] For more information about one controversy arising out of the Law School's free speech board, *see* Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1859–60 (2017) (controversy erupted after an anonymous student edited a "Black Lives Matter" poster so it read "All Lives Matter" instead).

[38] Jenna A. Robinson, *A Partial Shout-Down at UNC-Chapel Hill*, THE JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Oct 27, 2022), https://jamesgmartin.center/2022/10/a-partial-shout-down-at-unc-chapel-hill/ (reporting protests of Alliance Defending Freedom speaker invited by UNC Law Federalist Society). Other law schools have experienced much more significant speaker disruptions. *See, e.g.*, Greta Reich, *Judge Kyle Duncan's Visit to Stanford and the Aftermath, Explained*, THE STANFORD DAILY (Apr 5, 2023), https://stanforddaily.com/2023/04/05/judge-duncan-stanford-law-school-explained/.

on Zoom,[39] and requests that students avoid "offensive" Halloween costumes.[40]

Last but certainly not least, another reason this university is the perfect place for our symposium is that the University of North Carolina was a defendant in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*.[41] Although not a First Amendment case, the U.S. Supreme Court rejected the universities' argument that they were entitled to deference to their institutional determination that affirmative action provided educational benefits,[42] an argument that Court had previously accepted in *Grutter v. Bollinger*.[43] After the *SFFA* decision, the North Carolina General Assembly threatened legislation banning DEI offices on college campuses but ultimately deferred to the UNC System Board of Governors, which itself ordered the closure of diversity, equity, and inclusion offices and the reallocation of their funding.[44] Also in response to legislative pressure, the UNC System Board of Governors worked with faculty to pass a new civics requirement for all graduating students.[45] This civics requirement requires students to study certain listed documents "foundational to American democracy" in a course or courses before graduation; the requirement does not mandate that students take a dedicated civics

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[39] Kate Murphy, *UNC Law Addressing Concerns After Student Reported Racial Harassment in Class on Zoom*, THE NEWS & OBSERVER (Feb. 23, 2021), https://www.newsobserver.com/news/local/education/article249382325.html.

[40] The Law School's Student Affairs Office condemned students who satirized the Student Government's campaign "We're a Culture, Not a Costume" as "unprofessional." *See* Peter Bonilla, *UNC, Halloween, and the 'Professionalism' Threat to the First Amendment*, FIRE (Oct. 31, 2014), https://www.thefire.org/news/unc-halloween-and-professionalism-threat-first-amendment. Yale College had a similar Halloween costume controversy that made national news. *See* Anemona Hartocollis, *Yale Lecturer Resigns After Email on Halloween Costumes*, N.Y. TIMES (Dec. 7, 2015), http://www.nytimes.com/2015/12/08/us/yale-lecturer-resigns-after-email-on-halloween-costumes.html.

[41] Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 143 S.Ct. 2141, 2168 (2023) (recognizing a tradition of deference but holding that "[c]ourts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review").

[42] *Id.* at 2166–69.

[43] Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

[44] Liam Knox, *UNC System Board Votes to Eliminate DEI Offices*, INSIDE HIGHER ED (May 24, 2024), https://www.insidehighered.com/news/quick-takes/2024/05/24/unc-system-board-votes-eliminate-dei-policy-cut-spending.

[45] Ryan Quinn, *Lawmakers Sought to Mandate Class on Founding Documents. What Were Professors to Do?,* INSIDE HIGHER ED (May 24, 2024), https://www.insidehighered.com/news/faculty-issues/academic-freedom/2024/05/24/lawmakers-sought-mandate-readings-unc-passed-policy.

course, and it does not demand the course be taught with a pro-America viewpoint.[46] In this way, the new requirement minimizes the damage to academic freedom and puts off, for the moment anyway, more intrusive requirements set forth in proposed legislation.[47]

These days, the UNC System is responding to both state and federal political pressures. Like other research universities, UNC faces existential challenges to its mission as federal research dollars are cut and threatened. In February 2025, the UNC System Board of Governors decided to act proactively and issued a memorandum to all university chancellors ordering them to drop any required courses in their general education curriculum that relate to "diversity, equity, and inclusion."[48] The memo asserted this move was necessary to comply with federal contracting law and specifically cited an Executive Order from President Trump on "Ending Illegal Discrimination and Restoring Merit-Based Opportunity."[49] UNC System President Peter Hans also released a politically savvy statement titled "A Patriotic Bargain," which defends the long-standing partnership between the federal government and university research while simultaneously arguing that the universities have a duty "to maintain a true marketplace of ideas and recognize a responsibility to the public interest." [50] As part of its defense strategy, university leaders and lobbyists continue to press their message about student success, affordability, and accountability, which they hope will forestall additional attacks.[51]

With that introduction, let me now address three main challenges facing us today as we ponder the freedom of speech on university campuses.

The first challenge is determining whether and how the marketplace of ideas theory of the First Amendment applies in the

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[46] *Id.*
[47] *Id.*
[48] Ryan Quinn, *Citing Trump Order, UNC System Ends DEI Course Requirements*, INSIDE HIGHER ED (Feb. 10, 2025), https://www.insidehighered.com/news/quick-takes/2025/02/10/citing-trump-order-unc-system-ends-dei-course-requirements.
[49] Memorandum from Andrew Tripp, UNC Sys. Senior Vice President for Gov't Affs and Gen. Couns., on Federal Contracting Compliance to Chancellors (Feb. 5, 2025), https://wlos.com/resources/pdf/fbb52d7a-106e-4470-940a-443a61a0ff4b-February5MemorandumRegardingFederalContractingCompliance.pdf (citing Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025).
[50] Peter Hans, *Research as a Patriotic Bargain*, PUB. ED. WORKS (May 1, 2025), https://www.publicedworks.org/2025/05/hans-research-as-a-patriotic-bargain/.
[51] Erin Gretzinger, *UNC System Lobbyist Urges Calm Amid Trump's Directives*, THE ASSEMBLY (Feb. 6, 2025), https://www.theassemblync.com/education/higher-education/unc-system-lobbyist-trump-immigration-funding/.

higher education context.[52] University of North Carolina at Chapel Hill Chancellor Lee Roberts referred to universities as "the marketplace of ideas" in his opening remarks at this symposium. UNC System President Peter Hans has argued that the university has made a bargain with the federal government to be a "marketplace of ideas" as a condition of receiving research funding.[53] What does it actually mean for a university to be a marketplace of ideas?

As a general matter, the marketplace of ideas theory underscores many of the Supreme Court's First Amendment decisions, from those protecting offensive speech to those evaluating campaign finance regulations.[54] The foundation for this marketplace metaphor comes from Justice Holmes's dissent in *Abrams v. United States*,[55] where he argued that "time has upset many fighting faiths" and that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[56] In his concurrence in *Whitney v. California*,[57] Justice Brandeis added that the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth,"[58] and that absent an "emergency," we should not suppress speech we do not like but rather counter that speech with more speech.[59] A bedrock principle of the marketplace of ideas theory is that the government cannot regulate speech because it is "offensive" or unpopular.[60] Even false speech is presumptively protected unless it causes an identifiable harm.[61] As the Court

[52] The primary theory animating the Court's jurisprudence is the marketplace of ideas. The bulk of our existing First Amendment caselaw is not based on text, history, and tradition, notwithstanding statements to the contrary in *New York State Rifle & Pistol Association v. Bruen*, 142 S.Ct. 2111, 2130 (2022) (stating that the text, history, and tradition approach to Second Amendment questions embraced in that case "accords with how we protect other constitutional rights," including "the freedom of speech in the First Amendment").

[53] *See* Hans, *supra* note 50.

[54] *See* Mary-Rose Papandrea, *The Missing Marketplace of Ideas Theory*, 94 NOTRE DAME L. REV. 1725, 1726–34 (2019) (detailing the importance of the marketplace of ideas theory in the Court's speech decisions).

[55] 250 U.S. 616 (1919).

[56] *Id.* at 630.

[57] 274 U.S. 357 (1927).

[58] *Id.* at 375 (Brandeis, J., concurring).

[59] *Id.* at 377.

[60] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[61] United States v. Alvarez, 567 U.S. 709, 719 (2012) (plurality op.) (stating "[t]he Court has never endorsed the categorical rule the Government advances: that false

famously declared in *New York Times v. Sullivan*,[62] the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[63]

Many critics have noted flaws in the marketplace of ideas theory. As Professor Joseph Blocher has noted, these "explanatory weaknesses and normative difficulties" mostly "track the shortcomings of its idealized view of an uninhibited, costless, and perfectly efficient free market."[64] Our information ecosystem is riddled with market failures. People have unequal access to the "marketplace." Some speakers are more articulate and powerful than others. "Truth" does not always emerge from extended debate, especially in these polarized times, and the very idea of a "marketplace" for truth suggests a nihilistic view of facts. People are not always rational. They are not swayed when confronted with contrary facts and let their emotions such as fear, anger, and contempt govern their thinking. Even though the idealized "marketplace of ideas" is arguably more flawed than the idealized neoclassical marketplace of goods and services, the Court rarely invokes the idea of "market failure" to hold speech regulations constitutional; instead, the marketplace of ideas theory is primarily used to justify speech protections.[65]

Despite these formidable criticisms, the concept of the marketplace of ideas has many strengths, particularly if the theory is understood as "ha[ving] more to do with checking, character, and culture than with the implausible vision of a self-correcting, consent-generating, and participation-enabling social mechanism."[66] This vision of the marketplace of ideas theory "honors certain character traits—inquisitiveness, capacity to admit error and to learn from experience" and "devalues deference and discredits certitude."[67] In addition, essential to the marketplace of ideas theory is that the government does not have authority to dictate orthodoxy. As Justice Souter once said, adherence to the principles of the marketplace of ideas "keeps the starch in the standards for

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statements receive no First Amendment protection"); *id.* at 721–22 (noting "there are instances in which the falsity of the speech bears upon whether it is protected," but "reject[ing] the notion that false speech should be in a general category that is presumptively unprotected").

[62] 376 U.S. 254 (1964).

[63] *Id.* at 270.

[64] Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 831 (2008).

[65] *See id.* at 836.

[66] Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 2 (2004).

[67] *Id.* at 46.

those moments when the daily politics cries loudest for limiting what may be said."[68]

The Supreme Court has often mentioned the importance of protecting the marketplace of ideas in educational settings. In *Sweezy v. New Hampshire*,[69] for example, the Court stated: "The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[70] In *Keyishian v. Board of Regents,*[71] the Court specifically stated that "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom."[72] The Court explained that "[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, rather than through any kind of authoritative selection.'"[73] Most recently, in *Mahanoy Area School District v. B.L.*,[74] the Supreme Court doubled down on its support for the marketplace of ideas theory:

> America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it."[75]

If high schools—like the one at issue in *Mahanoy*—are the "nurseries" of democracy, surely universities must be even more dedicated to the protection of unpopular ideas.

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[68] Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 774 (1996) (Souter, J., concurring).
[69] 354 U.S. 234 (1957).
[70] *Id.* at 250.
[71] 385 U.S. 589 (1967).
[72] *Id.* at 603.
[73] *Id.* (citations omitted).
[74] 141 S.Ct. 2038 (2021).
[75] *Id.* at 2046.

These passages suggest some crucial reasons why a marketplace of ideas theory for the freedom of expression has a role on university campuses. A "pall of orthodoxy" cannot limit what professors research and teach, or the questions students can ask and explore. *Mahanoy* declares that schools not only must protect "unpopular" expression but also must teach their students to understand *why* it is important to protect unpopular expression. Freedom of inquiry is essential for the pursuit of knowledge. It is better to test ideas and arguments with other ideas and counterarguments.

This commitment to the marketplace of ideas is in tension, however, with other Supreme Court opinions giving deference to universities and school authorities to have different speech rules "in light of the special characteristics of the school environment."[76] Some scholars have argued that we should affirmatively reject the marketplace of ideas theory in the university context and instead embrace and formulate an institution-specific theory of approach to First Amendment questions that would allow universities to regulate speech in ways that are appropriate for their educational mission.[77] The argument for an "institutional" approach finds support in several Supreme Court opinions suggesting that the judiciary should defer to universities, at least when they are making core academic decisions. This concept is most often expressed with reference to Justice Frankfurter's concurrence in *Sweezy*:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[78]

This passage suggests that universities should have freedom from government regulation about who teaches, and what, how, and whom they teach. This would cast constitutional doubt on government efforts to restrict what topics and viewpoints can be

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[76] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[77] *See, e.g.*, Paul Horowitz, FIRST AMENDMENT INSTITUTIONS 107-41 (2013) (arguing in favor of treating universities as "unique institutions that have a special relationship with the First Amendment"; "[t]hey are laboratories *for* democracy, not laboratories *of* democracy") (emphasis in original); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1274 (2005) (suggesting special constitutional privileges for universities).

[78] Sweezy v. New Hampshire, 354 U.S. 234, 262–63 (1957) (Frankfurter, J., concurring).

taught, researched, and debated on campus. At the same time, this passage raises important questions about whether academic freedom belongs to the university or to the professors. Frankfurter's concurrence argues that *institutions* should have freedom to make decisions about who teaches and what, how, and whom they teach. Under this view of academic freedom, the university's interests presumptively trump the rights of its professors and students.

Although the Supreme Court has not explicitly held that universities should have leeway to regulate speech in ways to serve its educational mission, it has held, on occasion, that universities are entitled to discretion when making their academic decisions. For example, in *Christian Legal Society v. Martinez*,[79] the Court held that Hastings Law School could institute an "all comers" policy for registered student groups, even though such a policy applied outside of the university context could be unconstitutional as applied, on the grounds that universities are entitled to "wide discretion . . . in determining what actions are most compatible with its educational objectives."[80] In *Board of Curators v. Horowitz*,[81] the Court noted, when rejecting a dismissed medical student's procedural due process claim, that a university's academic decisions are "not readily adapted to the procedural tools of judicial or administrative decisionmaking."[82] The Court expressed a similar reluctance to second-guess academic decisions in *Regents of the University of Michigan v. Ewing*,[83] stating that judges are not "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions."[84]

To be sure, the Court has given mixed messages on the judicial deference owed universities. In *Papish v. Board of Curators of the University of Missouri*,[85] for example, the Court held that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."[86] Similarly, in *Healy v. James*,[87] the Court held that a university "may not restrict speech or association simply because it finds the views

[79] 561 U.S. 661 (2010).
[80] *Id.* at 720 (Alito, J., dissenting); *see also* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985) (explaining that judicial review of academic decisions should be limited).
[81] 435 U.S.78 (1978)
[82] *Id.* at 90–91.
[83] 474 U.S. 214 (1985).
[84] *Id.* at 226.
[85] 410 U.S. 667 (1973).
[86] *Id.* at 670–71.
[87] 408 U.S. 169 (1972).

expressed by any group to be abhorrent."[88] And as I have already mentioned, the Court recently abandoned a deferential approach when evaluating the constitutionality of affirmative action admissions policies.[89]

Given the lack of clarity in the Court's decisions, it is no surprise that it is hotly debated how much deference universities should receive to regulate student and professor expression. As I have argued elsewhere,[90] a university's claim to academic freedom and institutional deference is at its zenith in the context of teaching and research. In the classroom, viewpoint-based restrictions are permitted, and compelled speech is tolerated and often essential to achieve pedagogical goals and to assess student knowledge and understanding—a point all too obvious to our law students who are frequently required to provide answers to questions asked in class and to make arguments they perhaps would prefer not to make.[91] Similarly, professors must teach the subject they are asked to teach, and their teaching must be competent and germane to the subject area. Professors are hired and evaluated on the content of their scholarship. Professors do not, in fact, have the full freedom to engage in any expression they wish. Universities and professors necessarily must make content-based and even viewpoint-based decisions all the time. Curriculum, appointments, and tenure decisions made on an entirely viewpoint-neutral basis—rather than those based on relevant professional standards—would quickly undermine the university's educational mission.

But noting the imperfect fit of the marketplace of ideas theory with the core institutional enterprise of universities does not answer the difficult questions currently facing universities. Some have raised concerns that universities are promoting an "orthodoxy" in their classrooms and on their campuses that do not permit students and faculty to engage in robust debate. Conservative students have expressed concern that their views are not tolerated on campus, and at the same time, universities promote "liberal" views and do not do enough to regulate speech that creates a hostile educational environment. Conservative faculty lament that it is difficult to be hired, promoted, and tenure at left-leaning universities that are not

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[88] *Id.* at 187–88.

[89] *See supra* notes 41–43 and accompanying text.

[90] Mary-Rose Papandrea, *Law Schools, Professionalism, and the First Amendment*, 76 STAN. L. REV. 1609 (2024).

[91] *See* Bd. of Regents v. Southworth, 529 U.S. 217, 242–43 (2000) (Souter, J., concurring in the judgment) (noting that at a university, "students are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach.").

open to their points of view. These concerns cannot—and should not—be easily dismissed. It is unclear, however, where the institutional deference ends and the free speech rights of professors and faculty begin.

Lower courts have generally given universities and professors broad discretion to regulate student speech to serve legitimate pedagogical concerns.[92] Some lower courts have recognized a limit to this deference. For example, one court has offered that no deference is required when asserted pedagogical reasons are "pretext for punishing the student for her race, gender, economic class, religion or political persuasion."[93] But to date, there are few judicial decisions resolving this sort of pretext argument, aside from a handful where students alleged religious animus.[94] And no court has embraced a viewpoint neutrality requirement. But this does not mean that future courts will do so. More importantly, universities should not need the threat of judicial enforcement to appreciate that the core tenets of a marketplace of ideas theory, which rejects orthodoxy and conformity and embraces inquisitiveness and uncertainty, are essential to the educational mission.

Embracing the marketplace of ideas theory in the university context is much less problematic outside of the classroom and research labs. When students are engaged in speech in extracurricular and non-curricular contexts, the need to defer to the universities' academic expertise is much less persuasive. Nevertheless, even here we see some difficulties. Recent college protests have focused attention on a particular area of unresolved tension between the marketplace of ideas and protections against hostile environment harassment. Universities, however, are required to prohibit discrimination based on sex, race, ethnicity, and national origin under Title VI and Title IX. The Court has never directly decided how to reconcile these statutory anti-discrimination laws, which have been interpreted to include a prohibition of "hostile environment" harassment, with the robust protections of the First Amendment.[95] The Court has never recognized "harassment" as a category of unprotected or lesser-protected expression. In the town square, there is no general freedom to be free from speech that

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[92] Papandrea, *supra* note 90, at 1629 (noting that lower courts apply a deferential standard to curricular decisions in the face of student speech challenges).
[93] Axson-Flynn v. Johnson, 356 F.3d 1277, 1287 (10th Cir. 2004); *see also* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) (holding university is entitled to deference as long as it exercised professional judgment).
[94] *See, e.g.*, *Axson-Flynn*, 356 F.3d at 1280.
[95] *See* Papandrea, *supra* note 37, at 1816–17.

creates a hostile environment, (unless that speech happens to fall within another category such as fighting words, defamation, and true threats). In its May 7, 2024 "Dear Colleague" letter, the Office of Civil Rights asserted that "[s]chools have a number of tools for responding to a hostile environment—including tools that do not restrict any rights protected by the First Amendment."[96] For example, OCR offered, schools can engage in counterspeech that communicates disagreement with the offensive speech and take steps to create a welcoming campus**.** This Dear Colleague letter echoed a Dear Colleague letter from 2003 asserting in "the clearest possible terms that OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution."[97] Instead, OCR explained, "the statutes that it enforces are intended to protect students from invidious discrimination, not to regulate the content of speech."[98] OCR took to task universities that had "interpreted OCR's prohibition of 'harassment' as encompassing all offensive speech regarding sex, disability, race or other classifications."[99]

But simply asserting that the civil rights statutes do not conflict with the First Amendment does not make it so. The federal government's "non-legally binding" adoption[100] of a broader definition of anti-Semitism based on the definition promulgated by the International Holocaust Remembrance Alliance (IHRA) complicates the constitutional questions even more. Under the IHRA definition, "offensive political remarks" are not necessarily covered under Title IV unless that criticism is "targeted at or infused with discriminatory comments about persons from or associated with a particular country."[101] The Office of Civil Rights, to its credit, "acknowledges" that under this framework, it is sometimes difficult to distinguish between protected and unprotected expression.[102]

This brings us directly to a second challenge. The relevant First Amendment frameworks that we have governing student speech and professors are deeply undertheorized, uncertain, and

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[96] *See* May 2024 Dear Colleague Letter, *supra* note 3, at 3.
[97] U.S. Dep't of Educ., Off. of Civ. Rts., OCR-00028, Dear Colleague Letter on the First Amendment (July 28, 2003), https://www.ed.gov/about/offices/list/ocr/firstamend.html.
[98] *Id.*
[99] *Id.*
[100] President Trump issued an Executive Order in 2019 declaring that Title VI covers anti-Semitism and directing all executive agencies to consider the IHRA definition. Exec. Order No. 13,899, 84 Fed. Reg. 68779 (Dec. 11, 2019). This executive order remains in place. *See* CONG. RSCH. SERV., LSB11129, RELIGIOUS DISCRIMINATION AT SCHOOL: APPLICATION OF THE CIVIL RIGHTS ACT OF 1964 (2024).
[101] May 2024 Dear Colleague Letter, *supra* note 3, at 16–17.
[102] *Id.* at 17.

highly problematic. This constitutional framework developed separately from principles of academic freedom and differs in several important ways.

The American Association of University Professors has promulgated its own definition of academic freedom principles which most universities—public and private—have embraced in their relevant governing documents.[103] These principles developed separately from the framework courts use to evaluate First Amendment claims involving universities. It is perhaps therefore not surprising that the AAUP academic freedom principles differ in some very important ways from any constitutional rights professors have.

Academic freedom principles are generally understood to encompass the freedom to teach in the classroom, the freedom to research and publish, the freedom of intramural speech, and the freedom of extramural speech.[104] None of these freedoms are absolute. For example, under the AAUP principles, professors engaged in teaching should refrain from discussing "controversial" matters that are not germane to the class.[105] With respect to extramural speech, the AAUP principles state that professors are permitted to speak as citizens, but "their special position in the community imposes special obligations," which means they should "at all times be accurate, should exercise appropriate restraint, [and] should show respect for the opinions of others."[106] The AAUP's principles do not expressly mention protections for intramural speech. Instead, the AAUP asserts faculty are not mere employees subject to dismissal if they are not sufficiently respectful of university administration; instead, they are appointees akin to federal judges.[107] The AAUP's formulations of the academic freedom rights of professors bear little resemblance to the rough-and-tumble marketplace of ideas where people can engage in false, misleading, disrespectful, and offensive speech. Instead, academic freedom comes with corresponding duties, and this freedom is subject to professional standards, not political ones.[108]

Although the Supreme Court has spoken in stirring language about the importance of academic freedom, the Court has never

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[103] AM. ASS'N OF UNIV. PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, in AAUP POLICY DOCUMENT & REPORTS 3–11 (10th ed. 2006). [hereinafter 1940 Statement].
[104] MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 7 (2009).
[105] *1940 Statement*, *supra* note 103, at 3.
[106] *Id.* at 3–4.
[107] *Id.* at 6.
[108] See Horowitz, *supra* note 77, at 109-10.

actually detailed the contours of such freedoms or specifically embraced (or rejected) the AAUP's academic freedom principles. In fact, the Supreme Court has decided very few cases involving professors, and those that it has decided do not set forth general rules that are particularly helpful for professors. For example, *Keyishian* did not involve restrictions on a professor's curriculum choices, in-class speech, research, or intramural or extramural expression; instead, it struck down state-imposed loyalty oaths on the ground that the law was vague.[109]

When analyzing the First Amendment rights of professors at public universities, the lower courts typically apply the framework the Court has developed for analyzing the rights of government employees more generally. The Court has made clear that government employees "by necessity . . . accept certain limitations" on their First Amendment freedoms because their speech can "contravene governmental policies or impair the proper performance of governmental functions."[110] At the same time, a public employee "does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment."[111] Until almost 20 years ago, the framework for determining whether the government could regulate the speech of its employees consisted of two steps: (1) whether the employee spoke "as a citizen upon a matter of public concern,"[112] and (2) if so, whether the employer's reaction to that speech was nonetheless justified, balancing the employee's interest "in commenting upon matters of public concern" against the public employer's interest in "promoting the efficiency of the public services it performs through its employees."[113] The Court has recognized that government employees can make valuable contributions to the marketplace of ideas[114] but nevertheless has placed significant limits on their First Amendment rights.

The Court has embraced a sharp distinction between when a public employee speaks as a private citizen, and when he speaks as an employee.[115] In *Garcetti v. Ceballos*,[116] the Court held that when government employees speak "pursuant to their official duties, the

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[109] Keyishian v. Bd. of Regents, 385 U.S. 589, 604 (1967).
[110] Garcetti v. Ceballos, 547 U.S. 410, 418–19 (2006).
[111] San Diego v. Roe, 543 U.S. 77, 80 (2004).
[112] Connick v. Myers, 461 U.S. 138, 146–47 (1983).
[113] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
[114] *Garcetti*, 547 U.S. at 419 (noting "the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion").
[115] *Id.* at 421–22.
[116] 547 U.S. 410 (2006).

employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[117] The Court based its decision on the government speech doctrine, holding that this distinction simply "reflects the exercise of employer control over what the employer itself has commissioned or created."[118] In *Garcetti*, the public employee was a deputy district attorney,[119] but the Court's sweeping rejection of constitutional protection for "on the job" speech is a bright-line rule that applies to all government employees. In dissent, Justice Souter expressed his hope "that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities."[120] In response, the majority noted "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[121] After all, allowing the government to have absolute control over what professors research and what and how they teach would have a dramatic chilling effect on the production of knowledge and critical thinking and undermine the "vital role" of universities in our democracy.[122]

To date, every circuit court to directly address the question has held that *Garcetti*'s rule does not apply to research and teaching, but it is by no means clear that this unanimity will hold.[123] In the litigation challenging Florida's "stop Woke" law, for example, the State of Florida has argued that there should be no carve out from the *Garcetti* rule for professors at state universities.[124] This argument was unsuccessful before the district court, but it remains to be seen how the Eleventh Circuit (and potentially the Supreme Court) will address it. Despite the Court's frequent pronouncements about the importance of academic freedom, there remains reason to be concerned that an argument like Florida's would prevail. Lower courts have generally embraced arguments that political bodies can

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[117] *Id.* at 421.
[118] *Id.* at 422 (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)).
[119] *Id.* at 413.
[120] *Id.* at 438 (Souter, J., dissenting).
[121] *Id.* at 425 (majority opinion).
[122] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
[123] Kilborn v. Amiridis, 131 F.4th 550, 557–58 (7th Cir. 2025); Heim v. Daniel, 81 F.4th 212 (2d Cir. 2023); Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021); Demers v. Austin, 746 F.3d 402 (9th Cir. 2014); Adams v. Trs. of the Univ. of North Carolina-Wilmington, 640 F.3d 550 (4th Cir. 2011).
[124] Pernell v. Fla. Bd. of Governors, 641 F. Supp. 3d 1218, 1239–40, 1272–73 (N.D. Fla. 2022), *argued*, No. 22-13992 (11th Cir. June 17, 2024).

exercise absolute control over the curriculum in K-12 schools; this has been devastating for secondary school teachers asserting First Amendment claims based on their curricular or pedagogical choices.[125] The line between secondary education and higher education is not a clear one, with many students taking AP and other college-level classes in high school, and sometimes even maintaining dual enrollment in high school and community college. In addition, state legislatures make funding decisions all the time that give preference to certain areas of study and even points of view. Perhaps the Court would distinguish between political decisions to add to academic discourse, rather than to limit and censor it, but this might be a distinction without a meaningful difference.

In resolving this open *Garcetti* question, it also might matter who the defendant is. In some instances, like the Florida case, professors are fighting the state legislature. In other cases, however, professors are fighting their own institutions. In the latter situation, it is not clear whether the professor or the institution should prevail. Judge Easterbrook recently argued in a statement concerning the petition for rehearing en banc in *Kilborn v. Amiridis*[126] that the identity of the defendant makes a big difference: "[W]hen a professor and a university are at loggerheads about what constitutes effective teaching and scholarship, the university has to win."[127] Justice Alito made a similar argument when he was an appellate judge in *Edwards v. California University of Pennsylvania*.[128] In that case, the Third Circuit flatly rejected a professor's arguments that the district court had failed to provide the jury appropriate guidance about his academic freedom right to choose his own curricular materials, holding instead "that a public university professor does not have a First Amendment right to decide what will be taught in the classroom."[129] In this pre-*Garcetti* opinion, the panel based its conclusion on the government speech doctrine, explaining

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[125] *See, e.g.*, Evans-Marshall v. Bd. of Ed. of Tipp City Exempted Village Sch. Dist., 624 F.3d 332, 340 (6th Cir. 2010); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007).

[126] 131 F.4th 550 (7th Cir. 2025).

[127] Kilborn v. Amiridis, No. 23-3196, 2025 WL 1276034, at *2 (May 2, 2025) (statement of Easterbrook, J. concerning the petition for rehearing en banc). Judge Easterbrook noted, however, that the university "[o]ddly" did not make this argument in the case. *Id.* Judge Easterbrook joined a unanimous panel opinion several years earlier that cited Garcetti to support its holding that a university has the right to set the curriculum. Piggee v. Carl Sandburg College, 464 F.3d 667, 670–72 (7th Cir. 2006).

[128] 156 F.3d 488 (3d Cir. 1998).

[129] *Id.* at 491.

that "the University can make content-based decisions when shaping its curriculum."[130]

Even if there is an "academic freedom" carveout from *Garcetti*, it is not clear what this exception covers. To start, in the context of teaching and scholarship there might be "ministerial" requirements that do not meaningfully limit professors' academic freedom.[131] For example, Carolina Law now requires professors to complete a standardized syllabus cover sheet containing "mandatory UNC Disclosures" about academic policies, the university's Equal Opportunity Compliance, UNC's Counseling and Psychological Services, and a "Prohibition of Discrimination, Harassment, Etc." When I was the associate dean for academic affairs, I heard a few professors grumble that these requirements violated their academic freedom rights, but it is not likely they had a strong argument to that effect. At the same time, the line between permissible "ministerial" policies relating to university administration and impermissible compelled speech policies interfering with academic freedom is not a clear one. In *Meriwether v. Hartop*,[132] for example, the Sixth Circuit held that a school rule requiring professors to use students' preferred pronouns interfered with a professor's academic freedom and was not subject to the *Garcetti* bar.[133]

In addition, *Garcetti* specifically states that "academic scholarship" might be excluded, but what falls in that bucket aside from scholarly journal articles and books? For example, law professors frequently write op-eds, field press calls, testify before Congress, write amicus briefs, host podcasts, and make other public statements that relate to their area of expertise. Are these statements part of a professor's job? The core duties of a professor—to research and write—historically did not include a duty to engage in these activities; instead, these activities might more easily constitute "extramural speech."[134] On the other hand, in modern times, professors are often encouraged to speak to the media and have a robust social media presence in order to raise their individual

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[130] *Id.* at 492.

[131] *See, e.g.*, Lovelace v. Southeastern Massachusetts Univ., 793 F.2d 419,426 (1st Cir. 1986) (holding universities can set policies "such as course content, homework load, and grading policy"); *see also* KEITH E. WHITTINGTON, YOU CAN'T TEACH THAT! THE BATTLE OVER UNIVERSITY CLASSROOMS 123 (2024).

[132] 992 F.3d 492 (6th Cir. 2021).

[133] *Id.* at 506 (rejecting argument that pronoun rule "has nothing to do with the academic-freedom interests in the substance of classroom instruction").

[134] *See, e.g.*, Adams v. Trustees of the Univ. of North Carolina-Wilmington, 640 F.3d 550, 561–64 (4th Cir. 2011) (holding *Garcetti* does not apply to a professor's external public appearances and writings, even though he listed these activities in his tenure application, because none of the speech "was undertaken at the direction of UNCW, paid for by UNCW, or had any direct application to his UNCW duties").

profiles and the profile of the school. Some universities, including the University of North Carolina, offer training to professors about how to write and place op-eds. These efforts are also often cited favorably in promotion and tenure reports. Furthermore, it is the core mission of the university to share its knowledge with the public, and in many instances, the best way to share research and connect with the public is through social media, op-eds, podcasts, and other "non-academic" communications. These forms of communication can also help professors connect with their students, alumni, donors, and other educators.

Another unresolved issue is whether *Garcetti* covers "intramural" speech. The possible "academic freedom" exception from *Garcetti*'s rule striping protections for work-related speech specifically mentions only teaching and scholarship. *Garcetti* itself does not refer to statements made in the context of faculty governance. At the same time, faculty governance is an essential part of academic freedom, and often professors bring their academic expertise in teaching and research to faculty governance matters.

The courts disagree on how to handle intramural speech. In *Porter v. Board of Trustees of North Carolina State University*,[135] for example, the Fourth Circuit embraced a narrow reading of the *Garcetti* exception in a case where a professor alleged retaliation for his criticisms of new department policies relating to social justice, which he delivered at a faculty meeting and through a faculty-wide email.[136] In contrast, the Ninth Circuit recently held that *Garcetti* did not bar a professor's retaliation claims based on his criticism of his school's curriculum.[137] The Ninth Circuit recognized, however, that "'[i]t may in some cases be difficult to distinguish between what qualifies as speech 'related to scholarship or teaching . . . .'"[138]

The Court has embraced two other very important limits on government employee speech rights which have uncertain application to professors. In *Connick v. Myers*,[139] the Court established a threshold test that speech must be a matter of public concern if a government employee is entitled to protection.[140] Whether speech is a matter of public concern depends on the "content, form, and context of a given statement, as revealed by the whole record."[141] *Connick* applied this test narrowly to avoid

[135] 72 F.4th 573 (4th Cir. 2023), *cert. denied*, 144 S.Ct. 693 (2024).
[136] *Id*. at 583.
[137] Jensen v. Brown, 131 F.4th 677, 688–89 (9th Cir. 2025).
[138] *Id.* at 689 (quoting Demers v. Austin, 746 F.3d 402, 415 (9th Cir. 2014)).
[139] 461 U.S. 138 (1982).
[140] *Id.* at 146.
[141] *Id.* at 147–48.

constitutionalizing employee grievances.[142] In that case, an assistant district attorney claimed she was terminated for her office survey about several office policies.[143] In a 5-4 decision, the Court held that even though the survey concerned the functioning of a government office, most of the survey did not address matters of public concern because the employee's motivation was "not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors."[144] The four dissenting Justices attacked the majority for interpreting "public concern" so narrowly, arguing that her speech easily constituted speech on a matter of public concern because it concerned "the manner in which the government is operated or should be operated."[145]

Not surprisingly, this public concern inquiry poses some major difficulties when applied in the academic context. Lower courts disagree on whether academic research or teaching is a matter of public concern. The audience for teaching and research is often not a public one, and many professors teach and write in areas that do not generate widespread public interest. To avoid this problem, some lower courts have embraced an expansive view of speech as a matter of public concern. Focusing on the importance of having a robust marketplace of ideas, some courts have held that the public concern test is satisfied whenever the professor is engaged in an academic inquiry or pursuit, regardless of the size of the audience or how esoteric the topic.[146] For example, in *Kilborn* the Seventh Circuit held that a civil procedure professor's exam question, out-of-class statements, and in-class remarks were all matters of public concern because they served "broader pedagogical purposes" and must be considered in "the context of a public discussion that was occurring at the University."[147] An even more expansive example is *Meriwether*, where the Sixth Circuit held that a professor's refusal to use a student's preferred pronouns is a matter of public concern.[148] While gender identity is most certainly a matter of public concern and robust political debate, it is hardly clear that refusing to use a particular student's preferred pronouns is a meaningful contribution to that debate. In any event, what these cases really

[142] *Id.* at 154.
[143] *Id.* at 141.
[144] *Id.* at 148.
[145] *Id.* at 156 (internal marks and citation omitted).
[146] *See, e.g.*, Kilborn v. Amiridis, 131 F.4th 550, 559 (7th Cir. 2025) (taking this broad approach); Heim v. Daniel, 81 F.4th 212, 228–29 (2d Cir. 2023) (expressing support for a broad approach in a case involving a macroeconomist).
[147] 131 F.4th at 560–61.
[148] Meriwether v. Hartop, 992 F.3d 492, 511–12 (6th Cir. 2021).

demonstrate is that the public concern inquiry is inappropriate for the academic context.

Even if the public concern test can be met, under current doctrine a professor must still satisfy a balancing test set forth in *Pickering v. Board of Education*.[149] There, the Court recognized that government employees often have particularly valuable contributions to make to the public debate;[150] at the same time, however, the Court recognized government employers have an interest "in promoting the efficiency of the public services it performs through its employees."[151]

Balancing tests are inherently not protective of free speech. Under a balancing approach, content-based and viewpoint-based speech restrictions are not presumptively unconstitutional. The government does not have to show a compelling interest in regulating speech or that there are no less restrictive means of achieving that interest. In cases involving professors and their universities, both can assert competing claims to academic freedom principles. Professors who survive the *Garcetti* bar mentioned above may still fail at the *Pickering* stage. In a recent Second Circuit case, for example, where an economics professor unsuccessfully challenged a university's decision not to hire him, the court expressly held that content-based judgments, which are "normally anathema to the First Amendment," can be deemed "permissible academic reasons for declining to hire or promote a candidate."[152] Citing Justice Frankfurter's *Sweezy* concurrence, the Second Circuit held that universities must have freedom to set its own rules and standards for who is hired, what they teach, and how they teach it.[153]

In addition, professors can find themselves on the losing end of the balancing test seesaw when their speech is allegedly harassing or offensive. In *Kilborn*, the university did not raise an academic freedom defense, but it justified its regulation of the professor's curricular speech on its "substantial interest in ensuring its students can learn free of harassment."[154] The court, in that case, allowed the professor's claims to survive a motion to dismiss, but only because at that stage of the litigation, the court was obligated to accept as

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[149] 391 U.S. 563, 568 (1968).
[150] *Id.* at 571–72 (noting that public employees can provide "informed and definite opinions" that meaningfully contribute to "free and open debate" by the electorate on public issues).
[151] *Id.* at 568.
[152] Heim v. Daniel, 81 F.4th 212, 232 (2d Cir. 2023) (internal quotation marks and citations omitted).
[153] Id. at 230–31 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).
[154] *Kilborn*, 131 F.4th at 561.

true his allegations that the university's real motivation was to placate a hostile audience. Similarly, the Sixth Circuit upheld the dismissal of retaliation claims brought by faculty members punished for posting anonymous flyers criticizing members of Turning Point USA, a conservative organization, as "racist" and stated "hate & hypocrisy are not welcome at Tennessee Tech."[155] The court explained that the speech "created a reasonable threat of disrupting [the university]'s academic mission" and that the university's "interest in preventing a potential disruption to its pedagogical and collegial environment [that] outweighed the plaintiffs' interests in distributing the flyers."[156] It is important to note that the "harassment" and "hostile environment" mentioned in these cases do not constitute categories of unprotected speech, and the university did not claim in either case that the professor's expression violated federal civil rights laws.

The AAUP's guidance suggests that principles of academic freedom cover extramural speech, but even the AAUP recognizes that such expression is not protected if it shows unfitness for the job based on the professor's record as a whole.[157] Cracking the door open to permit removal for lack of "fitness"—whether under a *Pickering* balancing test or the AAUP definition—leaves professors extraordinarily vulnerable and potentially undermines the marketplace of ideas. Many would say that professors exercising their right to speak as citizens should have the right to engage in public debate, but controversial statements quickly lead to all sorts of community members—the faculty, students, donors, parents, alumni, the legislature, the board of trustees—believing that this person cannot be trusted in the classroom and should be removed.

As the foregoing has illustrated, the public employee framework and principles of academic freedom do not line up. If the Court does not carve out academic freedom from the *Garcetti* bar, professors will have absolutely no protection from retaliation for their research and teaching. Even if professors can survive *Garcetti*, the ill-fitting "public concern" requirement threatens to defeat their claims. And the *Pickering* balancing test leaves professors vulnerable to arguments that the university's interests outweigh the professor's speech interests. This confusion has led some scholars, like Professor David Rabban, to argue in favor "of a clarified and

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[155] Gruber v. Tennessee Tech Bd. of Trustees, No. 22-6106, 2024 WL 3051196, at *3–4 (6th Cir. May 16, 2024).
[156] *Id.* at *4.
[157] *1940 Statement*, *supra* note 103, at 6.

developed First Amendment law of academic freedom."[158] Until we have this clarification, however, we will continue to see courts struggling to apply an ill-fitting framework to academic disputes.

A related free speech challenge is determining the scope of student speech rights. As Justice Souter remarked in his concurrence in *Board of Regents of the University of Wisconsin System v. Southworth*,[159] the Court's prior academic freedom cases such as *Sweezy* and *Ewing* do not resolve students' First Amendment rights because they involved "limited subjects" and recognized "a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching."[160] Determining the scope of student speech rights is additionally complicated by the dearth of relevant Supreme Court precedent in the university setting and the open question of whether any or all of the Court's K-12 apply in this context.

There are very good reasons to question the application of K-through-12 cases in the higher education context. Among other things, students are not compelled to attend the university, college students are not minors, they are entitled to vote, they are not subject to parental control, they often live on campus 24/7 or close to it, and the doctrine of *in loco parentis* has been roundly rejected. Furthermore, university students are arguably entitled to academic freedom protections of their own. In *Healy v. James*, Justice Black's concurring opinion attacked the prevailing view that "the minds of students [are] receptacles for the information which the faculty have garnered over the years."[161] Instead, he argued, "students and faculties should have communal interests in which each age learns from the other."[162]

Healy v. James vacillated between invoking traditional First Amendment doctrinal rules, such as the heavy presumption against prior restraints,[163] and allowing the school some leeway to regulate speech in keeping with the "special characteristics of the school environment."[164] In *Widmar v. Vincent*,[165] the Court specifically remarked about this tension, explaining that while "students enjoy First Amendment rights of speech and association on the campus,"

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[158] DAVID M. RABBAN, ACADEMIC FREEDOM: FROM PROFESSIONAL NORM TO FIRST AMENDMENT RIGHT 14 (2024).
[159] 529 U.S. 217 (2000).
[160] *Id.* at 238–39 (Souter, J., concurring).
[161] 408 U.S. 169, 196 (1972) (Douglas, J., concurring).
[162] *Id.* at 197.
[163] *Id.* at 184.
[164] *Id.* at 188–89 (citing the Court's incitement cases but also citing *Tinker*).
[165] 454 U.S. 263 (1981).

a university is not a public forum because its "mission is education," and it has "authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."[166] For example, the Court explained, universities do not have to make their facilities available to the general public.[167]

In light of the uncertainty of the frameworks for regulating campus expression, university leaders must decide whether to embrace the leeway this lack of clarity affords. Complicating matters is that many questions universities face are not First Amendment questions at all; instead, they are more accurately described as institutional leadership questions. First Amendment experts largely agree that there are limits to student free speech rights on campus, but we disagree on what those limits might be. There are some concerns that we will hear in our first panel today that universities are increasingly using time, place, and manner regulations to make it harder for free speech to flourish. But some universities have allowed students to maintain encampments that violate school rules to occupy administrative buildings for some time. They do not have to do that. Violations of these school rules are not protected under the First Amendment, and some of these protests have led to property damage or violence. How much does a school have to tolerate? How much should a school tolerate? These are not First Amendment questions; they are questions for the university leaders. Some universities embraced the protests as indicative of an engaged student body; others cracked down indiscriminately on lawful and unlawful speech, whether to avoid losing control of the campus, or to steer clear of Title VI complaints and Congressional investigations, or to satisfy their governing bodies and presume from alumni, or to score political points.[168]

These institutional leadership questions are even more complicated for private universities. Most private universities have voluntarily committed themselves to the principles of the First Amendment. Private universities are not required to follow the First Amendment (unless they have pledged to do so by contract, or they are in California, which has a law requiring private universities to follow the First Amendment).[169] Some scholars have argued that

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[166] *Id.* at 267 n.5.
[167] *Id.*
[168] Lisa Desjardins, Karina Cuevas & Madison Staten, *How Colleges are Handling Campus Protests After Embracing Activism in the Past*, PBS: NEWSHOUR (May 6, 2024, 6:40 PM), https://www.pbs.org/newshour/show/how-colleges-are-handling-campus-protests-after-embracing-activism-in-the-past.
[169] Cal. Educ. Code § 94367 (West 2025).

private universities should reconsider their commitment to the First Amendment.[170]

That brings me to my final challenge in this area. The final challenge is that universities are under attack, and to defend ourselves, we have a lot of work to do to explain why universities are valuable to our democracy. As the open issues this essay has identified are litigated, universities will have to justify the need for academic freedom and institutional deference. Universities will no doubt continue to make these arguments in court, but it is increasingly important that they make these arguments in the court of public opinion. Universities must turn the tide of plummeting public opinion about their value to our democracy.

Because the University of North Carolina is a state university, beholden to the state legislature for much of its funding and regulation, these political efforts have been underway long before President Trump took office in January 2025. University leaders have acted proactively—and sometimes controversially—to blunt political intrusion into university affairs. In addition, the university has expanded programs supporting first-generation students, members of the military, and students from all areas of the State. The university has developed programs like Carolina Across 100—a name that refers to the one hundred counties in North Carolina—to use our resources to assist the entire State. The Communications Office tries to convince lawmakers and the public alike that our research is worth the investment costs.

In addition, as I mentioned at the outset, Chancellor Lee Roberts and UNC System President Peter Hans have reaffirmed our commitment to the marketplace of ideas in public statements. The next challenge—and perhaps the most fundamental challenge—is convincing faculty and students that the marketplace of ideas theory should be our loadstar. Although the marketplace of ideas theory has some obvious limits in the university setting, its rejection of certitude and its embrace of the freedom to disagree are essential attributes for the search for truth and for the promotion of democratic values.

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[170] *See*, *e.g.*, Kenji Yoshino, *Reconsidering the First Amendment Fetishism of Non-State Actors: The Case of Hate Speech on Social Media Platforms and at Private Universities*, 76 STAN. L. REV. 1755 (2024).

THE VALUE OF INSTITUTIONAL NEUTRALITY FOR FREE INQUIRY

Keith E. Whittington*

INTRODUCTION

Over the course of the 1960s, protests roiled American college campuses. As Richard Nixon assumed the White House and responsibility for the Vietnam War and as a draft lottery was reinstituted, campuses exploded—sometimes literally. In April 1969, armed students seized control of the student union at Cornell University.[1] The next month a student protest at "People's Park" near the University of California at Berkeley degenerated into a riot.[2] Shortly afterward, members of the Students for a Democratic Society and the Student Afro-American Society occupied the administration building at Columbia University and briefly took a dean hostage.[3] That fall, members of the White Panther Party set off a series of bombs at the University of Michigan.[4] The next spring, four students were killed by National Guardsmen at an antiwar protest at Kent State University.[5] That summer, members of the Weather Underground set off a car bomb on the campus of the University of Wisconsin.[6] Similar, if less infamous, events took place across the country at campuses large and small.

Meanwhile, universities and their faculties were struggling over how to respond to the intense student activism. To be sure, some individual professors joined in with the student activists. But others demanded more than individual action. They demanded an institutional response. In November 1969, the Council of the American Association of University Professors confessed that it found itself divided on the question of whether institutions of higher education should remain neutral on the political and social controversies of the day. The division on the AAUP Council mirrored the divisions within the professoriate more generally. No doubt views on institutional neutrality were difficult to separate from views on student activism. A comprehensive survey of faculty attitudes conducted in 1969 found that half the faculty under the age

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[1] DONALD A. DOWNS, CORNELL '69 (2012).

[2] MARC EDELMAN BOREN, STUDENT RESISTANCE 180–82 (2001).

[3] *Id*. at 174-75.

[4] *Panther by the Tail*, THE HISTORY OF THE UNIVERSITY OF MICHIGAN, https://historyofum.umich.edu/panther-by-the-tail/ (last visited May 15, 2025).

[5] Boren, *supra* note 2, at 187–88.

[6] JEREMY VARON, BRINGING THE WAR HOME 178 (2004).

of thirty expressed support for student activists. Less than a quarter of those over the age of fifty said the same.[7]

Universities, academic departments, and scholarly societies were inundated with demands that they take a stance on the Vietnam War and various other matters. One member of the AAUP Council complained about the "tyranny of the minority" "who may seek to immobilize the majority by denying them the right to adopt a collective position on a problem of grave moment."[8] The chair of a political science department thought that a resolution condemning the war by his faculty-student senate was improper but would as a practical matter make little difference, and so "I did not make the futile gesture of opposing this statement."[9] Another political scientist, some twenty years more junior, was at the vanguard in promoting such faculty resolutions and thrilled to the possibility that he was contributing "to the development of a revolutionary consciousness in America."[10] The outgoing president of Brandeis University thought that universities were at the heart of a "genuine revolution" sweeping the nation but tried to hold at bay those in the New Left who demanded that universities themselves become "a revolutionary force."[11] A university politicized in that way, he thought, "is a university doomed."[12]

The debates of the 1960s were left unsettled, though as a practical matter, numerous scholarly institutions did issue political statements. If the question of institutional neutrality died down along with American withdrawal from Vietnam, it was not laid to rest. Subsequent episodes of campus activism renewed the calls for universities to get off the sidelines and join the activists and renewed the debate over whether such actions would be appropriate.

The debate has taken on some new urgency now. It is not just the case that new social controversies are energizing political activism on college campuses, though there are. And it is not just that the professoriate is often in sympathy with the substantive political views of the campus activists, though they are. It is also the

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[7] EVERETT CARLL LADD, JR. & SEYMOUR MARTIN LIPSET, THE DIVIDED ACADEMY: PROFESSORS AND POLITICS 188 (1975). The student activism support scale was derived from a set of questions ranging from whether student demonstrations had a place on college campuses to whether students who disrupt campus should be expelled. *Id.* at 40.

[8] Donald N. Koster, *On Institutional Neutrality*, 56 AAUP BULLETIN 11, 12 (1970).

[9] Samuel Krislov, *The Obligation to Reject Engagement*, 56 AAUP BULLETIN 276, 276 (1970).

[10] Alan Wolfe, *A Summer Look at the Spring Events*, 56 AAUP BULLETIN 269, 272 (1970).

[11] Morris B. Abram, *Reflections on the University in the New Revolution*, 99 DAEDALUS 122, 124 (1970).

[12] *Id.*

case that new methods of organizing and communicating have transformed campus life just as it has transformed other aspects of society. In the spring of 1969, heated exchanges broke out in faculty senate chambers over whether resolutions denouncing the Vietnam War should be adopted, but when proponents of speaking out won those debates and secured their much-desired faculty resolution the victory was often quite fleeting. The appropriate notation would be made in the university records. Perhaps the student paper and alumni magazine would publicize what the faculty had said. And then, the solemn resolution of the faculty would disappear from public consciousness leaving barely a trace. Perhaps this is an example of a law sometimes attributed to Columbia political scientist Wallace Sayre: "the politics "the politics of the university are so intense because the stakes are so low."[13]

The stakes, at least for institutional political statements, might be somewhat higher now. Certainly, the potential audience is larger. Every university department, center, and program now come equipped with a website and a social media account. Institutional statements are now widely publicized and publicly archived. The same information technologies also lower the costs of coordinating political activities both for and against such institutional pronouncements. Momentum for adopting a resolution can build as sister institutions go on record themselves, and institutional statements can become newly controversial as they gain visibility to critics who might reside far beyond the campus gates.

My concern here is with the ways in which departing from a norm of institutional neutrality might damage the university's commitment to free inquiry and impinge on academic freedom. There is a separate concern, which I have developed elsewhere, that abandoning institutional neutrality also generates institutional risk. If scholarly institutions become, or are perceived to be, political partisans, they risk being treated as such. They will not be treated as part of a common inheritance of accumulated knowledge and a common resource of expertise and scholarly insight, but rather as allies of some political factions and foes of others. For an outside audience, institutional statements on political controversies may have little effect on shifting political opinion about the controversies themselves but might have more effect on shifting political opinion about the credibility and value of the institution.[14] However

[13] Herbert Kaufman, *Communications: Letters to the Editor*, 10 PS 511, 511 (1977).
[14] *See* Keith E. Whittington, On Institutional Neutrality and the Purpose of a University 23 (Apr. 30, 2024) (unpublished manuscript), http://dx.doi.org/10.2139/ssrn.4801896.

departing However, departing from a norm of institutional neutrality might not only affect the attitudes of those outside the institution. It might also affect the behavior of scholars within these institutions of higher learning.

The Kalven Report produced at the University of Chicago relatively early in the turbulence of the Vietnam era has become a touchstone for subsequent debates over institutional neutrality.[15] It is frequently cited at the University of Chicago itself, though most universities have shied away from explicitly embracing the fairly stringent commitment to institutional neutrality that the Kalven Report has been understood to represent. The brief Kalven Report reads more as a declaration of principles than as an apologia for the university's position. I think the conclusion that the Kalven committee reached is largely correct, but that report does not tell us why we should agree.

In 1967, George W. Beadle, the president of the University of Chicago, appointed a faculty committee led by Harry Kalven Jr. Kalven was a well-regarded scholar of the First Amendment in the Chicago law school, and the committee included luminaries from across the Chicago campus. The committee was charged with the mission of preparing a statement on the university's "role in political and social action."[16] The report produced by the Kalven committee reaffirmed the longstanding policy of the University of Chicago to maintain institutional neutrality. One of the very first acts of Chicago's faculty was to adopt a resolution in 1899 declaring that, "the University, as such, does not appear as a disputant on either side upon any public question; and that the utterances which any professor may make in public are to be regarded as representing his own opinions only."[17] The 1899 resolution contended that neutrality at the institutional level was critical to preserving the freedom of speech of faculty at the individual level, and the Kalven Report endorsed that view. The Kalven Report did not make a big splash at the University of Chicago at the time. Kalven received more attention on campus for another committee he was chairing at the same time; that committee was examining the university's policies on student discipline, which students apparently found to be the more consequential issue.

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[15] Kalven Committee, *Report on the University's Role in Political and Social Action*, U. CHI. (Nov. 11, 1967), https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf.

[16] *Id.*

[17] William R. Harper, *The Thirty-Sixth Quarterly Statement of the President of the University: Freedom of Speech*, 5 U. Rec. 370, 376 (1901).

The Kalven committee came in response to the activities of the Students for a Democratic Society on the Chicago campus. The SDS had been protesting the university's connections to the Continental Illinois Bank. The university kept its accounts at the Bank, and several prominent officials of the bank sat on the university's board of trustees. The Continental Bank participated in a consortium of American banks that provided a revolving line of credit to the government of South Africa, and the SDS argued that the bank was contributing to propping up the racial apartheid regime of that country. But the issue had already spread well beyond that initial controversy by the time the Kalven committee reported back to Beadle, touching on questions ranging from which corporations should be allowed to send recruiters to campus to which prospective students should be admitted to the university.

The Kalven Report contended that the university's role in regard to social controversies was distinctly limited. "A good university, like Socrates, will be upsetting."[18] The university will undoubtedly create "discontent with the existing social arrangements," but it did so by being the "home and sponsor of critics."[19] The university "is not itself the critic."[20] The university as such should strive for a stance of institutional neutrality on the controversies of the day, even as members of the university community engaged as partisans on those controversies.

Significantly, the Kalven Report did qualify its endorsement of institutional neutrality. Universities must defend "the very mission of the university and its values of free inquiry," and universities would inevitably have to adopt positions on matters of public policy affecting the institutions themselves.[21] A university need not sit on the sidelines when governments are making decisions about land use policies, tax policies, or intellectual property that will have consequences for the university itself. More notably, universities have an obligation to stand up for intellectual freedom. Institutional neutrality is valuable not for its own sake but as a means for preserving a societal space for free inquiry. If government officials or social movements challenge principles of intellectual inquiry or threaten the ability of scholarly institutions to perform their role in advancing and disseminating knowledge, then those institutions and their leaders have a responsibility to do everything in their power to counter those threats. Institutional neutrality is a

[18] Kalven Committee, *supra* note 9.
[19] *Id.*
[20] *Id.*
[21] *Id.*

means to an end, and university leaders must not become so focused on the means that they lose sight of the end.

I think this basic conclusion of the Kalven Report is correct. Adhering to a principle of institutional neutrality facilitates free inquiry by the scholars operating within these institutions.

I. THE RISK OF MISSION EROSION

At the very core of the mission of the university is the pursuit of truth and the advancement of human knowledge. How universities perform that mission is of great importance. Notably, modern universities seek to do that by sheltering within their walls a diverse array of scholars who individually examine claims, gather evidence, and develop arguments. The university as a corporate entity does not do that, and the faculty as a collective does not do that. Universities nurture a community of scholars who individually do that. Those individuals are united only in a limited sense of each being committed to the pursuit of knowledge through reasoned discourse.

The faculty as such are not called upon to reach collective judgments on substantive questions, and it would be a mistake if they were asked to do so. It is common for the press to report on scientific studies by reference to the university where the study was performed—the "Harvard study," "researchers at MIT," and the like. This is an understandable shorthand since the average news consumer will have heard of the university but not the researcher. However, this convention has the detrimental effect of casting a halo of borrowed prestige from the reputation of the institution over a single study by a single researcher and falsely implies that the university as a whole has endorsed the conclusions of a single study produced therein. As denizens of the campus, we should know that this is an error. The conclusions of any given study must necessarily be tentative for its analysis might be flawed. Moreover, it is wholly consistent with the pursuit of knowledge for a single university to employ experts who fiercely disagree with one another. If the English department has two Shakespeare scholars, they may fundamentally disagree over the proper interpretation of *Hamlet*. If the university has two labor economists, they may come to different conclusions about the effects of minimum wage policies on unemployment. If a law school has two constitutional scholars, they may have different views on the proper interpretation of the equal protection clause and may even have divergent views on how we ought to go about the process of

constitutional interpretation. We regard such internal disagreements as entirely compatible with the mission of the university because the mission is to allow such debates to take place in the hopes that the clashing of arguments will in time help illuminate the truth.

There are occasions when scholars are appropriately asked to come to common conclusions, but such endeavors are limited and voluntaristic. The social scientists Everett Carl Ladd and Seymour Martin Lipset might agree to conduct a survey of American academics for the Carnegie Commission on Higher Education and interpret its findings, but Ladd and Lipset could have parted ways if they had irreconcilable differences and other survey researchers were free to examine their data and offer competing interpretations.[22] The American Political Science Association might assemble a Committee on Political Parties to develop recommendations for fostering a more responsible party system, but individual members of the committee and subsequent scholars were free to dissent from the report's conclusions.[23] The White House might appoint a group of law professors to a Presidential Commission on the Supreme Court of the United States to examine potential reforms to the Court but those individuals need not have reached consensus and scholars outside the commission were free to criticize its conclusions.[24] For good reason, we do not ask Yale Law School to reach an agreement on possible judicial reforms or the political science department of Princeton University to issue a collective statement on possible reforms to American political parties. Those academic units are designed to support scholars investigating such questions, not to reach collective conclusions on the answers to those questions and certainly not to settle debates and foreclose future inquiries.

Even on substantive questions properly within the subject matter of an academic discipline, we do not require conformity on scholarly opinion about those questions. Academic disciplines are organized around ways of knowing, or

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[22] *See* LADD & LIPSET, *supra* note 1. For an example of contrary interpretation, *see* Robert A. McCaughey, *American University Teachers and Opposition to the Vietnam War: A Reconsideration*, 14 MINERVA 307, 307 (1976).

[23] *See Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, 44 AM. POL. SCI. REV. 1 (1950). For an example of a later critique, *see* Evron M. Kirkpatrick, "*Toward a More Responsible Two-Party System*"*: Political Science, Policy Science, or Pseudo-Science?,* 65 AM. POL. SCI. REV. 965 (1971).

[24] *See* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

Wissenschaft,[25] not around a list of known facts. The facts that we think we now know are always only provisional. They must be left open to challenge and reassessment. We train young scholars to understand what we think we currently know. Their competence as experts depends, in part, on their ability to faithfully describe Newton's Third Law of Motion, or Darwin's theory of natural selection, or Duverger's law of political party formation, or Arrow's impossibility theorem and the evidence we have to support them. We require teachers to competently inform students about such laws and the weight of support behind them, but we do not require teachers to refrain from criticizing them or offering students alternative perspectives. A commitment to the pursuit of knowledge requires that we not insist that young scholars agree with or believe in such laws. The conventional wisdom might be mistaken or require qualification, and academia should be open to young scholars deploying established ways of knowing to upset established truisms. A healthy academic discipline should not have a party line to which its members must pledge fealty. The theoretical physicist Max Planck is credited with observing that scientific revolutions often progress one funeral at a time, since critics of new theories are often not themselves persuaded by the new ideas even if they are no longer able to persuade their colleagues of the acuity of their criticisms. Academia once had dogmas and enforced orthodoxies, and the mission of a university was once understood as being one of handing down eternal truths unsullied. The nineteenth-century revolution in higher education displaced that mission and substituted in its stead a commitment to advancing knowledge by forsaking dogmas and challenging orthodoxies. Modern universities are committed to free inquiry, not enforced belief. Academic disciplines as such do not issue pronouncements and do not quash dissenters, or at least they should not do so without sacrificing their very reason for being.

Institutional statements on social and political controversies subvert that mission. By their nature, such statements tend to entrench contingent political views and thereby undercut the free search for truth. Such statements attempt to resolve disagreement and express current belief. It memorializes transient opinions when universities should be resisting such temptations, recognizing that the strongly held views of the moment might not survive further examination in

[25] *See Wissenschaft*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/wissenschaft_n?tl=true&tab (last visited Jan. 11, 2024).

the future. If a scholarly institution puts a stake in the ground regarding some current beliefs, it undercuts the willingness and ability of scholars to revisit those beliefs and call them into question.

Universities should not post a sign saying, "in this house we believe . . . ." The university as an institution should abjure such statements of faith. That is not to say that universities must be nihilistic and believe nothing at all, but what they should believe in is a process not a result. Universities believe in the value of free inquiry, reasoned argument, and experimentation. They do not believe in the conclusions of any particular inquiry or turn aside those who would challenge such conclusions. By signaling that some political beliefs are sacrosanct at a scholarly institution, that institution turns away from its mission of refusing to hold up any beliefs as sacrosanct. In issuing political statements, the current faculty or university leadership attempt to settle controversies and embed a set of views into the foundation of the university. Such statements inevitably discourage further debate and dissent. If the faculty as a body has agreed to a resolution of some issue, it does not welcome those who would unsettle that decision. decision.. Collective pronouncements are intended to close the door on further investigation, not to invite additional disputation. That is not the proper mindset of an academic enterprise.

Even more bizarrely, the issuing of political statements by academic institutions elevates opinion over expertise. Political resolutions institutionalize non-expert opinion at the expense of expert judgment. Perhaps we think the content of such resolutions are just matters of preference, opinion, and taste and are not amenable to expert judgment. But universities should not traffic in matters of preference and taste. It is at best a departure from the institutional mission. At worst it is a betrayal of the mission. Universities should be fostering a belief that they promote deliberate judgment. If instead they are seen as elevating partisan political opinion they will be devaluing their greatest currency.

Not all political statements can be chalked up to matters of taste. There are in fact experts on a campus or in academia broadly with considered judgments regarding all manner of social and political controversy. Those judgments may ultimately prove to be right or wrong, but the expertise that academia develops contributes to the public good by providing the best available scholarly knowledge to assist the democratic

public and policymakers in reaching decisions about how to respond to political problems.[26] There are scholars who have dedicated their careers to studying matters of war and peace or criminology. What is gained by academic institutions elevating not those scholarly voices but the collective view of the faculty on the wisdom of military action or the best means to address mass shootings? To be sure as citizens in a democracy all the members of the campus community are entitled to have and to express their personal opinions on such matters of public concern. Those opinions are not scholarly judgments, however, and universities confuse the issue if they elevate collective opinions rather than scholarly judgments.

Take an example of a current political controversy about which some professors have expertise—legislative apportionment and political gerrymanders. Individual scholars are routinely called upon to lend their expertise to those who are drawing up legislative maps and to those who are litigating over the maps once they have been drawn. Those scholars do not primarily or directly offer their normative preferences about how legislative seats should be apportioned, but rather they offer their statistical and political expertise about how seats can be apportioned and what the consequences of alternative maps might be. As might be expected, individual scholars routinely appear on both sides of those disputes. The U.S. Supreme Court has particularly struggled to find a "judicially manageable standard" for determining "whether the particular gerrymander has gone too far" and has exceeded "the limits of [the legislature's] districting discretion."[27] Justice Anthony Kennedy once held out the hope that "new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties," which could "facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards."[28] Academics have rushed to produce those "new methods of analysis" that might guide legislators and judges.[29] This in turn has led legislatures to complain that judges must subscribe to the *Political Research Quarterly* and the *American Political Science Review* in order to

[26] *See also* ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM (2012).
[27] Vieth v. Jubelirer, 541 U.S. 267, 291 (2004).
[28] *Id.* at 312–13.
[29] *Id.* at 313.

resolve cases.[30] Judges would be left trying to make sense of a "social-science stew" and "dueling 'social science' expert(s)," with each party choosing their own "favored social-science metric."[31] This social-science arms race infamously led Chief Justice John Roberts to challenge an attorney at oral argument to explain why judges should be asked to make rulings based on what "I can only describe as sociological gobbledygook" that the "intelligent man on the street is going to say [is] a bunch of baloney."[32]

Perhaps a faculty senate or a political science department might decide to help things along by formally adopting a resolution endorsing one of these competing metrics. What is supposed to be the status of such a resolution, and what does it add to the scientific or political process? The scholarly institution is not only attempting to elevate a particular set of conclusions as being uniquely authoritative, but it is also implicitly casting other conclusions and the scholars who endorse them into the outer darkness. If a new entrant into the gerrymander-metric wars emerges, has the scholarly institution effectively prejudged those conclusions as wrong? An institutional endorsement of a particular social-science answer attempts to artificially freeze the scientific process and establish as dogma one favored conclusion in a contested field.

Academics already contribute to this problem by joining in the production of open letters with large lists of signatories. If the goal of a letter or petition is to express weight in a political struggle, then numbers matter. The number of signatories on a petition matters in the same way that the number of individuals marching in the street or attending a rally or participating in a boat parade matters. It is the mass that is meaningful in certain kinds of political struggles. As an individual citizen, I can add my voice to that of the crowd, but my voice in that context is no louder nor more consequential than anyone else's. If, however, I am asked to sign a letter and identify myself with my academic title and affiliation, then presumably the purpose is to add something other than the equal weight of one more engaged citizen. The purpose is to lend scholarly credibility to the enterprise and to convey to the world that the letter does not

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[30] Brief for Appellants at 46, Gill v. Whitford, 585 U.S. 48 (2017) (No. 16-1161), 2017 WL 4325878.
[31] *Id.* at 46–47.
[32] Transcript of Oral Argument at 38, 40, *Gill*, 585 U.S. 48 (No. 16-1161).

merely reflect the personal opinion of a group of individuals but rather conveys the expert judgment of a group of relevant scholars. That message is not just watered down but becomes actively fraudulent when the signatories have no real expert credibility to lend.

On any given matter of public controversy, there are relatively few scholars with genuine and relevant expertise on the subject. Universities should be able to offer up those experts to those who want to be better informed about the matter at hand. Letters signed by dozens or hundreds of professors, however, are no longer offering informed scholarly judgment. They are offering up political opinion under the guise of informed scholarly judgment. Such efforts drown out and obscure genuine expertise and devalue the scholarly enterprise and what it can contribute to democratic politics. There may literally be only a handful of genuine experts on a given question of political interest. A collective letter by that handful should have weight not because of how many signatories there are but because of who those signatories are and the credibility that they have as a consequence of their previous scholarly work on that question. Opening such a letter to dozens, hundreds, or thousands of additional signatories changes the very nature of the letter and what it should be contributing to public discourse. A letter signed by thousands of academics on nearly any question should have no more weight in democratic politics than a letter signed by thousands of plumbers. If scholars are to speak with authority about matters of public concern, they must stick to those topics on which they can speak with authority and refrain from speaking out *as professors* on other topics.

Universities do the same thing when they speak in an institutional voice about matters of public concern. Such institutional speech drowns out and obscures genuine scholarly speech. It posits that hundreds of non-expert professors should be weighed in the balance against a handful of expert professors when the opinion of non-expert professors *speaking as professors* should have no weight at all. They should have a hearing in a democratic arena in the same way and to the same degree as any other citizen of the community should have a hearing. But when professors seize the megaphone of a scholarly institution in order to shout out their merely personal opinions, they do a disservice to both the profession and the polity. They attempt to overawe ordinary citizens and lay claim to an authority that they have neither earned nor deserve.

On many matters of public concern, the hazard of institutional speech is even more serious than one of misplaced or exaggerated authority. Imagine, for example, that a faculty senate votes on and issues a statement condemning or endorsing a military venture. Every member of that faculty senate has an equal vote in that process and carries equal weight in determining whether such a statement will be issued. But suppose further that there are actual experts on that topic on the faculty but that their views are in the minority among the faculty as a whole. The university in such a case would be in the very odd position of overriding the judgment of the actual scholarly experts in order to elevate the judgment of those with non-expert opinions. Why should academic institutions ever risk being in such a position?

Or imagine instead that an academic department claims the right to deplatform an invited speaker on the grounds that such a speaker is not qualified to speak on a topic at an institution of higher education, as a group of faculty did when Northwestern University professor Laura Kipnis was slated to speak at Wellesley College.[33] One kind of argument that has been advanced in the campus free speech context for barring outside speakers is a strong claim that universities should only host genuine scholarly experts speaking on their topics of expertise because otherwise universities might become complicit in spreading misinformation. An academic institution should tolerate only academic freedom and not free speech on its campus. Set aside the question of whether this is an attractive model for a modern university to follow or whether such a policy could be expected to be applied in a principled and consistent fashion. The pronouncement at Wellesley begged the question of who was authorized to evaluate such claims of scholarly qualification. Should the political science faculty be consulted on whether speakers scheduled to discuss political topics in humanities departments should be allowed to go forward? Should the Commission on Ethnicity, Race and Equity be able to determine whether a tenured feminist professor of film studies has the appropriate credentials to speak to an audience on a university campus about her experience with university Title IX

[33] KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 134–37 (Princeton, N.J.: Princeton University Press, 2018); LADD & LIPSET, supra note 1, at 215–18.

policies and administration? Claims of authority are not the same as actual authority.

The contradictions can become even more stark. If universities are to abandon a norm of institutional neutrality and adopt political positions, who is to make such decisions about whether and how to speak in the institutional voice? The faculty often assume it is they who will command the stage when debating such resolutions, but why should that be the case? Consider particularly the problem of institutional speech by subunits of the university, most notably the academic departments. Who is entitled to speak for the department on matters of social controversy?

Quite plausibly departments should only be able to issue political statements on behalf of the department when there is consensus among *all members of the department* for doing so. The students and the staff should not be impressed into issuing a statement made on their behalf without being consulted. For purposes of taking political stances, the staff of a department are just as much citizens with political views as any member of the faculty. They have a quite limited role within an academic department as a professional scholarly entity. But they should be regarded as equals to any member of the faculty for purposes of speaking in public as a citizen about matters of public concern. There is simply no justification for the faculty to issue political statements in the name of the staff. The faculty need not consult with the staff on which courses to offer or which professors to hire or what the requirements for obtaining a doctoral degree should be, but there is no comparable professional reason why the faculty should be able to ignore the views and preferences of the staff when it comes to issuing political statements in the name of the "department." If academic departments are to be treated as a political club as well as a professional scholarly enterprise, then every member of the club should be consulted about the club's political pronouncements.

If we accept the principle that every member of the departmental community is implicated by any statements issued in the name of the department and that every individual should stand as an equal when acting in their political capacity as citizens, then statements should only be issued if every member of the departmental community is equally accounted for in the decision-making process. If we then also accept something short of unanimity as the decision rule for issuing statements, then it will be the case that *the entire faculty of the department* could find

itself in the minority and in a dissenting position when the department issues statements on political matters. If we adopt such a policy allowing departments to issue political statements, then we should recognize and make explicit the possibility that the undergraduate majors in a department could simply outvote the other members of the department and issue political statements in the name of the department that the undergraduates alone wish to issue. If members of the faculty find that prospect unattractive, then perhaps they should think further on why they might be comfortable with overriding the dissenting views of the students, staff, or some members of the faculty when issuing statements purportedly in the name of the department. If members of the faculty think that institutional statements made in the name of the department but through the weight of the votes of the undergraduate students devalue the reputation of the department, then perhaps they should likewise consider whether academic institutions issuing public statements through the weight of non-expert professors would likewise devalue the reputation of the scholarly institution. The situation is unlikely to be improved if we empower some other set of actors within the university to speak in an institutional voice. The faculty will no more appreciate the board of trustees or the university president speaking on their behalf on matters of public concern. Indeed, the faculty would not be happy if they were dragooned into a statement written and agreed to solely by a committee of genuine scholarly experts on campus on a matter of social controversy.

Scholarly institutions that seek to take positions on matters of social and political controversy have altered their core mission and have done so in a way that will do damage to that mission. Rather than being a forum within which scholarly controversies rage, the university will position itself as a judge of those controversies. Rather than playing host to ongoing scholarly disagreements, the university will attempt to authoritatively settle those disagreements. Rather than privileging the process of scholarly disputation, the university will come to privilege a set of particular scholarly findings and conclusions. Rather than elevating expertise to better inform the polity, the university will exalt non-expert opinion in the hopes of influencing the polity. Institutional statements risk subverting the university's commitment to free inquiry into difficult and controversial subjects.

II. THE RISK TO ACADEMIC FREEDOM

Institutional political statements risk an even more direct infringement of individual academic freedom. The risk here is probably greater in the case of departmental statements than in the case of statements on behalf of the university as a whole, but even the latter carries some danger that it will chill the speech of individual members of the faculty.

It is a longstanding feature of academic freedom principles that professors should be evaluated solely on the basis of their professional and scholarly qualifications and not on the basis of their private political opinions or activities. The firewall between professional qualifications and private politics is critical to protecting individual professors from professional sanctions for holding unorthodox or controversial personal opinions and for protecting institutions from being held responsible for the private opinions and activities of members of the faculty. In 2011, the American Association of University Professors recognized that the rise of new forms of media had elevated the salience of the personal political opinions and expression of individual members of the faculty. Those developments had put new pressures on longstanding principles of academic freedom. As that report emphasized, "the fundamental principle is that all academic personnel decisions, including new appointments and renewal of existing appointments, should rest on considerations that demonstrably pertain to the effective performance of the academic's professional responsibilities."[34] The intrusion of political considerations into academic decision-making compromises the ability of universities to contribute to the public good by contributing to the public sphere scholarly judgments untainted by political pressures. The threat of such inappropriate interference with professional judgments can come as readily from "politically motivated academics" as it can from "private corporations and public officials."[35] Social media has made it easy for colleagues, deans, and trustees to discover whether a particular scholar is a socialist or what their views on Israel or abortion might be. The fact that such information is known does not mean it should factor into professional decisions. Even if that information is known, it should be deemed irrelevant. Whether

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[34] *Ensuring Academic Freedom in Politically Controversial Academic Personnel Decisions*, AAUP.ORG (2011), https://www.aaup.org/file/EnsuringAcademicFreedomFINALExecSumm.pdf.

[35] AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS AND REPORTS, 33 (11th ed. 2015).

or not a professor is a socialist, a Zionist, or pro-choice should have no bearing on whether that professor is hired or promoted by a university.

Early in the twentieth century, the German sociologist Max Weber called attention to these dangers when universities were struggling to maintain their autonomy from political forces. The public interest on which the autonomy of the universities rested, he thought, depended on the ability of professors to think freely and speak independently of social and political pressures. "Society as a whole has no interest in guaranteeing the permanent tenure of a professorial corps which has been carefully screened to determine that its political views are unexceptional."[36]

Professors are quick to recognize the truth in Weber's statement when the ideological screening of the professoriate is being done by political officials or trustees. They are slower to admit its truth when the ideological screening is done by the incumbent members of the professoriate itself. But if it would be damaging to the public good for the governor of Florida to screen state university professors for their political conformity, it would be equally bad for the faculty of the law school to impose such a screen themselves—even if the political conformity that such a screen would create would differ depending on who deployed it. Weber contended, "'The freedom of science, scholarship and teaching' in a university certainly does not exist where appointment to a teaching post is made dependent on the possession—or simulation—of a point of view which is 'acceptable in the highest circles' of church and state."[37] Things are not improved if a potential faculty member must simulate the political perspectives of the existing members of the faculty rather than the highest circles of church and state. Faculties should not "function as deputies on behalf of the political police," even if the political police are not the ones currently reigning in the state capitol.[38] It is a disservice to the greater public if scholars must pass through a screen to ensure that their political views are acceptable to those in power.

If departments make a practice of issuing political statements, then it will necessarily be the case that the political opinion of current and future members of the department will be

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[36] Max Weber, *The Power of the State and the Dignity of the Academic Calling in Imperial Germany*, 11 MINERVA 571, 589 (1973).
[37] *Id.*
[38] *Id.* at 590.

viewed as professionally relevant. Issuing political statements would officially become part of an "academic's professional responsibilities."[39] Those political opinions may or may not be dispositive in any given case, but the firewall between professional qualifications and private political views will have been breached. What were previously regarded as private political views of no consequence to departmental affairs will now become a legitimate professional qualification with consequences on departmental decision-making. If a department has a commitment regarding, for example, the status of Palestinians in Israel, then whether a potential faculty member shares those political values and would bolster the department's existing political commitments would potentially become a relevant consideration in hiring and promotion decisions. Would it be possible, further, to appoint a current member of the faculty to serve as department chair if that individual dissents from the department's collective views about contested political issues of the day? Ideally, it should make no difference whatsoever what a department chair's political opinions might be, but without a norm of institutional neutrality such views might be regarded as quite important. A department would no longer simply be an organization dedicated to a scholarly enterprise. It would now be a political club as well, and political clubs must necessarily behave differently than scholarly organizations and police the political activities of their members. We might think that a department would still prioritize traditional professional criteria in making judgments on who should gain membership into the department, but there is no particular reason to think that feelings will run stronger and deeper on matters of scholarly interest than on matters of political interest. The tail could easily wind up wagging the dog. The personal will become the professional.

If departments are empowered to issue political statements on the basis of something less than unanimity, the problems of compelled speech become quite serious. Any decision or rule that allows for lesser majorities to issue statements will necessarily result in the department issuing political statements in the name of and on behalf of individual department members who do not share the views expressed in the statement. Allowing for dissenting statements is not an adequate remedy for this problem. If there are dissenting voices

[39] *Infra* note 35.

in the department, it makes no sense for the department to be able to take a political stance *as a department*. Dissents will be ignored and subsumed by the departmental statement. At best, a department could issue a statement for and in the name of the majority of the department, with a minority statement getting explicit and equal billing. Of course, once such political statements are recharacterized as statements of a majority rather than statements of the department qua department, then it no longer makes sense to allow departments to issue statements at all. Individual members of a department are already free in their private capacity to generate collective statements that include any individual willing to sign on to the statement. The only purpose of a departmental statement rule is to allow departmental majorities to co-opt the reputation and status of dissenting individuals who would have refused to join a collective statement voluntarily. There is no justifiable reason for the department to be able to speak *in the department's name* on contested political matters when members of the department disagree with the opinion being expressed.

The constitutional principles around compelled speech should call to our attention a further problem, which is that individuals should have the right not to speak at all. The government infringes on the autonomy of individuals if it requires them to endorse political orthodoxies with which they do not agree, but it likewise fails to respect the dignity of individuals if it forces them to speak when they would prefer to remain silent. The U.S. Supreme Court first articulated a rule against compelled speech when public school officials required students to recite the Pledge of Allegiance during World War II. The Court in that case sang the praises of an American "freedom to be intellectually and spiritually diverse."[40] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[41] If public school children of the Jehovah's Witness faith wished to decline to pledge fealty to any nation, that was their right. When the Court was later called upon to say whether drivers in New Hampshire could blot out the State's motto of "live free or die" on the license plates that they were required to display in order to drive on public roads, the Court began "with the proposition

[40] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).
[41] *Id.*

that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[42]

State universities are legally bound by such First Amendment principles, but even private universities in the United States should generally recognize the same principle against compelled speech in their own operations. If an academic department issues a political statement in the name of the department, then it has effectively forced all individuals in the department to implicitly join that statement. If the only out from that implicit endorsement is for individuals to file a dissenting statement of their own, then the department has effectively denied individuals the "right to refrain from speaking at all."[43] If the departmental majority wishes to express a departmental view about, for example, the American military action in Iraq, the only options that would be left to a dissenting faculty member would be either to make plain their dissenting view by speaking or to remain silent and allow the departmental colleagues to speak on that dissenting faculty member's behalf. Either way, the department would be compelling speech from each and every member of the faculty. There is no reason why surrendering the right to choose what to say on political issues and the right to choose not to say anything at all on particular political issues should be a condition of employment in a university. A small set of private religious institutions might require such a statement of faith from members of its faculty, but we generally recognize that such requirements are antithetical to the core principles and self-conception of most modern American universities.

Abandoning the norm of institutional neutrality and adopting a practice of issuing political statements is troubling for the freedom of speech of individual members of the faculty, even if unanimity was accepted as the rule for issuing such statements. Making the issuing of political statements a formal part of a department's official activities would set up a situation in which lobbying and pressuring individual members of the department to engage in political speech that they would prefer not to engage in would become a routine feature of university life. There is no good reason why professors employed by the university should have to endure such lobbying campaigns as part of their employment. Professors join the university faculty to engage in scholarly activities, not to be political activists. A departmental

[42] Wooley v. Maynard, 430 U.S. 705, 714 (1977).
[43] *Id.*

statement policy will force faculty members who simply want to do their scholarly work to also have to affirmatively resist colleagues' demands to engage in political activism.

Of course, not everyone is well-positioned to resist such lobbying campaigns. A chaired full professor might well be comfortable as the lone holdout on a departmental political statement. An untenured assistant professor, however, holding out or even joining a dissenting minority would be in a far more disconcerting situation. If the tenured faculty in a department, or even just the tenured faculty in a subfield, felt strongly that a political statement should be issued by the department, it would require an untenured assistant professor in that subfield to have unusual courage to refuse to sign on to such a statement. Indeed, junior faculty might find themselves cross-pressured by competing factions holding divergent political views. If the members of the senior faculty are raging over whether the department should condemn American entry into a war, the members of the junior faculty have no safe haven. When the department itself is not politically neutral, the untenured members of the faculty cannot choose to be politically neutral either. Assistant professors will find themselves having to say which side they are on, even if the result is that they will have earned the enmity of some of their senior colleagues. Of course, such conflicts can arise over ordinary matters of departmental policy or hiring, but it seems inappropriate to create such a conflict in a context in which it could be easily avoided. Junior faculty should not be forced to compromise their personal political views in order to stay in the good graces of the senior faculty who will control their professional future, and they should not have to fear that their professional future will depend on whether they hold or are willing to express particular political views.

Abandoning a norm of institutional neutrality would convert what would previously have been regarded as purely private and personal political opinions into something that could be regarded as professionally relevant and that should therefore be factored into personnel evaluation decisions. Unfortunately, the extramural utterances of current and potential members of the faculty might sometimes influence hiring and promotion decisions in any case, but traditional academic freedom principles indicate that such conduct would be wholly inappropriate. If the expression of political opinions is no longer merely an extramural, private matter but is instead an aspect of

the professional speech and conduct of a member of the faculty acting on institutional business, then political opinions can no longer be reasonably ruled out of bounds in hiring and promotion decisions. Potential colleagues would be entitled to know whether the addition of a new faculty member would lead to changes in departmental policy not only on such questions as what the requirements of the degree program should be but also on such questions as whether American foreign or domestic policy is being properly conducted.

Moreover, if it is part of the routine business of a university for the faculty to issue political statements, then not only will faculty colleagues have a legitimate professional interest in the personal political opinions of every member of the faculty, but so will university officials, trustees, and even legislatures. If the job of a university professor includes having views on whether chants of "From the River to the Sea" is a call to violence, then they should be evaluated accordingly—and university trustees should reasonably dismiss professors who might commit the institution to the wrong position on such political questions. It will no longer be viable to wall off such opinions as merely personal and private and of no proper concern to university authorities.

If commenting on social and political controversies is part of the job description of members of the faculty and can appropriately be done through the instruments of university decision-making, then it will necessarily put pressure on those who might dissent from the majority sentiment of the university or the department. There will be pressure on members of the faculty to fall in line with and conform to the views of the majority of the faculty. In some cases that pressure might even rise to the level of fear of retaliation. If a university president or a department chair has spoken in their institutional capacity on political controversies, it is not unreasonable for a member of the faculty to worry that their professional prospects will be negatively affected if they are seen as contradicting the institution's apparent political commitments. A university that simultaneously says that professors should enjoy full freedom to speak in public as citizens on matters of public concern but also adopts procedures for issuing institutional statements on those same issues will have the strength of its former commitment questioned. Whether real or apparent, the political minority will come to view the institution as a hostile working environment in which they would be well advised to keep their own personal

political opinions to themselves. Indeed, prospective students and faculty will receive the signal that the institution is officially hostile to and unwelcoming of people with their personal political views. They would recognize that they should either avoid those institutions entirely or accept that they will be regarded as subalterns.

Institutions of higher education should not be signaling that some members of the campus community do not belong there. Justice Sandra Day O'Connor advocated for an understanding of the Establishment Clause of the First Amendment of the U.S. Constitution that emphasized government endorsement of religion. As she put it, "endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the community."[44] Official endorsement of political creeds has the same potential effect as official endorsement of religious creeds. An academic department should no more endorse political messages than it should festoon the department office with religious symbols or hang political banners over the departmental reception desk. If an academic department were to issue political statements, there is no reason for students or others to imagine that the political proclivities of departmental faculty will only manifest themselves in some parts of their professional activities but not in others. Many students already believe that professors are hostile to some political viewpoints, and allow their own political preferences to slant their teaching and grading. It will be more difficult to reassure students that professors understand that it would be professionally inappropriate to allow their personal politics to creep into their teaching duties if professors demonstrate that they believe that there is no divide to be maintained between their personal and professional activities. Students would have a reasonable fear that professors will treat students differently depending on their politics if those same professors use the university as their personal political platform.

To take a very extreme case, consider the situation of Northwestern University electrical engineering professor Arthur Butz. In 1976, Butz published a book arguing that the Holocaust was a hoax.[45] The university refused to fire or sanction Butz for publicizing such views on the grounds that they were fully

[44] Lynch v. Donnelly, 465 U.S. 668, 688 (1984).
[45] ARTHUR R. BUTZ, THE HOAX OF THE TWENTIETH CENTURY (1975).

protected expressions of his personal political opinion, an instance of extramural speech that was as protected in his case as it was for any other professor on the campus. Butz continued to express such views periodically, and on one such occasion, President Henry S. Bienen of Northwestern issued a statement affirming Butz's freedom to hold and express such views.

> Butz is a tenured associate professor in electrical engineering. Like all faculty members, he is entitled to express his personal views, including on his personal web pages, as long as he does not represent such opinions as the views of the University. Butz has made clear that his opinions are his own and at no time has he discussed those views in class or made them part of his class curriculum. Therefore, we cannot take action based on the content of what Butz says regarding the Holocaust—however odious it may be—without undermining the vital principle of intellectual freedom that all academic institutions serve to protect.[46]

Imagine, however, that Butz was not alone. Perhaps he kept his political views well concealed but aggressively recruited other engineering professors who shared them. One day he realized that a majority of his electrical engineering colleagues were also Holocaust deniers. If Northwestern University adhered to a strict policy of institutional neutrality regarding matters of political controversy, Butz and his friends would be limited to expressing their views on their personal web pages and through obscure conspiracy-mongering publishing houses. If the university instead authorized its faculty to issue formal political statements as a department, then Butz would be well positioned to transmute his personal political views into official departmental statements. Bienen would no longer be able to say that Butz expressed only his personal views and did not represent the views of the university. Butz's views would in fact be the views of the university, or at least of the electrical engineering department. Under such circumstances, professors, staff members, and graduate and undergraduate students would be confronted with the decision of whether or not they wanted to associate themselves with a department committed to Holocaust

[46] *University Senate Meeting*, Nw. U. (Nov. 9, 2006), https://www.northwestern.edu/faculty-senate/documents/faculty-assembly/SenateAgenda_Nov_9_06.pdf.

denial. Moreover, those colleagues and students would have good reason to believe that they were now outsiders and no longer full members of the departmental community. A university president faced with such a problem would likewise have to decide whether it would now become necessary to fire members of the faculty who held the wrong political views. In the confrontation between a policy allowing faculty members to hold extremist political views and a policy allowing faculty members to express such views through institutional instruments, one or the other would have to give.

Butz's views were, of course, extreme, and as a result he was unlikely to ever find himself surrounded by similarly minded faculty colleagues. But the divide between insiders and outsiders that Butz could create if he were able to commandeer the official organs of the department would be just as real if his particular politics were less of an outlier. Academic departments would create similar divides if they were likewise free to issue statements endorsing the American invasion of Afghanistan, the legal prohibition of abortion, or the desirability of prohibiting all immigration into the United States. Professors who found themselves on the wrong side of those departmental votes, and students who were informed of such votes, would quite reasonably consider themselves strangers in a strange land and would question whether they should remain associated with such a campus community. Institutional neutrality pushes politics into the private sphere in order to build and maintain a professional community dedicated to scholarly ends and sharing scholarly commitments. Abandoning such neutrality will instead invite fissures and schisms over politics. In a diverse campus community, such an invitation to struggle will at best be a distraction and at worse be bedlam.

In the nineteenth-century, advice manuals were produced to help guide young individuals who would be seeking to make their way in a professional world increasingly dominated by employment rather than independent farming or artisanship. The ambitious young gentleman or lady must learn how to "do the right thing at the right time in various important positions in life."[47] Rules of etiquette must be understood and adhered to if one were to "be self-possessed and free from embarrassment."[48]

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[47] THOMAS E. HILL, HILL'S MANUAL OF SOCIAL AND BUSINESS FORMS 5 (Chicago: Hill Standard Book Co., 28th ed. 1881).
[48] *Id.* at 7.

One of the foremost rules of etiquette was understood to be this one:

> Do not discuss politics or religion in general company. You probably would not convert your opponent, and he will not convert you. To discuss those topics is to arouse feeling without any good result.[49]

Such nineteenth-century etiquette books were particularly valuable in a world of great diversity. America in the Gilded Age was riven by intense partisan polarization and unprecedented ethnic and religious diversity. Knowing how to navigate a world of such diversity was essential. Cultural competence meant recognizing that talking about politics or religion in mixed company was unlikely to end well and was best avoided if business and social affairs were to be conducted without unnecessary animosity.

This is still good advice. But the advice is too easily forgotten when we imagine that we are not in fact operating in "general company." If we instead assume that all of our colleagues share our political and religious views, then of course openly discussing such topics might not "arouse feeling without any good result." Talking about politics might be as innocuous as talking about the weather if politics is not taken seriously or if we can count on the company we keep as not being very diverse. It seems doubtful that many members of the professoriate would be unbothered if scholarly institutions abandoned the norm of institutional neutrality relative to religious opinions. If academic departments or universities spoke with their institutional voice on the important value of being born again through having a personal relationship with Jesus Christ, professors would appropriately be appalled. They would immediately see that it would be wrong for institutional leaders or a majority of the faculty to convert the institutions of free scholarly inquiry into vehicles for the expression of personal beliefs. It is easier to quiet such concerns if the beliefs in question are more widely held and the dissenters are less apparent or less numerous. Given the political composition of the American professoriate, it becomes effortless to suppose that all right-thinking individuals will share the same opinions about matters of public controversy and that scholarly institutions can speak with one voice about such

[49] *Id.* at 147.

controversies. It would be effortless to suppose so, but it would be inimical to free inquiry to act on such a supposition. Professors may choose to speak with one another about religion and politics, but they should not wish that academic institutions will speak on such matters.

III. FROM THOUGHT TO ACTION

Institutional neutrality has been a point of contention around universities and around academic units within universities. Increasingly, however, other scholarly bodies are also being called upon to enter the political fray. Scholarly associations and journals are similarly pressed to abandon a posture of political neutrality and resolve to commit themselves to a particular political point of view. The prospect of a politically engaged scholarly association or scholarly journal has perhaps highlighted the question of what such engagement entails in practice. If a scholarly institution were to take a stand on a contested political issue, what, if anything, should follow from that?

This question has also arisen in the context of universities. Many of the recent debates about institutional neutrality have centered around the issuing of political statements. Who should control the university's megaphone and what can that megaphone be used to say? But once the university resolves to adopt a political posture, actions might be understood to follow from that resolution. If an institution is serious about its political commitments, then it should act on them and not just talk about them. Of course, one kind of action is excluding potential students or professors who disagree with the institution's political commitments. The institution might not only worry that dissenting colleagues could eventually change the institution's political commitments, but they might also wonder why they should provide a platform to colleagues who disagree with the institution's political commitments. If the institution is not a neutral vehicle for scholars of many views but is instead a vehicle for expounding particular political commitments, then it is counterproductive to tolerate those who might counter the message.

Exclusion of dissenters and suppression of dissent is the most obvious thing to do if an institution is a committed partisan rather than a neutral platform. Universities routinely resist the call to purge the campus of political dissenters on the grounds that the university is the home to many diverse voices. The

university does not endorse any of those voices, and none of those voices speaks for the university. A professor who expresses a controversial political opinion speaks for himself alone. Likewise, a controversial speaker who is brought to campus is not endorsed by the university that hosts him. The university has no one message to convey, and thus it tolerates the exhibition of many messages on its campus. It is the marketplace of ideas, not the purveyor of one idea. If the institution instead becomes an advocate rather than a forum, then there is less reason to tolerate counterprogramming to its favored message. It can no longer distinguish its own voice from the voice of those who speak on campus because now it has become the messenger for delivering a particular point of view. A diversity of voices only muddles the message the university has resolved to communicate. If the university as an institution knows the right answer to any particular political or social question, then it can only breed confusion if it allows on campus those who express the wrong answer to those questions. If the university has a dogma, then it need not tolerate heretics.

Other potential actions are less obvious but are also sometimes thought to follow from an institution committing itself to a particular political position. If the university as an institution has normative views and believes that some things are wrong, should it not take steps to actively advance those views and stamp out those things that are wrong? If it has a political position, should it not act in ways that are consistent with that position?

Divestment and disassociation are often thought to be the logical next step after political commitment. The Kalven Report itself was spurred by such a demand. The university might divest from disfavored enterprises and cease doing business with entities engaged in activities of which the university disapproves. It might disassociate itself from organizations that violate its political conscience. The university could, for example, refuse to invest its endowment in socially disfavored stocks, refuse to place deposits in banks that do business with disfavored nations, refuse to give offices on campus to individuals whom the university disfavors, refuse to accept funds from disfavored entities, and/or banish organizations from campus of which the university disapproves.

There might be policy reasons for objecting to a university barring from its campus Reserve Officers' Training Corps (ROTC) programs or Students for Justice in Palestine; or

investing the endowment only in socially conscious financial instruments or refusing to do business with companies owned or managed by individuals with disfavored political views. The merits or demerits of such policies are beyond my concern except for in one particular—whether they affect free inquiry—and in some cases, they do.

Within the university, such decisions regarding disassociation might affect both teaching and research. It is a core tenet of American academic freedom that, in accord with their own professional judgment, professors should be able to expose students to controversial material germane to the subject matter of the course that is being taught. The university should neither censor what materials are introduced to students nor sanction professors for bringing students into contact with such materials. One kind of "course material" that professors routinely use in their teaching is human beings, in the form of guest lecturers or visitors to a class. Instructors make use of guests to elaborate on or defend views that the professor might not share, to expose students to experiences or perspectives that they might not otherwise encounter, or to provide students with the benefit of specialized knowledge or expertise that would otherwise be hard to communicate. It is not hard to imagine such guests being controversial or for a demand that the university disassociate from some organizations or viewpoints to affect the use of such guests. It is already the case that student activists have disrupted classes in which disfavored individuals, such as employees of the Department of Homeland Security, have appeared. Students have objected to the presence on campus of visitors with disfavored views or ties, such as employees of fossil fuel companies. Professors have been brought up on disciplinary charges for inviting to a class a guest speaker with controversial views or past, such as a white nationalist. Outside activists have protested when professors have brought to class a guest speaker some regard as offensive, such as a drag queen or porn actress. Professors have demanded that scholars associated with the Israeli government not be allowed to speak on American college campuses. Assuming such speakers are germane to the subject matter of the class and presented within a context of critical inquiry rather than indoctrination, it is within the academic freedom of individual members of the faculty to make use of them, just as it would be within a professor's authority to assign works written by them or speeches recorded by them. A strong disassociation policy could require university interference with

how professors choose to teach their classes by restricting what guests they are allowed to use.

Scholarly activities on a campus can also be affected by such efforts at disassociation following a university's political commitment. In a modern university context, visiting fellows and speakers are routine features of the intellectual environment. Universities authorize members of the faculty or units of the university to extend such invitations at their own discretion. If a university were to interfere with such decisions because a member of the faculty or an established academic unit has invited a speaker of which university administrators disapprove, it would be intruding into scholarly affairs entrusted to the faculty. Such a form of interference with the faculty was not anticipated by the Statement on Academic Freedom and Tenure. When it spoke of "freedom of research," it was focused more narrowly on the production and publication of scholarly research.[50] After all, as the AAUP said in its 1915 Declaration, the "freedom of inquiry and research . . . is almost everywhere so safeguarded that the dangers of its infringement are slight."[51] The professor needed only the freedom to "pursue his investigations [and] declare the results of his researches, no matter where they may lead him or to what extent they may come into conflict with accepted opinion."[52] When, however, a dean or university president refuses to allow the faculty director of a scholarly center to invite a visitor to campus or sanctions a faculty member for having awarded a fellowship to a controversial scholar, it is an improper interference with the scholarly activities of the faculty at the university. Such efforts to exclude visitors from campus not only affect the freedom of teaching, they also affect the "unlimited freedom to pursue inquiry [that] is the breath in the nostrils of all scientific activity."[53] Modern academic inquiry requires not merely that professors be left alone to read their books and conduct their experiments but also that they be allowed to collaborate with colleagues and engage in scholarly exchange. Scholarly inquiry is a collective enterprise, and universities infringe on the pursuit of knowledge if they impose limits on how members of their faculty interact with others.

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[50] AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS AND REPORTS, xvii (11th ed. 2015).
[51] *Id.* at 4.
[52] *Id.* at 7.
[53] *Id.*

Scholarly research also requires resources, and universities can suppress research indirectly even if they eschew suppressing it directly. Political posturing by universities can lead to demands that they restrict funding sources that members of the faculty might use to pursue their research. If a university wishes to disassociate itself from the fossil fuel industry, then scientific research on campus sponsored by that industry might be hampered or cut off entirely. If a university is politically hostile to some funding sources, then scholarly activity that depends on those sources might be restricted. However, money is fungible, unlike people. It is at least theoretically possible for a university to replace funds that it has cut off and make a researcher whole. In practice, universities might struggle to do so or simply be disinclined to do so. It matters little whether the university has particular views about the specific content of the research that is affected by such decisions. Closing off access to funds from fossil fuel companies might affect research on green energy, and the university might only care about the source of funds and not the use that is made of those funds. But whether the university has a positive desire to prevent some research or whether it has allowed its political commitments to create barriers to some research, the effect on free inquiry by the faculty is the same. Some would go further, and demand that universities establish "Ethics and Society Review Boards" that would strangle research in its cradle if proposed research projects might, for example, lead to technology that might be "coopted for nefarious purposes" or lead to "job loss due to automation."[54]

Universities are not the only scholarly organizations that might abandon principles of institutional neutrality. Scholarly associations and scholarly journals have been tempted to do so as well. In some cases, those decisions might primarily be symbolic, and when they are, they might have the kind of exclusionary consequences that also arise in the context of universities. A scholarly association that wears its political commitments on its sleeve is unlikely to be perceived as welcoming to scholars who hold other political values. Symbolic resolutions are likely to have more consequences for the feelings, good and bad, of members of a scholarly association than for any outside body.

As with universities, a scholarly association that abandons a posture of political neutrality will soon have to

[54] Michael S. Bernstein et al., *Ethics and Society Review: Ethics Reflection as a Precondition to Research Funding*, PROC. NAT'L ACAD. SCI., Dec. 2021 at 1, 5 tbl.2.

grapple with demands that it consciously excludes those who disagree with its political stances. If a political science association is not merely a neutral platform for the sharing of information about political science, it will soon be forced to decide whether it should bar disfavored speakers from its professional conferences. If a scholarly association has substantive commitments on contested political questions, why should it provide a forum to those who would challenge or disagree with those commitments? Why should it allow its scholarly awards to be given to such heterodox scholars, or allow its journals to publish their work, or allow such scholars to use its employment resources? Political values are orthogonal to the scholarly values that ought to guide such decisions when space or resources are scarce. Unless those declarations of political values do no work at all in the operation of a scholarly association, a demand for political censorship will sometimes have to trump scholarly judgment. Free inquiry will have to be restricted in the name of promoting and protecting favored substantive ideas.

These challenges have become more stark in recent years. Jonathan Haidt, a founder of the Heterodox Academy, spotlighted one version of this challenge by publicly resigning from the Society for Personality and Social Psychology in 2022. The scholarly association added a new requirement for scholars applying to research at its annual conference. Conference participants would henceforth need to explain how their "submission advances the equity, inclusion, and anti-racism goals" of the society.[55] The selection of research to be presented at the conference would not simply be based on its "strength/rigor" or contribution to the scholarly literature.[56] It would also be based on whether the research advanced the ideologically freighted values of anti-racism. Such a requirement, Haidt argued, would force social psychologists "to betray their fiduciary duty to the truth and profess outward deference to an ideology that some of them do not privately endorse."[57] To enhance their professional opportunity to present at the primary scholarly venue of their discipline, students and professors would be obliged "to betray their quasi-fiduciary duty to the truth by

[55] Jonathan Haidt, *The Two Fiduciary Duties of Professors*, HETERODOX ACAD. (September 20, 2022), https://heterodoxacademy.org/blog/the-two-fiduciary-duties-of-professors/.
[56] *Id.*
[57] *Id.*

spinning, twisting, or otherwise inventing some tenuous connection to diversity."[58] When the commitment to diversity became a further mandate to demonstrate a commitment to anti-racism, spinning and twisting would no longer be enough.[59]

In 2021, Christopher Ferguson had similarly resigned from the American Psychological Association, an organization in which he had previously held leadership positions. He found that the scholarly association routinely issued political statements that conflicted with his own scholarly judgment in his area of expertise. Ultimately, he concluded, "the APA no longer functions as an organization dedicated to science and good clinical practice."[60] When the science conflicted with the politics of the association, it was the science that had to be pushed aside.[61]

Some scholarly journals have moved in a similar direction. The editors of *Nature Human Behavior* attracted particular attention for declaring that "although academic freedom is fundamental, it is not unbounded."[62] When making publishing decisions, "scientific merit" and "advancing knowledge and understanding" would sometimes have to be subordinated to avoid disseminating research findings that might indirectly be harmful to "individuals or human groups."[63] True research should nonetheless be suppressed if it "promotes privileged, exclusionary perspectives" or "undermines the dignity or rights of specific groups."[64] Free inquiry, it is said, should be circumscribed by the concerns of editors and publishers about social impact.[65]

If scholarly institutions, including journals and publishers of scholarly research, adopt a set of political commitments, they will be forced to choose when those political commitments

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[58] *Id.*
[59] *See id.*
[60] Christopher J. Ferguson, *My APA Resignation*, QUILLETTE (December 31, 2021), https://quillette.com/2021/12/31/my-apa-resignation/.
[61] *See id.*
[62] *Science Must Respect the Dignity and Rights of All Humans*, 6 NATURE HUM. BEHAV. 1029, 1029 (2022).
[63] *Id.*
[64] *Id.*
[65] For more detailed discussion, *see* Jonathan Rauch, *The Danger of Politicizing Science*, PERSUASION (September 21, 2022), https://www.persuasion.community/p/the-danger-of-politicizing-science; Bo Winegard, *The Fall of 'Nature,'* QUILLETTE (August 28, 2022), https://quillette.com/2022/08/28/the-fall-of-nature/; Anna I. Krylov, *The Peril of Politicizing Science*, 12 J. PHYSICAL CHEMISTRY LETTERS 5371 (2021); Anna I. Krylov & Jay Tanzman, *Critical Social Justice Subverts Scientific Publishing*, 31 EUR. REV. 527 (2023).

conflict with their older commitment to publishing cutting-edge research. One wonders how such scholarly associations or journals would deal with new entrants into the partisan gerrymander metric wars that have come to occupy legislatures and the courts. Should the decision as to whether a scholarly paper should be presented at a conference or published by a journal hinge on whether it would help or hinder the political interests favored by the leadership of those scholarly gatekeepers? Should research examining the economic effects of increased immigrants from lesser developed countries only be published if its empirical findings are politically convenient? Should research on the incidence of domestic abuse in particular demographic groups only be published if its empirical findings put those demographic groups in a favorable light?

Scholarly institutions should not put a political thumb on the scale in assessing scholarly research. Scholarly institutions did not always understand themselves to be neutral institutions. They were often harnessed to and bounded by political and religious demands. Faculty were fired and research was quashed when they conflicted with the sensibilities of the great and powerful. The extended struggle to reform and uplift American institutions of higher learning centered on the belief that knowledge was better than ignorance. The truth might sometimes be inconvenient, but it is better to know something and begin to think about how to respond to it, than to sweep things under the rug and be caught by surprise when one's ideals run aground on the rocky shoals of reality. Human society would flourish if it better understood the world, even if those new understandings were startling and forced the human race to adapt in unexpected ways. Abandoning the principle of institutional neutrality might carry with it the risks that come with becoming an antagonist in the political struggle, but it also impedes the quest to advance human knowledge.

NEW THREATS TO CAMPUS PROTEST

Timothy Zick*

ABSTRACT

This symposium Essay focuses on how universities responded, both initially and after the fact, to campus protests concerning the Hamas-Israel War. During those protests students and others erected encampments, held demonstrations, displayed signs, vandalized university property, and occupied buildings. Some protesters communicated anti-Semitic tropes and slogans. Although a few university leaders responded to the protests by negotiating with protest leaders, most relied on law enforcement and security to clear encampments and restore order. Since the initial protests, universities have adopted a spate of new policies that threaten campus protest. These measures include cancellation of already-permitted demonstrations, content-based speech restrictions, bans on encampments and temporary structures, masking bans, additional regulations concerning when, where, and how protests can occur, limits on who is allowed to organize and participate in campus demonstrations, and regulations addressing whether and where signage, displays, and sound amplification can be used. This Essay critically examines university responses to campus unrest considering First Amendment requirements and universities' general commitment to the free exchange of ideas. It argues that the recent backlash against campus protest poses a significant threat to a venerable and valuable tradition of campus dissent.

INTRODUCTION

University campuses have often been sites of conflict and unrest. The most recent episode of unrest occurred in connection with protests focusing on the Israel-Hamas War. On public and private university campuses across the United States, students and others erected tent encampments on campus greens and participated in demonstrations calling for an end to what they viewed as genocide in Gaza and for universities to divest from companies providing military assistance to Israel.[1] Despite media reports that typically focused on violent confrontations, the protests were disruptive but

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[1] *See, e.g.*, Isabela Rosales et al., *Encampments Cleared from at Least 3 University Campuses Early Friday as Pro-Palestinian Demonstrations Continue*, CNN (May 10, 2024), https://www.cnn.com/2024/05/10/us/college-campus-protests-encampments-cleared/index.html.

largely peaceful.[2] However, some protesters, including both students and those not affiliated with the university, occupied buildings and vandalized university property.[3] Further, on some campuses, protesters prevented students from entering areas of campus or accessing university buildings, at times based on their ancestry or point of view regarding the Israel-Hamas War.[4] Some activists also verbally harassed individual Jewish students on or near campuses, for example telling them to "return to Poland."[5] During the demonstrations, protesters also used phrases including "From the River to the Sea" and criticized "Zionism," which many consider antisemitic language.[6]

Legislators, donors, trustees, and others have all weighed in on how universities should respond to campus-protest-related unrest. This Essay focuses specifically on how university leaders responded to these and other aspects of protest-related unrest on campuses. University presidents and other leaders facing campus unrest are in a precarious position. They must preserve order on campus, respect expressive rights, and protect students from discrimination based on race, shared heritage, and other characteristics.[7] In addition, they must also respond to their respective boards of trustees and may experience immense pressure from donors, students, and other constituencies to address protest-related unrest and allegedly antisemitic and discriminatory conduct.

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[2] *Crowd Counting Consortium: An Empirical Overview of Recent Pro-Palestine Protests at U.S. Schools*, HARV. KENNEDY SCH. ASH CTR. FOR DEMOCRATIC GOVERNANCE & INNOVATION (May 30, 2024), https://ash.harvard.edu/articles/crowd-counting-blog-an-empirical-overview-of-recent-pro-palestine-protests-at-u-s-schools/.

[3] *See* Jesse Rodriguez & Phil Helsel, *Smashed Windows, Stacked Furniture Left After Occupation of Hamilton Hall at Columbia University*, NBC NEWS (May 1, 2024), https://www.nbcnews.com/news/us-news/smashed-windows-piled-furniture-left-occupation-hamilton-hall-columbia-rcna150154.

[4] *See* Danielle Greyman-Kennard, *Jewish UCLA Student Blocked from Entering Campus by Pro-Palestinian Activists*, THE JERUSALEM POST (May 1, 2024), https://www.jpost.com/breaking-news/article-799131.

[5] *See* Luis Ferré-Sadurní et al., *Some Jewish Students Are Targeted as Protests Continue at Columbia*, N.Y. TIMES (Apr. 21, 2024), https://www.nytimes.com/2024/04/21/nyregion/columbia-protests-antisemitism.html.

[6] *See* Ellen Ioanes, *The Controversial Phrase "From the River to the Sea," Explained*, VOX (Nov. 24, 2023), https://www.vox.com/world-politics/23972967/river-to-sea-palestine-israel-hamas.

[7] Only public universities are required to follow First Amendment standards concerning speech on campus. Private universities generally do so voluntarily, and many have policies that protect the free speech of students, faculty, and others. *See, e.g.*, CASS R. SUNSTEIN, CAMPUS FREE SPEECH: A POCKET GUIDE, 81–89 (2024) (discussing the public/private distinction). Both public and private universities that receive federal education funding are obligated to address instances of harassment and discrimination based on national origin or identity, as well as other characteristics. *See* 42 U.S.C. § 2000d (1964).

The stakes are high for university leaders, who face the prospect of donor withdrawal, legislative action, and further campus unrest. Presidents at prominent universities, including Harvard University and the University of Pennsylvania, were ultimately forced to resign based on their handling of campus protests.[8]

These substantial pressures and concerns do not relieve universities of their obligations to preserve free expression on campus. To that end, university leaders sometimes engaged and negotiated with campus protesters.[9] Some allowed students to construct and occupy encampments, at least temporarily, as they sought amicable resolutions to protesters' demands.[10] However, the most common response to campus unrest was to call on law enforcement to arrest protesters and remove encampments.[11] Police used tear gas, rubber bullets, and other aggressive tactics to disperse protesters and remove encampments.[12] On some campuses, law enforcement assaulted and arrested faculty and student journalists.[13] The arrests frequently led to expulsion and other forms of university discipline. Ultimately, more than 3,000 students and other activists were arrested for trespassing and other crimes.[14]

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[8] *See* Susan Svrluga & Danielle Douglas-Gabriel, *After Harvard and Penn Resignations, Who Wants to Be a College President?*, WASH. POST (Jan. 12, 2024), https://www.washingtonpost.com/education/2024/01/12/college-presidents-pressures-harvard-penn/.

[9] *See* Bianca Quilantan, *House GOP to Grill College Leaders for Negotiating with Protesters*, POLITICO (May 23, 2024), https://www.politico.com/news/2024/05/23/house-republicans-college-leaders-protest-negotiations-00159541.

[10] *See* Gabrielle Canon, *The US Universities that Allow Protest Encampments*, THE GUARDIAN (May 4, 2024), https://www.theguardian.com/world/article/2024/may/04/universities-allow-student-campus-protest-encampments.

[11] *See, e.g.*, Eryn Davis et al., *Police Clear Building at Columbia and Arrest Dozens of Protesters*, N.Y. TIMES (Apr. 30, 2024), https://www.nytimes.com/live/2024/04/30/nyregion/columbia-protests-college; Jamal Andress, *Some College Student Protesters Are Now Facing Criminal Charges*, SCRIPPS NEWS (May 1, 2024), https://www.scrippsnews.com/us-news/education/some-college-student-protestors-are-now-facing-criminal-charges.

[12] *See* Lily Kepner & Chase Rogers, *Seventy-Nine Pro-Palestinian Protesters Arrested After Setting Up Encampment at UT Austin*, USA TODAY (Apr. 29, 2024), https://www.usatoday.com/story/news/politics/state/2024/04/29/south-mall-ut-austin-protest-arrest-pro-palestinian-encampment-college-campus-protests/73497972007/; Jaclyn Diaz, *In NYC and LA, Police Response to Campus Protests Draws Sharp Criticism*, NPR (May 8, 2024), https://www.npr.org/2024/05/08/1248935672/campus-protests-police-arrests.

[13] *See* Hadas Gold, *Student Journalists Assaulted, Others Arrested as Protests on College Campuses Turn Violent*, CNN (May 1, 2024), https://www.cnn.com/2024/05/01/media/college-protests-gaza-arrests-violence/index.html.

[14] Isabelle Taft, Alex Lemonides, Lazaro Gamio & Anna Betts, *Campus Protests Led to More Than 3,100 Arrests, but Many Charges Have Been Dropped*, N.Y. TIMES (July 21, 2024), https://www.nytimes.com/2024/07/21/us/campus-protests-arrests.html.

Dozens of universities used the summer break following the initial spring semester protests to revisit their free expression and campus event policies.[15] Some transformed their campus spaces by using fences and security checkpoints.[16] Many universities also proposed or adopted additional restrictions on campus demonstrations. Some banned all demonstrations on the anniversary of the Hamas terrorist attack, including events that had already been approved.[17] More commonly, universities adopted additional restrictions on where, when, and how protests can occur on campus.[18] Universities banned encampments and the use of structures including tents and tables, adopted new permitting requirements that require advance notice of demonstrations and organizational sponsorship of events, strictly limited the times during which protests can take place, banned or restricted wearing masks or otherwise concealing one's identity, limited where signs can be displayed, restricted chalking, and limited or banned the use of sound amplification. Finally, some universities adopted content limitations including code of conduct provisions relating to the use of antisemitic or other derogatory words, such as "death to Zionists."

This Essay analyzes university responses to campus protests considering public universities' First Amendment obligations and private universities' general commitment to the free exchange of ideas. Universities' initial responses to campus unrest raise serious concerns about the use of militarized law enforcement tactics in the context of university protests. While some of the measures universities subsequently adopted are valid exercises of their authority to regulate the time, place, and manner of campus events, others raise serious First Amendment concerns. Whatever their *individual* merits, the universities' newly adopted measures should not be considered in isolation but rather as additions to existing and significant restrictions on campus protest.[19] Collectively, they constitute a short-sighted response that will create an environment increasingly inhospitable to campus protest. The recent backlash against campus protest imperils the future of direct action in places that have been vitally important to the mission of universities and to

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[15] *See* Alice Speri, *'A Police State': US Universities Impose Rules to Avoid Repeat of Gaza Protests*, THE GUARDIAN (Aug. 17, 2024), https://www.theguardian.com/us-news/article/2024/aug/17/campus-protest-rules.

[16] *Id.*

[17] *See* Ellie Silverman, *Judge Sides with U-Md. Pro-Palestinian Group, Clears Way for Oct. 7 Vigil*, WASH. POST (Oct. 1, 2024), https://www.washingtonpost.com/education/2024/10/01/university-maryland-vigil-ruling/.

[18] *See* discussion *infra* Section I.B.

[19] *See* TIMOTHY ZICK, MANAGED DISSENT: THE LAW OF PUBLIC PROTEST ZICK 121–28 (2023) (discussing university restrictions on expressive activity).

political and social activism. Indeed, there is evidence that this backlash has already significantly chilled campus protest.[20]

Part I of the Essay describes the Israel-Hamas demonstrations, universities' initial responses to the unrest they produced, and subsequent policy changes relating to campus protests. Part II analyzes universities' contemporaneous and post-protest responses considering First Amendment standards, federal law, and universities' general commitments to preserving free expression on campus. Part III emphasizes the need to preserve the tradition of protest and dissent on university campuses. Universities should resist the urge to crack down on campus protest and, indeed, take special care to facilitate opportunities for dissent on campus.

I. UNIVERSITY RESPONSES TO RECENT CAMPUS PROTESTS

University leaders responded to the protest-related unrest on campus at two different points in time: during the demonstrations and after protests had mostly subsided. In general, the initial response to campus unrest relied on command-and-control law enforcement tactics rather than dialogue and negotiation. Once the initial protests subsided, universities adopted a variety of new restrictions on campus demonstrations and events.

A. Contemporaneous Responses

Universities responded to campus civil unrest in various ways. Some leaders exhibited a degree of forbearance when tent encampments were erected, choosing to negotiate with demonstrators rather than forcibly remove them.[21] At Brown University and the University of California-Berkeley, for example, university leaders reached agreements with students "to reconsider divestment from Israel that led to the voluntary dismantling of encampments."[22] This approach enabled universities to address campus unrest without resorting to arrests and physical confrontation with law enforcement.[23]

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[20] *See* Johanna Alonso, *Massive Decline in Protests from Spring to Fall 2024*, INSIDE HIGHER ED. (Dec. 19, 2024), https://www.insidehighered.com/news/students/free-speech/2024/12/19/2000-fewer-pro-palestinian-protests-fall-spring-2024

[21] *See* Quilantan, *supra* note 9.

[22] Adam Federman, *The Crackdown on Campus Protests is Just Beginning*, TYPE INVESTIGATIONS (June 20, 2024), https://www.typeinvestigations.org/investigation/2024/06/20/the-crackdown-on-campus-protests-is-just-beginning/.

[23] *See* Michael S. Roth, *I'm a College President, and I Hope My Campus Is Even More Political This Year*, N.Y. TIMES (Sept. 2, 2024), https://www.nytimes.com/2024/09/02/opinion/college-president-campus-political.html (discussing protest response at Wesleyan University).

However, donors, trustees, public officials, and others sharply criticized the negotiation and dialogue approach and insisted universities take a much harsher stance toward disruptive student protests.[24] Many universities relied instead on aggressive protest policing to clear encampments and displace protesters. For example, Columbia University, which since the 1960s had generally declined to rely on local law enforcement to quell campus unrest, called in New York Police Department officers to disband encampments and arrest students who refused to leave.[25] In Texas, protesters were dragged, pepper sprayed, and tear-gassed by officers wearing riot gear.[26] At University of California, Los Angeles, protesters were hit by rubber bullets and other less-lethal weapons used by police.[27] At Emory University, police used rubber bullets and tear gas on protestors.[28] At Tulane University, police wore body armor and used less-lethal devices like pepper spray and tear gas to forcibly remove protestors from campus.[29] At Dartmouth University, officers wrestled a sixty-five-year-old professor to the ground.[30] Universities responded to building occupations and vandalism by calling on riot squads and other law enforcement units to remove students and restore order to campus. But universities experiencing otherwise peaceful encampments also relied on forcible tactics.[31] Police arrested more than 3,000 students and other protesters.[32]

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[24] *See* Quilantan, *supra* note 9.
[25] Sharon Otterman, *Columbia Said It Had 'No Choice' but to Call the Police*, N.Y. TIMES (May 2, 2024), https://www.nytimes.com/2024/05/01/nyregion/columbia-university-protests-arrests.html.
[26] *See* Kepner & Rogers, *supra* note 12.
[27] *See* Richard Winton et al., *A Staggering Two Weeks at UCLA: Protest, Violence, Division Mark 'Dark Chapter,'* L.A. TIMES (May 7, 2024, 5:11 PM), https://www.latimes.com/california/story/2024-05-07/a-ucla-timeline-from-peaceful-encampment-to-violent-attacks-aftermath; Jaclyn Diaz, *In NYC and LA, Police Response to Campus Protests Draws Sharp Criticism*, NPR (May 8, 2024, 5:01 AM), https://www.npr.org/2024/05/08/1248935672/campus-protests-police-arrests.
[28] Jessica Schladebeck, *Emory University Gaza Protesters Hit with Tear Gas, Rubber Bullets Amid Clashes with Police*, N.Y. DAILY NEWS, (Apr. 25, 2024, 3:56 PM), https://www.nydailynews.com/2024/04/25/emory-university-student-protests-rubber-bullets-tear-gas/.
[29] *See* Marie Fazio, *Pro-Palestinian Protesters Describe Chaotic Scene During Police Closure of Tulane Encampment*, NOLA.COM (May 1, 2024), https://www.nola.com/news/education/tulane-protestersdescribe-chaotic-encampment-closure/article_f8e86592-07e2-11ef-9f1c-9b1e29cea2fa.html.
[30] Vimal Patel, *Police Treatment of a Dartmouth Professor Stirs Anger and Debate*, N.Y. TIMES, (May 3, 2024), https://www.nytimes.com/2024/05/03/us/dartmouth-professor-police-protests.html.
[31] *See* Jeremy W. Peters, *Students Want Charges Dropped. What Is the Right Price for Protests?*, N.Y. TIMES (June 4, 2024), https://www.nytimes.com/2024/06/04/us/politics/college-protests-charges-students.html?unlocked_article_code=1.xE0.Vt-d.TPHBLVONOyF8&smid=nytcore-iosshare&referringSource=articleShare&u2g=i.
[32] Taft, Lemonides, & Betts, *supra* note 14.

Some universities reacted to pro-Palestine protests by changing protest policies as the demonstrations unfolded. For example, Indiana University changed its campus protest policies on the eve of a tent protest and arrested students who violated the amended policy; state police in armored personnel carriers were called in and snipers were posted on rooftops overlooking the peaceful, but now-unlawful, protest.[33] Similarly, during protests on its campus, the University of Virginia posted updated policies banning tents, claiming that the policies on its website were out of date.[34] Students were subsequently arrested for trespassing in violation of the updated policy.[35]

Aggressive policing and criminal charges were not the only sanctions protest organizers and participants faced. For students who participated in encampments, there were also serious academic consequences, including suspension, denial of access to university grounds, and the withholding of diplomas.[36] For international students, breaking campus rules concerning protests meant possible revocation of their visas.[37] Multiple private universities also banned chapters of Students for Justice in Palestine ("SJP") from their campuses.[38] Florida's public university system ordered the deactivation of all SJP chapters, claiming that the groups provided "material support for Hamas, a designated foreign terrorist group," in violation of federal law—only to later walk back the ban based on First Amendment concerns.[39] Some universities claimed pro-Palestinian groups violated campus rules, although they apparently did not suspend other groups that had engaged in similar activity.[40]

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[33] Liam Knox, *Abrupt Changes to Protest Policies Raise Alarm*, INSIDE HIGHER ED (Apr. 30, 2024), https://www.insidehighered.com/news/students/free-speech/2024/04/30/indiana-protest-policy-change-raises-free-speech-concerns.

[34] *See* Federman, *supra* note 22.

[35] *See id.*

[36] Michael Loria & Christopher Cann, *No Diploma: Colleges Withhold Degrees from Students After Pro-Palestinian Protests*, USA TODAY (June 4, 2024, 5:50 PM), https://www.usatoday.com/story/news/nation/2024/06/01/college-degrees-withheld-after-israel-gaza-protests/73899493007/.

[37] Maham Javaid, *For International Students, Protesting on Campuses has Higher Stakes*, WASH. POST (May 3, 2024), https://www.washingtonpost.com/nation/2024/05/03/international-students-campus-protest-visas/.

[38] Jonathan Friedman, *Suspensions of Students for Justice in Palestine Chapters Raise Questions and Concerns about Chilled Campus Environments*, PEN AM. (Dec. 8, 2023), https://pen.org/suspensions-of-students-for-justice-in-palestine-chapters-raise-questions-and-concerns-about-chilled-campus-environments/.

[39] Ari Blaff, *Florida Walks Back Ban on Students for Justice in Palestine amid Constitutional Concerns*, NAT'L REV. (Nov. 15, 2023, 11:37 AM), https://www.nationalreview.com/news/florida-walks-back-ban-on-students-for-justice-in-palestine-amid-constitutional-concerns/.

[40] *See* Friedman, *supra* note 38.

These responses occurred within a broader political and social context in which campus civil unrest became a national political and cultural flash point. Donald Trump stated that if he were President he would "deport" foreign protesting students and "crush" the pro-Palestinian campus movements.[41] Additionally, Republican members of Congress urged state governors to deploy the National Guard to quell campus unrest and threatened universities with the loss of substantial federal funding if they did not crack down on student protesters and limit campus demonstrations.[42] As mentioned, congressional grilling of university presidents over their responses to campus unrest resulted in multiple resignations.[43]

B. New Limits on Campus Protest

Once the initial protests had subsided, many universities used the summer recess to revisit their policies relating to free expression and events. Some changed access rules and made physical changes to campus. Many universities adopted measures that ban specific forms of protest and further restrict the time, place, and manner of demonstrations.[44]

Some students returning to campus after the initial spring semester protests were confronted with a changed physical environment. Several universities erected fencing around quads and other venues where demonstrations had occurred.[45] Columbia University instituted identification requirements to restrict access to certain areas of campus to those who are faculty, students, staff, and

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[41] David A. Graham, *Trump Has a New Plan to Deal With Campus Protests*, ATLANTIC (May 28, 2024), https://www.theatlantic.com/ideas/archive/2024/05/trump-campus-protests-deportation/678521/; Robert Tait, *Trump Tells Donors He will Crush Pro-Palestinian Protests if Re-Elected*, THE GUARDIAN (May 28, 2024), https://www.theguardian.com/world/article/2024/may/27/trump-donors-israel-gaza-palestinian-protests.

[42] Madina Touré & Irie Sentner, *Johnson Demands Biden Send in National Guard During Raucous Columbia Visit*, POLITICO (Apr. 24, 2024, 9:27 PM), https://www.politico.com/news/2024/04/24/mike-johnson-columbia-national-guard-00154199; *see* Bianca Quilantan, *Stefanik Demands Biden Administration Yank Columbia's Federal Funding*, POLITICO (Apr. 23, 2024, 6:55 PM), https://www.politico.com/news/2024/04/23/stefanik-columbia-federal-funding-00153967.

[43] *See supra* notes 8–9 and accompanying text.

[44] Declan Bradley & Garrett Shanley, *We Looked at Dozens of Colleges' New Protest Policies. Here's What We Found*, CHRON. HIGHER EDUC. (Sept. 12, 2024), https://www.chronicle.com/article/we-looked-at-dozens-of-colleges-new-protest-policies-heres-what-we-found?sra=true.

[45] *See* Speri, *supra* note 15.

their guests.[46] The university limited the number of entry points and instituted a color-coded scheme to determine which areas of campus are accessible and by whom.[47] Under such policies, nonaffiliates (those not part of the university community) will be denied access to substantial portions of campuses for any reason—including participating in demonstrations. Vanderbilt University adopted a policy that forbids members of the public from participating in—and even prohibits students and faculty from inviting members of the public to participate in—campus demonstrations and protests.[48] These restrictions are a direct response to the presence of nonaffiliates, or individuals who are not part of the university community, at recent campus demonstrations.

Faced with the prospect of vigils and demonstrations commemorating the one-year anniversary of the Hamas attack, some universities revoked or canceled student demonstrations on that day.[49] For example, the University of Maryland banned all student demonstrations on its campuses on October 7, 2024, including a previously approved vigil sponsored by SJP.[50] The university based its demonstration ban and event cancellations on unspecified security concerns.[51]

Most universities have taken a broader and more systematic approach to addressing campus protests. Responding to recent protest-related unrest, many have adopted measures prohibiting or restricting forms of direct action used by recent protesters.

More than forty public and private universities have adopted restrictions on student encampments including the use of tents and other temporary structures.[52] Some of these measures prohibit students from erecting permanent or semi-permanent encampments on campus green spaces, as they did during recent protests. Other restrictions extend beyond the erection of tent encampments. For example, officials at the University of Virginia have enforced their revised no-structures policy against a group of students who set up

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[46] *See Safety on Campus*, COLOMBIA | UNIVERSITY LIFE, https://universitylife.columbia.edu/protests-safety-on-campus (last visited Feb. 22, 2025).
[47] *See id.*
[48] *Vanderbilt Updates Freedom of Expression Policies and Expands Civil Discourse Programming*, VAND. UNIV. NEWS (Aug. 12, 2024, 2:00 PM), https://news.vanderbilt.edu/2024/08/12/vanderbilt-updates-freedom-of-expression-policies-and-expands-civil-discourse-programming/.
[49] Johanna Alonso, *Censorship and Consternation Mar Oct. 7 Campus Remembrances*, INSIDE HIGHER ED (Oct. 4, 2024), https://www.insidehighered.com/news/students/free-speech/2024/10/04/oct-7-events-colleges-face-backlash-and-censorship.
[50] *See* Silverman, *supra* note 17.
[51] *See id.*
[52] Bradley & Shanley, *supra* note 44.

a table in the Academical Village area, which includes the campus's famous Lawn, to display materials advocating Israeli divestment.[53] Campus administrators immediately informed the students they could not table in that location, pursuant to an amended policy that expanded the areas where structures were banned.[54] At the University of Illinois, a new policy covers "event tents, tables, walls, outdoor displays, inflatables, freestanding signs, huts, sculptures, booths, facilities, flashing or rotating lights, illuminated signs, or similar objects and structures."[55]

Many universities have revised their policies to ban other actions relied on during the recent protests. Several universities have banned overnight demonstrations anywhere on campus, again in direct response to encampments occupied during recent protests. Several universities have also banned masks or other face coverings during campus events or required that students approached by campus security produce identification.[56] Students argue that concealing their identities is necessary to protect them from doxxing, online harassment, and other reprisals, while universities maintain that masking bans and restrictions are necessary to distinguish members of the student body from "outside activists," and to enforce codes of conduct and criminal laws.[57]

Some universities have also imposed new permitting rules for demonstrations and other campus events.[58] Carnegie Mellon University adopted a rule specifying that unregistered demonstrations of more than twenty-five people can be disbanded at the university's discretion.[59] Some policies require substantial advance notice of any protest or demonstration, which will limit or deny opportunities for spontaneous gatherings. Policies also require that demonstration organizers receive permission from university bodies prior to being allowed to protest. For example, at Case Western Reserve University ("CWRU"), those who wish to hold a

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[53] Jason Armesto, *New UVa Protest Policies Tested for First Time*, DAILY PROGRESS (Sept. 14, 2024), https://dailyprogress.com/news/local/education/new-uva-protest-policies-tested-for-first-time/article_ace2ceb0-7152-11ef-a24f-ff38e988cde8.html.
[54] *Id.*
[55] Luke Taylor, *UI Proposes Policy Changes Surrounding Protests, Structures on Campus*, NEWS-GAZETTE (Aug. 1, 2024), https://www.newsgazette.com/news/local/university-illinois/ui-changes-policies-surrounding-protests-structures-on-campus/article_5a12e04a-4f96-11ef-ac6c-8b46d482f2b9.html.
[56] *See* Bradley & Shanley, *supra* note 44.
[57] *See id.*
[58] *See id.*
[59] Isabelle Taft, *How Colleges Are Changing Their Rules on Protesting*, N.Y. TIMES (Sept. 14, 2024), https://www.nytimes.com/2024/09/12/us/college-protest-rules.html.

"Large Demonstration"[60] on campus must provide three days' notice and their event must be approved by the "Freedom of Expression Policy Committee."[61] Other universities will now require organizational sponsorship for protests and other events, meaning that no group of students or non-community members can lawfully protest absent affiliation with a recognized student organization. For example, at CWRU and other universities, "[o]nly university members . . . if in good standing, may participate in demonstrations of any size."[62] Should a student organization such as SJP lose such standing, it would be unable to hold a demonstration on campus. Any student subject to discipline for engaging in an unlawful act, including an act of civil disobedience, would likewise be ineligible to participate in future campus protests. Finally, some new policies provide that universities reserve the right to charge protesters for cleanup costs or overtime pay for law enforcement officers.[63]

Many universities have also enacted restrictions on the time, place, and manner of demonstrations. For example, Rutgers University now only allows protests and other events between 9 a.m. and 4 p.m.[64] The University of South Florida has adopted a new policy that bans all protests "after five p.m. and during the final two weeks of each semester."[65] CWRU's revised policy only allows for demonstrations, of any size, to occur between 8 a.m. and 8 p.m., with a "limited exception for Small Demonstrations that are vigils, which may be held from 8 a.m. to 10 p.m."[66] Indiana University's newly revised policy allows "expressive activities" to occur only between the hours of 6 a.m. and 11 p.m.[67] Other policies ban any form of demonstration during official examination periods.[68]

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[60] *Freedom of Expression Policy: Procedures & Operating Rules*, CASE W. RSRV. UNIV., https://case.edu/provost/policies-forms-resources/university-policies/policy-freedom-expressionexpressive-activities/freedom-expression-policy-procedures-operating-rules [hereinafter CWRU Policy] (last visited Dec. 11, 2024) ("Any demonstration that is reasonably expected to have twenty or fewer participants and will last less than two hours does not require pre-approval of the Committee (hereinafter 'Small Demonstration'). . . . [A]ny proposed demonstration that is not a Small Demonstration requires the written approval of the Committee before it may occur (hereinafter 'Large Demonstration').").

[61] *Id.*

[62] *Id.*

[63] Bradley & Shanley, *supra* note 44.

[64] Taft, *supra* note 59.

[65] Odeya Rosenband, *How Universities Have Changed Their Policies on Protest because of the War in Gaza*, FORWARD (Aug. 28, 2024), https://forward.com/news/648549/universities-ban-encampments-add-antisemitism-training-as-students-return-to-campus/.

[66] CWRU Policy, *supra* note 60.

[67] Bradley & Shanley, *supra* note 44.

[68] *See id.* (discussing new Harvard University policy).

Universities have also identified specific locations or spaces on their campuses where demonstrations and other events may or may not occur.[69] Some have banned student protests and other events in places where recent protests occurred. Princeton has banned demonstrations on its Cannon Green and James Madison University now only allows university-sponsored events on its Quad.[70] Universities have also adopted narrower restrictions on the location of demonstrations and other events. The University of Wisconsin at Madison "now forbids expressive activity within 25 feet of entrances to university-owned or university-controlled buildings and facilities."[71] Other policies prohibit events and other activities inside university buildings and explicitly prohibit impeding or blocking "ingress or egress to or movement within and around campus buildings, classrooms, administrative offices, or other spaces."[72]

In addition to bans on encampments and masking, many universities have adopted additional restrictions on the permissible manner and time of protest. Some newly enacted university policies outright ban the use of amplified sound or limit such use to certain time periods or places.[73] At Vanderbilt University, "[o]n-campus displays are only allowed during daylight hours and for up to three consecutive days."[74] Some universities have also adopted new restrictions on activities such as using chalk to communicate messages or passing out flyers.[75]

Finally, a few new university policies directly address the content of campus expression. For example, American University has adopted a policy stating that any flyers distributed on campus must be "welcoming to all students."[76] In response to specific student displays and chants during recent protests, some universities have considered bans on speech that generally advocates violence

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[69] *See, e.g.*, CWRU Policy, *supra* note 60 ("Large Demonstrations are permitted at the KSL Oval, Freiberger Field, Van Horn Field, or on the Case Quad green space adjacent to Adelbert Hall. Physically blocking a campus building or walkway is not permitted for demonstrations of any size. Demonstrations of any size are not permitted inside any building or facility.").

[70] Taft, *supra* note 59 (explaining that both of these now restricted locations are places where students had previously set up encampments or other protests).

[71] Bradley & Shanley, *supra* note 44.

[72] *Id.*

[73] *See id.*

[74] Rosenband, *supra* note 65.

[75] *See* Sophie Hurwitz, *New University Rules Crack Down on Gaza Protests*, MOTHER JONES (Sept. 13, 2024), https://www.motherjones.com/politics/2024/09/new-university-rules-crack-down-on-gaza-protests/.

[76] Federman, *supra* note 22.

against others.[77] Some universities have updated their student codes of conduct and anti-discrimination policies to provide that antisemitic expression, including "language targeting Zionists or Zionism," is a violation of these policies.[78] As part of a settlement of a Title VI lawsuit, Harvard University recently adopted a nondiscrimination policy that treats speech subjecting Israel to a "double standard" or describes the creation of Israel as a "racist endeavor" as discriminatory actions.[79]

II. FREEDOM OF EXPRESSION AND CAMPUS UNREST

This Part assesses university responses to recent protests, using the First Amendment as a general benchmark. Private universities are not required to comply with the First Amendment but generally aspire to do so, and general principles of free inquiry apply to both state and private universities.[80] While it is true that "there is still much confusion about what free speech on college campuses actually means," general standards and principles are sufficient to allow for an assessment of how universities have responded to campus protest-related unrest.[81]

A. Contemporaneous Responses to Campus Unrest

As noted, initial university responses to campus unrest varied. Universities faced significant pressure to crack down on students and activists who organized and erected encampments, participated in other protest events, and communicated ideas some believed created a hostile environment, especially for Jewish students.

Universities that engaged in dialog with student protesters did so in the best tradition of the First Amendment. That is not to say discourse does or should substitute for disciplinary action for misconduct or acts of civil disobedience. However, an initial inclination to hear students out rather than forcibly remove or displace them is more consistent with both First Amendment and academic freedom principles relating to the free exchange of ideas.

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[77] *See* Taft, *supra* note 59.
[78] *Id.*
[79] *See* Vimal Patel, *Harvard Adopts a Definition of Antisemitism for Discipline Cases*, N.Y. TIMES (Jan. 21, 2025), https://www.nytimes.com/2025/01/21/us/harvard-antisemitism-definition-discipline.html?smid=nytcore-ios-share&referringSource=articleShare.
[80] *See* Federman, *supra* note 22.
[81] ERWIN CHEMERINKSY & HOWARD GILLMAN, *Free Speech on College Campus* 112 (2017).

At the same time, this more conciliatory approach is not without risk. Allowing students to occupy campus spaces risks disruption of the universities' primary educational mission. Further, campus protests sometimes attract activists from outside the campus community, which may lead to more widespread disruption.[82] Conciliation also exposes universities to criticism that they have not enforced their policies, assuming they exist, in equal fashion against all protesters. Thus, if they allowed pro-Palestinian protesters to erect encampments but had displaced other protesters engaged in similar behavior, critics could allege university authorities are disparately enforcing protest rules.

It appears that many universities were caught off guard by recent campus unrest, including by specific means of protest such as encampments and masking. As a result, some universities altered their expressive policies *during* the protests and then proceeded to enforce the newly amended policies. Basic due process and free expression protections require that protesters be aware, in advance, of whether their conduct or expression violates university policies. Further, amending policies in reaction to specific protest activities or movements raises the specter of content discrimination, which the First Amendment prohibits. On-the-fly amendment and enforcement expose universities to charges they have acted in a discriminatory manner.

Concerning the resort to law enforcement, universities do not violate the First Amendment by relying, in part, on local police to maintain order on campus. Serious violations including assault and destruction of university property may indeed call for a law enforcement response. However, universities deployed law enforcement even in reaction to minor infractions and peaceful assemblies. In other words, they relied on aggressive protest policing as a first, rather than last, resort.

The use by law enforcement of physical force, so-called "less-lethal" weapons including flash grenades and tear gas, snipers, armored personnel carriers, and other elements of militarized protest policing pose serious threats to campus speech and assembly. The general criminalization of campus misconduct and normalization of command-and-control protest policing on campus escalates conflict, leads to physical injuries,

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[82] *See* Lexi Lonas Cochran, *Colleges, Police Blame 'Outside Agitators' for Campus Protests. Experts Say It's Not So Simple*, THE HILL (May 17, 2024), https://thehill.com/homenews/education/4663670-colleges-police-outside-agitators-campus-protests-students-israel-hamas-gaza/.

and discourages even peaceful means of protest. This is not idle speculation. Aggressive protest policing has produced exactly these effects beyond campus gates.[83] Law enforcement's use of force against peaceable and compliant protesters, as well as some student journalists covering the protests, violates First Amendment free speech and press rights. By relying on law enforcement and physical force to disperse even peaceful student protests, universities imperiled the civil rights of some of their students.

Some might object that a more conciliatory approach will encourage lawlessness on campus. Allowing students to break the rules, critics might charge, will encourage campus anarchy. These concerns are overstated. Although campus protests were widespread, encampments appeared on only a fraction of U.S. university campuses.[84] Over the course of *thousands* of protest days, there were only *a few dozen* instances of property damage (primarily graffiti) or injuries to police or protesters.[85] Further, most injuries suffered by protesters were the result of activity by police or counter-protesters.[86]

Of course, universities must address protest-related violence, vandalism, harassment, and other serious offenses. The question is not whether, but *how*, they ought to do so. How universities respond to protest-related unrest in the moment may have a lasting effect on the environment for speech and assembly on campus. Over-reacting to short-term disruption can have long-term effects on the future of campus activism. Deploying the National Guard, armed law enforcement, and snipers ought to be a last resort, rather than the initial response it often appeared to be in connection with recent campus protests.

B. Protest Policy Revisions

Although some measures universities have adopted since recent campus unrest unfolded are likely valid under current First Amendment standards and precedents, others may not be. The Supreme Court has rejected the proposition that "because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[87] Indeed, as the Court has observed, "the

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[83] *See generally* Zick, *supra* note 19.
[84] *See* HARV. KENNEDY SCH., *supra* note 2 (collecting data on campus protest-related activities).
[85] *Id.*
[86] *Id.*
[87] Healy v. James, 408 U.S. 169, 180 (1972).

vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[88] Aside from such general statements, the Court has said relatively little about how the First Amendment applies on university campuses. However, general First Amendment standards provide useful guidelines for assessing the spate of newly adopted university measures aimed at regulating free expression on campus.

1. Content-Based Regulations

As discussed, the recent university policy revisions were in response to specific protests relating to the Israel-Hamas War. The First Amendment generally prohibits governmental regulation of speech based on its content.[89] While it is concerning that recent policy revisions are direct responses to specific protests and actions, the Supreme Court has signaled that it is the text of the policies, not their timing, that determines whether they are content neutral.[90] Officials, the Court has observed, are entitled to regulate in response to specific problems so long as they do so on neutral terms. Thus, it is unlikely courts would conclude that the revised policies are content based on this ground.

However, some university actions and policies do raise significant content neutrality concerns. For example, some universities canceled campus demonstrations based on the community's likely negative reaction to the message of the protest or the perceived offensiveness of the expression. A district court issued a preliminary injunction against the University of Maryland's revocation of a permit that had been issued to student groups wishing to hold a vigil on October 7, 2024, reasoning that it was based on viewpoint and speaker identity. [91]

Although the court recognized that many find the words and slogans of pro-Palestinian protesters abhorrent, it observed that "[t]hey are expressive of ideas, however vile they may seem to some, [and that] [t]here is no reason why they should not be given protection as speech when they are used in the forum of a public university."[92] The court further observed that nothing in the

[88] *Id.* (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).
[89] *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).
[90] *See* McCullen v. Coakley, 573 U.S. 464, 476 (2014) (concluding that a restriction on protests near abortion clinics was not content based simply because it was enacted in response to abortion rights protests).
[91] *See* Students for Just. in Palestine v. Bd. of Regents, No. 24-2683, slip op. at 13 (D. Md. Oct. 1, 2024).
[92] *Id.* at 8.

SJP's reservation form suggested that they would occupy any campus spaces other than the one they had reserved, destroy any property, or threaten, or harass Jewish students.[93] As the court noted, SJP had held more than seventy events on campus since the Hamas attack on Israel, "all without significant disruption or conflict."[94] Insofar as the university anticipated conflict relating to the October 7th vigil at issue, the court identified less restrictive alternatives to cancellation, including employing extra security personnel and erecting fencing for crowd control.[95]

Some recent policy revisions also raise significant content neutrality concerns. Public universities cannot adopt and enforce policies that require that all campus speech be "welcoming" and non-offensive.[96] Public universities can encourage this kind of civility, while private universities *could* adopt it as a general requirement.[97] However, where the First Amendment applies or is being used as the benchmark, universities cannot compel speakers or speech to be civil; on the contrary, most hateful and derogatory speech is constitutionally *protected* on university campuses.[98]

This was a lesson university learned during the 1980s and 1990s when courts invalidated hate speech codes intended to protect students of color from derogatory expression.[99] Ignoring that lesson, some officials and universities have tried to impose content-based campus speech bans. For example, Governor Greg Abbott of Texas directed all of the state's higher education institutions to adopt policies under which students would be punished for engaging in "antisemitic" speech – including speech claiming that the Jewish State is a racist endeavor or comparing

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[93] *Id.* at 9.
[94] *Id.*
[95] *Id.* at 11.
[96] Federman, *supra* note 22.
[97] *See* Sunstein, *supra* note 7 (discussing the different choices public and private universities can make regarding free expression).
[98] *See* CHEMERINSKY & GILLMAN, *supra* note 82, at 82–83 ("In the 1990s, persuaded by the powerful arguments for its regulation, over 350 colleges and universities adopted codes regulating hate speech. But every court to consider such a code declared it unconstitutional.").
[99] *See id.* at 82–83, 97–103 (discussing the history and litigation of campus hate speech codes); *see also* UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) ("The problems of bigotry and discrimination sought to be addressed here are real and truly corrosive of the educational environment. But freedom of speech is almost absolute in our land and the only restriction the fighting words doctrine can abide is that based on the fear of violent reaction. Content-based prohibitions . . . however well intended, simply cannot survive the screening which our Constitution demands."); Doe v. Univ. of Mich., 721 F. Supp. 852, 866–68 (E.D. Mich. 1989) (invalidating University of Michigan hate speech code).

Israeli policy to that of the Nazi Germany.[100] A district court issued a preliminary injunction against enforcement of the order on First Amendment grounds, concluding that it required universities to engage in unlawful viewpoint discrimination. As discussed earlier, Harvard University has adopted a similar definition. Since Harvard is a private university, the First Amendment's content neutrality standard does not apply to its antidiscrimination policy. However, the policy raises serious concerns about punishing students, faculty, and others for criticizing Israel inside and outside the classroom.

The First Amendment's content neutrality requirement also applies to how universities regulate student organizations. Although universities can take disciplinary action based on a group's violation of campus conduct rules or their unlawful activities, they cannot do so based solely on the viewpoint or message of the organization.[101] Universities that removed or expelled student groups during the recent campus unrest based solely on these messages or perceived ideologies violated the First Amendment.

As recent campus protests demonstrate, there is tension between robust free speech protections, including for hateful expression, and Title VI of the Civil Rights Act of 1964.[102] Title VI obligates any university that receives federal funds to adopt and enforce policies that protect students from harassment and discrimination based on, among other things, race, national origin, and shared ancestry.[103] Consistent with the First Amendment, universities can enforce policies that ban threats of violence, persistent harassment, blocking access to campus facilities, and other activities that interfere with students' educational opportunities.[104] Moreover, under Title VI, universities cannot show deliberate indifference to harassment or direct discrimination against their students.[105]

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[100] Students for Just. in Palestine v. Abbott, No. 1:24-CV-523-RP, 2024 WL 4631301, at *1 (W.D. Tex. Oct. 28, 2024).

[101] *See Healy*, 408 U.S. at 180 (holding expulsion of local SDS chapter violated First Amendment). *See also* IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 393 (4th Cir. 1993) (invalidating university punishment of fraternity based on disapproval of viewpoint).

[102] 42 U.S.C. § 2000d.

[103] 42 U.S.C. § 2000d; 34 C.F.R. § 100.3.

[104] *See* CHEMERINSKY & GILLMAN, *supra* note 81, at 116–25.

[105] *See* Kestenbaum v. Harvard, No. 24-10092-RGS, 2024 WL 3658793, at *5 (D. Mass. Aug. 6, 2024) ("An institution is deliberately indifferent to student-on-student harassment if its response to the mistreatment is 'clearly unreasonable in light of the known circumstances.'").

During recent campus protests, some students and nonaffiliates engaged in antisemitic harassment and acts that prevented Jewish students from accessing campus grounds and facilities.[106] Title VI prohibits persistent harassment of individual students and interference with access to campus facilities.[107] Further, universities may be liable under Title VI for failing to enforce anti-harassment and other disciplinary policies in a non-discriminatory manner, for example by addressing anti-Black actions but failing to do the same regarding anti-Jewish actions. Such claims do not generally raise thorny free speech questions.

In contrast, treating the use of certain words, such as "Zionist," as grounds for discipline raises significant First Amendment concerns. That response is particularly troublesome in the context of a protest or demonstration, where vulgar and derogatory language is commonplace, and communications are generally directed to a public audience rather than to individuals. During the recent campus demonstrations, some protesters used reprehensible language, for example celebrating the murder and rape of Israeli Jews.[108] Such language undoubtedly offends and upsets Jewish (and other) students, some of whom have reported feeling unsafe on their campuses.[109]

Some commentators have complained that the Department of Education's Office of Civil Rights (OCR), which interprets and enforces Title VI, sometimes "seems to foster a sense that the expression of offensive ideas is a form of harassment."[110] However, Title VI is not intended to restrict expression protected by the First Amendment, including speech, however upsetting, that advocates or celebrates violence. To reconcile its obligations with the First Amendment, Title VI should not be interpreted such that it requires universities to punish students engaged in a demonstration, either because their

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[106] *See* Greyman-Kennard, *supra* note 4.

[107] *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999) (holding that discriminatory harassment, which may include expressive conduct, loses the First Amendment's protection if it is "so severe, pervasive, and objectively offensive, and [] so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities").

[108] *See* Erwin Chemerinsky, *College Officials Must Condemn On-Campus Support for Hamas Violence*, N.Y. TIMES (Oct. 20, 2024), https://www.nytimes.com/2024/10/20/opinion/hamas-colleges-free-speech.html.

[109] *See* Sara Weissman, *Jewish, Muslim Students Fear Their Views Put Them in Danger*, INSIDE HIGHER ED. (Mar. 8, 2024), https://www.insidehighered.com/news/students/diversity/2024/03/08/report-most-jewish-muslim-students-fearful-amid-conflict.

[110] CHEMERINSKY & GILLMAN, *supra* note 81, at 15.

chants or displays constitute harassment or discrimination, or because the protest itself creates a hostile environment. Under such an interpretation, many protests, including those relating to illegal immigration, abortion, transgender rights, the war in Ukraine, and other topics might also be characterized as forms of harassment or discrimination.

To avoid that result, OCR and universities ought to treat campus protests differently from classrooms, dormitories, and other places where individual harassment and discrimination are more likely to affect students.[111] That is not to say that instances of persistent harassment or discriminatory actions, including those that occur as part of or in connection with a protest or demonstration, can never be subject to discipline. However, the OCR and universities should endeavor to protect robust and discordant expression, even when personally offensive, and avoid treating protests or demonstrations themselves as hostile environments.

2. Permitting Policies

In response to the disruption of encampments, deeply offensive expression, and complaints from students, trustees, and others, many universities have revised their campus protest policies. Some revised their permitting provisions in ways that raise First Amendment concerns.

So long as the permitting decisions are based on objective criteria and do not grant university officials unbridled discretion to grant or deny permits, universities can require that protest organizers obtain a permit.[112] However, some newly enacted university permitting policies require significant advance notice before a demonstration can occur.[113] Some courts have been sensitive to the effects that such advance notice provisions can have on spontaneous demonstrations. For example, a federal appeals court invalidated a general 24-hour notice requirement, noting that the city had presented no evidence the events would pose traffic safety or other public order concerns.[114]

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[111] *See* Michael C. Dorf, *Federal Antidiscrimination Law Does Not Require Campus Crackdowns*, VERDICT (Apr. 22, 2024), https://verdict.justia.com/2024/04/22/federal-antidiscrimination-law-does-not-require-campus-crackdowns.

[112] *See* Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

[113] *See, e.g.*, CWRU Policy, *supra* note 60 (requiring three days' notice for any Large Demonstration).

[114] *See, e.g.*, Long Beach Area Peace Network v. City of Long Beach, 522 F.3d 1010, 1035–37 (9th Cir. 2008) *amended by* 574 F.3d 1011 (9th Cir. 2009).

University permitting policies that rely upon automatic notice requirements may be invalid under the First Amendment. A requirement that students give significant advance notice for any and all demonstrations would have precluded a spontaneous response to the start of the Hamas-Israel conflict. Obviously, the date of such demonstrations cannot be fixed in advance. Further, whether or not they violate First Amendment standards, registration policies can significantly chill student activism by creating a mechanism for surveillance of protest activities.

Additionally, permitting schemes that require students to submit displays or other materials for review prior to an event may raise serious prior restraint and content discrimination concerns.[115] Policies must clearly specify the criteria to be applied to any displays and the objective factors that constrain official discretion regarding printed materials.[116] Moreover, some new permitting policies may seek to shift security, cleanup, and other costs onto student protest organizers. Courts have invalidated some cost-shifting requirements.[117] Admittedly, the law regarding such issues is underdeveloped. However, universities must carefully specify the conditions under which expressive activities can occur on campus and be aware that some courts have rejected cost-shifting schemes.

3. Time, Place, and Manner Restrictions

Many recently adopted university restrictions on expression are efforts to close gaps in coverage, for example by restricting modes of protest that may not have been prohibited at the time they occurred. The First Amendment broadly allows universities to impose content-neutral limits on the time, place, and manner of protests, demonstrations, and other events. Despite the obvious targeting of recent protest methods and activity, courts would likely *treat* many of the revised policies as content-neutral regulations. The policies must still be clear in terms of the actions they allow or prohibit. They must not impose overly broad restrictions on expressive activity. And they must be evenly enforced against all demonstrators regardless of message or cause.

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[115] *See* Lovell v. City of Griffin, 303 U.S. 444, 450–53 (1938).
[116] *See* Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969) (requiring that permitting requirements provide "narrow, objective, and definite" standards).
[117] *See, e.g.*, *Long Beach Area Peace Network*, 522 F.3d at 1038–40; Cent. Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1525–26 (11th Cir. 1985).

On the assumption that they did not adopt their revised policies for the purpose of suppressing only the pro-Palestinian protests, universities can ban encampments and overnight vigils. Indeed, there is a Supreme Court decision on point. In *Clark v. Community for Creative Non-Violence*,[118] the Court upheld a federal agency regulation that banned overnight camping on the National Mall and in Lafayette Park in the District of Columbia.[119] The Court concluded the ban was a content-neutral mean of preserving federal resources, was narrowly tailored to that end, and left open ample alternative channels for protesters to communicate their message.

Under the time, place, and manner standard, university restrictions or bans on protest activity before or after a certain hour of the day would also likely be valid, so long as the measures did not restrict more speech than necessary to serve university interests in maintaining tranquility and students were able to protest during other times. Likewise, restrictions on sound amplification are valid so long as they meet the same requirements.[120] Thus, universities can limit loud noises during exams, near classroom buildings while classes are in session, and near dormitories.

Universities can also impose content-neutral restrictions on the use of displays, including the number of signs that will be allowed, the size of the signs, the places where placards and the like can be used, and the materials used to make such signs and other displays. However, policies that impose broad signage and display bans may be invalidated as insufficiently tailored to university interests in aesthetic or other concerns.

In general, universities can also limit where and when students can set up tables and other displays. Again, however, those restrictions must be narrowly tailored to address university interests in ensuring access to campus buildings and other interests in maintaining campus order. Universities can also prohibit speakers from blocking or impeding access to campus buildings and facilities, again as part of their authority to regulate the manner of protest.[121] They can likewise determine where on-campus students will be allowed to use chalk to communicate,

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[118] 468 U.S. 288 (1984).

[119] *Id.* at 289 (concluding that the ban was a content-neutral mean of preserving federal resources, was narrowly tailored to achieve that end, and left open ample alternative channels for protestors to communicate their message).

[120] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791–803 (1989).

[121] *Cf.* McCullen v. Coakley, 573 U.S. 464, 486–87 (2014) (recognizing state's interest in preserving access to reproductive health care facilities).

such as by limiting that activity to certain sidewalks on campus or prohibiting chalking on buildings. Again, these restrictions must allow for ample alternative channels of communication.

Many universities have recently adopted policies that ban or restrict the wearing of masks or the taking of other actions to conceal one's identity. Some ban identity concealment entirely, while others allow masking but require students to show identification if asked to do so by a university official or law enforcement officer. Whether masking bans or restrictions are valid is a question that has divided courts. The First Amendment protects a right to speak anonymously in certain contexts, for example when distributing political leaflets.[122] While some courts have invalidated anti-masking laws on the grounds that the right to anonymous expression extends to individuals who wish to conceal their physical identity, others have disagreed.[123] Regulations that fall short of bans (for example, policies allowing masking unless an official specifically requests to see identification) may be more defensible on First Amendment grounds. Depending on the jurisdiction and the manner in which the policy is written, university masking and identity-concealing policies may or may not violate the First Amendment rights of student protesters. Like registration requirements, however, anti-masking policies may substantially chill student dissent. The ability to protest anonymously protects students from doxxing, university reprisals, and in some cases deportation.

Broadly speaking, universities can regulate *where* protests and demonstrations can occur on their campuses. The First Amendment's public forum doctrine generally addresses which locations are open to expressive activity and under what circumstances. The doctrine affords greater protection to speech and assembly in areas that have traditionally been open for these purposes, such as public streets, parks, and sidewalks, than to other types or categories of public property.[124]

Assuming the public forum doctrine applies on campuses, universities have broad authority to impose locational restrictions. For example, universities may provide that classrooms and administrative offices are off limits to protests and other expressive activities. They can ban protest activity in

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[122] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342–43, 357 (1995).
[123] *Compare* Am. Knights of the KKK v. City of Goshen, 50 F. Supp. 2d 835, 836 (N.D. Ind. 1999) (holding unconstitutional a city ordinance that prohibited mask wearing in public for the purpose of concealing one's identity), *with* State v. Miller, 398 S.E.2d 547, 549 (Ga. 1990) (upholding state anti-masking law).
[124] *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

such places on the grounds that these locations are dedicated solely to classroom instruction and administrative functions. There is no First Amendment right to protest in the Dean's office, during a class, or on an athletic field during a sports event.

Universities are also likely entitled under the First Amendment to limit access to certain campus areas to affiliates or members of the campus community. The public forum doctrine allows governments to limit access to certain properties based on the status of the speaker. As the Eleventh Circuit observed in one case, an evangelist not associated with the university was "not a member of the class of speakers for whose especial benefit the forum was created" and thus could be "constitutionally restricted from undertaking expressive conduct" in areas otherwise open to campus community members.[125] Other courts have upheld permit requirements for non-affiliates based on safety, space, and other concerns, as well as requirements that outside speakers be sponsored by student groups or faculty members.[126] As a matter of First Amendment public forum doctrine, universities can impose some access restrictions on non-affiliates and prioritize access and use of campus facilities by students, faculty, and staff. However, courts disagree regarding whether they can ban non-affiliates altogether.

In general, the scope of university control over access to open areas of campus—including walkways, quadrangles, plazas, gardens, and other common areas—is uncertain. Part of the reason for this uncertainty is that courts have struggled to apply public forum doctrine to the various locations on university campuses.[127] One lower court characterized the entire campus as "an enclave created for the pursuit of higher learning by its admitted and registered students and by its faculty."[128] By contrast, other courts have characterized the campus as "more akin to a public street or park than a non-public forum."[129] Some

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[125] Bloedorn v. Grube, 631 F.3d 1218, 1235 (11th Cir. 2011); *see also* ACLU v. Mote, 423 F.3d 438, 444 (4th Cir. 2005) (characterizing campus as a "limited public forum" in which the university could distinguish among classes of speakers); Students for Life USA v. Waldrop, 162 F. Supp. 3d 1216, 1224 (S.D. Ala. 2016) ("[T]he Court accepts that the Perimeter could theoretically be a designated public forum as to students despite being a limited public forum as to the general public.").

[126] *See, e.g.*, Bowman v. White, 444 F.3d 967, 980–81 (8th Cir. 2006); Gilles v. Garland, 281 F. App'x 501, 508–13 (6th Cir. 2008).

[127] *See* John Inazu, *The Purpose (and Limits) of the University*, 5 UTAH L. REV. 943, 966–69 (2018) (discussing application of public forum doctrine to university campuses).

[128] *Bloedorn*, 631 F.3d at 1234.

[129] Hays Cnty. Guardian v. Supple, 969 F.2d 111,117 (5th Cir. 1992).

courts have recognized that campus spaces that are "physically indistinguishable from public sidewalks," or otherwise blend into non-campus areas, ought to be generally open for speech and assembly.[130]

University campuses vary in terms of their physical characteristics and geography. Thus, perhaps not surprisingly, courts have not charted a consistent path in terms of applying the public forum doctrine to campus grounds. That said, as noted, universities can adopt and enforce content-neutral regulations on expressive activity so long as they are narrowly tailored to address important interests and leave open ample alternative channels of communication.

One spatial regulation that is suspect is the campus "free speech zone."[131] Colleges and universities have sometimes limited speech activity to small and remote locations, in some instances comprising just a tiny fraction of the campus grounds.[132] As the president of one university stated when his campus's zoning policy was challenged in court, "[f]ree speech can occur anywhere on campus . . . [b]ut protests or other political activity must stay in the free speech zones."[133] Of course, "protests and other political activity" *are* free speech. In any event, it is difficult to maintain that severe limitations on expressive activity are narrowly tailored to serve university interests in maintaining order and safety on campus. Whatever the merits of specific locational restrictions, relying on such restrictive speech zones burdens far more speech and assembly than necessary to further these goals. Universities would be well advised to steer clear of a zoning approach that restricts protest to small, remote areas.

A general caveat is in order. When it comes to time, place, and manner regulations, universities have broad authority to limit expression when it interferes with university functions or events. However, as noted, this authority is not unlimited. Some applications of new policies are already raising serious free speech concerns. For example, it appears universities have adopted strict interpretations of certain place and time

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[130] McGlone v. Bell, 681 F.3d 718, 733 (6th Cir. 2012).
[131] *See* Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J. COLL. & UNIV. L. 481, 503–05 (2005).
[132] *See, e.g.*, Pro-Life Cougars v. Univ. of Hous., 259 F. Supp. 2d 575, 577–79 (S.D. Tex. 2003); Roberts v. Haragan, 346 F. Supp. 2d 853, 856–59 (N.D. Tex. 2004).
[133] TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 277 (2009).

regulations. Some have prohibited silent and non-disruptive study-in protests in libraries and other facilities, while others have punished students and faculty who participated in nighttime candlelight vigils.[134] Whether these and other limits are valid under First Amendment standards depends in part on whether bans on peaceful and non-disruptive activities adequately serve asserted university interests.[135]

In sum, universities bound by or seeking to follow First Amendment standards are generally prohibited from regulating or censoring speech based on its content but have the authority to adopt and enforce content-neutral restrictions on the time, place, and manner of speech and assembly. While universities have broad authority to limit access to campuses and determine the location of protests, policies that confine protesters to small speech zones, suppress spontaneous assemblies, impose certain costs on protest organizers, and ban or restrict anonymous protest may violate the First Amendment.

III. CONCLUSION: PRESERVING CAMPUS PROTEST

University responses to recent protest-related unrest have brought us to a critical crossroads insofar as the future of campus protest is concerned. Universities generally relied first on a combination of law enforcement tactics and internal disciplinary measures, followed by significant revisions to existing campus free expression policies. While it is important to assess whether and how these responses burden First Amendment rights, this Part looks beyond such concerns to their potential effect on future campus protest activity.

Assessment of recent responses to campus protest-related unrest should be undertaken with an understanding of the nature and central purposes of the university. The Supreme Court has recognized that universities are "vital centers for the Nation's intellectual life," and has expressed a special concern that individual thought and expression must not be chilled on college campuses.[136] As John Inazu has observed, "a central purpose, if not *the* central purpose, of the university is to be a place of facilitating disagreement across differences."[137] Preserving space

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[134] *See* Isabelle Taft, *How Universities Cracked Down on Pro-Palestinian Activism*, N.Y. TIMES (Nov. 25, 2024), https://www.nytimes.com/2024/11/25/us/university-crackdowns-protests-israel-hamas-war.html.

[135] *See, e.g.*, Brown v. Louisiana, 383 U.S. 131, 141–42 (1966) (reversing breach of peace conviction for peaceful and orderly sit-in at a public library).

[136] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 836 (1995).

[137] Inazu, *supra* note 127, at 947.

for protest and dissent on college campuses is vitally important in teaching students what it means to engage in robust and uninhibited debate, and for "enact[ing] the aspirations of democratic governance."[138] If, as the Court has opined, America's elementary and secondary schools are "the nurseries of democracy," universities are part of an educational system that teaches, facilitates, and sustains democratic participation.[139]

As Justice William O. Douglas once wrote, "[w]ithout ferment of one kind or another, a college or university . . . becomes a useless appendage to a society which traditionally has reflected a spirit of rebellion."[140] Indeed, the tradition of campus protest has sparked significant social and political change. As John Kenneth Galbraith observed during the period of campus unrest relating to the Vietnam conflict:

> It was the universities . . . which led the opposition to the Vietnam War, which forced the retirement of President Johnson, which are forcing the pace of our present withdrawal from Vietnam, which are leading the battle against the great corporations on the issue of pollution, and . . . a score or more of the more egregious time-servers, military sycophants and hawks.[141]

Given universities' missions, including their general support for the free exchange of ideas, it is unfortunate more university leaders did not turn, initially at least, to discourse and negotiation rather than more aggressive tactics: criminal arrests, use of tear gas and less-lethal weaponry, snipers, armored personnel carriers, and the like.[142] As Keith Whittington has observed: If universities are to be a space where ideas are held up to critical scrutiny and our best understanding of the truth is identified and professed, then dissenting voices must be tolerated rather than silenced, and disagreements must be resolved through the exercise of reason rather than the exercise of force.[143] While the principle was directed at *students'* recent disruptions of

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[138] *Id.* at 950.
[139] Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 181 (2021).
[140] Healy v. James, 408 U.S. 169, 197 (1972) (Douglas, J., concurring).
[141] John Kenneth Galbraith, *An Adult's Guide to New York, Washington and Other Exotic Places*, NEW YORK, Nov. 15, 1971, at 52.
[142] *See* Eddie R. Cole, *Instead of Calling in Law Enforcement to Deal With Protesters, College Presidents Could Have Followed This Example*, TIME (June 4, 2024, 9:00 AM), https://time.com/6984701/college-presidents-protest-history/.
[143] KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 7 (2019).

offensive expression on campuses, Whittington's admonition should apply to *anyone* who would silence or censor campus expression by force—including university leaders.

To be sure, university responses were influenced not only by the obligation to maintain order and safety on campus, but also by external pressures from politicians, boards of trustees, and other constituencies. At least in some instances, they were responding to serious infractions including vandalism and occupation of campus buildings. However, similar responses were directed toward even peaceable encampments. The simple gathering of dissenting students was treated as a form of civil unrest, which led politicians and others to call for deploying the National Guard and using aggressive protest policing tactics.

Some have gone even further. Donald Trump has called for "crushing" the campus protest movement and deporting students studying on foreign visas who committed any protest-related violation.[144] Indeed, the Trump Administration has arrested and initiated deportation proceedings against a former Columbia University student for his role in organizing pro-Palestine campus protests.[145] Members of Congress have proposed laws that would deny student loan forgiveness to any student who engaged in a form of unlawful protest activity or revoke the visas of students who participated in encampments or other forms of unlawful protest.[146] One bill would have required any student convicted of "unlawful activity" on a university campus to be assigned to Gaza for at least six months for what the bill's sponsor described as "community service."[147] Outside campus gates, these sentiments and pressures have produced widespread violations of protesters' First Amendment rights and significantly chilled public protest.[148] Universities should not repeat these errors. Rather, as Inazu has urged, "[t]he democratic university must [] strive to protect minority, dissenting, or unpopular views—an aspiration that draws its inspiration from the First Amendment."[149]

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[144] *See* Graham, *supra* note 41.
[145] Minho Kim, *The U.S. Is Trying to Deport Mahmoud Khalil, a Legal Resident. Here's What to Know.*, N.Y. TIMES (Mar. 10, 2025), https://www.nytimes.com/2025/03/10/us/politics/mahmoud-khalil-legal-resident-deportation.html?smid=nytcore-ios-share&referringSource=articleShare.
[146] *See* H.R. 8468, 118th Cong. (2d Sess. 2024); H.R. 8322, 118th Cong. (2d Sess. 2024).
[147] H.R. 8321, 118th Cong. (2d Sess. 2024).
[148] *See generally* Zick, *supra* note 19.
[149] Inazu, *supra* note 127, at 949.

To uphold these values, universities should not react to campus unrest by piling more and more protest restrictions onto existing free expression policies to demonstrate their willingness to crack down on dissent many find offensive and disturbing. Prior to the recent protests, universities were hardly free and open fora.[150] Indeed, most already employed permitting and other schemes that limited where, when, and how protests could occur on campus. Some recently adopted policies close gaps in these schemes, for example by prohibiting overnight camping. However, recent policy changes generally exacerbate the problem of limited breathing space for campus protests. Evidence shows that the number of protests has declined significantly, but also that administrators are interpreting their new speech restrictions in ways that threaten even non-disruptive and silent means of campus dissent.[151]

Protests can be disruptive, and in many cases, they are intentionally so. As Whittington has noted, campus debates "are often boisterous and freewheeling. They reflect the chaos of American democracy rather than the decorum of the seminar room."[152] The nature and character of the campus protest environment are vitally important to preserving these functions and values. Indeed, the Free Speech Movement of the 1960s sprang from students' demands that Sproul Plaza, and other areas of the University of California at Berkeley campus, be open to demonstrations.[153] The Supreme Court has recognized that universities "began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn."[154] Further, it "has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."[155] As the Court has observed, the university classroom, "with its surrounding environs, is peculiarly the 'marketplace of ideas.'"[156]

Those environs, including the open areas of campus, cannot facilitate discourse across difference when they are padlocked or gated, closed off to students and community members, restricted to so-called free speech zones, and weighed

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[150] *See* Zick, *supra* note 19 (discussing university restrictions on expressive activity).
[151] *See* Alonso, *supra* note 20 (reporting on reduction of protest activity on campus).
[152] Whittington, *supra* note 143.
[153] *See generally* ROBERT COHEN & REGINALD E. ZELNIK, THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S (2002).
[154] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 836 (1995).
[155] Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981).
[156] Healy v. James, 408 U.S. 169, 180 (1972) (citation omitted).

down by onerous permitting and cost-shifting requirements. The American Association of University Professors has condemned these measures because they "severely undermine the academic freedom and freedom of speech and expression that are fundamental to higher education," "trample on the rights of students," and have been adopted "with little or no faculty input."[157]

Campuses are also becoming increasingly unwelcome places for visitors. University leaders should not respond to recent unrest by creating a gated community sealed off from the outside world. Although universities are empowered to limit access by non-affiliates to campus, that approach has significant costs. Campus community members including students and faculty routinely engage and interact with campus non-affiliates, including itinerant speakers, nearby residents, and merchants. Creating an environment that forecloses interaction with non-affiliates undermines the mission of exposing students to a wide variety of perspectives. A vibrant mix of student groups, street preachers, pro-life activists, antiwar protesters, and political canvassers offers a much more robust marketplace of ideas. Restricting access to campus can have long-term negative effects on the expressive community.

Like laws that apply outside campus environs, university policies that over-regulate speech and assembly are a trap for the unwary activist. As Justice Gorsuch recently observed in a case involving an arrest of a protester, owing to the proliferation of public order laws "almost anyone can be arrested for something."[158] Students protesting in an environment in which any misstep could lead to arrest, expulsion, or other sanctions may decide dissent is not worth the cost. If students can be disciplined or arrested for tabling, displaying pamphlets, or participating in study-ins and candlelight vigils, they are going to be reticent to participate in more disruptive forms of dissent.

The problem of campus antisemitism, which appears to be the main impetus for calls to crack down on student protests, will not be resolved by further restricting student demonstrations or punishing protesters for failing to comply with additional time, place, and manner regulations. Additional restrictions on

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[157] *AAUP Condemns Wave of Administrative Policies Intended to Crack Down on Peaceful Campus Protest*, AAUP (Aug. 14, 2024), https://www.aaup.org/news/aaup-condemns-wave-administrative-policies-intended-crack-down-peaceful-campus-protest.

[158] Nieves v. Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring).

noise, chalking, displays, and the presence of non-affiliates may convince certain constituencies that universities are responding to concerns about harassment and discrimination. However, they do not address the underlying problem.

Addressing antisemitism will require discourse across differences, which necessitates universities being more, not less, open to demonstrations and dissent. Instead of imposing increased limitations on campus protests, universities ought to focus on how they can teach students and others how to disagree in ways that foster mutual respect and preserve equal educational opportunities for their classmates.[159]

[159] Many universities have held programs focused on helping students debate across sharp divides. *See, e.g.*, Jessica Blake, *How to Help Students Debate Constructively*, ACTA (Oct. 28, 2024) https://www.goacta.org/2024/10/how-to-help-students-debate-constructively/.

SAFE SPACES FOR FREE SPEECH? BASES FOR A CONSTITUTIONAL DUTY TO PREVENT PRIVATE DISRUPTION OF STUDENT SPEECH ON CAMPUS

Tyson Langhofer, Mathew W. Hoffmann, & P. Logan Spena

INTRODUCTION

The United States Supreme Court has long referred to America's public university campuses as "marketplace[s] of ideas."[1] This description evokes a picture of a teeming courtyard, awash with students and professors alike, each hawking their intellectual wares, inviting others to partake in this vast smorgasbord of ideas. This marketplace creates inherent competition, as each purveyor of an idea must compete with all other purveyors for "customers." Competitions inherently create conflict, as each participant seeks to prevail. Competitions necessitate rules (or laws). Rules necessitate a governing body to enforce the rules. Human history (both recent and ancient) demonstrates that without rules and a neutral governing body with both the ability and willingness to fairly enforce the rules, a marketplace will inevitably devolve either into chaos and anarchy or a totalitarian regime dominated by one individual or faction. Either way, the marketplace is destroyed. In its place, we are left with either a complete vacuum of ideas or an assembly line for one type of thought.

Numerous recent examples abound,[2] but one will suffice to illustrate the destructive effect on the marketplace of ideas

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[1] Healy v. James, 408 U.S. 169, 180–81 (1972) ("The college classroom, with its surrounding environs, is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.").

[2] Tyson C. Langhofer & Mathew W. Hoffmann, *Alliance Defending Freedom Letter to University of Memphis*, ALL. DEF. FREEDOM (Oct. 2, 2024), https://dm1l19z832j5m.cloudfront.net/2024-10/TPUSA-Memphis-Demand-Letter-2024-10-02.pdf; Philip A. Sechler, *Alliance Defending Freedom Letter to University of Pittsburgh*, ALL. DEF. FREEDOM (June 5, 2023), https://dm1l19z832j5m.cloudfront.net/public/2023-06/University-Of-Pittsburgh-2023-06-05-Letter.pdf; Tyson Langhofer, *Alliance Defending Freedom Letter to Virginia Commonwealth University*, ALL. DEF. FREEDOM (Apr. 5, 2023), https://dm1l19z832j5m.cloudfront.net/public/2023-04/StudentsForLife-VCU-Letter.pdf; Maya Britto, Mark Krikorian Speaks at YAF Event, Disrupted by Protestors Calling for Event Cancellation, THE JOHNS HOPKINS NEWS-LETTER (Oct. 31, 2024), https://www.jhunewsletter.com/article/2024/09/mark-krikorian-speaks-at-yaf-event-disrupted-by-protestors-calling-for-event-cancellation; Bernd Debusmann Jr. & Mike Wendling, *House Speaker Mike Johnson Heckled by Protesters in Tense Columbia Campus Visit*, BBC (Apr. 24, 2024), https://www.bbc.com/news/world-us-canada-68893185; Tara Suter, *University of Vermont Cancels UN Ambassador's Address Amid Gaza Protests,* THE HILL (May 3, 2024), https://thehill.com/homenews/education/4642571-university-of-vermont-cancels-un-ambassadors-address-amid-gaza-protests/; Antonia Hylton, Mirna Alsharif & Marlene Lenthang, *Columbia*

when a university refuses to enforce its policies. In 2016, Young Americans for Freedom at California State University Los Angeles (YAF), a recognized student group, invited conservative commentator, Ben Shapiro, to speak on campus. YAF properly reserved the University Student Union Theater for the event pursuant to university policy. After YAF began advertising the event, a number of students and faculty began posting angry comments threatening to disrupt the event because they disagreed with Shapiro's political viewpoints.

Despite numerous threats of violence and disruption, YAF was confident that the university would ensure the event proceeded without disruption. After all, the university maintained many policies affirming its duty to foster and protect the marketplace of ideas. In its Statement of Students' Rights and Responsibility, the university acknowledged its "duty to develop policies and procedures which safeguard academic freedom."[3] The policy affirmed that "[s]tudents and student organizations are free to examine and to discuss all questions of interest to them, and to express opinions publicly or privately."[4] The policy recognized students' right to "invite and hear any speaker of their choosing"[5] and that "campus facilities will not be used [sic] a device of censorship."[6]

The university also maintained a policy prohibiting violence on campus. This policy claims the university is "committed to creating and maintaining a working, learning, and social environment for all members of the University community which is free from violence."[7] The university acknowledged that "[c]ivility, understanding, and mutual respect toward all members of the University community are intrinsic to excellence in teaching and learning, to the existence of a safe and healthful workplace, and to the maintenance of a campus culture and environment which serves the needs of its many constituencies."[8] The university rightly recognized that "[t]hreats of violence or acts of violence not only impact the individuals concerned, but also the mission of the University to

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Cancels Universitywide Commencement Ceremony After Weeks of Protests on Campus, NBC NEWS (May 6, 2024), https://www.nbcnews.com/news/us-news/columbia-university-cancels-commencement-rcna150778.

[3] First Amended Complaint ¶ 128, Young America's Foundation v. Covino, No. 2:16-cv-3474 (C.D. Cal. Feb. 21, 2017).

[4] *Id.* ¶ 129.

[5] *Id.* ¶ 351.

[6] *Id.* ¶ 130.

[7] *Id.* ¶ 133.

[8] *Id.* ¶ 134.

foster higher education through open dialogue and the free exchange of ideas."[9] Thus, the policy promised that the university "will take decisive action to eliminate violent acts, threats of violence, or any other behavior which by intent, action, or outcome harms another person."[10]

Finally, the university maintained a policy protecting free expression. The policy asserts that "[e]xposure to the widest possible range of ideas, viewpoints, opinions and creative expression is an integral and indispensable part of a University education for life in a diverse global society."[11] The goal of the policy was to "protect the rights of speakers and non-speakers," "ensure fair access and due process," and "maintain a safe environment on the University campus."[12] To accomplish its goal, the policy prohibited a number of activities, including (i) blocking or interfering with ingress and egress into and out of campus buildings, (ii) interfering with any use of university property which is authorized by the university, (iii) significantly and materially disrupting an event on campus, (iv) engaging in physically abusive conduct toward any person or presenting a credible threat of physical harm, and (v) bringing signs or placards into campus buildings.

Contrary to these policies' numerous promises, the university's president unilaterally announced a few days prior to the event that he was canceling the event in response to pressure from students and faculty. After YAF and Shapiro announced their intention to proceed with the event, the president responded that "I strongly disagree with Mr. Shapiro's views" but nevertheless promised to "allow him to speak" and "make every effort to ensure a climate of safety and security."[13]

On the morning of the event, members of YAF noticed the campus was blanketed with flyers urging students to participate in a "Power to the People Unity Rally" and "Take-Over" the Student Union to prevent Shapiro from delivering his speech.[14] Two hours before the event was to begin, more than 100 protestors, including students and professors, began gathering in the Student Union. The protestors eventually linked arms in front of the doors to physically block access to the theater where the event was to be held. Many of the protestors shouted

[9] *Id.*
[10] *Id.*
[11] *Id.* ¶ 139.
[12] *Id.* ¶ 140.
[13] *Id.* ¶ 173.
[14] *Id.* ¶ 176.

threats and engaged in physically threatening behavior, including pushing, shoving, kicking, and punching those attempting to attend the event.

The university had 28 police officers on campus during the event. On a typical day, the university would only have 4 police officers on duty at any given time. Many of these officers were standing in the crowd and directly in front of the doors that were being blocked by the mob. Despite the substantial police presence, the police made virtually no effort to enforce university policy or to stop the mob from violating the rights of students who wished to attend the event. In an interview during the event, the university's chief of police admitted that the mob was preventing people from attending the event. When asked whether they would take steps to control the mob, he said, "[W]e're not exerting any control over the crowd . . . because it's not a safety issue at this point."[15] In fact, the university's president later admitted that he had ordered the university police not to interfere with the protestors at the event. As a result of the university's refusal to enforce its policies, the theater was less than half full, and more than 100 people were prevented from attending the event, including some of the YAF students who organized the event.

Do the First or Fourteenth Amendments impose any duties on government actors in this situation? The First Amendment only prevents the *government* from abridging the freedom of speech. It does not apply to the acts of ordinary citizens. So, do students have any recourse against their universities when other students and/or faculty violate university policies and shut down their constitutionally protected speech?

As Part I explains, typical constitutional and statutory rules sharply limit the extent to which private acts can give rise to constitutional liability for public officials. Nevertheless, as Part II will demonstrate, existing doctrines permit some claims under the First Amendment. In addition, a proper understanding of the Fourteenth Amendment's Equal Protection Clause supports a cause of action against university officials for failure to enforce university policy where the failure deprives students of their own ability to speak in available university fora.

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[15] *Cal State L.A. Agrees to Drop Discriminatory Speech Policies, Settles Lawsuit*, ALL. DEF. FREEDOM ((Feb. 28, 2017), https://adfmedia.org/press-release/cal-state-la-agrees-drop-discriminatory-speech-policies-settles-lawsuit-0.

I. CONSTITUTIONAL AND STATUTORY RULES LIMIT PUBLIC OFFICIALS' LIABILITY FOR STUDENTS' SUPPRESSION OF OTHER STUDENTS' SPEECH

The provisions of our Constitution, particularly the First and Fourteenth Amendments, regulate the government.[16] For there to be a violation of the Constitution at all, there needs to be state action.[17] And, to hold a public official liable for an alleged constitutional violation under 42 U.S.C. § 1983, the plaintiff must show that the unlawful act took place "under color of state law."[18] That statute only imposes liability on government officials or entities for their own acts—it does not generally authorize vicarious liability.[19]

These rules create several impediments to the prospect of holding universities or their officials liable when one group of students disrupts another group's expressive activity. Nevertheless, there are some circumstances were failing to enforce university policies to stop those violations will give rise to liability under the Free Speech Clause of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. In order to understand the circumstances where there may be liability, it is critical first to understand the circumstances in which there will not be.

A. Public Officials are Generally Not Liable for Failure to Stop Injuries Caused by Private Parties

The primary impediment to holding university officials accountable for student-on-student acts that disrupt on-campus speech is the rule that government officials generally have no duty to protect citizens from being harmed by other citizens.[20]

The leading case expressing this rule is *DeShaney v. Winnebago County Department of Social Services*.[21] In *DeShaney*, the Supreme Court addressed a fact pattern of truly conscience-shocking omissions by government officials. In January 1982,

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[16] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech"); U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[17] *See* Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 930 (1982); *see also* Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978) ("most rights secured by the Constitution are protected only against infringement by governments").

[18] *Lugar*, 457 U.S. at 929; *see also* United States v. Classic, 313 U.S. 299, 326 (1941).

[19] *See* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 694 (1978).

[20] That general rule exists under current Supreme Court case law, but it's not consistent with the text of the Equal Protection Clause. *See infra*, Section II.B.

[21] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

authorities received notice that toddler Joshua DeShaney was likely being abused.[22] A year later, the child was admitted to the hospital with "multiple bruises and abrasions."[23] The state took Joshua into temporary custody and county authorities assigned a caseworker and entered a voluntary agreement with Joshua's father outlining various goals.[24]

A mere month after Joshua was returned to his father's custody, county authorities were again alerted that Joshua had been back in the emergency room for "suspicious injuries."[25] County authorities took no action but made monthly visits to Joshua's home for the next six months.[26] During that time, the caseworker observed "a number of suspicious injuries on Joshua's head."[27]

A few months later, Joshua was admitted to the emergency room for the second time that year.[28] County authorities resumed home visits, but on both of the next two visits, the caseworker did not see Joshua because "she was told that Joshua was too ill to see her."[29] Authorities "took no action."[30]

In March 1984, four months after Joshua's previous hospital admission, Joshua's father "beat 4-year-old Joshua so severely that he fell into a life-threatening coma."[31] Joshua suffered severe brain damage.[32] Ultimately, he passed away in November 2015 at the age of 36.[33] His father served less than two years in jail.[34]

Joshua and his mother sued the county officials under Section 1983, alleging that their failure to protect Joshua violated his rights under the Due Process Clause of the Fourteenth Amendment.[35] The Supreme Court affirmed the dismissal of

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[22] *Id.* at 192.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 192–93.
[28] *Id.* at 193.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Crocker Stephenson, *Boy at Center of Famous 'Poor Joshua!' Supreme Court Dissent Dies*, MILWAUKEE J. SENTINEL (Nov. 11, 2015), https://archive.jsonline.com/news/obituaries/joshua12-b99614381z1-346259422.html.
[34] *Id.*
[35] *DeShaney*, 489 U.S. at 193.

their suit.[36] The Court ruled that while the Fourteenth Amendment bars state *deprivations* of life, liberty, or property, "nothing in the language of the Due Process Clause itself requires the State to *protect* the life, liberty, and property of its citizens against invasion by private actors."[37] The "purpose" of the Fourteenth Amendment, the Court said, "was to protect the people from the State, not to ensure that the State protected them from each other."[38]

The Supreme Court also rejected the claim that the county authorities incurred an obligation to protect Joshua through their knowledge of his circumstances and the fact they had "actually undertaken to protect Joshua from" danger.[39] The Court acknowledged that there are circumstances in which the government has an obligation to protect citizens from harm inflicted by other private citizens.[40] But, the Court held, the state only incurs such an obligation "when the State by the affirmative exercise of its power *so* restrains an individual's liberty that it renders him unable to care for himself."[41] The Court speculated that the state could have generated a "duty under state tort law" to protect Joshua, but firmly rejected any constitutional obligation to protect outside of the limited circumstances it recognized.[42]

As a matter of substantive constitutional law, *DeShaney*'s reasoning also stops university officials from being held liable under the Due Process Clause simply for every failure to stop one group of students from interrupting another group of students from exercising their constitutional rights. That's because the "fundamental" premise "that the First Amendment prohibits governmental infringement on the right of free speech" is "[s]imilar[]" to the Fourteenth Amendment Due Process Clause's application to "acts of the states, not to acts of private persons or entities."[43] Joshua DeShaney's father couldn't violate the Due Process Clause because he wasn't a state actor, and state officials had no freestanding Due Process Clause duty to step in. So too, student disruption of other student speech doesn't violate the First Amendment because students generally aren't state

[36] *Id.* at 194.
[37] *Id.* at 195 (emphasis added).
[38] *Id.* at 196.
[39] *Id.* at 197–98.
[40] *Id.* at 198–99.
[41] *Id.* at 200 (emphasis added).
[42] *Id.* at 201–02.
[43] Rendell-Baker v. Kohn, 457 U.S. 830, 837–38 (1982).

actors, and university officials don't have a universal duty to stop harms perpetrated by private parties.

B. Acts by Student Disruptors Generally do not Qualify as State Action or Action Under Color of Law

While government officials do not have a general constitutional duty to stop harms perpetrated by private parties, and private parties generally cannot violate the Constitution on their own, there are some circumstances where a private party's acts can give rise to constitutional liability. These circumstances exist where the private party's actions are "fairly attributable to the State" and thus qualify as state action under one of the various tests the Supreme Court has articulated.[44]

The Supreme Court has recognized several ways a private actor may qualify as a state actor, though most would likely not apply to student activity that disrupts other student expression. For example, under the "public function" test, a private party may be deemed a state actor where it performs a function that "has been 'traditionally the exclusive prerogative of the State.'"[45] It is unlikely that any unruly student group will satisfy this test such that their restriction on other student speech is transformed into state action.

Similarly, a private actor regulated by the state may be regarded as a state actor where "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[46] But, again, this test applies to highly regulated entities (and is not always satisfied even by public utilities), so it is unlikely it would transform student action into state action.

Two other tests are also unlikely to generally transform student action into state action but are more plausibly relevant than the first two: the "compulsion"[47] and "joint action"[48] tests. Under the compulsion test, the state bears responsibility where "the State has commanded a particular result" because "it has saved to itself the power to determine that result and thereby to a significant extent has become involved in it, and, in fact, has

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[44] Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922, 937 (1982).
[45] *Rendell-Baker*, 457 U.S. at 842 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)) (cleaned up).
[46] *Jackson,* 419 U.S. at 351.
[47] *See* Adickes v. S. H. Kress & Co., 398 U.S. 144, 170-71 (1970).
[48] *See Lugar*, 457 U.S. at 939.

removed that decision from the sphere of private choice."[49] Because professors wield substantial authority over their students, this test could be satisfied if faculty were to direct students to disrupt the expressive activity of other students, as has happened in some cases.[50]

The "joint action" test is typically implicated when private action is joined with coercive state power, such as when private parties use state attachment proceedings enforced by law enforcement officials.[51] This test will not transform spontaneous student action into state action. Still, there could be some circumstances that might qualify, such as when University of Missouri communications professor Melissa Click famously shouted to other students, "I need some muscle over here," in an attempt to forcibly stop one student from filming student protests on campus in November of 2015.[52]

So, while there may be cases where student action is sufficiently connected with faculty directives that the action may qualify as state action and implicate the First Amendment or other constitutional provisions, most spontaneous acts of students that disrupt other student speech will not qualify as state action. Thus, there must usually be some other basis for alleging a constitutional violation.

C. Even Where There is State Action, Section 1983 does not Impose Vicarious Liability

The prospect of holding university officials liable for student acts disrupting other students' speech is further constrained by a statutory rule: liability under Section 1983 cannot be predicated on theories of vicarious liability.[53] Rather, officials must personally participate in the constitutional

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[49] *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963) (cleaned up).

[50] *See* e.g. Verified Complaint ¶¶ 66–85, *Fresno State Students for Life v. Thatcher*, No. 1:17-cv-00657-DAD-SKO (E.D. Cal. May 11, 2017). In *Fresno State Students for Life*, a professor directed students from one of his classes to assist him in erasing sidewalk chalk messages written with prior university permission by a pro-life student group. *See id.*

[51] *See Lugar*, 457 U.S. at 941 ("a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment").

[52] *See* Phil Helsel, *University of Missouri Teacher Who Sought 'Muscle' to Block Journalist Apologizes*, NBCNEWS.COM (Nov. 10, 2015) https://nbcnews.to/3A0B3Q0.

[53] *See* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 707 (1978) (Powell, J., concurring) ("the rejection of the Sherman amendment can best be understood not as evidence of Congress' acceptance of a rule of absolute municipal immunity but as a limitation of the statutory ambit to actual wrongdoers, i.e., a rejection of respondeat superior or any other principle of vicarious liability").

deprivation to be liable.[54] This rule does not preclude liability for overseeing officials. Rather, it requires a degree of culpability that exceeds other tort doctrines like *respondeat superior*. "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence."[55]

This statutory rule makes establishing liability through omission especially difficult.

D. Officials may be Liable for Omissions in Two General Circumstances

Though the statutory requirement of personal involvement makes liability of state officials for omissions difficult to establish, it is not impossible. There are two sets of circumstances that could be pertinent to officials' failure to stop student disruptions of other students' speech (*i.e.*, where an omission could generate liability).

1. Officials may be Liable for an Omission Where They Breach a Specific Duty to Act

Officers may be liable for failure to intervene where they have a duty to act. The quintessential example is an officer's "duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers."[56] But this rule only applies "where a state actor had both a duty to intervene and a reasonable opportunity to do so."[57]

Courts have suggested, but have not definitively determined, that school officials have a duty to prevent disruptions like student disruptions of other speech. The Sixth Circuit has opined, "School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place."[58] The Ninth Circuit has also agreed: school officials "have a duty to prevent the occurrence of disturbances."[59]

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[54] *See Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988).
[55] *Id.*
[56] *O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. 1988).
[57] Patricia M. McGrath, *Civil Rights Law—Onlooking Officers Not Liable Under §1983 for Private Violent Acts of Fellow Officers*—Martinez v. Colon, 54 F.3d 980 (1st Cir. 1995), 30 SUFFOLK U. L. Rev. 961, 963–64 (1997).
[58] *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007). *See also LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (6th Cir. 2001) ("*Tinker* does not require school officials to wait until disruption actually occurs before they may act. In fact, they have a duty to prevent the occurrence of disturbances.") (cleaned up).
[59] *Karp v. Becken*, 477 F.2d 171, 175 (9th Cir. 1973). *See also Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992).

These cases do not directly establish the liability *of* school officials *to* other students for a failure to stop other student disruptions because these statements were made in the context of *justifying* restriction of student speech under *Tinker v. Des Moines Independent Community School District*.[60] The better reading of the duty at issue, then, is that officials have a duty to prevent disruption in general for the sake of the orderly operation of the school, not that any failure to stop a disruption would generate liability for the responsible officials under the First Amendment. Nevertheless, to the extent the breach of duty occurs *in* the context of a forum that is open to student speech, official failure to stop disruption when they have a reasonable opportunity to do so could be a basis for liability.[61]

2. Officials may be Liable for Deliberate Indifference to Harm Done to People in Their Custody or to Unconstitutional Conditions

Officials may also be liable for omissions where their failure to act amounts to "deliberate indifference" to the violation of the rights of someone within their custody.[62] Deliberate indifference liability is most common in the prison context,[63] but can also occur in sexual harassment cases in public employment.[64]

Generally, constitutional liability for deliberate indifference will only attach when the underlying act is also a constitutional violation.[65] In cases where a person is in the government's custody, deliberate indifference to private mistreatment may amount to a violation of the Constitution's prohibition on cruel and unusual punishment under the Eighth Amendment.[66]

Outside of the custodial context, constitutional liability does not usually attach for private wrongs.[67] However, a supervisor's failure to correct some private wrong may still amount to a constitutional violation where that failure

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[60] Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
[61] *See* McGrath, *supra* note 57.
[62] Estelle v. Gamble, 429 U.S. 97, 104 (1976).
[63] *See id.* at 103–05.
[64] *See*, *e.g.*, Murphy v. Chi. Transit Auth., 638 F. Supp. 464, 468–69 (N.D. Ill. 1986).
[65] *See id.* at 469 (supervisor's deliberate indifference "is not actionable under § 1983" where the subordinates' "abusive behavior, not being state action, was [also] not violative of plaintiff's constitutional rights").
[66] *See Estelle*, 429 U.S. at 104–06.
[67] *See Murphy*, 638 F. Supp. at 469.

deliberately deprives the plaintiff of something the Constitution guarantees. For example, a public official is liable of intending a deprivation of equal protection if he turns a blind eye to sex discrimination in a public workplace.[68] If the public official intentionally disregards private action that effectively imposes an unconstitutional condition on the citizen, the public official is responsible for his own wrongs under Section 1983.

II. THE FREE SPEECH AND EQUAL PROTECTION CLAUSES APPLY TO FAILURES TO ENFORCE POLICIES PROTECTING STUDENT SPEECH ON CAMPUSES

While constitutional and statutory rules limit the extent to which public officials may be liable for student action that disrupts other students' expressive activity, there are viable causes of action under both the First Amendment and the Equal Protection Clause. Under the First Amendment, officials may be liable under a retaliation theory or a deliberate indifference theory, both of which are fact-intensive causes of action. Under a proper interpretation of the Equal Protection Clause, officials may also be liable for failures to protect speech on university campuses.

A. First Amendment

"[It] is fundamental that the First Amendment prohibits governmental infringement on the right of free speech."[69] So, any attempt to establish liability based on the First Amendment must allege that some state action is responsible for the deprivation. Where student action in violation of university policy disrupts other student speech, the best claim is to allege a retaliatory failure by university officials to enforce university policy with the intent of chilling protected expression. A secondary theory is to allege deliberate indifference to violations of speech the university has a preexisting duty to protect (speech within a forum the university has opened).

[68] *See id.* ("If the supervisors intended plaintiff to be the victim of discrimination through the medium of the staff attorneys, then a § 1983 action would lie against the supervisors.").
[69] Rendell-Baker v. Kohn, 457 U.S. 830, 837 (1982).

1. Retaliation

The First Amendment protects against direct restrictions on speech, including student speech.[70] The First Amendment also protects against indirect restrictions on protected speech in the form of retaliatory acts on the basis of that speech.[71] "It is well established that government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right."[72]

Retaliation claims include three elements: (1) "the plaintiff engaged in protected conduct," (2) the government took an "adverse action" against the plaintiff that "would deter a person of ordinary firmness from continuing to engage in that conduct," and (3) "the adverse action was motivated at least in part by the plaintiff's protected conduct."[73]In the context of student acts violating university policy and disrupting the expressive activity of other students, a potential plaintiff's satisfaction of the first element, engaging in constitutionally protected speech, is presumed. The question is, what "adverse action" on behalf of government officials might exist?

The key here is that any action or omission, even one which, "taken for a different reason, would have been proper,"[74] can qualify as an adverse action, so long as it has the effect of deterring a person of ordinary firmness from continuing to speak. Adverse action can include subjecting an employee to peer-on-peer harassment, even where each individual act was "trivial in detail," so long as the actions are "substantial in gross" sufficient to deter the employee's speech.[75] Adverse action can also include a refusal to act. For example, a citizen "could sue the police for failing to investigate a crime in response to their criticism over how the police had investigated an earlier crime."[76]

Thus, a student group who wants to speak on campus could state a claim for First Amendment retaliation if they could show that they (1) engaged in protected conduct, (2) that the

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[70] *See*, *e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").
[71] *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–87 (1977).
[72] Thaddeus-X v. Blatter, 175 F.3d 378, 386 (6th Cir. 1999) (citations omitted).
[73] *Id.* at 394 (citations omitted).
[74] Josephson v. Ganzel, 115 F.4th 771, 789 (6th Cir. 2024) (citation omitted).
[75] Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982).
[76] Rudd v. City of Norton Shores, 977 F.3d 503, 515 (6th Cir. 2020) (citation omitted).

university failed to enforce university policy against other groups that disrupted their speech such that the group was objectively deterred from continuing to speak, and (3) that the university's failure to enforce its policies was motivated at least in part because of the group's speech.

The advantage of this cause of action is that it is well-established in current law. The disadvantage is that it is fact-intensive: it requires showing that the failure to enforce the policy would deter a person of ordinary firmness from continuing to speak and that the university's failure to act was motivated by the original speech (rather than some other consideration).

2. Deliberate Indifference

A second viable First Amendment theory for students is deliberate indifference. This theory avoids the challenge of establishing that the inaction is based on the past speech of the student group and does not require the student to establish "adverse action" in the form of objective deterrence. On the other hand, this theory does require establishing an intention to impose some kind of unconstitutional condition, since the underlying activity (private action by students disrupting speech) does not itself violate the First Amendment.[77]

Students proceeding under such a theory cannot allege mere indifference to the acts of other students, since those "actions [would] not [be] state actions and therefore [would] not violate plaintiff's constitutional rights."[78] Rather, students must allege that officials were deliberately indifferent to the disrupting students' actions in order to achieve an outcome the officials could not constitutionally achieve on their own (for example, excluding the students from the benefit of a university forum).[79]

B. Equal Protection Clause

While the First Amendment may impose a duty to protect in certain circumstances, the Fourteenth Amendment provides an explicit textual grant of "protection." Yet the Supreme Court has given the Equal Protection Clause a reading wholly inconsistent with its text.[80] Instead of offering "protection of the

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[77] *See supra* notes 64-65 and accompanying text.
[78] Murphy v. Chi. Transit Auth., 638 F. Supp. 464, 470 (N.D. Ill. 1986).
[79] *See id.*
[80] *See generally* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON UNIV. C. R. L. J. 1 (2008); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON UNIV. C. R. L. J. 219 (2009).

laws" for those "den[ied]" the same by state actors,[81] the Clause only serves as "a guarantee of *equal* treatment"—and not even that if the atextual characteristics of race, sex, or a fundamental right aren't involved.[82]

But as a member of Congress noted shortly after the Clause's ratification, "the great object to be accomplished, the great end to be reached, is 'protection.'"[83] Congress during this time constitutionalized the government's traditional and paramount duty to protect its people from violence. And it had copious evidence of the Southern states' failure to protect the newly freed slaves and people who sympathized with the Union. That evidence included numerous outrages against people because of their religious and political speech—outrages that state executives refused to police and that state courts would not remedy.

So, Congress proposed the Fourteenth Amendment's Equal Protection Clause to require states to comply with their duty of protection. When that failed to stop state officials from refusing to protect free speech and other rights, Congress followed up with the Ku Klux Klan Act ("KKK Act"), interpreting the Fourteenth Amendment and making the Equal Protection Clause privately enforceable.

The KKK Act allowed vindication for state officials' violations of their duty to protect. Failing in that duty incurs liability similar to that in a negligence action. When state officials fail to act as reasonable persons to protect people in their jurisdictions, they violate the Equal Protection Clause.

The Fourteenth Amendment framers' understanding of the dangers to free speech after the Civil War show the urgency of applying the Equal Protection Clause to our nation's public college campuses. Free speech violations run rampant, as the example of YAF and Ben Shapiro indicates. But the Equal Protection Clause makes clear that standing idly by while hostile mobs shut down events is no less unconstitutional than if the college itself had shut down the event.

1. The Congress that Developed the Equal Protection Clause Proposed it to Protect Speech

Shortly after taking office, President Andrew Johnson appointed governors in the former Confederate states and

[81] U.S. CONST. amend. XIV, § 1.
[82] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213 (1995).
[83] CONG. GLOBE, 42d Cong., 1st Sess. app. 182 (1871).

instructed them to hold constitutional conventions to reestablish civil government.[84] But Republicans in Congress refused to seat representatives sent by those states.[85] To investigate the question of representation, Congress established a Joint Committee on Reconstruction in December 1865, and charged it to "inquire into the condition of the States which formed the so-called confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress."[86]

The Committee embarked on its work, "no trifling labor," involving so many important considerations."[87] It examined "the condition in which those States were left at the close of the war; the measures which have been taken towards the reorganization of civil government, and the disposition of the people towards the United States."[88] The Committee also observed that the recently ratified Thirteenth Amendment had made a "large proportion" of the Southern population "instead of mere chattels, free men and citizens."[89] Those freedman had "remained true and loyal, and had, in large numbers, fought on the side of the Union."[90] The Committee declared it "impossible to abandon them, without securing them their rights as free men and citizens."[91] To do otherwise would have caused "[t]he whole civilized world" to cry out over "such base ingratitude" which the Committee stated was "offensive to all right-thinking men."[92] The Committee thus examined "what could be done to secure their rights, civil and political."[93]

In the former Confederate States, "vindictive and malicious hatred" prevailed against the former slaves.[94] "[A]cts of cruelty, oppression, and murder" occurred against the freedmen "which the local authorities [were] at no pains to prevent or punish."[95]

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[84] *See* David P. Currie, *The Reconstruction Congress*, 75 UNIV. CHI. L. REV. 383, 384–85 (2008).
[85] *Id.* at 386.
[86] Currie, *supra* note 83, at 385.
[87] H.R. REP. NO. 30-39, pt. I, at VII (1866).
[88] *Id.*
[89] *Id.* at XIII.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.* at XVII.
[95] *Id.*

Witnesses before the Committee testified about private violence targeting the exercise of free speech. The Reverend William Thorton, a black Baptist minister in Virginia, informed the Committee that he mentioned President Lincoln's assassination in a sermon, after which a white man threatened to "break up [his] church."[96] A black couple had each received thirty-nine lashes simply for attending Reverend Thorton's service.[97] After another public meeting, Reverend Thorton heard that a white man had threatened to murder him "first chance."[98] A freedman from Virginia testified that the former Confederates would "kill anyone" who sought to "establish colored schools."[99] The ex-rebels patrolled the freedman's "houses just as formerly," so they could not hold meetings for education.[100] Similarly, black people were "afraid to be caught with a book."[101]

A northern reporter who traveled throughout the Carolinas and Georgia testified about a conversation he had with an ex-Confederate officer in Georgia.[102] The ex-officer concluded, "[t]here isn't any freedom of speech here or anywhere in the State, unless you speak just as the secessionists please to let you."[103] He had made "a speech on last Fourth of July" that the country had previously "been the land of the oppressed and the home of the slave."[104] He also said that he "hoped the war had made it possible for men to be free without regard to color."[105] That cautious speech sufficed "to kill [him] politically in [his] county."[106] He feared that writing a letter to a newspaper expressing his views would also kill him literally.[107] He predicted he would "be shot before to-morrow morning if [he] were to publicly say what" he told to the journalist.[108] The ex-captain also predicted the Black Codes,

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[96] H.R. REP. NO. 30-39, pt. II, at 53 (1866).
[97] *Id.*
[98] *Id.*; *accord id.* at 8 (a "candid rebel gentlem[a]n of Alexandria," Virginia said, "Sooner than see the colored people raised to a legal and political equality, the southern people would prefer their total annihilation."); *id.* at 18 (testimony that Virginians in general "despise the freedmen . . . all they want is for the military to be removed and they will handle them roughly").
[99] *Id.* at 55.
[100] *Id.*
[101] *Id.*
[102] *See* H.R. REP. NO. 30–39, pt. III, at 170–74 (1866).
[103] *Id.* at 175.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*

stating his belief that when the federal troops left, "three-fourths of the counties in [Georgia] would vote for such a penal code as would practically reduce half the negroes to slavery in less than a year."[109] He warned that "there would be a reign of terror in a month."[110]

In Louisiana, the police shut down black religious meetings held after nine pm, and in some places, worshippers were violently and forcibly jailed[111] A Union general had to require that black churches "were to be equally protected and respected in the enjoyment of their proper privileges."[112] Also in Louisiana, a federal official observed that private violence prevented the newly freed slaves from receiving an education.[113] The official noted that freedmen throughout the South spent what free time they had learning to read and write, including, "a grandmother who was then reading in the Second Reader."[114] But "outside of the military posts the rebels were breaking up the colored schools, intimidating the teachers, and driving some of them away."[115]

Witnesses also discussed the new Black Codes in the South. The former assistant commissioner of the Freedmen's Bureau in South Carolina testified that the Palmetto State's new laws would deprive freedmen of most of their rights and "reduce them as near to a condition of slaves as it will be possible to do."[116] The assistant commissioner of the Bureau of Refugees and Freedmen in Louisiana reported that the "leading officers of the State" had replaced the word "slave" in "the old black code of the State" with the word "negro."[117]

The Black Codes "imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value."[118] The Black Codes burdened speech. For example, a Mississippi law prohibited any freedman

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[109] *Id.*
[110] *Id.*
[111] H.R. REP. NO. 30-39, pt. IV, at 79 (1866).
[112] *Id.*
[113] *See id.* at 114–17.
[114] *Id.* at 117.; *accord id.* at 55 (223) (black people were "anxious for education"); Booker T. Washington *Up From Slavery*
[115] *Id.* at 117. *But see id.* at 130 (289) (General Robert E. Lee testifying that Virginians "have exhibited a willingness that the blacks should be educated, and they express an opinion that that would be better for the blacks and better for the whites").
[116] H.R. REP. NO. 30-39, pt. II, at 216–18 (1866).
[117] H.R. REP. NO. 30-39, pt. IV, at 78–79 (1866).
[118] Slaughter-House Cases, 83 U.S. 36, 70 (1872).

from "exercising the function of a minister of the Gospel, without a license from some regularly organized church."[119]

To remedy the problems in the former Confederacy, the Joint Committee resolved that Congress pass and propose to the states the Fourteenth Amendment with its prohibition on "deny[ing] to any person . . . the equal protection of the laws."[120] Congress complied, and the requisite number of states (not without some chicanery) ratified the Amendment by 1868.[121]

2. The KKK Act Created the Remedy for the Denial of Equal Protection Because of Speech

The foundation of our government lies on the premise that government exists to protect the people. William Blackstone linked the allegiance of a subject to the King's duty to protect that subject.[122] Under that framework, protection refers both to the law enforcement and remedial functions of government.[123] The Joint Committee proposed the Fourteenth Amendment to redress the state of lawlessness that endangered freedmen and Union sympathizers in the Reconstruction Era South. The problem was not that the Southern states lacked laws protecting all people, but rather, that "[s]heriffs, having eyes to see, see not; judges, having ears to hear, hear not."[124]

Protection of the law just as importantly extends to the remedial function of the law. If the government fails in its law enforcement duty, the wronged has a right to a remedy. Without a remedy, William Blackstone concluded that "in vain would rights be declared, in vain directed to be observed."[125] As Chief Justice Marshall famously declared, "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."[126] So if someone trespasses on another's land, the protection of the laws allows the owner to bring suit for "damages for the invasion."[127]

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[119] 1865 Miss. Laws 165–66.
[120] U.S. CONST. amend. XIV, § 1.
[121] *See* Douglas H. Bryant, Commentary, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 563–75 (2002).
[122] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 159 (1893).
[123] *See generally* Green, *supra* note 79 (collecting exhaustive historical and contemporaneous sources supporting this reading).
[124] Mitchum v. Foster, 407 U.S. 225, 241 (1972) (citation omitted). Rep. Perry made this statement in debate about the Ku Klux Klan Act of 1871, which "enforce[d] the provisions of the Fourteenth Amendment."
[125] BLACKSTONE, *supra* note 121, at 56.
[126] Marbury v. Madison, 5 U.S. 137, 147 (1803).
[127]BLACKSTONE, *supra* note 121, at 56.

Even after the ratification of the Fourteenth Amendment, laws remained unenforced, and wrongs persisted unremedied in the South. The rise of the Ku Klux Klan spurred Congress to enact the eponymous Act of 1871 (also known as the Civil Rights Act) which contained what is now 42 U.S.C. § 1983.[128] Congress passed the Act under its Section 5 power to enforce the Fourteenth Amendment.[129]

The KKK Act, "grew out of a message sent to Congress by President Grant on March 23, 1871."[130] The President "requested emergency legislation" because "a virtual state of anarchy existed in the South and . . . the states were powerless to control the widespread violence."[131]

The legislative debates over the KKK Act reveal how many of the Fourteenth Amendment framers understood the Equal Protection Clause to apply.[132] It "conferred" "a new right": "the right to the protection of the laws."[133] That right became "the most valuable of all rights, without which all others are worthless and all rights and all liberty but an empty name."[134] And it applied both to State "commission" and "omission."[135]

Congress saw both a failure of the states to enforce their laws and failures of the state courts to remedy wrongs. States denied protection of the laws not only to the freedmen but also to white people sympathizing with the Union.[136] And the 42nd Congress was especially concerned with free speech.

The violence targeted Black people and Union supporters based on their political opinions. Representative John Coburn of Indiana lamented the "injury of a certain class of citizens entertaining certain political principles."[137] In the South, "a certain class of high crimes [was] not noticed," the perpetrators of which were "not arrested, put on trial, or punished."[138] The result: "no liberty of speech or suffrage and no protection to life and property in those places as to all equally."[139] Representative

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[128] *See* Monroe v. Pape, 365 U.S. 167, 172–73 (1961).
[129] *Id.* at 171.
[130] *Id.* at 172.
[131] *The Background of Section 1983*, 90 HARV. L. REV. 1137, 1153 (1977).
[132] *See* Green, *supra* note 79, at 227–29.
[133] CONG. GLOBE, 42nd Cong., 1st Sess. 608 (1871).
[134] *Id.*
[135] *Id.*
[136] *See* S. REP. NO. 1-42, at XXII (1871).
[137] CONG. GLOBE, 42nd Cong., 1st Sess. 457 (1871).
[138] *Id.*
[139] *Id.* ("[T]he very height of criminal enormity is reached when these banded outlaws, with murderous hands, strike at innocent and helpless men for merely entertaining certain political opinions.").

Clinton Cobb of North Carolina discussed testimony that people were whipped and murdered with "[n]o motive … except 'political animosity.'"[140]

Congress had before it another exhaustive report from another committee, this one to investigate alleged outrages in the South, particularly in North Carolina.[141] That Senate Committee heard testimony that the KKK took the president of the Union League, a black man, from his house at one in the morning and hanged him.[142] If the KKK thought a "man ought to be killed for being too prominent in politics, they would have a meeting and pass sentence upon him."[143]

A Republican newspaper editor in Asheville, North Carolina, told the Committee that he had sold his newspaper because of intimidation for his political opinion.[144] The editor relayed the story of a Black minister who was "beaten very severely" and ordered to leave the county.[145] The editor "feared to give free expression to [his] views as a political man, or as an editor" because he had been threatened "with injury if [he]persisted in giving expression to [his] views."[146] The authorities did not make any arrests over these events.[147] In 1869, General Alfred Terry "demand[ed] the interposition of the National government" to protect "freedom of speech and political action" in Georgia because many areas of the state had "practically no government," frequent murders, no efforts to punish the murderers, and the abuse of freedmen was "too common to excite notice."[148]

At that time, the lower federal courts did not have "general federal-question jurisdiction."[149] So, state courts had to vindicate federal rights. But state courts did not or could not provide adequate redress in these cases. For example, the Committee referenced a North Carolina law that made the act of going out in a mask (as KKK members would do) a felony.[150] But

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[140] *Id.* at 439.
[141] *See generally* S. REP. NO. 1–42 (1871).
[142] *Id.* at VI.
[143] *Id.* at IX.; *see also id.* at XVIII (The Klan engaged in "whipping of negroes" and "threats of violence to prominent men, because of their political opinions").
[144] *See id.* at 102–04.
[145]. *See id.* at 103.; *accord id.* at XXII ("keeping a Sunday school for colored children" served "as a sufficient reason" for being hung, whipped, or beaten).
[146] *Id.*
[147] *Id.* at 104.
[148] *Id.* at L.
[149] *See* District of Columbia v. Carter, 409 U.S. 418, 427 (1973).
[150] S. REP. NO. 1–42, at XXII (1871).

grand juries largely refused to return indictments for violations and other crimes based on political opinions, prosecutors would not prosecute the indictments, and ultimately, juries would not convict the offenders.[151]

> In nine cases out of ten, the men who commit the crimes constitute or sit on the grand jury, either they themselves, or their near relatives or friends, sympathizers, aiders, or abettors; and if a bill is found, it is next to impossible to secure a conviction upon a trial at the bar.[152]

That made it "utterly impossible to secure anything like a fair trial."[153] The Committee concluded that it would be "idle to say that in the past the victims of violence have been protected, or public safety secured by the vindication of the law and the punishment of the guilty."[154] Despite the "many hundreds, if not thousands" of crimes committed, not a single member of the KKK had been convicted in North Carolina.[155]

This evidence revealed to Congress the need for remedial legislation. Representative (later President) Andrew Garfield recognized that [T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.[156]

So, Congress recognized "an action at law, suit in equity, or other proper proceeding for redress" of "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States.[157]

3. Section 1983 Creates a Negligence-style Cause of Action for Violations of the Equal Protection Clause

The "elements of the most analogous tort as of 1871 when § 1983 was enacted" determine the cause of action for a violation of the Equal Protection Clause.[158] That Clause imposes a "duty" on state governments to protect, and duty is negligence's calling

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[151] *See id.* at XXIII.
[152] *Id.* at XXIV–XXV.
[153] *Id.* at XXIV.
[154] *Id.* at XXVI.
[155] *Id.* at XXXI.
[156] CONG. GLOBE, 42nd Cong., 1st Sess. 153 (1871).
[157] 42 U.S.C. § 1983.
[158] Thompson v. Clark, 596 U.S. 36, 43 (2022).

card. By 1871, the tort of negligence was well-established. It included actions against sheriffs for negligent escapes of debtors and bailment actions. While early negligence cases may have imposed a type of strict liability, the mid-1800s cases had shifted to a duty-centric analysis.[159] A sheriff had a "duty" to "take care and keep the prisoner."[160] So the Missouri Supreme Court "scarcely" had "a doubt" that a sheriff had acted negligently when he exited a canoe before the detained debtor and walked "thirty or forty yards" away only to turn around to see the debtor "pushing the canoe out in the stream."[161]

The text of KKK Act also informs the contours of an Equal Protection Clause violation. Section 3 of that law "deem[s] a denial … of the equal protection of the laws" under the Fourteenth Amendment when a "state" is "either … unable to protect" or "from any cause, fail in or refuse protection" from "insurrection, domestic violence, unlawful combinations, or conspiracies" that "so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any" right[162] That language indicates that the Equal Protection Clause does not have any purpose requirement. The modifier "equal" could suggest such a requirement. For example, the state must protect a certain population but then consciously deny protection to another segment. But the KKK Act makes actionable a denial to "any portion" of the people from "any cause." State actors need not intend to deny someone the equal protection of the laws for their conduct to violate the Equal Protection Clause.

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[159] *See* Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L. J. 1127, 1146–55 (1990).

[160] Warberton v. Woods, 6 Mo. 8, 11 (1839).

[161] *Id.* at 9, 11; *See also* Teasdale v. Hart, 2 S.C.L. 173, 176 (S.C. 1798) (stating that in taking bail, sheriff must act with "reasonable degree of diligence"); *Moore v. Westervelt*, 27 N.Y. 234, 239 (N.Y. 1863) (sheriff as bailee "must exercise ordinary diligence . . . which is the care that every common person of prudence, and capable of governing a family, takes of his own concerns"); Price v. Stone, 49 Ala. 543, 551 (1873) (stating that "sheriff is only required to use such care and diligence about keeping the boat as a person of ordinary discretion and judgment might reasonably be expected to use in reference to his own property").

[162] Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, § 3 (1871) (current version at 42 U.S.C. § 1983).

4. Defining the Duty of Equal Protection as it Applies to Free Speech on College Campuses

How does the duty to protect speech apply on college campuses? Some have taken an expansive view.[163] The Fourteenth Amendment's text and standard tort-law principles delineate the parameters of the equal-protection right while only holding colleges responsible for their unreasonable actions. In sum, a college official must enforce extant laws and policies against those who disrupt events as a reasonable official would under the circumstances.

As the text of the Equal Protection Clause requires, the government must provide the "protection of the laws." It cannot deprive anyone of the protection of the extant laws; it must enforce those laws. But the duty to protect does not turn the government into an arbiter of any speech dispute between citizens. Laws generally do not and should not prohibit verbal jousting between students. Neither should the state interject itself in such personal, pure speech disputes.

Conduct that violates state law or a public university's policies (for example, against assault), triggers the equal protection requirement. The proper analysis—as a tort duty—will be fact-intensive. Determining whether the government failed to provide equal protection requires an examination of whether it acted with reasonable care. The government will not become liable for all failures to protect. The factors for determining reasonableness include government knowledge, the allocation of government resources, the nature of the forum, and the severity of the disruption.

a. Government Knowledge

The "foreseeable likelihood that the person's conduct will result in harm" and "the burden of precautions to eliminate or reduce that risk of harm" inform the government's equal protection duty. For campus events scheduled in advance, the university will have notice that its failure to take precautions could result in harm. That's especially true in cases for which the college has noticed that the speaker has suffered hostility before and others on campus have objected to the speaker's presence or tried to organize a counter-event. The justification for advance notice requirements frequently imposed by colleges themselves allows the college to research the speaker and assess potential

[163] *See, e.g.*, Green, *supra* note 79, at 293–94.

security requirements. Once undertaking a reasonable assessment of the risk, colleges must provide the appropriate security called for by that risk assessment.

Spontaneous speech events modify the government's duty. Colleges cannot be expected to know what is occurring at all places on the entire campus at all times. But they must understand that the outdoor areas of campus—at least for their students—serve as a traditional public forum, that colleges are the marketplaces of ideas, and that students very likely are engaging in speech some find controversial. They thus cannot plead ignorance or helplessness in the face of a reaction to spontaneous speech. Colleges must still provide adequate security, as part of their state duty to furnish protection of the laws. That protection can include patrols of police or security officers, cameras in high-trafficked areas, and educating students on the respect that should be given for the freedom of all to express their views.[164]

College campuses are often discrete and limited spaces. The government thus has more control over what happens on campus. So, it correspondingly has a higher duty of policing conduct adverse to free speech activities. That duty extends to discipline for students who interfere with others' rights.[165] As the Reconstruction-era evidence indicates, failing to punish wrongdoers qualifies as a denial of equal protection. It fails to provide ex-post protection to the victims. Similarly, colleges must appropriately discipline for otherwise unlawful infringements on free speech rights.

b. Allocation of Resources

Not funding or underfunding campus police or security could violate the duty to protect. Colleges often plead that they do not have the resources to protect those on their campuses. Those pleas are unavailing (and often counterfactual). The government has the foundational duty to protect. A college that

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[164] *See, e.g.*, N.C. GEN. STAT. § 116-302 (2017) ("All constituent institutions of The University of North Carolina shall include in freshman orientation programs a section describing the policies regarding free expression consistent with this Article.").

[165] *See, e.g.*, N.C. GEN. STAT. § 116-300(7) (2023) ("The constituent institution shall implement a range of disciplinary sanctions for anyone under the jurisdiction of a constituent institution who substantially disrupts the functioning of the constituent institution or substantially interferes with the protected free expression rights of others, including protests and demonstrations that infringe upon the rights of others to engage in and listen to expressive activity when the expressive activity has been scheduled pursuant to this policy or is located in a nonpublic forum.").

doesn't have the resources to protect its students against assault or theft fails to complete its basic mission. Just so, a college that doesn't protect free speech fails, too. If it doesn't have adequate resources to protect, a university must increase its security budget or coordinate with other law enforcement to help.

Universities must also properly allocate resources for discrete events. Even if a college in general properly funds its security or enforcement arms, those resources are wasted if college officials don't intervene when disruptors interfere. This scenario can arise in two ways: (i) events for which the university has adequate notice and security resources but refuses to provide sufficient security for a specific event when officials know disruption or violence is likely to occur, and (ii) events for which the university has adequate security on hand but orders the police to stand down and allow students to shut down an event. These two situations reflect an abject failure to ensure equal protection of the laws and could subject the university to First Amendment liability. The university has the necessary resources on hand but refuses to enforce its laws or policies, likely because it does not want to protect potentially unpopular viewpoints.

c. The Nature of the Forum

In general, the more public the First Amendment forum, the more a college has notice that it must provide equal protection for speech. A campus's generally accessible grassy areas, sidewalks, and streets all serve as traditional public fora.[166] Colleges hold these places "in trust for the use of" their students "for purposes of assembly, communicating thoughts between [students], and discussing public questions."[167] The very nature of the outdoor areas on campus put colleges on notice that they must protect against attacks on free speech rights.

A college also has a strong duty to protect speech in locations reserved for events. Indoor areas like lecture halls generally would be either designated or limited public fora.[168] University policies almost universally require reservations for events in indoor areas, including for large speaking events. Those reservations place the government on notice of its duty to protect, which means that reserved events impose an even greater protection duty on colleges than for spontaneous speech in a

[166] *See* Minn. Voters All. v. Mansky, 585 U.S. 1, 11 (2018).
[167] Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983) (citation omitted).
[168] *See* Widmar v. Vincent, 454 U.S. 263, 267 (1981).

traditional public forum. Student groups also often hold meetings in indoor locations, but controversy from meetings is less likely. So, unless the government has notice of potential disruption or has failed to allocate resources, its duty to protect is correspondingly reduced.

d. The Severity of the Disruption

The severity—both anticipated and actual—heightens the government's duty to protect speech. No college official has perfect foresight about what events will attract disruptors. But certainly an increasing level of public debate or hostility concerning a speaker (like with a high-profile and controversial speaker such as Ben Shapiro), correspondingly increases a university's obligation to protect speech.

The level of disruption at the event itself also factors into the calculus. The First Amendment protects the right to dissent just as much as it protects the right to hold an event. And universities should not be quick to regulate the marketplace of ideas. But when polite disagreement, such as a tough question during a question-and-answer period or a protest outside the event, turns into preventing a speaker from delivering his message, the university must intervene.

State laws protecting free speech on college campuses have recognized the competing First Amendment concerns. They generally require colleges to step in when a disruptor "substantially interferes with the protected free expression rights of others, including protests and demonstrations that infringe upon the rights of others to engage in and listen to expressive activity when the expressive activity has been scheduled pursuant to this policy or is located in a nonpublic forum."[169] The model legislation for those free speech laws defines proscribed disruptions as conduct akin to a disruption of the peace.[170] This provides an accessible rule colleges can use to determine when they need to act. They can look to conduct traditionally prohibited in exercising their disciplinary authority. The move from protected protest to conduct that substantially interferes with free speech triggers a college's duty to protect.

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[169] § 116-300(7).

[170] *See Forming Open and Robust University Minds (FORUM) Act*, AM. LEGIS. EXCH. COUNCIL, https://alec.org/model-policy/forming-open-and-robust-university-minds-forum-act/ (Dec. 26, 2018).

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The Equal Protection Clause means colleges must enforce extant law and policies. It doesn't require them to adopt new laws and policies. As with the situation in the South post-Civil War, the problem is not that necessary laws and policies don't exist, but that the responsible officials don't enforce or selectively enforce those laws and policies. Existing laws prohibit assault, breach of the peace, and other disruptive conduct. All universities have a code of conduct regulating relevant behavior. The Equal Protection Clause simply means that colleges must give *all* their students the protection those laws and policies confer.

CONCLUSION

Our nation's public universities aren't serving their proper role as marketplaces of ideas. Even when college officials themselves don't censor student speech, they will turn a blind eye or stand idly by while others do so. When their failure to act becomes retaliation or deliberate indifference to free speech, students can hold them responsible under the First Amendment. So, too, when officials refuse to enforce laws and policies to prevent disruption of campus speech, they violate the Fourteenth Amendment.