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Campus Free Speech in the Mirror of Rising Anti-Semitism

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ARTICLE

CAMPUS FREE SPEECH IN THE MIRROR OF RISING ANTI-SEMITISM

HARRY G. HUTCHISON*

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I. PREAMBLE

The United States Supreme Court's freedom of speech jurisprudence—whether applied in the public square or on campus—remains muddled. This confusion mirrors the fact that "[t]here are few hard and fast rules."[1] The Court has called freedom of expression—verbal and nonverbal behaviors expressing a person or group's opinion, point of view, or identity[2]—"the matrix, the indispensable condition, of nearly every other form of freedom."[3] Channeling liberalism's ideological ambitions, which specify that the right to liberty manifests itself as freedom of conscience and free speech, freedom of expression is seen by many as a moral and utilitarian right,[4] a "constitutional lodestar" on which democracy itself is grounded.[5] Despite evidence that liberalism has failed,[6] its foundational goals have

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1. Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. REV. F. 20, 20 (2019) (showing prior restraints on, and prohibitions of, speech based on viewpoints were rarely permissible).

2. ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 22 (2017).

3. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

4. WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 67–74 (2004) (discussing John Stuart Mill, Austin, and Godwin).

5. Stephen M. Feldman, *Free Speech and Free Press*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 629, 629 (Mark Tushnet et al. eds., 2015).

6. *See generally* PATRICK J. DENEEN, WHY LIBERALISM FAILED 1–20 (2018) [hereinafter DENEEN, WHY LIBERALISM FAILED] (explaining how "widespread anger and deepening discontent have arisen from the spreading realization that the vehicles of our liberation have become iron cages of our captivity").

become inseparable from the belief that the quest for "freedom" *qua* "freedom," when disconnected from the deliberate pursuit of the "good,"[7] advances the engine of human progress.[8] In an age of religious and ethnic intolerance derived from movements founded on rival faiths that promise redemption for their followers,[9] claims championing speech, however anagogical or allusive of secular salvation, spark the following three observations.

First, rather than seeing freedom as a communal enterprise originating in the *oikos,* as part of "the belonging together of all things in the good,"[10] the lonely pursuit of freedom disconnected from the "good" is seen as the reception of gifts from one's self. In this view, one's self constitutes a random collection of molecules that tumble through the cosmos[11] while pursuing liberation and gathering and cultivating experimental impulses.[12] Summoning a therapeutic sensibility, which conflates democracy with the "democratization of 'self-esteem,'"[13] the unconstrained pursuit of freedom, however indispensable, when severed from a connection to the good, may be metaphysically impoverished and philosophically "diabolical."[14] Second, as speech—epitomizing the transmutation of invisible thought—becomes

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7. For one conception of the "good," see IRIS MURDOCH, THE SOVEREIGNTY OF GOOD 94–95 (ARK Paperbacks 1985) (1970) (suggesting we are not really in doubt about the direction in which the good lies; it is that which every soul pursues and is the source of knowledge and truth).

8. *See* CHEMERINSKY & GILLMAN, *supra* note 2, at 26 (discussing the connection between government censorship and societal stagnation). *But see* DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 43–63 (showing the pursuit of freedom, change, reform, and progress as part of the quest for liberal autonomy has resulted in titanic inequality, thus rendering this pursuit an illusion).

9. *See, e.g.*, MARY EBERSTADT, IT'S DANGEROUS TO BELIEVE: RELIGIOUS FREEDOM AND ITS ENEMIES 2 (2016) (noting the rise of Nazism, communism, and totalitarianism).

10. D. C. SCHINDLER, FREEDOM FROM REALITY: THE DIABOLICAL CHARACTER OF MODERN LIBERTY 9 (2017) (suggesting freedom, properly understood, has the symbolical sense of the belonging together of all things in the good).

11. JAMES K. A. SMITH, ON THE ROAD WITH SAINT AUGUSTINE: A REAL-WORLD SPIRITUALITY FOR RESTLESS HEARTS 75 (2019) [hereinafter SMITH, ON THE ROAD WITH SAINT AUGUSTINE] (quoting Greta Gerwig's film, *Lady Bird* (2017)).

12. Harry G. Hutchison, *Chasing Shadows: The Economic and Noneconomic Thrust of BDS*, 1 INT'L COMPAR., POL'Y & ETHICS L. REV. 205, 227 (2018) [hereinafter Hutchison, *Chasing Shadows*] (internal footnotes omitted).

13. CHRISTOPHER LASCH, THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY 6–7 (1995) [hereinafter LASCH, THE REVOLT OF THE ELITES].

14. *See, e.g.*, SCHINDLER, *supra* note 10, at 1–4 (noting the modern separation of freedom from the notion of the good signifies the flight from the classical to the medieval approaches and then to the modern period's acceptance of unconstrained liberty, even though freedom must be understood in ontological terms cognizing the connection between freedom and the good and must see freedom in relation to the *other* as a vital component of freedom).

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visible as it is shaped by a collection of molecular particles in a randomized pattern that is orthogonal to any organizing principle, it becomes central to unconstrained liberty and thus occupies a "preferred place"[15] in the pantheon of constitutional jurisprudence.

Third, the blossoming ontological separation of freedom from the pursuit of the "good" or, alternatively phrased, rituals representing "the caves and hollows of what had worked before,"[16] has significant consequences. For one, premised on the claim that judges have a "particular duty and special duty to exhibit courage in times of mass panic," one can argue expressive communication should be given greater weight when balanced against reasons typically offered to suppress or punish speech.[17] This inference gives rise to the assertion that "a commitment to civil liberty in general—and the freedom of speech in particular—requires 'civic courage' of all government officials,"[18] many of whom have attained membership in a new class of cosmopolitan professional elites.[19] Membership in this new class, which includes academics, commentators, and judges who are fortified by their rising insularity, matches data showing political ideologies have lost touch with the ordinary concerns of citizens.[20] Losing touch enables newly enfranchised elites—aptly referred to as "liberalocrats"[21]—to disconnect from the past[22] and the notion of place,[23] just as "cosmopolitan openness to the world is perfectly consistent with picking and choosing among the options you find" except those that are next door.[24] Intoxicated by their

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15. Thomas v. Collins, 323 U.S. 516, 529–30 (1945).

16. LESLIE JAMISON, THE RECOVERING: INTOXICATION AND ITS AFTERMATH 196–97 (2018).

17. Ronald J. Krotoszynski, Jr., *The Clear and Present Dangers of the Clear and Present Danger Test:* Schenck *and* Abrams *Revisited*, 72 SMU L. REV. 415, 417 (2019) (footnotes omitted).

18. *Id.*

19. *See* LASCH, THE REVOLT OF THE ELITES, *supra* note 13, at 5–6 (explaining the rise of a new class of elite cosmopolitans in revolt against Middle America who have lost sight of the notion of home, patriotism, and the *oikos*, and replaced it with a "tourist's view of the world").

20. *Id.* at 80.

21. *See* DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 131–43 (describing the rise of the new aristocrats).

22. CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS 7 (2018) [hereinafter LASCH, THE CULTURE OF NARCISSISM].

23. *See* LASCH, THE REVOLT OF THE ELITES, *supra* note 13, at 5–6 (noting young people refuse to stay in, or return to, their hometowns and often perceive them as backward or old-fashioned).

24. *See* KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS 5 (2006) (discussing the international lens through which various eighteenth and nineteenth century authors approached their work).

insulation from the common life,[25] provoked elites engender a shift in plausibility structures fueled by contempt for earlier notions of patriotism, democracy, and the importance of the heartland.[26] This shift authorizes them, as a new aristocracy of brains, to replace spurned ideas with cosmopolitanism, multiculturalism, and a "tourist's view of the world"[27] that finds ethics and values in an atomized planet inhabited by strangers.[28] Predictably, cosmopolitan commentators, after elevating freedom of expression above other freedoms and goals, are equipped to "see the Enlightenment not simply as a secularist movement but as Epicurean, a modern retrieval of an ancient philosophy."[29]

This Epicurean flight from a common constellation of views and interests is emblematic of modernity's struggle with memory, or rather its penchant for forgetting.[30] This flight culminates in political, social, and cultural amnesia that yields compounding problems.[31] This multiplicity of disturbances is attended by the birth of strange, ahistorical beings who are pastless, futureless, atomized, and born anew at every instant.[32] A compound of disturbances arising from such utopian pursuits also gives rise to a Sisyphean challenge to rationality and reality.[33] Multiplication quickens against a backdrop wherein modern elites insist on the perfectibility of man, nature, and society grounded in a trust in human ability and power, as part of a "belief in amelioration without limit, of mutability without *telos*, [and] of progress without boundary."[34] On the other hand, the fate of modern

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25. *See* LASCH, THE CULTURE OF NARCISSISM, *supra* note 22, at 3–4 (explaining how people relentlessly take competitive individualism and the pursuit of happiness to their negative extremes).

26. LASCH, THE REVOLT OF THE ELITES, *supra* note 13, at 5–6.

27. *Id.*

28. APPIAH, *supra* note 24, at 155–74 (finding cosmopolitanism's central concern is meeting the needs of strangers).

29. N. T. Wright, *Loving to Know*, FIRST THINGS (Feb. 2020), https://www.firstthings.com/article/2020/02/loving-to-know [perma.cc/3TH5-4UHG].

30. PAUL CONNERTON, HOW MODERNITY FORGETS 1–2 (2009).

31. *See id.* at 2 (discussing how younger generations have little relationship to the public past through diminished social mechanisms present in earlier generations).

32. LASCH, THE CULTURE OF NARCISSISM, *supra* note 22, at 11 (quoting Donald Bartheleme's suggestion that Marivaudian beings have no sense of history).

33. *See, e.g.*, SMITH, ON THE ROAD WITH SAINT AUGUSTINE, *supra* note 11, at 38 (showing Sisyphean joy is predicated on the impossibility of arriving at a specific destination as modern man inhabits a universe divested of illusions leaving man an alien, a stranger in exile without memory and without hope of some promised land).

34. PATRICK J. DENEEN, DEMOCRATIC FAITH, at xiv, 5 (2005).

Jews sharply contradicts this faith.[35]

By fleeing common notions of language and values necessary to sustain reality and pursue true freedom[36] and embracing narcissism and its accompanying depletion of the psyche made manifest by a devaluation of the past,[37] elite commentators can ignore harm sprouting from the promised land of unconstrained freedom. Issuing forth from the pursuit of unconstrained freedom inclusive of new possibilities and newly found interpretations of the First Amendment, unquenchable celebrations of expressions—which transgress the bounds of orthodoxy—surface. Consistent with this pursuit, it appears that "the overriding objective at all times should be to equip the [F]irst [A]mendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent[.]"[38]

The intensifying crusade to embrace unorthodoxy as freedom's atomistic and highest goal[39] enables some to see campus speech freedom as "a fundamental American freedom and a human right, and there [is] no place that this right should be more valued and protected than America's colleges and universities.[40] A university exists to educate students and advance the frontiers of human knowledge, and does so by acting as a 'marketplace of ideas' where ideas compete."[41] This competition-based and progress-infused[42] aspiration provides a platform to defend maximum freedom of speech against countervailing efforts to fight students'

35. RUTH R. WISSE, IF I AM NOT FOR MYSELF: THE LIBERAL BETRAYAL OF THE JEWS, at ix (1992) (discussing the desacralization of the Cathedral of St. Genevieve and repurposing it as a space dedicated to the fallen heroes of the French Revolution).

36. Harry G. Hutchison, *Affirmative Action: Between the Oikos and the Cosmos*, 66 S.C.L. REV. 119, 122 (2014) (internal citation omitted) (reviewing RICHARD SANDER & STUART TAYLOR, JR. MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP AND WHY UNIVERSITIES WON'T ADMIT IT (2012)) (suggesting any tempered discussion of affirmative action requires an agreement on basic facts, values, and an overall desire to pursue what is good and just).

37. *See, e.g.*, LASCH, THE CULTURE OF NARCISSISM, *supra* note 22, at 6–7 (discussing society's lackadaisical view of history and narcissistic tendencies).

38. Vincent Blasi, *The Pathological Perspective, and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

39. *See, e.g.*, CARLE C. ZIMMERMAN, FAMILY AND CIVILIZATION 269–84 (F. Stuart Chapin ed., 1947) (demonstrating this shift is central to cultural, sociological, jurisprudential, and political developments, menacing the family and civilization).

40. *Mission*, FIRE, https://www.thefire.org/about-us/mission/ [https://perma.cc/EJU2-3BX2].

41. *Id.*

42. *Id.*

marginalization[43] in higher education's domain.[44] Countervailing endeavors include: (A) grappling with anti-Semitism as a form of harm to one's racial or ethnic identity[45] in a larger fight to preclude bigots from promoting racial, ethnic, and religious hatred,[46] and (B) saving the West from its current crisis of meaning.[47] Other countervailing efforts may be provoked by the suspicion that universities have a mission, which is not fully compatible with the exercise of unconstrained speech.[48]

Part II introduces First Amendment doctrine, case law, and rules that may implicate public universities. Part III examines the inception of modern First Amendment canons coupled with an often overlapping and speculative inspection of contemporary doctrinal innovations. Modern analyses of free speech, whether sustainable or not, and whether unavoidably complex or not, are generated by, and interwoven with, the notion that speech instrumentally creates the conditions necessary for self-rule within a republican form of government whose legitimacy depends on the consent of the governed.[49] Later doctrinal innovations concentrated on further advancing freedom of speech rights. These moves reflect the unraveling of classic conceptions of freedom of speech in favor of a virtually unlimited right to freedom of expression. It also reflects a shrinkage of a

43. *See, e.g.*, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 656 (1999) (noting Title IX precludes the exclusion of any person, based on sex, "from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under any education program or activity receiving Federal financial assistance" (citing 20 U.S.C. § 1681(a) (2018))).

44. *See* CHEMERINSKY & GILLMAN, *supra* note 2, at 153 (stating an "emphasis on free speech values is a 'self-serving election' away from efforts to fight racism, everyday exclusion, and the marginalization of underrepresented students in higher education").

45. *See, e.g.*, Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J. 837, 839 (2007) [hereinafter Marcus, *Anti-Zionism as Racism*] (arguing "anti-Semitic harassment at federally assisted programs and activities. . . constitutes racial discrimination prohibited by Title VI when sufficiently severe, pervasive, and objectively offensive as to deny equal educational opportunities to Jewish students," and indicating the Title VI's prohibition on racial discrimination encompasses anti-Semitism to the same extent as does the Fourteenth Amendment and the Civil Rights Act of 1866).

46. *See* Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 55 (1985) (explaining how democracy in United States of America would suffer if bigots were prohibited from spewing hate on public forums).

47. *See generally* Eric Cohen, *The Message from Jerusalem*, MOSAIC (Jan. 6, 2020), https://mosaicmagazine.com/essay/history-ideas/2020/01/the-message-from-jerusalem/ discussing how "American society faces a deep crisis of meaning to which the city, and the idea, of Jerusalem has an answer . . . needed by Jews . . . and Christians").

48. *Mission*, *supra* note 40.

49. *See generally* Laura Weinrib, *Rethinking the Myth of the Modern First Amendment*, *in* THE FREE SPEECH CENTURY 48 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

common view of democracy and self-government as a counterweight to speech claims that Justice Holmes, Justice Brandeis, and Judge Hand bequeathed to us. This backdrop elevates a question originating from the work of one of America's leading social critics, Professor Lasch: whether democracy, which is currently obsessed with rights and grievances rather than responsibilities and duty, deserves to survive.[50] Such questions loom large over any analysis of liberty and freedom of speech within a constitutional republic. These questions raise still another query: can an increasingly fractured and fissiparous nation recapture a common conception of democracy, a common language with which to settle disputes about democracy's meaning, a consensus regarding the tenets of the First Amendment, and a commonplace understanding of the "good?" Part IV considers the application of the First Amendment doctrine within a university setting. This analysis is complicated because universities are not necessarily public forums, may be subject to academic freedom rules, and pursue missions that are incompatible with the notion of a self-governing polity—a goal that has been foundational for First Amendment rules for decades. Part V offers a conclusion.

II. INTRODUCTION

The First Amendment—even if it properly protects speech in the public square or on university campuses—does not protect every communication.[51] Restrictions on expression can be justified when they countenance conduct threatening the peace and well-being of the State.[52] When expression vitiates a free and robust exchange of ideas or takes a racially defamatory form, which deforms democratic self-government,[53] expression may become indefensible. Similarly, when speech is constitutive, for example, of anti-Semitic harassment, which cannot be defended on

50. *See generally* LASCH, THE REVOLT OF THE ELITES, *supra* note 13, at 86–91 (showing democracy is threatened because Americans are too busy defending their rights while giving short shrift to responsibilities).

51. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952) (discussing the limits on protected expression).

52. *See id.* at 251–66 (explaining how the State has the power to punish utterances directed at a defined group, unless it can be said that such restriction is unrelated to the peace and well-being of the State); *see also* Lasson, *supra* note 46, at 36 (stating how only certain kinds of speech, such as political opinion, are fully protected).

53. *See* Lasson, *supra* note 46, at 39 (suggesting racism becomes a substantive evil both to those directly targeted and indirectly to all other members of society).

either constitutional grounds or via academic freedom rules,[54] claims that such expression is protected is unavailing. Instead, surfacing from the history of extreme propaganda and the necessity of curbing "false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it is presented," the State is compelled to act.[55] Speech claims should be considered in a context that explores whether claims of protection are simply cover for discriminatory animus and behavior. Context is particularly poignant within the arena of anti-Semitic activity because such conduct "remains a disturbing problem in American society. Data show[s] that Jews consistently are the most likely of all religious groups to be victimized by incidents of hate and that such incidents are increasing at an alarming rate."[56] Campuses are not immune to this development.[57] Indeed the number of Jewish students experiencing anti-Semitism on campuses across the United States rose to nearly 75%.[58]

Despite the fact that (a) libelous utterances are not necessarily within the domain of constitutionally protected speech,[59] (b) bigots have twisted the law into a weapon on which to launch a frontal attack on constitutive components of the republic,[60] (c) a plausible distinction exists between speech *per se* and harassment, which rises to the level of discriminatory conduct,[61] and (d) differences exist between private speech as opposed to government speech,[62] often the defense of expansive freedom of speech

54. Marcus, *Anti-Zionism as Racism*, *supra* note 45, at 888–91.

55. *See Beauharnais*, 343 U.S. at 261 (expressing how in the face of a history fraught with extreme religious and racial propaganda, it would be wrong to deny the legislature the opportunity to curb the actions of these groups).

56. *See, e.g.*, Mark Goldfeder, *Why We Should Applaud Trump's Executive Order on Anti-Semitism*, HILL (Dec. 16, 2019, 2:00 PM), https://thehill.com/opinion/civil-rights/474271-why-we-should-applaud-trumps-executive-order-on-anti-semitism [https://perma.cc/FEE8-EE4F].

57. *Id.*

58. *Id.*

59. *See Beauharnais*, 343 U.S. at 266–67 (limiting constitutional protections for libelous statements).

60. *See* James Loeffler, *An Abandoned Weapon in the Fight Against Hate Speech*, ATLANTIC (June 16, 2019), https://www.theatlantic.com/ideas/archive/2019/06/lost-history-jews-and-civil-rights/590929/ [https://perma.cc/96GB-U2W8] (observing university helplessness as "domestic extremist movements masquerade as a political cause").

61. *See, e.g.*, Goldfeder, *supra* note 56 (explaining how speech is protected by the First Amendment, but discriminatory harassment is unprotected).

62. *Id.* (noting the difference between private and government speech, a distinction which frees the government to reduce discrimination in certain context because the government does not engage in viewpoint discrimination violative of the First Amendment when it chooses to fund a program

claims, nonetheless advances. Often it does so beneath a tympanic banner proclaiming "freedom of speech is essential to freedom of thought; it is essential to democratic self-government; and the alternative—government censorship and control of ideas—has always led to disaster."[63] Instead, expansive speech claims ignore contradictory evidence showing that free speech corresponds with its own share of disasters.[64]

Free speech aspirations in the context of a university may be attached to the likely mistaken contention that public universities must be seen as public fora,[65] and thus they are required to "accommodate all viewpoints, no matter how loathsome" they may be.[66] Building and expanding upon the standard account of the origins of the modern conception of the First Amendment,[67] these views advance despite the fact that the modern view, at its inception, was formulated to vindicate democracy as a collective enterprise.[68] To be sure, this conception may have also supplied a platform for transformative political ideas and limited amounts of fuel to expand the constitutional protection of speech in the future.[69]

Whether classic conceptions of the First Amendment should have substantial bearing on regulations promulgated by public universities or not,[70] consideration of the vitality and provenance of free speech claims

advancing permissible goals); *see also id.* ("[W]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." (quoting Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015))).

63. CHEMERINSKY & GILLMAN, *supra* note 2, at 23. *But see* Lasson, *supra* note 46, at 55 (arguing punishing racial defamation despite freedom of speech claims to the contrary has not jeopardized liberty elsewhere).

64. *See infra* Part III.A.

65. S*ee* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983) (explaining how the Court divided property into three categories: traditional public fora, dedicated public fora, and nonpublic fora, for purposes of assessing what type of regulation is proper under the circumstances).

66. Chad Flanders, *Are Universities Schools? The Case for Continuity in the Regulation of Student Speech*, 93 N.Y.U. L. REV. ONLINE 137, 138 (2018).

67. *See, e.g.*, Weinrib, *supra* note 49, at 48–67 (disputing the standard view of the origins of the modern First Amendment).

68. *See, e.g.*, Vincent A. Blasi, *Rights Skepticism and Majority Rule at the Birth of the Modern First Amendment*, *in* THE FREE SPEECH CENTURY, *supra* note 49, at 13, 13–14 [hereinafter Blasi, *Rights Skepticism and Majority Rule*] (suggesting the First Amendment took on a more expansive meaning during the period of 1917–1919 under the leadership of Justice Holmes, Justice Brandeis, and Judge Hand).

69. Weinrib, *supra* note 49, at 65.

70. *See, e.g.*, Flanders, *supra* note 66, at 138–39 (noting expansive First Amendment claims are built upon the appeal to cases dealing with true public forums (streets and parks) and rejecting most speech limitations at the university level and thus Supreme Court decisions on hate speech, fighting words, true threats, and incitement ought to control speech, rather than Court decisions dealing with educational institutions) (footnotes omitted).

implicating universities requires examining the inception of modern First Amendment doctrine. In addition, an examination of contemporary doctrinal innovations ostensibly built upon this inception is warranted as a predicate for determining whether free speech rules apply to universities. The next section considers the emergence of the First Amendment doctrine.

III. FIRST AMENDMENT DOCTRINE

Defining the First Amendment doctrine is a thorny enterprise. Complications arise because early Supreme Court precedents rarely gave content and substance to the First Amendment.[71] Consistent with the Court's intuition: "For over a century after the First Amendment was ratified in 1791, public officials regularly suppressed speech they regarded as threatening, blasphemous, antisocial, and even uncivil, and the judiciary rarely intervened. Until the 1920s, the First Amendment was not considered binding on the states,"[72] but then:

> [t]he [Supreme] Court . . . used the Fourteenth Amendment to incorporate all of the First Amendment freedoms to be applicable to states and local governments. Thus, the scope of First Amendment freedoms protect individuals from actions by local and state governments, as well as from actions by the federal government.[73]

Under some circumstances, private persons or private legal entities may find that sufficient "state action" was exercised so that the First and Fourteenth Amendments can be invoked as a constraint.[74] Although the Court declined to "actively protect the freedom of speech until the end of the first quarter of the Twentieth Century,"[75] the Justices eventually agreed that (A) government could not take sides against virtually any opinion and (B) most expressions of opinion were tolerable or even good, dependent on the judgment that the First Amendment should further the political value of self-government.[76]

71. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1252 (8th ed. 2010) (footnotes omitted); *see also*, Robert C. Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, *in* THE FREE SPEECH CENTURY, *supra* note 49, at 106 (suggesting courts played a little role in protecting free speech before the 1930s).

72. Weinrib, *supra* note 49, at 50.

73. NOWAK & ROTUNDA, *supra* note 71, at 1252.

74. *Id.* at 1252 n.4.

75. *Id.* at 1252.

76. Post, *supra* note 71, at 106–07.

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These moves were advanced by interwar progressives who demanded state neutrality in economic disputes, believed expressive freedom was essential to bolster the exercise of state power,[77] and judged the notion of individual autonomy hopelessly untenable during a period of rapid industrialization.[78] Conservatives who believed that free speech could curb the state's non-neutral meddling in business activities were also engaged in this effort.[79] Consider one perspective on the initiation of the nation's evolving First Amendment discourse followed by a discussion of inventive and innovative speech claims.

A. *Creating the First Amendment's Modern Age*

On its traditional exposition,[80] the First Amendment's modern age was propelled by a "judicial triad" who included Judge Hand, Justice Holmes, and Justice Brandeis.[81] They took pains to protect political dissenters' speech without eviscerating majority rule claims[82] and laid a foundation to cast expressive freedom as a central pillar of constitutional democracy.[83] To be sure, verdant possibilities have surfaced, showing the judicial triad's understanding of democracy has been placed under contemporary stress. Stress surfaces regarding whether democratic governance deserves to survive America's "disinclination to subordinate self-interest to the general will"[84] as individual rights have been elevated at the expense of responsibility.[85] Pessimism abounds as elections, once regarded as vehicles conveying legitimacy, "are increasingly regarded as evidence of an

77. Weinrib, *supra* note 49, at 49.

78. *See id.* at 51 (showing how labor activists attacked the notion of individual autonomy in the face of rapid industrialization, which led them to question whether workers could bargain individually for a living wage).

79. *Id.* at 49.

80. *See id.* at 48–49 (arguing the roots of free speech in the United States are more complicated than the mythical claims associated with the origins of the modern First Amendment and that the roots of free speech rights are both more radical and more conservative than the traditional account).

81. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 13–14.

82. *Id.* at 28.

83. Weinrib, *supra* note 49, at 65.

84. LASCH, THE REVOLT OF THE ELITES, *supra* note 13, at 213–14.

85. *See id.* at 80–91 (raising questions regarding the viability of democracy because the growing insularity of elites vitiates formerly common notions including notions of reality as liberalocrats presume that democracy can dispense with civic virtue, while they act in ways that ensure that democratic institutions no longer guarantee a workable social or political order, while elevating individual rights at the expense of duty).

impregnably rigged system."[86] Abandoning for the moment the question of whether democracy deserves to survive, and the query whether autocracy led by liberalocrats deserves to thrive, an alternative view contends modern free speech arose on a non-mythological basis[87] that was later "infused with an aspirational commitment to participatory democracy, minority rights, and peaceful social change."[88]

The propositional legitimacy of traditional expositions of the inception of the modern age of free speech was furthered by the discovery of foundational constructs that framed speech as a necessary vehicle that enhanced, rather than confined, the national experiment in republican governance.[89] The scope of speech freedoms proffered by the judicial triad was "evaluated with attention to how the communicative activity at issue fits into the larger constitutional design founded on the principle of popular sovereignty"[90] as opposed to a free-floating, putatively neutral, amorphous right that characterized later conceptions of the First Amendment. Landmark First Amendment decisions followed the triad's evolving insights, which envisioned the courts' proper jurisprudential task was to grant or deny "[First Amendment] claims with consistent emphasis on the question of democratic function."[91] Relying on constitutional scholar Vincent Blasi's comprehensive analysis, this subsection provides an overview of the emergence of modern First Amendment doctrine, an event which later took a fateful turn toward the reification of individual autonomy.

Although many contemporary observers believe speech freedoms "exist for the very purpose of countermanding [attempts by] zealous political majorities that . . . neglect the [counter]claims of dissenters," the judicial triad—later celebrated as champions of free speech—entered this arena with great respect for majority rule and jurisprudence "that denied . . . natural rights and treated positive rights as exceptional, confined, and instrumental."[92] These judges—none of whom seemed predisposed to concede "that protecting dissent is most vital when the very survival of

86. DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 2.

87. Weinrib, *supra* note 49, at 48–49 (arguing the modern free speech doctrine was sparked by interwar progressives who believed expressive freedom was essential to bolster the exercise of state power and to protect workers' rights and by conservatives who embraced speech rights in order to curb state meddling with business activity).

88. *Id.* at 65.

89. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 28.

90. *Id.*

91. *Id.*

92. *Id.* at 13.

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institutions . . . [were] at some risk"[93]—offered differing tests to properly examine free speech claims. First, consider Judge Hand's approach.

1. Judge Hand's Contribution

Judge Hand's analysis focused on discerning the meaning *conveyed* by expression rather than its literal meaning; concurrently, he measured the "predicted consequences of [speech] or speaker intent" as a way of testing its constitutional legitimacy.[94] Hand pondered the exigency of "providing [speech with] a safe harbor" that would sufficiently secure democracy a minimum quantity of speech, thus enabling the formation of a majority of citizens to capture the nation's mantle of authority.[95] Hand's formulation advanced the notion that all "opinion [is] tolerable, if not [necessarily] good," and accordingly, speech should be subject to preclusive regulation only if it lacks any genuine value.[96] This view concedes the possible repugnance, if not the falsity of some speech, "both the justification for protecting controversial speech and the limits to that protection depend on categorical judgments regarding which kinds of speech" advance democratic governance inclusive of a governing majority.[97] Hand determined that "[w]ords are not only keys of persuasion, but the triggers to action,"[98] thus justifying the prohibition of advocacy "counsel[ing] the violation of law" because it lacks any democratic function.[99] Judge Hand's approach coheres with the determination that "hostile criticism" is welcome when it serves a democratic function, but words conveying views incompatible with democracy could be constrained by the State.[100] Hand drew a boundary between protected and unprotected speech that depended on the observation that speech's primary function is to provide dialectical fuel for the creation rather than the diminution of the authority of the majority.[101] This determination neither supports a highly "individualistic notion of the

93. *See, e.g.*, Krotoszynski, Jr., *supra* note 17, at 417 n.8 (discussing the limitations of speech freedoms).

94. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 15–16.

95. *Id.* at 16.

96. *Id.* at 16–17.

97. *Id.* at 17–18.

98. *Id.*

99. *Id.* at 18.

100. *Id.*

101. *Id.* at 18–19.

First Amendment [later] favored by" some commentators,[102] nor does it provide a basis for applying such a conception to university campuses.

2. Justice Holmes's Contribution

Holmes solved the free speech puzzle by conceiving the freedom to speak as a beneficial "phenomenon that forces majority understanding and [propels society's adaptation] to changing conditions."[103] Justice Holmes's three best-known formulations were the "clear and present danger" test, the "limiting example of falsely shouting 'Fire!' in a theater and causing a panic," and the "marketplace of ideas" metaphor."[104] In harmony with his book, *The Common Law*, these abstractions concluded that legal doctrine is about evolution and adaptation rather than ontological first principles.[105] Rejecting natural law and, by inference, natural rights and the notion that some truths are enduring, Holmes's early decisions were propelled by "pragmatic[and] consequentialist" considerations that uniformly found for regulators rather than free speech challengers.[106]

Then came Holmes's decision in *Abrams v. United States*,[107] which was part of a series that presumably launched the Court's free speech jurisprudence.[108] In *Abrams*, Justice Holmes noted, "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct . . . ."[109] Since the Constitution was not a repository of enduring principles, Holmes channeled his inner Epicurus and replaced deduction of what should "have happened from some antecedent dogmatic framework—with induction . . . supposedly . . . [examining the evidence] without fear or favor."[110] This perspective viewed the Constitution as "an experiment, as

102. *See id.* at 31 (observing how some justices favor a distinctively individualistic conception of the First Amendment).

103. *Id.* at 19.

104. Krotoszynski, Jr., *supra* note 17, at 427–30 (citing Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (per curiam)); *see also* Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 22 (discussing Holmes's three best known formulations).

105. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 19.

106. *See id.* at 20–21 (showing Holmes, while sitting on the Supreme Judicial Court of Massachusetts, upheld a law prohibiting police officers from participating in political campaigns and later sitting on the U.S. Supreme Court upheld the convictions of dissenters under the Espionage Act of 1917 in three cases).

107. Abrams v. United States, 250 U.S. 616 (1919).

108. Bloom, Jr., *supra* note 1, at 21.

109. *Abrams*, 250 U.S. at 630.

110. Wright, *supra* note 29.

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all of life is an experiment."[111] Such views reflecting a "sharp distinction[,] . . . [a] divide famously characterized by G. E. Lessing as the 'broad and ugly ditch' between the eternal truths of reason and the contingent truths of history"[112] led inevitably to the following claim:

> If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.[113]

This articulation coheres with the difficulty of reconciling the "'eternal truths of reason,' . . . with the messy . . . events in the world of space, time, and matter . . . ."[114] On Professor Blasi's account, this articulation does not necessarily signal a change of view by Holmes regarding the importance of free thought and speech or the "nature of rights and claims of majority rule."[115] Instead, Holmes's "concern remained collective instrumental efficacy" and progress affixed to the perception that the best way to test the truthfulness of a claim is by examining its acceptance or lack thereof in the market's rough and tumble competition.[116] "Markets decentralize and privatize decision making, nonprescriptively honoring and implementing preferences and judgments of all sorts. Markets reward participants who generate and master pertinent information. They respond to changing conditions and lessons learned . . . ."[117]

Holmes's oration on the value of markets and the competition for ideas echoes his "interest in the work of Charles Darwin."[118] Parenthetically, as Schindler observes, "Darwin's late modern interpretation of evolution stands as a 'universal acid':[119] the inner logic . . . [of which] eats away at all other traditional ideas, . . . dissolv[ing] everything[, including orthodoxy,] in its wake,"[120] thus providing space for future jurisprudential innovation.[121]

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111. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 22 (quoting *Abrams*, 250 U.S. at 630 (Holmes, J. dissenting)).

112. Wright, *supra* note 29.

113. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 22 (quoting United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting)).

114. Wright, *supra* note 29.

115. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 22.

116. *Id.*

117. *Id.* at 22–23.

118. *Id.* at 23.

119. SCHINDLER, *supra* note 10, at 148.

120. *Id.*

121. *Id.*

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This is true even though Holmes's views—emphasizing adaptation—largely served the majority rule rather than radical human autonomy isolated from the collective interest.[122]

Later, the "clear and present danger" prong of Justice Holmes's approach was undermined in "1969, when the Supreme Court in *Brandenburg v. Ohio*,[123] glossed the test in such a way as to require both a direct call to serious unlawful action and a high probability that the call to arms would be heeded"[124] before the government could sanction speech.[125] *Brandenburg* gained additional salience because Justice Black indicated the "clear and present danger [test] should have no place in interpret[ing] the First Amendment."[126] Justice Douglas observed that "[t]he line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts."[127] This signifies that *pure speech* should be "immune from prosecution" while raising the question of what constitutes "pure speech." Although Douglas' and Black's ideas supply fuel for later efforts to accelerate the acceptance of expansive conceptions of freedom of speech, it appears that even after being drained of some of their force by later interpretations, Holmes's more modest views favor the collective rather than the individual interest. Taken as a whole, his views fail to support free speech maximalism in the public square or universities.

3. Justice Brandeis's Contribution

Justice Brandeis solved the free speech issue by envisioning speech as an individual liberty, which was important as such but particularly for its contribution to society's democratic character.[128] "Brandeis' concurring opinion in *Whitney v. California*,[129] decided in 1927, contains his most intellectually ambitious account of the freedom of speech. In modern First Amendment adjudication, duels occasionally break out among the Justices over whose position can best claim support from Brandeis'

122. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 24.
123. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).
124. Krotoszynski, Jr., *supra* note 17, at 416.
125. *Id.* (observing post-*Brandenburg* courts have applied the clear and present danger "test in a demanding fashion").
126. *Brandenburg*, 395 U.S. at 449–50 (Black, J., concurring) (per curiam).
127. *Id.* at 456–57 (Douglas, J., concurring).
128. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 24.
129. Whitney v. California, 274 U.S. 357 (1927).

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reasoning in *Whitney*."[130] Offering lyrical language while simultaneously proclaiming the mantle of principle, Brandeis noted that there is "a complex, interactive relationship between individual liberty and collective well-being"[131] which culminates in the following propositions: (a) "[t]hose who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary";[132] (b) those who won our freedom "valued liberty both as an end, and as a means . . . [while also believing] that freedom to think [as you will and speak as you think] are means indispensable to the discovery and spread of political truth"[133]; (c) the framers knew that order could not

> be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies;[134]

and (d) "the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."[135]

This syllogism supports the conclusion that "[o]rder, stable government, the path of safety, the fitting remedy, nonarbitrary resolution of differences—this is a catalog of the most important goods that governments are instituted to provide, and they all flow from the freedom of speech."[136] Freedom and its corresponding goods, including stability rather than transgressive unorthodoxy, are generated by placing duties and responsibility on the polity. Even though Brandeis saw liberty as an end in itself, individual choice or personal space—privacy, economic security, entrepreneurial opportunity—are prioritized for their capacity to advance "their contribution to the discharge of the duties of citizenship."[137] Justice Brandeis contends that "'the final end of the state' is to '*make* [not

130. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 24.
131. *Id.*
132. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).
133. *Id.*
134. *Id.*
135. *Id.*
136. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 25.
137. *Id.* at 26.

'leave'] men free to *develop* [not 'exercise'] their faculties.'"[138] Likewise, proper government depends on developing its people's character and the exercise of their duties, rather than the expansion of highly individuated human flourishing.[139] Freedom of speech rests on its inherent democratic character, which is viewed as a public good because liberty is an essential component of proper political order.[140] Brandeis's analysis reinforces the State's power to constrict speech grounded on the then-common understandings of the constituent units of a democracy.

4. Fashioning Free Speech Doctrine: *Barnette*, *Thornhill*, and the Way Forward

Judge Hand submits that legitimate speech boundaries are grounded in the conclusion that the primary function of speech is to provide fuel for the creation of a governing majority.[141] Justice Holmes contends that the Constitution is not a repository of enduring principles but a framework for the deployment of experience and adaptation.[142] Justice Brandeis observes that freedom of speech rests on its inherent democratic character as a public good necessary for political order.[143] On the other hand, negative consequences for the value of speech mount in contradistinction to the judicial triad's perspective when any of the following occurs: first, when the communication at issue is directed toward an objective that is distinctly different from the establishment of a proper political order and the formation of the nation's democratic character; second, when common understandings of democracy are lost in the fog roused by the elevation of rights over duties and responsibility; and third, when individual choice, personal space, and privacy are no longer to be prioritized for their contribution to the discharge of citizenship by politically equal individuals but for purposes of advancing unmoored individualism.

The language offered by the judicial triad provides the First Amendment with additional heft, strengthening democracy and self-government as a result.[144] Concurrently, the goal of a stronger democracy constitutes an

138. *Id.* (quoting Justice Brandeis).

139. *Id.* at 27.

140. *Id.* at 25.

141. *Id.* at 26–27.

142. *Id.*

143. *Id.*

144. Weinrib, *supra* note 49, at 65 (discussing expressive freedom as a central pillar of constitutional democracy).

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inherent constraint on speech rights.[145] Still, skeptics challenge the capacity of the judicial triad's approach to fashion an effective set of constitutional rules that infrangibly protect expression and strengthen self-government.[146] This presumed defect implicates the defensibility, language, trajectory, and future doctrinal developments tied to the judicial triad's analysis.

After the First Amendment's unshackling, new risks, including risks to democracy, were instantiated once free speech doctrines were unleashed by evolutionary trends highlighted by Holmes's capitulation to experimentation during the early part of the twentieth century, adaptation, and progress.[147] Risks included the probability that free speech proponents, propelled by a radicalized conception of human autonomy, would pursue unconstrained speech beyond historically cognizable bounds.[148] After all, the Court has struggled with tense questions such as whether highly expansive interpretations of freedom of speech could be attached to the moorings offered by the judicial triad and their intellectual heirs. Answering such a question in the affirmative, "[i]n recent decades . . . some Justices, at times even a majority, have undertaken to conceptualize the First Amendment as embodying . . . a 'distinctly individualistic' notion of the freedom of speech, designedly independent of concerns relating to democratic function.'"[149] Individualistic notions of freedom of expression, independent of any democratic function, were implicated by two of the Court's most famous decisions in the 1940s. Both *Thornhill v. Alabama*[150] and *West Virginia State Board of Education v. Barnette*[151] exemplify the electrifying tension between unconstrained free speech rights and individual duty and responsibility thought necessary to reclaim democracy.

In *Thornhill*, the Court stated:

> Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of

145. *Id.* at 48.
146. *Id.*
147. *Id.* at 49.
148. *Id.*
149. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 29.
150. Thornhill v. Alabama, 310 U.S. 88 (1940).
151. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

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> the power of correcting error through the processes of popular government.[152]

At first blush, *Thornhill*'s formulation emphasizes the role speech plays in public education, thereby advancing democratic governance.[153] This perspective is reconcilable to observations offered by the judicial triad. Simultaneously, *Thornhill*'s emphasis on the right of free discussion could also be reconciled with an evolving viewpoint, which reached its innovative apotheosis in Chemerinsky and Gillman's recent contention that speech and ideas, however offensive,[154] however hateful,[155] deserve "broad protection: freedom of speech is essential to freedom of thought; it is essential to democratic self-government; and the alternative" is a recipe for a myriad of problems.[156]

On the other hand, in *Barnette*, decided in 1943, the Supreme Court reemphasized that freedom of speech is not some free-floating right residing in the exclusive control of an individual.[157] Instead, the Court stressed speech's capacity to strengthen the polity. Initially, of course, the Court's analysis could be seen to favor the Chemerinsky and Gillman view. For instance, the *Barnette* Court ruled that "compelling children to salute the flag and pledge their allegiance to it violates a right of self-determination in matters that touch individual opinion and personal attitude."[158] Justice Jackson suggests that authorities' attempts to compel youths to embrace a majoritarian doctrine regarding patriotism and civic commitment may be illegitimate.[159] He also asserted "[t]o believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."[160] This initial analysis is consistent with the claim that some assertions in *Barnette* and *Thornhill* could advance free-standing autonomy and the pursuit of unorthodoxy made tangible by "those

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152. *Thornhill*, 310 U.S. at 95.
153. *Id.*
154. CHEMERINSKY & GILLMAN, *supra* note 2, at 19.
155. *Id.* at 24 (discussing the principle of free thought and freedom, especially in regard to hate).
156. *Id.* at 23.
157. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 644 (1943) (Black, J. & Douglas, J., concurring).
158. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 28 (footnotes omitted).
159. *Id.* at 28–29.
160. *Barnette*, 319 U.S. at 641 (Black, J. & Douglass, J., concurring).

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who insist on asserting their individuality against dominant opinion."[161] Such a move could fuel an expansive conception of speech rights.

Conversely, Justice Jackson indicated that the right of self-determination is a vehicle for "implementing the political community's decision to 'set up government by consent of the governed.'"[162] Although liberals dismiss public opinion in favor of experimentation,[163] the *Barnette* opinion trusts that a republican form of government grounds authority in public opinion rather than authority controlling public opinion.[164] Hence, even though schools cannot impose public opinion, they can, consistent with their mission, educate the young for citizenship.[165] Justice Jackson's *Barnette* opinion thus furthers a moderate conception of speech rather than an expansive one. On his account, free speech advances self-governing democracy and corresponds with the determination that an overriding objective can constrain free speech impulses.[166] *Barnette* echoed the views the judicial triad conferred on us as they sought to expand constitutional protection for speech and set boundaries. Congruence with boundaries emerges because the *Barnette* Court "conceiv[ed] of free and independent thought by individuals as both the starting point and the last line of defense of democratic governance."[167]

Taken together, *Thornhill* and *Barnette* confirm that modern First Amendment doctrine was unavoidably dependent, for its legitimacy, on the notion that freedom of speech has limits which waltz in tandem with the necessity of forming independent citizens for self-governance. This approach coheres with early and mid-twentieth century Supreme Court decisions, emphasizing free speech in the context of the collective instead of judicial celebrations of individuals reveling in their disconnection from community and society. Still, if the Court in *Terminiello v. City of Chicago*[168] was correct in its contention that the "function of free speech under our

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161. CHEMERINSKY & GILLMAN, *supra* note 2, at 24.

162. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 28.

163. *See, e.g.*, DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 143–48 (describing how contemporary liberals have become the heirs of the "[n]ineteenth-century architects of progressive liberalism," who were propelled by an "imperative to liberate individuals from any arbitrary and unchosen relationships and remake the world into one in which those especially disposed to expressive individualism," experimental living, and the rejection of public opinion).

164. *Barnette*, 319 U.S. at 641.

165. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 28.

166. *Id.*

167. *Id.* at 29.

168. Terminiello v. City of Chicago, 337 U.S. 1 (1949).

system of government is to invite dispute,"[169] it is likely that language can be found on which to establish future expansions of speech rights. Partially consistent with this viewpoint, both *Thornhill* and *Barnette* offer some language supporting an expansive conception of the First Amendment that strains against the Court's attempts to enunciate principles indicating the First Amendment is subject to enduring doctrinal limits.

A richer understanding of free speech's origin is informed by the destabilizing contributions of Professor Laura Weinrib, showing that the modern understanding of the First Amendment "was not reasoned from first principles."[170] Instead, it was "a compromise that served particular ends."[171] If true, the notion of a modern First Amendment conception has always had "its share of apostates."[172] Professor Weinrib undermines the salience of the judicial triad's claims showing that the roots of modern free speech doctrine are both more radical and more conservative than Blasi and others suggest.[173] Expansive doctrinal transmutation built upon the triad's foundation has become a possibility for reasons extending beyond the fact that members of the judiciary are less susceptible to popular pressure than the political branches and hence can afford to be more imaginative.[174] Undeniably, more inventive justices have concluded that the First Amendment is a bundle of "free-floating" principles, facilitating the deduction that radical human autonomy "has become a versatile, noninstrumental justification for invalidating a wide variety of laws that regulate communicative activity."[175] This liberalizing maneuver verifies that as "the rationale for freedom of speech becomes noninstrumental, decisions no longer have to be justified in the manner of Hand, Holmes, and Brandeis—that is, with reference to past experience, empirically grounded predicted effects, specific and broadly recognized commitments, or coherent fit within a larger political or social design."[176] Blasi argues that abandoning these markers facilitates a "dangerously *ipse dixit* jurisprudence" even if "noninstrumental reasoning [does not] always ha[ve] th[is]

169. *Id.* at 4.

170. Weinrib, *supra* note 49, at 66.

171. *Id.*

172. *Id.* at 67.

173. *Id.* at 48–67 (suggesting the roots of the modern approach to the First Amendment are both more radical and more than conservative than many have suggested).

174. *Id.* at 48.

175. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 29 (internal footnotes omitted).

176. *Id.*

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quality."[177] It also supplies a basis for standardless, free speech maximalism, as an offshoot of modern First Amendment doctrine.

Free speech doctrinal innovations exist in tension with both classic and modern free speech ideas, but at the same time, Professor Blasi concedes that autonomy claims anchored in historical conceptions of natural rights, or carefully formulated ideals of self-authorship and personal responsibility could properly inform First Amendment jurisprudence if deployed in a disciplined manner.[178] Hence, as a defender of a modest rendering of the judicial triad's contributions, Blasi agrees that non-instrumental liberties have a place in American constitutional design. On the other hand, he argues that the existence and range of such "intrinsic liberties must be construed with attention to how their recognition affects the instrumental liberties and prerogatives of self-governing citizens in a republic."[179] Such a construal would properly enable government to constrain freedom of speech claims that are not grounded in the prerogatives of self-governing citizens or consistent with the judicial triad's perspective affirming that freedom of speech has a larger purpose than the self-satisfied expression of views. On this account, expressions of disparate views are part of our collective pursuit of the truth that comes only "from the relentless, disinterested and critical student of facts."[180] Grounded in Brandeis' analysis, Blasi argues that "the highest office in the land is 'citizen,'" who neither exalts order at the cost of liberty, nor liberty at the cost of order.[181]

Modern free speech doctrine commenced as a balanced canon that was hostile to the notion that fundamental rights could eclipse majoritarian preferences.[182] As a result, the judicial triad was reluctant to deploy constitutional rights to invalidate rules passed by political majorities.[183] Although the triad "avoid[ed] recognizing a free-standing individual right of expressive liberty that exists apart from . . . the principle of majority rule," and "despite that common ground, the theories embraced by the three differ radically from one another."[184] Nonetheless, reflecting a newly transformed understanding of self-government as "[t]he nation began to

177. *Id.*
178. *Id.*
179. *Id.* at 31.
180. *Id.* at 27 (quoting Judge Henry Friendly's understanding of Justice Brandeis's thought).
181. *Id.*
182. *Id.* at 13–14.
183. *Id.* at 13.
184. *Id.* at 14.

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equate democracy with 'the organized sway of public opinion,'" the Court effectively assumed that the government could not take sides against any opinion save that which expresses itself in the violation of the law.[185] Despite the Court's reticence, it permitted a limited expansion of its conceptual foundation along the following three bases: (1) by conceiving freedom of speech as a majority-creating procedure rather than as an individual right;[186] (2) by conceptualizing freedom of speech as a salutary phenomenon that forces majority understanding and is capable of adapting to changing conditions;[187] and (3) by viewing freedom of speech as an individual liberty that is pivotal for its contribution to society's democratic character rather than other values.[188] Effectively, the judicial triad assigned speech a modest valuation in our republic.

A modest valorization of expression signifies that speech is considered essential to the formation of public opinion and may be constitutionally protected under certain circumstances.[189] Whereas speech, deemed irrelevant for the formation of public opinion, such as commercial advertising or the mere advancement of personal preferences, remains unprotected or subject to lesser protection because it is regarded as exogenous to discovering political and economic truth.[190] Speech grounded in a sincere search for truth deserves protection because it is "necessary for the formation 'of that public opinion which is the final source of government in a democratic state.'"[191] Such claims remain vital despite evidence that the Supreme Court has "lost track of *why* the First Amendment" should protect speech and "has begun to apply First Amendment doctrine to all kinds of communication that have nothing to do with the formation of public opinion" and little to do with the pursuit of truth.[192] Losing track enables the Court to see freedom of expression as a device that advances human autonomy by "serv[ing] . . . the needs of . . . the human spirit—a spirt that demands self-expression."[193] This allows the

185. Post, *supra* note 71, at 106.

186. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 14–15 (citing Judge Learned Hand).

187. *Id.* at 19.

188. *Id.* at 24.

189. Post, *supra* note 71, at 107.

190. *Id.*

191. *Id.*

192. *Id.* at 109.

193. Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J. concurring).

individual "to realiz[e] . . . his . . . potentialit[y] as a human being."[194]

5. Questioning the Survival of the Liberal Conception of Speech in the Real World

The aforementioned analysis provokes questions of whether modern free speech intuitions—building on lines supplied by Holmes, Hand, and Brandeis—can survive an inspection in the real world of praxis rather than the abstract world of philosophical speculation. From the Left, Professor Weinrib gives a negative answer.[195] She first observes that the triad's work—whatever its intent may have been—has now been transmuted into a "liberal conception of free speech" that sustains its doctrinal chops by "shield[ing] unpopular speakers."[196] Thus, "in the interest of informed governance and pluralistic tolerance, [it] exposes the polity to unconventional and even dangerous ideas";[197] correspondingly, these moves goad the nation and perhaps universities to embrace unconstrained speech as the default rule.[198] At the same time, the nation suffers from accelerating fragmentation because the two deeply divided precincts of America can agree on only two, or at most, three things: first, the polity, more than any other time in our history, is deeply and viciously divided; second, identity politics is among the most potent forces of our time;[199] and third, perhaps, the "Who am I?" universal question has become tougher to answer given the great scattering, rooted in the evisceration of the family, thereby unearthing identity politics and exposing such doctrines to countervailing charges from conservatives and progressives alike.[200]

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194. Feldman, *supra* note 5, at 640.

195. *See generally* Weinrib, *supra* note 49 (discussing these questions and her thoughts, answering in the negative).

196. *Id.* at 48.

197. *Id.*

198. *See id.* (noting the strong defenses of free speech by Holmes, Hand, and Brandeis, persuaded the American public of the judiciary's invaluable role in defending it).

199. MARY EBERSTADT, PRIMAL SCREAMS: HOW THE SEXUAL REVOLUTION CREATED IDENTITY POLITICS 5 (2019) [hereinafter EBERSTADT, PRIMAL SCREAMS].

200. Mary Eberstadt, *'The Great Scattering': How Identity Panic Took Root in the Void Once Occupied by Family Life*, QUILLETTE (Aug. 27, 2019), https://quillette.com/2019/08/27/the-great-scattering-how-identity-panic-took-root-in-the-void-once-occupied-by-family-life/ [https://perma.cc/Y6S2-NUC2] (showing while "conservatives excoriate [identity] politics as politically opportunistic theater[,] . . . [l]iberals and progressives put forth an opposing grievance-first narrative, arguing that identity politics emanates from authentic wounds," concluding that both could be right, since identity panic is grounded in the implosion of family).

Against this backdrop, Professor Weinrib's insights attain additional cogency. Her analysis traverses the gap between theory and reality. Weinrib shows the triad's contributions, as a practical matter, may offer scant protection to disfavored groups even though members of the judiciary are "less susceptible to popular pressure than the political branches, [are better] equipped to balance liberty against security," and are best able to evaluate the State's justifications for suppression of expression.[201] Instead of receiving coveted protection, Weinrib observes individuals and minority groups' ability to exercise free speech rights as a core value, advancing their interest, is filled with more hurdles than many have imagined.[202] Hurdles continue to multiply as legions of people unmoored from a sense of self and a sense of group and have reformulated themselves in identitarian tracks[203] comprised of fragmented groupings searching for ever-new heuristics.

Professor Weinrib amplifies her claims by noting an unflinching commitment to the First Amendment, no matter how inventive, may prove inadequate and counterproductive.[204] Observing limits to the willingness of men to use free speech, she notes that free speech may block democratic reform, may trigger the rise of demagogues, and "no kind of legal guaranty has ever been able to protect minorities from the hatreds and intolerances let loose when [a] . . . system breaks down."[205] Such legal insufficiencies diminish the accomplishments of the judicial triad and their intellectual heirs.[206] These insufficiencies also confirm transnational analysis showing that rivalrous individuals and groups endeavor to capture government for their own ends to the disadvantage of others, a maneuver harmonious with the fact that governments in liberal societies have become instruments of plunder rather than vehicles for

201. Weinrib, *supra* note 49, at 48.

202. *See id.* at 66–67 (describing the hurdles individuals and minorities face).

203. *See generally* EBERSTADT, PRIMAL SCREAMS, *supra* note 199, at 5–16 (arguing the 1960s sex revolution is responsible for the destruction of traditional familial constructs resulting in many individuals, today, experiencing existential crises and focusing on themselves rather than a family community).

204. *Cf.* Weinrib, *supra* note 49, at 66–67 (discussing how the "New Dealers" broke away from advocating for expansion of free speech doctrine to prevent judges from "block[ing] democratic reforms" necessary to keep the U.S. from "succumb[ing] to totalitarianism . . . [in] economic desperation").

205. *See id.* (quoting Wisconsin Senator Robert La Follette Jr.).

206. *See id.* at 66 (stating the consensus of the 20th century regarding the court's preeminence in free speech protection is under attack).

ensuring civil peace.[207] This further disfavors already disfavored groups.

Equally apparent from the Right, Professor Deneen and others demonstrate the philosophical underpinnings of free speech as a leading component of negative freedom and liberal proceduralism—part of a consensus "grant[ing] . . . autonomous individual[s] . . . wide berth to define what is good and true"[208]—has produced its share of catastrophes. The rhetorical potency of expansive free speech claims are inescapably fastened to the implosion of liberal proceduralism in the wake of more than a quarter of a century in which virtually all our grand narratives have collapsed.[209] This implosion is spurred on by the wreckage created by more than a century's worth of efforts repudiating the reality of human nature and the adjuration of the world's and the universe's intelligibility, even though the opposite of such denials may be indispensable for asserting that the human person is free.[210] This tsunami of debris denying reality unavoidably undermines the intelligibility and even the possibility of "free speech." Together, these observations correspond with the onset of calamities for liberal societies.

Calamities erupt, shrinking the value of free speech doctrines because these canons carry the Enlightenment and Lockean abstractions' unwieldy baggage, which operate in tandem with contentions suggesting humans ought to be free from any command or consideration outside their own head.[211] Hence, truth, as Holmes imagined, is subject to a gauntlet of rivalrous competition.[212] But there is more because, more likely than not,

207. *See* JOHN GRAY, POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT 11–12 (1996) (discussing the shift in modern societies where individuals and governments place their own interest above the general public).

208. Sohrab Ahmari, *Giving the Boot, in* FIRST THINGS 47, 48–49 (Apr. 2019) (reviewing MAX BOOT, THE CORROSION OF CONSERVATISM: WHY I LEFT THE RIGHT (2018)).

209. *See* DOUGLAS MURRAY, THE MADNESS OF CROWDS: GENDER, RACE AND IDENTITY 1–2 (2019) (contending the explanations formerly provided by religion and then by political ideologies have collapsed leading to the formation of societies where people struggle for an "explanation for what we are doing here").

210. Robert A. Preston, *Ideas Have Consequences Fifty Years Later, in* STEPS TOWARD RESTORATION: THE CONSEQUENCES OF RICHARD WEAVER'S IDEAS 46, 49 (Ted J. Smith 3d ed., 1998) (showing the appeal to the intelligibility of the universe is grounded in philosophical realism, against nominalism (or empiricism, positivism, or materialism) holding only the individual is real).

211. DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 1 (demonstrating irrespective of whether its ideals could be actualized in the world outside our heads, this idea—liberalism—envisioned humans as "rights-bearing [abstractions] . . . who could fashion and pursue for themselves their own version of the good life").

212. LOUIS BETTY, WITHOUT GOD: MICHEL HOUELLEBECQ AND MATERIALIST HORROR 129 (2016).

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after becoming intoxicated by developments from our postmodern era, the pursuit of truth has become extraneous; instead, it has been replaced by the demand for transgressive and unorthodox speech that is unmoored from anything approaching the notion of truth.[213] Predictably, truth, as a describable entity, has become a casualty of the nation's therapeutic shift wherein the pursuit of agreed-upon notions of truth and justice have been replaced with the electrifying quest for feelings. As a result, the ostensible search for "justice" and truth has become indistinguishable from the grievance imperium, and masters of this new pursuit—made tangible, for example, by BDS advocacy—acquire moral power and propel human agency.[214] Within this milieu, what masquerades as a quest for truth and justice becomes an agenda for corroborating one's own biases,[215] or as Heidegger clarifies, the acclaimed love of truth is simply convenience, which quickly turns to hate when truth presses individuals by undermining the facticity of their claims.[216] Under a banner proclaiming freedom, progress, and societal perfection, truth claims become vacuous. This void manifests itself in unimaginable devastation of every known form of association and every human construction as if the goal has always been deliberate deformation designed to ensure misery[217] bolstered by the pathologies characterized by the formation of gulags and the loss of culture.[218]

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213. *See*, *e.g.,* Feldman, *supra* note 5, at 640 (showing freedom of expression has been transformed from a search for "truth" into a self-fulfillment device that enables the individual to choose her own message).

214. Hutchison, *Chasing Shadows*, *supra* note 12, at 227.

215. SMITH, ON THE ROAD WITH SAINT AUGUSTINE, *supra* note 11, at 144.

216. *Id.* at 145 (quoting MARTIN HEIDEGGER, PHENOMENOLOGY OF RELIGIOUS LIFE (trans. Matthias Fritisch and Jennifer Anna Gosetti-Frencei, 2004)).

217. WISSE, *supra* note 35, at 176 (describing Russia after the fall of the Soviet Union).

218. DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 87–88. Deneen shows that liberal proceduralism eliminates culture rooted in nature, time and place and thus conduces toward a questionable basis on which to organize society, leaving a huge space for "the rise of [the] Leviathan," the ever-expanding regulatory state. *Id.* at 82–88. Since radical autonomy operates as a structural component of liberal proceduralism, individuals who are liberated from communal ties forego from communal and familial ties issuing forth from local markets and cultures and thus the pursuit of radical human autonomy, which leaves the individual more vulnerable thus elevating the state to judge conflicting claims. *Id.* at 87–88. Second, as vulnerable individuals rely ever-more on the Leviathan to protect them through ever-more government intervention, then the destruction of local cultures and norms (an orthodoxy) achieves not liberation but powerlessness culminating in a nonculture as liberalism parasitizes the original meaning of culture and replaces its meaning with a liberal simulacrum, which eviscerates actual culture that is replaced by government-enforced multiculturalism, becoming a mono-culture to which all must subscribe. *Id.* at 88–90.

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However speculative this analysis may be, the free pursuit of truth has been exchanged for the tight embrace of autonomy, allowing the individual to choose her own message premised on the human spirit's whims.[219] This signifies the constitutional protection of free expression[220] as a search for "truth," has taken flight from reality and transformed itself into protection for a less-than-serious contest between dueling speech claims. This move produces evidence that Lockean liberty is frequently disassociated from contact with reality[221] and is widely associated with repression.[222] These observations achieve added poignancy because, for centuries, as Ruth Wisse notes, "Jews have put their faith in liberal ideas of progress, toleration, and secular democracy,"[223] a faith that has failed them.[224] In a world where tragedy and the shattering of shalom is the rule rather than the exception, it appears that unreality[225] unsurprisingly infects liberalism's unconstrained commitments to freedom of speech norms and unrestrained liberty itself. This counterfeit reality is laid bare because the absence of a commonplace conception or search for the truth, or a common pursuit of the "good,"[226] creates a fatal lacuna to intelligible conversation that advances democracy and human life.

219. *See, e.g.*, Feldman, *supra* note 5, at 640 ("[T]he fundamental rule of [free speech doctrine is] a speaker has the autonomy to choose the content of his own message.").

220. *Id.* at 639–43 (examining First Amendment jurisprudence and its relation to the pursuit of truth in American life).

221. SCHINDLER, *supra* note 10, at 185–88 (explaining the Supreme Court's formulation of liberty originating in *Planned Parenthood v. Casey*).

222. Ahmari, *supra* note 208, at 48–49 (reviewing MAX BOOT, THE CORROSION OF CONSERVATISM: WHY I LEFT THE RIGHT (2018)).

223. *The Liberal Betrayal of the Jews*, JEWISH LEADERSHIP CONF., https://www.jewishleadershipconference.org/liberal-betrayal/ [https://perma.cc/E9SV-W6F6].

224. WISSE, *supra* note 35, at ix–xi (observing liberals' belief in progress, rationality, freedom, cultural pluralism, and the rule of law failed to save the Jews of Europe from the Shoah and showing that while liberals were apparently not unsympathetic to Jews, they failed to protect them because the fate of the Jews called into question their deepest assumptions).

225. EDWARD FESER, ARISTOTLE'S REVENGE: THE METAPHYSICAL FOUNDATIONS OF PHYSICAL AND BIOLOGICAL SCIENCE 16 (2019) (showing unreality likely surfaces because the unconstrained pursuit of freedom reflects the failure of liberalism's proponents to abide by the distinction between actuality and potentiality, a crucial difference that limits the scope of individual freedom bounded by reality).

226. SCHINDLER, *supra* note 10, at 1–10 (demonstrating modern liberals have separated the meaning of "freedom from a substantial notion of the good" and have turned freedom into a "substitute for the good"; a problem arising because freedom, properly construed, must see freedom primarily in ontological terms that both recognize the essential connection between freedom and the good and sees relations to the *other* as an intrinsic part of the meaning of freedom).

Deneen verifies the culture of freedom and human rights, grounded in "mythical Enlightenment premises" propelled by the pursuit of ontological individualism, produced a parade of horribles, leaving individuals subject to the arbitrary judgment of an ever-growing Leviathan.[227] Freedom from all constraints inevitably culminates in human vulnerability, which is followed briskly by sharply rising government intervention (authoritarianism) designed to deal with this preordained development.[228] As we become our own jailers and as increasing vulnerability crests in rising captivity, the populace is left desperately seeking a way out of the addictive crawlspace of self and its consequences.[229] Verifying that liberalism has failed by succeeding through attainment of its actual objectives, we have become "increasingly separate, autonomous, nonrelational selves replete with rights and defined by our liberty, but insecure, powerless, afraid, and alone."[230] This paradox, confirming that the pursuit of liberty has proven mythological, is corroborated by transnational evidence showing that there is a demon in democracy,[231] evinced as liberalism transmutes itself into totalitarianism[232] and as demonic acts multiply in the name of the good. Simultaneously, the narrow class of perpetrators of such acts (liberalocrats) falsify the notion of the good, allowing them to achieve more power while sweeping aside any sense that they are doing evil.[233] Corresponding with the fact that the landscape of western democracies—including the United States—is littered by the debris of liberalism's pursuit of unconstrained freedom,[234] modern free speech norms predictably empower militants to

227. *Id.* at 88–90.

228. *Id.*

229. SMITH, ON THE ROAD WITH SAINT AUGUSTINE, *supra* note 11, at 65–66.

230. DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 16.

231. RYSZARD LEGUTKO, THE DEMON IN DEMOCRACY: TOTALITARIAN TEMPTATIONS IN FREE SOCIETIES 1–10 (Teresa Adelson trans., Encounter Books 2016) (2012).

232. DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 59–63 (showing totalitarianism rises out of the "discontents [produced by people's] isolation and loneliness" as well as the state's role in actively dissolving traditional human communities, including a vast web of intermediating human institutions; and further showing that the expansion of liberalism requires further state expansion to control a society without shared norms, practices and beliefs accompanied by the demand that state eviscerate all nonliberal forms of human support for human flourishing, a move which transforms liberalism into totalitarianism and thus reducing liberty).

233. ALAIN BESANÇON, CENTURY OF HORRORS: COMMUNISM, NAZISM, AND THE UNIQUENESS OF THE SHOAH 14 (Ralph C. Hancock & Nathaniel H. Hancock trans., ISI Books 2007) (1998).

234. First, this phenomenon constitutes liberal democracy's attempt to resolve the contingencies of political life into the rigorous universality of a moral science, but it has not succeeded leaving them willing to settle for the "moral superiority" of authoritarianism and its accompanying

transform language from a means of communication between individuals who share differing, yet reconcilable values, into a vehicle that conceals an ideological impetus designed to conform the nation to a terrifying vision.[235] Unsurprisingly, liberalism's dystopian wreckage includes rising anti-Semitism.[236] Nor have universities been spared developments along similar lines even if they have been spared the virulence and horrors of the twentieth century.[237]

The salience of Professors Deneen's and Weinrib's irruptive accounts indicates that free speech doctrine, however revivified by language offered by the judicial triad, and however expanded by the contemporary embrace of unconstrained speech as the default rule, may be insufficiently equipped to enhance democracy. Concurrently, free speech norms may be inadequate to shelter all citizens from harm.

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cruelty thus producing evil from the pursuit of the good that is narrowly defined by a narrow class of individuals. *See*, *e.g.*, Gary Saul Morson, *How the Great Truth Dawned: On the Soviet Virtue of Cruelty*, NEW CRITERION (Sept. 2019), https://newcriterion.com/issues/2019/9/how-the-great-truth-dawned [https://perma.cc/6GYS-M3WD] ("All it takes is a sense of one's own moral superiority for being on the right side; a theory that purports to explain everything; and—this is crucial—a principled refusal to see things from the point of view of one's opponents or victims, lest on be tainted by their evil viewpoint."). Second, liberal democracies had to come to terms with the process of the repressive erasure of memory that arose in the twentieth century. *See*, *e.g.*, Jeffrey Kastner et al., *Historical Amnesias: An Interview with Paul Connerton, Seven Types of Forgetting*, CABINET MAG. (2011), http://www.cabinetmagazine.org/issues/42/kastner_najafi_connerton.php [https://perma.cc/64M2-A8CD] ("[Y]ou can say that there's an *ethics* of memory at the end of the twentieth century in a way that I don't think is there at the end of the nineteenth or eighteenth or seventeenth centuries, and that is precisely because totalitarian regimes engaged in such severe and punitive processes of repressive erasure in the twentieth century."). Third, this culminates in the invention of identity politics, as the power of grand narratives implodes, leaving the new religion of victimhood and social justice. MURRAY, *supra* note 209, at 245–52.

235. Abe Greenwald, *Victimhood Culture Leads to Anti-Semitism,* COMMENT. (Dec. 30, 2019), https://www.commentarymagazine.com/politics-ideas/victimhood-culture-leads-to-anti-semitism/ [https://perma.cc/V453-AQAS]. Seduced by the spell of ideology, history shows the existence of free speech empowers militants to transform language from being a means of expression between individuals who share common but differing yet reconcilable values into a vehicle that conceals an ideological effort to force reality to conform to a particular vision of the world. BESANÇON, *supra* note 233, at 14.

236. BESANÇON, *supra* note 233, at 96 (evoking the terrifying ideologies that instantiated the horrors of Nazism, the Shoah, and sixty million dead as part of an optimistic program to impose national socialism and communism).

237. Joshua Rhett Miller, *US College Campuses Are "Hotbed" of Anti-Semitism*, N.Y. POST (Apr. 24, 2017, 12:16 PM), https://nypost.com/2017/04/24/us-college-campuses-are-hotbed-of-anti-semitism/ [https://perma.cc/2SHU-ACXH] (suggesting the number of violent attacks on Jews on campus has been reduced but remains high).

B. *Free Speech Rules and in an Era of Innovation*

1. Supreme Court Rules: Neutrality and Other Philosophic Difficulties

Despite the rising tide of liberalism's debris, when modern conceptions of free speech doctrine are applied to the public squares or college campuses,[238] this application is often established on the proposition that citizens in their capacity as citizens operate within a marketplace of ideas; each citizen is endowed with an equal right to influence the direction and content of public opinion.[239] This approach is tethered to the idea that all citizens are entitled to speak on matters of public concern including "the right to speak freely and the right to refrain from speaking at all."[240]

Advanced by the allegation that "[i]f 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,"[241] free speech purportedly serves many ends, including "our democratic form of government," and it achieves its inflection point in the contention that communication advances society's pursuit of the truth.[242] Whether the putative pursuit of the truth and democratic governance is compatible with the elevation of autonomy and unorthodoxy or not, this debate has been informed by First Amendment discourse, which "has taught us to regard freedom as a form of monadic . . . individualism."[243] Whether such views can come to terms with deep skepticism about the possibility of rights or not,[244] attempts to enforce unrestricted speech rules hint that speech is an ultimate destination rather than an inferior way station. Insistence on unconstrained speech and autonomy faces an inhospitable geography (reality) indicating this objective may be impossible to attain. Irrespective of whether unrestricted speech, the pursuit of political neutrality, and the

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238. Post, *supra* note 71, at 114 (arguing academic freedom of teaching is not homologous with the classic First Amendment tradition).

239. *Id.* at 116 (rejecting the marketplace of ideas approach to universities).

240. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council, 138 S. Ct. 2448, 2463 (2018) (quoting *Wooley v. Maynard*, 430 U.S. 705. 714 (1977))).

241. W. Va. Bd. of Educ. v. Barnette, 319 U.S 624, 642 (1943) (internal emphasis omitted).

242. *Janus*, 138 S. Ct. at 2464.

243. Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse, and the Problem of DeBartolo,* 1990 WIS. L. REV. 149, 183 (1990).

244. *See, e.g.*, BETTY, *supra* note 212, at 92 (quoting August Comte's and Michel Houellebecq's suspicion that in the absence of "a creator God to affirm them, rights are no more than a shaky human conception subject to the whims of history and human preference . . . [or] 'arbitrary [human] wills'").

elevation of autonomy should be enforceable, these goals are undergirded by the deduction that the "best remedy for speech we dislike is more speech."[245] Despite deepening disrespect for democratic self-governance[246] as the nation surrenders to elite/aristocratic control,[247] two background conclusions manifest themselves as predicates to understanding Supreme Court rulemaking.

First, freedom of speech rights, like all other constitutional rights, are not absolute.[248] Speech rights are subordinate to the judgment that the ultimate liberty is not speech but the right to live in peace.[249] This determination should call forth judicial modesty regarding efforts to further expand speech rights. Second, in the wake of our collapsing metanarratives, the Supreme Court has assumed an expanded role for itself to act "neutrally" as our Chief Interpretation Officer to preside over a tournament of competing narratives,[250] and to give content to citizens' right to participate in the formation of public opinion.[251]

Against this foreground, three essential rules—largely applicable to the public sphere—emerge.[252] First, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys . . . . Viewpoint discrimination is thus an egregious form of content discrimination."[253] Assessing what constitutes content discrimination is

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245. CHEMERINSKY & GILLMAN, *supra* note 2, at 146 (citing Justice Brandeis).

246. *See* LASCH, THE REVOLT OF THE ELITES, *supra* note 13, at 84–85 (showing elites ignore the conditions necessary for democracy and self-governance to survive); *see also* Jeff Guo, *Washington's 'Governing Elite' Think Americans Are Morons*, WASH. POST (Oct. 5, 2016, 9:56 AM), https://www.washingtonpost.com/news/wonk/wp/2016/10/05/washingtons-governing-elite-actually-think-americans-are-morons/ [https://perma.cc/4WD7-RS6H] (exploring survey data finding "Washington's bureaucrats have grown too dismissive of the people they are supposed to serve").

247. Monica Showalter, *Democracy Dies in the Washington Post: WaPo Op-Ed Argues for Having Elites Decide Presidential Nominees,* AM. THINKER (Feb. 19, 2020), https://www.americanthinker.com/blog/2020/02/democracy_dies_in_the_washington_post_wapo_oped_argues_for_having_elites_decide_presidential_nominees.html [https://perma.cc/7ECN-7226].

248. *See* Lasson, *supra* note 46, at 53–54 (showing personal liberty is the degree to which it allows an individual to impose his speech on someone else and the deleterious effect his actions has on others because the ultimate liberty "is not freedom of speech but the right to live in peace secure from harassment" and hence certain kinds of speech can be restricted).

249. *Id.* at 53–54 (showing liberties including speech can be restricted).

250. Harry G. Hutchison, *Agency Fees in the Mirror of Liberalism's Contradictions*, 38 QUINNIPIAC L. REV. (forthcoming 2020) (manuscript at 10), https://ssrn.com/abstract=3455588 [hereinafter Hutchison, *Agency Fees*].

251. Post, *supra* note 71, at 107.

252. *Id.*

253. NOWAK & ROTUNDA, *supra* note 71, at 1254–55 (quoting Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 828–829 (1995)).

complicated.[254] The Supreme Court has wrestled with various distinctions between content-based restrictions[255] and viewpoint discrimination,[256] all of which are tied to the deduction that "[a]ll of the clauses of the First Amendment" are connected "by the concept of freedom of belief."[257] Although (a) freedom of belief is not explicitly written into the First Amendment itself,[258] (b) as explained in *Rosenberger v. Rector & Visitors of University of Virginia*,[259] viewpoint discrimination is a subset of content discrimination,[260] and (c) "[t]he Court's concern with content discrimination predates the focus on viewpoint discrimination,"[261] which "is a far more serious offense to freedom of speech than content discrimination"[262] because one side is handicapped on the basis of what it can say.[263] Still, the Supreme Court allows the government to "place reasonable time, place and manner restrictions on speech without regard to content"[264] despite the forecast that these regulations will have the incidental effect of limiting the amount of free expression in our society.[265]

Second, the Supreme Court has been "vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions" consistent with the deduction that "[t]he First Amendment recognizes no

254. *Id.* at 1255.

255. *Id.* at 1253 (noting the Court has determined that "content-based restrictions on speech are subject to strict scrutiny, whereas non-content-based restrictions are subject to a more lenient form of judicial review").

256. *Id.* at 1254 (noting the Court has never approved a government action punishing an individual merely on the basis that her view differs from the government's viewpoint). "Not all content-based punishment involves viewpoint-based punishment. Yet all viewpoint-based punishment involves content-based punishment." *Id.* at 1254.

257. *Id.*

258. *Id.*

259. Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

260. *Id.* at 829 ("Viewpoint discrimination is thus an egregious form of content discrimination.").

261. Bloom, Jr., *supra* note 1, at 21.

262. *Id.* at 25.

263. *Id.* at 26. In *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, a majority of the Court distinguished "regulation of content, which would be subject to strict scrutiny, from the regulation of viewpoint, which would be prohibited per se." *Id.* In 1986, in a four-Justice plurality opinion the Court "invalidated a regulation in part because it discriminated on the basis of viewpoint." *Id.* at 23 (footnotes omitted); *see also* NOWAK & ROTUNDA, *supra* note 71, at 1254–55 (showing the closest the Court has come to upholding viewpoint discrimination was in *Morse v. Frederick*, a case allowing a public school to punish a student's speech that was interpreted as encouraging drug use).

264. NOWAK & ROTUNDA, *supra* note 71, at 1255.

265. *Id.* Although, the Court will not rubber-stamp time, place, and manner regulations of speech, such regulations are not subject to the compelling interest test. *Id.*

such thing as a 'false' idea."[266] Instead, coherent with Justice Holmes's analysis, ideas must be tested by the market.[267]

Third, a basic principle of the First Amendment is "that 'freedom of speech prohibits the government from telling people what they must say.' . . . The essential thrust of the First Amendment prohibits improper restraints on the *voluntary* public expression of ideas.'"[268] This principle suggests that government cannot enforce a hierarchy of ideas.

Evidently, the Court incorporates these rules with regard "to the set of communicative acts judged necessary for the formation of public opinion"[269] since the civil polity's participation in the creation of public opinion sovereignly decides the nation's destiny.[270] Creating conditions necessary for public discourse rules out content discrimination to "[ensure] that persons set the agenda for government action rather than the reverse. The State cannot rule out topics or viewpoints that persons wish to place on the national agenda"[271] harmonious with the inference that the equality of ideas permits every democratic citizen the equal right to influence public opinion to which the State responds.[272] This largely Rawlsian view concedes "there are no experts: a philosopher has no more authority than other citizens."[273] Public opinion bows to "the equality of ideas flow[ing] from . . . political equality" as opposed to "epistemological equality," which conflicts with notions of truth and falsity.[274] Significantly, "the rule against compelled speech prevents coercion that would interfere with the ability of persons to imagine that the State is potentially responsive to them" because we cannot authorize the formation "of our own government if we are compelled to participate in the formation of public opinion in a manner that is contrary to our own will."[275]

266. Post, *supra* note 71, at 107–08 (quoting Hustler Mag., Inc. v. Falwell 485 U.S. 46, 51 (1988)).

267. *Id.* at 108 (citing Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 51 (1988)).

268. *Id.* (emphasis added) (first quoting Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc. 570 U.S. 205, 213 (2013); and then citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985)).

269. *Id.*

270. *Id.* at 109.

271. *Id.* at 108.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

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Irrespective of whether the state is responsive to the will of all citizens,[276] irrespective of whether all speech doctrines can be connected to the dawn of the modern age, and irrespective of whether such ideas culminate in disaster, newer understandings and extensions of Supreme Court views emerge. These understandings may reflect opinions that are disconnected from the history of the First Amendment, the judicial triad's emphasis on democratic legitimacy, and the creation of democratic character. Despite appeals to judicial modesty, such views may legitimize efforts by contemporary elites who are pastless, futureless, atomized, "born anew at every instant,"[277] and who exercise real power over and express "utter contempt for the citizens they" ostensibly serve.[278] More likely than not, these moves advance First Amendment viewpoints, which elevate free speech's non-instrumental capacity.

Whether the Court's speech intuitions stray from the judicial triad's boundaries, it is increasingly commonplace to decline to acknowledge protection can be limited when the expression fails to contribute to public opinion as a collective enterprise but instead insatiably elevates individual agency. Although declination does not fit within the framework established by the judicial triad, it is favored by cosmopolitan commentators.[279] Whether expansive free speech claims represent a new conception of the First Amendment without democratic limits or not, all enumerations of speech rules that build upon claims that the government's power to sanction expression is constrained by an antidiscrimination principle, there are no false ideas, and authorities cannot tell citizens what to say, invite problems. Consider the following difficulties implicating freedom of expression within such intuitions, in an era wherein public opinion falls prey to manufactured consent, favoring the privileged.[280]

First, the contention that there are no false ideas is self-evidently

276. Evidence exists showing that this claim is implausible. *See generally* Guo, *supra* note 246 (detailing evidence showing that this claim is implausible).

277. LASCH, THE CULTURE OF NARCISSISM, *supra* note 22, at 11.

278. Guo, *supra* note 246.

279. *See* CHEMERINSKY & GILLMAN, *supra* note 2, at 24–48 (expressing support for free speech maximalism); *see also* Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 30–32 (discussing Court views supporting a non-instrumentalist view of speech).

280. *See generally* EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (1988) (showing the media defends the economic, social, and political agendas of privileged groups that dominate domestic society, the state, and the global order).

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falsifiable, and it is haunted by its imaginary nature.[281] Since the Court's gnostic claim implies that truth is illusory, the force of this assertion could facilitate a re-configuration of truth by individuals and groups who have a predetermined agenda.[282] Their agenda could terminate in a moral equivalence between the Golden Rule, for example, and the incomprehensible September massacres before things fell apart after the dawn of the French Revolution's new age in 1792[283] and efforts to deal with odious forms of authoritarianism that evoke the world's halting efforts to deal with the dogs of doom, surfacing during the age of social catastrophe.[284] The romance associated with the latter age remains alive as vast numbers of contemporary liberals persist in severing "the repressive policies of all actual Communist governments from the [unlikely] perfection of those that may yet exist in the future."[285]

What is more, the Supreme Court's proclamation—that false ideas do not exist—becomes intertwined with a practical question: has the Court given observers a workable limiting principle with respect to the putatively neutral and equal citizen's right to express their views however false they may be? Without a limiting principle or acknowledging not all claims are truthful in any cognizable sense, arguments multiply providing fertile ground to advance a limitless right of expression, and free speech rules become standardless. This fosters the probability that no rules exist aside from claims issuing forth from a Nietzschean will to power.

Second, difficult questions arise regarding the probability that the veneer of neutrality hides decision making that advances the preferences of the privileged and contradicts contentions that all citizens are *equally* free to influence and shape the formation of public opinion.[286] These contradictions breed doubts, diminishing the plausibility of free speech

281. Post, *supra* note 71, at 112–13.

282. *See supra* note 280 and accompanying text.

283. DAVID ANDRESS, THE TERROR: THE MERCILESS WAR FOR FREEDOM IN REVOLUTIONARY FRANCE 110–15, 149–77, 116–48 (Farrar, Straus and Giroux 2005) (describing the September massacres before things fell apart, the dawn of the French Revolution's new age in 1792, and the new Jacobin age).

284. *See, e.g.*, ROBERT GELLATELY, LENIN, STALIN, AND HITLER: THE AGE OF SOCIAL CATASTROPHE 3–6 (2007) (showing how catastrophe enveloped Europe between 1914 and 1945; it was part of a continuous period upheaval, being that society was transformed by "two world wars, the Russian Revolution," the Holocaust, and the rise and fall of the Third Reich).

285. WISSE, *supra* note 35, at 183.

286. Catharine A. MacKinnon, *The First Amendment: An Equality Reading*, *in* THE FREE SPEECH CENTURY, *supra* note 49, at 140, 141.

norms, and enforcing such norms may bolster inequality.[287] Contradictions surface because speech hermeneutics lack a substantive notion of equality;[288] additionally, paradox devours modern liberalism despite its capitulation to a Whig version of history culminating in liberty and progress.[289] Paradox appears because liberalism, "[i]n contrast to its crueler competitor ideologies, . . . is more insidious: as an ideology, it pretends . . . neutrality, claiming no preference and denying any intention of shaping the souls under its rule."[290] Even though "liberalism promised to displace an old aristocracy in the name of liberty; yet as it eliminates every vestige of an old order, the heirs of their hopeful antiaristocratic forebears regard its replacement as a . . . more pernicious[] kind of aristocracy."[291] After leaving equality adrift, "[t]he liberties that liberalism was brought into being to protect—individual rights of conscience, religion, association, speech, and self-governance—are extensively compromised by the expansion of government activity into every area of life."[292] This is so because "[s]tatism enables individualism, [and] individualism demands statism."[293] Therefore, the liberalized state permeates civil society so much "the two are mostly indistinguishable."[294]

Neutrality, as a jurisprudential value, must confront additional problems, which deservedly expose it to deepening disrespect. These particular difficulties arise because free speech rules originate from and are enforced by liberalocrats, our new ruling class. Liberalocrats encompass a nonrepresentative and unaccountable cadre of consultants, bureaucrats and judges—including all the Justices of the Supreme Court[295]—who, through breeding, education, and training have separated themselves from the lives, and political concerns of common citizens.[296] Judges' isolation multiplies

287. *Id.*

288. *Id.* at 141–42.

289. Murray N. Rothbard, *The Progressive Theory of History*, MISES INSTITUTE (Sept. 14, 2010), https://mises.org/library/progressive-theory-history [https://perma.cc/UD8K-T43C].

290. DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 5.

291. *Id.* at 7.

292. *Id.*

293. *Id.* at 17.

294. JAMES DAVISON HUNTER, TO CHANGE THE WORLD: THE IRONY, TRAGEDY, AND POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD 154 (2010).

295. Hutchison, *Agency Fees*, *supra* note 250, at 540.

296. *See* DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 131–41 (showing elite universities engage in the educational equivalent of strip mining by identifying and enrolling students as part of two-tiered educational system that separates out the most talented students, teaching them the set of cooperative skills needed and thus replacing "one unequal and unjust system with another[,]"

neutrality's conceptual and practical difficulties. Troubles surface because the prevailing philosophic conceptions on which liberalism was formed, and then adopted by Article III courts, are not neutral.[297] They emphasize abstract notions of equality, highly atomized understandings of the individual, and de-emphasize the pursuit of the "good" grounded in an originating social contract.[298] Instead, liberalism pursues ideological goods, while pretending such goods originate behind a veil of ignorance.

Complications compound because liberalocrats, as image bearers of liberalism, have chosen to live as innovators who "engage in experiments in living", in non-conformity with the notion of public opinion—particularly opinion predicated on custom.[299] They are driven by the epistemic belief that ordinary citizens—decidedly seen as "morons"[300]—must be controlled by experts and expert opinion.[301] Against this backdrop, enforcement of speech norms requires action by judges, university administrators, and bureaucrats, whose educational background favors decision making that is drawn toward partiality advantaging the privileged,[302] a trend that replaces "one unjust and unequal system with another," even more insidious one, led by a new set of aristocrats.[303] Within this framework, in the absence of an origination and grounding in neutrality, it becomes impossible to discover

promising growth and goods to the lower classes, while elites reign as a new aristocracy that disdains public opinion). Consistent with this analysis, all our current Justices' educational profile fits Deneen's description. *Id.*; Hutchison, *Agency Fees*, *supra* note 250, at 540.

297. *See* sources cited *supra* note 296.

298. *Id.*

299. *See*, *e.g.*, DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 143–48 (describing how contemporary liberals have become the heirs of the nineteenth-century architects of progressive liberalism, who were propelled by an imperative to liberate individuals from arbitrary and unchosen relationships, and remake the world into one disposed to embrace expressive individualism, premised on experimental living and the outright rejection of public opinion).

300. Guo, *supra* note 246.

301. DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 138–40 (describing the rise of a new aristocracy and the replacement "of one unequal and unjust system with another system enshrining inequality" through the promise of material advancement).

302. Apparently, they are haunted by behaviors and beliefs they hold in common with rich elites, who "have far more in common with their counterparts in London, Paris, and Tokyo than with their fellow Americans." Mike Lofgren, *Revolt of the Rich*, AM. CONSERVATIVE (Aug. 27, 2012, 12:00 AM), https://www.theamericanconservative.com/articles/revolt-of-the-rich/ [https://perma.cc/9G5H-VBXH].

303. *See* DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 131–41 (demonstrating elite universities engage in the educational equivalent of strip-mining by identifying and enrolling students as part of a two-tiered educational system that separates out the most talented students and teaches them a set of cooperative skills, thus replacing "one unequal and unjust system with another").

equally empowered citizens since the citizenry possess conflicting understandings of the good and unequal abilities to mold public opinion while their political concerns are undermined by decision making of the nation's liberalocrats.[304] This narrative unravels the thesis that robust free speech norms facilitate the formation of public opinion, while concurrently implying that citizen self-governance is an appealing illusion. Instead of advancing the formation of public opinion via the equal contributions of *all* citizens, liberalism's presumptions lend themselves to the mounting disadvantage of individuals who are marginalized and disfavored.[305] Disturbingly, evidence gathered from universities indicates that this group is disproportionately comprised of Jewish students.[306]

However, many courts and commentators cling to the fable of neutrality.[307] The prospect of attaining true neutrality is tempered because liberalocrats, including judges, enforce non-neutral assumptions rooted in liberalism's foundational commitments, which include, among other things, J. S. Mill's harm principle.[308] Even though, from its inception, the harm principle has been unable to guarantee metaphysical neutrality[309]—and while liberalism's quest for freedom and progress has been belied by the instantiation of titanic inequality[310]—liberalism's proponents persist in defending liberalism's distinctive commitments as deeply desirable goods in themselves.[311] This defense lays bare declarations that such goods arise *ex nihilo* from disinterested humans in their original position and ignores the likelihood that liberalism, despite its initial success, concludes in serfdom.[312] In fairness, we are all philosophical, if unacknowledged, heirs; we have all "inhaled invisible philosophies in the cultural air we breathe[,]"

304. *See*, *e.g.*, *id.* at 5 (showing liberalism pretends neutrality).

305. Hutchison, *Agency Fees*, *supra* note 250, at 102–03.

306. *See*, *e.g.*, Goldfeder, *supra* note 56 (indicating nearly 75% of Jewish students experience anti-Semitism in the United States).

307. *See* discussion *supra* Section III.B.1.

308. *Id.*

309. Matthew Schmitz, *An Informal Establishment*, FIRST THINGS (May 2020), https://www.firstthings.com/article/2020/05/an-informal-establishment [https://perma.cc/P7E9-RXKK].

310. DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 43–63.

311. Goldfeder, *supra* note 56 ("Every person is free to say what they want, however abhorrent, about Jews and/or the Jewish state.").

312. Joel Kotkin, *The Return to Serfdom*, NAT'L REV. (July 25, 2019, 12:29 PM), https://www.nationalreview.com/magazine/2019/08/12/the-return-to-serfdom/?referringSource=articleShare [https://perma.cc/8P6F-Y9KT].

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thus making it difficult to grasp the cloak of neutrality.[313] Nonetheless, liberalism's commitments, ideas, and goals, in the skillful hands of highly insulated and highly isolated commentators and judges, enable free speech rules to thrive under a banner of neutrality, when neither neutrality *qua* neutrality, nor democratic formation exist.[314]

Uncritical devotion to abstract free speech conduces to two deficiencies: (1) it fails to generate "public opinion," which commands the mantle of authority, and (2) it tends to systematically protect non-neutral speech while promoting social and political inequality.[315] Because such undeniable deficiencies afflict doctrines surfacing from the modern age of the First Amendment and its intellectual offspring, courts and universities should keep such inadequacies in mind before credulously enforcing free speech norms and principles on university campuses and elsewhere.

2. Separating Speech from Conduct

Before pressing ahead, it is useful to consider whether speech can be separated from conduct. Courts must solve this constitutional quandary: What speech falls "within 'the freedom of speech that the Constitution protects'"?[316] Such questions achieve contemporary prominence within the realm of anti-Semitism because advocates of the BDS movement deploy speech, however deceptive, to delegitimize Israel through Holocaust inversion techniques.[317] These techniques are driven by false claims, which are based on an imaginative aristocracy of grievances entwined with allegations of human rights violations by Israel and its supporters.[318] These

313. SMITH, ON THE ROAD WITH SAINT AUGUSTINE, *supra* note 11, at 20.

314. *See supra* text accompanying notes 299–311.

315. MacKinnon, *supra* note 286, at 142.

316. Frederick Schauer, *Every Possible Use of Language?*, *in* THE FREE SPEECH CENTURY, *supra* note 49, at 33.

317. Mary Margaret Olohan, *BDS Movement Uses Holocaust Inversion to Delegitimize Israel, Israeli Government Report Finds,* DAILY CALLER (Oct. 18, 2019, 4:04 PM), https://dailycaller.com/2019/10/18/bds-movement-report-israel-government/ [https://perma.cc/Q8ZS-NMV9] (showing a link between discourse and violence as BDS advocates intentionally use Holocaust inversion, the portrayal of Jews and Israel as Nazis, to create "an inverted reality where Israelis are the new 'Nazis' and Palestinians the new 'Jews,' and an inverted moral construct in which the Holocaust serves as a moral lesson for, and a moral indictment of, the Jewish State"). BDS may be indistinguishable from anti-Semitism. *Id.*

318. Hutchison, *Chasing Shadows*, *supra* note 12, at 217–28 (describing the deceptive creation of an aristocracy of grievance during our emotive age).

complex moves impel a "global surge in Jew-hatred" and are abetted by apathy climaxing in oppression by indifference.[319] Neither the public square nor universities are immune from these toxins. It is therefore important to separate presumably protected speech from conduct, while concurrently challenging Justice Douglas's intuition that pure speech may be immune from limitation.[320] Instead, courts should carefully interrogate institutions about their contentions, including universities when they engage in an unbalanced and uncontextualized application of free speech norms that disfavors targeted students.[321]

This debate reinforces the necessity of appraising speech questions with analytical skepticism regarding the presumptive appeal of liberalism's foundational claims. Arguably, any evaluation should be grounded in an affirmative response to the proposition that speech should nurture rather than shred communal bonds and should heal rather than spread hatred within our society. This observation corresponds with (a) Justice Brandeis's claim that hate operates as a destabilizing force in society,[322] (b) Professor Weinrib's admonition that unconstrained speech may trigger the rise of demagogues and fail to protect minorities when the system breaks down,[323] (c) the possibility that libelous utterances should not be constitutionally protected,[324] and (d) an analytical distinction that exists between speech *per se* and harassment rising to the level of discriminatory conduct.[325] These reflections—emphasizing the necessity of reclaiming space for the notion of the "good"—remain defensible even if courts and universities must entertain a principled debate on where limits should be placed.

The question remains whether free speech rules should be viewed as tenable on university campuses. Clarity may be difficult, but the next section offers one view of the cathedral.

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319. Bari Weiss, *Inconvenient Murders,* N.Y. TIMES (Dec. 5, 2019), https://www.nytimes.com/2019/12/05/opinion/politics/antisemitism-europe-corbyn.html [https://perma.cc/8U2L-23FY].

320. Brandenburg v. Ohio, 395 U.S. 44, 456–57 (1969) (Douglas, J., concurring) (per curiam).

321. For a discussion of contextualization, see *infra* Part IV.B.4.

322. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

323. Weinrib, *supra* note 49, at 67.

324. Beauharnais v. Illinois, 343 U.S. 250, 266–67 (1952).

325. *See, e.g.*, Goldfeder, *supra* note 56 (observing speech is protected by the First Amendment, but "discriminatory harassment, with or without accompanying acts," is not protected).

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IV. FREE SPEECH WITHIN THE UNIVERSITY?

A. *Prolegomenon*[326]

Systematic analysis of university speech rules challenges the applicability of the Supreme Court's three speech rules and the force of the judicial triad's ideas. The triad's views, and those of Holmes in particular, fairly provide scope for innovation and invention.[327] After all, he was consumed with the notion of adaptation that "demands the redirection of inquisitive energy . . . stimulated by competition over ideas . . . [while overcoming] the forces of custom and inertia" and tradition.[328] Holmes's free speech observations tethered to the inevitability of human progress provide a mushrooming platform for advancing the innovative jurisprudential assumptions of contemporary liberalocrats who are the presumptive intellectual heirs of Locke's economic liberalism and Mill's lifestyle liberalism.[329] This conclusion remains vivid despite liberalism's intellectual and political bankruptcy.[330] Bankruptcy becomes evident for numerous reasons including that an assessment of the "nature of anti-Semitism makes it impossible to believe in the progressive improvement of humankind without obscuring evidence of the Jews. . . . [and] their progressive demoralization . . . ."[331] Notwithstanding the onset of bankruptcy, and the fact that "classical liberalism has been in decline for more than a century"[332] as it diverges from reality and trends toward obsolescence,[333] liberalism's evolving insights furnish an ideological basis, which allows Holmes's heirs to pursue an unconstrained view of negative freedom and emphasize non-instrumental liberties.

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326. "[A] formal essay or critical discussion serving to introduce and interpret an extended work. *Prolegomenon*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/prolegomenon [https://perma.cc/9SNL-TJQH].

327. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 23.

328. *Id.*

329. *See generally* DENEEN, WHY LIBERALISM FAILED, *supra* note 6, at 144–61 (describing liberalocracy's ascendance as a new ruling class of self-made individuals who have been freed from accident, circumstances, and custom to live experimental lives, accompanied by the belief that ordinary people must be controlled by experts and expert opinion because they lack the expertise necessary to control their own lives).

330. LASCH, THE CULTURE OF NARCISSISM, *supra* note 22, at 2.

331. WISSE, *supra* note 35, at x.

332. HANS-HERMANN HOPPE, DEMOCRACY: THE GOD THAT FAILED 221 (2001).

333. Matthew Schmitz, *The Ghost of Classical Liberalism*, FIRST THINGS (Apr. 2020), https://www.firstthings.com/article/2020/04/the-ghost-of-classical-liberalism [https://perma.cc/HT4A-UNML].

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On the other hand, the judicial triad's speech rules were initiated to advance self-government by the polity whereas "speech within universities does not serve this purpose. It serves the purpose of education, which [likely] requires an entirely different framework of speech regulation and protection."[334] Professor Post demonstrates that university communications are "ordinarily protected according to principles of academic freedom as distinct from freedom of speech."[335] Hence, it is misleading when those arguing in favor of a maximum free speech view say their position is rooted in doctrine.[336] In reality, such assertions are anchored in a normative ideal of what should happen within a university's boundaries.[337] The First Amendment protects the right of individuals to speak as individual members of the polity in a public forum, in contradistinction to freedom of inquiry rules governing "disciplinary communities," permitting them to "develop autonomously according to their own internal logic."[338]

Against these claims, numerous queries arise including:

(1) Is the scope of academic freedom in the classroom determined by the First Amendment?

(2) Can a university regulate speech based on its substantive content or the message conveyed?

(3) Must all individual expressions within a university be free from university sanction?

(4) Is there such a thing as a false idea within the domain of a university?

(5) Can universities impose non-neutral constraints on the expression of ideas?

As an initial matter, the scope of academic freedom in the classroom is *not* determined by the First Amendment.[339] The freedom of professors is determined by their competence, and their teaching must cohere with the

334. Post, *supra* note 71, at 112.

335. *Id.*

336. *Bee* Flanders, *supra* note 66, at 138 ("[T]he overall impression is that public universities are required to host and accommodate all viewpoints, . . . There is reason to take this position seriously."

337. *Id.* (reiterating the commonly held belief public universities must allow all viewpoints to be heard to avoid "running afoul of the First Amendment").

338. Post, *supra* note 71, at 117.

339. *Id.* at 113 (stating instead it is determined "by the requirements of professional competence").

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educational mission of a university.[340] This freedom is inclusive of the "freedom of thought, of inquiry, of discussion[,] and of teaching," but not absolute freedom of utterance.[341] Similar and broader constraints apply to students since student "communication is not about influencing public opinion." Instead, they are tasked with learning, and "their speech may be regulated in ways that facilitate their education."[342]

These preliminary answers achieve prominence because First Amendment principles do not govern most campus disputes despite the fact that "Americans have enjoyed a robust civic culture . . . celebrat[ing] freedom of expression" for quite some time.[343] Within a university's research realm,[344] the marketplace of ideas metaphor is inapplicable[345] because the marketplace is incompatible with the objective of freedom of inquiry designed to create expert knowledge within disciplines.[346]

University speech does not proceed along the pathway blazed by either the judicial triad or their contemporary heirs, leaving the First Amendment rather useless for purposes of solving most campus disputes. Neither a university's educational objectives nor its normative goals are directed toward influencing public opinion, but rather advancing expert knowledge and educating students. Students acting within or outside of a classroom while on a university campus are unlikely to be acting as sovereign agents of self-government like citizens within a republican form of government.[347] Accordingly, if the judicial triad's analysis retains its persuasive power, universities can (1) regulate speech based on its substantive content; (2) sanction individual expression under certain circumstances; (3) permit false ideas—consistent with the hierarchical claims disciplines make; (4) impose non-neutral constraints on expression within the realm of their

340. *Id.*

341. *Id.* at 117.

342. *Id.* at 112.

343. *Id.* at 106.

344. *See id.* at 115 (noting participation in an academic discipline means being subject to criticism by members of the discipline and thus the institution's freedom of inquiry rules rather than First Amendment rules apply).

345. *See id.* (exhibiting the distinction between the freedom of inquiry characteristic observed in the First Amendment tradition of an uninhibited marketplace of ideas as opposed to a university setting).

346. *See id.* at 115–16 (explaining how disciplines cannot create expert knowledge through prohibiting content discrimination, as "[d]isciplines are grounded on the premise that some ideas are better than others").

347. *See id.* at 112 (describing how students expressing themselves in the classroom are not acting as sovereign agents of self-government).

control—consistent with the fact that students and faculty must understand not all ideas are equal on campus; and (5) compel students to engage in certain speech.[348] Additionally, "no competent teacher would permit a class to descend into name-calling and insults"[349]—a determination that implies classrooms are not defensible venues for libelous utterances. While "students have a [First Amendment] right to petition the administration for redress of their grievances[,] . . . the institution is under no obligation to respond."[350]

Federal courts persuaded by the judicial triad should carefully interrogate claims that most university arenas implicate the First Amendment, despite seemingly definitive statements by the American Civil Liberties Union (ACLU), such as:

> Restrictions on speech by public colleges and universities amount to government censorship, in violation of the Constitution. Such restrictions deprive students of their right to invite speech they wish to hear, debate speech with which they disagree, and protest speech they find bigoted or offensive. An open society depends on liberal education, and the whole enterprise of liberal education is founded on the principle of free speech.[351]

This claim—perceiving public universities as public forums rather than schools and confusing an open society with a university—flounders because universities are not public forums but schools operating within a definable hierarchy of values.[352] This remains true even though faculty and students, as part of students' training program are "'free . . . to express the widest range of viewpoints in accord with the standards of scholarly inquiry[, academic freedom], and professional ethics.'"[353] Contrary to First Amendment rules precluding governments from enforcing a hierarchy of ideas, universities—consistent with academic freedom norms—can and must enforce a pecking order.[354] Confusion rather than clarity abounds

348. *See id.* at 115 (discussing how universities exercise content and viewpoint discrimination and compel speech based on an inequality to advance expert knowledge and education).

349. *Id.* at 113.

350. Josh Blackman, #*Heckled*, 18 FIRST AMEND. L. REV. 1, 13 (2019).

351. *Speech on Campus*, ACLU, https://www.aclu.org/other/speech-campus [https://perma.cc/X5Y3-L3FT].

352. Post, *supra* note 71, at 115 (noting while public discourse "postulates the democratic equality of all citizens, [academic] disciplines are inherently hierarchical").

353. *Id.* at 113 (omission in original)).

354. *Cf. id.* at 117 (discussing the significant distinction created by scholastic fora and how universities react as a result).

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when "the educational or research functions of a university are neither salient nor well theorized."[355] This gap signifies that some areas are not amenable to the application of academic freedom rules, thus providing scope for a dispute regarding which rules reign.[356]

In fairness, some argue that campus free speech controversies can be understood only within "the context of the history of free speech", which is in turn "inseparable from the First Amendment."[357] Free speech maximalists assert that freedom of speech is an "indispensable condition[] of nearly every other form of freedom."[358] First Amendment lawyer Floyd Abrams argues that universities have become centers of intolerance.[359] He observes: "[T]he single greatest threat facing free speech today 'come[s] from a minority of students, who strenuously . . . disapprove of the views of speakers whose view of the world is different from theirs and who seek to prevent those views from being heard.'"[360] Disputing such claims, Professor Robert Post shows there are good reasons to limit speech in many cases[361] despite the observation that freedom of speech norms are under threat for a variety of reasons.[362] In reality, "the best way to look at university First Amendment case[s], is not by treating universities as akin to public forums, but by treating them as *schools*"[363] with an educational and research mission safeguarded by academic freedom rather than Supreme Court case law. Still, doubt rather than clarity reigns because there is little "agreement on what function free speech should serve,"[364] little agreement

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355. *Id.*

356. *See id.* (demonstrating a lack of clarity on how academic freedom rules apply to outside speakers). *But see* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 823, 830–32 (1995) (deploying the anti-viewpoint discrimination principle and refraining from examining the university's motivation to invalidate a university regulation that prohibited reimbursement of expenses to a student newspaper that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality" (alteration in original)).

357. CHEMERINSKY & GILLMAN, *supra* note 2, at 22.

358. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

359. Thomas Healy, *Return of the Campus Speech Wars*, 117 MICH. L. REV. 1063, 1065 (2019) (second alteration in original).

360. *Id.* (quoting Ronald K. L. Collins, *Guest Contributor—Floyd Abrams*, "*Liberty is Liberty*," CONCURRING OPS. (Mar. 18, 2015), [https://perma.cc/RXN6-AJ76]).

361. *See* Post, *supra* note 71, at 112–13 (providing classroom examples where regulation is warranted and even beneficial).

362. *Mission*, *supra* note 40.

363. Flanders, *supra* note 66, at 157 (emphasis in original).

364. Weinrib, *supra* note 49, at 65.

regarding the purpose and proper conception of the university itself,[365] or agreement regarding education's end.[366]

Despite this foreground, which indicates speech can be restricted, and First Amendment canons are largely inapplicable to universities, contrary claims reappear. The next two subsections respond by examining specific hurdles and issues impinging on the plausibility of applying free speech norms to public universities followed by closing observations in subsection D.

B. *Specific Hurdles and Issues on the Road to University Speech Norms*

Persistent contentions that Supreme Court precedent leaves little "room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large"[367] remain credulous because the Court has never ruled that its public school decisions—*Tinker*,[368] *Hazelwood*,[369] *Fraser*,[370] and *Morse*[371]—are limited only to schools as opposed to universities.[372] Hence, the ACLU cannot substantiate its insistence that campuses must agree that "[s]peech that deeply offends our morality or is hostile to our way of life warrants the same constitutional protection as other speech because the right of free speech is indivisible."[373] While it is possible to distinguish cases involving university students and public school students in certain contexts,[374] as we shall see, several issues and hurdles encroach on the promise of unconstrained freedom of speech on campus, including: academic freedom norms,

365. Flanders, *supra* note 66, at 142 (suggesting a maximalist conception of free speech for universities wrongly conceives them as public fora, cultivating a free-wheeling ethos separating universities from public schools).

366. S*ee generally* ANTHONY T. KRONMAN, EDUCATION'S END: WHY OUR COLLEGES AND UNIVERSITIES HAVE GIVEN UP ON THE MEANING OF LIFE (2007) (contending higher education should focus on the meaning of life).

367. Flanders, *supra* note 66, at 139.

368. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

369. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

370. Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

371. Morse v. Frederick, 551 U.S. 393 (2007).

372. Flanders, *supra* note 66, at 139–40.

373. *Speech on Campus*, *supra* note 347.

374. *See, e.g.*, Tanford v. Brand, 104 F.3d 982, 985–86 (7th Cir. 1997) (distinguishing elementary and middle-school-aged children from university students for purposes of invocations deciding coercion and endorsement within the meaning of the Establishment clause as defined by the *Lemon* test).

harassment rules, and the inventive formation of social justice groupings, as well as other subjects, either separately or in combination with each other.

1. Has the University Engaged in Government Speech?

"The Supreme Court has held that when the government is the speaker, the First Amendment does not apply at all, or provide a basis for challenging the government's action."[375] In 2009, the Court "affirmed and extended this principle in *Pleasant Grove City, Utah v. Summum* . . . ."[376] Although *Pleasant Grove*[377] did not involve a university but a city park,[378] there is little reason to doubt its application to public universities. The Court's unanimous decision in *Pleasant Grove* held that the challenged exercise of government speech—allowing the placement of donated monuments on public land—was not subject to scrutiny under the Free Speech Clause.[379] This decision went beyond the borders set by the Court in *Rust v. Sullivan*[380] and *Johanns* v. *Livestock Marketing*[381] because for "the first time the Court has said that the government can adopt private speech as its own and thereby avoid the First Amendment."[382]

When public universities engage in government speech, they are "accountable to the electorate and the political process"[383] rather than the courts. Hence, the First Amendment is mute when universities speak.[384] This raises the question of whether a university can decide to adopt a particular side's position as its own message, thereby terminating an ongoing campus dispute and escaping First Amendment preclusion by favoring one

375. Erwin Chemerinsky, *Isaac Marks Memorial Lecture: Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 730 (2011) [hereinafter Chemerinsky, *Not A Free Speech Court*].

376. *Id.*

377. Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

378. *See* Chemerinsky, *Not A Free Speech Court*, *supra* note 375, at 730 (describing the context of the case where a city park contained eleven privately donated monuments and the subsequent denial by the City of Pleasant Grove of the request to erect a monument associated with the religious organization); *see also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 566 (2005) (holding the government speech, at issue, was exempt from First Amendment analysis).

379. Chemerinsky, *Not A Free Speech Court*, *supra* note 370, at 731.

380. Rust v. Sullivan, 500 U.S. 173 (1991).

381. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

382. Chemerinsky, *Not A Free Speech Court*, *supra* note 370, at 731.

383. *See* NOWAK & ROTUNDA, *supra* note 71, at 1284.

384. *Id.* at 1283–84.

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side of a campus debate.[385] Prevailing case law answers this question in the affirmative, thus allowing a university to "pick and choose the viewpoints it expresses—the justification need not be neutral."[386]

2. Are Universities Public Forums?

As previously noted, free speech norms are placed under stress when distinguishing between communication within a public university versus communication within a public square. Generally, when the government restricts speech on property it owns, or in a medium of communications owned by the government such as a public school paper or a public campus, a court will analyze restrictions on speech in terms of the type of forum involved.[387] In *Widmar v. Vincent*,[388] for instance, the Court held the government could not "exclude religious groups from using . . . public school classrooms for after-hours meetings if the government" opened such rooms to general public discourse.[389] Forum analysis typically applies to government-owned, as opposed to privately-owned property or channels of communication.[390] Government-owned property is divided into three categories: public forum, limited public forum, and nonpublic forum.[391] The more public the forum, the more likely that the First Amendment

385. My debt to Chemerinsky should be obvious. *See* Chemerinsky, *Not A Free Speech Court*, *supra* note 370, at 731 (discussing the possibility of the government circumventing private speech as its own to bypass the First Amendment).

386. Blackman, *supra* note 346, at 14 (citing Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015); Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Rumsfeld v. F. for Acad. & Institutional Rts, Inc., 547 U.S. 47 (2006)).

387. NOWAK & ROTUNDA, *supra* note 71, at 1262.

388. Widmar v. Vincent, 454 U.S. 263, 267–77 (1981) (holding the principle of keeping regulations of speech content-neutral is violated when a state university makes its facilities available for the activities of registered student groups but denies a registered religious group use of such facilities because of a university regulation prohibiting the use of university buildings for religious purposes).

389. NOWAK & ROTUNDA, *supra* note 71, at 1263.

390. *Id.* at 1262.

391. *Id.* "A public forum is government property that has traditionally been held open to public discourse such as . . . public parks" wherein the government generally "impose[s] content-neutral times, place, or manner" restrictions. *Id.* A limited public forum refers to a government-owned channel of communication or government-owned property that is not traditionally open to public discourse; however, nonetheless, "the government . . . has chosen to open this channel . . . to public discourse for a time." *Id.* at 1262. A nonpublic forum is "government property, or a government-owned [communication channel]" not traditionally held "open to public discourse and that the government has chosen not to open to such discourse." *Id.* at 1263. Examples would include "a public school classroom when class is in session." *Id.*

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controls.[392] Generally speaking, universities are not properly seen as public forums; thus, free speech rules have limited campus value.

3. Academic Freedom Rules

The warp and woof of academic freedom rules shrink the application of the Supreme Court's First Amendment law to universities.[393] This is true, even if one agrees with Professor MacKinnon's claim of academic freedom's trajectory tracing the same arc, which advances substantive inequality.[394] The contest between academic freedom rules and the institution's research and educational mission on the one hand and the pursuit of unconstrained speech accompanied by attempts to shut down opposing viewpoints on the other has given rise to a fierce debate. This debate's temperature has skyrocketed, reflecting society's mounting ideological struggles in the wake of liberalism's decomposition.[395] Although decomposition mounts as Americans are drawn irresistibly to individualism and isolation while pursuing un-constrainable liberty,[396] citizens are sympathetic to a broad consensus on the value of speech. Accordingly, citizens agree it is doubtful that a diverse, democratic society or a pluralistic university can survive without some measure of tolerance for opposing viewpoints.[397] Constructing tolerance in an educational environment—where neither free speech in isolation from other values nor the cultivation by the polity of democratic governance is the institution's objective—is difficult despite the hunch that universities ought to advance

392. *Id.* at 1263.

393. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 6–8 (Kermit L. Hall et al. eds., 2d ed. 2005).

394. *See* MacKinnon, *supra* note 286, at 150 (arguing academic freedom has been weaponized "in the hands of sexual harassers and racists . . . against students who claim their equality rights based on sex and race").

395. *See, e.g.*, Ahmari, *supra* note 208, at 48–50 (suggesting the move toward a liberal consensus has been transmuted into "a profoundly illiberal, repressive force—[despite or] precisely because it grants the autonomous individual such wide berth to define what is good and true").

396. *See, e.g.*, Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline*, 16 Hofstra Lab. & Emp. L. J. 133, 133–42 (explaining utilitarian individualism's deterioration increases as Americans move toward expressive individualism).

397. CHEMERINSKY & GILLMAN, *supra* note 2, at 158–59 (stating a more tolerant and inclusive society and university fosters a diverse, democratic society). *But see, e.g.*, Kevin den Dulk, *Isolation and the Prospects for Democracy: the Challenge of the Alienated: Does Pluralism Have an Answer to Our Social Estrangement?*, COMMENT (May 24, 2018), https://www.cardus.ca/comment/article/isolation-and-the-prospects-for-democracy/ [https://perma.cc/2YKT-DQSA] (referencing Robert Putnam's opinion that increasing levels of ethnic and ideological diversity within contemporary society correspond negatively with the trust and solidarity necessary to sustain conversations).

debate. The advancing debate must be within limits that constrain certain expressions, which "distract from, rather than contribute to, the educational focus of the discussion."[398]

Because campuses are organized by academic freedom rules,[399] which non-neutrally[400] serve a university's purposes,[401] university debates operate in tension with principles encouraging maximum freedom of expression.[402] Since free speech norms pivot on whether expression advances self-government—and universities aim to further education and academic inquiry achievable through academic freedom—classic First Amendment principles are largely inapplicable to universities.[403] On one account, "[a]cademic freedom means that both faculty members and students can engage in intellectual debate without fear of censorship or retaliation."[404] In this regard, academic freedom includes the right to express and challenge one another's views without fear, as long as they do not impair others' rights. "[I]n the case of faculty members," if their views do not demonstrate "professional ignoran[ce], incompeten[ce], or dishonest[y] with regard to their discipline", they retain academic freedom.[405]

Such views make sense, so long as people concede academic freedom principles constrict the scope of modern freedom of speech doctrines.[406] In this view, academic freedom rules are implicated in "appropriately translating the principles of [significant constitutional cases involving public schools such as] *Tinker* et al. to colleges and universities"[407] because both public schools and universities must deal with students rather than members

398. Flanders, *supra* note 66, at 154.

399. *See* Cary Nelson, *Defining Academic Freedom: Penn State Professors Move to Given More Leeway to Faculty Members Dealing with Controversial Issues*, INSIDE HIGHER ED (Dec. 21, 2010), https://www.insidehighered.com/views/2010/12/21/defining-academic-freedom [https://perma.cc/PC43-FH35] (discussing implications of academic freedom and what is and is not allowed).

400. *See, e.g.*, Blackman, *supra* note 346, at 15–19 (offering examples of non-neutral behavior by universities in the domain of speakers who are invited by student groups).

401. Post, *supra* note 71, at 112 (suggesting First Amendment principles may not apply to universities because the legitimacy of speech hinges on whether it advances self-government, while universities exist to further academic inquiry and education).

402. *See* Nelson, *supra* note 399 (clarifying the boundaries of academic freedom).

403. Post, *supra* note 71, at 112.

404. Nelson, *supra* note 399.

405. *Id.*

406. *Cf.* NOWAK & ROTUNDA, *supra* note 71, at 1283–85 (contrasting "government regulation of private speech [with] speech by the government" and providing an historical background).

407. Flanders, *supra* note 66, at 140–41.

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of the public at-large.[408] This line of cases confirms the Court's acceptance of a "wide range of permissible restrictions on free speech".[409]

Nonetheless, in *Healy v. James*,[410] to advance debate at Central Connecticut State College, students sought recognition for "a local chapter of Students for a Democratic Society."[411] The university's president refused, and the students sued under the First Amendment.[412] Case law indicates high school and college students were both subject to instruction, and classes were the main vehicle for this objective; thus, making it difficult to posit a decisive break between the nature of high schools and universities.[413] Nonetheless, the *Healy* Court observed "state colleges and universities," like the high school students in *Tinker*, "are not enclaves immune from the sweep of the First Amendment."[414] In *Healy,* Justice Powell noted: "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."[415] While Justice Powell's analysis coheres with liberalism's emphasis on freedom of inquiry, and while he wrongly concludes that classrooms are marketplaces of ideas, and conflates academic freedom with the First Amendment, the Court maintained that "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case."[416] This conclusion coheres with the necessity of limits on speech. Consistent with these limits, the *Healy* Court upheld the students' claim for recognition but also determined that the university environment justifies insistence on compliance with certain reasonable regulations permitting the campus to impose sanctions for

408. *Id.*

409. *Id.* at 147–48.

410. Healy v. James, 408 U.S. 169 (1972).

411. *Id.* at 170.

412. *Id.*

413. Flanders, *supra* note 66, at 153, 154; *see also* Doe v. Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602, 627 (E.D. Va. 2016) (holding *Tinker* ought to be applied to universities in a way that accounts for institutional differences between universities and secondary schools); Axson-Flynn v. Johnson, 356 F. 3d 1277, 1289–90 (10th Cir. 2004) (citing Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993)) (indicating the court is not unmindful of the differences between university and high school students in terms of age and maturity).

414. *Healy*, 408 U.S. at 180 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1960)).

415. *Id.* at 180–81.

416. *Id.* at 180 (omission in original) (quoting *Tinker*, 393 U.S. at 506).

violations to safeguard "the traditional academic atmosphere."[417]

Despite the language of *Healy*, free speech intuitions remain under threat in public universities, and the deployment of either classic or inventive free speech doctrines against such threats face a bleak future. Commentators, who rightly condemn the uncritical application of freedom of speech doctrines to campus life, offer two weighty questions that are difficult to answer in the affirmative. The questions include: (a) Do First Amendment protections attach to speech in a university and (b) Does speech—meaning the advancement of the process of self-government in our republic—occur within universities,[418] a query that helps determine whether a university free speech crisis exists.[419] Whether the First Amendment applies to private universities or not,[420] and beyond the possibility of a speech crisis[421] or the differing free speech rights of three different groups,[422] critics of the blanket application of the First Amendment to public universities persistently emphasize that speech should ordinarily be "protected according to principles of academic freedom."[423] This analysis repudiates both the Supreme Court's confused analysis and conflation of academic freedom rules and the First Amendment in *Healy* and the Court's confused analysis—claiming classrooms are a marketplace of ideas.[424]

Conflation and confusion reigns because commentators—including Justices of the Supreme Court—"identify liberty of thought, unfettered inquiry, and robust debate as foundational values within higher education".[425] Since universities are not a free market for ideas, there is not a clean break between universities and public high schools,[426] and a principled distinction exists between First Amendment norms and academic freedom rules, First Amendment principles must therefore shrink. Massive shrinkage is warranted because universities are driven by objectives, which

417. *Id.* at 193–94, 194 n.24.

418. Post, *supra* note 71, at 112.

419. *See* Healy, *supra* note 354, at 1066 (giving examples of free speech issues on college campuses).

420. *See id.* (contending the First Amendment is inapplicable to private universities).

421. *See id.* at 1067–69 (noting the limited number of First Amendment violations among 4,700 colleges in the United States).

422. *Id.* at 1070–81 (observing the free speech rights of three different groups—faculty, students, and outside speakers—should be distinguished).

423. Post, *supra* note 71, at 112.

424. Healy v. James, 408 U.S. 169, 180–81 (1972).

425. CHEMERINSKY & GILLMAN, *supra* note 2, at 156.

426. Flanders, *supra* note 66, at 152–53.

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are calculated to create competent communities while cultivating independent minds.[427] Universities fashion a structured process designed to spark self-creation as part of liberalism's goals[428] and ostensibly assist society in pursuing rational certainty.[429] Speech has a role in this process, but its role dwindles in the face of academic freedom rules' superiority. Consequently, even though government viewpoint discrimination in the public square constitutes a per se violation of the First Amendment,[430] campuses can freely engage in such discrimination and compel speech because universities "do not consider all ideas to be equal."[431] This approach turns classic First Amendment norms on their head as campus administrators constrict certain categories of speech while simultaneously elevating others.[432] Academic freedom rules supply an undefined third zone between unconstrained speech and complete censorship. This enables universities to be bound by rules found in the *Tinker* quartet of cases, subject to the stipulation that the approach taken should be adjusted to fit students' needs and characteristics in college.[433]

4. Speech in the Mirror of Harassment Rules

Consistent with Professor Weinrib's concern that free speech principles inadequately protect minorities from harm and may trigger the rise of hateful demagogues,[434] observers, including the President in his recent Executive Order,[435] indicate more must be done to protect students from discrimination in schools and colleges. Harassment consists of speech that

427. Post, *supra* note 71, at 115 (arguing "*only* universities reproduce, refine, and conserve the practices, beliefs, and methods of knowing that define" a particular academic discipline).

428. *Id.* at 113–14.

429. BETTY, *supra* note 212, at 12 ("There is no power in the world—economic, political, religious or social—that can compete with rational certainty. The West has sacrificed everything to this need: religion, happiness, hope—and, finally, its own life.").

430. *See* Bloom, Jr., *supra* note 1, at 23 (noting the Supreme Court has determined speech regulations of viewpoint are prohibited per se).

431. Post, *supra* note 71, at 116.

432. *See* CHEMERINSKY & GILLMAN, *supra* note 2, at 150–52 (listing what campuses can and cannot do).

433. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).

434. *See* Weinrib, *supra* note 49, at 66–67 (showing a commitment to the First Amendment, no matter how inventive, may prove inadequate to problems disfavored groups face).

435. *See* Exec. Order No. 13,899, 84 Fed. Reg. 68,779 (Dec. 16, 2019) (noting the increase in anti-Semitic incidents relating to students).

targets an individual and is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim['s] educational experience, that the victim-student [is] effectively denied equal access to an institution's resources and opportunities."[436] The Civil Rights Act[437] and Education Amendments Act[438] mandate compliance obligations pursuant to the Department of Education's financial assistance rules.[439] Title VI of the 1964 Civil Rights Act states:

> No person in the United States shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[440]

Anti-harassment rules are difficult to dismiss because they gel with the university's mission to teach students how to debate ideas vigorously within a forum constrained by academic freedom and inquiry rules, while complying with the canons of civility.[441]

Harassment rules play a role in constraining expressive acts at both public and private universities under federal financial assistance rules. In an era that has seen rising plots designed to carry out anti-Semitic attacks in the

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436. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651 (1999) (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

437. Title VI of the Civil Rights Act, 42 U.S.C. § 2000d.

438. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

439. Off. of Civ. Rts., U.S. Dep't of Educ., Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html [https://perma.cc/9FEN-2MZF] (noting the Department of Education is committed to enforcing civil rights laws even though the "OCR's jurisdiction does not extend to religious discrimination"). "The OCR aggressively investigates alleged race or ethnic harassment against Arab Muslim, Sikh and Jewish students." *Id.* On one view—largely connected with the Supreme Court's decision making in *Shaare Tefila Congregation v. Cobb*—Jews, for instance, "should be considered members of a distinct 'race' for purposes of interpreting the Civil Rights Act of 1866." *See, e.g.*, Kenneth L. Marcus, *Bullying As A Civil Rights Violation: The U.S. Department of Education's Approach to Harassment*, 12 ENGAGE 54, 56 (Aug. 2011) [hereinafter Marcus, *Bullying As a Civil Rights Violation*] (referring to the OCR's use of *Shaare Tefila* as guiding line for Title VI prosecutions of anti-Semitic harassment).

440. OFF. OF CIV. RTS., U.S. DEP'T OF EDUC., TITLE VI ENFORCEMENT HIGHLIGHTS: OFFICE FOR CIVIL RIGHTS (2012), https://www2.ed.gov/documents/press-releases/title-vi-enforcement.pdf [https://perma.cc/9VPN-5F9U] (citing Title VI of the 1964 Civil Rights Act).

441. *See, e.g.*, Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, 53 L. & CONTEMP. PROBS. 195, 223–24 (1990) (suggesting it is a university's mission to teach students to vigorously perform within the marketplace of ideas).

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United States,[442] federal harassment rules face a complex backdrop because commentators worry whether the working definition of anti-Semitism is sufficiently protective of Jewish students.[443] Others worry that traditional anti-Semitism has been converted into a "new anti-Semitism," which directs its ire against the state of Israel.[444] Other complex issues surface as well, including two sets of questions.[445] First, how should institutions distinguish, if at all, between unlawful ethnic or ancestral anti-Semitism and other forms of religious anti-Semitism that are outside the scope of the federal government's Office of Civil Rights (OCR) policy coupled with the related inquiry whether constitutional limitations on harassment investigations exists.[446] Second, questions surface regarding whether "[t]he distinctions between racial and religious prejudice are elided by [other] definitions, such as *Merriam-Webster's* which straddle the difference, defining anti-Semitism as '[h]ostility toward or discrimination against Jews as a religious group or 'race.'"[447]

When speech is labeled a form of harassment, bullying, or hate speech, multifaceted issues surface because "there is not a category of speech known as 'hate speech' that may *uniformly* be prohibited or punished."[448] This view adheres to the notion that society favors free speech, whereas individuals seek protection from particular messages.[449] Although this debate continues unabated, and though hate speech may be proscribed under certain circumstances,[450] proponents of free speech maximalism would limit university speech restrictions to a narrow category inclusive of hate

442. *See Synagogue Massacre Led to String of Attack Plots, Jewish Group Says*, POLITICO (Oct. 21, 2019, 9:47 PM), https://www.politico.com/news/2019/10/20/jewish-attacks-pittsburgh-052868 [https://perma.cc/ZGP3-WSEQ] (noting the rise in arrests relating to plots to attack synagogues).

443. *See* KENNETH L. MARCUS, THE DEFINITION OF ANTI-SEMITISM 20–21(2015) [hereinafter MARCUS, THE DEFINITION OF ANTI-SEMITISM] (noting Kenneth Stern was criticized after co-authoring a statement indicating the "Working Definition" could be used to censor speech).

444. *See* Marcus, *Bullying As a Civil Rights Violation*, *supra* note 439, at 56 (questioning whether "new anti-Semitism" is addressed by standing practices of OCR prosecution).

445. *See id.* (suggesting additional complexity).

446. *Id.*

447. MARCUS, THE DEFINITION OF ANTI-SEMITISM, *supra* note 443, at 56 (second emphasis deleted).

448. Stephen J. Wermiel, *The Ongoing Challenge to Define Free Speech*, A.B.A., https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/the-ongoing-challenge-to-define-free-speech/ [https://perma.cc/6MFX-5QAM] (emphasis added).

449. *Id.*

450. *See, e.g.*, Flanders, *supra* note 66, at 141 n.27 (arguing modern Supreme Court decisions proscribing hate speech are consistent with its earlier precedents, such as *Tinker*).

speech, fighting words, true threats, and incitement constraints *as* defined by the Court in true public forum cases.[451] Outside this category, they assert, offensive speech would be impermissible.[452] Such views are predicated on the deduction that Supreme Court speech canons apply to campuses—consistent with *some* case law—a stance that is bolstered by a normative ideal viewing universities as public forums wherein tolerance is demanded and offense is expected.[453] But as Professor Flanders shows, this approach is inapplicable because "universities are in fact schools and not pure 'marketplaces of ideas,' where speech generally goes unregulated."[454]

Notwithstanding this debate, it bears noting the OCR is charged with interpreting a university's nondiscrimination obligations under Title VI, Title IX,[455] and other rules.[456] The OCR's interpretative gloss supports

451. *See id.* at 141 (suggesting those promoting limiting First Amendment speech on campus to the strictest category is not ideal).

452. Erwin Chemerinsky, *Hate Speech Is Protected Free Speech, Even on College Campuses*, VOX (Dec. 26, 2017, 4:33 AM), https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest [https://perma.cc/WTZ4-5GNL] (stating the Supreme Court has repeatedly said "the First Amendment means public institutions cannot punish speech, or exclude speakers," when and if the speech "is hateful or deeply offensive").

453. *See* Flanders, *supra* note 66, at 142 (noting the concept of universities being a public forum is more rooted in normative ideals than in law).

454. *See id.* at 141 (demonstrating support for the *Tinker* approach to free speech on university campuses).

455. *See* CHEMERINSKY & GILLMAN, *supra* note 2, at 15 (suggesting the OCR interprets campuses' duties under Title VI and the Title IX with regard to conducting learning environments).

456. More specifically:

> Educational institutions have a responsibility to protect every student's right to learn in a safe environment free from unlawful discrimination and to prevent unjust deprivations of that right. The Office for Civil Rights enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. . . .
>
> Discrimination on the basis of race, color, and national origin is prohibited by *Title VI of the Civil Rights Act of 1964*. . . .
>
> Discrimination on the basis of sex is prohibited by Title IX of the Education Amendments of 1972. This includes discrimination based on pregnancy, parental status, and sex stereotypes . . . .
>
> Discrimination against persons with disabilities is prohibited by *Section 504 of the Rehabilitation Act of 1973* and *Title II of the American with Disabilities Act of 1990* (Title II prohibits discrimination on the basis of disability by public entities, whether or not they receive federal financial assistance). . . .
>
> Discrimination on the basis of age is prohibited by *Age Discrimination Act of 1975*.

claims that the expression of certain ideas contributes to harassment. The University of California at Irvine, a public university, supplies an example of such a resolved claim against the Zionist Organization of America (ZOA).[457] ZOA charged the university with creating "a hostile learning environment for Jewish students" because the school's administrators permitted speakers, who were invited by the Students for Justice for Palestine and the Muslim Student Union, to engage in offensive speech.[458] This claim was denied.[459] Although this outcome may be inconsistent with the anti-bullying component of academic freedom,[460] it was not completely surprising for two reasons. For one, the OCR earlier clarified "that it has no power to force universities to police speech that is protected by the First Amendment and that public universities could not ban merely offensive speech."[461] Second, Title VI harassment rules may have limited applicability if a complaint asserts that speech, which "merely expresses offensive views toward a protected class" of individuals, does not adversely

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> These civil rights laws extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries and museums that receive federal financial assistance from ED. These include all public schools and most public and private colleges and universities.
>
> Programs or activities that receive ED funds must provide aids, benefits or services in a nondiscriminatory manner in an environment free from discriminatory harassment that limits educational opportunities. Such aids, benefits or services may include, but are not limited to, admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, and housing. Some of the civil rights laws enforced by OCR also extend to employment.
>
> OCR also enforces the *Boy Scouts of America Equal Access Act*. Under this Act, OCR can investigate complaints involving the denial of equal access or a fair opportunity to meet to, or discrimination against, any youth group officially affiliated with a group or organization listed in title 36 of the United States Code (as a patriotic society) that is intended to serve young people under the age of 21 that requests to conduct a meeting at a public elementary school, a public secondary school, or a state or local education agency that receives funds from ED.

OFF. OF CIV. RTS., U.S. DEP'T OF EDUC., *How to File a Discrimination Complaint with the Office for Civil Rights*, https://www2.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt [https://perma.cc/44TN-VZR5].

457. CHEMERINSKY & GILLMAN, *supra* note 2, at 15.

458. *Id.* 15–16.

459. *Id.*

460. *See* Post, *supra* note 71, at 114 (noting academic freedom does not license professors to bully their students).

461. CHEMERINSKY & GILLMAN, *supra* note 2, at 17.

affect "a student's educational opportunities or benefits."[462]

Conversely, one can persuasively argue any examination of speech claims within a university should consider *both* anti-harassment concerns and the existence of exceptional circumstances that contextualize certain categories of expression. *Virginia v. Black*[463] provides an example. In *Virginia*, the Court upheld an anti-cross burning statute by considering the statute's prohibition in the context of the actor's intent to intimidate; this approach provides a roadmap for universities.[464] Professor MacKinnon argues the *Black* Court's examination of "the history of the reality of cross burning—Ku Klux Klan terrorism, heralding lynching and other torture and murder—[shows] the practice was . . . [a] 'symbol of hate,'" even though, communicative conduct took place.[465] To the extent that offensive speech, accompanied by some measure of conduct, surfaces and targets a historically besieged group—such as Jews or other minorities—contextualization could help students and universities demonstrate that offensive speech is impermissible despite claims to the contrary.[466] Beyond the possibility, academic freedom rules may plausibly constrain hate speech that is viewed in a properly contextualized manner; legitimate attempts to bar such expressions challenge the notion that the First Amendment applies fully to universities. If speech is properly contextualized, it may arguably do more than merely provide an example of conduct implicating "pure" speech, thus indicating federal anti-harassment rules should apply to trench on speech claims.

5. Social Justice, Free Speech, and Academic Freedom Rules

A new heuristic, fashioned by recent ideological efforts, has disrupted free speech norms and academic freedom rules. This heuristic originates in an elevated form of moral knowledge, insistent upon interpreting society "through the lens of 'social justice', 'identity group politics' and 'intersectionalism' . . . ."[467] Nevertheless, historically, free speech norms

462. *Id.* at 120–21; *see also* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999) (describing the type of sexual harassment a student must establish in a discrimination suit).

463. Virginia v. Black, 538 U.S. 343 (2003).

464. *Id.* at 367; MacKinnon, *supra* note 286, at 152.

465. MacKinnon, *supra* note 286, at 152.

466. CHEMERINSKY & GILLMAN, *supra* note 2, at 17 (suggesting universities cannot ban merely offensive speech).

467. MURRAY, *supra* note 209, at 2–3 (noting identity politics atomizes according to sex, gender, and sexual preferences and presumes there is some elevated moral knowledge that comes with such distinct identities leading to a system of justice, which emerges from the perpetually moving hierarchy

empower individuals and groups disinterested in transforming language from: a means of expression between individuals who share common but differing yet reconcilable values into: a vehicle that conceals ideological endeavors designed to conform reality to "a particular vision of the world."[468] Because there is no escaping the metaphysical, this largely obscured metaphysical move places the targets of such a shift at risk.[469] Virtually any attempt to untie the knot of the social justice story with all of its complexity and its gnarled, taut, and disparate plotlines indicates that social justice warriors (SJWs) put academic freedom rules and free speech values through a threshing sledge in order to attend to putative deprivation and perceived harms associated with the university.[470]

Using Jacques Derrida's teachings of postmodern power, SJWs focus on the reversal of Platonist hierarchies, a move which may lead to the elevation of evil over good,[471] and demonstrates "barbarism is not a primitive form of life, . . but a pathological development of civilization."[472] Although Derrida argues that the very experience of a thing is a matter of interpretation,[473] SJWs develop dogmas, emphasizing the formation of "ideologically motivated moral[, even religious] communities"; a maneuver provoking scholarship in grievance studies and creating scriptural

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uncovered). This leads to new heuristics for individuals to ingest and new ways of policing and enforcing these new heuristics thus creating a new religion. *Id.* at 3–4. Victories attained by identity groups must be followed by additional victories even if the movement has already achieved its objectives, thus placing more avenues of speech under threat. *Id.* at 1–9.

468. BESANÇON, *supra* note 233, at 14.

469. *See, e.g.*, Rod Dreher, *Liberalism & Sacred Order*, AM. CONSERVATIVE (May 21, 2020, 11:57 AM), https://www.theamericanconservative.com/dreher/justin-lee-metaphysics-liberalism-sacred-order-deneen/ [https://perma.cc/U3GD-36R3] ("There is no escaping metaphysics—that is, an underlying account of the nature of reality. Metaphysics also implies a moral and political anthropology: an account of what a human being is . . . the reason we are having so many problems sorting ourselves out politically is because we, as a late liberal polity, lack a shared metaphysics.").

470. Victories attained by identity groups must be followed by additional victories even if the movement has already achieved its objectives, thus placing more avenues of speech under threat. *See, e.g.*, MURRAY, *supra* note 209, at 1–9 (discussing the speed of wars fought with the support of large tech companies resulted in great success for postmodernism).

471. *See, e.g.*, *Jacques Derrida*, STAN. ENCYCLOPEDIA OF PHIL. (July 30, 2019), https://plato.stanford.edu/entries/derrida/ [https://perma.cc/QU2H-5H82].

472. JOHN GRAY, THE SILENCE OF ANIMALS: ON PROGRESS AND OTHER MODERN MYTHS 9–10 (2013).

473. JAMES K. A. SMITH, WHO'S AFRAID OF POSTMODERNISM?: TAKING DERRIDA, LYOTARD, AND FOUCAULT TO CHURCH 49 (2006) [hereinafter SMITH, WHO'S AFRAID OF POSTMODERNISM].

canon.[474] These moves are grounded in victimhood[475] may be disconnected from reality as SJWs and other members of the Left advance allegations of rising human rights and other violations on university campuses and elsewhere. Such claims are frequently inversely disproportionate to the nation's actual number of such violations.[476] While SJWs are not alone in conflating their understanding of truth with something quite different—objective reality[477]—when university administrators readily accept such conflations as part of liberalism's essential fabric, it may have suffocating consequences. Such consequences may include (a) allowing SJWs to push against an open door labeled progress and tolerance,[478] thus providing a fresh opportunity to betray the Jews[479] and others; (b) facilitating the coddling of student minds as part of an elevation of identity politics;[480] and (c) corresponding with Professor Stephen Carter's deduction that "the true harbinger of an authoritarian future lives not in the White House but in the groves of academe."[481]

Complexity reigns and full comprehension eludes, in an environment where postmodern activists, whether through the exercise of either free speech rights or academic freedom norms, are unleashed to assert that the First Amendment and/or academic freedom rules, were once seen as a defense of the powerless, but have now become a weapon of the powerful.[482] Propelled by this intuition, SJWs may attempt to block their fellow citizens' participation in the formation of public opinion or the life

474. James A. Lindsay & Mike Nayna, *Postmodern Religion & the Faith of Social Justice,* AREO (Dec. 18, 2018), https://areomagazine.com/2018/12/18/postmodern-religion-and-the-faith-of-social-justice [https://perma.cc/X3T9-9WFM].

475. MURRAY, *supra* note 209, at 245–48 (noting social justice campaigners focus on representing those with alleged rights grievances).

476. *Id.* at 232.

477. SMITH, WHO'S AFRAID OF POSTMODERNISM, *supra* note 469, at 43 (explaining this conflation).

478. Hutchison, *Chasing Shadows*, *supra* note 12, at 224.

479. *See generally* WISSE, *supra* note 35, at 21–42 (describing the contours of this ongoing betrayal including the possibly emptiness of progress and the limits of tolerance).

480. *See, e.g.*, Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/ [https://perma.cc/QU4S-H52G] (suggesting America's universities feature students' efforts to scrub campuses of distressing words and issues).

481. Stephen L. Carter, *The Ideology Behind Intolerant College Students*, BLOOMBERG OP. (Mar. 6, 2017), https://www.bloomberg.com/opinion/articles/2017-03-06/the-ideology-behind-intolerant-college-students [https://perma.cc/5DRP-HKZJ].

482. MacKinnon, *supra* note 286, at 140.

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of the academic community based on SJWs' unique preferences rather than in compliance with legal doctrines or cognizable norms applicable to all members of the academic community.

The unchallenged exercise of SJWs' normative claims may shrink their opponent's application of academic freedom and, where applicable, freedom of speech principles, for their opponents, in exchange for trigger warnings, assertions of victimology, and the invocation of an aristocracy of grievance.[483] Although it is unlikely that SJW problem-solving corresponds with reality in every case, it often "coincides with attempts by Western leaders to hide the resurgence of anti-Jewish hatred".[484] Uncritical acceptance of SJW views empowers one faction of the polity at the expense of another, mangles the free speech debate, leads to unequal enforcement of speech rights, and diminishes the importance and uniform application of academic freedom rules; thus, exposing disempowered and disfavored groups to revulsion or violence.

Corresponding with SJWs' heuristics afflicting the contemporary Left,[485] this possibility—emphasizing the rights of one side of a debate and the exigent necessity of depriving the other side of similar rights—has surfaced repeatedly on campus.[486] While it is a mistake for universities to focus solely on freedom of speech rules at the expense of defending disputed events on academic freedom grounds and freedom of inquiry norms, a pattern of disruptions has surfaced, including events at the University of Chicago, the University of Pennsylvania, Middlebury College (all private schools), and elsewhere,[487] including the University of California at Irvine.[488] At the University of Chicago, Professor Kontorovich, a well-known Jewish scholar, after accepting an invitation to lecture about the intersection of the First Amendment and anti-BDS laws, dealt with a

483. Hutchison, *Chasing Shadows*, *supra* note 12, at 217–33 (analyzing grievances and BDS).

484. *Id.* at 224 (citation omitted).

485. Loeffler, *supra* note 60.

486. Scott Jaschik, *Who Gets Shouted Down on Campus?*, INSIDE HIGHER ED (Feb. 26, 2018), https://www.insidehighered.com/news/2018/02/26/event-sponsored-jewish-and-pro-israel-groups-university-virginia-disrupted-and [https://perma.cc/6NLB-8R5U] (describing the disruption of an event sponsored by Jewish and pro-Israel groups at the University of Virginia and various similar disruptions at other campuses).

487. *See, e.g.*, Ryszard Legutko, *The Demon in Middlebury,* FIRST THINGS (Aug. 2019), https://www.firstthings.com/article/2019/08/the-demon-in-middlebury [https://perma.cc/UF9C-Z9XM] [hereinafter Legutko, *The Demon in Middlebury*] (showing the intolerance on display at Middlebury College is not an isolated incident).

488. *See, e.g.*, Jaschik, *supra* note 482 (referring to an incident in which a pro-Israel group disrupted a talk given by Michael Oren at the University of Chicago).

virulent disruption from students.[489] At the University of Pennsylvania, a student group's invitation to Professor Amy Wax to speak on racial inequality provoked an outpouring of vituperation and the privileging of dissenting groups to abuse the professor while fellow faculty members responded by falsely labeling her writings as "the equivalent of a swastika or a burning cross."[490] Similarly, Professor Legutko experienced vitriolic intolerance and cancellation at Middlebury College.[491] The proliferation of such moves appears integrated with a ritual that fashions grievances into a religion, signaling that those with differing political and ideological views can no longer converse with one another, even within the guardrails, academic freedom properly provides.[492] Among an avalanche of consequences, this move beckons one final probability: violence.[493] With its inherent capacity to shut down speech, violence is an ever-present possibility when students' rights to demonstrate against a particular viewpoint[494] are transformed into an illegitimate right to disrupt or otherwise terrorize a university event held in a classroom or on campus.[495]

6. Group Libel Statutes?

Beyond the ability of academic freedom principles and harassment rules to constrain the application of First Amendment norms on university campuses and beyond the exact boundaries of a university's purposive goals, anti-Semitism may be constrained via the application of criminal libel statutes in use since 1936. In 1936, Mayor La Guardia responded to a hate-merchant's writings attacking "Jewish anti-Americanism and Talmudic communism," "by invoking his power as chief magistrate of the city of New York to issue a summons for criminal-libel."[496] "By the end of the 1940s, eight states had enacted statutes" criminalizing different group libel

489. Blackman, *supra* note 346, at 56–59.

490. Alexander Riley, *Woke Totemism*, FIRST THINGS (Aug. 2019), https://www.firstthings.com/article/2019/08/woke-totemism [https://perma.cc/6UZD-AG3H].

491. Legutko, *The Demon in Middlebury, supra* note 483.

492. *See* Riley, *supra* note 486 (discussing anthropologists' findings of aboriginal religion).

493. MURRAY, *supra* note 209, at 253–54; *see also* JAMES DAVISON HUNTER, BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR 4–5 (1994) (arguing culture wars precede violence).

494. *See* Blackman, *supra* note 346, at 25–26 (showing a "distinction between a demonstration and a disruption").

495. *Id.* at 29–45 (discussing demonstrations and disruptions at a public university).

496. Loeffler, *supra* note 60.

forms.[497] Furthermore, in 1952, in *Beauharnais v. Illinois*,[498] the Supreme Court upheld a state group libel law designed "to shut down the most extreme peddlers of racism and anti-Semitism," in a case never overturned.[499] Recall Judge Hand's determined words are not only keys of persuasion but triggers to action.[500] This conclusion's deductive force justified the prohibition of advocacy counseling the violation of law because it lacks any democratic function.[501] Similarly, one could argue this intuition justifies fettering criminal libel or racially defamatory speech because such expressions lack a democratic function and are thus incompatible with democracy.[502] Accordingly, the state should constrain this type of speech.[503] Going forward, Judge Hand's intuitions sparked group libel laws or similar laws may hold promise in limiting hateful or discriminatory speech on campus without violating First Amendment norms or academic freedom rules. Such laws may be useful off-campus as well.

7. Speech and National Security Rules

Freedom of speech norms, if applicable, face difficulties when national security rules come into play. Chemerinsky and Gillman admit as much.[504] Separately, Professor Chemerinsky echoed Justice Breyer's dissenting opinion[505] in *Holder v. Humanitarian Law Project*,[506] upholding a federal law that prohibited the provision of "material support" to a "foreign terrorist organization."[507] This law withstood two groups' challenges seeking First Amendment protection for their assistance to organizations "that had

497. *Id.*

498. Beauharnais v. Illinois, 343 U.S. 250 (1952).

499. Loeffler, *supra* note 60.

500. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 18 (citing Judge Learned Hand).

501. *Id.*

502. *See, e.g.*, Lasson, *supra* note 46, at 30–50 (advocating the application of group libel statutes currently in force in five states, the continuing validity of *Beauharnais v. Illinois*, suggesting private libel is non-speech and that racism is an evil that can be restricted, asserting that private victims of defamation are entitled to redress for their injuries as opposed to public victims, and arguing racial defamation is not speech because categorizing racial defamation as speech confuses form with substance, and its value is outweighed by negative consequences).

503. Blasi, *Rights Skepticism and Majority Rule*, *supra* note 68, at 18.

504. *See* CHEMERINSKY & GILLMAN, *supra* note 2, at 23 (discussing the "constant tensions between free speech and other values" such as national security).

505. Chemerinsky, *Not A Free Speech Court*, *supra* note 370, at 728–30; *see* Holder v. Humanitarian L. Project, 561 U.S. 1, 40 (2010) (Breyer, J., dissenting) (criticizing the majority opinion for permitting the punishment of speech absent evidence of likely harm).

506. Holder v. Humanitarian L. Project, 561 U.S. 1 (2010).

507. 18 U.S.C. § 2339B (2006).

been designated by the Department of State, as foreign terrorist organizations."[508] The *Holder* decision specifies that the speech at issue could be punished because it was not pure political speech but constituted material support of a terrorist group.[509] The Supreme Court reached its 6-3 decision, notwithstanding the contention that upholding the law would allow the punishment of speech without proof that it was likely to cause harm.[510] The Court rejected its earlier decisions concerning incitement and especially *Brandenburg*, which allowed "pure advocacy of even the most unlawful activity—as long as that advocacy is not 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.'"[511] Disputing *Holder*, Chemerinsky concluded "the Court allowed the government to prohibit speech that in no way advocated terrorism or taught how to engage in terrorism."[512] Because *Holder* remains good law, invoking national security rules can constrain free speech at universities.

8. Other, Often Overlapping Issues

Contentious campus disputes implicating the First Amendment or academic freedom, including clashes regarding invited speakers, students' speech off-campus, or students marching through the campus yelling repulsive chants, have arisen. In resolving most speech issues, the pertinent constitutional question is whether and how severe the communicative restraints must be in order to achieve "the twin objectives of research and education."[513] Risking the repetition of frequently overlapping issues and concerns, "[a]cademic freedom turns on judgments of competence, whereas ordinary First Amendment principles forbid such judgments. Academic freedom protects the autonomy of a profession, whereas First Amendment rights protect the freedom of individuals."[514] Where academic freedom requirements are most obscure, speech analysis reverts to first principles grounded in "the *purposive* nature of First Amendment rights."[515] Conversely, in the absence of obscurity, we must return to "the premise that

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508. Chemerinsky, *Not A Free Speech Court*, *supra* note 370, at 728–29.

509. *See id.* at 729 (concluding speech could be punished "so long as it was done in coordination with a foreign terrorist organization").

510. *Holder*, 561 U.S. at 40–42 (Breyer, J., dissenting).

511. *Id.* at 51 (omission in the original) (quoting Brandenburg v. Ohio, 395 US. 444, 447 (1969) (per curiam)).

512. Chemerinsky, *Not A Free Speech Court*, *supra* note 370, at 730.

513. Post, *supra* note 71, at 121.

514. *Id.*

515. *Id.* at 121–22.

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public universities may regulate speech as necessary to achieve their institutional objectives."[516] Correlatively, most student speech in the classroom and much academic research, even when protected by academic freedom, is exogenous to discovering political and economic truth. Since First Amendment rules are thus ruled out of bounds, observers must turn to academic freedom rules, which uphold professors' absolute freedom of thought, inquiry, discussion, and teaching but not the absolute freedom of utterance.[517] Freedom of utterance is constrainable because universities may justifiably engage in content and viewpoint discrimination.

Conversely, disputes regarding invited speakers involve uncertainty over whether such speakers implicate the university's educational and research missions governed by academic freedom rules because such speakers are not responsible either for disciplinary competence or for competence in teaching.[518] Moreover, outside speakers' research fails to add to the university's productivity and fails to create a long-term relationship with students contributing to their intellectual independence.[519] Student-invited outside speakers may be excludable because such speakers "do not implicate the academic freedom of the faculty."[520] Additionally, "[s]tudents are accountable neither for the research mission of the university nor for its educational responsibilities", thus making it difficult to claim such speakers support the goals of the university.[521] When students invite speakers—because they believe they have something worthwhile to say—"the first two cardinal rules of First Amendment jurisprudence are thus inapplicable" because in asserting "certain ideas are more worth hearing than others", students exercise content and viewpoint discrimination.[522] Content and viewpoint discrimination are acceptable "so long as they serve [the university's] educational and research purposes."[523] This wrangle is solvable when universities clarify why they are prepared to "authorize student-invited outside speakers," a move illuminating why the communication is or is not appropriate.[524] The First Amendment rights of

516. *Id.* at 121.
517. *Id.* at 117.
518. *Id.*
519. *Id.*
520. *Id.* at 118.
521. *Id.*
522. *Id.* at 118–19.
523. *Id.* at 119.
524. *Id.*

invited speakers are irrelevant, and the question becomes, "how policies that authorize students to invite speakers to campus do and do not advance institutional purposes of education and the expansion of knowledge."[525]

Student demonstrations on campus implicate the constitutionally difficult question of how public higher education's mission is understood. The Constitution contains no explicit account of this mission. Similarly, traditional academic freedom principles do not necessarily tell us how to handle specific cases such as students marching through campus chanting repulsive slogans and carrying repugnant signs.[526] Such demonstrations could not be excluded from a public park because cardinal First Amendment principles deem "public discourse immunized from regulation despite" its offensiveness.[527] Instead, the university's dilemma must be encapsulated in examining of the nature of a public university.[528] Careful analysis indicates the question of whether the demonstration is allowable on a public campus cannot be resolved based on of free speech principles.[529]

Recent years have witnessed disputes regarding the regulation of off-campus student speech, which "does not arise in the context of university activities."[530] Post observes that "as the connection between off-campus student speech and the campus environment grows more tenuous," freedom of speech principles become a more attractive rationale to decide the legitimacy of off-campus conduct.[531] Suppose a student's speech has no connection with a university's mission. Then, justifying the regulation of off-campus behavior becomes difficult because such a move would merge with the already rejected view that universities should adopt an *in loco parentis* conception of education.[532] Still, in states with group libel statutes, off-campus conduct meeting the parameters of such laws could constrain off-campus speech.

525. *Id.*
526. *Id.* at 121.
527. *Id.*
528. *Id.*
529. *Id.* at 121–22.
530. *Id.* at 119.
531. *Id.*
532. *See id.* at 119–20 (discussing the rejected view of universities justifying off-campus regulation of speech not comporting with the educational mission akin to a parent controlling all facets of a child's life).

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9. Closing Analysis

Public universities and their facilities are designed to serve specific purposes. The effort to achieve these goals supports regulation of speech independent of the four corners of the First Amendment. The Supreme Court has established that a "university's mission is education," depriving the First Amendment of power to preclude a university from imposing "reasonable regulations compatible with that mission upon the use of its campus and facilities."[533] Hence, a university has the "right to exclude . . . First Amendment activities that . . . substantially interfere with the opportunity of students to obtain an education."[534] In Professor Post's view, "[i]f state universities could not regulate speech as required to achieve their mission, they would be forced to abstain from content discrimination; they would be compelled to treat all ideas equally; they would be disabled from compelling speech. Neither private nor public universities could function under such severe constraints."[535] While freedom of speech in the public square prohibits the government from controlling what people say or "taking sides against any opinion except that which must express itself in the violation of the law", universities are entitled to "evaluate the competence of both students and faculty; they must compel students and faculty to speak; they must routinely and pervasively engage in content discrimination."[536]

Simultaneously, as civilization's tectonic plates shift as a consequence of liberal democracy's looming moral insolvency, commentators face an intimidating range of questions while campus speech wars flare as both a "symptom and symbol of some larger political and cultural battle."[537] Such "wars are being waged primarily over hateful and offensive speech,"[538] raising the following questions: (A) whether universities are schools located along points of a continuum, thus implicating the Supreme Court's classic public school decisions, which granted authority to states and school officials to proscribe student speech;[539] (B) do Supreme Court

533. Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981).

534. *Id.* at 277 (citing Healy v. James 408 U.S. 169, 188–89 (1972)).

535. Post, *supra* note 71, at 120.

536. *Id.* at 106–07, 120.

537. *See* Healy, *supra* note 354, at 1063 (discussing the reoccurring nature of passionate academic debate on campus grounds).

538. *Id.*

539. *See* Flanders, *supra* note 66, at 140 (positing distinctions between high schools and universities should be made on a continuum); *id.* at 139–40 (discussing how the Supreme Court has

First Amendment rules deserve to be fully applied on campus; (C) under what circumstances can a college curtail speech—particularly anti-Semitic speech—when the expression, coupled with indicia of animus, is properly classifiable as harassment, incitement, and a form of discrimination; (D) can libelous speech, on- or off-campus, be constrained by statute; and (E) what are the implications of academic freedom rules for all of the above-referenced questions?

In the face of this interrogation, university administrators are torn between dueling sympathies: "a deep commitment to free speech" and an asserted, if incomplete, appeal, to academic freedom on the one hand, and a "strong commitment to diversity and the well-being of their students" on the other.[540] After improperly refusing to see freedom of expression as a balanced canon, some administrators adopt maximalist positions to resolve their dueling sympathies and thereby welcome all expressions, "no matter how offensive or" inconsistent with academic freedom they may be.[541] Concurrently, administrators "embrace the proposition that all members of the academic community must have the freedom 'to use campus grounds for the broad expression of ideas, even if those ideas are expressed in ways that run contrary to the norms of professional conduct.'"[542] Free speech innovators impel such claims and drives the deduction that freedom of expression is "the matrix, the indispensable condition, of nearly every other form of freedom."[543] Free speech innovators, valuing speech as an end in itself rather than a means to other ends,[544] often claim the judicial triad's mantle of authority[545] even though innovation, when concretized, transforms the Constitution into a palimpsest bereft of any limiting principle. If this analysis is correct, then the deification of freedom of expression, like liberalism itself, risks becoming long on inventiveness and short on defensible doctrine.

Taken together, this analysis confirms the First Amendment constitutes the wrong framework for deciding most speech questions on university

not yet limited its decisions to exclude universities); *id.* at 148 (addressing the categories of student speech that can be regulated and to what degree).

540. *See, e.g.*, Healy, *supra* note 354, at 1063 (examining the push and pull to eliminate hateful and offensive speech).

541. *Id.* at 1064.

542. *Id.*

543. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

544. Feldman, *supra* note 5, at 640.

545. *See, e.g.*, Weinrib, *supra* note 49, at 48 (analyzing the judiciary's role in shaping the modern First Amendment).

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campuses because free speech principles, if they exist, are unlikely to trump academic freedom and inquiry rules at public universities. This Article establishes academic freedom rules apply in most instances as a limiting principle, that libelous utterances are not necessarily within the domain of constitutionally protected speech,[546] and bigots have the propensity to twist the law into a weapon used to assault constitutive components of the republic of which universities are a part.[547] Limiting campus speech is warranted to deny hate-motivated actors the opportunity to spew repugnant claims advancing anti-Semitism or other forms of bigotry.

In every instance—of student speech, student-invited speakers, student demonstrations, and limits on faculty utterance—the preeminent application of academic freedom rules are consistent with core speech principles that disallow blind devotion to the First Amendment when the expression at issue is irrelevant to the formation of public opinion such as commercial advertising or the mere advancement of personal preferences. Such communication is unprotected or subject to lesser protection because it is exogenous to the discovery, if possible, of political and economic truth.[548] The invocation of this overall approach to campus speech vindicates both academic freedom, broadly conceived, and First Amendment principles perceived within boundaries provided by the judicial triad. This approach will not end disputes but will ensure that disputes, even those led by free speech maximalists, will be fought out on terrain that is distanced from appeals to, often illusory, First Amendment norms.

V. CONCLUSION

Speaking for all who pursue human progress, French Jewish intellectual Alain Finkielkraut said: "There is nothing more humiliating than to have to defend the truth."[549] The humiliating truth of anti-Semitism intensifies in an epoch wherein the history of liberalism's betrayal of the Jews echoes in the antiphonal shouts of white supremacists blaming the Jewish people for

546. Beauharnais v. Illinois, 343 U.S. 250, 266–67 (1952).

547. Loeffler, *supra* note 60 (observing public universities remain helpless while domestic extremist movements masquerade as a political cause).

548. Post, *supra* note 71, at 107.

549. WISSE, *supra* note 35, at xi.

the outbreak of the coronavirus pandemic.[550] Such charges defy reality and the notion of progress and evoke Private Train's contrapuntal angst as he studies an unfolding village massacre:

> This great evil. Where does it come from? How'd it steal into the world? What seed, of what root did it grow from? Who's doin' this? Who's killin' us? Robbing us of life and light. Mocking us with the sight of what we might've known. Does our ruin benefit the earth? Does it help the grass to grow, the sun to shine? Is this darkness in you, too? Have you passed through this night?[551]

Train's anguish recalls Hannah Arendt's account of the rise of anti-Semitism after European Jews lost power and influence.[552] She observes the Dreyfuss affair "gave birth to the Zionist movement—the only political answer Jews have ever found to antisemitism, and the only ideology in which they have ever taken seriously a hostility that would place them in the center of world events."[553] These events include the world's failure to take what the Nazis said about themselves seriously.[554]

In the world we have inherited, where we strive to hear the silence of lives lost, where evil is not natural but voluntary,[555] and where Americans are drawn irresistibly to self-referential individualism and isolation as part of liberalism's decay, our collective memory dissolves as a result of the acid formed by the imperative of progress. At the same time, while evidence mounts showing that equal rights are important but insufficient for democratic citizenship,[556] liberalocrats—liberalism's contemporary intellectual heirs—increasingly surrender to the allure of a tyrannical

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550. *Extremists Use Coronavirus to Advance Racist, Conspiratorial Agendas*, ADL (Mar. 10, 2020), https://www.adl.org/blog/extremists-use-coronavirus-to-advance-racist-conspiratorial-agendas [https://perma.cc/9NKZ-98DL].

551. SMITH, ON THE ROAD WITH SAINT AUGUSTINE, *supra* note 11, at 180 (quoting THE THIN RED LINE (20th Century Fox 1998)).

552. *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 4–5 (Houghton Mifflin Harcourt Publ'g Co. 1973) (1951) (describing how a loss of influence and power, while retainment of wealth, attributed to the rise of anti-Semitism).

553. *Id.* at 120.

554. *See id.* at 3 (describing how the Nazis' chief discovery and goal of persecuting Jewish people has since failed to have serious consideration throughout the world).

555. *See* SMITH, ON THE ROAD WITH SAINT AUGUSTINE, *supra* note 11, at 182 (positing St. Augustine's attribution of evil as a choice and voluntary in nature).

556. *See* LASCH, THE REVOLT OF THE ELITES, *supra* note 13, at 80–91 (explaining citizenship confers equality but not the other way around).

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administrative state, unaccountable to democratic governance. Simultaneously, anti-Semitism permutes as university officials advance shibboleths in the face of hateful speech and proclaim their allegiance to the First Amendment rights of torch-bearing neo-Nazis.[557] University officials are not alone in their capitulation; various groups, doubtlessly persuaded by free speech maximalists, urge the public to allow the torch-bearers' protected speech to continue unabated.[558] This failure to take neo-Nazis and others seriously ignores the linkage between discourse and violence and facilitates law-abiding citizens' targeting by torch-bearers.[559]

Although conflicting forces regarding speech coexist on campus, and while "colleges will always be a flashpoint in the larger cultural," political, and social brawls enveloping our postmodern republic, limits endure.[560] Through academic freedom rules, public campuses can exercise content and viewpoint discrimination because all ideas are not equal.[561] Additionally, academic freedom rules may play a role in restricting SJW disruptions, and divergencies remain between speech per se and harassment rising to the level of discriminatory conduct.[562] Thus, pervasively discriminatory speech can be constrained. Lastly, universities can avoid being trapped in simplistic understandings of the First Amendment.[563] As a consequence, universities should no longer feel inert and powerless to fight anti-Semitism on campus.

Avoidance of this trap furnishes a basis for restricting the rights of hate-fueled torch-bearers who, given their unfathomable flight from reality, pose a clear and present danger to human life. Avoidance rejects moderns' infectiously Epicurean fondness for forgetting and helps us remember that the matrix, the indispensable condition for every other form of liberty "is not freedom of speech, but the right to live in peace, [free] from harassment."[564] Representing a small step that inverts the contemporary

557. Loeffler, *supra* note 60 (describing how 300 neo-Nazis marched through a university while officials responded by adhering to First Amendment norms).

558. *See id.* (explaining how various national Jewish organizations, though renouncing the display of anti-Semitism, urged for allowance of protected speech).

559. *See* Olohan, *supra* note 314 (showing a linkage between discourse and violence as BDS advocates use Holocaust inversion techniques that portray Jews as Nazis).

560. Healy, *supra* note 354, at 1082–83.

561. Post, *supra* note 71, at 116.

562. *See, e.g.*, Goldfeder, *supra* note 56 (noting the Constitution protects speech not discriminatory harassment).

563. *See* Loeffler, *supra* note 60 (stating how universities were a source of confusion on how to deal with torch-bearing neo-Nazis protesting on campus).

564. Lasson, *supra* note 46, at 53–54 (declaring our unwavering commitment to the First Amendment may be undermining the democratic principles we are striving to protect).

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elevation of individual rights at the expense of individual and collective responsibility, avoidance offers a tenuously affirmative answer to the question of whether this constitutional republic deserves to survive. Lastly, responding to the fact that if we are honest, we should not be "in doubt about the direction in which the Good lies,"[565] avoidance moves us toward becoming a nation that acknowledges limits, facilitates mutability within telos, pursues progress within boundaries, and acquiesces in the reality of imperfectability.[566]

Possibly, these combined maneuvers may destabilize racial, ethnic, and religious tropes. Although speech, in our late modern republic, may be a right, perhaps even a moral one enabling us to do wrong, still, within the context of a university or as a member of a university community, it is doubtful that right's holders can do wrong with impunity.[567]

565. MURDOCH, *supra* note 7, at 97.

566. *See, e.g.*, Patrick J. Deneen, *Counterfeiting Conservatism*, AM. CONSERVATIVE (Apr. 1, 2010, 12:00 AM) https://www.theamericanconservative.com/articles/counterfeiting-conservatism/ [https://perma.cc/QX5Y-5FE6] (analyzing how conservative's reactionary, as opposed to progressive, mindset has led to a radical shift in ideology).

567. EDMUNDSON, *supra* note 4, at 193.

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