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Draft 2

# *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*

The First Amendment was ratified in 1791, and ever since Americans have enjoyed a robust civic culture that celebrates freedom of expression. But courts played virtually no role in protecting free speech rights before the 1930s. As late as 1907, Justice Oliver Wendell Holmes could easily summarize the dominant doctrinal view of the First Amendment as having the "main purpose" of preventing "all such previous restraints upon publications as had been practised by other governments,'" and not of preventing "the subsequent punishment of such as may be deemed contrary to the public welfare."[1]

## I. The Emergence of the Classic First Amendment Tradition

Holmes' narrow view of the First Amendment evolved during the 20th Century due to altered understandings of self-government.[2] The nation began to equate democracy with "the organized sway of public opinion."[3] The efforts of the Wilson administration to control public

[1] Patterson v. Colorado, 205 U.S. 454, 462 (1907) (Holmes, J.). Even as late as 1915, Harlan Fiske Stone, the future author of footnote four of *Carolene Products*, could summarize "the more important" aspects of the Bill of Rights as including "freedom of religious worship, the right peaceably to assemble, the right to bear arms, the right to be free from unreasonable searches and seizures, the right to a speedy trial by jury, the right not to be compelled to testify against oneself in a criminal trial, the right not to be deprive of life, liberty, or property without due process of law, and the like." HARLAN F. STONE, LAW AND ITS ADMINISTRATION 140 (1915). It is remarkable that in this long list Stone does not even mention freedom of expression.

[2] ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION (2014).

[3] CHARLES HORTON COOLEY, SOCIAL ORGANIZATION: A STUDY OF THE LARGER MIND 118 (1956).

opinion by prosecuting those opposed to World War I prompted American jurists to rethink the role of courts in protecting freedom of speech. As Learned Hand wrote to his friend Zechariah Chafee, "any State which professes to be controlled by public opinion, cannot take sides against any opinion except that which must express itself in the violation of law. On the contrary, it must regard all other expression of opinion as tolerable, if not good."[4]

When the Supreme Court at last began actually to protect First Amendment rights in the 1930s, it explicitly theorized First Amendment rights in terms of the political value of self-government. In the early and decisive case of *Stromberg v. California,* for example, the Court proclaimed that "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[5] A decade later the magnificent opinion by Justice Roberts in *Thornhill v. Alabama* affirmed that "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 the power of correcting error through the processes of popular government."[6]

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[4] Letter from Learned Hand to Zechariah Chafee, Jr., Jan. 8, 1920 (on file in the Chafee Papers, Box 4, Folder 20, Harvard Law Library, Treasure Room), *as reprinted in* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History,* 27 STAN. L. REV. 719, 764-766 (1975).

[5] Stromberg v. California, 283 U.S. 359, 369 (1931).

[6] Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

The classic First Amendment tradition thus protected speech insofar as it was deemed necessary for the formation "of that public opinion which is the final source of government in a democratic state."[7] The corollary of this conceptual framework was that speech deemed irrelevant for the free formation of public opinion was not protected by the First Amendment. Only two years after *Thornhill*, for example, Justice Roberts could hold for a unanimous Court that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising,"[8] evidently because such advertising was regarded as exogenous to the discovery and spread of political and economic truth.

Over the years, the Court developed core First Amendment rules that give content to the right to participate in the formation of public opinion in the public sphere. Here are three such rules that are essential to modern First Amendment jurisprudence:

> **Rule 1: "**It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the

[7] Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y.), *rev'd ,* 246 F. 24 (2d Cir. 1917). Hence *Thornhill*:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

*Id.* at 101-02.

[8] Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination."[9]

**Rule 2:** "We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a 'false' idea. As Justice Holmes wrote, '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 that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market....'"[10]

**Rule 3: "'**It is . . . a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'' . . . 'At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.'"[11] "'The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to

[9] Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819, 828-29 (1995). *See* Reed v. Town of Gilbert, 135 S.Ct. 2218, 2226 (2015) (The state "'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

[10] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988). *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 (1984); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 284 (1974).

[11] Agency for Intern. Development v. Alliance for Open Society Intern., Inc., 570 U.S. 205, 213 (2013) (quoting Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 61 (2006) and Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641 (1994).

> speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.'"[12]

First Amendment doctrine incorporates these three very stringent rules because they enable the First Amendment to serve "as the guardian of our democracy."[13] The First Amendment underwrites democratic legitimacy insofar as we are free to influence public opinion and insofar as we believe that the state is responsive to public opinion. [14] If these two conditions hold, we can believe that our government is also potentially responsive to us.[15] The three essential rules of First Amendment jurisprudence are designed to safeguard the first of these conditions.

The three rules thus apply to the set of communicative acts judged necessary for the formation of public opinion. I shall call this set "public discourse." In the context of public discourse, the rule against content discrimination ensures 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. The rule establishing the equality of ideas stands for the proposition that every democratic citizen has an equal right to influence the contents of

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[12] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (quoting Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 255 (1968)). "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796-97 (1988). "Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views." United States v. United Foods, 533 U.S. 405, 410 (2001). *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

[13] Brown v. Hartlage, 456 U.S. 45, 60 (1982).

[14] POST, *supra* note 2.

[15] *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012).

public opinion. As John Rawls once put it, in public debate "there are no experts: a philosopher has no more authority than other citizens."[16] The equality of ideas flows from the premise of political equality, not from any postulated epistemological equality, which would be incompatible with the very concepts of truth and falsity.[17] Finally, the rule against compelled speech prevents forms of coercion that would interfere with the ability of persons to imagine that the state is potentially responsive to them. We are not the free authors 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.

## II. The Classic Tradition Under Siege

When persons participate in the formation of public opinion, they are sovereign. They decide the destiny the nation. The three essential rules of First Amendment jurisprudence define and codify this sovereignty. But, as Alexander Meiklejohn famously noted, in a democracy "the governors and the governed are not two distinct groups of persons. There is only one group—the self-governing people. Rulers and ruled are the same individuals. We, the People, are our own masters, our own subjects."[18]

Meiklejohn's insight is fundamental. The people could not be sovereigns if they could not also sometimes be subjects, for there would then be nothing left to govern. That is why classic First Amendment doctrine does not and cannot apply to "speech as such."[19] Almost all human

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[16] See John Rawls, *Reply to Habermas*, 92 J. Phil. 132, 140-41 (1995).

[17] Hence the Court's ruling that within public discourse even deliberate falsehoods can receive First Amendment protection. United States v. Alvarez, 132 S.Ct. 2537 (2012).

[18] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 12 (1948).

[19] Glickman v. Wileman Brothers and Elliott, Inc., 521 U.S. 457, 478 (1997) (Souter, J., dissenting).

action is communicative, and if First Amendment rights were interpreted to endow persons with sovereignty every time they spoke, the People would be constitutionally prohibited from almost all forms of regulation. They would pro tanto lose their sovereignty.

The Court stumbled across this dilemma in 1976 when it reversed its own precedent and extended constitutional protection to commercial speech.[20] The commercial marketplace exists through acts of communication, and if all such speech were protected by the three essential rules of First Amendment doctrine, the people would be stripped of the power to regulate their own economic circumstances. The Court thus very self-consciously created forms of protection for commercial speech that are far less strict than those accorded to public discourse.[21] It said that commercial speech could be compelled,[22] for example, and that the state could engage in content discrimination by suppressing "misleading" advertisements.[23] In the commercial marketplace all opinions are not equal; some are downright fraudulent.[24]

The classic First Amendment tradition has in the past two decades come under severe strain because the Court seems to have lost track of *why* the First Amendment protects speech. It has begun to apply First Amendment doctrine to all kinds of communication that have nothing to do with the formation of public opinion.

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[20] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[21] Robert C. Post, *Compelled Commercial Speech,* 117 W. VA. L. REV. 867 (2015).

[22] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

[23] Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980).

[24] Illinois ex Rel. Lisa Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003).

A clear sign of this confusion are judicial efforts to extend to the professional speech of doctors the same protections that it accords to the formation of public opinion. As the Third Circuit recently opined in a case involving a statute regulating the speech of physicians, "[S]peech is speech, and it must be analyzed as such for purposes of the First Amendment."[25] Taken literally, the Third Circuit's approach would transform every malpractice case involving communication--every failure to warn, every misleading medical opinion--into a question of constitutional law.

The same tendency to overreach has become visible in the context of commercial speech.[26] The over-extension of First Amendment doctrine has led to repeated condemnations of modern First Amendment decisions as creating "The New Lochner,"[27] as establishing the rationale for striking down ordinary commercial regulations.[28] In this chapter, I shall illustrate this contemporary failure to appreciate the fundamental purpose of the First Amendment by examining recent controversies about freedom of speech and universities.

## III. Freedom of Speech Within Universities: Misapplying the Classic First Amendment Tradition

### A. The Contemporary Controversy

[25] King v. Governor of New Jersey, 767 F.3d 216, 229 (3d Cir. 2014); *see* Wollschlaeger v. Florida848 F.3d 1293, 1307 (11th Cir. 2017) (en banc).

[26] *See, e.g.,* Sorrell v. IMS Health Inc., 131 S.Ct. 2653 (2011); United States v. United Foods, Inc., 533 U.S. 405 (2001).

[27] *See, e.g.,* Amanda Shanor, *The New Lochner,* 2016 WISC. L. REV. 133.

[28] *See* Robert C. Post and Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L, FORUM 165 (2015).

One hears now everywhere the cry that First Amendment rights are at risk because universities have failed to protect freedom of expression. Within weeks of her confirmation, the new Secretary of Education, Betsy DeVos, proclaimed that "the real threat" in modern universities "is silencing the First Amendment rights of people with whom you disagree."[29] And in September Attorney General Jeff Sessions complained that "Freedom of . . . speech on the American campus is under attack."[30] Universities, Sessions announced, should abide by "what the late Justice Antonin Scalia rightly called 'the first axiom of the First Amendment,' which is that, 'as a general rule, the state has no power to ban speech on the basis of its content'"[31] Certainly, Sessions asserted, failure to comply with such "free speech rights" was "not an option" for public universities, "but an unshakable requirement of the First Amendment."[32]

Controversies currently roiling American campuses are characterized as pitting "a sharp increase in attention to students' psychological health" against "a somewhat diminished concern—sometimes bordering on outright skepticism—about the right to free speech."[33] They

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[29] Scott Jaschick, *DeVos vs. the Faculty*, INSIDE HIGHER EDUCATION (February 24, 2017), available at https://www.insidehighered.com/news/2017/02/24/education-secretary-criticizes-professors-telling-students-what-think?utm_source=Inside+Higher+Ed&utm_campaign=00ea4196f1-DNU20170224&utm_medium=email&utm_term=0_1fcbc04421-00ea4196f1-197462733&mc_cid=00ea4196f1&mc_eid=e7d1eb30be. *See* Graham W. Bishai, *With Provocative Speakers, New Group Aims to 'Test' Free Speech Values*, THE HARVARD CRIMSON (April 6, 2017), at https://www.thecrimson.com/article/2017/4/7/free-speech-club/#.WOdkwlvMeVM.email.

[30] Lisa Marie Segarra, *Colleges Are an 'Echo Chamber of Political Correctneess.' Read Jeff Sessions' Speech on Campus Free Speech*, TIME MAGAZINE (Sepgember 26, 2017), at http://time.com/4957604/jeff-sessions-georgetown-law-speech-transcript/.

[31] *Id.*

[32] *Id.*

[33] JONATHAN ZIMMERMAN, CAMPUS POLITICS: WHAT EVERYONE NEEDS TO KNOW 5 (2016). *See* Jacqueline Pfeiffer Merrill, *YES: Students must consider all ideas* THE CHRONICLE (WILLIMANTIC CONNECTICUT), November 3, 2016, at 5 (referring to "rising campus ambivalence about free expression").

are said to reveal "an 'apparent chasm' between free speech advocates and student activists."[34] Efforts to curb micro-aggression are resisted as "nothing less than an attack on free speech"[35] and as provoking the question whether "racist expression should be allowed as long as it's cloaked in the First Amendment."[36] "The 'safety'-crusaders who equate words with violence" are charged with nullifying "the First Amendment on account of feelings."[37] Cancellations of university speakers are condemned as inconsistent with "the First Amendment."[38] The upshot is the enactment of statutes like the Campus Free Speech Protection Act of Tennessee, which provides:

> (a) The general assembly finds and declares that public institutions of higher education in Tennessee are not immune from the sweep of the First Amendment to the United States Constitution . . . which guarantees freedom of speech and expression.
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> (b) It is the intent of the general assembly that the public institutions of higher education embrace a commitment to the freedom of speech and expression for all students and all faculty.[39]

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[34] Jennifer Schuessler, *Can Cries of 'Free Speech' Be a Weapon? Students Say Yes,* NEW YORK TIMES (October 16, 2016), available at http://www.nytimes.com/2016/10/17/arts/pen-warns-that-college-students-often-see-free-speech-as-a-cudgel.html?_r=0.

[35] Cindi Andrews, *Academic fascism begins with curbing free speech*, CINCINNATI ENQUIRER, at p. 5 (August 16, 2015) ("Once leftists gain control, as they have at many universities, free speech becomes a liability and must be suppressed.").

[36] Editorial, *Standing For Campus Free Speech*, TAMPA BAY TIMES (October 8, 2016), at 10. *See* Amanda Hoover Staff, *an a Halloween costume be hate speech?: A costume depicting Donald Trump hanging Hillary Clinton and President Obama from a noose sparked outrage at a University of Wisconsin football game. Are there controversial cosutmes that don't fall under free speech protections?* THE CHRISTIAN SCIENCE MONITOR (October 31, 2016).

[37] Sally Jenkins, *Free Speech? Columbia wrestlers can pay the price*, THE WASHINGTON POST (November 16, 2016), at D08.

[38] Susan Svrluga, *Writer's Speech at U-Md canceled*, THE WASHINGTON POST (October 26, 2016), at B01.

[39] Campus Free Speech Protection Act, 2017 Bill Text TN S.B. 723, text at http://www.capitol.tn.gov/Bills/110/Amend/SA0333.pdf. *See* Peter Schmidt, *Tennessee Law Is Hailed as Offering Unprecedented Protection of Campus Speech*, THE CHRONICLE OF HIGHER EDUCATION (May 10, 2017), at http://www.chronicle.com/blogs/ticker/tennessee-law-is-hailed-as-offering-unprecedented-protection-of-campus-speech/118311; Peter Schmidt, *A State's Effort to Head Off Campus Speech-Fights Gets Mixed Reviews*, THE CHRONICLE OF HIGHER EDUCATION (May 16, 2017), at http://www.chronicle.com/article/A-State-s-Effort-to-Head-Off/240088?cid=trend_au&elqTrackId=6d39ab8080af4fd1b466de696acbbef2&elq=e9311457c81c451a8a07cd2e11ec27d9&elqaid=13978&elqat=1&elqCampaignId=5833. The Tennessee statute is evidently the leading edge of a

On one side of the spectrum, the President of the University of California system, invoking "First Amendment protections," complains that "we have moved from freedom of speech on campuses to freedom from speech."[40] On the other side of spectrum, right leaning commentators argue that "Pro-life speakers are unwelcome, and conservatives are demonized, even banned from campuses for believing that ideas written into America's Constitution have meaning in modern America. Farewell 1st Amendment and the remainder of the Bill of Rights."[41]

The organization that is most influential in advocating the application of First Amendment jurisprudence to universities is the Foundation for Individual Rights in Education ("FIRE"). "The mission of FIRE is to defend and sustain individual rights at America's colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity."[42] FIRE's mission statement explicitly affirms:

> **Why is free speech important on campus?**
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> Freedom of speech is a fundamental American freedom and a human right, and there's no place that this right should be more valued and protected than America's colleges and universities. 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. The intellectual vitality of a university depends on this competition—something that cannot happen properly when students or faculty members fear punishment for expressing views

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coming wave of state legislative protections for free speech on campus. *See* Chris Quintana and Andy Thomason, *The States Where Campus Free-Speech Bills Are Being Born: A Rundown*, THE CHRONICLE OF HIGHER EDUCATION (May 15, 2017), at http://www.chronicle.com/article/The-States-Where-Campus/240073?cid=at&utm_source=at&utm_medium=en&elqTrackId=ddc8c04f9ace45d1b98525b7161c83bc&elq=bb12c0f09bee4686a72e62ba086a8ab7&elqaid=13919&elqat=1&elqCampaignId=5804.

[40] Janet Napolitano, *It's time to free speech on campus again,* THE BOSTON GLOBE (October 2, 2016), at K3.

[41] Jerry Shenk, *How political correctness will kill higher ed,* THE LEBANON DAILY NEWS (October 8, 2016), at A5.

[42] Website of FIRE, available at https://www.thefire.org/.

> that might be unpopular with the public at large or disfavored by university administrators.
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> Nevertheless, freedom of speech is under continuous threat at many of America's campuses, pushed aside in favor of politics, comfort, or simply a desire to avoid controversy. As a result, speech codes dictating what may or may not be said, "free speech zones" confining free speech to tiny areas of campus, and administrative attempts to punish or repress speech on a case-by-case basis are common today in academia.
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> **What is the First Amendment?**
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> The First Amendment to the United States Constitution is the part of the Bill of Rights that expressly prohibits the United States Congress from making laws "respecting an establishment of religion," prohibiting the free exercise of religion, infringing freedom of speech, infringing freedom of the press, limiting the right to peaceably assemble, or limiting the right to petition the government for a redress of grievances. The protections of the First Amendment are extended to state governments and public university campuses by the Fourteenth Amendment.[43]

FIRE aggressively proclaims that First Amendment protections of free speech ought to apply within the domain of universities. The assumption is apparently that First Amendment protections attach to speech, and that speech occurs within universities.

### B. The Classic First Amendment and the Campus

The question I wish to explore is what it might mean to apply the classic First Amendment to universities. The purpose of classic First Amendment principles is to protect the process of self-government. But speech within universities does not serve this purpose. It serves the purpose of education, which requires an entirely different framework of speech regulation and protection. Speech within campus is ordinarily protected according to principles of academic freedom, as distinct from freedom of speech.

[43] Available at https://www.thefire.org/about-us/mission/.

Consider, for example, speech within a classroom. Classroom communication is not about influencing public opinion; it is about educating students. When students express themselves in a classroom, they are not acting as sovereign agents of self-government. They are acting as students who are tasked with learning from their instructors. The plain implication is that their speech may be regulated in ways that facilitate their education.

It is for this reason that the three cardinal rules of First Amendment jurisprudence are manifestly inapplicable to student speech in the classroom. First, content discrimination is rampant in all classrooms. Students must address the subject under class discussion rather than whatever happens to be on their minds. If I am teaching a class on the Constitution, my students cannot ramble on about the World Series. Second, all ideas are not equal within classroom discussion. Each student should be respected, but the function of classroom conversation is to instruct students in the art of distinguishing good from poor ideas.[44] No competent teacher would conduct a class on the premise that all ideas were equal. Third, compelled speech is normal within classrooms. Students are called upon to answer questions and required to take examinations.

Consider other important First Amendment doctrines. In order to preserve equality of participation within public discourse, the First Amendment precludes the state from regulating public discourse by suppressing speech that is offensive or outrageous or abusive.[45] But no

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[44] On distinguishing respect for students from respect for their ideas, *see* MATTHEW W. FINKIN AND ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 105 (2009).

[45] *See* Robert C. Post, *Community and the First Amendment,* 29 ARIZ. ST. L.J. 473, 479-80 (1997). Abusive, degrading, offensive, and outrageous speech is protected in public discourse for reasons that derive from the value of self-governance. *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV, 601 (1990).

competent teacher would permit a class to descend into name-calling and insults. Even if the object of classroom education is to expose students to ideas that they might not otherwise encounter and that they might find disturbing or threatening, it is nevertheless inconsistent with learning for students to experience this encounter in settings in which they are personally abused or degraded.[46] Competent teachers therefore insist on respect within the classroom in order to promote the effectiveness of the educational experience. Personal insults and incivility are inconsistent with deliberation and learning.

A similar analysis applies if we focus on the speech of professors within the classroom. The three essential rules of First Amendment jurisprudence do not apply to professorial communication in the classroom. The mission of the classroom is instruction, and professors are regularly judged on the competence of their performance in successfully educating students. Universities routinely engage in content discrimination in assessing professorial classroom communication. If I am supposed to be teaching constitutional law, I can't spend my classroom time talking about auto mechanics. Universities also assess the quality of the ideas conveyed by professors. If a mathematics professor continuously gets her equations wrong, her competence will be called into question. Universities also compel professors to show up to class, to teach, and therefore to speak. Within the classroom, university professors do not have freedom of speech, as measured by the classic First Amendment tradition.

Professors do, however, have *academic freedom* within the classroom.[47] The scope of academic freedom is not determined by First Amendment principles of freedom of speech, but

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[46] "Students are entitled to an atmosphere conducive to learning . . ." AAUP, *A Statement of the Association's Council: Freedom and Responsibility*, available at https://www.aaup.org/report/freedom-and-responsibility.

[47] FINKIN AND POST, *supra* note 44, at 79-111.

by the requirements of professional competence. Professors are free to teach in ways that are required by the educational mission of a university and that are thus conceptualized as professionally competent.

The function of higher education is ordinarily said to be the inculcation of what Cardinal Newman called "real cultivation of mind."[48] As the American Association of University Professors put it in its classic 1915 *Declaration of the Principles on Academic Freedom and Tenure*¸ the purpose of university education is "not to provide . . . students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently."[49] This training can occur only if students and faculty in a classroom are "free . . . to express the widest range of viewpoints in accord with the standards of scholarly inquiry and professional ethics."[50]

Independence of mind is not a form of information that can be handed from teachers to students. It is instead a characterological trait that students must be inspired to embrace. The hope is that students who witness actual independence of mind will be moved to internalize autonomous thinking as a form of living. As Richard Rorty puts it "Students need to have freedom enacted before their eyes by actual human beings" if higher education is to achieve its purpose of becoming a "provocation to self-creation." [51]

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[48] JOHN HENRY NEWMAN, THE IDEA OF THE UNIVERSITY DEFINED AND ILLUSTRATED xvi (1888) (*Preface*).

[49] American Association of University Professors, *Declaration of Principles on Academic Freedom and Tenure* (1915), reproduced in FINKIN AND POST, *supra* note 44, at 174.

[50] *Id.*

[51] RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE 123, 125 (1999).

No doubt much of higher education requires the transmission of information and skills. But if our most important goal is to inspire a mature independence of mind, professorial speech within a classroom must be given great latitude. Professors must be allowed to demonstrate their own independence. As the 1915 *Declaration* reasons:

> No man can be a successful teacher unless he enjoys the respect of his students, and their confidence in his intellectual integrity. It is clear, however, that this confidence will be impaired if there is suspicion on the part of the student that the teacher is not expressing himself fully or frankly. . . . It is not only the character of the instruction but also the character of the instructor that counts; and if the student has reason to believe that the instructor is not true to himself, the virtue of the instruction as an educative force is incalculably diminished. There must be in the mind of the teacher no mental reservation. He must give the student the best of what he has and what he is.[52]

Academic freedom of teaching is thus quite encompassing. But it does not derive from, nor is it homologous with, the classic First Amendment tradition. Freedom of teaching is not about self-government; it is about education. That is why the three essential rules of First Amendment jurisprudence do not apply to professors in the classroom.

It is also why professors who bully, abuse, degrade, or demean their students risk being found professionally incompetent in achieving the university's mission of education. Professional ethics require professors to "demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors."[53] They also require professors to "avoid any exploitation, harassment, or discriminatory treatment of students."[54] Professors

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[52] *Declaration*, *supra* note 49, at 167-68.

[53] AAUP, *Statement on Professional Ethics*, available at https://www.aaup.org/report/statement-professional-ethics.

[54] *Id.*

must walk a narrow and difficult line between maintaining student trust and identification and provoking students to consider new, unfamiliar and perhaps even threatening ideas.

If the classic First Amendment tradition does not apply to speech in the classroom, it also does not apply to the professional research of faculty. The mission of universities includes the expansion of knowledge. Universities are not especially concerned with the kind of knowledge that derives from immediate sensory apprehension; nor do they typically dedicate themselves to the production of the charismatic knowledge characteristic of art. Instead universities seek to advance the *expert knowledge* produced by what we call *disciplines*.[55] One cannot know whether cigarettes cause cancer merely by smoking; one cannot measure climate change by taking the temperature on a winter's day; one cannot know the half-life of Plutonium 230 merely by staring at a lump of metal. To know, or even to formulate these questions, one must understand the practices of disciplines like medicine, climatography, or nuclear physics.

Universities provide an institutional home for such disciplines. Other organizations like private corporations may create knowledge, but *only* universities reproduce, refine, and conserve the practices, beliefs, and methods of knowing that define the disciplines that certify expert knowledge. Universities are the only major institution that systematically trains the experts on whom we must inevitably rely in deploying disciplinary knowledge.[56] We depend upon doctors to create vaccines to immunize us against Zika; we rely upon engineers to build bridges. We do not crowdsource such questions or decide them by public opinion polls or by popular vote. We use universities to train engineers and to educate doctors in their respective disciplines.

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[55] *See* Robert C. Post, *Debating Disciplinarity*, 35 CRITICAL INQUIRY 749 (2009).

[56] ALLAN GIBBARD, THINKING HOW TO LIVE 226-27 (2003).

Disciplines may be defined as "communities of the competent."[57] In contrast to public discourse, which postulates the democratic equality of all citizens, disciplines are inherently hierarchical. To speak with authority within a discipline requires training in relevant beliefs, practices, and methods of knowing. It takes long years of preparation to become an authority within a discipline. That is why disciplines subject new devotees to long and arduous apprenticeships in the course of graduate education. Disciplines are grounded on the premise that some ideas are better than others; disciplinary communities claim the prerogative to discriminate between competent and incompetent work.

Healthy disciplines also require freedom of inquiry. As Thomas Haskell writes, "*The price of participation in the community of the competent is perpetual exposure to criticism.*"[58] The reason for this price is not complicated to discern:

> The function of seeking new truths will sometimes mean . . . the undermining of widely or generally accepted beliefs. It is rendered impossible if the work of the investigator is shackled by the requirement that his conclusions shall never seriously deviate either from generally accepted beliefs or from those accepted by the persons, private or official, through whom society provides the means for the maintenance of universities.[59]

The freedom of inquiry characteristic of a disciplinary community differs starkly from the classic First Amendment tradition. The distinction is often carelessly ignored, probably because of the old saw that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truths will ultimately prevail,"[60] and that the First Amendment

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[57] Thomas L. Haskell, *Justifying the Rights of Academic Freedom in the Era of "Power/Knowledge,"* in THE FUTURE OF ACADEMIC FREEDOM 45-46 (Louis Menand, ed. 1996).

[58] Haskell, *supra* note 57, at 47.

[59] Arthur O. Lovejoy, *Academic Freedom*, in ENCYCLOPEDIA OF THE SOCIAL SCIENCES 384-85 (Edwin R. A. Seligman & Alvin Johnson eds., 1930).

[60] Red Lion Broad. v. FCC, 395 U.S. 367, 390 (1969).

advances "knowledge . . . by fostering a free marketplace of ideas and an 'uninhibited, robust, wide-open debate on public issues.'"[61] But these bromides about the marketplace of ideas are quite misleading.

Disciplines do not create expert knowledge through a marketplace of ideas in which content discrimination is prohibited and in which all ideas are deemed equal. No professionally edited journal runs on the principle of the marketplace of ideas. Instead disciplinary journals authorize experts to make judgments of quality that acknowledge the possibility of critique and discovery. The marketplace of ideas is inimical to such judgments.

The marketplace of ideas prohibits such judgments because each person is endowed with an equal right to influence the content of public opinion. As Michael Walzer writes, "[e]very citizen is a potential participant, a potential politician. The potentiality is the necessary condition of the citizen's self-respect."[62] If the value of political equality entitles all to participate in the marketplace of ideas, disciplinary debates are not subject to this value. Disciplinary disputes occur among those who are already trained within existing disciplinary practices. Authority and competence matter within disciplinary debates.

Disciplines thus live in the tension between freedom of inquiry and judgments of competence. Disciplines that do not allow freedom of inquiry wither and atrophy; but disciplines that do not evaluate the quality and merit of disciplinary work disintegrate and become

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[61] Gloria Franke, *The Right of Publicity vs. The First Amendment: Will One Test Ever Capture the Starring Role,* 79 CALIF. L. REV. 945, 958 (2006).

[62] MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 310 (1983).

incoherent. The three essential rules of the classic First Amendment apply to the marketplace of ideas precisely because it is not afflicted by any such tension.

It would make no sense, therefore, to apply these three rules to university regulations of faculty research. In pursuing their mission to advance knowledge, universities regularly and routinely exercise content and viewpoint discrimination. Universities offer grants to research projects they consider likely to be productive; they do not operate as passive marketplaces of ideas. Universities hire faculty based upon considerations of content, focusing on areas they believe especially important to the development of disciplinary fields. Universities continuously assess the competence of faculty. They do not consider all ideas to be equal. If there were no such thing as a false idea, there would be no such thing as a true idea, and the entire aspiration of disciplines to produce expert knowledge would collapse. That is why history professors who deny the holocaust are not hired or promoted. Universities also compel speech. The rule is publish or perish. Universities hire and promote faculty based upon their certification as experts, and consequently faculty must demonstrate their expertise by speaking.

The classic First Amendment tradition is thus a very bad guide to the way that universities actually control the professional speech of faculty. Within universities, research faculty are not entitled to classic First Amendment protections for speech. They are entitled instead to *academic freedom* of research.[63] Academic freedom of research is, in the words of the *Declaration of the Principles on Academic Freedom and Tenure*, the freedom to pursue the "scholar's profession"[64] according to the standards of that profession. The *Declaration* asserts

[63] FINKIN AND POST, *supra* note 44, at 53-77.

[64] *Declaration, supra* note 49, at 163.

that the "liberty of the scholar within the university to set forth his conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar's method and held in a scholar's spirit; that is to say, they must be the fruits of competent and patient and sincere inquiry."[65] Academic freedom, the *Declaration* precisely notes, upholds "not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession."[66]

The classic First Amendment tradition protects the right of *individuals* to speak. This is because democratic legitimation attaches to individual persons. But the freedom of inquiry that is relevant to a university's mission of research attaches instead to disciplinary communities. It is designed to allow such communities to develop autonomously according to their own internal logic.

To get a concrete sense of what this might mean in practice, consider the case of a young assistant professor who is denied tenure because a university has judged his work to be incompetent. If the professor sues for damages, a court will rule in his favor if it believes that his work was not substandard when measured by relevant disciplinary criteria. But a court will rule in the university's favor if it concludes that the professor's work was indeed substandard when assessed by pertinent disciplinary criteria. In effect, therefore, a court will not protect the right of

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[65] *Id.* at 173. On the relationship between academic freedom and a theory of knowledge, *see* John R. Searle, *Two Concepts of Academic Freedom*, in EDMUND L. PINCOFFS, ED., 88-89 THE CONCEPT OF ACADEMIC FREEDOM 92 (University of Texas Press 1975).

[66] *Declaration*, *supra* note 64, at 179-80. Hence the conclusion of Thomas Haskell: "Historically speaking, the heart and soul of academic freedom lie not in free speech but in professional autonomy and collegial self-governance. Academic freedom came into being as a defense of the disciplinary community (or, more exactly, the university conceived as an ensemble of such communities)." Haskell, *supra* note 57, at 54.

the professor to publish what he individually wishes to say; it will not protect the professor's right to freedom of speech. It will instead protect the integrity of relevant disciplinary standards.

### C. The Source of the Confusion

When seen from this angle, it seems so obvious that speech within universities cannot be governed by classic First Amendment doctrine that we may ask how constitutional First Amendment rights could ever have come to be confused with the regulation of speech within universities. Why do people now complain, as they so often do, that universities are denying First Amendment rights? I suggest that confusion occurs in circumstances where the educational or research functions of a university are neither salient nor well theorized and where academic freedom is thus not a very useful concept.

Disputes over invited speakers, for example, often involve uncertainty over the educational and research missions of the University. Such speakers are responsible neither for disciplinary competence nor for competence in teaching. Their research does not add to the productivity of the university, nor are they expected to establish long-term relationships with students that can inspire the development of intellectual independence. Outside speakers thus appear almost as strangers to the essential missions of the university. It is not clear how academic freedom applies to them. It is a small step from this ambiguity to the conclusion that outside speakers should be regarded as participants in public discourse and therefore accorded full First Amendment rights.

But this conclusion obscures the essential logic of how outside speakers actually enter university environs. Universities are not public fora. Whatever happens under the aegis of a university must be justified by reference to the university's twin missions of research and

education. This means that outside speakers are invited to universities *because* they serve these missions. Universities betray their fiduciary responsibilities to the extent they expend resources on speakers who fail to serve these missions.[67] It follows that although the conceptual framework of academic freedom has not been elaborated to include outside speakers, the scope and bounds of the proper regulation of the speech of outside speakers must nevertheless be justified in terms of their contribution to the twin missions of the modern university.

Exactly how outside invited speakers contribute to the educational or research missions of a university is a complicated question. Relevant circumstances and distinctions proliferate indefinitely. So, for example, consider the case of a faculty member who invites an outside speaker to lecture in her class because she believes that the speaker will contribute to her research or to her pedagogical responsibilities. If the university administration believes that the outside speaker is inconsistent with the research or educational functions of the university, there is a conflict between faculty and administration about how to attain university goals. Principles of academic freedom require the university administration to give great (if not decisive) deference to the judgment of faculty in such contexts.[68] First Amendment free speech principles have little to do with the matter.

Outside speakers are often invited in ways that do not implicate the academic freedom of faculty. Especially difficult cases often arise in the context of student-invited outside speakers.

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[67] In this chapter I do not consider situations where speakers come to campus based exclusively on private resources and without explicit university sanction, because in such circumstances the connection between speakers and universities becomes particularly difficult to define. I consider instead situations in which universities are asked to expend their resources to sustain speakers.

[68] Under ordinary principles of academic freedom, students have little standing to challenge the professional judgments of faculty about the value of an outside speaker with respect the attainment of either educational or research goals. Universities therefore have little tolerance for student efforts to shut down faculty-invited outside speakers.

Students are accountable neither for the research mission of the university nor for its educational responsibilities. It is puzzling, therefore, how to analyze student-invited speakers in terms of the purposive goals of the university.

We must begin our analysis from the premise that universities are not Hyde Parks. Unless they are wasting their resources on a frolic and detour, they can authorize students to expend university resources to invite speakers[69] *only* because it serves university purposes to do so. In the case of student-invited speakers, universities delegate to students the determination whether particular speakers serve university educational or research purposes. Outside speakers are not selected at random, even by students. Students invite speakers because they believe the speakers have something worthwhile to say. The first two cardinal rules of First Amendment jurisprudence are thus inapplicable, because students exercise content (and perhaps viewpoint) discrimination, and they also determine that certain ideas are more worth hearing than others.

Yet Content and viewpoint discrimination, as well as judgments of value, are acceptable in universities, so long as they serve educational and research purposes. The difficulty is that universities typically undertheorize the relationship between student-invited speakers and its own education and research mission..[70] Universities might support student-invited speakers because they wish to empower students to pursue research interests different from those offered by faculty. Or universities might support student-invited speakers because they wish to create a diverse and heterogeneous campus climate in which students can learn the democratic skills

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[69] *See supra* note 67.

[70] The Supreme Court has approved a Law School policy authorizing student programs in order to encourage "tolerance, cooperation, and learning among students." Christian Legal Society v. Martinez, 561 U.S. 661, 689 (2010). The Court held that the school could limit expressive association in order to serve these goals. The school policy supporting student organizations was theorized as a limited purpose public forum.

necessary to negotiate a public sphere filled with alien and cacophonous voices. Universities may wish to educate students in practices of citizenship by encouraging a wide variety of student groups to invite outside speakers to recreate within the campus a marketplace of ideas.

As universities clarify *why* they authorize student-invited outside speakers, they will concomitantly clarify the circumstances in which the communication of such speakers is and is not appropriate. The First Amendment rights of invited speakers are irrelevant to this clarification. The question is how policies that authorize students to invite speakers to campus do and do not advance institutional purposes of education and the expansion of knowledge. It is mistaken to invoke freedom of speech principles to pre-empt this inquiry.

Apart from the question of invited speakers, recent years have witnessed controversies about the regulation of student speech that occurs off campus and that do not arise in the context of university activities. Often the rationale given for such regulation is the protection of the campus "environment" from hostile racist or misogynist influences.[71] But as the connection between off-campus student speech and the campus environment grows more tenuous, this rationale becomes more difficult to credit. Freedom of speech principles become a concomitantly more attractive lens of analysis.

In such circumstances, analysis must begin from the premise that if student speech has literally no connection with a university's mission, either positive or negative, then a university cannot justify regulating that speech by a purposive account of its own goals.[72] The fact that

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[71] *See, e.g.*, Manny Fernandez and Richard Pérez-Peña, *As Two Oklahoma Students are Expelled for Racist Chants, Sigma Alpha Epsilon Vows Wider Inquiry*, NEW YORK TIMES (March 10, 2015), available at http://www.nytimes.com/2015/03/11/us/university-of-oklahoma-sigma-alpha-epsilon-racist-fraternity-video.html?_r=0.

[72] *See, e.g.*, Pickering v. Board of Education, 391 U.S. 563 (1968).

universities are nevertheless reaching out to regulate offr-campus behavior suggests that they in fact do believe that it somehow relates to their educational mission. I suspect that this is because a new definition of educational goals is now emerging. Student pleas for "safe spaces" and for expurgated environments reflect a desire for universities to adopt an educational commitment that can properly be called *in loco parentis*.

If universities were indeed to formulate their educational mission in this way, they would accept the obligation to educate the *entire* student, not just those aspects of students that directly interact with the university environment. Just as parents assert control over every dimension of their children's lives, so universities under an *in loco parentis* conception of their educational mission would not compartmentalize distinct aspects of their students' lives. They would seek comprehensively to educate persons who are students. Hence if universities adopt an *in loco parentis* conception of education, they might be justified in asserting jurisdiction over all aspects of student speech, including speech off campus and seemingly unrelated to university matters.[73]

This comprehensive educational ambition was rejected by most universities in the 1960s. Its resurrection now is neither well understood nor widely-accepted. University efforts to regulate student speech based upon this account of their educational mission are hotly disputed.[74] Ultimately, however, this controversy cannot be resolved by the classic First Amendment

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[73] In the 1960s, the freedom of speech movement sought precisely to oppose this concept of education. *See* Robert C. Post, *Constitutionally Interpreting the FSM Controversy, in* THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S 401 (Robert Cohen & Reginald E. Zelnik eds., 2002).

[74] *See, e.g.*, Eliza Gray, *Civil Libertarians Say Expelling Oklahoma Frat Students May Be Illegal,* TIME (March 10, 2015), available at http://time.com/3739268/sigma-alpha-epsilon-university-of-oklahoma-expel-free-speech/.

tradition; it can be settled only by clarifying the educational mission of universities, which is a challenge well worth meeting.

### D. Public Universities

I have so far discussed freedom of speech in the context of universities in general. But public universities are state institutions that must abide by the First Amendment. It is therefore tempting to believe that ordinary principles of freedom of speech should (at a minimum) apply in the context of public universities.

Public universities, however, no less than private ones, are designed to serve particular purposes. All government institutions established to achieve particular goals must regulate speech as necessary to achieve those goals, on pain of becoming ineffective.[75] That is why, in the context of higher education, the Court has explicitly announced that "a university's mission is education" and that the First Amendment does not deny a university's "authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities,"[76] which includes "a university's right to exclude . . . First Amendment activities that . . . substantially interfere with the opportunity of other students to obtain an education."[77]

If 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

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[75] *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987). Another way to put this point is that the First Amendment does not require the state to protect speech within courtrooms, bureaucracies, and prisons as though the values of self-government were at stake.

[76] Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981).

[77] *Id*. at 277 (citing Healy v. James, 408 U.S. 169, 189 (1972)).

ideas equally; they would be disabled from compelling speech. Neither private nor public universities could function under such severe constraints. Public universities, no less than private ones, must 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. FIRE and overblown public rhetoric notwithstanding, it makes little sense to apply core First Amendment principles of freedom of speech to public universities.

The constitutional question for public universities is thus whether and how communicative restraints are necessary to realize the twin objectives of research and education. The fullest account we have of the relationship between freedom of expression and the achievement of these objectives is contained within the long and distinguished tradition of *academic freedom*, which starkly contrasts with ordinary principles of First Amendment doctrine. Academic 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. Because public universities must achieve the purposes for which they are created, First Amendment doctrine as applied to them is best conceived within the functional framework orients principles of academic freedom.

First Amendment restraints on public universities are therefore most difficult to understand when the requirements of academic freedom are most obscure. Many contemporary controversies involving freedom of expression on university campuses simply do not implicate academic freedom, as it is traditionally understood. In such circumstances First Amendment

analysis must revert to first principles. It must begin from the premise that public universities may regulate speech as necessary to achieve their institutional objectives.

This raises the constitutionally difficult question of how the mission of public higher education is to be understood. It is true that the Constitution contains no explicit account of this mission, but whenever speech is regulated within the context of a government institution, this same basic constitutional question of mission is raised.[78] In the context of public universities, we can make it visible in a relatively simple case. Suppose students march through campus chanting, "No means yes; yes means anal."[79]

Traditional principles of academic freedom do not tell us much about how to handle such a demonstration. It is clear that such a demonstration could not be excluded from a public park, because it would be protected by the cardinal rules of First Amendment jurisprudence. The march would be deemed public discourse and immunized from regulation despite its offensive and outrageous nature. But because public universities are not public parks, and because they are dedicated to the mission of educating their students, the constitutional inquiry whether student demonstrations of this nature seriously interfere with the educational mission of a public university cannot be evaded.

Ordinary First Amendment doctrine concerning offensive or outrageous speech is not helpful with regard to this inquiry, because such doctrine is rooted in the requirements of self-

[78] *See* Post, *supra* note 75.

[79] *See* Tyler Kingkade, *Texas Tech Frat Loses Charter Following "No Means Yes, Yes Means Anal" Display,* HUFFINGTON POST, October 9, 2014, available at http://www.huffingtonpost.com/2014/10/08/texas-tech-frat-no-means-yes_n_5953302.html.

governance in the context of a heterogeneous nation.[80] Instead a court must determine the nature of a public university's educational mission and the extent to which student demonstrations of this kind obstruct that mission.[81] These are no doubt truly difficult issues, but Classic First Amendment doctrine does not help us resolve them.[82]

## IV. Conclusion

Modern debates rely heavily on the constitutional rhetoric of freedom of speech because in recent years so many have contended that First Amendment protections ought to be applied to "speech as such"[83] rather than to public discourse. This tendency derives from a failure to understand the *purposive* nature of First Amendment rights. Because communication inheres in all aspects of life, this failure poses a great threat to the classic First Amendment tradition. The predictable over-extension of First Amendment rights will in the long run prove unsustainable. We ought to stop traveling down that path while there is still time. Contemporary controversies about the regulation of speech within universities well illustrate the danger.

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[80] *See* note 45 *supra*.

[81] The famous Woodward Report issued by Yale University on December 23, 1974, effectively obscures these questions when it simultaneously asserts *both* that "The primary function of a university is to discover and disseminate knowledge by means of research and teaching," *and* that a university "is not primarily a fellowship, a club, a circle of friends . . . . Without sacrificing its central purpose it cannot make its primary and dominant value the fostering of friendship, solidarity, harmony, civility, or mutual respect." The Woodward Report, available at http://yalecollege.yale.edu/deans-office/policies-reports/report-committee-freedom-expression-yale. These two propositions are in serious tension; in extreme situations, they cannot be reconciled except through a theory of education that runs contrary to the experience of virtually all university teachers and administrators. It is no wonder, therefore, that the Report is almost always read to subordinate the goal of teaching and to elevate "free speech over every other university goal or purpose." JONATHAN ZIMMERMAN, CAMPUS POLITICS: WHAT EVERYONE NEEDS TO KNOW 113 (2016). But a university that abandons the goal of teaching can no longer remain true to *raison d'etre.*

[82] Note that under the recently enacted "Campus Individual Rights Act" of Utah, available at https://le.utah.gov/~2017/bills/static/HB0054.html#53b-27-101, the direct imposition of First Amendment "public forum" principles onto public campuses would prevent a university from regulating this demonstration on the grounds of content or viewpoint. *See Reed v. Town of Gilbert,* 135 S.Ct. 2218 (2015).

[83] Glickman v. Wileman Brothers and Elliott, Inc., 521 U.S. 457, 478 (1997) (Souter, J., dissenting).